

**THE IMPLEMENTATION OF RESTORATIVE JUSTICE BY  
MAGISTRATES, PROSECUTORS AND PROBATION OFFICERS  
IN SENTENCING OF YOUNG OFFENDERS AT SELECTED  
DISTRICT MAGISTRATE COURTS IN THE WESTERN CAPE**

By

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To God, for the wisdom, guidance and allowing me the grace to fulfil my dreams.

## DECLARATION

This work has not been previously submitted in whole, or in part, for the award of any degree. It is my own work, each significant contribution to, and quotation in, this dissertation from the work, or works, of other people has been attributed, and has been cited and referenced.

Signed by candidate

Date: 30/08/06 .....

## ABSTRACT

The qualitative study was conducted, within the judicial and social welfare system. Using convenience sampling (non-probability), magistrates, prosecutors and probation officers were specifically targeted to ascertain to what extent participants were currently implementing the approach of restorative justice in the sentencing of young offenders.

Data was collected from charge sheets with regard to sentence remarks and the type of crime committed, and served as proof of implementation of such an approach. The study also explores the knowledge of these three professional groups with regard to restorative justice and their attitudes towards its implementation.

The primary respondents comprised magistrates, prosecutors and probation officers from selected urban and rural district magistrates courts within the Western Cape. Face to face interviews with a semi-structured schedule were conducted to gather data from respondents. Thereafter, these interviews were transcribe and type up, which was followed by the categorisation of patterns and the thematic analysis of data. The thematic analysis was used to analyse and interpret the data in a way that was informed by the theoretical underpinnings of the study. It should be noted that, although the research is qualitative in nature, it was necessary to include quantitative information in order to broaden the information gathered and to make it easier to draw conclusions and make generalisations. The quantitative dimension was generated by means of data collected from court files.

The study found that the concept of restorative justice is generally well known among magistrates, prosecutors and probation officers. The respondents also appeared to have a clear understanding regarding the concept of restorative justice and seemed to be of the opinion that it will assist in preventing crime,

protecting the community, and deterring potential offenders if implemented with the necessary resources and controls. However, the charge sheets reflected a scenario, showing that judicial officials and probation officers preferred to apply traditional way of sentencing, rather than incorporating restitution, for example. This seemed to suggest that they did not completely believe in the benefits that restorative justice would offer to the parties involved.

It is my contention in this thesis that, whilst the restorative justice approach has merit, it should, however, not be seen as a substitute for our current criminal justice system, but should rather complement it. A holistic approach is required to involve the victim, offender and community with more interdisciplinary cooperation taking place between the different role players to apply restorative justice in the sentencing of young offenders.

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## INTRODUCTION

When one considers the high crime rates in South Africa and the government's focus on meting out punishment rather than bringing about justice, one has to conclude that a different approach to the punishment of criminal offenders is needed, if justice in the true sense is to be achieved.

Since 1992 there has been an increase in seeking alternative measures in our criminal justice system, especially concerning juveniles. The proposed Child Justice Bill (49 of 2002) opens the door for transformation in our approach to young people who are in trouble with the law, and provides fertile ground for intensive research into finding alternatives solutions to reduce crime, and detention. It focuses on restoring harmony and bringing restitution, rather than on punishment (Wood: 2003).

A report leading up to the governments launch of the Moral Regeneration Movement in April 2002, as quoted by Maepa (2005:18), stated:

"The fight against crime... is a futile exercise unless we help the crime prevention units by helping out people to make the right decisions from the start, that is, to distinguish between good and bad, right and wrong."

One of the priorities listed by the Moral Regeneration Movement in its implementation strategy is: "*restoration of the family as a fundamental social institution.*"(Maepa; 2005:18). Besides analysing the problem, the Movement reflects the significance government attaches firstly to criminals acknowledging the "*wrongs*" caused by criminal behaviour; and secondly, the need to repair these "*wrongs*" through means other than courts and prisons.

The development of a new framework for youth justice reform is a sign of a shift away from the punitive and retributive practice towards the rehabilitative, educational and restorative options. These are indications that government recognises the importance of restorative justice principles in dealing with crime in general. This form of justice offers a practical way for families and communities to get involved in responding to crime and to heal its consequences.

In his State of the Nation address at the opening of Parliament on 8 February 2002, President Thabo Mbeki stated:

“Trends in crime incidents as well as other problems in society, including white-collar crime, call for partnership across society to improve our moral fibre, to strengthen community bonds, to pull together in the direction of hope and success. Payment for honest work is more fulfilling and sustainable than theft.”

Despite South Africa's standing in the field of restorative justice, due to the Truth and Reconciliation Commission (TRC), there seems to be little evidence of a restorative justice approach in the day-to-day criminal justice system. The *per capita* prison population of the country is one of the largest in the world.

According to statistics as published in the annual report 2004/2005 by the Office of the Inspecting Judge – *“there are 3284 children under the age of 18 years in prison, 12 are younger than 14 years, 1775 of them are awaiting trial and 1509 are serving sentences.”* Children should not be in prison at all, excluding exceptional circumstances.

These statistics highlight concerns with regards to the question as to how often this approach has been utilized in courts and whether magistrates, probation officers and prosecutors are aware of restorative justice as an alternative to our criminal justice system.

A pilot study that was conducted by the researcher at the Bellville and Wynberg Magistrates Courts with regard to the "*Attitudes of magistrates, prosecutors and probation officers towards the application of restorative justice to young offenders*" revealed that the three different groups were mainly positive about the approach. It was found that they lacked knowledge on the principles of restorative justice and were only familiar with the concept of diversion.

The urge to conduct the study emerged from the findings in the pilot study as well as the researcher's interest, stemming from her professional experience in the field of corrections.

This research will, therefore, focus on the implementation of restorative justice in the sentencing of young offenders. The researcher has been working in the field of social work and criminal justice for the past 15 years and will thus draw extensively on her own experiences. Furthermore the researcher will include the discussion of theory related to restorative justice, linking this with underlying principles and programmes. The examination of policy framework as guide documents will follow with an evaluation of the usefulness of restorative justice as alternative sentencing paradigm for South Africa.

**Chapters One to Three** review literature on the nature, principles, approaches of restorative justice, as well as giving an overview of the legislation and policy development affecting young people in trouble with the law.

**Chapter Four** follows with a description of the research design and methodology utilized for this study to gather information, the sampling process and analysing of data.

**Chapter Five** includes a presentation of the findings, based on the themes that have emerged during the study.

**Chapter Six** covers the conclusions and recommendations.

## **CHAPTER ONE**

### **LITERATURE REVIEW**

#### **1.1 INTRODUCTION**

The purpose of the literature review is to gain theoretical perspective on restorative justice as an alternative to retributive justice.

A wide range of information was drawn from practices of social work, criminology and law. The researcher has found that child justice is a well-researched field of academic interest. She examined information on youth justice in South Africa in order to draw conclusions and correlations with the findings in her own study.

Law violations can be defined as the conflict that occurs between those who uphold the legitimacy of the law and those who violate it. When such conflict occurs, the state intervenes with actions intended to prevent further conflict. In most countries, the typical response to crime is to punish the offender. By doing so, society attempts not only to express its view of unacceptable behaviour, but also seeks to deter offenders from future anti-social conduct. Recently, however, there have been serious questions about the legitimacy of the law as well as a growing dissatisfaction with the treatment of juveniles by the current criminal justice system. This dissatisfaction has manifested itself in an alternative approach for dealing with conflicts and harm, namely restorative justice.

This chapter discusses the concept and principles of restorative justice, and considers the benefit of adopting this approach in the current youth justice environment in South Africa.

## **1.2 HISTORICAL OVERVIEW OF JUSTICE PARADIGMS**

Restorative justice is both a new and ancient paradigm of justice and has recently been given increased attention by lawmakers and justice practitioners in a number of countries.

The modern theory of restorative justice began to emerge in the late 1970's and has been developing during the last two decades of the twentieth century. Skelton in Sloth – Nielson & Gallinetti (Ed) (2004: 36) are of the opinion that although restorative justice is new as a theory in thinking about formal justice, it is an old paradigm because theorists and practitioners have drawn from traditional systems around the world

### **1.2.1 Early Attempts to Control Crime**

Ancient tribes quickly learned that the evil and selfish actions by offenders required from them to stand together for their own protections. Crimes that affected the community or angered the gods e.g. witchcraft or spying, were considered the most serious. The guilty party was usually tortured to death or banned from the tribe or community.

Crime committed by one individual against another was not considered a community matter. These types of crime were settled under the biblical doctrine of "an eye for an eye". The victim or the victim's family was responsible for catching and punishing the perpetrator by inflicting the original injury on the guilty party (Bayse: 1995: 5).

This system was ineffective, as angry victims frequently demanded much harsher penalties, which produced conflict and animosity between clans that would last for generations. On the other hand, people have discovered that revenge causes more pain and is therefore no resolution for problems. In fact it results in more dysfunctional relationships and families.

As times have changed and communities grew, people began noticing that punishment designed to humiliate and tortured perpetrators did little to deter offenders. Given the above restorative justice arose as an alternative.

A number of people have adopted the term "restorative justice", but have given it somewhat different meanings. Howard Zehr (1990) who is, to many, the 'grandfather' of restorative justice, views justice as a process in which all parties search for restitution, reconciling and solutions. He suggested that there are two alternative lenses: *retributive justice and restorative justice*. These two approaches will be discussed later.

Braithwaite (1997:3) points out that restorative justice has been the dominant model of criminal justice throughout most of human history. People traditionally have been very reluctant to call in the state for dispute resolution, even when the state has claimed that role. For centuries the role of the state in prosecution was minimal. Instead it was widely accepted that the community had to solve its own disputes.

Bazemore and Umbrecht (1995: 301-302) are of the opinion that the consequences of crime, or disputes between individuals, were traditionally the responsibility of the group - thus being settled without interference by the state. It was acknowledged that members of the community were injured by the crime, and thus restoration of the relationship, reconciliation between parties, and reparation to the victim or the injured party were necessary. Not only can the origin of the principles of restorative justice be tracked to traditional reactions to crime, they also emerged clearly in the strongly established traditions of western and non-western societies.

Consedine and Bowen (1994) illustrate what is possible with a restorative approach and how it provides a complementary justice system for the Maori community in New Zealand. In their research they found that traditional

procedures could achieve outcomes that modern retributive adjudication could not. It involves indigenous people in processes that belong to them and not to outsiders.

### **1.3 FAILURE OF THE CURRENT SYSTEM**

With reference to statistics, as mentioned in the annual report 2004/2005 of the Office of the Inspectorate Judge, as well as by Consedine and Bowen (1997:53), it appears that imprisonment and punishment is not achieving its purpose of deterrence and rehabilitation. One of many reasons as cited by Consedine (1999:86) is that our current system is one of retributive justice, which primarily asks "How do we punish this offender?" Restorative Justice asks: "how do we restore the well-being of this victim, the community and the offender?"

#### **1.3.1 The Retributive Approach**

Retributive justice is probably the oldest theory of justice and has its roots in ancient religious and theological thinking. Conrad Brunk in Maepa (Ed), (2005: 25) is of the opinion that there is a strong influence of viewing a criminal offence as 'sin'. In many religions, sin can only be atoned through the suffering of the offender. This is the origin of the retributive theory's focus on punishment. Brunk (2005) mentions that offenders suffering or loss is what constitutes the 'pay back' to society and victims. The theory simply blinds itself to the fact that the injustice of an offence is the loss and the harm suffered by the victim. It does not address the suffering of the victim and therefore relationships and losses are not restored.

In contrast to these responses, restorative justice focuses on repairing the damage done to the victims, by ensuring that the offender takes responsibility for the actual emotional, physical, verbally and material harm done to them

### **1.3.2 The Centrality of Imprisonment in Retributive Justice.**

Crime is as old as human themselves. Bayse (1995) is of the opinion that the biblical account of the first couple on earth reveals that they possessed criminal capacity. With each generation the chain of criminality has become stronger. Bayse (1995: 4) quotes the following statistics to prove his statement.

*“Since 1985, according to the Department of Justice’s National Update (1992), at least one-in-four American families have been the victim of serious crimes each year. The prison population seems to have double in the following period. The May 1993 figures show that by the end of 1992 a record of 1.33 million inmates were housed in United States prisons and jails. An additional 2.7 million people were on probation”.*

Prisons and jails seem to bulge beyond capacity. Unfortunately it seems that there is no relief in sight when one considers the crime rate and prison population in South Africa. The retributive model of ‘get tough’ has been no more successful than the rehabilitation model in controlling crime. Prison overcrowding may be contributing to the breakdown of the criminal justice system itself.

The retributive model of crime emerged with the government and the offender as the sole parties and a focus which upheld the authority of the state. All power now is given to the state judges, police and prisons wardens. Both victim and offender were left powerless - victims as they are shut out from the justice process from the beginning; and offenders, who are not given the opportunity to take responsibility for their behaviour and actions. Instead the aim was merely to punish with imprisonment, as the centre of our punitive obsession (Consedine 1999: 18).

Van Ness (1997) is of the opinion that instead of repairing past harm, criminal justice became future –orientated, attempting to make offenders and potential offenders law abiding citizens. The result was that restitution, which is both past-orientated and victim-centred, was eventually abandoned with fines,

corporal punishment and the death sentence in some countries taking its place as the response to crime.

The introduction of imprisonment as a sentence was originally intended as a means of reform of brutal forms of punishment in medieval times. It has become the most popular sentencing option for crime over the past 200 years, especially to accommodate those awaiting trial. *“The idea of using imprisonment as a sentence was linked to the idea of ‘penance’ – the offender was expected to spend time in seclusion, thinking about his or her sins; thus some prisons in North America were called penitentiaries”* (Sloth – Nielsen & Gallinetti 2004 :36).

However the real focus of prisons today is more on punishment rather than rehabilitation and to keep the community ‘safe’ from dangerous criminals. Globally we are faced with a high crime rate and a high prison population due to a criminal justice system that is, in most countries, retributive in nature.

### **1.3.3 Overview of the Effects of Imprisonment**

In his book, *Discipline and Punish – The Birth of the prison* (1979:265), Foucault criticises the prison system since its birth in 1820, elaborating on its failure. He states *“imprisonment causes delinquencies, gangsterism, family destruction and recidivism- those leaving prison have more chances than before of going back to it”*

In support Considine (1999:20) goes on to add an important point, noting the psychological effects of imprisonment:

*“Imprisonment breaks down social personality and disempowers people. The vast majority of prison inmates become more self-centred and dependant on others. ... imprisonment distorts and twists the psyche and the spirit of the imprisoned”.*

The researcher has spent approximately seven years of her career working with, and counselling awaiting trial inmates and convicted prisoners. From her experience it is clear that imprisonment has devastating effects on the lives of the prisoners, their families and the victim. She also has first hand experience on the conditions of prison life, including overcrowding, which clearly has an impact on the social functioning of a person. It impacts negatively on social structures and is a breeding ground of crime such as theft, abuse, gang rape and assault.

Considine (1999:21) quotes the following writing by Mike Martin a former prison inmate.

*" Prison may change people, it may cause some to be crafty, but because of its punitive nature it is incapable of turning them into anything other than a lifetime liability to society."*

In reaction to this increasingly brutal treatment of offenders, reformers began to call for a new approach to the punishment of offenders.

#### **1.4 THE NATURE OF RESTORATIVE JUSTICE**

There is no single definition that can embrace all of the available perspectives on the concept of restorative justice, but van Ness provides a helpful description. He argues that restorative justice is a way of doing justice so that healing can take place, and this includes the important elements of: *"calling to account for one's action, reparation, and dealing with what went wrong, dealing with the feelings and issues around it, dealing with the harm of the crime, but also with the harm of the criminal justice process"* (van Ness, 1997: 31-35).

Criminologist tends to emphasise different aspects of restorative justice in the description of the concept:

- Bazemore and Umbrecht (1995: 302) hold the view that restorative justice seeks to respond to crime at the micro and

macro level. At the micro level, the emphasis is on the damage of the crime and the restoration of the victim, while the macro level refers to community safety and crime prevention.

- The South African Law Commission (1997: 6-7) placed emphasis on the fact that:
  - A crime is harming or damaging to another person;
  - The victim and offender must be encouraged to put aside differences and conflict altogether;
  - The victim and offender should have had central positions in the criminal justice system;
  - The criminal justice system should play a facilitating role with regard to offender responsibility and the interest of the victim.

According to Consedine and Bowen (1997: 13) restorative justice sees crime as a violation of people on relationships. It creates an obligation to make things right. It involves the victim, the offender and the community in a search for solutions that promote reparation, reconciliation and reassurance. On the other hand, retributive justice sees crime as a violation of the state, and the establishing of guilt. The protection of the public and the sentencing of offenders are traditionally considered as core state functions. An offender standing trial is up against a whole system to punish him or her, if found guilty. The victim is seldom given the opportunity to air feelings or to question the offender.

The restorative justice process emphasizes offender accountability, victim recognition and healing. Restorative justice is already taking place in some countries. In Auckland, New Zealand, in 1998, there were more than 70 cases in the adult courts that were dealt with by the restorative justice process. These included charges as serious as aggravated robbery and sexual assault (Consedine & Bowen: 1997:13).

### 1.4.1 Underlying Principles of Restorative Justice

Although there are a number of definitions for restorative justice, most of the terms contain the following three principles described by Batley in Maepa (Ed) (2005; 21).

- Crime is seen as something that causes injuries to victims, offenders and communities. It is in the spirit of 'ubuntu' that the criminal justice process should seek the healing of breaches, the redressing of imbalances and the restoration of broken relationships.
- Not only government, but victims, offenders and their communities should be actively involved in the criminal justice process at the earliest point and to the maximum extent possible.
- In promoting justice, the government is responsible for preserving order and the community is responsible for establishing peace.

Van Ness (1997:39) demonstrates the view that there are four parties affected by crime: victim, offender, community and government. The writer goes on to say that restorative justice theory emphasizes that every crime involves specific victims and offenders, and thus the goal of the criminal justice process is to help them come to a resolution. Sloth – Nielsen (2004:17) points out that our current criminal system, which operates for adults and youth offenders, is adversarial and operates as a contest between the state representing the victim and the wider public's interest, versus the defender.

Hickey as cited in Consedine and Bowen (1999:83) argue that the purpose of the justice system is to prove that the defendant committed the alleged offence thus leading to a breach of the criminal law. "*The creation of offenders, the investigation of crime, and the preservation of the peace, the protection of the public and the prosecution and sentencing of offenders are traditionally considered core state functions*". The sentencing court is, therefore, expected to impose punishment that is proportionate to the gravity of the offence.

Considine and Bowen (1999:58) quote the following from what Zehr says on a video tape.

*“From a structural justice standpoint, one of the more fundamental needs is to hold offenders accountable in a meaningful way. I have conversations with judges sometimes and they say, well, but I need to hold the offender accountable. – I agree absolutely, but the difference is how we understand accountably....*

*“What they understand by it, and the usual understanding, is ‘you take your punishment’. Well, that’s a very abstract thing.. You do your time in prison and you’re paying your debt to society, but it doesn’t feel like you’re paying a debt to anybody. Basically, you’re living off people while you are doing that. You never in that process come to understand what you did.... ‘Accountably’ means understanding what you did, then taking responsibility for it; and taking responsibility for it means doing something to make it right, but also helping to be part of that process.”*

The current Western model of criminal justice in the researcher’s view does not hold offenders accountable in a meaningful way. However, The Child Justice Bill (2002) propounds the principle that young people committing offences should be held accountable and be encouraged to accept responsibility for their behaviour.

The following can be considered as central to restorative justice, as demonstrated by Batley in Maepa (Ed) (2005: 22).

- Facing reality is the first step to freedom, and where restoration begins.
- By accepting responsibility: the person acknowledging the truth of the situation and accepting responsibility which contributes to the recognition that a personal response is required.
- By accepting personal responsibility for the consequences of one’s behaviour, leads to an expression of repentance. This calls for sincere regrets for the actions and a realisation that they were

wrongful, which can be expressed by asking for forgiveness from the person who has been harmed.

- The willingness to face the full wrongfulness despite the fact that there is no guarantee that the person who has been harmed in the process will offer reconciliation.
- Making restitution is a practical way of facing the consequences of behaviour, and can be expressed by means of apology, or thankfulness for reconciliation.

These constitute the cost of restoration to an offender and there is no shortcut.

Considine and Bowen (1999:60) note the following from a report of the Restorative Justice Conference held at Saskatoon, Canada in March 1995. On that occasion, The deputy Minister of Justice of Saskatchewan, Brent Cotter stated:

*....the criminal system encourages you to avoid responsibility and deny and hope you might get off. In a family, such behaviour would be considered dysfunctional. In a community it is still dysfunctional.*

The focus should be on changing the behaviour of the offender, so that the risk of re-offending is reduced. When looking at the huge crime rate and high prison population it seems that our current justice system values toughness and punishment as a more important outcome, which is indicative of support to a system that is seemingly a complete failure in social and monetary terms.

From her encounter with inmates the researcher has experienced that the period of incarceration somehow provides a 'shield' behind which an offender can hide for a period of time and then say "I have done my time – and paid my debt." This 'shield' prevents any direct sense of accountability to the victims.

Considine and Bowen believe that an offender will not rehabilitate until his or her own sense of guilt is realised, which often can only be achieved by insight

and some form of direct contact with the victims in order to communicate an apology and practically assist in restoring a victim's loss. The restorative justice process also returns certain responsibilities to the community, thus giving them (the community) a sense of responsibility for their own members, including victims, offenders and their families (1999: 19 -23).

## **1.5 THE PARADIGM OF RESTORATIVE JUSTICE**

Considine and Bowen (1999:86) are of the opinion that restorative justice may be better able to meet the objectives of the criminal justice system, or at least some of them, than the current approach. The approach responds to the interest and concerns of victims, offenders and communities in the following ways.

- Victims – restorative justice provides victims with support, restitution opportunities for healing and the ability to influence the outcome of their complaints.
- Offenders – restorative justice holds offenders accountable and prevents re-offending by making offenders acknowledge and show awareness of their consequences of their offending.
- Communities – restorative justice reduces crime and increases public confidence in the criminal justice system by involving community –based groups in victim support and offender based programme. These forms of intervention will be discussed at a later stage.

Rehabilitation is not possible without any form of commitment, and acknowledgement of the problem by all parties involved. Restorative justice offers a different perspective on community safety, and suggests a new way in dealing with offenders.

Current research indicates that courts in New Zealand have become more attracted to restorative justice because they are victim-centred and emphasize

offender responsibility. They know that the retributive system is failing to deter criminals or satisfy victims. The community, rather than criminal justice agencies, are increasingly being recognized as the prime site of crime control.

Judge Fred McElrea as quoted by Consedine & Bowen (1999:56) supports these views:

*" It is my view that criminal justice has been divorced from community for far too long. Restorative justice is essentially a community-based model that encourages the acceptance of responsibility by all concerned and draws on the strengths of the community to restore the peace".*

Restorative justice is, therefore, not a separate system of justice, but can be viewed as a complementary to the current approach. It ensures that authority is given to people within their communities to take responsibility for their own members, including victims, offenders and families.

The two paradigms can be summarized as follows: the current criminal justice system that is, retributive justice, focuses primarily on punishment. The aim of good law is to build a strong, safe and healthy society. Retributive justice does not give people justice, as it disregards the rights of both the rights of the victim and the potential of the offender. Consedine (1999: 19) has a strong belief that punishment, viewed as, a deliberate infliction of suffering, is counter-productive.

Restorative justice on the other hand seeks to redefine crime and interpret it not so much as breaking the law, or offending the state, but wrongdoing to another person. The offender and victim are encouraged to be directly involved in the justice process - in airing their feelings about the conflict through dialogue and negotiations in the presence of other role-players, such as the community and family members. (Consedine & Bowen 1999:18). A significant aspect of this process is that participants become empowered in dealing with their feelings and working towards a resolution.

## 1.6 CONCLUDING REMARKS

The crime rate in South Africa is regarded as one of the highest in the world. A huge crime rate raises the concern about the commitment and success of law-enforcing agencies to prevent crime, or to bring the perpetrator to justice.

The researcher supports the rule of law. However, it is her view that offenders should be given the opportunity to put right the wrong they did by taking responsibility for their behaviour and being assisted to become law abiding citizens. Prisons are unable to rehabilitate offenders under the present conditions of overcrowding, and a criminal justice system that is mainly retributive of nature and overlook the needs of the victim and potential of the offender. The effects of imprisonment indicate that a concerted effort has to be made by the state and the community to reduce the prison population in order to work on reforming the offender and the criminal justice system.

Retributive justice clearly does not offer any positive contribution to the wellbeing of communities. A change of attitude on the part of both the government and civil society concerning the frequent use of imprisonment as a solution to our crime problem is required.

We have seen the emergence of restorative justice as an approach to the problem of crime and acknowledging the victim in the justice process. The concept of restorative justice is not a new practice in Africa. Our political transition was one of restorative justice, with the Truth and Reconciliation Commission taking the lead in recognizing the victim and restoring peace.

Restorative justice suggests a new way of dealing with offenders and with victims. It seems that courts and law-makers in several countries have been listening to the implementation of these principles in traditional and Western societies, as indicated in the literature.

The next chapter will look more closely at the practice of this 'new' approach and how it contributes to fulfill the objectives of a criminal justice system that involves more than just the perpetrator and the state.

As indicated above, restorative justice is already being applied in New Zealand. In some jurisdiction, for example Auckland, numerous cases have been dealt with through the restorative justice process. These included charges as serious as aggravated robbery and sexual assault. The courts in New Zealand became more attracted to restorative justice when considering the implementation of this approach, because they are victim-centred and they emphasise offender responsibility.

## **CHAPTER TWO**

### **THE PRACTICE OF RESTORATIVE JUSTICE**

#### **2.1 INTRODUCTION**

The previous chapter have focused largely on the philosophy of restorative justice, the principles underlying this justice paradigm, and its relationship to retributive justice. The present chapter will focus on the practical application of restorative justice.

As pointed out previously, the restorative justice process has as its aims offender accountability, victim recognition and healing. Central to the restorative justice practice is the participation of community members who are present to support the victim and offender. The value of this supporting role of family members and friends cannot be emphasised enough.

Consedine(1999) claims that crime is fundamentally about disrespect. The justice process is therefore about respect- respect for life, property and the feelings of others. The principles of restorative justice enforce a sense of having been shown unconditional acceptance, compassion and having in a way restores human dignity.

Within this framework several applications of restorative justice can be found internationally. These are outlined in the following contexts!

- Mediation. (Victim-offender mediation);
- Conferencing. (Family group conferencing or victim offender conferencing); and
- Sentencing circles.

Although the information discussed below are drawn mainly from developed countries, is it important to recognise that a number of initiatives are taking place in African societies too-as they have for centuries.

## 2.2. THE HISTORY OF THE RIGHTS OF CRIME VICTIMS

The goals of deterring crime through punishment, rehabilitating offenders, and protecting society through the incarceration of dangerous persons, began to overshadow the demands of victims that they be restored to financial, emotional and physical health where possible. Karmen (1990:17) points out that the state undertook the obligation of providing the accused and convicted person with lawyers, food, housing, medical care, school, job training, etc. whilst leaving victims to fend for themselves.

As the state takes on their role, victims become mere witnesses in their own cases. There is little, if any opportunity for them to express the emotional impact of the crime, or to describe the extent of harm or trauma resulting from the incident. Rather, they have often been characterized as the "forgotten people within the criminal justice process, virtually invisible." (Karmen 1990: 18).

The rediscovery of the plight of crime victims was initiated in the late 1950's and early 1960's by a small number of women groups and responsive lawmakers focusing on abused women and children, (Karmen 1990: 16-17). They started to make the public aware of victims needs. Until recently, little attention was paid to victims of crime and violence in South Africa. The focus was primary placed on the offender of the crime, with the victim viewed as a complainant or witness. Davis and Snyman (2005: 3-4) are of the opinion that victims of crime and violence are often victimized twice. First by the offender and secondly by members of the insensitive criminal justice system, the health care system and even the support services.

Martin Wright (1991), drawing from experience as both a victim and offender advocate, argues that the exclusion of victims from the process could be remedied in a restorative justice approach to crime. This would entail the use of compensation, restitution and mediation processes to permit greater participation by both victim and offender. (Van Ness 1990; 26).

Given the amount of emphasis that is placed on the input acceptance and participation of the role players, particularly victims and offenders, one could presume that one way to reduce the shortcoming and enhance justice for victims is to incorporate restorative justice into our existing system.

A major milestone in the development of victimology in South Africa was the establishment of the Truth and Reconciliation Commission (TRC) in 1995. This contributed to the definite recognition of the importance of the victim within the crime context. It has also paved the way for a restorative approach to the offender and the victim, utilising procedures that are more victim-friendly and compatible with restorative justice principles.

## **2.3 RESTORATIVE JUSTICE PROGRAMMES**

### **2.3.1 Victims- Offender Mediation**

Mediation was the key to problem solving amongst hearing tribes. Considine (1999: 174) referred to the Khoi-Khoi (Hottentots), where disputes were heard before assemblies of all men of the camp under the leadership of the senior clansmen of the clan.

One of the earliest and most popular writers on victim-offender mediation is Mark Umbreit (1994). He has demonstrated that victims and offenders are more satisfied when using mediation than going through adversary court proceedings. Mediation offers victims and offenders the opportunity to meet one another with the assistance of a trained mediator to talk about the crime, come to an agreement and take steps towards justice.

The first U.S. victim-offender reconciliation programme (VORP) was established in Indiana in 1978. According to Karmen (1990), the initiators were inspired by biblical teachings that crime symbolised a rupture or wound that afflicted a whole community and had to be healed through reparation rather than retribution. By taking a restorative rather than a punitive approach these reconstruction programmes helped the injured party and perpetrator to

settle their differences peacefully. To heal their emotional wounds, both the victim and the offender need to be empowered.

Quoting Zehr, Van Ness (1997: 71) highlights what mediation entails: "*mediation must be dynamic, taking into account the participants and empowering them to work in their own ways*" Meeting between the victim and offender are vital, according to Van Ness (1997) and give both parties the opportunity to pursue three basic objectives:

- To identify the injustice;
- To make things right; and
- to consider future actions for problem solving (1997: 71)

The researcher is of the opinion that the person who performs the role as facilitator in this mediation process should be skilled and trained in order to handle complex sensitive issues experienced by both victim and offender.

The writer Van Ness (1997: 71-72) describes the essence of such meetings in achieving the objectives as follows: In identifying the injustice, both parties are given the opportunity to describe the crime and its impact from their own perspective. It is during this stage that the parties form a common understanding of what happened. The victim obviously will be able to air their feelings of loss, and the offender has a change to express remorse.

A discussion on how to make things right will follow after the facts are known and responsibility understood. Van Ness (1997) is of the opinion that this stage involves the identifying of the nature and extent of the victims loss. This also involves some form of agreement that specifies the type of restoration: in kind or service, monetary means or other reparation to which the parties have agreed. This agreement may include follow- up meetings and monitoring procedures. Further meetings will therefore also consider future actions to address any social problems such as unemployment, or drug problems on the part of the offender.

Karmen (1990) mentioned that over a hundred reconciliation programmes had sprung up across countries, run in most jurisdictions by non-profit organizations. In South Africa, Nicro a welfare organization is in the forefront with regard to restorative justice programmes. These alternatives to incarceration offer advantages to victims, offenders and communities. For victims, it provides a safe, secure setting to confront their offenders in the presence of trained and skilled intermediaries.

More important, to most perpetrators the chance is provided to substitute restitution for 'hard' prison time. For the community one can argue that the benefit is that negotiated settlements relieve court backlogs as well as jail and prison overcrowding. A significant dividend is that restorative justice nurtures an atmosphere of forgiveness, redemption, acceptance and harmony within the community (Umbreit 1990, and Wright 1991).

### **2.3.2 Family Group Conferencing or Victim Offender Conferencing.**

Considine (1999) mention several initiatives in New Zealand that uses alternative approaches to resolve problems caused by crime. One is family group conferencing, which include not only the victim and the offender, but also their families or support groups, with a facilitator to assist them.

According to Van Ness and Strong (1997:73), family group conferencing emerged in New Zealand in 1989. It was later replicated and adopted in Australia, and is now also used in the United States and Europe. This programme has ancient roots, as it was adopted from the 'Whanau Conference' as practised by the Maori people.

The conference was originally developed for the use of youth offenders and possibly including the arresting official, even the lawyer in some instances and other representatives were present. The focus is on the harm that was done and the resulting consequences. This programme emphasizes the collaboration of key stakeholders, which includes the community. Since the alleged offender is part of a family – the F.G.C. also provides encouragement

for affirming the worth of the offender. Our current justice system, which labels and rejects the offender, ignores the needs and potential of the offender.

Considine & Bowen (1999:87) referred to a restorative justice group in Auckland, which operate to bring together the victim, offender, their family and other key members of the community: *"The needs of both offender and victim are taken into account with a view to increase victim satisfaction and offender accountability. Generally conference recommendations are made to judges and are considered in the sentencing."*

The proceedings during such a conference include the following as described by Van Ness and Strong (1997: 73-75): "A scripted process is followed whereby the facilitator explained the procedures, the offender give his or her side of the story and the victim express him or herself; they describe their feelings and experiences. Direct questions are allowed and the family or friends of both the victim and offender are allowed to speak."

Negotiations follow until all parties are satisfied. Van Ness and Strong (1997) indicate that research findings are positive with regard to the used of such programmes. The outcome is that many offenders had developed empathy for their victims; families reported changed behaviour of offenders and that a support network for the offender had been strengthen.

It is likely that in our current criminal justice system offenders in most cases experience a lack of social support. This is also observed in the researchers work experience within the prison system. Recidivism are largely the result of poor support structures within the communities, from families and from the reintegration function of the justice system.

The researcher is of the opinion that the integration of such programmes within the criminal justice system is crucial to ensure co-operation from the offender. Such a process is aimed at helping the offender to gain insight into his/her offending behaviour and to understand that the crime has caused injury to others (including the victim and the community).

Howard Zehr (1990: 258) indicates that the F.G.C. concept is working so well that judges and other practitioners have called for adaptation of the programme to the adult system in New Zealand.

### **2.3.3 Sentencing Circles**

Sentencing circles (also known as 'circles') are facilitated community meetings attended by offenders, victims, community and representatives of the justice system. They are based on traditional practices among aboriginal people in Canada.

Circles are a restorative justice application, which emphasizes community building and community problem-solving. Consedine (1999: 161-162) is of the opinion that sentencing circles are a common practice in some communities in Canada; which include key personnel like judges. It brings together offender, victims or their representatives, support groups and interested community people to discuss what happened, why and what should be done. The writer refers to '*circles of support*' that are used to address individual and community needs, including the victim-offender relationship. "*Healing circles*" deal with serious sexual abuse cases and the community.

#### **The objectives of sentencing circles are:**

- Acknowledgement of the offender of his offence and its implications.
- To address causes of the offence by involving all parties and providing opportunities to participate meaningful.
- To promote healing of all affected parties by repairing the damage.
- Build a sense of community values by restoring respect-respect to each other (Consedine 1999: 163).

#### **How do sentencing circles work?**

Consedine (1999: 163) mentions four types of circles that are held, to ensure that all affected groups must be worked with, and that the process must be handled in stages. The writer highlights the importance of separating the victim and offender at the first stage, because of the power of imbalance.

The researcher supports this view because of the emotional and psychological effects cause by the crime that a victim may suffer if there was no proper intervention to prepare the victim. On the other hand is it also important for the facilitator to ensure that the victim is emotionally prepared and ready to face the offender. One can, therefore, say that a restorative justice approach will only come to its right with the willingness, co-operation of the victim and community.

Two teams, (one working with the victim, one with the offender) explain to the offender what he or she has done and why it is wrong, with the intension of reinforcing his good qualities. The other team address the feelings and views of the victim. An important expectation of this process, according to Van Ness (1997: 76), is to bring love, concern, support and a willingness to forgive to the meeting. The meeting will then decide together on solutions, restitution to the victim and monitoring procedures to ensure the implementation of a action plan. A pre-sentence report is then compiled and provided to the court, with recommendations given to the judge.

So far the Canadian community has experienced much support from prosecutors and judges in the acceptance of their recommendations. Restorative justice is not a process restricted to only aboriginal communities or the First Nations peoples and other Canadians. According to Consedine the restorative philosophy of the African traditional justice approach has a lot to offer to the modern South Africa (1999: 175).

#### **2.4 WHAT DOES RESTORATIVE JUSTICE MEAN FOR SOUTH AFRICA?**

Consedine (1999:171-174) is of the opinion that the understanding of restorative justice is not a new concept and practice in Africa. Exploring traditional African models of justice, one finds the Sotho practices of the "Lekgotla". If an offence is reported to a traditional leader, he may call a lekgotla to session. The victim, the offender, and family member and friends of both offender and the victim, and community members normally attend the

lekgotla. Everyone attending benefited from equal participation and all decisions were taken by consensus. The aim was to restore what has been lost through the offence. This age old system with its restorative roots provides a stark contrast to the current system in use, which is based on a retributive approach to justice. Skelton (2002: 496-513) is of the opinion that the acceptance of a different kind of justice, familiar with African traditional justice, community courts and the Truth and Reconciliation Commission provided fertile ground for moving towards restorative justice approaches.

Clearly, restorative justice has captured the attention of South African policy makers and appears to hold the promise of being able to address some current shortcomings in the administration of justice. For example, the first page of the Executive Summary of Discussion Paper 82 on a new sentencing framework (South African Law Reform Commission, 2000: xxix) states the following, as cited by Davis and Snyman (2005: 114):

*"The South African sentencing system faces various problems. There is a perception that cases are not treated alike; that sentences do not give enough weight to certain serious offences; that imaginative South African restorative alternatives are not being provided for offenders that are being sent to prison for less serious offences; that sufficient attention is not being paid to the concerns of victims of crime and that, largely because of unmanageable overcrowding, sentenced prisoners are being released too readily."*

Consedine highlighted the work of Karen Van Eden, a Bachelor of Social Science Honnours student at the University of Cape Town during 1995, who carried out research among the people of the Eastern Cape. She, found that within the Thembu community, parents were expected to accompany the child to apologise to the offended person. If property had been damaged or stolen, negotiations took place between the parent of the child and the offended family, in order to decide how to correct the problem. In situations where the two families were unable to reach on agreement, the case was taken to a higher authority within the community (1999: 175).

Through this approach, youth were educated by a caring community and encouraged to take responsibility for their actions. In this way they were actively involved in the restorative justice process – a process that taught them the values of responsibility, respect, caring and knowledge.

Another illustration is the 'people court' which is currently known as "community courts." In the Western Cape this court is situated in Mitchell's Plain and Cape Town magistrate's court. The purpose of these courts is to speed up cases and to ensure that community members have excess to observe their satisfaction with procedures.

The researcher has found in her encounter with one of the magistrates, Mr Engel of the Cape Town Court, that this type of court process is people-focussed. Mr Engel indicates that community courts are functioning according to the principles of restorative justice, as quoted:

*"It is likely that justice has a closer look during hearings at the person, rather the offence. Communities are absolutely involved in solving the problem as the court gives opportunities for people to share their problems/concerns... I will even do site visits to understand the complain and circumstances of the victim and offender, before passing sentence" (Personal Interview: with Mr. Engel).*

The general functioning of court hearings involves times that are suitably for community members to attend, for example evenings and over weekends, and in the language preferred by the participants. Jurisdiction is destructed to domestic and interpersonal disputes as well as petty crime and right violations. The emphasis is placed on community participation; those presiding are mostly representatives from street committees, and neighbourhood watch groups. On the other hand, one found, as stretched by Consedine (1999), that structured street committees deliver a valuable service in combating and preventing crimes.

Sipho Citabatwa, Secretary of Gugulethu's NY 141 Street Committee, explains the aim of such hearing, as noted by Consedine (1999: 178):

*"We are dealing with the issue because here she is part of the community. How we can solve the very problem and that the offender understands that we are not dealing with the issue because he or she is a criminal. You cannot heal a wound not knowing what causes the wound. He or she is needed and can be an asset to the community".*

Citabatwa, as cited by Consedine (1999; 178), explained further the consultation- mediation process and decision-making with regard to appropriate action between the victim, offender and community members. This can be regarded as the same approach that characterise family conferences. This form of restorative tradition has much to offer to our new post-apartheid South Africa. It gives new dimension to our current system, which is retributive of nature and overlooks the potential of our youth, who still have much to offer.

## **2.5 CONCLUDING REMARKS**

There is no doubt that our current criminal justice system of retribution lacks the capacity to deter crime, involve the community and to provide effective rehabilitation opportunities and solutions to the victim and offender.

Cullen and Gilbert (1982: 20) draw attention to the need to work on the reparation of both the offender and the community: *"The goal of our criminal justice system should be to improve rather than to damage an offender and that for society's own welfare. Criminal punishment should reflect not our basest instincts (vengeance) but our most noble values."*

This is evident in the fundamental principles of what restorative justice has to offer as an approach in dealing with crime. As pointed out by Braithwaite (1997:3): *"restorative justice is not a new concept but has been the dominant model of criminal justice throughout most human history"*. Not only can the origin of the principle of restorative justice be traced to traditional reactions to

crime as discussed in the literature with regard to Canadian and New Zealand communities, but it was strongly visible within South African traditional societies.

Our own political transition was one of reconciliation, and has within this context illustrated that restorative justice is a fundamental principal in reform. It bring people together to ensure healing. The evolving of community courts is a start to involve communities in the criminal justice system. It is also evident that restorative justice is not one particular programme, but rather an approach that seeks to prevent crime and restore injured relationships in the community.

These different approaches to mediation offer offenders the opportunity to review their criminal behaviour and to come out of denial, taking responsibility for their actions. Victims are helped to take control of their lives again and find healing. Communities become responsible in problem solving, supporting both the victim and offender, and preventing crime.

The following chapter will discuss the policy framework underscoring the important reforms within our existing child justice system towards a restorative justice approach that will be better able to fulfil the expectations of society.

## **CHAPTER THREE**

### **LEGAL AND POLICY FRAMEWORK FOR RESTORATIVE JUSTICE**

#### **3.1 INTRODUCTION**

Historically, children and young persons charged with crimes have been managed in much the same way as adult offenders. In the late 1980's and 1990's it was common for children to be arrested and detained in prisons for long periods of time awaiting their trials. As a result the government began to develop policy frameworks in an attempt to protect young children and set new strategies in dealing with young offenders.

In South Africa, a number of policy initiatives have drawn on restorative justice since 1995. This includes the Inter-ministerial Committee on Young People at Risk (1996), the National Crime Prevention Strategy (1996), the White Paper for Social Welfare (1997), the Child Justice Bill (2002) and the SA Law Reform Commission's Report on Sentencing (Project 82). In addition, the Department of Correctional Services adopted restorative justice as its official policy in November 2001.

For the purpose of the study, the following policies and legislation will be briefly explained:

- Constitution of the Republic of S.A.
- Probation Services Amendment Act. (Act 35 of 2002)
- Criminal Procedure Act (Act 51 of 1977)
- Child Justice Bill (49 of 2002)

The chapter will provide an overview and not an analysis or in depth discussion of policy developments relevant to restorative justice and contributing towards juvenile justice reform.

### 3.2 THE CONSTITUTION OF THE REPUBLIC OF S.A. (Act 108 of 1996)

Dr. Manto Tshabalala-Msimang, former Deputy Minister of justice, as quoted by Bezuidenhout and Joubert (2003:73), made the following statement during her opening address at a conference hosted by the Centre for Child Law in Pretoria on 30 October 1998:

*“The day will come when nations will be judged not by their military or economic strength, nor by the wellbeing of their peoples; - but the provisions are made for those who are vulnerable and advantaged; and by the protection that is afforded to the growing minds and bodies of their children”*

In compliance with this idea, South Africa ratified the 1989 United Nations Convention on the Rights of the Child on 16 June 1995. This Convention gives guidance to countries to enhance the delivery of children’s rights-based services and programmes. This means that countries are obliged to give effect to its provisions; by means of laws, policies and practices designed to further the conventions goals (Bezuidenhout and Joubert: 2003).

Sloth- Nielsen (Community Laws Centre) is of the opinion that the provisions of Art. 40 of the Convention set a solid framework for the administration of justice in respect of children in trouble with the law. This includes recognising:

*“The need to treat an accused child in a manner consistent with the promotion of the child’s sense of dignity and worth which reinforces the child’s respect for the human rights and fundamental freedom of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s age assuming a constructive role in society” (2004:26).*

In recognising the injustice of our past, South Africa underwent a major constitutional change and adopted the current Constitution of the Republic of South Africa, (Act 108 of 1996,) which upholds the standards set by the

United Nation Convention on the Rights of the Child. The Bill of Rights, Chapter 2 of the Constitution affords additional rights to children:

Section 28 reads as follows:

1. Every child has the right –
  - (a) to a name and a nationality from birth;
  - (b) to family care or parental care or to appropriate alternative care when removed from the family environment;
  - (c) to basic nutrition, shelter, basic health care services and social services;
  - (d) to be protected from maltreatment, neglect, abuse or degradation;
  - (e) to be protected from exploitive labour practices
  - (f) not to be required or permitted to perform work or provide services that –
    - (i) are inappropriate for a person of that child's age; or
    - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development
  - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under section 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
    - (i) kept separately from detained persons over the age of 18 years; and
    - (ii) treated in a manner, and kept in conditions, that take account of the child's age.
  - (h) to have a legal practitioner assigned to the child by the state, and at state expense not to be used directly in armed, in civil proceedings affecting the child, if substantial injustice would otherwise result, and
  - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

2. A child's best interests is of paramount importance in every matter concerning the child
3. in this section "child" means a person under aged of 18 years.

The new constitutional dispensation puts new emphasis on the criminal justice system in all matters affecting children and lays the foundation for changes with regard to youth justice reform.

### **3.3 PROBATION SERVICES ACT (ACT 116 OF 1991)**

The act was enacted on 7 November 2002, and can be seen as the first piece of South African legislation to mention restorative justice. In Section 1 (d) 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, and victims' and' communities"* and encourages probation officers and assistant probation officers to undertake activities and programmes in this regard.

These provisions could be seen as additional tasks to an already overworked and under staffed corps of probation officers. However, it is clear that probation work has started establishing itself as a specialize field within the social work profession. There is little doubt that the justice system will not be able to function optimally without the contributions/recommendations made by probation officers before imposing sentence on a child offender. Probation services are, therefore, integral to the management of children in conflict with the law.

#### **3.3.1 Power and Duties of Probation Officers**

The publication of the first Probation Regulations (Prisons and Reformatories Act 13 of 1911) laid down duties for probation officers, and so has the Probation Service Act 116 of 1991, which were expanded in the Amendment Act (No. 35 of 2002). A comparison between the two sets of duties will

indicate how the process has moved towards restorative justice during the past decade.

#### **Duties of Probation Officers In Terms of Act 13 of 1911**

1. "to supervise the person placed under his care, and to act as his best friend.
2. to see to it that the probationer abides by his conditions;
3. to visit the probationer at least once a month and to request the probationer to at least visit him once every two weeks.
4. to immediately investigate any breach of a condition and to report it to the Minister of Justice.
5. to provide the minister with periodic reports;
6. to keep such records as prescribed by the Minister.
7. to administer a probationer's salary where appropriate and advisable"

#### **Powers and Duties of Probation Officers as Described in the Probation Services Act (No. 116 of 1991) (Section 4)**

1. The powers and duties of probation officers shall include -
  - a) " the investigation of the circumstances of an accused with a view to reporting to the court on his treatment and committal to an institution, as well as the rendering of assistance to his family.
  - b) The rendering of assistance to probationers in complying with his probation conditions in order to approve his social functioning.
  - c) the immediate reporting to the court or the Commissioner when a probationer does not in any manner comply with or in any manner deviates from his probation conditions;
  - d) the reporting to the court or the Commissioner, in such manner and at such time as the court or the commissioner may determine;
  - e) the planning and implementation of programmes referred to in section 3 in general or in respect of particular persons".

In the mentioned Act there are more duties which are directly linked with non compliance or obstruction, but it is the duties of the probation officer in the

Amendment Act (No. 35 of 2002) that need to be highlighted, because of its restorative justice value.

Section 4 of the principal Act is amended to include the following;

- (i) the reception, assessment and referral of an accused and the rendering or early intervention services and programmes, including mediation and group conferencing;
- (j) the investigation of the circumstances of an accused and the provision of pre-trial reports recommending the desirability or otherwise of prosecution;
- (k) the investigation of the circumstances of a convicted person, the compiling of a pre-sentence report, the recommendation of an appropriate sentence and the giving of evidence before the court.

The Act defines 'family group conferencing' as a gathering convened by a probation officer as a diversion or sentencing option to devise a restorative justice response to the offence.

As has been seen, probation officers in South Africa fulfil a major task. Moreover, when considering that this profession plays a more pivotal role in the Child Justice Bill in the implementation of restorative justice in the youth justice system. In fulfilling their duties, probation officers take on various roles, e.g. investigations, crime prevention, planning and implementation of restorative justice programmes (including mediation and group conferencing). Furthermore, is it clear that their involvement in pre-trial proceedings (they perform assessments of children immediately after arrest) adds a new dimension to their duties, and the treatment of children in trouble with the law. Since its early beginnings more than a century ago, probation has developed an occupational identity of its own.

Batley in Maepa (Ed) (2005; 121), is of the opinion that if pre-sentence reports are written from the perspective of restorative justice, and opportunities for applying restorative justice options are actively explored by

informed probation officers, that these officials will constitute a key occupational group for implementing restorative justice.

### **3.4 CRIMINAL PROCEDURE ACT (Act 51 of 1977)**

Aspects of restorative justice are also provided for in the Criminal Procedure Act. Sentences with a restorative justice outcome will provide an excellent way of including the victim in the criminal justice process and thus underpin the restorative justice approach. There are opportunities for creative sentencing options to enhance rehabilitation and reintegration, particularly when including conditions for correctional supervision in section 276 1 (i) and (h) as well as for suspended or postponed sentences in section 297.

Correctional supervision is a sentence in its own right, which is served within the community. A person who is serving a sentence of correctional supervision is known as a probationer and may be subjected to certain conditions, e.g.

- House arrest;
- Restriction to magistrates districts;
- Community services which is rendered free of charged; and
- Participation in treatment programmes or compulsory attendance of educational lectures.

In terms of section 297 of the mentioned Act, offenders may be sentenced to a postponed or suspended sentence, caution or reprimand. Postponement of sentences may be coupled with one or more of the following conditions:

- The rendering to the aggrieved person some compensation for damage or loss.
- The performance without remuneration outside the prison of some services for the benefit of the community under supervision or control of an organization as determine by the court. Community services shall only be performing by those older than 15 years of age for a period not less than 50 hours.
- Submission to correctional supervision.

- Submission to instruction or treatment.
- Submission to supervision under a probation officer.
- Compulsory attendance of programmes or residence of a specific centre for a specific purpose.

Section 300 and 301 provide opportunities for the victim to be compensated for any losses or harm as a result of the offence committed. Section 48(e) of the Child Justice Bill encourages the rendering to the victim some symbolic benefit or delivery of some object as compensation for the harm caused by the offence. The mentioned legislation paves the way for victims, to be compensated and to be part of the negotiating process for any benefits. Though various provisions in the Criminal Procedures Act could be used for the application of restorative justice, the Act makes no specific provision for the application of restorative justice.

### **3.5 CHILD JUSTICE BILL (Bill 49 of 2002)**

The Bill can be seen as a uniquely legal instrument that accepts that youth in conflict with the law are often themselves victims of violence, neglect and other environmental factors. On the other hand, it can be seen as part of a long process of youth justice reform in South Africa, aimed at the development of a comprehensive justice system to manage children and young people who come into conflict with the law. Restorative justice clearly forms the philosophical foundation of youth justice, as reflected in the Bill.

An overview of the Bill will be provided as a basis for discussion on whether it does in fact promote the restorative justice concept.

#### **3.5.1 Brief History**

Until the ratification of the Bill, the administration of justice for children and young people accused of committing crimes is being governed mainly by the following four acts:

1. The Child Care Act No. 74 of 1983;
2. The Criminal Procedures Act (No. 51 of 1977);
3. The Probation Service Act (No. 116 of 1991); and
4. The Correctional Service Amendment Act (No 8 of 1959).

Since 1992, there has been an increased focus on alternative measures for a comprehensive justice system to manage children and young people in conflict with the law. Several initiatives were taken to have juveniles released from prison and police cells, with conferences and workshops subsequently focussing on this topic. It was especially in this process that diversion from the criminal justice system frequently emerged as a real alternative to the present manner in which juveniles are treated in the South African criminal justice system (Muntingh: 1995; 4).

The law-making process began after pressure from consultancy groups and NGO's, when the (then) Minister of Justice, Dullah Omar requested the South African Law Reform Commission (SALRC) to include in its programme an investigation into juvenile justice. The SALRC project committee commenced its work in 1997 and a discussion paper with a draft Bill was published for comment in 1998. This was followed by a final report to the minister of Justice in August 2000. The Bill was scrutinised by the Department's legislative advisors and minor changes were made. The Child Justice Bill (No. 49 of 2002) was introduced into parliament in November 2002. At the time of writing (2006) the Bill had not been promulgated as yet.

The Child Justice Bill can, therefore, be seen as an attempt to incorporate the sections in these current laws around the practise of youth justice into one detailed document, outlining the roles and responsibilities of all key role-players.

### **3.5.2 Overview of The Child Justice Bill**

Following is an overview of the Bill as a basis for discussion on whether it does in fact promote the restorative justice concept.

The objectives of the Bill are to promote 'ubuntu' (linked to forgiveness) in the child justice system through:

- I. Fostering of children's sense of dignity and worth;
- II. Reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safe-guarding the interest of victims in the community.
- III. Supporting reconciliation by means of a restorative justice response, and
- IV. Involving parents, families and communities in child justice processes in order to encourage the reintegration of children; and
- V. Promoting co-operation between all government departments and other organisations and agencies involved in implementing an effective child justice system.

(<http://www.childjustice.org.za/bill.ht>)

Restorative justice is defined in the Bill as follows: "*Restorative justice means the promotion of reconciliation, restitution and responsibility through the involvement of a child, a child's parent, family members, victims and communities*" (Bill 49 [2002] Definitions).

It is apparent that the drafting of the Bill has been strongly informed by the restorative justice paradigm. It places emphasis on holding the offenders accountable for their actions and argues for the development of restorative interventions that will facilitate a process of reconciliation between the offender, victim, family and community. (Van Ness & Strong, 1997; Zehr, 1990).

The proposed system includes alternatives to arrest, compulsory assessment of each child by a probation officer and appearance at a preliminary inquiry within 48 hours of the arrest. The inquiry will be chaired by a magistrate and will take the form of a multi-disciplinary conference with the prosecutor,

probation officer and family of the child attending. The aim of the new system is to divert as many children away from the formal justice system as possible.

### **3.5.3. Diversion**

The Bill aims at upholding the principles of restorative justice in part through the process of diversion. Shearar and Graser (2005: 157) define diversion as: *“Rerouting children below the age of 18 who have broken the law away from the formal justice proceedings, which often result in detention, either awaiting trial or through sentencing.”*

The whole of Chapter 6 of the Bill is devoted to diversion. The following paragraph outlines the Bill’s intended purpose of diversion:

**The purposes of diversion in terms of section 43, chapter 6 of the Child Justice Bill are to –**

- a. Encourage the child to be accountable for the harm caused;
- b. Meet the particular needs of the individual child;
- c. Promote the reintegration of the child into the family and community;
- d. Provide an opportunity to those affected by the harm to express their views on its impact on them;
- e. Encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;
- f. Promote reconciliation between the child and the person or community affected by the harm caused by the child;
- g. Prevent stigmatising the child and prevent adverse consequences flowing from being subject to the criminal justice system; and
- h. Prevent the child from having a criminal record.

**[<http://www.childjustice.org.za/bill.htm>]**

Perpetrators will now be able to be accountable for their actions, and in the process are given the opportunity to acknowledge their responsibility to contribute to a better South Africa. The offender is confronted more directly with the consequences of his act and an active effort is demanded of him to repair or compensate the harm.

Most of the young people who enter the criminal justice system come from dysfunctional families and can be classified as youth at risk and in need for care. As a result of being young, homeless and vulnerable to strangers, they are forced to find an existence amongst the dangers on streets. The present criminal justice system disrupts their already fragile lives. (Skelton 1993: 11).

Diversion eliminates the stigma attached to being accused and assists the child in avoiding a criminal record. It also provides better guidance for those children in trouble with the law and can assist the youth to understand the consequences of unacceptable behaviour.

In the South African criminal justice system it is tradition that communication between victim and offender is not encouraged. The victim in most cases only seeks for justice and is mostly not interested in the potential of the offender. (Muntingh and Shapiro 1995:5) Diversion provides opportunities to the victims to air their feelings and be part of the criminal justice process. On the other hand, the negotiating element of the restorative justice intervention may jeopardise the rights of the parties concerned as offenders may abuse the system to avoid punishment. (Muntingh 1997) Mediation requires co-operation from the victim, who may not always be willing to give it. It is, therefore, important to ensure that unnecessary pressure on the victim does not result in a sort of secondary victimisation.

The Bill offers three "levels" of diversion, depending on the seriousness of the offence. Sloth Nielsen & Gallinetti (2004; 51) describe the different levels as follows:

- "Level one includes programmes less intensive and of short duration.

- The second and third levels contain programmes of increasing intensity, which can be set for longer periods. Victim -offender mediation and family group conferences are available at level two.”

The intention is to encourage those working in the system to use diversion in a range of different situations. The Bill also provides minimum standards for diversion and builds in procedural rights protection for children who are offered diversion options.

#### **3.5.4 Sentencing**

The effects of imprisonment have been outlined in Chapter Two. The Bill makes provision for different sentencing options, upholding the commitment, as cited in the Constitution “... that no child should be detained except as a measure of last resort” (Section 28: g).

These sentence options included community-based and restorative justice sentences. Sentences also involve correctional supervision and compulsory residential requirements. These can be seen as creative alternatives for areas that are under resource. The postponement or suspension of sentences is linked to a number of conditions, which includes requirements such as restitution, compensation or symbolic restitution and an apology.

#### **3.5.5 The Family Group Conference**

Both the Probation Service Amendment Act (35 of 2002) and the Child Justice Bill (49 of 2002), suggested the application of restorative justice in the form of family group conferencing and victim mediation processes (VOM; and FGC's). A probation officer is responsible for convening the conference within 21 days after the decision that such a conference must take place. The conference is empowered to regulate its own procedure and to make such a plan as it deems fit, provided that it is appropriate to the child and family, and consistent within the principles contained in the legislation

The plan must specify the objectives for the child and family, as well as time frame in which they are to be achieved. It must contain details of services, assistance available for the child and family, relevant matters relating to

education, employment, recreation and welfare of the child. (Sloth-Nielsen & Gallinetti; 2004).

### **3.5.6 Other Features of the Bill**

- There are recommendations of a monitoring system that will oversee the implementation of legislation. This includes the development of a register. There should be clear guidelines as to who is responsible for keeping of records.
- The Bill allows for greater range of diversion options, e.g. family time orders, school attendance order etc. Absent parents will be forced to become more involved in their children's lives and in a way be held accountable and responsible for their child's progress.
- The insertion of a compulsory preliminary inquiry ensures that a probation officer has conducted the relevant assessment. Active participation of all role-players is required in the process. This is a formal step to be held within 48 hours of a child's arrest, prior to plea. It can be seen as one of the most striking aspects of the Bill.
- The Bill sets minimum standards for the involvement of all children despite of their race or stability. (Wood: 2000). The current system is not in favour of street children and those staying in squatter camps

### **3.6 CONCLUDING REMARKS**

The South African criminal justice system has not treated young persons in trouble with the law kindly in the past. Since the early 1990's, child rights activist have been promoting restorative justice principles and lobbying for the creation of separate child justice system for children in conflict with the law. Currently South Africa and all it's children can look forward to a child justice systems with laws and procedures specifically develop for children.

The proposed child justice system as described in the Child Justice Bill seems to meet the principles of restorative justice as described in Batley in Maepa (Ed) (2005). Restorative justice is aimed at developing a system that deals

with offenders and victims in a restorative way. Such a system will include both sanctions and voluntary processes. The Bill creates new procedures and cost-effective mechanisms to ensure the involvement of the victim, the offender and community members in coming to resolutions and to provide better opportunities for children.

The Bill has been designed, and amendments have been made to existing policies to address the inconsistency and often destructive application of justice, as pointed out in Chapter two by the South African Law Reform Commission of 2000, to ensure that children's rights are protected. While these are promising changes, there are still concerns as to whether the proposed system will be adequately resourced and whether diversion will be effective enough in order to fulfil the expectations of the society in disapproval of criminal actions.

Developments surrounding the Bill and other law processes are indicative of the state's commitment to moving away from a largely retributive system of dealing with young offenders, to a system in which restorative justice plays an important role. It offers a humane approach, focussing on the empowerment of the young people and their families by providing intervention skills and resources that offer a chance to right the wrongs and improve their lives.

## **CHAPTER FOUR**

### **RESEARCH METHODOLOGY**

#### **4.1 INTRODUCTION**

This chapter will cover the background and rationale of the research study, and will formulate the research problem by stating the aim of the study, the study population, as well as the sampling method. To place the study in context, the method of investigation and processing of the data will be described.

#### **4.2 MOTIVATION OF THE STUDY**

The high level of crime and the high incidence of juvenile crime and incarceration in South Africa are burning issues at the centre of discussions amongst various role-players, including youth and law activists, politicians, non-profit organizations, representatives of the corporate sector etc. These have resulted in the compilation of law reform actions that promote an alternative approach to our current justice system in dealing with young offenders.

The Child Justice Bill (49 of 2002) opens the door for transformation in our approach to young people, and provides alternative sentencing options like diversion, mediation and group conferences, which are rooted within the paradigm of restorative justice. Specific orders as set out in the Bill provide opportunities for young offenders to take responsibility for their criminal behaviour without facing incarceration. By diverting a case from the criminal justice system, the child is able to avoid obtaining a criminal record.

The restorative justice approach is in contrast with our current system, which is punitive. Restorative justice acknowledges the needs of the victim, offender

and community, and provides opportunities for parties to resolve problem situations.

Although the Bill is still waiting to be interrogated and passed by Parliament, certain sections are being implemented by the justice system.

It would appear that diversion is currently running on an ad hoc basis in our courts, with the decision to divert or not primarily made by the prosecutor. It has also been evident for some time that a degree of inconsistency exists with regard to the sentencing of young offenders, and that magistrates tend to rely mainly on the traditional sentence of imprisonment.

A pilot study that was conducted by the researcher at the Bellville and Wynberg Magistrate Courts with regard to the "*Attitudes of magistrates, prosecutors and probation officers towards the application of restorative justice to young offenders*" revealed the following:

Using a sample of three respondents from the three groups of criminal justice role players namely magistrates, prosecutors and probation officers at both courts were interviewed on the basis of availability. It was found that all role players were mainly positive about the new approach, which is, applying restorative justice principles in sentencing, but they lacked knowledge on the concept and fundamental principles of restorative justice. They were only familiar with the concept of diversion. In fact all respondents indicated that they did not know the meaning of restorative justice.

As a result of the findings in the pilot study, and considering the high imprisonment statistics as reported in the *2004/2005 Annual Report of the Office of the Inspecting Judge*, the researcher came to the conclusion that, in order to gain a deeper understanding of the matter, it is necessary to expand the study by including more role-players responsible for administering justice and by assessing the types of sentences passed at selected urban and rural district magistrates courts.

The broadened study will aim at determining to what extent judicial officials and probation officers implement the approach of restorative justice in the sentencing of youth offenders. The collection of data from charge sheets with regard to sentence remarks and type of crimes will serve as proof of implementation. The researcher will also explore the attitudes of the different role-players to the application of restorative justice in sentencing.

#### **4.3 AIM, PURPOSES AND OUTCOMES OF THE STUDY**

##### **The Aim of the Study:**

The research was undertaken to determine to what extent restorative justice is implemented by magistrates, prosecutors and probation officers in the sentencing of youth offenders.

##### **The purposes of the study are:**

- to gather information and statistical data on the implementation of restorative justice in the sentencing of juveniles.
- to determine the level of knowledge of magistrates, prosecutors and probation officers with regard to restorative justice;
- to explore the views of magistrates, prosecutors and probation officers on the concept of restorative justice;
- to determine to what extent role-players make use of restorative justice in the sentencing of young offenders.

Some anticipated **outcomes of this study** for participants are that:

- Through the interview process, participants will be able to evaluate their knowledge of restorative justice and identify limitations and strengths in that regard. This could contribute to self-awareness in respect of their responsibilities in the implementation of restorative justice;
- The study would contribute to participants' acceptance of restorative justice in the sentencing of more serious crimes. It is

hoped that participants will be able to evaluate their readiness for the transformation of the justice system.

#### **4.4 RESEARCH METHOD**

Bless and Higson-Smith (1997:63) refers to research design as "*a program to guide the researcher in collecting, analysing and interpreting observed facts.*"

A combination of qualitative and quantitative research methods was used in this study. Babbie and Mouton (2001:278) explain that "*the qualitative researcher's emphasis is on studying human action in its natural setting and through the eyes of the actors themselves*". DeVos (1998) states that the qualitative research approach uses the emic perspective of enquiry, which implies that meaning is derived from the subject's perspective. Since this study sought to determine the attitudes of magistrates, prosecutors and probation officers in the implementation of restorative justice in the sentencing of youth offenders, it was appropriate to take this approach.

The researcher interviewed magistrates, prosecutors and probation officers who have firsthand knowledge of and experience in the juvenile courts, or are working in this field. These factors served to enhance the richness of the information gathered, because they were able to reflect broadly on the subject under discussion.

Another advantage of choosing the qualitative design is that it allows for interaction with the research participants, which promotes building of relationships and in turn develops some form of trust. It should be noted that while the research is qualitative, the researcher found it necessary to include quantitative information in order to broaden the information gathered. The quantitative dimension lies in data collection from court files over a period of a year (June 2004 – May 2005). The quantitative method relies heavily on "factual data". (Grinnell, 1986: 266).

Information on the gender, age, nature of the crime committed, and remarks/ recommendations regarding sentences with a restorative justice implication,

were compiled into a database. This information was tabled and comparisons were made with the themes arising from the literature review. Trends were identified from the interviews, to establish to what extent judicial officials make use of restorative justice in the sentencing of youthful offenders.

An advantage of the document study method is that the researcher has to rely on the data as provided on charge sheets/courts files, and is able to avoid being influenced by the subject under study.

A disadvantage of the qualitative design of this study is that the findings are not generalisable to the criminal justice role players generally, as the sample is not representative of the wider population of magistrates, prosecutors and probation officers. Only purposely selected district magistrate courts were identified for the research study. However, it is felt that this research will provide important insights into the implementation of restorative justice in the sentencing of youthful offenders. Furthermore, it can be used as a pilot study for future research, whereby a more scientific approach with experimental or control groups can be utilized to analyse the impact of restorative justice as a sentencing option for the youthful offender.

## **4.5. STUDY POPULATION AND SAMPLING**

### **4.5.1 Population**

Bless and Higson-Smith (1997:85) define population as "*the entire set of objects and events or group of people which is the object of research and about which the researcher wants to determine some characteristics*". The study population in this research includes magistrates, prosecutors and probation officers working at selected magistrate courts.

The research is also geographically bound to district magistrate courts in both rural and urban areas of the Western Cape. The courts were selected on the basis of distance to make them easily accessible to the researcher, bearing in mind that time and finance were a major constraints.

The researcher chose to study four urban and five more rural magistrates' courts. In the urban areas, the focus of the research was in Cape Town, Oudtshoorn, Mitchells Plain and Khayelitsha Courts, which also covers the diversity of the population in the province. The magistrate courts of Riversdal, Albertinia, Calitzdorp, Porterville and Clanwilliam were selected for the rural areas. This ensures that rural communities are also part of the research so that the researcher can report on the progress of restorative justice in these more outlying areas.

After the original selection of courts in rural areas was made, the researcher discovered that the judicial staff of the Riversdal court also covers the area of Albertinia, which would lead to a duplication of information. The researcher therefore added Citrusdal to the study population, and left out Albertinia. The reason for deliberate selection for the study, as explained by authors such as Rubin and Babbie (1997:266-267), is to ensure that the respondents meet the requirements of what the researcher wants to investigate.

#### **4.5.2 Sampling**

According to De Vos (1998:191), sampling "*can be viewed as a subject of measurements drawn from a population in which we are interested*". We therefore study the sample in an effort to understand the population from which it was drawn. Non-probability sampling was chosen for the qualitative research method (interviews), which typically uses the accidental or availability sampling technique. The accidental or availability sampling technique, according to De Vos (1998: 198) who quotes Collins (1990:270), is "*a convenient or availability sample and that the respondents are usually those who are nearest and most easily available*".

This sampling method means that the researcher handpicks research participants according to their availability.

It was decided to interview at least ten respondents from each of the relevant criminal justice role players (magistrates, prosecutors and probation officers). The researcher end up interviewing in total 40 respondents. The criteria used for the respondents in this study were as follows:

- The respondents must have work experience in juvenile courts.
- The respondents could be previous or current staff, working in juvenile courts.

A total of 13 magistrates, 16 prosecutors and 11 probation officers were interviewed from selected magistrate courts. Probation officers are scarce, with only one worker per magistrate court. Some of them were unavailable due to being on maternity or annual leave during the research period. It was for this reason that only eleven probation officers were interviewed.

A total of 627 cases (court files) were viewed for the purpose of the study. All juvenile case files were examined at the different courts, at district level after being separated from the files of adults. The results will, therefore, reflect a broader representation of what is happening in the criminal justice system in respect of juvenile offenders, who appear in district courts.

#### **4.6 METHOD OF DATA COLLECTION**

##### **4.6.1 Personal Interviews**

Semi-structured interviews were scheduled to gather data. According to Bless and Higson-Smith, an interview involves (1997:106): "*direct personal contact with the participants who are asked to answer questions*". This is regarded as the most structured way of getting information directly from respondents.

An interview schedule was compiled and structured with fixed wording and sequences based on relevant indicators from the literature review.

The interview schedule was pre-tested with a probation officer not involved in the research study. The reason for pre-testing was to ascertain whether participants would have any difficulties in understanding the questions. The schedule was found to be clear and easy to understand.

The interview schedule contained nine questions, focusing on different themes e.g. current criminal system; victims, restorative justice etc. (see Appendix A).

#### 4.6.1.1 Advantages of the interview process

The main advantage of interview schedules according to De Vos (1998:300) *"is that they provide for relatively systematic collection of data and at the same time ensure that important data are not forgotten."* Bless and Higson-Smith (1997:106) also emphasise that interviewing is *"a method of getting people to express their views broadly"* Thus the interview allowed the research participants the opportunity to express their views on restorative justice as a sentencing option in the sentencing of juveniles.

The researcher also found that being a trained social worker was advantageous, as she had already studied and practiced the art of interviewing. Interviewing is a skill that many researchers lack to their disadvantage, as indicated by De Vos (1998:300): *"the main disadvantage of these interviews is that they require a highly trained and proficient interviewer"*.

The interview skills and knowledge of the researcher allowed for the establishment of rapport with the research participants, which contributed to the participants being more open in discussing their inner thoughts and life experiences. Face-to-face interviews with the participants allowed for a high response rate and also ensured that all questions were answered.

Grinnell (1986:309) quotes Bailey, who noted the following four major sources of respondent's errors and biases in self-reported data:

- 1) *"Deliberately lie because they do not know the answer.*
- 2) *Make mistakes without realising it often because they are not able to admit socially undesirable feelings, attitudes or traits, even to themselves.*
- 3) *Give inaccurate answers by accident, simply because they misunderstood or misinterpreted the question.*
- 4) *Are unable to remember, despite their best effort."*

The research participants had to reflect on their own knowledge and experiences and, therefore, making mistakes without realising it was not a significant problem. Furthermore, the structure of the interview schedule gave participants little opportunity to be vague and unreliable. Together with the researcher's knowledge and interview skills, it was possible to steer certain situations so that it could lead to participants only giving relevant information.

#### **4.6.1.2 Disadvantages / challenges of the interview process**

Some participants experienced memory loss due to new work commitments, especially amongst judicial officials who rotated between different courts. Other problems that were encountered and that could negatively affect the study are detailed below:

- During the interview process, some research participants, especially magistrates and prosecutors were impatient and provided limited time to finish the interview. In such instances, the researcher had to arrange follow-up interviews to ensure optimal gathering of information.
- Some participants had difficulty in expressing themselves. The researcher used her skills as a trained social worker to carefully probe and encourage more in-depth responses.
- Problems could have been encountered with recording the data as the researcher decided not to use a tape recorder. Consequently all responses were manually recorded, which could have resulted in some error.

The researcher also took cognisance of the following criteria that need to be followed during the process of data collection, as described by Mouton (1996:111):

1. *Suspension of personal prejudices and biases.*
2. *Systematic and accurate recording of observations.*
3. *Establishment of trust and support with the interviewee.*

In dealing with some of the above, the following strategies were put in place:

- 1) Open and closed-ended questions were asked, which provided consistency in the nature of data collected from participants.
- 2) Through her experience as a social worker and her encounter with different people, the researcher has gained the ability to develop relationships. She arranged appointments beforehand with participants to explain the purpose of the research study, which contributed to the establishment of trust and also support from participants.

#### **4.6.2 Court Records**

The study of court files that were finalized over the period of a year (June 2004 – May 2005,) specifically relating to the sentencing of youth offenders on district level served as a fundamental component of the research method. Access to information from court files was obtained from office managers of the different courts. These documents reflect information on the age, sex of the offender, nature of the offence, and type of sentence posed by the court. The researcher focused on statistics most relevant to the research study; i.e. sentences given to juveniles that have a restorative justice impact.

This information will be utilized to indicate the frequency with which restorative justice is used in the sentencing of youth offenders.

A total of 627 charge sheets were selected and put on a database. Demographic data on the age, sex, nature of the crime and sentence passed were recorded. For the purpose of the study, in the findings the researcher will only reflect statistics of the type of sentences passed. By using the case files for data collection, the researcher will be able to give a statistical account of what is happening with regard to the implementation of restorative justice in the sentencing of youth offenders.

#### 4.7 DATA PROCESSING

According to Mouton (1996:11), "*we analyse data by identifying patterns and themes in the data and drawing certain conclusions from them*". The researcher is using the respondents' own words and phrases, in order to attach meaning to their responses.

The data analysis for this study follows the approach of Huberman and Miles, as quoted by De Vos (1998:340), who are of the opinion that data analysis "*consist(s) of three processes: data reduction; data display and conclusion drawing or verification*".

De Vos (1998:340) states the following regarding data reduction: "*the potential data is reduced in an anticipatory way as the researcher chooses a conceptual framework, research questions, cases, etc.*" Making summaries, and arranging data into categories and themes makes data more manageable. In the researcher's own study, the questions that appeared in the structured interview schedule were used as a guideline to categorise and compare responses obtained from participants during the research study. In the first phase, the responses of each respondent were recorded on individual interview schedules. Thereafter, the responses of each cluster of judicial officials were grouped together on a data sheet.

The data were analysed under two themes, considering the general trends in responses. Subsequently, a cross analysis was done, drawing comparisons between the three groups of judicial officials.

The next activity as proposed is data display, and involves "*an organised, concise assembly of information that permits conclusion drawing and actions*", as quoted by De Vos (1998:340). The researcher displays data in the form of text, which reflects direct quotes from research participants. The quantitative method of numbers is used to enhance the qualitative method of data analysis. Tables and graphs are also utilized to reflect both, the qualitative and the quantitative data. The last activity in the Huberman and Miles approach as described by De Vos (1998:340) is conclusion drawing and verification. "*The range of tactics includes comparisons, contrast, noting of*

*patterns and themes*". De Vos (1998:351) indicates that verification involves checking for the most common biases that can interfere with the process of drawing conclusions.

The researcher used inductive reasoning in order to make interpretations and draw meaning from the data display. A full presentation of the analysed data is presented in the next chapter. Conclusions that were drawn were also tested for their validity as discussed earlier on in this chapter.

#### **4.8 RESEARCH PROCESS**

As indicated above, the research was done at various magistrate courts, with magistrates, prosecutors and probation officers employed by the Department of Social Services. Letters explaining the need for the research were sent to the various office managers for permission, who in return, provided the researcher with contact details of the supervision/managers of all the role-players. The researcher then telephonically contacted the chief magistrates, chief prosecutors and chief social workers (probation officers) with a faxed letter to obtain access to junior staff or prospective respondents.

After an agreement was reached and those involved were informed, supervisors in turn delegated the necessary logistical arrangements to the researcher, and contact details were provided by the different officers. The researcher then made telephonic contact and arranged interviews with available respondents. This was an exhausting exercise as the courts were busy and the researcher had to wait at courts for officials to be interviewed (irrespective of agreed upon meetings). This became time consuming and was also costly, as the researcher had to return to courts over a period of days to complete the interviews.

Magistrates and prosecutors were interviewed at the courts, whilst probation officers were interviewed at the offices of the Department of Social Services and Poverty Alleviation. The gathering of information from charge sheets was

more effective. Office managers were helpful and cooperative, permission was given after a meeting was held and the purpose of the study was explained. The researcher was given access to the archive with a clerk to assist with any queries.

#### 4.9 VALIDITY AND RELIABILITY

Mouton (1996:111–113) defines reliability as “*the outcome of the process as a set of data or empirical information.*” The researcher therefore aims to produce reliable data. The author goes further and suggests that reliability is synonymous with stability or consistency over time. This means that if we use the same measures (interview schedule) and hold the conditions under which data are collected as consistent as possible, we should get equally reliable data from one interview situation to another.

Mouton (1996:112) also states that “*objectivity is a precondition for the attainment of validity in research*”. According to the author this means ensuring the value of the process, methods and procedures used: “*objectivity in research is based on taking decisions and making judgements to avoid certain pitfalls that would lead to bias and error.*” (1996:112)

The researcher tried to ensure some level of reliability and validity by:

- pre-testing the interview schedule for all research participants;
- making sure that the research questions were clear and in line with the research design;
- informing respondents beforehand with regard to the purpose and expectations of the study to avoid confusion;
- clearly defining the researcher’s role and experience;
- ensuring that interviews were conducted within suitable time frames and circumstances to enhance trust and an open atmosphere;
- clearly describing the response through the use of direct quotes by respondents and supporting this by using the quantitative method (statistics);
- using the same interview schedule for all research participants;

- clearly pointing out any areas of weakness in the research design, measuring tools and data analysis; and
- analysing findings in such a way as to ensure that meaningful conclusions could be drawn from the research.

#### 4.10 ETHICAL ASPECTS

Persuading participants to co-operate with the researcher during data collection can be a problem. Participants have rights, which should be respected. As defined by De Vos (1998:24) *“ethics is a set of moral principles which is suggested by an individual or group ---- which offers rules and behavioural expectations about the correct conduct towards experimental subjects, respondents, other researchers etc.”* Ethical guidelines therefore not only serve as a standard, but should be the basis to evaluate one’s own conduct.

The goals of the research were clearly defined and discussed with research participants. The research was transparent and respected participants’ requests to see the interview schedule (questions). Participants were given the option of choosing to be involved in the research. They were assured of confidentiality and anonymity, which meant that their names would not appear in the interview schedule. The researcher was aware of the respondent’s right to privacy and therefore utilised her experience as a social worker to respect participants’ views and the confidentiality of those views. The researcher was, therefore, cautious not to misrepresent facts in order to achieve her own agenda or violate the rights of participants. Attention was given to the relationship between the researcher and participants, by respecting their views and their time schedules.

#### 4.11 LIMITATIONS OF THE STUDY

The following factors were anticipated as areas that would infringe on the process of the study:

- The major limitations of the research were time and money, as the researcher had to go back and reschedule interviews in order to get hold of respondents.
- The researcher encountered obstacles in getting hold of respondents due to busy court schedules and staff who were on leave. Some offices of the prosecutors and probation officers were asked timeously to give permission for the research, whilst others received but lost the request letters for the research study. This required follow-up, which impacted negatively on the planning of the project, and also lead to extra financial expenses.
- A delay at the university in the processing of the original research proposal lead to late registration, which impacted on the completion of the research study.

Despite the negative aspects, the general response and support of the different professional groups were overwhelming. The researcher was able to gain insight into the views of magistrates, prosecutors and probation officers with regard to the implementation of restorative justice in sentencing youth offenders.

Office managers from the different magistrate courts were co-operative, as they encouraged their staff to assist the researcher with data collection from court files.

## **CHAPTER FIVE**

### **RESEARCH FINDINGS**

#### **5.1 INTRODUCTION**

This chapter presents the findings of the research. Although the method of the study was discussed in the previous chapter, it is important to briefly mention it, and to link it to the results of the study. Attention will be given to the profile of the research group and the knowledge and experience of certain professional groups (magistrates, prosecutors and probation officers), on the matter of understanding and applying restorative justice to the field of youth justice. The chapter will focus particularly on the implementation of restorative justice in the sentencing of youth offenders and the attitudes and knowledge of the role players when applying this approach.

#### **5.2 SUMMARY OF RESEARCH DESIGN**

This section was discussed in detail in Chapter Four. To make it easier for the reader to understand and to ensure continuity, a brief outline of the research method will follow.

Although the qualitative method of data collection, in the form of an interview schedule was used, the quantitative technique of enumerating data was also used to enrich the data analysis. The quantitative dimension lies mainly in data collection from court files. The interview schedule was used to probe perceptions, knowledge and attitudes relating to the implementation of restorative justice within the sentencing of youth offenders.

The findings were analysed by making summaries and identifying certain patterns, similarities and themes. The questions that appeared in the structured interview schedule were used as a guideline to categorise and compare responses obtained from the participants during the research. Categories are separated and presented with the views of each cluster of

participants. Subsequently a cross analysis was done, drawing comparisons between the three groups of judicial officials.

The findings are presented in text form, groupings and figures in order to add depth and meaning to the data. It should be noted that forty respondents were interviewed. The presentation of the findings may at times seem confusing as the number reflected in the number column is on occasion greater where respondents provided more than one response to a question. The secondary focus of the study comprises of 627 court case files that were viewed to reflect a broader representation of what is happening in the justice system with regard to the application of restorative justice.

### **5.3 OVERVIEW OF RESEARCH PARTICIPANTS**

The universum of the study includes magistrates, prosecutors and probation officers, working in different urban and rural magistrate courts within the juvenile justice system. In total 13 magistrates, 16 prosecutors and 11 probation officers were selected to collect data in the form of an interview schedule. The courts were selected on the basis of geographical locality, to make it easily accessible to the researcher. As mentioned in Chapter Four the research is also geographically bound to district magistrates courts in both rural and urban areas of the Western Cape.

The findings clearly indicate that magistrates, prosecutors and probation officers need to be trained with regard to the application of the restorative justice process, as there are still uncertainties that could be directly linked to incompetent staff, limited resources and the fact that the Child Justice Bill has not yet been passed. A broader perspective will be discussed in Chapter Six which contains the conclusions and recommendations.

## 5.4 EFFECTIVENESS OF THE CURRENT CRIMINAL JUSTICE PROCESS.

The literature review, as discussed in Chapter Two, revealed that our current criminal justice system fails in its mission to prevent crime and deter offenders from future anti-social conduct. Consedine (1999: 86) states that our current system is one of retributive justice, which primarily asks: "How do we punish this offender?" In South Africa, we are faced with a high crime rate and a high prison population due to a criminal justice system that is not achieving its purpose of deterrence and rehabilitation.

In the present study, the respondents had to indicate to what extent the current criminal justice system was effective in:

- a) preventing crime
- b) deterring offenders and potential offenders
- c) protecting society and
- d) rehabilitating offenders

The findings with regard to their responses to these aspects are summarised / presented in the following tables.

### 5.4.1 The Effectiveness of the Criminal Justice System in Preventing Crime

#### 5.4.1.1 Views of magistrates

<b>Table 1:</b>	Total	%
1. Partially effective on an individual basis and with first offenders.	6	46.16
2. Not effective, as crime is still on the increase.	5	38.46
3. Does not work preventatively, as the focus is on punishment, after the crime was committed.	2	15.38
Total	13	100%

Most magistrates do not seem to think that the current criminal justice system is successful in preventing crime. It is significant that two magistrates (15.38%) admitted that their focus was not on prevention but on punishment of the offender. This can be viewed as a matter of concern and may indicate stereotyping of functions and roles within the judicial profession. Judicial officials have a vital role to play in preventing crime and promoting opportunities for all parties concerned, i.e. the victim, the offender and the community.

#### 5.4.1.2 Views of prosecutors

<b>Table 2:</b>	Total	%
Partially effective with first offenders.	4	25.0
Not effective, still high crime rate due to re-offending.	5	31.25
Ignorance of role players e.g. community and SAPS, as they do not understand their role and function with regard to crime prevention.	4	25.0
There is a level of effectiveness, due to community involvement in preventing crime.	2	12.5
No response, don't work with prevention.	1	6.25
Total	16	100%

The above data indicates that prosecutors are fully aware of the present high crime rate in South Africa. A significant remark made by four prosecutors (25%) is that role players do not understand the concept of prevention and what is expected from them with regard to crime prevention, particularly when taking into consideration the escalating crime rate as reflected in the literature review. This suggests that alternative measures are required to involve all stakeholders, to improve the effectiveness of a criminal justice system. After all, restorative justice holds all parties accountable and capitalizes on their strengths, skills and resources to prevent crime. There seems to be a realisation amongst a small percentage of prosecutors (25%) that the system is partially effective with first offenders. One can conclude that these views are probably / most likely based on individual cases.

#### 5.4.1.3 Views of probation officers

<b>Table 3:</b>	Total	%
Not effective, as the crime rate is still on the increase.	6	54.55
Not effective, as the system is too punitive.	5	45.45
Total	11	100

The above table shows that more than half of the probation officers (54.55%) regard our current criminal justice system as not being effective in preventing crime, whereas the remaining probation officers (45.45%) are of the opinion that the system is too punitive. The high crime rate, in their view, seems to be indicative of a criminal justice system that has failed to prevent crime. This is in line with what has been revealed in the literature review. Prisons are far exceeding their capacity and no relief seems to be in sight when one considers the high crime rate and the large prison population in South Africa. This indicates that imprisonment continues to be the popular choice of the criminal justice system when meting out punishment. The reader will later be able to draw more specific conclusions in this regard, when the statistical data on sentences that were actually passed, which was gathered from court records, is revealed.

#### 5.4.1.4 Discussion

There is agreement amongst all three categories of respondents that our current criminal justice system is not effective in preventing crime, as evident from the increasing crime and re-offending rate. The fact that both magistrates and prosecutors hold the view that the system is only partially effective with first offenders can be understood in the light of their encounters with youth offenders on a daily basis. It can also be a direct result of diversion, as discussed in the literature review, and as currently practiced in courts to assist youth offenders from getting a criminal record. Diversion is defined as the re-direction of cases from the formal criminal system, and it gives offenders a second change to improve their lives (Graser and Shearar, 2005: 157). Prosecutors are furthermore of the opinion that communities do not take enough responsibility for preventing crime. This may relate to the opinion of

probation officers, that our current system is too punitive, as it focuses mostly on punishment, rather than on holding the offender accountable for his wrongdoings and on rehabilitating him. For many years punishment was seen as the most important mechanism for combating crime and deterring offenders and potential offenders. A shift in attitude and mindset is required, however, to move away from a retributive system that continues to focus on imprisonment when meting out punishment.

The time has come for judicial officials to become involved in the problems in their respective communities and of those who are on trial, by being aware of the resources available in such communities. The high crime rate is a universal problem that requires partnerships between all relevant role players. Judicial officials, like magistrates and prosecutors, have multiple roles to play, and cannot merely focus on punishing the offender.

#### **5.4.2 The Effectiveness of the Criminal Justice System in Deterring Offenders and Potential Offenders.**

##### **5.4.2.1 Views of magistrates**

<b>Table 4:</b>	<b>Total</b>	<b>%</b>
The current criminal justice system, with its focus on imprisonment and punishment no longer serves as a deterrent for offenders.	5	38.46
The system is partially effective, especially with first offenders.	5	38.46
The system is not effective with regard to potential offenders, due to a lack of preventative measures and poor social structures.	3	23.08
<b>Total</b>	<b>13</b>	<b>100%</b>

The data indicates that 5 / more than a third (38.46%) of the magistrates seem to share the same views as the probation officers and the prosecutors, i.e. that the current justice process is not effective in deterring offenders and potential

offenders. The view that the system is partially effective with first offenders may be a result of their day-to-day encounter with offenders. This gives magistrates an opportunity to evaluate the types of offender that enter the system for the first time, as well as those that re-offend.

The fact that a relatively small number of magistrates (23.08%) regard the lack of preventative measures and poor social structures (family and community involvement) as contributing factors to the failure of the current justice process in deterring offenders, can be understood in the light of the primary objectives of restorative justice, namely, the importance of engaging all stake holders.

#### 5.4.2.2 Views of prosecutors

<b>Table 5:</b>	Total	%
The current justice system does not serve as deterrent, as punishment does not scare offenders and potential offenders.	9	56.25
The current justice system is effective to a certain extent with first offenders and juveniles, but then they are already part of the system.	7	43.75
Total	16	100%

The above could be seen as an agreement by most of the prosecutors that the current justice process fails in deterring offenders and potential offenders. The high re-offending rate and the high crime rate seem to prove this sentiment. Although some respondents felt that the current justice process may be effective with first offenders and juveniles, it is already too late at that time, because these offenders are already part of the high crime statistics. Although over half of the prosecutors (56.25%) felt that punishment does not deter offenders, it appears that this is still the popular choice of the criminal justice system. These perspectives should also be an indication that punishment on its own does not hold any value for the offender, the community or the victim.

### 5.4.2.3 Views of probation officers

<b>Table 6:</b>	<b>Total</b>	<b>%</b>
Statistics on re-offending are proof that offenders are no longer afraid of prison sentences.	6	54.55
Some sentences are too lenient; the system does not prevent crime or deter offenders.	5	45.45
<b>Total</b>	<b>11</b>	<b>100%</b>

The above findings may be an indication that probation officers realise that an approach like restorative justice will be more effective in deterring offenders than the existing punitive approach. The literature review reveals that prison sentences were introduced to deter the offender and to encourage and/or force him to think about the "sin" caused by his or her actions. Over half of the probation officers (54.55%) mentioned that the high re-offending rate is indicative of the fact that imprisonment is not the only solution. The offender needs to take responsibility for his criminal behaviour, and be willing to make a change and to become aware of the harm caused by crime.

Table 6 also suggests that probation officers are not satisfied with the current justice system, as they regard it as too lenient in sentencing, and as they feel that prison sentences do not deter potential offenders. This is understandable, as probation officers are thought to be more inclined towards rehabilitation and are expected to be in the forefront in promoting restorative justice.

### 5.4.2.4 Discussion

An important fact emerges from the responses with regard to the effectiveness of the criminal justice system in deterring offenders and potential offenders, namely that family and community involvement are essential for effective intervention and rehabilitation. The respondents' views correspond with what is reflected in the literature regarding the high crime rate. There is an increasing outcry by reformers for a new approach to the punishment of offenders. Research in New Zealand indicates that courts have become more attracted to restorative processes because they are victim-centred and emphasize offender

responsibility. It is generally felt that the retributive system is failing to deter criminals or to satisfy crime victims. The community, rather than criminal justice agencies, are increasingly being recognized as the prime site of crime control.

### 5.4.3 The Effectiveness of the Criminal Justice System in Protecting Society

#### 5.4.3.1 Views of magistrates

<b>Table 7:</b>	<b>Total</b>	<b>%</b>
The high crime rate is proof that society is not protected against crime.	6	46.13
The current criminal process is effective in protecting society against crime, when the accused is punished and removed from society.	5	38.47
It succeeds partially, as the community has become more aware of crime to prevent it from happening to them.	2	15.40
<b>Total</b>	<b>13</b>	<b>100%</b>

An interesting remark by a small percentage of magistrates (15.40%) is the emphasis on the involvement of the community in the prevention of crime. In addition to the recognition on the part of some magistrates that the current system is not protecting society, it is encouraging that they acknowledge the role of communities in combating crime. The term 'communities' refers to churches, private organizations, neighbours and formal groups. In order to break the cycle of recidivism, the assistance and cooperation of communities is required. Although a somewhat smaller proportion (38.47%) of the respondents view punishment and imprisonment as ways of protecting society, these cannot be regarded as the only way to protect society. Offenders come from communities that ought to give them a chance to change and make right the wrong done by their criminal behaviour. It is those communities that take responsibility for their members who benefit from their efforts. Ashley Shearar (2005) has found in her research on the feasibility of restorative justice for South Africa, that there is a real need for restoration in our communities. These

are supported by the fact that even violent crimes are committed by those closest to one another.

#### 5.4.3.2 Views of prosecutors

<b>Table 8:</b>	Total	%
The high re-offending and crime rates are proof that the current justice process is not effective in protecting society against crime.	9	56.25
The current justice process serves its purpose by punishing and removing the offender from the community.	7	43.75
Total	16	100%

It is evident from the prosecutors' responses that the current criminal process fails in protecting society against crime. The views by magistrates are generally in line with those of prosecutors and probation officers, namely, that communities are protected when the accused is punished and removed from society. In other words, the offender is shut out, and must return to his family after a certain period of time. The community should feel satisfied and protected by the justice system that it protects them too. However, it is my view, that punishment should rather be positive and benefit all involved; whilst overcoming loss and repairing the damage. Our current justice system does not hold the offender accountable for his/her criminal behaviour, which leads to poor rehabilitation and a high re-offending rate, as indicated in the literature study.

As is evident from the high rate of recidivism, the offender is likely to return to the community after serving a sentence, but without taking responsibility for his behaviour, and often without remorse. The retributive justice system does not offer any positive contribution to the wellbeing of communities. In fact, imprisonment breaks down family ties and impacts negatively on the social functioning of a person, as the focus is not on rehabilitation but on punishment. Those leaving prison have more chances than before of going back to it, and of thus being a continued threat to the community.

### 5.4.3.3 Views of probation officers

<b>Table 9:</b>	<b>Total</b>	<b>%</b>
1. There is no security or protection, as society has no trust in the system.	5	45.45
2. The high crime rate is proof that societies are not protected by the current criminal justice system.	4	36.36
3. Societies are only protected when offenders are removed from society.	2	18.19
<b>Total</b>	<b>11</b>	<b>100%</b>

The above data indicates that over a third (36.36%) of the probation officers regard our current justice system as failing in protecting society. There seems to be a feeling by almost half of them (45.45%) that societies have no trust in the current criminal justice system and that people will only feel safe and protected when the offender receives a sentence and has been incarcerated or removed from society. Ironically, the focus of this professional group is – or should be – on caring for and rehabilitating offenders. In Chapter Three, the reader was alerted to the fact that imprisonment causes delinquency and disempowers family lives. I have argued throughout that removing the offender from the community will not protect the community, nor will it solve the problem. The offender is part of a family structure and should be given a chance to improve his life and in the process contribute to a safer environment.

### 5.4.3.4 Discussion

In response to the question whether the criminal justice system is effective in protecting society, a significant proportion of respondents indicated that punishment and imprisonment can be regarded as effective forms of protection. Their views coincide with those of Consedine and Bowen (1994), that, when looking at the high crime rate and prison population, we value toughness and punishment as more important than rehabilitation. Judicial officers thus support a system that is seemingly a complete failure in social and economical terms – and also with regard to the protection of societies. Conversely, respondents have little choice but to implement the forms of punishment that are available to them, irrespective of their own views that the

system is failing in its objectives to deter offenders and to protect societies. This appears to be partially true when considering the responses of probation officers.

The so-called 'light in the darkness' are the responses from a small number of magistrates, recognising that poor family and community involvement and a lack of preventative measures are contributing to the failure of the criminal justice system in protecting societies. This concurs with the views of the prosecutors (see Table 2) who suggest that role players are ignorant about their responsibilities with regard to crime prevention. These can be attributed to the fact that some respondents acknowledge that a different approach, in the form of restorative justice, is needed to address the imbalance of responsibilities. As indicated in the literature review, this could this be linked to the primary objectives of restorative justice, which emphasize the engagement of all stakeholders in the justice process.

#### **5.4.4 The Effectiveness of the Current Criminal System in Rehabilitating Offender**

##### **5.4.4.1 Views of magistrates**

<b>Table 10:</b>	<b>Total</b>	<b>%</b>
The current justice process does not succeed in the rehabilitation of offenders due to limited resources, poor social structures and a lack of co-operation from individuals.	8	61.53
The current justice process is partially effective, as individuals are able to learn from their mistakes and sentences	5	38.46
<b>Total</b>	<b>13</b>	<b>100%</b>

The table reflects an overall view by almost two-thirds (61.53%) of the magistrates that the current system fails to rehabilitate offenders. Contributing factors seem to be limited resources, poor social structures and a lack of cooperation from offenders. These correlate with some of the views from prosecutors, who have first hand experience in this matter due to their daily

encounters with offenders. The remaining magistrates (38.46%) acknowledge that there are individuals who learn from their mistakes (and other who do not) which correlates with the responses by prosecutors that rehabilitation is possible with intensive intervention and individual cooperation and willingness.

It is evident from the findings that most of the respondents feel that the current justice process is not effective in the rehabilitation of offenders, mainly due to limited resources and a punitive system. As stated in the literature review, imprisonment was originally introduced as a means of reform. However, writers like Foucault have criticised the prison system since its inception in 1820. He has stated that "imprisonment causes delinquencies, gangsterism, family destruction and recidivism – those leaving prison have more chances than before of coming back to it" (Foucault, 1979: 265). Imprisonment has no rehabilitative value, as the focus is basically not on the needs of the person but on the appropriate punishment for a specific crime. This is also reflected in the responses by prosecutors (37.5%) and probation officers (45.46%), which can be linked to the fact that these two groups are working more closely with offenders as persons than magistrates.

It is interesting that as many as 50% of the prosecutors (50%), 27.27% of the probation officers and 38.46% of the magistrates view the current system as only partially effective in rehabilitating offenders. This suggests that the imbalance, which stems from an emphasis on punishment, can be restored: With the focus on the offender as a person, and cooperation of the offender, rehabilitation is possible. This represents a shift in mindset from a punitive to a more rehabilitative approach, which includes holding the offender responsible for his criminal behaviour. Respondents acknowledge that adequate resources and the involvement of both offenders and communities are essential for rehabilitation, and that individual willingness and cooperation are essential in any form of intervention.

#### 5.4.4.2 Views of prosecutors

<b>Table 11:</b>	Total	%
To a certain extent, with intensive intervention and the co-operation of offenders, the system is effective.	8	50.0
The criminal justice process is not effective in the rehabilitation of offenders due to a lack of resources and a punitive system.	4	25.0
The criminal justice process is not effective in the rehabilitation of offenders due to a punitive system.	2	12.5
Rehabilitation fails due to a lack of support from family structures and a community that is not educated.	2	12.5
Total	16	100%

It can be deduced from these findings that prosecutors have mixed feelings with regard to the effectiveness of the current justice system in the rehabilitation of offenders. While 37.5% of the respondents regard it as ineffective due to a lack of resources, family and community support and a punitive system, there are others who indicate the opposite. There seem to be some possibilities with intensive intervention and with the cooperation of the offender that our current justice system can be more effective in rehabilitating offenders, as long as the interventions include family structures, victims and the broader community. It has been found that poor family structures and poor support are the main factors that cause recidivism. Restorative justice makes provision for involving parents and communities in the rehabilitation of the offender.

#### 5.4.4.3 Views of probation officers

<b>Table 12:</b>	Total	%
Imprisonment has no rehabilitation value.	5	45.46
The high recidivism rate is proof that the current system has no rehabilitation value.	3	27.27
Partially effective with the cooperation of individual offenders.	3	27.27
Total	11	100%

The above table reflects the view that almost half (45.46%) of the probation officers do not regard imprisonment as a means of rehabilitation, which, in their view, is evident in the high crime rate. This appears to contradict their responses in Table 6, where it seems that probation officers regard the sentencing of offenders as too lenient. This is strange when considering that this is a profession born out of caring for those in conflict with the law and a profession that focuses on changing criminal behaviour. However, a small percentage feels that rehabilitation is indeed possible with the cooperation of individuals. However, the overcrowded prison conditions and paucity of resources existing in South African prisons do not create an environment where young people can learn responsibility and be rehabilitated. According to the Probation Services Amendment Act (No 35 of 2002), the role of the probation officer is to assess a child so that incarceration can be avoided wherever possible. Young offenders should not be held in prisons, but this should only be a last resource, as reflected in the literature review.

#### **5.4.4.4 Discussion**

Based on the responses recorded above, it is evident that most of the respondents regard our current criminal justice process as ineffective in preventing crime, deterring offenders, protecting societies and rehabilitating offenders. Respondents spoke about the high crime and recidivism rates, which is proof of a system that has failed to achieve its objectives.

The essence of the findings is that retributive punishment, especially imprisonment, cannot be regarded as an effective measure to prevent crime or to protect communities. The respondents' views are clear that our current justice system is too punitive, which has a negative impact on rehabilitation. Furthermore, it fails to involve the community in the justice process. Other important findings are the views that a lack of resources, poor commitment from role players and ignorant communities contribute to an ineffective justice system. When considering the vital role that probation officers play in preventing crime and promoting restorative justice, the remarks of some that sentences are too lenient, is of particular concern. However, it should be noted that these are not generalised opinions but the responses of certain

participants. Nevertheless, it highlights the need for further training of probation officers on the matter of restorative justice.

In conclusion, these findings show that, with the application of a more humane and inclusive approach, such as restorative justice, rehabilitation is possible.

## 5.5 THE ROLE OF THE VICTIM IN THE CRIMINAL JUSTICE PROCESS

Van Ness (1997: 39) expresses the view that there are four parties affected by crime: the victim, the offender, the community and the government. He explains that the emphasis of restorative justice theory is on the fact that every crime involves specific victims and offenders and thus the goal of the criminal justice process is to help them come to a resolution. Our current justice system, however, views the government and the offender as the sole affected parties and focuses on upholding the authority of the state. Consedine (1999: 18) indicates that this leaves both the victim and the offender powerless: victims are shut out from the justice process from the outset, and offenders are not given an opportunity to take responsibility for their behaviour and actions.

### 5.5.1 Views of magistrates

<b>Table 13:</b>	Total	%
Victims should only give evidence.	4	26.67
Victims should be part of the criminal justice process and be allowed to share opinions with regard to the appropriateness of the sentence, parole and release proceedings.	7	46.66
Victims should be allowed to follow the procedures but not form part of the negotiating of sentencing options.	4	26.67
<b>Total</b>	<b>15</b>	<b>100%</b>

Despite the fact that almost half of the respondents are in favour of victims being allowed to play a more active role in solving matters, it is still a concern to note that the rest of the magistrates restrict the victims to only giving

evidence (26.67%) or following procedures (26.67%). This agrees with Consedine's comment, that government has the final authority. Thus, magistrates have the final say when passing sentences. These may be contributing factors as why magistrates hold different views on the role of the victim in the restorative justice approach. Involving the victim in the sentencing process may cause uncertainties amongst magistrates, who are use to control the courtroom and the passing of sentences – a situation that requires adaptation and a change of mindset and attitude. The data reflected clearly that magistrates are careful not to allow the victim to have too much power, instead restricting them to being a witness and sharing certain opinions. This poses a challenge to this professional group.

### 5.5.2. Views of prosecutors

<b>Table 14:</b>	<b>Total</b>	<b>%</b>
Victims should be prepared and educated on the justice process in order to play a more active role.	7	35.0
Victims should play a more active role by giving input on the offence and sentencing.	3	15.0
Victims should not be involved at this stage, as they do not have the necessary information and resources.	10	50.0
<b>Total</b>	<b>20</b>	<b>100%</b>

\* Please note that among the 16 respondents, 20 suggestions were given on the role of the victim other than giving evidence.

The Table above indicates that a small percentage of the prosecutors (15.9%) interviewed are in favour of victims playing a more active role in the justice process. Another 35% feel that victims need to be prepared and educated in order to become more involved. Fifty percent argue that victims lack the knowledge and resources to be involved in the justice process. This indicates that, as far as prosecutors are concerned, victims are not given the opportunity at this stage to be part of the justice process. It is clear that prosecutors experience mixed feelings and appeared to blame the non-involvement of

victims at this stage on the lack of adequate resources. The Criminal Procedure Act (No 51 of 1977) makes provision for the compensation of victims. This alone provides opportunities for the victim to be part of the justice system and should be utilized more often by prosecutors.

### 5.5.3 Views of probation officers

<b>Table 15:</b>	Total	%
Victims should play a direct role with regard to compensation, sentencing and problem solving.	6	54.54
A report should be compiled on the impact of the crime on the victim to determine an appropriate sentence.	3	27.28
Victims must give evidence and be updated on the progress of the proceedings.	2	18.18
Total	11	100%

These findings indicate that probation officers acknowledge the need for the victim to be involved in the criminal justice process. In fact, a remarkable suggestion, although it has only come from a relatively small percentage (27.28%), is to compile a report on the circumstances of the victim. This will also force the inclusion of the victim and address the need of the victim to air his feelings and communicate losses incurred. Currently, a report is only compiled on the offender, and this generally does not benefit the victim at all. Unfortunately, a small number of probation officers (18.18%) do hold the view that the role of the victim should be limited to providing evidence.

### 5.5.4 Discussion

The findings indicate that a significant total of the respondents – probation officers (54.54%), prosecutors (35%), and magistrates (46.66%) – regard the involvement of the victim in the criminal justice system, and even in parole proceedings, as fundamental to changing our current justice process. The suggestion by a significant number of respondents that the victim should be included in the criminal justice process is a positive sign, as it shows that respondents have realized that our current system has failed to involve the

victims. In fact, both victim and offender are currently powerless, as indicated in the literature review. A total of 50% of the prosecutors feel that victims can play a more active role in the justice process, but that they need to be educated and prepared for court proceedings in order to negotiate informed sentence options. This is vital for the mediation process to be successful for both victim and offender, and to implement restorative justice. The suggestion from a small number of probation officers that a report should also be compiled on the victim is a positive move towards acknowledging the rights of victims and thus including them.

While most of the respondents are in favour of introducing and using victims in the justice process, prosecutors also admit that they lack knowledge and resources on how to implement this. These are important observations, as prosecutors and probation officers are seen as the best people to drive the process of involving and preparing the victim for the justice process. It is, therefore, essential to ensure that all role players are skilled and educated on the concept of restorative justice, and that our justice system has the necessary resources to apply that approach. Role players in the judicial field should be encouraged to utilize existing resources, such as legislation and victim empowering groups. The South African Law Commission (1997: 6-7) emphasises this, when it states that the victim and the offender should have central positions in the criminal justice system, and that the criminal justice system should facilitate offender responsibility thereby ensuring victim participation. There should be proper ethical guidelines and protocols in place to ensure that victims can participate in the justice system. Judicial officials should be held accountable for ensuring that existing resources are utilized and that victims are part of the criminal proceedings. The contradictory responses from the magistrates mentioned above, may be a result of uncertainties with regard to the theory and application of restorative justice.

## 5.6 THE RESPONDENTS' UNDERSTANDING OF THE NATURE OF RESTORATIVE JUSTICE

Van Ness provides a helpful description (concept) of restorative justice. He argues that restorative justice is a way of administering justice so that healing can take place. This includes the important elements of:

*"Calling to account for one's actions, reparations and dealing with what went wrong, dealing with the feelings and issues around it, dealing with the harm of the crime, but also with the harm of the criminal justice process". (1999: 31-35)*

In light of this description of restorative justice as well as of the principles noted by other sources in the literature, the focus should be on the harm inflicted rather than the laws broken. Involving and acknowledging the feelings of both the victim and the offender is essential in this process in order to reach an agreement that is suitable and acceptable for all parties.

### 5.6.1 Views of magistrates

<b>Table 16:</b>	Total	%
To restore justice and repair the damage that was done by crime in a way that suits both the victim and the offender. (To restore the harm done by putting the victim in a similar position as before the crime took place.)	10	76.92
To give the accused an opportunity to take responsibility for his/her crime by admitting his/her wrongdoing and repaying the community.	2	15.38
To allow courts to become more accessible for communities.	1	7.69
<b>Total</b>	<b>13</b>	<b>100</b>

It is evident from Table 16 that the large majority of magistrates (76.92%) understand restorative justice as a process that aims to restore justice and repair the damage that was done by crime in a way that suits both the victim and the offender. This is significant as it paves the way for proper implementation. In order to apply restorative justice, it is important that role

players, such as magistrates, prosecutors and probation officers, who are responsible for youth justice, have a good understanding of restorative justice. A small percentage of the magistrates (15.38%) views restorative justice as a way to give the accused an opportunity to take responsibility for his/her crime by admitting his wrongdoings. The focus is on the offender taking responsibility and becoming accountable for his wrongdoings in order to restore justice.

### 5.6.2 Views of prosecutors

<b>Table 17:</b>	<b>Total</b>	<b>%</b>
It involves restoration for the harm caused by the accused and the crime, and involvement of both the victim and offender in problem solving.	10	62.5
It provides an opportunity to satisfy the complainant.	1	6.25
It provides an opportunity for the offender to understand his/her punishment as well as rehabilitation options.	4	25.0
No comments, not trained as yet.	1	6.25
<b>Total</b>	<b>16</b>	<b>100%</b>

Table 17 above indicates that the majority of prosecutors (62.5%) have a good understanding of what restorative justice entails, namely the involvement of the role players in problem solving and making amends for the harm done by the accused. A smaller percentage (25%) indicated that the offender would be able to understand why he or she is being punished. This can be linked to the previous 62.5% who felt that offenders should be held accountable by taking responsibility for their behaviour. One respondent (6.25%) regarded restorative justice as an opportunity to satisfy the victim, while another (6.25%) did not respond.

### 5.6.3 Views of probation officers

<b>Table 18:</b>	<b>Total</b>	<b>%</b>
The focus of restorative justice is on the accused making amends for his wrongdoing by taking responsibility for his actions.	5	45.45
Restorative justice is an approach that creates the opportunity for both the victim and the offender to find solutions that will satisfy both parties.	6	54.55
<b>Total</b>	<b>11</b>	<b>100%</b>

It can be deduced from the findings that probation officers, coming from a profession that is more rehabilitation orientated than those of magistrates and prosecutors, have a good understanding of restorative justice. More than half (54.55%) agree that the approach creates an opportunity for both victim and offender to find solutions. The remainder (45.45%) shared similar views with some of the magistrates, who regard restorative justice as a way to give the accused a chance to make amends for his/her wrongdoing by teaching him to see the importance of taking responsibility and reaching a solution, and realising that these are fundamental elements of restorative justice.

### 5.6.4 Discussion

Most of the respondents have a good understanding of the main elements of restorative justice. About one third (31.3%) of the prosecutors, 76% of the magistrates and 54.5% of the probation officers agree that restorative justice involves repairing the harm done by the offence to the satisfaction of both parties involved. A significant number of probation officers (45.5%), magistrates (12.5 %) and prosecutors (25%) also indicate that offenders should be encouraged to take responsibility for their actions and even repay the victim and/or the community. Based on the responses recorded in this study, it is evident that respondents generally have a good understanding of restorative justice and are positive about the inclusion of both the victim and the offender in the problem solving process, as long as all parties have the necessary resources and training. This can be regarded as a positive step

towards applying this approach to the current justice system. A knowledgeable and informed workforce is necessary to address negative thoughts and replace punitive approaches, to bring about transformation within the justice system.

## 5.7 MAIN OBJECTIVES OF RESTORATIVE JUSTICE

It has been emphasised that our current criminal justice system is retributive in nature. It sees crime as a violation of the state, and aims to establish guilt and to meet out punishment. According to Consedine and Bowen restorative justice sees crime as a violation of people in relationships. It creates an obligation to make things right. It involves the victim, the offender and the community in a search for solutions that promote reparation, reconciliation and reassurance (1997: 13).

The respondents in the present study were asked what they regarded as the main objectives of restorative justice.

### 5.7.1 Views of magistrates

<b>Table 19:</b>	<b>Total</b>	<b>%</b>
To satisfy the victim by acknowledging the victim's rights and acknowledging the harm done by compensating the victim for any losses.	7	53.8
To involve both the victim and the offender in possible solutions towards reconciliation.	4	30.8
To educate all role players on the consequences of crime.	2	15.4
<b>Total</b>	<b>13</b>	<b>100%</b>

More than half (53.8%) of the magistrates agree that victims need acknowledgement in the criminal justice process and that they should be compensated as a means of making restitution for the harm done by the offender. This can be seen as a significant step towards recognising victims in the criminal justice system. Karmen (1990: 18) stated that victims have often been characterized as the "forgotten people within the criminal justice process, virtually invisible". The view held by magistrates can therefore be regarded as

a step towards transformation by finally recognizing the needs of victims. Almost one third (30.8%) of the magistrates view the reconciliation process, which includes both the victim and offender, as one of the main objectives of restorative justice. However, as is evident from Table 13, there is still a long way to go for transformation in respect of the application of restorative justice. This is evident from the view of 15.4% of the magistrates who indicate that education of all role players is fundamentally important for the application of restorative justice.

### 5.7.2 Views of Prosecutors

<b>Table 20:</b>	Total	%
To address the harm cause by crime, and restore balance and peace as a result of crime.	6	30.0
To give the accused a second chance by taking responsibility for the crime and thereby avoiding a criminal record.	6	30.0
To involve the victim in the justice system, in order to protect the victim's rights and ensure participation.	3	15.0
Don't know much about restorative justice, but are more confident and knowledgeable on diversion.	2	10.0
To reconcile parties, with the community taking responsibility for crime.	2	10.0
Not trained yet, therefore no comment.	1	5.0
Total	20	100%

Table 20 above illustrates that 30% of the respondents view accountability for wrongdoings, which would lead to the offender taking responsibility for his crimes and acknowledging the harm done, as one of the main objectives of restorative justice. The data further reveal uncertainties amongst prosecutors (10%) who admit that they are only familiar with diversion, although it seems that prosecutors are also not sure about the meaning of diversion. They do not realize that restorative justice is not always part of the diversion process, especially where victims are not involved.

A primary component of restorative justice is for the young offender to accept responsibility for his actions, but the community also needs to take responsibility for the crime, as indicated by two (10%) of the respondents. According to the Child Justice Bill, in order for a child offender to be diverted, he/she must "voluntarily acknowledge responsibility for the offence" (S44 (a) Bill 49 [2002]). By this one could argue that every child exposed to diversion has indeed accepted responsibility. This is strengthened by the views of another 30% that restorative justice will ultimately restore peace through the acknowledgment of the harm inflicted by the crime.

### 5.7.3 Views of probation officers

<b>Table 21:</b>	<b>Total</b>	<b>%</b>
It creates an opportunity to make things right by involving the victim, offender and community in the search for solutions by promoting forgiveness, reconciliation and rehabilitation opportunities.	9	81.8
To restore the imbalance caused by the crime and to strengthen relationships in the community.	2	18.2
<b>Total</b>	<b>11</b>	<b>100%</b>

Table 21 shows that the majority of probation officers (81.8%) say that the main objectives of restorative justice are to create opportunities to make things right by involving victim, offender and community in searching for solutions and by promoting forgiveness, reconciliation and rehabilitation opportunities. The respondents reflected the basic pillars of restorative justice, as discussed earlier in the literature review, which includes the view of 18.2% that relationships will be strengthened and restored.

### 5.7.4 Discussion

It is important to note that the majority of the respondents have a clear understanding of what the main objectives of restorative justice are. This can be the result of their day-to-day encounters with diversion, which seems to be used more frequently in courts nowadays, if one considers the views of the

prosecutors who are regarded as the primary decision makers in the diversion process. It is also encouraging to see that respondents view the main objectives of restorative justice as being to involve all parties (victim, offender and community) in the problem solving process and to hold the offender accountable for his actions. It is also encouraging to note that the magistrates recognise the victim's rights. This view is a positive step towards the possibility of reducing the exclusive decision making powers of the judiciary. The next question that needs to be answered is whether respondents are in fact seizing opportunities to implement restorative justice or whether they are opting to go for the traditional way of doing things. This issue needs to be explored further in future research.

## **5.8 APPLICATION OF THE PRINCIPLES OF RESTORATIVE JUSTICE**

It has been emphasised in the literature review that the aims of the restorative justice process are offender accountability, victim recognition and healing. Restorative justice has become an increasingly popular alternative to the traditional Western application of retributive criminal justice. The literature review further reveals the view, held by Zehr, as quoted by Consedine and Bowen (1999) that one of the fundamental needs of justice is to hold the offender accountable in a meaningful way. The underlying principles of restorative justice enforce a sense of being shown unconditional acceptance and compassion and having one's human dignity restored.

The different role players were asked to indicate to what extent they actually consider the principles of restorative justice in the sentencing of youth offenders.

### 5.8.1 Views of magistrates

<b>Table 22:</b>	<b>Total</b>	<b>%</b>
Rely heavily on the report of the probation officer for background information on the circumstances of the offender.	2	15.4
Strongly considers the principles of restorative justice such as accountability, remorse, insight into the crime and attitude of the offender.	7	53.8
To a certain extent, taking into account previous conviction of the offender.	4	30.7
<b>Total</b>	<b>13</b>	<b>100%</b>

It is interesting that just over half (53.8%) of the magistrates indicated that they consider the principles of restorative justice when sentencing youth offenders. This can be regarded as a positive sign, as magistrates have the final say when it comes to sentencing an offender. The question remains, though, whether these principles are applied in practice, considering the statistics on youth that do receive a prison sentence. While two (15.4%) of the magistrates indicate that they rely on the background report about the offender submitted by the probation officer, four (30.7%) indicate that the previous criminal record of the offender is still a determining factor when sentencing a youth offender. This can be understood in the light of the fact that restorative justice is still a fairly new concept for many in the judicial sector.

### 5.8.2 Views of prosecutors

<b>Table 23:</b>	<b>Total</b>	<b>%</b>
Relying on the probation officer's report for background information on the offender.	7	38.8
Serious consideration given to principles like accountability and cooperation, and the attitude of the offender towards his offence.	4	22.2
Circumstances around the crime considered in influencing their decision.	2	11.1
Consideration of family involvement as a principle.	3	16.6
Restorative justice principles not regarded as very important when sentencing juveniles	2	11.1
<b>Total</b>	<b>18</b>	<b>100%</b>

A significant percentage (38.8%) of the prosecutors indicates that they rely heavily on the background report submitted by the probation officers to guide them when recommending sentences for youth offenders. From this one can deduce that the input of probation officers has become more vital and that it adds value to the criminal justice process where youth offenders are concerned. The fact that 22.2% of the respondents strongly consider principles like accountability is a positive step towards offenders being made more responsible for their behaviour. The three prosecutors (16.7%) that consider family involvement as a principle in sentencing can be linked with the response on accountability. Family involvement plays an important role in the rehabilitation of the offender. One can deduce that prosecutors are in favour of Consedine's principles of restorative justice when sentencing youth offenders. The small number of respondents (11.1%) that indicate that they do not regard these principles as important, as they cannot expect parents to pay for their child's crime, may be a result of poor knowledge or uncertainty about the concept.

### 5.8.3 Views of probation officers

<b>Table 24:</b>	Total	%
Consider principles like remorse, accountability, insight and willingness to compensate.	6	54.5
Circumstances around the crime and the offender's attitude towards the offence are an important consideration.	4	36.3
Currently busy with training.	1	9.1
<b>Total</b>	<b>11</b>	<b>100%</b>

Considering the views of the judicial role players, namely magistrates and prosecutors, it is understandable that most of the probation officers (54.5%) strongly consider the principles of restorative justice. A smaller percentage (36.4%) indicated that it is important not to look only at the current circumstances of the offender when compiling the report, but also at the person's attitude and understanding of their wrongdoing.

### 5.8.4 Discussion

It is evident from the data that most of the respondents from the different professional groups in the courts consider the principles of restorative justice during the sentencing process of youth offenders. They also appear to have a good knowledge base and understanding of the underlying principles. The majority of the respondents indicate that they predominantly consider accountability by the offender, as well as remorse, cooperation towards compensation and the insight of the offender in his/her wrongdoings, as considerations in sentencing. This corresponds with what Zehr (1999) and other sources indicate, as reflected in the literature review. The literature review reflects the increasingly prominent role of probation practice that has started to establish itself as a specialised field within the social services profession. The responses of magistrates and prosecutors give a clear indication that the justice system will not be able to function optimally without the contributions made by probation officers in the sentencing of child offenders. Whether the recommendations made by probation officers are considered by magistrates and prosecutors is a question that needs further

research though. Magistrates and prosecutors do, after all, have the final say in sentencing to overrule recommendations, which may hamper any positive input that was done by probation officers with regard to the rehabilitation of an offender.

## **5.9 THE BENEFITS OF RESTORATIVE JUSTICE**

The respondents had to indicate what benefits, if any, restorative justice holds for the principal parties that are affected by crime, namely the victim, the offender and the community (Van Ness, 1997: 37), because the goal of the criminal justice process is to enable them to come to a resolution together. The literature review (see Chapter Two) mentions several reconciliation programmes and initiatives working with restorative justice in New Zealand (see Consedine, 1999). The aims of such programmes are to bring together the victim, the offender, their families and relevant key members of the community. Van Ness and Strong (1997) indicate that the research findings are positive with regard to the use of the restorative justice approach. By investigating the respondents' views, the researcher will be able to determine their understanding of the benefits that restorative justice holds for the parties involved, as well as their attitude towards applying the concept in practice.

The following tables illustrate the views of the different professional groups regarding the benefits that restorative justice holds for victims, offenders and communities.

## 5.9.1 The Benefits of Restorative Justice for the Victim

### 5.9.1.1 Views of magistrates

<b>Table 25:</b>	<b>Total</b>	<b>%</b>
The victim will feel more satisfied with the criminal justice system because of their involvement.	6	46.14
The victim will be able to get compensation for his/her loss.	4	30.79
By involving the victim in the justice process, human dignity will be restored, and the offender will realise the harm he has caused.	3	23.07
<b>Total</b>	<b>13</b>	<b>100%</b>

It can be seen from the above Table 25 that magistrates have a good understanding of the benefits that restorative justice holds for the victim, as described by Consedine (1999: 18, 86). By involving the victim in the justice process, he is empowered to deal with his/her feelings and to be part of a solution. The question about compensation needs to be explored in order to determine how frequently this option is being utilized, as there is legislation in place e.g. a compensation order (Criminal Procedures Act), as indicated in the literature review. Magistrates are in a position to rule in favour of the victim, and should not primarily focus on the punishment of the offender, but also look at means to recover the losses that were suffered by the victim.

### 5.9.1.2 Views of prosecutors

<b>Table 26</b>	<b>Total</b>	<b>%</b>
Direct involvement of the victim provides an opportunity to express the harm done by the offender.	8	50.0
The victim will be able to experience closure in a protected environment, as they will be part of the criminal justice system.	3	18.75
Currently no benefits, as victims are not fully involved, besides testifying.	5	31.25
<b>Total</b>	<b>16</b>	<b>100%</b>

The fact that half of the respondents admit that direct involvement of the victim provides an opportunity for them to address the harm done by the offender, should be evaluated against the response of a third (31.25%) that admit that nothing is done for the victims. As much as prosecutors see the value of such process for the victim, it is sad to note that nothing is happening to improve the situation of victims. When probed and asked exactly what they did, the responses correlated with those in Table 12, i.e. that they do not involve victims at this stage, as they are not equipped to handle the situation. Although prosecutors have a theoretical understanding of restorative justice, they do not apply it at this stage, despite the fact that 18.75% admit that victims will be able to experience closure. One can infer from this data that, despite their knowledge base, prosecutors are either not equipped or unwilling to handle victims, as there are other resources (victim empowering organizations) to assist with training or intervention.

#### 5.9.1.3 Views of probation officers

<b>Table 27:</b>	<b>Total</b>	<b>%</b>
The victim will be able to get an understanding of the accused, satisfaction that justice has been achieved, and compensation for any losses.	6	54.54
The victim will have the opportunity to express the pain caused by the impact of the crime.	3	27.28
There are currently no benefits, as victims are not fully involved apart from testifying.	1	9.09
Busy with training in restorative justice.	1	9.09
<b>Total</b>	<b>11</b>	<b>100%</b>

There is an overall feeling amongst probation officers that a restorative justice approach will benefit the victim. They feel that the process will enable the victim to express their pain and feelings as a result of the crime, and that he will be able to receive compensation for any losses. Although a very small percentage indicates that victims are not involved in the process, it is a matter of concern when one compares this with the views of prosecutors, who agree

that nothing is done for the victim. One can infer from these comments that little is happening in practice to acknowledge the needs of the victim. There is also no attempt to involve the victim or the community, as had been recommended in the literature review. The focus is still primarily on the offender. The data further indicated that probation officers do not involve community resources to assist with victims. Probation officers are responsible for creative thinking to ensure that rehabilitation or intervention is available for both victim and offender. There is a wide range of resources, such as victim-empowered groups, waiting to be tapped as service providers in these situations.

### 5.9.2. The Benefits of Restorative Justice for the Offender

The following tables reflect the views of the different professional groups concerning the benefits that restorative justice holds for the offender.

#### 5.9.2.1 Views of magistrates

<b>Table 28:</b>	<b>Total</b>	<b>%</b>
The offender has the opportunity to understand his wrongdoings and to take responsibility for his/her criminal behaviour.	8	61.53
Offenders receive a second chance to avoid a criminal record.	3	23.07
No benefits, as offenders do not realise the impact of their crime, especially with postponed sentences.	2	15.40
<b>Total</b>	<b>13</b>	<b>100%</b>

The responses in Table 28 above suggest that more than half of the respondents see the benefits of a restorative justice approach for the offender as an opportunity for changing his/her behaviour and taking responsibility for the harm they caused as a result of their crimes. It is evident that magistrates seem to have a good understanding of the benefits of restorative justice for the offender. These viewpoints echo the literature reviewed on offender

accountability, which states that the child should be encouraged to take responsibility for his behaviour, as pointed out in the Child Justice Bill.

#### 5.9.2.2 Views of prosecutors

<b>Table 29:</b>	Total	%
Restorative justice is one of the best processes for highlighting the effect of crime upon the victim and the community.	4	25.0
The offender takes responsibility for his/her criminal behaviour.	7	43.75
Youth offenders avoid getting a criminal record or prison sentence by being diverted.	3	18.75
No benefits, as offenders do not realise the impact of their crime, especially with postponed sentencing.	2	12.5
<b>Total</b>	<b>16</b>	<b>100%</b>

It can be deduced from the above findings that, despite the different points of view, respondents do have a good understanding of what restorative justice could mean for the offender. Respondents identified offender accountability as one of the most important benefits. This involves a process whereby the offender takes responsibility for the crime, and also becomes aware of the consequences of the crime for the victim and the community at large. The study also reveals that a small percentage (12.5%) feel that offenders with postponed sentences will not realise the impact of their crime. This can be seen as a sign of uncertainty amongst prosecutors who should be informed on the type of sentences that will enforce and promote restorative justice. It is therefore required of prosecutors to be more creative in the recommendation of sentences. Postponed sentences can be coupled with conditions like community service to ensure that offenders are held accountable.

### 5.9.2.3 Views of probation officers

<b>Table 30:</b>	Total	%
The offender takes responsibility for the crime and is empowered to improve his behaviour and ask for forgiveness.	6	60.00
The offender gets a second chance to avoid a criminal record with diversion as an option.	2	20.00
The process illustrates the effects of crime on the victim and the community and places the responsibility on the offender.	1	10.00
No comments — in training at present.	1	10.00
Total	10	100%

The above-mentioned findings of the probation officers' views on the benefits of restorative justice for the offender correlate with the literature review. The findings reveal that probation officers have a good level of understanding and knowledge of the benefits of restorative justice for offenders. This links with the principles of restorative justice, as indicated in Table 24 and indicates that magistrates, prosecutors and probation officers will be able to apply restorative justice when sentencing offenders. What is required, though, is a motivated, innovative workforce that will look beyond obstacles and make use of available resources. Probation officers are responsible for compiling a report on the circumstances of the offender and for making recommendations that will address the needs of the offender to bring about change. It is the responsibility of probation officers to know the resources in the community and to link them up with the needs of the client system.

### 5.9.3 The Benefits of Restorative Justice for the Community

The following tables summarise / present the views of different professional groups on the benefits of restorative justice for the community.

### 5.9.3.1 Views of magistrates

<b>Table 31:</b>	Total	%
The community will be part of the healing process and of resolving problems.	7	43.75
The community will be able to care for its own people, as everyone involved takes responsibility for the crime, the solution, and rehabilitation.	4	25.0
Restorative justice does not only resolve conflicts but also strengthens relationships amongst families and community members.	3	18.75
No benefits, as parents are apathetic towards their children and communities are not involved in the current justice process.	2	12.5
<b>Total</b>	<b>16</b>	<b>100%</b>

It is significant that almost half (43.75%) of the respondents indicated that communities will be part of the healing process, which linked with views of another four (25%), that communities will be able to care for their own people, as everyone involved would take responsibility. The theory of restorative justice clearly indicates that a restorative justice process returns certain responsibilities to the community, thus giving the community a sense of responsibility for their own members: victims, offenders and their families (Consedine and Bowen, 1999). The above-mentioned responses correlate with the literature reviewed, and indicate that magistrates have a good level of understanding of what restorative justice will mean for community involvement.

The responses of two magistrates (12.5%), however, reflect the view that communities will not benefit from an approach like restorative justice in cases where parents are apathetic towards their children. In her experience within the prison system, the researcher has observed that recidivism is largely the result of poor support structures which include families within the communities.

### 5.9.3.2 Views of prosecutors

<b>Table 32:</b>	<b>Total</b>	<b>%</b>
The community will be more involved in the rehabilitation of the offender and in the justice process.	2	12.5
The involvement of the community will result in restoring trust in the justice system.	6	37.5
The community will become more involved in crime prevention.	2	12.5
Conflicts will be resolved and the relationship between the victim, offender, friends and family strengthened.	4	25.0
No benefits, as the community is currently not involved in the justice process.	2	12.5
<b>Total</b>	<b>16</b>	<b>100%</b>

Overall, the above findings suggest that prosecutors agree that restorative justice will benefit the community. These viewpoints correlate with the theory on restorative justice as described by various authors (Zehr, 1990; Consedine, 1999). A small percentage (12.5%) felt that there would be no benefits from such an approach, because the community is currently not involved in the justice process. This can be regarded as proof that little is happening in the criminal justice system to ensure the inclusion of the community. It is a concern to observe that judicial officials seem to have tunnel vision, and that they do not open themselves up to creative thinking. Their only focus seems to be on punishing the accused and finalising a case. Communities have a social responsibility towards its members, and should therefore be part of the healing process.

### 5.9.3.3 Views of probation officers

<b>Table 33:</b>	<b>Total</b>	<b>%</b>
Restorative justice contributes to conflict resolution and the strengthening of relationships amongst families and community members.	3	27.27
Communities will be more involved in the rehabilitation of the accused and in the justice process.	7	63.63
No comments – busy with training.	1	9.10
<b>Total</b>	<b>11</b>	<b>100%</b>

The above-mentioned findings reflect a good understanding amongst probation officers of the benefits of restorative justice for the community. As indicated in the literature review, restorative justice seeks to involve the victim, the offender and the community in a search for solutions that promote repair, reconciliation and healing. This correlates with the responses of the different groups with regard to their understanding of restorative justice (Tables 16-18)

### 5.9.4 Discussion

It can be deduced from the findings that the majority of the respondents understand the benefits of restorative justice for the victim, the offender and the community. Direct experiences with the restorative justice applications were limited at the time of the study, resulting in prosecutors (31.25%) and probation officers (9.09%) admitting that victims are currently not involved, apart from giving evidence. Despite this, the fact that respondents could identify how a restorative justice approach could respond to the interest and concerns of the victim, suggests that prosecutors, magistrates and probation officers are likely to be receptive to the concept of restorative justice. The findings are similar to the viewpoints of some other authors (Van Ness, 1997; Consedine & Bowen, 1999), who maintain that restorative justice provides crime victims with support, restitution, opportunities for healing, and the ability to influence the outcome of their complaints. It is encouraging that the key role players in the administration of criminal justice have a positive attitude towards the application of restorative justice, considering how victims were treated in

the past: "forgotten people within the criminal justice process, virtually invisible" (Karmen, 1990: 18). It is not sufficient to simply have the understanding and knowledge of the process, though: Magistrates, prosecutors and probation officers, who are the advocates of this new approach, need to become proactive by using the opportunity to increase awareness of it and to apply it in the court process.

Similarly, it is also disappointing to note that probation officers and prosecutors in particular are not equipped to utilize existing resources despite their day-to-day interactions with crime victims. Victims should be involved in activities that are meaningful for their own development and deal with the losses incurred through crime. Zehr (1990) and others clearly indicate that a restorative justice approach provides the best opportunity for the offender to describe the crime and to recognise the impact of his/her behaviour on the victim and the community from his/her own perspective. More important are the benefits in negotiating settlements, as the offender takes responsibility for his wrongdoings and can ask for forgiveness.

The findings in this study provide an indication that respondents have a good level of understanding of how the restorative justice approach will benefit the offender. A significant remark made by a small percentage of prosecutors is the fact that offenders with postponed sentences do not realise the impact of their crime. This is a contradiction, as postponed sentences are seen as opportunities to enhance rehabilitation, particularly with the inclusion of conditions. The criminal justice system should play a more facilitating role with regard to offender responsibility.

As much as respondents seem to have a good understanding of how communities can benefit from restorative justice, the implementation of this concept will only become a reality when constructive efforts are put in place to involve and educate communities. It is evident that restorative justice theory is currently not being applied in practice, as we lack the capacity and resources to involve key players in meaningful ways, such as those described in the Child Justice Bill (No 49 of 2002). The Bill makes provision for diversion and outlines

the responsibilities of all role players, the family and the community. The Bill also creates new procedures to ensure the involvement of victim, offender and community in coming to a resolution and providing better opportunities for children. As stated previously, unfortunately the Child Justice Bill has not yet been promulgated, which is hampering role players in applying restorative justice effectively in their criminal justice practice.

## **5.10. CHALLENGES THAT RESTORATIVE JUSTICE HOLDS**

There are various challenges that must be faced when implementing restorative justice, for the purposes of this discussion they can be divided into the following three categories:

- a) Victim
- b) Offender
- c) Community

The respondents were asked to indicate their views on the challenges for the victims, offenders and community when implementing restorative justice. The findings are reflected in the following tables.

### **5.10.1 Challenges in respect of the victim**

Until recently, little attention was paid to victims of crime and violence in South Africa. The focus was primarily placed on the offender, with the victim viewed as a complainant or witness. The restorative justice process emphasizes offender accountability and provides victims with support, restitution opportunities for healing and the ability to influence the outcome of their complains.

### 5.10.1.1 Views of magistrates

<b>Table 34</b>	<b>Total</b>	<b>%</b>
No disadvantages if restorative justice is implemented with the necessary resources and control	7	53.84
There is no compensation for the victim due to poor social and economic factors, e.g. unemployment.	4	30.78
Too much power for the victim can result in the offender taking advantage of the situation, and negotiating sentencing options that suit him/her, especially where the victim is known and related to the offender.	2	15.38
<b>Total</b>	<b>13</b>	<b>100%</b>

More than half of the magistrates (53.84%) stated that a restorative justice approach has no disadvantages for the victim. However, respondents did indicate that the necessary resources and controls are imperative to ensure the effectiveness of this approach. This view is supported by about a third of the magistrates (30.78%), who agreed with probation officers and prosecutors that compensation may not be possible, bearing in mind the poor economic and social situation of most offenders. A concern was raised by 2 (15.38%) of the magistrates that the offender could take advantage of the victim, if he/she thought the victim had too much power with regard to sentencing options. This could happen in situations where the victim is related or known to the offender. In that case, the process could be abused because of the emotional attachment between people. The offender might be able to influence or manipulate the victim to negotiate a more suitable sentence. Situations like these are possible, but preventable, when considering that key role players have to facilitate the process and that the magistrate still has the final say in passing the sentence.

This process can only benefit victims who have been excluded and overlooked by our current justice system. To ensure the participation of victims in such a process, government needs to put in place a mechanism that will oversee the rights and needs of the victim.

### 5.10.1.2 Views of prosecutors

<b>Table 35</b>	<b>Total</b>	<b>%</b>
There is currently no support or programme available for victims.	5	31.25
Victims are not always willing to cooperate and want revenge.	3	18.75
Compensation is not always available.	1	6.25
There is no disadvantage if victims are part of the consultation process.	5	31.25
No response was given to this question, due to a lack of experience with victims in this regard.	2	12.5
<b>Total</b>	<b>16</b>	<b>100%</b>

Table 35 reflects the disparate views held by prosecutors. Almost a third (31.25%) felt that there was no support for the victim, while others were of the opinion that victims tended to be unwilling to participate and to want revenge (18.75%). This could be attributed to the fact that victims are not adequately involved in the process, as indicated in the above table, from which it emerged that prosecutors admit that they do not have the necessary information and resources to prepare the victim for the criminal procedures. This may have a direct link with the apathy experienced by victims, as there are no programmes or interventions available to prepare and motivate them to be part of restorative justice. Conversely, a further third (31.25%) of the prosecutors are of the opinion that a restorative justice process will only benefit the criminal justice system if the victim is involved in the consultation process. These views are in correlation with the literature review, which highlighted the importance of including all the parties involved. There can be no resolution or remorse without the participation of the parties that have been affected by the offence.

### 5.10.1.3 Views of probation officers

<b>Table 36</b>	<b>Total</b>	<b>%</b>
The criminal justice system takes too long to finalise cases, which results in victims being excluded and reliving the emotional trauma.	4	36.30
There is no compensation for victims.	2	18.10
Victims may have unrealistic expectations of the sentence passed on the offender, which may result in a desire for revenge.	2	18.10
No disadvantages result, if restorative justice is applied responsibly with the necessary resources.	2	18.10
No comments – in training	1	9.40
<b>Total</b>	<b>11</b>	<b>100%</b>

The findings reflect a concern by a third (36.30%) of the probation officers that the long court rolls and thus the long time frame for finalising cases, cause further trauma for the victim. Probation officers deal with both the victims and the offenders on a daily basis and have first hand experience in the delays of court cases. Only 2 (18.10%) feel that restorative justice has no disadvantages for the victim, although it seems that they are concerned that the system overlooks the rights of the victim. The criminal justice system needs to consider the emotional state of the victim and the trauma experienced as a result of the offence, in order to recognise the needs and rights of the victim. The findings reflect that a further 2 (18.10%) feel that support should be provided to victims, and that there is a lack of compensation for victims. This is evident from the fact that court rolls are overloaded, which causes the speedy finalisation of cases, without proper preparation or interventions on behalf of victims, as the focus is on punishing the offender.

The overall view from all three groups of respondents is that, although restorative justice would benefit victims, the system is still failing to involve them. The lack of proper compensation may be the result of the poor application of appropriate legislation. It can be concluded that, irrespective of

respondents' knowledge base, they furthermore lacked the resources to apply restorative justice in a way that would benefit victims. Victim empowerment programmes are one of the new developments to address the imbalance caused by improper intervention for the victim. It is felt, however, that the court should become more aware of creative ways to assist victims in obtaining compensation and to ensure fair treatment.

### 5.10.2 Challenges in Respect of the Offender

Most research on child offending shows that the majority of children who commit crimes emanate from highly disrupted and dysfunctional homes and communities (Consedine 1999, Skelton 2002). Whilst young people may need to be afforded a second chance to learn from their harmful behaviour, they should understand the impact from their harmful behaviour and take responsibility for their action in a constructive manner.

#### 5.10.2.1 Views of magistrates

<b>Table 37</b>	<b>Total</b>	<b>%</b>
There are no disadvantages for the offender if restorative justice is implemented with the necessary resources and control.	7	53.80
Offenders are not always in a position to repay or compensate the victim because they tend to be unemployed.	2	15.40
Restorative justice can be seen as a soft option by offenders, who could abuse the system to avoid a criminal record.	4	30.80
<b>Total</b>	<b>13</b>	<b>100%</b>

The majority of the magistrates interviewed (53.80%) are of the opinion that restorative justice has no disadvantages for the offender, if it is implemented with the necessary resources and control. If this is true, then, if restorative justice is properly implemented, it should be of no concern that youthful offenders could abuse the system, as indicated by four (30.80%) of the magistrates. The Child Justice Bill (49 of 2002) and the Criminal Procedure Act

(51 of 1977) make provision for implementation strategies, but they also provide legislation and powers to key role players for overseeing the process and effectively monitoring and implementing restorative justice.

As indicated previously, proper resources with regard to staff capacity and control will contribute to the effective application of restorative justice for offenders.

#### 5.10.2.2. Views of prosecutors

<b>Table 38</b>	<b>Total</b>	<b>%</b>
There are no disadvantages for offenders who comply with the requirements of diversion programmes.	5	31.25
Young offenders may abuse the restorative justice system in order to avoid a prison sentence or a criminal record.	7	43.75
There are limited options available for keeping offenders in the community, once they have been given a postponed sentence.	2	12.5
There are limited resources for the rehabilitation of offenders, due to a shortage of probation officers.	2	12.5
<b>Total</b>	<b>16</b>	<b>100%</b>

Although prosecutors are concerned that offenders may see restorative justice as a soft option, they also realize that this approach holds no disadvantages, as diversion currently proves to be successful (31.25%). The table shows, however, that a total of seven (43.75%) prosecutors feel that young offenders may abuse the system to avoid prison sentence or a criminal record.

A small percentage of the prosecutors (2 respondents, i.e. 12.5%) are concerned that there are insufficient probation officers. These are regarded as key role players who prepare and engage the offender in rehabilitation. In my view, though, this should not be a concern, as probation officers are not the only service providers. It is the responsibility of probation officers, however, to be aware of the available resources and to ensure and facilitate community

participation. In this way, they can strengthen the intervention services they provide to the offender. The concern with postponed sentences, which was raised by two (12.5%) of the prosecutors, seems to be related to the fact that this option is mostly utilized to keep the offender in the community. This should not be a concern when considering the various options, e.g. community-based sentences and compulsory orders. This issue of giving a postponed sentence seems to be an area that still needs to be explored, as judicial officials tend to use the traditional method of sentencing, without incorporating options that can develop and benefit the offender. With postponed sentences, the offender is merely given a ticket to freedom without being forced to take responsibility for his/her actions.

#### 5.10.2.3. Views of probation officers

<b>Table 39</b>	<b>Total</b>	<b>%</b>
There are no disadvantages for the offender if restorative justice is implemented with the necessary resources and control.	5	45.45
Restorative justice could be seen as a soft option by offenders who could abuse the system to avoid a criminal record.	6	54.54
<b>Total</b>	<b>11</b>	<b>100%</b>

The table suggests that some probation officers are in a agreement with prosecutors and magistrates that restorative justice holds no disadvantages for the offender if proper controls are implemented. There seems to be a concern amongst the majority (54.54%) of probation officers that offenders could abuse restorative justice to avoid a prison sentence. When considering that probation officers are the key role players with regard to intervention and making recommendations for diversion and other options, it is significant to note their concerns regarding the fact that offenders may see restorative justice as a soft option. Clearly, it is the responsibility of probation officers to make a proper assessment and to determine what sentences and interventions are suitable for the young offender.

The literature review pointed out that probation services are an integral part of the management of children in conflict with the law. In fact, Section 4 (i) of the Probation Services Amendment Act (No 35 of 2002) makes provision for the reception, assessment and referral of an accused, and for early intervention services and programmes, including mediation and group conferencing. As much as offenders may see restorative justice as a soft option, it is the responsibility of probation officers, magistrates and prosecutors to oversee the process and ensure its proper implementation.

### 5.10.3 Challenges in respect of the community

The community should feel satisfied and protected by the justice system that is in place to protect them as well. Community input is essential in the decision to adopt restorative justice as a system (Zehr 1990; Consedine 1999)

#### 5.10.3.1 Views of magistrates

<b>Table 40</b>	<b>Total</b>	<b>%</b>
There are currently no disadvantages if restorative justice is implemented with the necessary resources, as the community will be part of the justice process.	8	61.53
The lack of resources makes it difficult to include families and communities in the rehabilitation process.	3	23.07
Communities need to be educated on the concept of restorative justice to ensure participation.	2	15.38
<b>Total</b>	<b>13</b>	<b>100%</b>

A significant number of the magistrates – i.e. 8 respondents (61.53%) – believe that restorative justice can only benefit the community if it is implemented with the necessary resources. Communities must be part of the process to experience the benefits of restorative justice, but this will only be possible with an informed community, as indicated by 3 (23.07%) of the magistrates. Once they have been educated and are involved in the process, the community will be able to understand the concept and take proper advantage of restorative

justice. A small percentage (15.38%) indicated that families and communities are often not part of the rehabilitation process. The researcher acknowledges the fact that it is imperative to have sufficient resources to implement restorative justice effectively, and thus argues that knowledge in this regard is power. A change of heart and a change of attitude are needed to ensure that, through educating the community, the country becomes receptive to the concept. The significance of these findings is that, as much as magistrates have identified obstacles that hamper the restorative justice process, not much is happening in practice to improve the situation. One could raise the question as to how involve is magistrates in facilitating the process or in promoting the concept to the broader community.

#### 5.10.3.2. Views of prosecutors

<b>Table 41</b>	Total	%
There are currently no disadvantages, as the community is envisaged to be part of the rehabilitation of its own people and the justice process.	7	43.76
Communities are uninformed and therefore do not understand the type of sentences passed by the court with regard to diversion or community services.	9	56.24
Total	16	100

As indicated by 43.76% of the prosecutors, faith in the justice system can be restored by involving the community, and participation in the rehabilitation of its own members can be ensured. One can infer from the comments given by prosecutors that communities are not currently involved in the justice process as provided for in the Child Justice Bill. The views of 9 of the prosecutors (56.24%) are similar to those of magistrates, namely that communities are uninformed and ignorant with regard to the concept of restorative justice; they do not understand the purpose of diversion and of sentences such as community services. One can conclude that communities need to be more involved in the justice process to overcome their own dissatisfaction with the criminal justice system.

### 5.10.3.3. Views of probation officers

<b>Table 42</b>	<b>Total</b>	<b>%</b>
There are currently no disadvantages, as the community is envisaged to be part of the justice process.	3	27.27
Communities need to be educated on the concept, as they do not understand it when an offender is not punished retributively.	5	45.46
Respondents did not respond response to this question, as communities are not currently included in the criminal justice process.	3	27.27
<b>Total</b>	<b>11</b>	<b>100%</b>

A total of three (27.27%) probation officers admit that communities are not involved at this stage. This may be a result of the fact that this part of restorative justice is being neglected by the different role players who are responsible for promoting restorative justice. This is also echoed in the views of 5 (45.46%) of the respondents, namely that communities are uninformed and that they have no insight into the main objectives of restorative justice. Three (27.27%) respondents believe that restorative justice will only benefit the community when it is part of the justice process (see Tables 27-29).

The responses of 5 of the probation officers (45.46%) are similar to those of prosecutors and magistrates, to the effect that the community will not be able to capitalize on / to benefit fully from the restorative justice process due to a lack of knowledge. This is a matter of concern, as restorative justice will not and cannot be effective without including all parties (victim, offender and communities). It seems that there is reluctance amongst these professional groups to take on the responsibility of educating and involving community members. This should not be an excuse, though, as these three groups are responsible for administering the criminal justice process, which includes the education of relevant parties, such as the community for instance.

#### **5.10.4 Discussions**

Based on the responses recorded in this study, it is evident that most of the magistrates, prosecutors and probation officers feel that restorative justice holds no disadvantages if practiced as described by various authors (Karmen 1990; Van Ness 1997; Consedine 1999). According to these authors, the integration of restorative justice within the criminal justice system involves the participation of all parties, viz. victim, offender and community, to ensure meaningful outcomes. However, the concerns of respondents are: firstly, the lack of resources, and secondly, a community that is uninformed on the matter of restorative justice, which hampers the process. The lack of resources referred to by respondents has to do with the lack of probation officers and the implementation of appropriate legislation (specifically the Child Justice Bill), which is still awaiting finalisation by parliament. Generally, respondents seem to be positive about restorative justice, which is encouraging. However, they also need to be proactive and creative by utilizing the possibilities that already exist in legislation.

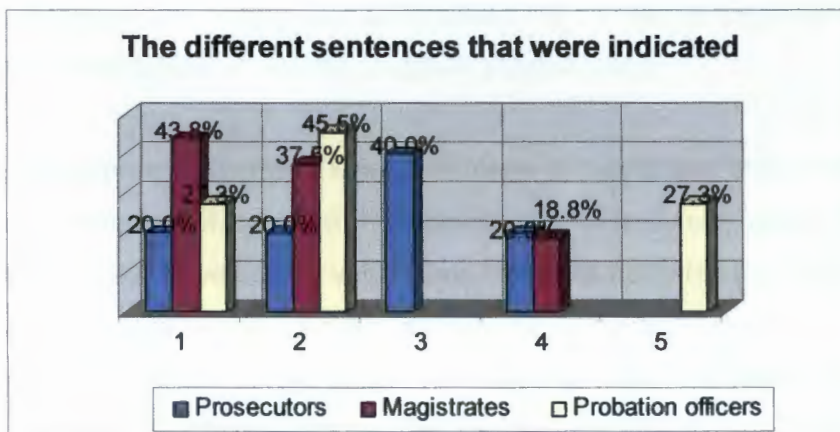
Although these findings are encouraging in respect of the application of restorative justice, they also suggest the need for skilful facilitators as well as services that can assist victims in the process. There is general agreement amongst magistrates, prosecutors and probation officers that there is limited compensation and few resources available to address the needs of the victim. Another aspect in respect of which there is agreement amongst the participants in this study, which is becoming increasingly crucial if restorative justice outcomes are to be effective, is the need for communities to be educated on the concept of restorative justice. Without proper support structures in place at the homes of offenders and in their communities, the process of restorative justice will be futile. These are serious matters that should be prioritised on the state agenda if the government hopes to control crime and wishes to ensure that restorative justice is applied to all parties.

## 5.11 PARTICULAR SENTENCES WITH A RESTORATIVE JUSTICE OUTCOME

Respondents were requested to give their views on sentences that have a restorative justice outcome, and to give reasons for these views. Sentences with a restorative justice outcome provide an excellent way of optimising the principles of engagement and inclusion that underpin the restorative justice approach. An outcome may include restitution to the victim and community, and rehabilitation of the offender through the sentence.

### 5.11.1 The Different Sentences with a Restorative Justice Outcome, Indicated by Respondents

Figure 1



01. Suspended Sentences
02. Correctional Supervision
03. Compensation Orders
04. Postponed Sentences
05. Diversion Programmes

A total of 43.8% of magistrates view suspended sentences as having a restorative justice value, while only 20% of prosecutors and 27.3% of probation officers hold this view. It seems that a certain proportion of respondents from the different groups feel that correctional supervision would also be able to provide a restorative justice outcome. This can be anticipated because community services are provided for both as a condition of suspended sentences as well as being part of correctional supervision. When looking at the findings, one can infer that these two types of sentences are regarded as the preferred sentence option when applying restorative justice. With community service, it is expected of the offender to pay back to the community or victim by availing his/her skills and services to a certain organization or business, free of charge. The court lays down conditions that are coupled with the mentioned sentences, which order the offender to perform specific community hours and to attend intervention programmes. These types of sentences are popular and bring about the increased responsibility and accountability of offenders and their rehabilitation.

It is worrying that such a low percentage of responses from prosecutors (20%) and probation officers (45.5%) regard correctional supervision as a sentence with a restorative justice value. One can infer from this that, although most of the respondents have a general understanding of the subject of restorative justice and are in favour of such an approach, as it will benefit the offender, the victim and the community, in practice the opposite is true. These uncertainties may be a result of magistrates and prosecutors that are still inclined to be punitive in their approach towards the offender. The probation officer could therefore easily follow the trend once they have observed what approach a specific magistrate or prosecutor prefers. One could therefore suggest that, as much as these three professional groups should work together and make informed recommendations with regard to the type of sentence, the final decision is still made by the magistrate.

It is significant that only 40% of prosecutors suggested that compensation orders should be used. When magistrates and prosecutors were probed regarding the use of compensation orders, the general view was that the youth

are usually in no position to repay the victim, as they are often unemployed or students. Moreover, the justice system cannot expect parents to pay for their children's mistakes.

It is interesting to note that only prosecutors (20%) and magistrates (18.5%) view postponed sentences as appropriate options, with probation officers not responding in this regard. The findings show that magistrates and prosecutors rely on the recommendations made by probation officers in their pre-sentence reports (see Tables 21-22). The Probation Services Amendment Act (No 35 of 2002) empowers probation officers to play a leading role in the promotion and application of restorative justice. It appears from legislation that the justice system will not be able to function optimally without the recommendations made by probation officers. There is some criticism from prosecutors that probation officers are not creative in making and clarifying their recommendations. One can infer from this that probation officers need to be more proactive, informed and creative when applying restorative justice.

Only 27.3% of probation officers were of the opinion that diversion has a restorative justice outcome. This is surprising as, together with prosecutors, they are regarded as the primary group responsible for promoting promote diversion. This is a matter of concern when considering the low responses of probation officers regarding diversion, and the fact that diversion has, in fact, become well established at most of the courts in the country. It should be noted that the focus of the study is on the types of sentences with a restorative justice outcome and not specifically on diversion. The latter may be part of a restorative justice process.

#### **5.11.2 Opinions Expressed by the three Groups of Respondents**

**The three different groups of respondents were asked to express their opinions on why specific sentences should have restorative justice outcome. These are reflected below.**

### **Views of Magistrates**

Two of the magistrates explained why they felt that correctional supervision and postponed sentences might be beneficial.

- *“Correctional supervision coupled with conditions, e.g. family conference, community services for those over 16 years of age. It is also expected from the offender to participate in intervention services.”*
- *“A postponed sentence will prevent a youth offender from getting a criminal record.”*

From the views of the magistrates it is clear that the existing sentence option, such as correctional supervision, can be utilized in various ways to enforce family participation, accountability, intervention and compensation. It depends on the initiative of those responsible for the administration of youth justice to ensure that the appropriate sentences are proposed and passed with a restorative justice value.

### **Views of Prosecutors**

The following are direct quotes from prosecutors on why they felt that suspended and postponed sentences might be beneficial.

*“A suspended sentence coupled with compensation or restitution orders will benefit the victim. The victim will receive payment for any losses.”*

- *“Postponed sentences coupled with custody and compulsory attendance of programmes by young offenders. Offenders will be involved in rehabilitation processes.”*
- *“Postponed sentences will have no restorative justice value, if not coupled with options like family conferences, programmes”*
- *“Probation officers should play a more active role in the recommendation of sentences. Recommendations are not always clear or directive regarding what the value of restorative justice options will mean for the victim or the offender*

The views by some of the prosecutors make it clear that postponed and suspended sentences will have no restorative justice value if they are not

combined with conditions or options. This can also be seen as an indication that our current criminal justice system does indeed make provision for restorative justice when combined with sentence options. It is therefore required from the prosecutors, as indicated earlier, to be creative when recommending various sentence options. As much as prosecutors felt that probation officers need to clarify their recommendations, they (prosecutors) should also have an understanding of the value of sentences passed for the victim, offender and community. In other words, it is not the sole responsibility of probation officers to look for suitable options that will involve and benefit all the role players (victim, offender, community), but instead the responsibility should be shared with prosecutors and magistrates.

### **Views of Probation Officers**

The following are explanations by a few probation officers on why certain sentences might be beneficial

- *“Community services enable the offender to take responsibility for his crime and to pay back to the community.”*
- *“A suspended sentence with conditions will contribute to the rehabilitation of the offender.”*
- *“Correctional services will mean repayment to the community and rehabilitation for the offender.”*
- *“A fine can be used to compensate the victim for any losses.”*

The above comments by the probation officers reflect a clear understanding of the different sentences that are available. Furthermore, they could clearly state the outcomes of such sentences, which seem to contradict the comments of some of the prosecutors to the effect that the recommendations of probation officers are not always clear. This could also be indicative of a lack of communication between these two groups. Prosecutors and probation officers are supposed to work together very closely and to share notes in order to make the appropriate recommendations to the magistrate.

### 5.11.3 Discussion

The above findings indicate that respondents seem to have a good understanding of the value of restorative justice sentences for the victim, the offender and the community. These sentencing options are furthermore supported and stipulated in the Child Justice Bill (No. 49 of 2002) and in the Criminal Procedures Act (No. 51 of 1977). When comparing their views, there should be no doubt that officials dealing with youth offenders know what they want to achieve when passing a particular sentence. In practice, however, the implementation of restorative justice seems to be neglected, when the above findings are compared with the data gathered from the charge sheets. The researcher has found that, although many courts utilize the sentences mentioned, the decisions are not based on a restorative justice outcome, but aim rather to finalise a case.

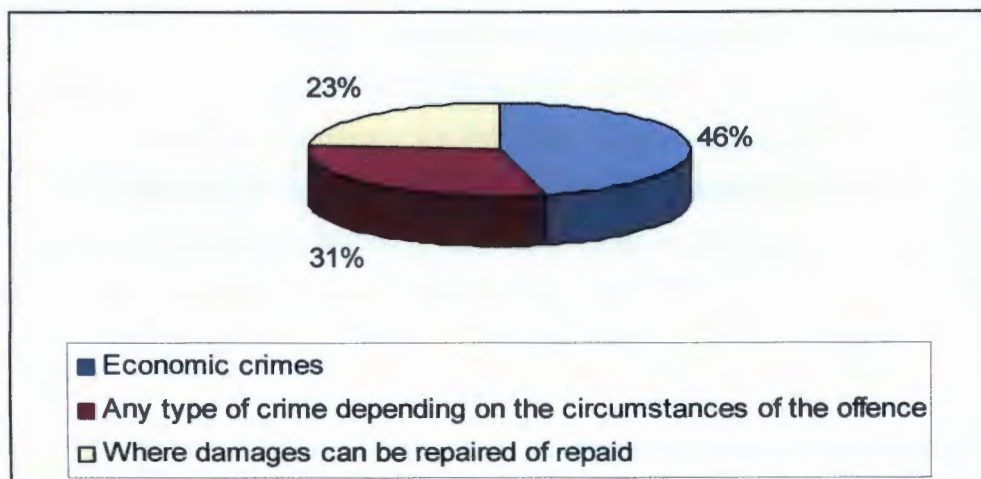
Although compensation orders and fines are mentioned in the charge sheets, we find that in practice payments are mainly made to the State. Unless specifically stipulated, the victims very rarely benefit from these fines. It can thus be concluded that the sentences mentioned have restorative justice outcomes, but that magistrates, prosecutors and probation officers need to familiarise themselves with family conferences and to implement the options more consistently in practice. A more vigorous team effort is required from justice and probation officers to integrate and apply the theory. It seems that cases are not dealt with in a manner where restorative justice is applied as a process. Instead, the focus is on certain aspects such as diversion and the passing of certain orders, but without involving the victim, offender or community as indicated by certain authors (Zehr 1990, Consedine and Bowen 1999; Wright 1991) in the literature review. It appears that there is no proper planning or communication amongst magistrates, prosecutors and probation officers. Instead, the focus is on finalizing the case, which can of course be a result of overloaded court rolls and an insufficient work force. Conversely, it may also be that judicial officials still need to adapt to this approach.

## 5.12 CRIMES THAT ARE APPROPRIATE FOR RESTORATIVE JUSTICE

It emerged from the literature review (see Chapter Two) that, although restorative justice is thought to be a new theory, it is in fact an old paradigm that theorists and practitioners have drawn from traditional systems around the world. Restorative justice is already being implemented in some countries. For example, in Auckland, New Zealand in 1995 more than 70 cases in the adult courts were dealt with by means of a restorative justice process. These included cases with a variety of charges, such as aggravated robbery, sexual assault and less violent cases.

### 5.12.1 Views of Magistrates

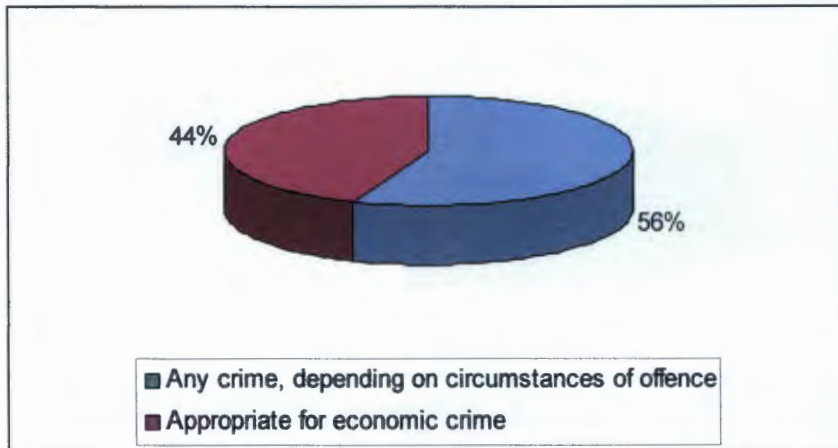
Figure 2



The findings show that the views of the magistrates are largely in agreement with those of the prosecutors. Almost half of the magistrates (46%) also agreed that economic crimes are suitable for restorative justice. This seems to be a fairly safe way for the different role players to deal with such offenders. Another third (31%) felt that any type of crime was appropriate for restorative justice, although this does depend on the circumstances of the crime. The remaining 23% held the view that cases where repayment for damages was possible could be dealt with restoratively. This can be understood in light of the fact that respondents want to acknowledge the rights of victims, and thus look for ways of repairing the harm and damage caused by the offender.

### 5.12.2 Views of Prosecutors

Figure 3

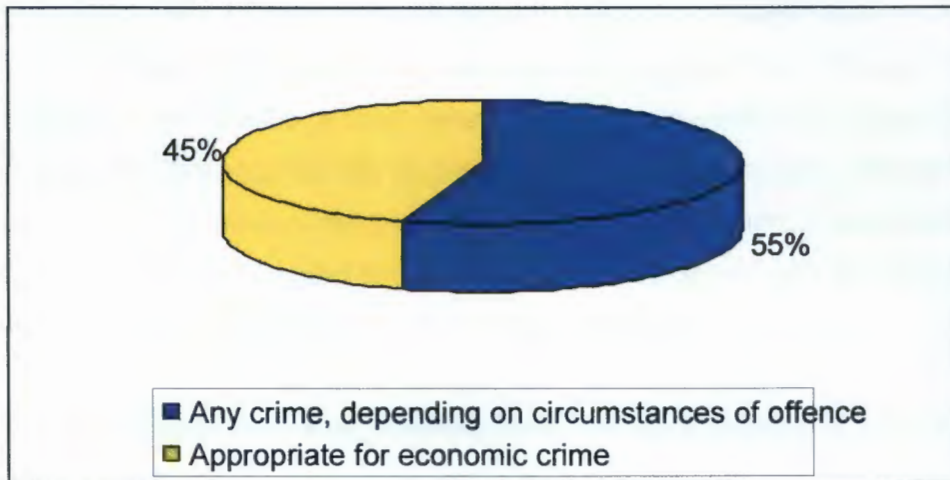


It is evident from Figure 3 that over half of the prosecutors (56%) were confident that any type of crime, depending on the circumstances of the offence, would be appropriate for the restorative justice approach. The rest of the respondents (44%) felt that economic crimes specifically would be more suitable for restorative justice. The findings also suggest that most prosecutors agree with Consedine (1999) that the focus should be on the offence and not the person.

One can also conclude that respondents' views are based on the fact that they rely strongly on the probation officer's report, which contains information about the circumstances of the offender. Prosecutors who feel that restorative justice should be limited to economic crimes may be expressing uncertainty, as they still need to adapt to this approach.

### 5.12.3 Views of Probation Officers

Figure 4



The majority of probation officers (55%) felt that any type of crime was appropriate for a restorative justice approach. It is also interesting to note that a similar percentage (45%) is of the opinion that it is only appropriate for less serious crimes and economic crimes. It is significant that most prosecutors and probation officers share the view that restorative justice would be suitable for all types of crimes. One can infer from the findings that these two groups have a different view from magistrates, because they work so closely together with both the offender and the victim. Prosecutors and probation officers look at a wide range of factors, such as the circumstances of the offender and the circumstances of the offence, and they have direct contact with the parties. In contrast, magistrates in many cases follow the recommendations and do not deal with the offender or the victim on a personal level.

### 5.12.4 Discussion

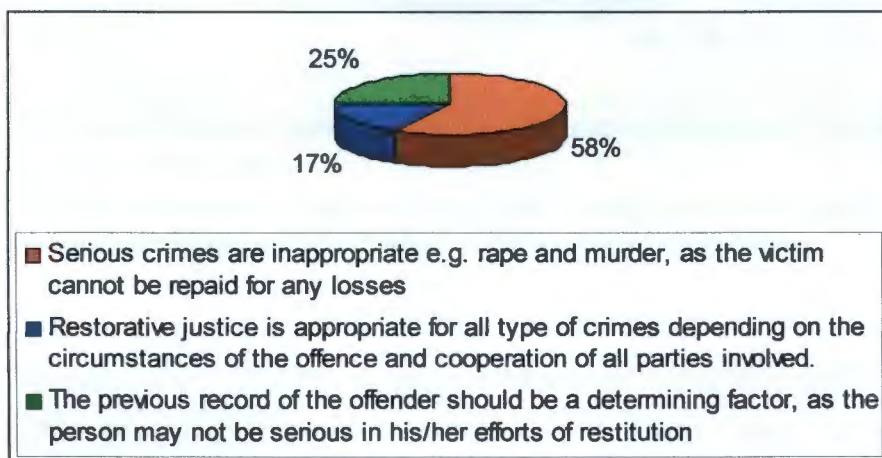
It is evident from the data collected that the respondents are comfortable with the idea that less serious crimes and economic crimes can be appropriate for the restorative justice approach. Any doubt in this regard could be the result of uncertainties amongst the different groups, although they all understand the objectives of restorative justice and do seem to be in favour of applying it. As much as magistrates, prosecutors and probation officers acknowledge the fact

that restorative justice can only benefit the offender, the victim and the community, they do also tend to fear that restorative justice may be seen as a soft option. This causes uncertainties with regard to its application, as it is still a new concept and these three professional groups still need to adapt to this practice. The statistics of court cases that were viewed by the researcher support the findings that role players are not yet ready to apply restorative justice to more serious crimes. Although respondents seem to agree with Consedine (1999) that the focus should be on the person and not the offence, it does seem that theory contradicts itself in practice.

### 5.13 CRIMES THAT ARE INAPPROPRIATE FOR RESTORATIVE JUSTICE

#### 5.13.1 Views of Magistrates

Figure 5

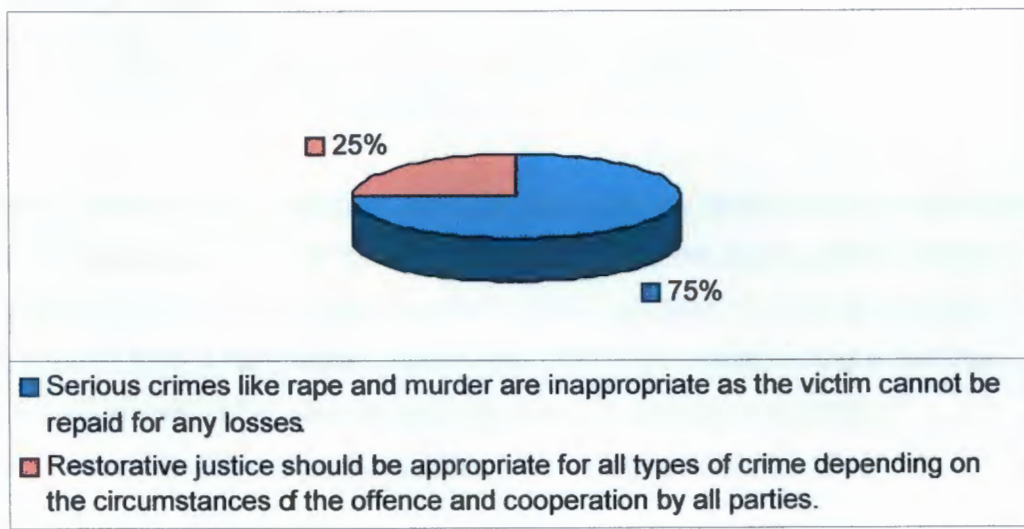


It is evident from Figure 5 that the majority of magistrates (58%) are of the opinion that restorative justice is not appropriate in respect of serious crimes like rape and murder. The fact that most of the magistrates are against the application of restorative justice for serious crimes, such as rape and murder, may be seen as a sign of uncertainty on their behalf. Magistrates hold the view that the suffering of the victims in such cases cannot be repaid. The magistrates should bear in mind that the focus of restorative justice is not only on compensation but also to hold the offender accountable for his criminal behaviour and to offer restitution. Another 17% feel that no crime should be

excluded. It is interesting to note that only 25% of magistrates indicated that the criminal history of a person should be a determining factor, explaining that the offender may not be serious in his/her efforts of restitution, but might rather abuse the system to avoid a prison sentence. This may be understood in the light of the fact that magistrates are responsible for the sentencing of the offender and, therefore, see themselves as needing to protect the community.

### 5.13.2 Views of Prosecutors

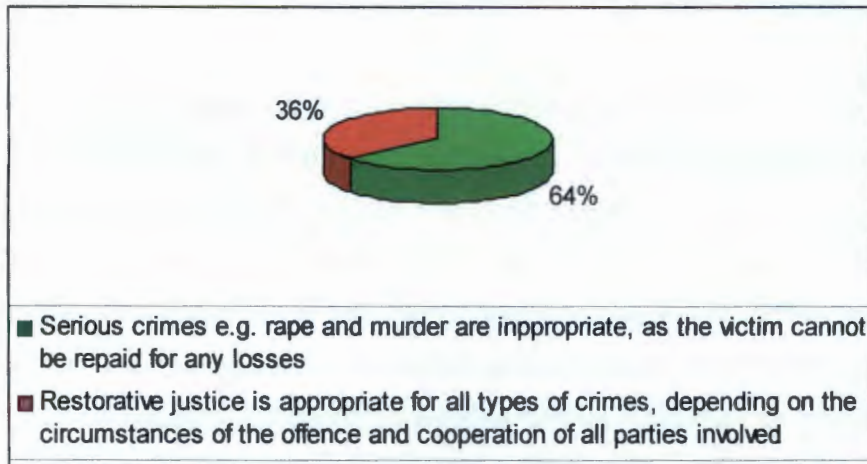
Figure 6



The data reflects that the majority of the prosecutors (75%) felt that restorative justice was not appropriate for serious crimes. These views may be the result of uncertainties amongst respondents with regard to the practical application of restorative justice as an approach. These views are in line with the views of magistrates and can be a result of the fact that restorative justice is still new in the system. It is also understandable in the light of the high crime rate, that magistrates and prosecutors are cautious when applying restorative justice in serious situations. The remaining 25% of the prosecutors indicated, however, that no crime should be excluded from a restorative justice approach.

### 5.13.3 Views of Probation Officers

Figure 7



Most of the probation officers (64%) agreed with the responses of magistrates and prosecutors, namely that restorative justice is not appropriate for serious offences. However, just over one third (36%) felt, that no crime should be excluded from a restorative justice approach. The overall feeling is that the circumstances of the offence and the offender, and the principles of accountability and cooperation should be taken into consideration.

The findings suggest that, at the time of the survey, prosecutors, magistrates and probation officers did not support restorative justice as a sentencing option for serious crimes. These views emerged from the fact that they believed that offenders would not be able to repay the harm done to the victim, or the victim's family or their community. This is a contradiction when considering the views of probation officers on what they understand by restorative justice. After all, the focus of restorative justice is not only the monetary payment of losses, but also to facilitate a process that will bring about restitution and healing of those affected by crime. However, it must be appreciated that this is still a new concept in South African criminal justice. These findings also reflect the need to create opportunities within the justice system for restorative justice to be implemented on a regular basis and not only for diversion cases.

The results also indicate that prosecutors, probation officers and magistrates need 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 regarding how to apply restorative justice at the sentencing stage. This would explain why only a small percentage of prosecutors (16.7%), magistrates (25.0 %), and probation officers (36.4%), are more receptive to including all types of crime, with a focus on the circumstances of the offence and on cooperation between the different parties. It appears that respondents are careful and reluctant to apply restorative justice in respect of serious crimes. This may be reinforced by a lack of knowledge on the application of restorative justice, or it may be that the system is simply not ready to adopt such an approach. The operation of the street committee in Guguletu, as described in Chapter Three, gives an account of the consultation, mediation, and decision making process with regard to appropriate action between the victim, the offender and community members. It is a challenge to our criminal justice system to include the mediation process in criminal court hearings if we want to ensure fairness and cooperation from all the relevant role players.

#### **5.14 ADDITIONAL VIEWS ON THE APPLICATION OF RESTORATIVE JUSTICE**

Respondents were asked whether they have any additional views on the matter of applying restorative justice. The following table reflects the additional views expressed by the respondents:

### 5.14.1 Additional views on the application of restorative justice

<b>Table 43</b>	<b>Magistrates</b>		<b>Probation</b>		<b>Prosecutors</b>	
			<b>Officers</b>			
Parents and communities must be educated about restorative justice to ensure participation and accountability.	4	28.57%	0	0.00%	5	25.00%
More resources e.g. social workers and more involvement from the private sector and NGOs are required to ensure the application of restorative justice.	7	50.00%	4	21.05%	4	20.00%
Role players must receive more training on the application of restorative justice	7	50.00%	4	21.05%	4	20.00%
A specialized judiciary who understands the youth and cultural diversities is necessary.	2	14.29%	0	0.00%	0	0.00%
Mediators must be appointed to assist victims in the pre- and post-trial phases.	2	14.29%	0	0.00%	0	0.00%
A change of mindset is required to apply the approach in court settings.	0	0.00%	4	21.05%	0	0.00%
Regular meetings with street committees, neighbourhood watch are important for strengthening relationships.	0	0.00%	3	15.79%	4	20.00%
No Comments	0	0.00%	2	10.53%	3	15.00%
<b>Total</b>	<b>14</b>		<b>18</b>		<b>20</b>	

More than a quarter of the magistrates (28.57%) and a quarter of the prosecutors (25%) indicated that informed parents and communities would ensure their participation in the restorative justice process and that communities would take responsibility for providing programmes. Half of the magistrates (50%) and 21.05% of prosecutors felt that the lack of resources and the lack of training by 15.79% of probation officers hampered the application of restorative justice. This includes the view of 10.53% of probation officers that the appointment of mediators is vital for preparing and involving victims. According to some probation officers (21.05%), a change in mindset is required to ensure the application of restorative justice. According to prosecutors, regular meetings between justice and community committees are also necessary to strengthen relationships and participation. This is vital for ensuring coherent responsibilities for the task at hand. Those responsible for administering restorative justice will have clear guidelines as to what is expected to promote the concept and ensure community participation.

### 5.14.2 Discussion

The lack of resources such as social workers, the absence of involvement of the private sector in assisting with programmes, and the lack of community services opportunities are some of the obstacles encountered in the application of restorative justice. It should be noted that respondents from all professional groups have indicated that an educated justice staff and a community with the necessary structures would embrace a restorative justice approach. A positive suggestion made by prosecutors is the implementation of regular meetings between magistrates, prosecutors and probation officers. This will in fact benefit the system and address the imbalance of powers with regard to the sentences that are passed. Magistrates will also get a better understanding of the work done by probation officers, and will in the process learn to respect the views and recommendations made by this group. Another advantage of such an engagement is that it will facilitate negotiations and discussions with community role players.

The possible role of assistant probation officers in conducting restorative justice processes should be explored. They could assist with the preparation of parties and the follow up of outcomes.

This will contribute to a more effective service delivery in the application of restorative justice. Some of the views are reflected in the following statements made by the different professional groups:

- *“This approach must become more significant in courts.”*
- *“Regular meetings to report on incidents that affect the application of restorative justice are needed between justice and street councils, street committees.”*
- *“The relationship between courts and the broader community is still a concern.”*
- *“We need judicial officials who understand the youth and different cultures to avoid biases.”*

It is evident from the above views that a wide range of interventions with regard to education, awareness amongst communities and an equipped staff is necessary to apply restorative justice effectively. Two of the key criteria of the restorative justice process are that the facilitators are guided by the uniqueness of each case and that they have the particular competence and dexterity required. This in itself can pose a challenge for the application of restorative justice, as selection and training of appropriate facilitators needs to be managed carefully if the process hopes to gain credibility and support.

In South Africa, probation officers have been identified as the key facilitators of the restorative justice process. This study is in support of this view, as both magistrates and prosecutors admit that they rely on the information provided by probation officers on the circumstances of the offence when considering sentence options. At present, probation officers are probably in the best position to facilitate restorative justice initiatives, considering their training in social work skills, counselling and mediation, including in community and family dynamics. As well as such training in the field of probation, it also focuses on criminal and juvenile justice, rehabilitation and understanding the needs of victims. Probation officers need additional training also in criminal law and criminology, to narrow the gap between them and magistrates and prosecutors.

It should be noted that, although probation officers have been identified as the key role players, a team effort is required to apply restorative justice effectively. Probation officers cannot be solely responsible for promoting the concept: prosecutors and magistrates are also expected to apply it. The Restorative Justice Centre in Pretoria was commissioned by the government to train probation officers in facilitating restorative justice procedures. This was done on a country-wide level. A possible drawback for probation officers as facilitators is that, even if they have been properly trained, they may lack the capacity in terms of time and numbers to undertake this task. As has been pointed out earlier, the shortage of probation officers is a big concern amongst those involved in the criminal justice system. One can, therefore, infer that

adequate specialized training and more probation officers and mediators are required to ensure the appropriate application of restorative justice.

## 5.15 THE PRACTICAL APPLICATION OF RESTORATIVE JUSTICE IN SENTENCING

A total of 627 court files was obtained from the magistrate courts of the various districts and analysed. The following information, containing the type of sentences passed and the type of crime committed, was gathered from court files in order to determine to what extent magistrates, prosecutors and probation officers have made use of restorative justice when sentencing young offenders.

### 5.15.1 Selected Magistrate Courts

The research was geographically bound to district magistrate courts in both rural and urban areas of the Western Cape. The courts were selected on the basis of distance to make them easily accessible to the researcher, bearing in mind that time and finance were major constraints. The courts were also selected to cover the diversity of the population in the province and to ensure that rural communities were also part of the research study.

**Figure 8**

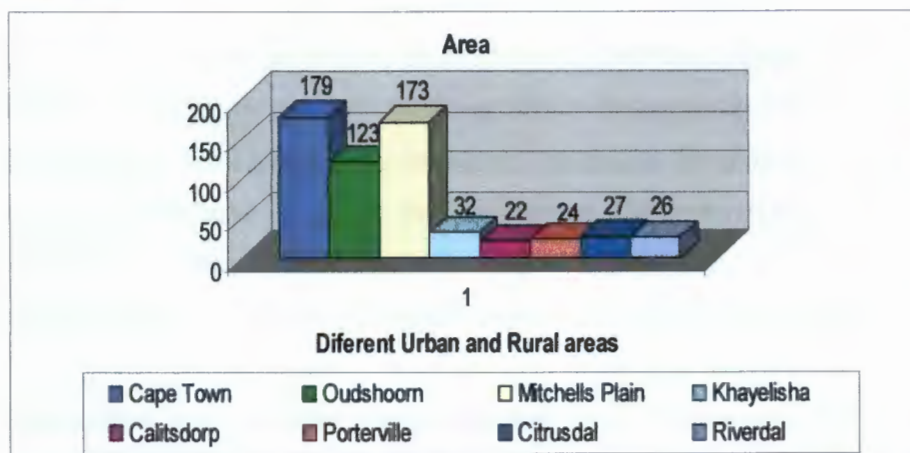


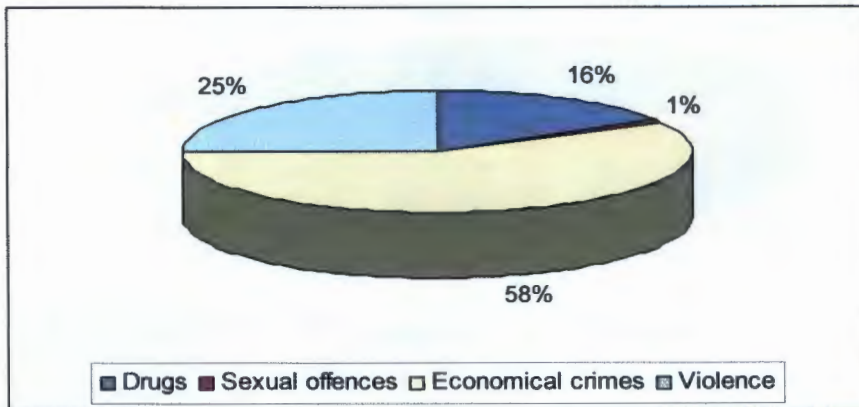
Figure 8 indicates the total number of charge sheets that were obtained over a period of a year [June 2004-May 2005] from the selected magistrate courts. It

is evident from the statistics that the urban areas reflect the highest crime rate amongst youth offenders.

### 5.15.2 Type of Crime

Figure 9 reflects the type of crimes committed by youth offenders and which sentences were passed.

**Figure 9**



The majority of cases (58%) were economic crimes, whilst 25% of the cases were aggressive or violence related. About 16% of the cases were drug related offences whilst only 1% was sexual offences. This could be understood in the light of the fact that almost all sexual offences were referred to Regional Courts, due to the seriousness of the crime.

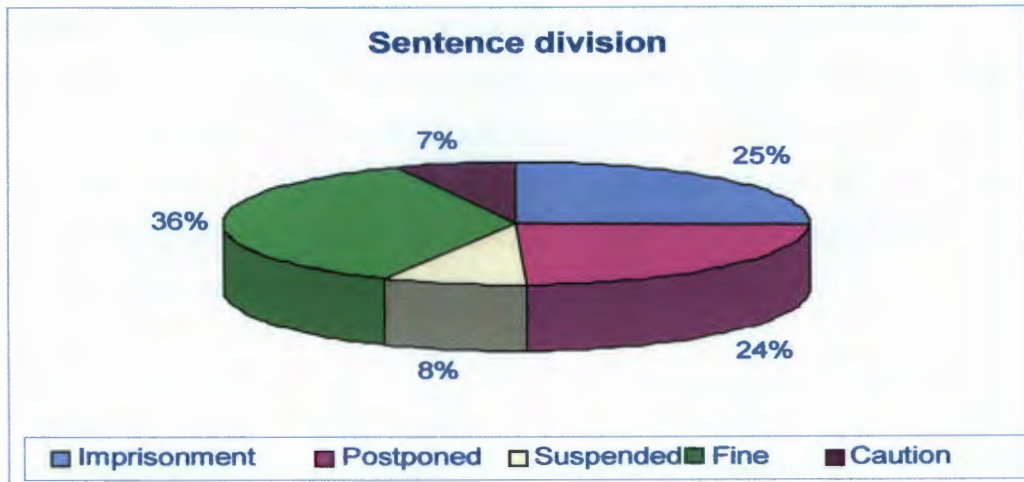
The survey on charge sheets was limited to districts courts, as not all of the selected magistrate's courts make provision for regional court procedures especially in rural areas. The research has found, for example, that serious cases at Porterville court are tried in Atlantis, Citrusdal in Van Rhynsdorp, and Albertinia in Mosselbaai. It was, therefore, difficult because of time, distance and financial constraints to include regional courts in the survey.

It is evident from the information gathered from charge sheets that most crimes are of an economic nature. It can be concluded that courts will, therefore, have ample opportunities to apply restorative justice, when one considers the views

held by participants on what they regard as appropriate sentences for a restorative justice outcome (Figures 5-7).

### 5.15.3 Type of sentences

Figure 10



The above figure reflects the types of sentences passed by the various courts over a one year period (June 2004 – May 2005).

The study shows that, despite of the fairly high percentage of 36% that were given a fine, 25% were imprisoned, which is disappointing when considering the attempts to transform and develop the juvenile justice system, and even more so when considering the views held by most of the respondents and the fact that they are in favour of a sentence with a restorative outcome. The international instruments and our Constitution are clear on the point that children should not be in prison at all, except under exceptional circumstances. These statistics, together with those from the office of the Inspecting Judge mentioned in the literature review, might be an indication that the safeguards intended to prevent children going to prison are not effective.

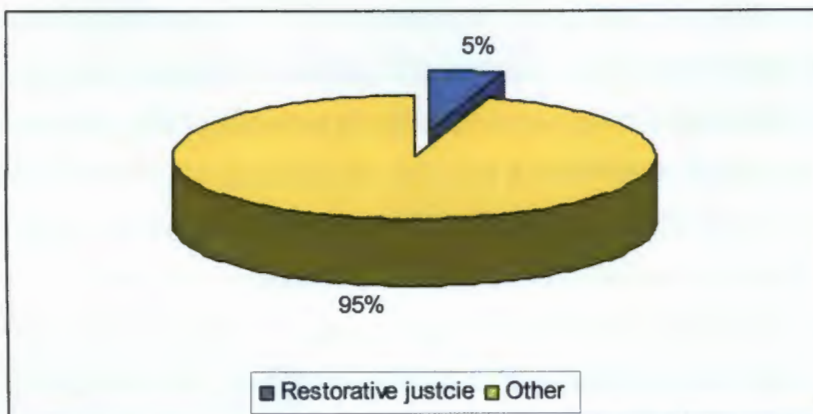
An analysis of the statistics shows the poor utilisation of compensation orders, despite the views of prosecutors as indicated in Figure 7, and the fact that this option is in line with the principles of restorative justice. The researcher would

like to draw the reader's attention to the fact that the imposition of a fine does not mean compensation to the victim, unless it has been specifically indicated by a court order that such payment must be made to the victim.

#### 5.15.4 SENTENCES WITH A RESTORATIVE JUSTICE OUTCOME

Figure 11 reflects the sentences with a restorative justice outcome that were passed by the courts selected for this study. These sentences refer to compensation orders, community services, or rehabilitative programmes etc., either combined with other sentence options or as a condition with other sentence options. The non-restorative justice sentences used by the courts include fines, postponed and suspended sentences without any conditions, imprisonment or referral to juvenile centres.

**Figure 11**



The above figure reflects the reluctance on the part of magistrates, prosecutors and probation officers in respect of change and transformation towards implementing a restorative justice approach. The statistics presented herein confirm the findings that respondents have not applied restorative justice principles. Magistrates and prosecutors still tend to use the traditional ways of punishing offenders, and therefore require a change of mindset in order to promote the application of restorative justice.

### **5.15.5 Discussion**

The findings clearly indicate that restorative justice is not being implemented by the courts that were studied herein, despite the positive responses received from magistrates, prosecutors and probation officers regarding the application of restorative justice. By studying charge sheets, the researcher found that cases are generally being dealt with in a hasty manner, which hampers any form of mediation and discourages the involvement of the relevant parties, which is a recommendation that emerged from the literature review. It also appears that probation officers are not clear and directive in their recommendations, which consequently does not adequately assist prosecutors and magistrates to make their decisions.

The findings with regard to the actual sentences, as reflected in the charge sheets, are in contradiction to the findings with regard to the types of sentences that respondents see as appropriate for restorative justice, as reflected in Figure 7. This clearly demonstrates the uncertainty and lack of knowledge and skills amongst magistrates, prosecutors and probation officers regarding the application of restorative justice in sentencing. Although respondents do agree on the value of a restorative justice approach, there is little evidence of their commitment in applying it. Contrary to local and international experience, as indicated in the literature review, it would seem that courts are wary of using restorative justice sentences for a wide range of cases, including for repeat offenders and for those who have committed serious offences. In fact, most of the offences listed by respondents as being appropriate for a restorative justice approach have attracted non-restorative justice sentences as evidenced by the charge sheets. This highlights a need for magistrates, prosecutors and probation officers to be made aware of the fact that restorative justice can be applied at the pre-trial, pre-sentence and post-sentence stages.

## **CHAPTER SIX**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **6.1 INTRODUCTION**

There is no quick solution to reducing the rate of crime, re-offending and recidivism in South Africa. However, restorative justice can have an impact on the reduction of crime by keeping young offenders out of the formal criminal justice system and by preventing recidivism. Restorative justice, as indicated in the literature review, is a process over which more control can and should be exercised to ensure the involvement and commitment of most of the parties involved, than could be done in the current criminal justice system. It requires the participation of the offender, the victim, the community and the State to work towards a resolution of the crime problem in a way that is more flexible and constructive. This requires a change of mindset on the part of both the government and civil society, to move away from a retributive approach that involves the frequent use of imprisonment towards the application of restorative justice as a solution to our crime problem. This study has provided valuable insight into the knowledge and attitudes of prosecutors, magistrates and probation officers in this regard. It has also provided the reader with insight into how the specific professional groups view and apply the concept of restorative justice in the sentencing of youth offenders. Furthermore, it has provided the reader with statistical data on the type of sentences passed by judicial officials in respect of particular crimes. The statistical data gives a different angle, as it provides evidence for the extent to which restorative justice has been applied in the sentencing of young offenders in respect of the views of the respondents.

This study has found that, generally, the concept of restorative justice is well known to prosecutors, magistrates and probation officers. The respondents appear to have a clear understanding regarding the concept of restorative

justice and seem to be positive that it will assist in preventing crime, protecting the community, and deterring potential offenders if it is being implemented with the necessary resources and controls. The charge sheets, however, tell a different story: they paint a picture of judicial officials who still tend to apply the traditional ways of sentencing, ignoring the restitution and healing value that restorative justice can offer to the parties involved. Whilst the restorative justice approach has merit, it should, however, not be seen as a substitute for our current criminal justice system, but should rather complement it.

## **6.2 CONCLUSIONS**

The researcher has formed certain conclusions as a result of the literature review and the empirical study. Accordingly, various recommendations can be made. The following conclusions based on the findings of the study have been drawn.

### **6.2.1 The Nature of Restorative Justice**

The literature review indicates that the current justice system in South Africa, which is punitive in nature, has failed in its purpose of deterrence and rehabilitation. Consedine (1999) and Foucault (1979) argue that the idea of using imprisonment as a sentence and focusing mainly on punishing the offender causes damage that is difficult to undo. The use of imprisonment as a form of punishment for criminal behaviour and detention for awaiting trial youth are still the most popular form of punishment in South Africa. Thus prisons are overcrowded (as indicated by statistics supplied by the Inspectorate Judge), and this, in turn, does not create an environment that is conducive to rehabilitation or human dignity. The essence of this is that retributive punishment, especially imprisonment, cannot be regarded as an effective measure for preventing crime or protecting communities.

Clearly, a change of attitude on the part of both the government and civil society, concerning the frequent use of imprisonment as a solution to our crime problem is required. Several authors including Consedine and Bowen (1999), Van Ness (1997), and Bazemore and Umbrecht (1995), argue that restorative

justice provides a complementary approach to the current retributive justice system. It sees crime as a violation of people and relationships, and creates an obligation for offenders to make things right. The emphasis is on offender accountability, recognition of the victim and healing. When considering the vital role of these professionals in promoting restorative justice, the remarks made by probation officers, who indicate that sentences are too lenient, are cause for concern.

The findings of the survey generally correlate with what emerged from the literature review. The majority of respondents stated that the current criminal justice system is not effective in preventing crime, deterring offenders and potential offenders, rehabilitating the offender and protecting society. It was also concluded that communities no longer have trust in the current system and that victims are excluded from the justice system. Other important findings are that a lack of resources, a poor commitment from role players and communities that are uninformed on the topic of restorative justice, contribute to the poor application of this approach. Communities are not aware of restorative justice and will, therefore, not understand the types of sentences passed, e.g. diversion etc. The survey has found, though, that the majority of the respondents do know about restorative justice and understand its objectives.

There was a general consensus amongst respondents that the principles of restorative justice, such as offender accountability and responsibility, recognition of the victim, reconciliation and making restitution, are important factors in the sentencing of youth offenders. These include obtaining and taking into account background information of the offender and the offence, as provided in the reports by probation officers.

Although respondents acknowledged that victims are excluded from the justice process, it seems that the majority of respondents in fact prefer victims to have limited powers or simply just ignore them in their day-to-day practice. It can be concluded that, as far as the role players in the criminal justice system are concerned, victims should be involved to ensure fairness with regard to

appropriate sentence solutions, but that they should not play a determining role. Even though most of the respondents acknowledged the existence and rights of the victim, there were discrepancies with regard to the powers of the victim when it came to negotiating sentence options. It was also evident that prosecutors need training and probation officers lack the resources to develop their capacity to ensure service delivery to the victim. The input received from prosecutors clearly indicates their need for more in-depth knowledge in working with victims, as well as resources to provide assistance and compensation. The findings lead to the conclusion that prosecutors, magistrates and probation officers are receptive towards and knowledgeable about restorative justice, which is encouraging for the transformation of the criminal justice system. Yet, in their day-to-day practice restorative justice principles only feature in a limited way. However, it should be noted that these are not generalised ideas, but responses by certain participants, and that the study was confined to selected districts' magistrate courts in the Western Cape and that it does not apply to the other courts or the country at large. Nevertheless, it is felt that the findings do provide some valuable insight, which could guide policy development in the criminal justice system.

### **6.2.2 Application of Restorative Justice.**

Restorative justice is not a new concept, as pointed out by Braithwaite (1997) and Consedine (1999), but has been the dominant model throughout most of human history, particularly in traditional societies. Our own political transformation was one of reconciliation and has, within this context, illustrated that restorative justice is a fundamental principle in reform. It is evident from the literature review that restorative justice brings people (in other words, victim, offender, community and state) together to ensure healing and solutions for crime. As described by Van Ness (1997), the basis of restorative justice is that the process brings love, concern, support and a willingness to forgive to the meeting. Both the offender and the victim will have opportunities to give their views, and the meeting will decide together on solutions, restitution to the victim and monitoring procedures to ensure the implementation of an action plan.

The following constitutes the gist of restoration as described by Batley and Maepa (Eds.) (2005) and Consedine and Bowen (1999): There is no shortcut. The offender accepts accountability, shows a willingness to change his behaviour, helps the victim to find closure and restitution, and, it is hoped, receives forgiveness. There is also the involvement of community-based groups in victim support and offender-based programmes.

Different forms of restorative justice intervention are described in the literature review, and are applicable not only to minor offences but also to serious offences, such as rape and robbery etc. The approach seeks to prevent crime and restore injured relationships in the community. Mediation approaches offer offenders the opportunity to make amends and review criminal behaviour, for victims to experience satisfaction, and for the community to be part of the rehabilitation and healing of its own people.

From the study of the court documents, it can be concluded that the majority of the respondents did not really apply restorative justice principles in practice. The only practice seemed to be reflected in sentences, such as community services, which included a restorative justice outcome. The findings indicated that role players were not skilled in and knowledgeable about the application of restorative justice. Prosecutors admitted that they were not equipped to address the needs of victims and to involve them in the restorative justice process.

Although the Child Justice Bill (No. 49 of 2002:) and the Probation Service Amendment Act (No. 35 of 2002) make provision for programmes based on restorative justice principles, it seems that, given the shortage of resources and the existence of uninformed communities, it is currently difficult to implement restorative justice on a large scale.

It can also be concluded from the survey that magistrates and prosecutors rely heavily on the pre-sentence reports submitted by probation officers. These reports provide significant information on the nature and circumstances of the offence and the offender. Probation officers can, therefore, play a more pro-

active role in the implementation of restorative justice, as their recommendations should be more informative and creative with regard to the process of justice and programmes of a restorative justice nature. As observed from the charge sheets, the survey clearly indicates that the large majority of sentences passed by our courts have little or no restorative justice value.

It is clear that an integrated approach is needed in order to unite the three professions in recognizing each other's roles and working towards implementing restorative justice. A change in mindset is needed in order for the relevant role players to consider serious offences too for restorative justice options. It is also important to create opportunities for this by providing more staff and increasing awareness within communities in order to assist role players to apply restorative justice within the justice system. The findings reflect that our community structures (families, churches, schools, i.e. the broader community), is uninformed with regard to the nature and application of restorative justice.

The research shows the relevance of using restorative justice in our current criminal justice system, but it is also evident that we need to involve and educate communities on the concept of restorative justice in order to gain their confidence. There is an untapped field of resources available in communities to assist with victim empowerment and rehabilitation programmes. Role players, such as the state and other institutions, need to work together more closely to promote this concept.

### **6.2.3 Legal and Policy Frameworks for Restorative Justice**

The literature review in Chapter Two focussed on the legislation and policy frameworks passed since 1994, and specifically on those that focus on the rights of the child and on developments within the youth justice system. It then explored alternative measures for a comprehensive justice system to manage children and young people who are in conflict with the law. It was necessary to discuss the Child Justice Bill (No. 49 of 2002), the Probation Services Act (No. 116 of 1991) and the Probation Service Act (No. 16 of 1991), as the focus of this study has been on the application of restorative justice in the sentencing of

youth offenders. The drafting of the Child Justice Bill, in particular, has been strongly informed by the restorative justice paradigm, and it was specifically drafted to promote and regulate diversion from formal court procedures. This Bill incorporates national and international instruments, protecting the rights of the child and ensuring appropriate, individual responses for each child in trouble with the law. The proposed legislation even makes provision for a child justice court, outlines the details of sentencing and makes provision for monitoring the child justice system. The powers and duties of the probation officer were discussed in broad terms, although with particular focus on the compilation of a pre-sentence report and the assessment of each child, to prevent a child being incarcerated or kept in police cells.

The partnership between the relevant role players, that is, magistrates, prosecutors and probation officers, was placed in context for the purpose of the study, as the research participants are all responsible for applying restorative justice in the sentencing of youth offenders. The study revealed that, although magistrates and prosecutors admit that they rely heavily on the information and recommendations made by probation officers, the final decision still lies with the courts and thus with the magistrate. This means that magistrates still have the power to overrule the recommendations made by a probation officer. The statistics obtained from charge sheets may be proof of this imbalance of power between judicial officials and probation officers.

The findings concluded that, although policy frameworks are available, a lack of resources and knowledge is hampering the effective implementation of such provisions. Although Section 4 of the Probation Service Act was amended to include mediation and group conferencing, the findings concluded that respondents generally do not apply such restorative justice principles in the sentencing of youth offenders. Only a very small percentage of sentences use these principles.

The lack of knowledge about the practical application of restorative justice was also illustrated by the fact that, contrary to local and international experiences, respondents were wary of using restorative justice sentences for a wide range

of cases, including sexual offences, repeat offences and serious crimes. They also demonstrated a lack of knowledge regarding how to compensate victims, in spite of the fact that the Criminal Procedure Act (No. 51 of 1977) makes provision for such compensation orders. The study revealed a low utilisation of compensation orders, even though this option is in line with the principles of restorative justice. The findings from the charge sheets with regard to community services are largely to be expected, because offenders can be sentenced to community service both as a condition of suspended sentence and as part of correctional supervision. These conditions are commonly seen by most of the respondents as a way of taking responsibility for the crime and of paying back to the community. However, the statistical data from the charge sheets reflect a low utilization of these sentence options. The study revealed that, even though respondents are guided by legislation to apply restorative justice options, they do not necessarily apply it in practice. The percentages of postponed and suspended sentences were extremely high but lacked the inclusion of conditions or other orders to enforce compliance with restorative justice.

The conclusion is drawn that, although respondents appear to be knowledgeable regarding the objectives and principles of restorative justice, they lack the capacity and/or the inclination to apply these. The question could be raised as to whether the proposed system can and will be adequately resourced.

### **6.3 RECOMMENDATIONS**

Arising from the above-mentioned conclusions, the following recommendations are made:

- Theoretical knowledge of role players involved in the child justice system on restorative justice should be reinforced and updated to ensure effective application of restorative justice.

- Staff from the Departments of Justice and Social Services and Poverty Alleviation should receive in-service training concerning juvenile justice and youth development, to enable them to understand the vulnerability and needs of the youth. This will help them to apply a developmental restorative justice approach in the management of such children.
- A re-evaluation of the decision making process within our criminal justice system is needed. More cognisances should be taken of the recommendations made by probation officers in their pre-sentence reports. The relationship between the main role players in the child justice system, namely the police, the courts, the department of corrections and the welfare sector, needs to be assessed. In order for the child justice system to operate effectively, there needs to be close cooperation between these role players. Magistrates must be committed to the needs of youth at risk and be able to understand the processes involved in restorative justice. This will contribute to a shift in mindset from relying on harsh forms of punishment to a more restorative outcome.
- Interdisciplinary cooperation between the different role players, welfare organizations and communities is necessary to provide programmes and community services that will have a restorative justice outcome, and opportunities for offenders to be involved in rehabilitation.
- The present problems of the high crime and re-offending rates and of under-resourced service providers should be addressed by both non-governmental and State departments as a matter of urgency, to reduce and hopefully even prevent crime. Judicial officials should ensure the use of alternative sentencing options for juveniles who have committed offences to reduce the high prison population. Because of its ineffectiveness in reducing recidivism and its socially and psychologically damaging nature, imprisonment should be avoided at all cost and should only be used as a last resort.
- Resources and funds should be made available to address the needs of victims and to assist victims before, during and after court proceedings.
- Mediation services and family group conferencing should be made available for the victim, the offender and the community, because these

programmes provide an excellent way of operationalizing the values and aims of engagement that underpin the restorative justice process.

- The promulgation of the Child Justice Bill (No. 49 of 2002) should be prioritised for finalisation on the government agenda. The finalisation of the Bill will enforce the application of set standards and procedures. The Bill will bind officials to adopt a strategy and obey certain rules. This will also enhance the implementation of restorative justice.
- The appointment and utilization of more probation officers and judicial staff to promote, recommend and monitor the application of restorative justice is essential.
- Awareness campaigns and training of principal role players to educate families and communities on the principles and application of restorative justice should be undertaken.
- Assistant probation officers should be utilized to assist with the setting up of mediation processes or to follow-up on restorative justice programmes that were endorsed by the court. This will alleviate the workload of the probation officer.

#### **6.4 FURTHER RESEARCH:**

It is recommended that further studies be undertaken to determine the following:

- The understanding of restorative justice amongst victims and offenders, by using an experimental or control group.
- The effectiveness of diversion programmes in the prevention or control of re-offending by youth offenders; and
- An evaluation study to ascertain the effective implementation and promotion of restorative justice by probation officers, since this is seen as one of the key tasks of this professional group, as described in the Probation Services Act (No. 116 of 1991)
- Investigating the attitudes towards the application of restorative justice of community members not directly involved in criminal cases.

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**INTERVIEW SCHEDULE**

1. To what extent, in your view, is the current criminal justice process effective in:

a) preventing crime,

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b) deterring offenders and potential offenders

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c) protecting society

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d) rehabilitating offenders.

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1. What role, if any- other than giving evidence – should **the victim** play in the criminal justice process.

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2. What is **your understanding** of 'Restorative Justice'?

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3. What would you regard as the **main objectives** of 'Restorative Justice'?

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4. To what extent do you consider **Restorative Justice principles when sentencing** a youthful offender?

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5. In your view, what **benefits**, if any, does Restorative Justice hold for:  
a) the victim of crime?

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b) the offender?

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c) the community?

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**Please elaborate.**

6. Do you feel that Restorative Justice holds any **disadvantages** for:

a) the victim?

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b) the offender?

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c) the community?

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**Please elaborate.**

7. Are there **particular sentences** that, in your view, have Restorative Justice outcomes? If so, which, and how would their outcomes be restorative?

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8. In your view, for **which crimes** would a Restorative Justice approach be most appropriate?

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9. Do you feel that Restorative Justice would be **inappropriate** for certain crimes? If so, please indicate which, and give reasons.

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10. Do you have **any other views** on the matter of applying Restorative Justice in respect of youthful offenders?

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