

# Restorative Justice Empowerment\*

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## ***Restorative Justice Empowerment***

According to traditional wisdom, determining the just and fair (or the best and most appropriate) response to a criminal act is best left to trained and specialised criminal justice professionals. Restorative justice philosophy holds the opposite view, that such decisions are best made by the principal parties (victim and offender) themselves, and preferably in dialogue with one another in the presence of their respective communities of care and support (typically family and friends). Thus, the fundamental difference between conventional and restorative justice can be most usefully articulated by reference to this one concept: *empowerment*. That is, empowerment of the key stakeholders in the responses of the criminal justice system to wrongful and criminal acts so that the matter is resolved in ways that are *meaningful and right for them*.<sup>1</sup>

This is a complex idea. For one thing, empowerment of this sort cannot be total empowerment where anything goes. Rather, it must be circumscribed, or *bounded*. The relevant restorative processes and outcomes must be consistent with society's shared and most important standards, norms, and values, not to mention the law. For another, restorative justice philosophy emphasises individual and community healing and the creation and re-establishment of social harmony and peace through the criminal justice response to the offence. Thus, the restorative justice empowerment of the primary stakeholders in the resolution of the dispute is, not only bounded, but also *directed*. The primary purpose of this paper is to articulate the meaning and application of this complex but critical idea in restorative justice. I start by contextualising the idea of directed empowerment as it presents itself in the restorative justice literature and in practice.

### **Restorative Justice Ideology and Respect for Autonomy**

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<sup>1</sup> Barton 1999, 2000a,b.

According to Galaway and Hudson,

Three elements are fundamental to any restorative justice definition and practice. First, crime is viewed primarily as a conflict between individuals that results in injuries to victims, communities and the offenders themselves, and only secondarily as a violation against the state. Second, the aim of the criminal justice process should be to create peace in communities by reconciling the parties and repairing the injuries caused by the dispute. Third, the criminal justice process should facilitate active participation by victims, offenders, and their communities in order to find solutions to the conflict.<sup>2</sup>

There is an unstated assumption behind this description, that restorative justice processes rely critically for their effectiveness on the *empowerment of the primary stakeholders* in the dispute. Judge FWM McElrea's account of restorative justice makes this critical component explicit, as well as emphasises the directed nature of restorative justice empowerment.

Thus we come at once to the heart of restorative justice, which I define as involving three radical changes to the mainstream western model of justice:

- 1) The transfer of power (principally the courts' power) from the State to the community;
- 2) The use of FGC [Family Group Conferences] or some other mechanism to produce a negotiated community response; and
- 3) The involvement of victims as key participants, thereby enabling a healing process to occur.<sup>3</sup>

While a necessity, the directed nature of restorative justice empowerment presents conceptual and practical challenges of its own.<sup>4</sup> Stated briefly, this ideologically driven expectation and commitment to secure "restorative" solutions, and the corresponding working

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<sup>2</sup>Galaway and Hudson 1996, p. 2.

<sup>3</sup>McElrea 1996, p. 109.

<sup>4</sup>The ideological and practical commitment towards healing and reconciliation also comes through strongly in the restorative justice literature in the form of denunciations of punitiveness and retribution and corresponding exhortations of restoration and reconciliation in response to wrongful and criminal acts. While such a conceptual framework in terms of the (false) retributive/restorative dichotomy is misleading (Barton 1999, 2000a,b), it highlights once again the emphasis placed on restorative justice interventions being helpful and constructive, as opposed to being counter-productive and destructive.

definition of success in terms of “restorative” outcomes, presents restorative justice practitioners with the unenviable task of securing restorative outcomes without manipulation or imposition of a restorative agenda on the parties. The parties often arrive at conciliatory agreements and outcomes without difficulty, but just as often they do not. Forgiveness and reconciliation are the last things on an angry victim’s mind, and the self-protective rationalisations of defensive, disengaged offenders are no lesser obstacles. Restorative justice ideology is one thing – reality often proves to be another. Restorative justice interventions and meetings are often messy, and the road to healing and reconciliation can be rocky, and the path to them, far from being obvious, sometimes may not even be there.

The challenge for the practitioner is to overcome such obstacles by taking the parties through an empowering process of consultation, discussion, venting, and negotiation that will bring them to the point where reconciliation and healing, if these are at all possible in the circumstances, can easily and naturally happen. Trying to manipulate or force participants into “restorative” outcomes and agreements, not only tends to be counter-productive, but violates people’s autonomy and right to think and decide for themselves and hold onto their emotions without fear of disapproval or pressure from outside from people with more power. Thus, in a relevant and very important sense of the word, good restorative justice practice, especially in the more complex and difficult cases, is an art. But, as much as it is an art, it is not a mystery. It depends critically on two major factors:

1. Development and competent application in criminal justice contexts of appropriate skills and techniques of alternative conflict and dispute resolution.
2. Working knowledge of a sound restorative justice philosophy and of a conceptual framework that operationalises and translates that philosophy into practice.

The former of these falls outside the scope of this paper. My purpose here is to provide the reader with a conceptual framework for the latter by articulating in greater detail the most fundamental concepts and distinctions that give effect to the idea of *directed empowerment* in restorative justice processes and meetings. Taken in turn, these concepts and distinctions are:

1. Deep versus surface approaches to problem solving
2. Moral versus legalistic problem framing
3. Primary versus secondary stakeholders

4. Individual and community empowerment
5. The principle of equal justice
6. The meaning and definition of success in restorative justice best practice

### ***1. Deep and surface approaches to resolving problems***

The *deep versus surface* construct signifies fundamental philosophical and ideological differences that are readily recognisable in practice. Within each and every restorative justice program managers and practitioners have a critical choice between taking a *deep approach* or a *surface approach* to the way their processes and meetings are being run. A *surface approach* is characterised by the focus being on reaching tangible agreements and certain fairly specific material outcomes, such as restitution and compensation to victims, keeping the case out of court, and saving the offender from a criminal conviction and jail.

While such goals and outcomes are important, they do not exhaust, let alone do justice to, the idea of restorative justice in terms of reconciliation and healing. Best practice in restorative justice goes beyond the surface approach, beyond the kind of material externalities mentioned. The fundamental aim and purpose in restorative justice is to bring about closure and healing of the effects of crime, especially the emotional harm, disconnectedness and social isolation experienced by those most seriously affected by the wrongdoing. Invariably, this includes not only the victim and those close to them, but also the offender and their family and friends. Therefore, consistent with restorative justice ideology, best practice is strongly directed towards repairing the damage to individual lives and social bonds by reconciling the parties in conflict and securing a sense of closure for them through the intervention.

Such substantive aims and outcomes (substantive justice) require that practitioners take a *deep approach* in the way they respond to the occasioning criminal wrong, its causes, and its consequences. In terms of the process employed (procedural justice) the deep approach means that substantive resolutions and outcomes are achieved through processes that involve *all* the relevant stakeholders, that victims, for example, are not left out. It also means that all participants are empowered and encouraged to speak their minds truthfully and without fear. Finally, it means that participants on both sides are helped and encouraged through appropriate

preparation and the skillful use of prompts in their meeting to talk, not only about facts and figures, but also about their emotional experiences of disappointment, anger, devastation, and fear. Without dealing with these emotional dimensions of the wrongdoing, closure, reconciliation, and the satisfaction that the matter has been properly resolved and put to rest are unlikely to be achieved.

Indeed, unresolved emotional and moral psychological issues hinder, not only healing and lasting reconciliation between the parties, but also material agreements.<sup>5</sup> This reason, however, weighty as it is, is not the main argument supporting the deep approach. Criminal justice interventions that make the most difference overall to the relevant stakeholders are not only fair and just to the offender in the traditional sense, and they are not merely compensating the victim in material terms, but are also, and principally, restorative in the deeper sense just explained. Thus, a deep approach in restorative justice is not a boon, but essential. In turn, and in practice, the deep approach requires a certain kind of focus in the way the criminal justice problem at hand is framed and approached – which leads directly to the next point of discussion.

## ***2. Moral versus legalistic approaches to framing problems***

Program managers and Facilitators can choose to treat their cases as being primarily *legal* matters, or they can treat them as being primarily *moral* matters. In the former instance the problem or incident will be seen as a case where the law has been broken and the main purpose of the intervention is to determine the most appropriate response to the offence which is understood and treated primarily as *a violation of the law*. This kind of conceptualisation or interpretation of the offence leads more or less automatically to a surface approach in terms of both the process and the kind of resolution sought. This is because in legal framing the focus is on the law and formal requirements in terms of achieving material agreements and resolutions, rather than the *moral violation* of particular individuals and communities whose lives have been wrongfully disrupted by the wrongdoer and who, as a consequence, are likely to feel deeply violated, upset and angry. Such social and moral psychological considerations, and participants' corresponding needs in terms of closure, conciliation, and emotional healing, are more naturally the domains of moral problem framing.

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<sup>5</sup> Retzinger and Scheff 1996.

The likelihood of legal framing is particularly high in cases where legal professionals step into power vacuums created by poor facilitation processes, or by poor preparation that results in low attendance rates from primary stakeholders. Consider a typical example. Suppose that the victim fails to attend. They may or may not be represented by professional people from a victim support organization. Or suppose that the victim does attend but does not feel empowered enough to participate confidently because of poor preparation or facilitation in the meeting, or because they feel intimidated in the absence of support from family and friends who were not invited or encouraged to attend. Suppose also that there is a similar lack of support and empowerment for the offender, and that this is compensated for by the attendance of a legal advocate. In such meetings it is almost inevitable that the legal advocate and the police officer, or even a victim advocate, or a social worker, will dominate the discussion, possibly speaking '*Legalese*,' quoting statutes, current court practice and precedents, trying their best to clinch what they consider to be the best deal for their respective clients. Indeed, in the absence of powerful communities of support and care for both the offender and the victim, it is hard to see how else a meeting like this could proceed.

While such processes may be more interesting and action filled for the relevant professionals, they seriously short change primary stakeholders. They are but a recreation of the court room with all the characteristics of a surface approach, bar the judge, and all parties are back to square one. It is important, therefore, that Facilitators do not allow restorative justice interventions and meetings to go down this track. Consistent with restorative justice philosophy, the alternative is to frame and conceptualise offences as *moral wrongs* that have been committed against specific, identifiable individuals and their immediate communities (whenever such is the case). In other words, when an offender is confronted in a restorative justice meeting, they should not merely, or primarily, be facing a legal issue of having broken the law. Rather, they must be confronted with distinctively moral issues and realities, especially in terms of the harmful consequences their actions have had on others.

Questions of how best to repair the harm caused, and of how to put things right, are also moral matters. Principally, it is a moral expectation that offenders should make appropriate amends for their wrongful behaviour, that they should put right the wrongs they committed. Thus, to the extent that participants in a restorative justice meeting discuss the criminal behaviour in question by focusing on its moral and emotional dimensions, they engage each other as members of the moral community, as real people with hopes, dreams, fears, and vulnerabilities. This kind of moral and emotional engagement with each other is much more

meaningful and satisfying to stakeholders than the dry, bureaucratic and legalistic approach of the professionals who have no personal or emotional investment in the matter and its resolution.

In making the above observations I am not suggesting either that professionals should not be involved in these matters, or that they should make an emotional investment in them. What I am saying is that, as secondary stakeholders, professionals need to be aware and must respect the emotional and moral psychological needs of the primary stakeholders for restoration in terms of closure, emotional conciliation, and healing. In practice this means that professionals at the very least take the back seat in restorative justice meetings, and allow the community of primary stakeholders to deal with their issues and emotionality as *moral* matters, rather than as legal matters to be resolved through an adversarial process. Ideally, their role is to provide appropriate information and support for primary stakeholders, thus maximising in restorative justice terms the benefits of the meeting for everyone involved.

While professionals must play and discharge their respective roles and responsibilities to the parties, the law, and the public interest, these must be done in ways that do not marginalise, disempower, or otherwise interfere with the emotional healing and reconciliation which is so important to primary stakeholders. They must resist the temptation to dominate the meeting by focusing on legal and other technicalities that are of interest mostly to them, or by behaving as if they were supposed to be the major players and decision makers in the matter. They are not, and if they are allowed to be, then restorative justice meetings are hardly worth the trouble. From the point of view of marginalised and disempowered participants, in diversionary programs the case could just as well have gone to court.<sup>6</sup> Alternatively, it could have been disposed of as a police caution, which would be much cheaper, less time consuming and all round less troublesome and aggravating for everybody involved.

### ***3. Primary and secondary stakeholders***

Ideally, and as already explained, in a restorative justice meeting there is restoration and healing for all key participants: the victim, the offender, and their respective communities of support and care - which typically consist of family members, close friends, colleagues and

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<sup>6</sup> However, acquiring a criminal record would still remain a relevant and important consideration where court would be the only alternative to a poorly run meeting.

neighbours, trusted and respected teachers, coaches, counselors, members of one's church, etc. For the sake of conceptual clarity and good practice it is important to think of all these participants as being *the primary stakeholders* in the case and to think of facilitators, social workers, psychologists, lawyers, police, etc., as being *secondary stakeholders*.

While not all stakeholders may fall neatly into one or the other of these categories, the *primary versus secondary* construct signifies fundamental differences between different types of participants, which will be reflected in good practice. As we have seen, restorative justice conceptualises crime primarily as a social, or rather anti-social, exchange between individuals that result in injuries to specific people and communities, rather than "The Law," "The Crown," "The People," or "The Queen." Wrongdoing and crime are committed by one person, the wrongdoer or offender, against an identifiable other, the victim. Especially when there is an identifiable victim who has been wronged and harmed, it is a distortion and obfuscation of the truth to claim that the crime was committed against the state.<sup>7</sup>

Starting from such a fundamentally different theoretical position from traditional criminal law theory, restorative justice philosophy also holds that, as long as agreements are within the law and do not obviously harm the public interest, resolutions reached between the parties are primarily *their* business, not that of professionals representing the state. Unlike the offender, the victim and their respective families and friends, professionals do not have, or at least they are not supposed to have, anything major or personal at stake in the way the matter is resolved. Since it is the primary stakeholders who are most affected by the wrongful behaviour in question, the primary focus of a criminal justice intervention ought to be their restoration and healing, and the efforts of the professionals must be directed toward this end.

When there is closure, emotional conciliation and healing between the primary parties, reaching concrete agreements and tangible outcomes between them also becomes easy, if not automatic. Conversely, even if tangible agreements and outcomes are reached in terms of the surface approach, but the process fails to achieve closure, emotional conciliation and healing for the primary stakeholders, the proclaimed success of the intervention will be overshadowed by a serious failure in restorative justice terms. When this happens, not only is there no sense of closure and satisfaction for the primary parties that justice has been done, but the likelihood of

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<sup>7</sup> For a more complete argument on this point, see Barton 1999 (Ch. 10), 2000c.

the offender reoffending remains unaffected. Additionally, there is an increased likelihood that some primary stakeholders are left with a sense of having been victimised or revictimised by the intervention or the meeting. Therefore, maintenance of a clear distinction between primary and secondary stakeholders in restorative justice is critical.

As to the responsibility for ensuring constructive participation in restorative justice processes and meetings by professionals, that lies squarely with the Facilitator. The Facilitator can ensure that their participation is constructive by:

- 1) Informing them beforehand of what is expected of them;
- 2) Involving professionals only at appropriate stages of the process or the meeting;
- 3) Helping them to stay within their roles through appropriate prompts and facilitation techniques, such as asking them the right questions at the right time and, when necessary, asking them to express their concerns at a later point when so prompted (by the Facilitator).

These points highlight once again the importance of competent practitioner training – a subject that will be discussed in more detail below. They also highlight the importance of inviting sufficient numbers of supporters of the right kind for both the victim and the offender. In the face of a strong group of supporters, the need, the temptation, as well as the ability of professionals to take over will diminish – which leads to the next critical consideration, the importance of creating and strengthening communities of support and care on both sides of a criminal justice dispute.

#### ***4. Individual and Community Empowerment***

*Invitation and Involvement.* Quite often, achieving closure and emotional conciliation through restorative justice processes depends critically, not only on individual, but also on community empowerment. Especially in the more serious and difficult cases, the power of restorative justice consists in the creation and empowerment of a community of caring supporters for both the victim and the offender. Their supporters should be the most significant people in their respective lives, people who they trust and respect most at a personal level, people with whom they have, or have had in the past, significant personal and emotional ties. Typically, these will be family members, friends, colleagues, neighbours, teachers, coaches, etc.

There should not be less than 4 – 6 such supporters present on each side. As a general rule, however, the Facilitator or Convenor should invite everybody who has been significantly affected by the incident and anyone who is a legitimate stakeholder in the resolution that may be reached at the meeting. Some of the most powerful and successful restorative justice meetings have 30 or more participants present.

Balanced and empowered communities of supporters are a Facilitator's greatest assets. They are the foundation of consistent success, and a most reliable measure against people feeling victimised and revictimised in meetings when things get difficult, as they often do. By tapping their support for the offender and the victim at appropriate times, and by prompting for their views and considered judgements on crucial matters of right and wrong, harm, responsibility, punishment, apology, forgiveness, reparation and conciliation, a Facilitator creates an atmosphere of safety, reasonableness and trust in which even the most difficult issues can be discussed and dealt with in a fair and sensible manner.

By contrast, the absence of either the victim or the offender, and poor supporter presence tends to generate all kinds of problems and difficulties. In such meetings Facilitators need to work hard to keep things on track, and it tends to be under such conditions that they abandon neutrality and impartiality in an attempt to balance and rescue a deteriorating situation. This should never happen. Moralising, patronising, and intimidating behaviour by a Facilitator are not only wrong and out of place, but are also unnecessary when there are sufficient numbers of victim and offender supporters to draw on for correcting and balancing skewed perspectives, and cooling and stabilising heated and volatile situations in the course of the meeting.

*Empowerment.* Once invited and involved, individuals and their supporters must be empowered so that they, as a community, can deal with both the causes and the consequences of the incident in question. The degree to which this can happen depends critically on the extent to which professionals let go of their own institutionally sanctioned power and control. Provided that proposals are within the law and are not unreasonable, professionals must share and use their power to support the primary stakeholders in dealing with their own issues and problems the way it makes sense and is right for them. Local problems are often best addressed through local solutions. In most cases it is the primary stakeholders who are best placed to decide how best to address, not only the consequences, but also the causes of the wrongful behaviour in question, thus minimising the chances of recurring problems.

In practice, individual and community empowerment requires that primary stakeholders be adequately informed beforehand of their decision making powers, and of their rights and responsibilities in relation to the case. They must know and must be reassured that *they* can deal with these issues, and that competent professionals will be there to help them. Next, in the actual meeting they must be enabled and encouraged to express their views and feelings concerning the matter at appropriate times and stages in a well designed process. Primary stakeholders must not be ignored, sidelined, silenced, trivialised, or intimidated, either by secondary stakeholders, or by other primary stakeholders who may be more vocal and dominant. Finally, crucial decisions in terms of outcomes and resolutions must be made through consensus decision making by primary stakeholders, in necessary through the help and support of professionals and other secondary stakeholders present.

Provided that sufficient numbers of primary stakeholders are present at the meeting from both sides, it is not the place of secondary stakeholders to veto a resolution with which all primary stakeholders are happy and satisfied. For, if the primary stakeholders feel disempowered by professionals their experience is unlikely to be positive and restorative. Under such conditions of disempowerment, from the perspective of the primary stakeholders at least, nothing really has changed. If they are sidelined, or are being told what to do and how to do it, there is little point in their attending the meeting, and might well have been better off without it.

*Which community? Two concepts of a community in restorative justice.* The concept of community empowerment in restorative justice is not as precise as it may at first appear, or as we need it to be. It can mean the *community of primary stakeholders* in the dispute, that is, the offender, the victim, and their respective families, friends, trusted neighbours, colleagues, etc. Alternatively, community may be taken to mean a *community of secondary stakeholders* who represent the wider community, such as selected and trained community representatives, and other professionals, such as the police, probation officers, social workers, etc. While these two definitions of a community represent pure categories, and in practice most restorative justice programs create a mixed community of participants from both categories, I suggest that the transfer of the state's power that Judge McElrea is talking about is incomplete if the power currently invested in the courts and criminal justice professionals is transferred only, or mostly, to other *secondary stakeholders* in the dispute, especially since many of them are still the state's representatives.

Decision making powers in terms of determining eligibility for diversion from the courts and in terms of the final resolutions reached in each case should predominantly lie with the community of primary stakeholders, rather than with secondary stakeholders. Since restoration and healing are needed mostly in the community of primary stakeholders, it is *they* who need to be mostly involved and empowered to deal with the causes and consequences of the incident or dispute in question. When a meeting is dominated by secondary stakeholders, either because primary stakeholders are scantily represented or because professionals fail to step back and surrender their power, primary stakeholders will feel marginalised and the restorative, peace making, and healing potential of the meeting is undermined.

Overly vocal and dominant secondary stakeholders can also inhibit the degree to which primary stakeholders will express their thoughts and feelings about the incident and the conflict. For example, when a shaken and tearful offender finally finds the strength to talk about their feelings of enormous shame and devastation at having betrayed the trust of loved ones, it is most inappropriate and unhelpful of a secondary stakeholder to cut them short in pursuit of a different agenda. Ultimately, it is the Facilitator's role to ensure that secondary stakeholders do not inhibit active participation and self-disclosure from the primary stakeholders. To the extent that meetings are characterised by such inhibiting factors of individual and community disempowerment, they will fall short of their potential in restorative justice terms.

### ***5. The principle of equal justice***

Focusing on restoration and healing also highlights the importance of taking seriously a hitherto neglected side of criminal justice: *criminal victim justice*. The experience of victims in the standard criminal justice process is captured well by Judith Simpson's one line summary of an edited collection of survival stories by victims of crime:

As you will note, in every story the victim is revictimised by the system.<sup>8</sup>

Restorative justice is meant to be different. In view of the emotional harm, disruption, and social isolation experienced by many victims as a consequence of their victimisation, securing for

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<sup>8</sup> Personal correspondence with Victims of Crime Assistance League (VOCAL ACT) Administrator, Judith Simpson. The book referred to is Giuliano 1998.

them a fair and just process is as imperative as it is for the offender. If they are to be consistent and successful, restorative justice programs and interventions must give effect to the notion that crime is primarily a matter between the victim and the offender, rather than the offender and the State. Restorative justice ideology is explicitly predicated on the principle of equal justice, that *justice and fair treatment are equally the right of both the victim and the offender*. While traditional criminal justice systems are quick to pay lip service to the principle, their processes and procedures almost invariably disempower and revictimise the victim.

Unfortunately, victim interests continue to figure as secondary even in what are meant to be restorative justice programs. For example, in the samples studied by Maxwell and Morris,

Victims actually attended in less than half the cases when they could have been present. This failure of victims to attend ... was largely due to poor social work practice. Only 6 percent of victims said that they did not want to meet the offender. When invited at a suitable time and with adequate notice, victims attended.<sup>9</sup>

A less than 50% victim attendance rate is unacceptable from a restorative justice point of view. Initial data from the Reintegrative Shaming Experiment (RISE) Project indicates that in Canberra victims attended 86% of conferences.<sup>10</sup> Even this figure is too low. The Wagga Wagga Police conferencing program in NSW has shown that with skill and dedication a near-perfect (98%) victim attendance rate is achievable.<sup>11</sup>

However, while without being informed and encouraged to attend victims miss out on opportunities for restoration and healing, it must not be assumed that restorative justice interventions and meetings will automatically result in restoration and healing for attending victims. In the same program Maxwell and Morris found that among victims who did attend their conferences only in 49% of cases did they express any degree of satisfaction with the

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<sup>9</sup> Maxwell & Morris 1996, p. 99.

<sup>10</sup> Sherman, et. al. 1997.

<sup>11</sup> Moore 1995.

outcome; only about a third of victims went away from the FGC feeling better; and about a third of them said they felt worse as a result of attending the FGC.<sup>12</sup>

On the basis of such figures, Maxwell and Morris concluded that “as a system of restorative justice, family group conferences are not always successful.”<sup>13</sup> This is an understatement. From the point of view of victim justice and victim restoration such results are unacceptable. They raise important ethical and legal questions about exposing victims to such high risks of revictimisation<sup>14</sup> – considerations lead to my final point of discussion on standards of success and failure.

### ***6. Success and failure in restorative justice***

Restoration for primary stakeholders in terms of reported and visible signs of closure, satisfaction, emotional conciliation and healing are largely a function of Facilitator competence in preparing and running a restorative justice meeting consistently with the deep approach. Conversely, participant dissatisfaction, experiences of victimisation and revictimisation are largely functions of poor practice which, in turn, is all too clearly linked to inadequate training and the lack of ongoing quality feedback on practice. Good initial training and ongoing feedback are essential to evolving, refining, and maintaining good practice.<sup>15</sup> The onus is on those entrusted with the implementation and the running of restorative justice programs to establish best practice in their jurisdictions by ensuring that all Facilitators receive appropriate training, and that nobody is allowed to practice until they can demonstrate minimum standards of competency in meeting preparation and facilitation. .

The program studied by Maxwell and Morris is a very good example of how *not* to implement restorative justice programs. Those poor client satisfaction and revictimisation

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<sup>12</sup>Maxwell and Morris 1993, 1996.

<sup>13</sup> Maxwell & Morris 1996, p.100.

<sup>14</sup>Barton 2000a.

<sup>15</sup> Maxwell & Morris 1996, p.103.

figures are mainly due to the continued use of a sub-optimal facilitation process,<sup>16</sup> and the fact that meetings are convened and facilitated by a transient population of Coordinators. To make matters worse, these Coordinators are typically thrown in at the deep end without appropriate training in conflict resolution and facilitation techniques. Over the past ten years, many Coordinators (mostly social workers) have come and gone, using the position of Coordinator as a step in their career ladder. All that time, the department responsible for the program has failed to provide appropriate training in conflict resolution and conference-specific facilitation techniques to its practitioners.

Such program implementation and practice is not only substandard, but also reprehensible.<sup>17</sup> There is a serious obligation on everybody involved in the planning and implementation of restorative justice programs – from policy advisers and legislators to program managers and Facilitators – to ensure that restorative justice interventions do make a positive difference for the primary stakeholders. At the very least they should not end up worse off than they were before, or would have been without, that intervention. Moral duty to the primary stakeholders, and the moral responsibilities of public office require that no criminal justice program is allowed to deliver below this minimum.

Moreover, it is important that poor results such as the above are not discounted or played down. Most importantly, poor findings should not lead to a lowering of standards and

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<sup>16</sup> For example, apart from poor victim presence and the near-complete absence of communities of support for the victims, for the most part conferences also fail to create strong communities of support for the young offender who, perhaps, would need it most. Additionally, not unlike in the court room, meetings almost invariably start off with the police officer reading out the charges, followed by the victim's account, with the young offender having the chance to speak only after that. This is a back to front process and is disempowering and intimidating, especially to an already timid and fearful young offender. The good sense in giving young offenders first say in restorative justice meetings has been emphasised by Braithwaite and Mugford as early as 1994 (p. 150), as well as by others since then, but with little effect. (Barton 2000a)

<sup>17</sup> The lack of inadequate training has been pointed out in a Ministerial Review as early as 1992, and subsequently by Maxwell and Morris (1993, 1996). In terms of providing practitioners with training in conference-specific facilitation and conflict resolution techniques, there has been little change.

expectations through re-definitions of success and failure in terms of the lowest common denominator. Thus, I disagree with Maxwell and Morris that

the real measure of the success of family group conferences is the extent to which they represent a fair, humane and acceptable method of dealing with young offenders.<sup>18</sup>

From the point of view of restorative justice this is clearly setting the standard too low. Restorative justice interventions must deliver more than merely being “a fair, humane and acceptable method of dealing with young offenders,” for, arguably, so is court. Rather, the question to ask is: *What kind of difference can restorative justice interventions make that are not possible through court?* According to restorative justice ideology and philosophy, the difference must be in terms of achieving closure, emotional conciliation, and healing for all primary stakeholders in line with the deep approach.<sup>19</sup> Also, such criteria of success in restorative justice must be defined by reference to *both* offender- and victim-focused criteria. We must not allow discounting their importance by defining “real” success in terms of weaker, less demanding criteria – criteria that do not even reflect any of the distinctive features and elements of restorative justice ideology. Rather, deficiencies in practice should be highlighted so that they may be rectified in light of standards that are clearly based on restorative justice ideology and philosophy.

*Recidivism: The toughest test.* While not unique to restorative justice, the challenge of combating persistent offending is an important criterion of success by which the effectiveness of restorative justice interventions must be measured. While at this point empirical data is still lacking, it is not at all unreasonable to expect that restorative justice interventions show themselves to be more efficient than court at combating recidivism.<sup>20</sup> My view is that it is especially in the most difficult cases that restorative justice interventions must be used to make a difference. Naturally,

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<sup>18</sup> Maxwell & Morris 1996, p.105.

<sup>19</sup> Judged only in these terms, in my view the program in question falls very short of its restorative potential. The fact that many young offenders are diverted through it from court could be considered a benefit that, arguably, is not due to the program being “restorative” in intent or nature.

<sup>20</sup> For more detailed explanations of how and why restorative justice interventions can make an impact on recidivist offenders, see Barton 2000b.

the more difficult a case and the greater the need for social reintegration and community support, the better the preparation, the program support, and the actual facilitation of the meeting must be. Otherwise, restorative justice interventions will have no better chance than traditional criminal justice responses in addressing the underlying causes of persistent offending.

This is clearly borne out in the aforementioned program where only a third of young offenders felt involved and often said little in their FGCs, 26% of a sample of 14 – 16 year olds referred to FGCs in 1990 – 91 had been (re)convicted within 12 months, 64% of them had been (re)convicted after just over four years, and 24% of them had been persistently reconvicted over the same period.<sup>21</sup> These results are more than disappointing. In light of the much-emphasised potential of community empowerment in dealing with crime, the above reoffending rates clearly fall short of legitimate expectations.<sup>22</sup>

Therefore, and in conclusion, in cases where restorative justice interventions failed in addressing persistent offending, we must first examine whether the quality of preparation, facilitation, and program support have been up to standard. It would be premature and mistaken writing off restorative justice in the high risk cases as another failure before we even satisfied ourselves that the relevant attempts had been done well by well-trained and competent Facilitators who consistently and reliably use the deep approach rather than a surface approach in addressing problems, frame problems in moral terms rather than legal ones, observe the principle of equal justice between offenders and victims, and give practical significance to the distinction between primary and secondary stakeholders in the resolution of the dispute by empowering the former in a community context with backup support from the latter.<sup>23</sup> As with most initiatives and programs of this nature, much depends on practice, and the limits and true potential of restorative justice empowerment will not be known until these fundamental concepts

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<sup>21</sup> Morris and Maxwell 1997.

<sup>22</sup> Alder and Wundersitz 1994; Barton 1999, 2000a; Barton and van den Broek 1999; Braithwaite 1989, 1996; Braithwaite and Mugford 1994; Consedine 1995; Consedine and Bowen, 1999; Maxwell and Morris 1993, 1996; McElrea 1993, 1996, 1997; Moore 1993; O'Connell 1996, 1997. Umbreit 1989; van Ness 1990; Wright 1996; Zehr 1990; and many others.

<sup>23</sup> The latest research on FGCs and reoffending by Maxwell (1998) confirms these hypotheses.

and distinctions are consistently and reliably reflected and implemented through restorative justice best practice.

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