MARIE KEENAN | ESTELLE ZINSSTAG

Sexual Violence and Restorative Justice

Addressing the Justice Gap

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MARIE KEENAN AND ESTELLE ZINSSTAG

With the participation of
Caroline O'Nolan, Ivo Aertsen, Gunda Wössner, Anne-Marie de Brouwer, Virginie Busck-Nielsen, Daniela Bolívar, Vince Mercer, Karin Sten Madsen, Niamh Joyce, and Camila Pelsinger

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Marie: for Gerry O'Toole and Colette Keenan,
my two beautiful grandchildren, who now inspire my work for a safer world;
one that also finds new pathways to justice.

Estelle: to Georgios and Charlotte

Preface

Sexual violence, in its many forms, is in the news every day. However, its causes, consequences, and meaning are far from sufficiently and adequately understood and engaged with. This is the case at the personal, relational and family level, in institutional contexts, and at the community and political level. To become a victim of crime is also a social process. To stress the societal dimension of the phenomenon, the authors of this book preferred using the term 'sexual violence' over the individualising notion of 'sexual harmful behaviour'. By doing so, scholars (and practitioners) have to engage not only with the personal responses to those involved in or affected by sexual violence—a task that is accomplished exhaustively and brilliantly throughout this volume—but also with the political debate on how to organise our societies in this regard. This task is also taken up by the authors of this study. Many countries are facing public policies in the sphere of sexual violence calling for more criminalisation and penalisation. The underlying assumption is that these legal and judicial strategies have the capacity to strengthen social acknowledgment and to support disapproval while also enhancing deterrence and dissuasion of offenders and meeting the needs and expectations of the victims. In the meantime, we know that it does not work in that way at all, as is convincingly explained by the authors in Chapter 2 where the limits of legal reform in this field in the last 30 years are analysed.

There seems to be an important 'justice gap' indeed. But, instead of turning away from the justice question, Marie Keenan and Estelle Zinsstag very consistently address the justice needs in the case of sexual violence and, most importantly, they explore how these needs could be better served by innovative justice mechanisms. They conclude, for example, that participation in restorative justice can indeed improve victims' experiences of justice, as well as strengthening their psychological well-being. Bringing to the surface what these justice needs, interests and experiences precisely entail, is an important achievement of the interdisciplinary study presented in this book.

Such a study does not happen overnight. Both authors have been involved in this topic since many years, on the basis of their PhD studies, diverse national and European research projects, many conferences, debates and consultations, a series of forgoing publications, involvement in policy advising and—not the least—in personal professional practice. This wealth of knowledge and expertise is now compiled in one volume. The structure of the book is as complete as it is logical: before we can start constructing our responses, we have to *understand* the phenomenon of sexual violence, for all its stakeholders and in all its dimensions, and how findings

can be theoretically framed. We need to look at 'the broad spectrum of sexual violence, including the less well-known types and phenomena'. Then we look at the response side, first the existing legal approaches, and how well or poorly they address the phenomenon. Next they explore international policy frameworks to find openings to new types of responses, such as restorative justice. A following step is to know how these new restorative justice approaches work in practice, and what can be learnt from empirical research so far. But the authors' ambitions reached further: to understand into detail how the international landscape of restorative justice specifically for sexual violence looks like. Therefore, they undertook a large survey to map existing practices, always putting them in their local societal contexts. And they discovered practices and programmes that until now mainly remained 'under the radar'. Then a more in-depth exercise follows: a thematic analysis of restorative justice practices and policies in five European countries. Service development, legislation, reporting practices, inter-agency cooperation … are discussed for the whole of these countries in a comparative way. In the next chapter we learn very concretely from the presentation of six restorative justice programmes for sexual violence in as many jurisdictions. It seems then logical to know how the stakeholders themselves then experience the offer and the work of restorative justice: we read four fascinating personal narratives, each one from another perspective. To make this all possible in practice and to effectively implement programmes, training and the development of guidelines are crucial, and these are thus discussed in the last chapter, before a number of essential findings and learnings are summarised and commented upon in the conclusion.

For many, doing restorative justice in cases of sexual violence is not self-evident. This field remains contested and to some extent discussable or provides at least a number of challenges. However, this book demonstrates that going into this direction is not only possible, but also necessary from an ethical point of view, as the authors argue. We should respect those involved in sexual violence, and therefore not decide on their behalf, in whatever sense. We should recognise their right of experiencing justice. How justice in restorative justice relates to justice in criminal law is reflected upon in the concluding chapter of the book. The authors adopt a clear position in this regard: restorative justice complements criminal and civil law mechanisms, but also interacts with them in a constructive way in order to finally re-shape the latter into an integral restorative criminal justice response to all aspects of sexual crime. Restorative justice is about 'restoring or creating trust in the relevant norms and practices', while at the same time offering room—through dialogical processes—for giving meaning to, nuancing, interpreting and challenging existing norms. In short, the authors go for a maximalist consequentialist theory of restorative justice. And moreover, they explain how they developed a personal, nuanced feminist vision of (restorative) justice.

It goes without saying that, as referred to above, the translation into practice is key. In this field, practice is actually ahead of theory, we read. Be that as it may, those

who still have their doubts about the seriousness of the undertaking—but also all others including practitioners—should read Chapter 9. There, not only training provisions are being presented, but also good practice is discussed extensively. This is done in a remarkably thorough and at the same time respectful way. Core principles of practice are being discussed, such as risk and risk assessment, case suitability and selection, trauma informed practice, the relationship to therapy, victim or offender initiation of the process, and offender responsibility. How to deal with power imbalances and the possibility of re-traumatisation, how to ensure safety, how to involve family members, how to deal with rape myths …? All this is reviewed in detail, as well as a discussion of the consecutive phases of the restorative justice process, from preparation of a case until follow-up and evaluation.

This and other chapters also nicely demonstrate the reflective nature of the study, with a relevance that transcends the field of sexual violence and offers insights for restorative justice in general. A few examples that struck me are the following. The authors reflect about the tension between training and practice standards on the one hand, and the need for ongoing innovation and flexibility on the other. In addition, their thinking about the principle of neutrality in restorative justice is of value: restorative justice after sexual violence is neither 'neutral' nor 'impartial', they argue. Because of the existing power imbalances, it is not a 'morally neutral endeavour' at all. Restorative justice should also avoid the 'privatisation' of sexual crime: it should not serve 'diverting offenders of sexual crimes from the formal criminal justice system to a more "private" justice arena'. Finally, restorative justice practitioners should be offered support when dealing with sexual violence. Challenges in this respect relate to the attitudes of allied professionals, in particular when the latter overestimate the risk posed by offenders and when they show a tendency to over-protect their client-victims leading to a sort of 'victim rescuing'. In short, the space between victims and offenders' risks to be 'colonised by strong professional voices since "offenders must be controlled" and "victims must be protected" '.

Challenging, sometimes provocative, but always based on a consistent vision and empirical realities, and with the realistic perspective of fundamentally rethinking and improving our systems of justice: this is what we needed, and this is exactly what is offered by Marie and Estelle—with the support of many others—in this exceptional publication.

Ivo Aertsen

Acknowledgements

This book is the sum of the work and commitment of a large number of people, without whom this book would not have come to fruition. Over the nine years of the project, a number of babies were born, intercontinental moves took place, a number of serious health issues impacted a few of the team, evolving work commitments of course had to be managed and now we live with COVID-19, but we believe none of these events have interfered with the quality of the data that was collected, its evaluation by the research team, and the finalisation of the book. We hope this book will make a difference.

We would like to start by very warmly thanking Ivo Aertsen for his support, inspiration and collegiality throughout the entire project and the writing up of the book. Ivo's support and encouragement knew no bounds. We also thank our close colleagues in both institutions, who went over and above the call of duty: Niamh Joyce and Caroline O'Nolan in University College Dublin and Daniela Bolivar and Virginie Busck-Nielsen in KU Leuven. We also had the chance of working together with an amazingly enthusiast and supportive steering group during the Daphne project composed of Anne-Marie De Brouwer, Knut Hermstad, Vince Mercer, Karin Sten Madsen, Gunda Wössner, and Kris Vanspauwen and we are grateful for their contribution. We would also like to mention and thank most sincerely the members of our international advisory board, Kathleen Daly, Janine Geske, Mary Koss, and Tony Ward, for the pioneering work they have contributed and still contribute to this field; we thank them for their availability and supportive participation in our project. In the final stages of the write up of this book, and to make sure we had all the latest information, we were able to count on numerous colleagues around the world to help us update or integrate the newest data in some of the chapters and these were Annemieke Wolthuis, Makiri Mual, Karen Kristin Paus, Catharina Borchgrevink, Lara Keegan, and Camila Pelsinger. Last but not least, thank you also to Laetitia Ruiz, Christine van Noort, Julie Willems, and Jennifer Watson for the great research assistance at different stages of the project and finalisation of the book.

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We thank all the various people who took part so warmly in all our events and activities, particularly those who took the time to answer the lengthy survey and those who allowed us to interview them in person during our study visits, and all the participants in the workshops and final conference which provided us with rich feedback on our research. In the end there really are so many people involved in all these activities it would be difficult to name you all (in several cases also for reasons of anonymity) so we hope you will accept a blanket recognition of your contribution and support, knowing we are very grateful for your help.

It became clear to us as we wove our way through this project of thinking, research, critical analysis, and discussion that all the people we met who are working in the fields of sexual violence and restorative justice and their interconnections, do this with such commitment and desire for change. It has been humbling to get to know you all and to be able to discuss the (often-)difficult work being done in this sphere.

To the victims/survivors who accepted to share their stories with us, we are truly grateful. Their resilience, courage, and agency reminded us continually of the importance of this project.

Marie: My two beautiful young grandchildren, Gerry O'Toole and Colette Keenan, now inspire my work for a safer world and for new pathways to justice. I dedicate this book to them both. They have taken the baton from my two adult children, Kate and Colm Keenan.. My life's work was inspired by these two wonderful young adults who are now out there themselves trying to make the world a better place in which to live for us all.

Estelle: I would like to express my immense gratitude to my family and friends, in particular my parents Evelyne and Georges, for their relentless cheering. It goes without saying that I am most indebted to my husband Georgios and daughter Charlotte (the latter having basically lived with this project for the entirety of her life) for their continuous and unwavering love and support; all this would simply not be possible without you and I dedicate this book to both of them.

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List of Acronyms

CA	Community Accountability (USA)
CI	Commissions of Inquiry
CIJ	Centre for Innovative Justice (Australia)
COSA	Circles of Support and Accountability
DRC	Democratic Republic of Congo
EC	European Commission
EU	European Union
FGC	Family Group Conference
FGM	Family Group Meeting
GBCI	Green Bay Correctional Institute (USA)
HSB	Harmful Sexual Behaviour
ICC	International Criminal Court
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICVS	International Crime Victim Survey
IJS	Informal Justice Systems
ITSO	Integrated Theory of Sexual Offending
LFF	Lucy Faithful Foundation
MAPPP	Multi-Agency Public Protection Panel (UK)
NCPRSC	National Statutory Contact Preference Register for Serious Crime (Ireland)
NSPCC	National Society for the Protection of Cruelty to Children (UK)
PTSD	Post-Traumatic Stress Syndrome
PAR	Participatory Action Research
RJ	Restorative Justice
RJI	Restorative Justice Initiative (USA)
SiB	Slachtoffer in Beeld (the Netherlands)
SV	Sexual Violence
TC	Truth Commission
TJ	Transitional Justice
TJPP	Transformative Justice Practitioner Programme (USA)
TRC	Truth and Reconciliation Commissions
UK	United Kingdom
US/USA	United States of America
VIS	Victim Impact Statement
VLO	Victim Liaison Officer
VOD	Victim-Offender Dialogue

VOM	Victim-Offender Mediation
VOMP	Victim-Offender Mediation Programme
WDOC	Wisconsin Department of Corrections
WHO	World Health Organisation
YOT	Youth Offending Team (UK)

Introduction

Exploring restorative justice in cases of sexual violence

Sexual violence[1] in all its forms, whether intra-familial, within institutions, anonymous, or during conflicts, although frequent and widespread as can be seen in all the media reports, is a crime for which anecdotal accounts and scholarly reports seem to suggest that the victims in their great majority do not receive redress. It is a crime with high levels of attrition (Kelly, Lovett, & Regan, 2005; Temkin & Krahé, 2008), for which victims may feel discouraged or even punished for coming forward and sometimes re-victimised by criminal justice and other institutional processes (Bourke, 2007; Topping, 2021). It is a widely recognised fact that the current and traditional approach to 'justice' (that procured in a formalistic way by police authorities, the court system, the prison, etc.) is limited in what it can offer in terms of 'justice' to victims or accountability for offenders of sexual crime, in part because of its structure and aims (Cossins, 2020; Keenan & Griffiths, 2019; Rossner & Forsyth, 2021; Temkin & Krahé, 2008). This type of 'conventional justice' is intended to establish culpability for wrongdoing under the law, within a highly adversarial system regarding the laws of evidence. Research has found that this approach to justice does not fundamentally address victims' needs nor makes offenders feel more responsible for what they have done (see Keenan, 2014; Zinsstag & Keenan, 2017), that there is a real 'justice gap' regarding this type of crime (Cossins, 2020; Temkin & Krahé, 2008). In short, the criminal justice system, in its classical meaning, seems to be rather limited in its potential to contribute alone to effective problem solving.[2]

The advances made by public campaigns, national legislations, and international courts concerning sexual violence in the last decades have however contributed to greater awareness of sexual crimes and their aftermath, resulting in changes in legislation and substantial and procedural legal practices, much of which has been seen to help victims (McGlynn & Munro, 2010; Powell, Henry, & Flynn, 2015).

[1] We use the term sexual violence as an umbrella term to mean all crimes of a sexual nature, including crimes such as sexual assault, incest, rape, sexual harassment, molestation, etc. For more information, see also chapter one.

[2] We will be discussing and putting into question the very wording 'criminal justice system' as we feel it does not adequately represent what justice is and can do and prefer therefore to call it 'criminal legal system', see the conclusion in particular for a developed explanation for this. For the needs of the book however and because it is currently generally understood as such, we will be using mostly the expression 'criminal justice system' here but may at points also use the other if relevant.

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Reforms have included the development of special units within the police forces to deal sensitively with victims of sexual crime; victim accompaniment in court and the provision of victim liaison services for victims (see Keenan & Griffith, 2021); the adoption of more robust prosecution guidelines; and inter alia the recognition that sexual violence can be used in times of war as a war tactic and therefore can be judged as a war crime (see Zinsstag, 2006, 2008). Despite these innovations however, it still remains a fact that it is difficult to prosecute sexual crime and to secure a criminal conviction and for victims to have an experience of justice via the criminal justice system (see e.g. Cossins, 2020; McGlynn & Munroe, 2010; Powell, Henry, & Flynn, 2015). Further there is little room for the impact of the trauma on victims to be heard in the course of criminal proceedings, or for their story to be told outside of the limit of carefully crafted legal 'evidential' questions until a conviction is secured when then the limited medium of Victim Impact Statements give victims an opportunity to report the impact on them some jurisdictions, e.g. in Ireland or in some of the international courts (see also de Brouwer, 2005; Keenan, 2017; Keenan & Griffith, 2019, 2021; Temkin, 2002).

Offenders too have limited opportunity to explain their offending, make reparation or offer an apology in the course of criminal proceedings (Braithwaite & Daly, 1994; Radzik, 2007). In the main, offenders are often advised to remain silent by legal advisers as is their right in law and in due process (Godenzi, 1994; Keenan, 2017). However, as Keenan's (2012, 2014) research with offenders illustrates this leaves gaps for offenders too.

When it comes to communities, who often bear some responsibility for the social climate and conditions in which sexual violence becomes possible (Anderson & Doherty, 2008; Gavey, 2005) and is simultaneously charged with the task of supporting victims and abuse perpetrators to reconstruct their life and find their place in the community of law abiding citizens again (Drumbl, 2000) the criminal justice system has little to offer. For many communities, fear and lack of information overtake the rehabilitative and reintegrative ideal; leaving both individual victims, offenders and communities ever more vulnerable.[3] Therefore other justice solutions and responses are needed in addition.

The theory and practice of restorative justice is rapidly developing and offering some well-argued new avenues for dealings with crime in general (see e.g. Zinsstag et al., 2011). It also has the potential to be extended to cases of sexual violence, and some pilot projects, programmes and initiatives are already well underway in this domain internationally (see e.g. Daly, 2006a; Jülich, Buttle, Cummins, & Freeborn, 2010; Keenan & Griffith, 2019; Keenan, Zinsstag, & O'Nolan, 2016; Koss, 2013; Marinari, 2021; Miller, 2011; Zinsstag & Keenan, 2017). It is the intention of this book to examine this innovative justice paradigm in more depth in the particular

[3] For some discussion on community and the role of community in restorative justice and beyond, see e.g. Fonseca Rosenblatt (2015), Pavlich (2017), and Petrich (2016).

context of sexual trauma and violence in order to critically analyse the empirical realities of restorative justice approaches in cases of sexual crime and to see how they could be developed adequately for sexual crime going forward.

1. Origins

As Daly argues in most of her writings on the topic, there is too little research and scholarly publications on the topic of sexual violence and restorative justice specifically, despite its necessity, potential and demand (2006, 2011a, 2012, 2015, 2017, forthcoming). Daly is part of a very small group of pioneering researchers who have approached seriously the topic in the early 2000s (see also e.g. Koss, 2006, 2010, 2014), although it must be said, as we will show in this book, this group is growing and the research is becoming more systematic and comprehensive (see e.g. Keenan, 2014; Jülich & Thorburn, 2017; Mariani, 2021; McGlynn, Westmarland, & Godden, 2012; Pali & Madsen, 2011; Zinsstag & Keenan, 2017).

Some have argued that the practice of restorative justice in cases of sexual violence is well ahead of the theory, analysis and research (see Zinsstag et al., 2011) while others suggested it was mostly practiced 'under the radar' (O'Nolan, Zinsstag, & Keenan, 2018, see also discussion in Daly, forthcoming). The concern was that there was no way of ensuring adequate safeguards, rules of practice, risk assessments and shared knowledge across sites and jurisdictions or to ensure that best practice prevails in the long term. The concern was also that the broader research and practice communities could not access the results and potential benefits and challenges of such work, for victims', perpetrators', researcher communities, and public policy makers (see also Moore et al., 2021). As readers will see however, we found that restorative justice in response to sexual violence is being practiced 'above' as well as below the radar and that practice is increasing year on year. However restorative justice after sexual crime is still not mainstream in most countries, and in this book, we interrogate the reasons why not and what can be done to remedy this situation.

A second argument for writing this book, as was already touched upon above, is the well-documented limitations of conventional approaches to justice in crime scenarios in general, but more particularly in cases of crime against the person, ever more poignantly so in cases of sexual crime and victimisation. Research indicates that this is a highly under-reported crime for a variety of reasons (Brown & Walklate, 2012; Temkin & Krahé, 2008). Victims of sexual crime are often fearful of reporting the crime because they fear losing control of their lives by state and criminal justice systems as they move from subject to object in criminal proceedings (see e.g. Cossins, 2020; Sharratt, 2011; Temkin & Krahé, 2008). Sexual violence traditionally was viewed as a problem of the private sphere and in some jurisdictions the same thinking holds still today (see e.g. Gavey, 2005). However, since the

feminist movement shed light on such limited perspectives and reconceptualised sexual crime and gender-based violence as a public/political issue, this thinking has advanced public understanding of the gendered nature of sexual violence and the need for public and political response (see e.g. Goodmark, 2018; Powel, Henry, & Flynn, 2015). We take the position that sexual violence has private and public dimensions, and both are considered in the treatise of the subject here.

A third argument for advancing the project, is the concern that the criminal justice system often leaves many questions unanswered for victims and many avenues unexplored for victims, perpetrators and their communities, leaving many problems unaddressed as these individuals inevitably learn to live as part of the citizenry of the same country again (Drumbl, 2000; Herman, 2005; Keenan, 2017; Temkin & Krahé, 2008). In the absence of innovative justice thinking communities and families are torn apart by a crime for which there appears to be no justice, no healing or no apparent restorative solution.

A fourth reason for this book is the fact that the criminal justice systems is also failing sexual offenders as well as their victims. Offenders are not *per se* encouraged to recognise the wrongness of their actions and the harm they have committed in the course of their engagement with criminal proceedings nor given an opportunity to explain or give answers to their victims who may have questions to be answered (Godenzi, 1994). There are clear limitations in the social understanding of punishment, as well as barriers to rehabilitation and possibilities to desist for sex offenders (Laws & Ward, 2011) and we believe there is a clear role for additional justice mechanisms, such as restorative justice, to humanise the response of offenders, give them the opportunity to hear the impact of their crime directly and address the justice gap from that point of view as well.

The fifth and final argument for writing this book is to make an important theoretical contribution to the field of justice in relation to the impact of sexual crime. The book offers a strong contribution to the application of restorative justice in cases of sexual violence, from a criminological, psychological, legal, and feminist point of view.

1.1 Finding a place to stand

In finding a place to stand we adopt Herman's (1997; 2005) trauma theory as a starting point on sexual violence, and as a guiding light for our work. Herman (1997) indicates there are three stages to responding to trauma: (1) establishment of safety, (2) remembrance and mourning, and (3) reconnection with people. We believe there is room for another aspect of recovery from trauma which involves 'taking back power'. It is here that we see a role for restorative justice. Our research points to the fact that some victims of sexual crime want to face their offender, at some point along their journey of recovery, and by so doing to empower themselves

and take back power, with correct support and within the right justice framework. We take the position that this right should not be denied to victims of sexual crime who wish for this opportunity.

We also draw on Christie (1977) as a starting point for our restorative justice theorising to suggest that victims of sexual crime should have the right to have a say in how justice is delivered in their case, and that neither states nor professional should refuse them this right, including the right to restorative justice, especially in circumstances where conventional justice fails to meet their justice needs and interests. However, we develop the conceptual work on restorative justice beyond that of Christie (1977) in considering its application in sexual crime cases, and in doing so recast some restorative justice principles (such as neutrality) in advancing this conceptual work. In advancing a theoretical framework for how restorative justice can offer a meaningful, legal, justice response to sexual violence victims and offenders this book aims to make a difference for victims of sexual crime and to improve legal societal justice responses for them. It aims to offer meaningful routes to accountability taking and amends making for offenders and to improve the quality of life for victims, offenders, and their families and communities.

2. Definitions and terms

2.1 Definitions

2.1.1 Sexual violence

Sexual violence is a broad term used in this book which is legally and culturally defined and encompasses many types of sexual acts including (and not limited to) contact and non-contact child sexual abuse, sexual assault, rape, sex trafficking, historical sexual violence, war-time sexual violence, and sexual violence perpetrated through the use of communication technology. This definition was presented at the introduction of our survey for our global mapping exercise (which we describe in chapter five). We have also generally followed the widely accepted definition of sexual violence by the World Health Organisation during our research and in the book, which is defined as follows:

> Sexual violence refers to any sexual act or attempt to obtain a sexual act, or unwanted sexual comments or acts to traffic, that are directed against a person's sexuality using coercion by anyone, regardless of their relationship to the victim, in any setting, including at home and at work (Sexual Violence Research Initiative, 2021).[4]

[4] See http://www.svri.org/research-methods/definitions

Indeed, some agencies and practitioners, prefer to use the term 'sexual harmful behaviour' rather than sexual violence particularly when working with young people (see e.g. Mercer, 2009; 2020; Youth Justice Agency, 2012), and suggest it offers a much less stigmatising wording for the offending which puts the emphasis on the behaviour rather than on the person who perpetrated the harm. While we understand the importance of not stigmatising children and young people who sexually offend, we are concerned about the minimising effect of the sexual violence in some of these cases. Further theorising is required here.

Chapter one examines sexual violence in more detail, as a concept, the impact on victims, offender characteristics, theories of explanation, and the role of society including rape myths.

2.1.2 Restorative justice

There is no agreed definition of restorative justice, largely because the meaning of restorative justice depends on which aspect and/or aim one favours or privileges (see discussion in Daly, 2016). A number of definitions have received much attention and are considered here. Definitions can be largely grouped as process definitions or reformist definitions—the former focusing on process of 'doing' restorative justice; the latter focusing on the broader aim of reimagining and reforming justice responses to crime. One much cited process definition was coined by Marshall (1996: 37) and reads:

> restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.

The definition of a restorative process as written in the Handbook on Restorative justice Programmes of the UNODC (2006: 6) reads:

> [It] is any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.

In the second edition of the Handbook the UNODC (2020: 4) adjusted their definition as follows:

> Restorative justice is an approach that offers offenders, victims and the community an alternative pathway to justice. It promotes the safe participation of victims in resolving the situation and offers people who accept responsibility for the harm caused by their actions an opportunity to make themselves accountable to those

> they have harmed. It is based on the recognition that criminal behaviour not only violates the law, but also harms victims and the community.

Walgrave (2020) argues that the vision of restorative justice advanced by the UNODC (2020) in the new version of the Handbook is unambitious and gives the impression that restorative justice can be summarised by a series of processes or programmes simply there to complement the criminal justice system. Favouring a more reformist definition Walgrave (2000, 2008, 2020, 2021) argues that restorative justice is not just a process response to crime but rather that the philosophy of restorative justice must permeate the whole criminal justice system, transforming and reforming as it weaves through, and be part of a whole system reformation involving legal, punitive and restorative components. In this reformist, consequentialist view of restorative justice crime is addressed in a hierarchical manner depending on gravity and circumstances (see conclusion for further advancement on this thinking). Walgrave (2021: 291) summarises the history of ideas regarding restorative justice as follows:

> A consequential view (which I used to refer to as a 'maximalist' view) does not expect to ever reach the kind of 'nature reserve' community populated only by good willing people, which is what 'purists' seem to hope for. It also does not ignore the problems with the punitive criminal justice system, as the 'diversionists' do. Consequentialism 'does not shy away from making its hands dirty' and includes the eventuality of coercion in the restorative scope.

He sees a consequentialist reformist restorative justice further (2021: 324) as:

> the everlasting movement for a higher quality of social life, governed through a better, more participatory, more inclusive, more responsive and more just democracy, promoting the cohesion of individual self-interests into a project of common self-interest. And the part to play in this endeavour by searching for a way to do justice better by consequentially pursuing the prioritisation of restorative responses to crime'.

Zehr (1990) argued similarly some decades earlier that restorative justice offers a 'change of lens' in the way justice is offered to stakeholders in a crime in comparison to how the criminal justice system responds to them as a default response (on the latter see also Richards, 2014). As explained also in Walgrave, Ward, and Zinsstag (2019: 451–455) the main aims of restorative justice should be, among other, 'placing the responsibility on the offender' 'acknowledging and addressing the harm suffered by the victim' and 'restoring or creating trust in the relevant norms and practices', which can only be done by developing a 'criminology of trust' premised

on a 'socio ethical understanding of how we relate to each other, how we deal with fellow humans in trouble, how social life should be governed' (p. 457).

Purposefully, we have adopted a trauma informed consequentialist reformist approach to restorative justice in our work in this book and also adopted some concepts from transitional justice in examining restorative approaches to sexual crimes committed not only in peaceful contexts but also in fragile, transitional, post-conflict societies. Daly and Proietti-Scifoni (2011: 212) write that 'in transitional settings, restorative justice and restoration are concerned not only with individuals but also collectivities and with regime change and state building'. Clamp (2014: 7) argues further that

> the central premise is that the primary potential of restorative justice in responding to international crime should be viewed in terms of the lessons that it provides for problem-solving rather than its traditional role as a mechanisms or process to respond to conflict per se.

These few definitions show that restorative justice is a wide field of practice and that in the context of sexual violence a number of different approaches can be considered and used.

2.2 Clarifying terms

There are many debates regarding terminology which we address here in order to clarify our position.

2.2.1 Victims, survivors, person harmed

Walklate (2004) cautions against using a dichotomy that commonly presents women as victims and men as offenders, suggesting this binary may be unhelpful and degrading to both parties. The term 'victim' is often used within a legal context for persons who have been subjected to sexual violence, with the term 'survivor' being preferred by some persons so harmed, representing the fact of their survival in the face of such victimisation. Legal literature refers to persons who report experiences of sexual violence as complainants until the accusation is proven. The restorative justice literature refers to persons subjected to crime as the 'person harmed' (see e.g. the Scottish Government, 2019). This layered vocabulary has been developed in order to address stigma and avoid reduction of personhood to that of a defined legal or other label. We accept the right of the individual to define their experiences as they prefer. Accepting that individual preference must be respected, we use all of these terms interchangeably throughout our work (see also discussion in Cahn, 2005; Keenan, 2012) but the terms victim and victim/survivor are those most often used.

2.2.2 Offender, perpetrator, person who harmed, or person responsible

Debates also take place as to the appropriate terminology to refer to the person who has committed the sexual offence (see Keenan, 2012). The concern is also about reducing the identity of the person to a classification of crime. Terms such as 'offender' or 'perpetrator' can be limiting ones, yet they are used in much social science and legal literature. We acknowledge these terms may not fully represent the person, and equally that some offenders may have been victims themselves. We also acknowledge that offenders may act in a way after the crime that shows that they are willing to repair the harm and desist from further offending and so become former offenders. Legal literature refers to persons accused of crime as defendants or accused, while some literature refers to accused persons as 'offenders'. We accept these terms have the potential to stigmatise. In the restorative justice literature, the person who caused the harm is referred to as 'person who harmed' (Scottish Government, 2017, 2019), or 'person responsible'. While we use the terms interchangeably the term most often used when discussing persons who have perpetrated sexual violence is 'offender'.

2.2.3 Restorative justice, restorative justice practices, and restorative practices

We use the term 'restorative justice' to refer to restorative justice initiatives and practices that take place within the context of crime involving a breach of the penal code, and which adhere to the principles and values of restorative justice. 'Restorative practices' on the other hand we use to refer to restorative practices aimed at resolving conflict in other contexts such as schools, workplace, prisons, and neighbourhoods (for more detail see e.g. Aertsen, 2020; Thorsborne & Blood, 2013; Zinsstag et al., 2011).

2.2.4 Restorative justice values and principles

Restorative justice has a number of aims, principles, and values such as: providing an opportunity for the victim to feel that their harm or victimisation has been recognised (McGlynn & Westmarland, 2018); providing an opportunity for the victim to ask questions and receive information from the offender (Pali & Madsen, 2011; Umbreit, Vos, Coates, & Brown, 2003a); giving victims an opportunity to take back power (Achilles, 2000: 1); providing a means for victims to talk about how the incident impacted them (Jülich & Thorburn, 2017; providing an opportunity for the victim to receive reparation and/or an apology (Geske, 2007; Koss, 2014; Miller, 2011; Miller & Hefner, 2013; Roberts, 1995; Suggnomè vzw, 2005; Umbreit et al., 2003a);[5] repairing the harm caused by the offence (Couture, Parker, Couture, & Laboucane, 2001; Zehr, 1990); increasing the offender's sense of responsibility for

[5] See also discussion about money as reparation in sexual violence cases in Holder and Daly (2018).

the offence (Couture et al., 2001; Daems & Robert, 2006; Daly, 2006a; Jülich, Buttle, Cummins, & Freeborn, 2010; Koss, 2014; Mercer, 2009; Orcutt, Karp, & Draper, 2020); and maximising the opportunity to provide victims, offenders and the community with a sense of justice (Jülich et al., 2010: 2).

In addition, the safety of proceedings is paramount (Jülich & Landon, 2017), and this can be ensured by a number of conditions. First the restorative justice proceedings should be victim initiated (Zinsstag & Keenan, 2017; Marinari, 2021) it is really important that the offender recognises his/her guilt prior to the initiative, or at least does not deny his/her responsibility (Kirkwood, 2021; Liebmann, 2007) and that participation by both parties is completely voluntary (Kirkwood, 2021). One of the main keys to any of these programmes is a very thorough preparation of all parties prior to a meeting, facilitated dialogue, conference or circle (Zinsstag & Keenan, 2017; Keenan, 2018). The outcome of the process often depends on the quality of the preparation. The meetings may be direct or indirect, through the use of video links, letters (see e.g. Pali & Madsen, 2011) or through the mediator him/herself. Finally, they should be organised and facilitated by specially trained mediators/facilitators (Keenan, 2018; Keenan, Zinsstag, & O'Nolan, 2016; Mercer, Madsen, Keenan, & Zinsstag, 2014).

The programme may take place within or without the involvement of the court. It is a fact that today many such initiatives happen informally, organised by rape crisis centres, hospitals, within prisons and often through self-referrals rather than referrals generated by the criminal justice system (see also Marinari, 2021). Restorative justice programmes may also have objectives related to the criminal justice system. In Belgium the establishment of Mediation for Redress (Suggnomè/Moderator and Mediante, see also chapter six) aimed 'to investigate the effect of mediation on judicial decision making and to find out to what extent the criminal justice system can accept reparation as one of its central objectives' (Aertsen & Peters, 1998: 516). It is a fact however that restorative justice should be available to victims of sexual crime at all stages within, alongside and outside criminal justice system (see also Keenan, 2017; Keenan, Zinsstag, & O'Nolan, 2016).

2.2.5 Fully restorative and alternative and quasi-restorative justice

We made the distinction between two approaches to restorative justice in the project on which part of this book is based.

The distinction we made was as follows:

a) Fully restorative justice practices refer to restorative responses to sexual violence using formal restorative justice methodologies such as victim-offender mediation, restorative conferences and healing circles which involves a direct or indirect communication process between the main parties including the

victim and offender and which may involve the participation of other relevant stakeholders (see chapter five for more details).

b) Alternative or quasi-restorative justice practices refer to practices that include some restorative justice guiding principles and values without explicitly drawing on restorative justice methodologies involving direct or indirect contact between the main victim and offender. A non-exhaustive list is provided below, as an example.
   - Practices, which incorporate the victim dimension in the thinking when working with the offender (e.g. victim empathy work to help the offender understand the impact on the victim)
   - Practices, which focus on reparation for victims without the direct or indirect involvement of the offender
   - Practices, which promote the active involvement of offenders in responsibility taking (e.g. Circles of support and accountability).

3. Towards a theoretical framework

3.1 'Truth' and restorative justice

Herman raises the following question when opening her 2005 study on justice from the victim's perspective: '*In the course of their recovery*, victims of sexual and domestic violence confront the most basic questions about the meaning of justice: How can the truth be made known?' (emphasis added in original, p. 571). There are various mechanisms available in order to make truth known. Criminal justice may be one way of finding out aspects of what happened during a crime but may not always bring forward the full story or truth and further criminal justice may not always be an option or desirable for some victims. Foley (2016) stresses the importance of finding ways to seek truth and tell the truth, through well-functioning truth finding and truth telling mechanisms.

There are different types of truth which are not directly related to law. Markel (1999: 408–411) explained there are 'four faces of truth': 'forensic or factual truth', 'personal or narrative truth', 'social truth', and 'healing or restorative truth'. The search for truth is important for a society, and crucial for victims of crime, to acknowledge and address the suffering and harm done and put in place measures which will allow for individual healing and societal reconstruction. All of these truths are relevant to the restorative process. As Foley (2016) explains 'forensic or factual truth' is the one used within criminal justice and the courts; the one that can be proven through forensic examination and analysis of certain evidence gathered and tested. The second form of truth 'personal or narrative truth' involves individuals giving their own account of what happened through their narrative account of

what happened from each point of view. Personal or narrative truth takes place at a micro level. 'Social and dialogue truth' follows a similar premise to truth telling as 'personal or narrative truth' but social truth involves community or broad societal dialogue, at a macro level. Healing or restorative truth, which is the one of particular relevance to restorative justice include the second and third type of truth telling as described above, as well as other elements specific to restorative justice, such as the truth of the impact, or the truth of the context. The first type of truth is less important here although acknowledgement of having perpetrated wrongdoing and some broad acceptance of the fact of the case are suggested as desirable in EU and UN policy (see e.g. EU Victim Directive, 2012; UNODC, 2020, see also chapter three). The focus of healing and restorative truth is for the stakeholders to establish *the facts of the harm done*, for the offender to recognise the harm done, to take responsibility for the harm caused, explain his/her actions and answer the victims' questions as truth fully as possible. This truth provides acknowledgment of the broad facts of the case, the harm done, visibility as to the responsibilities for wrongdoing and repair and helps build a narrative which can allow some clarity, healing, and in some cases closure for participants. Foley (2016: 68) also explains: that truth telling in restorative justice holds the discursive capacity for all persons present to arrive at a shared truth and understanding.

The 'right' to truth, an evolving legal concept also in international law, has its historical roots in the struggle of families of the disappeared in Latin America who tried to force authorities to disclose information about the fate of their relatives (Zinsstag, 2008; Zinsstag & Busck-Nielsen Claeys, 2018). Usually Truth Commissions, which developed in a transitional context, are also increasingly used in peaceful contexts to examine past harm, historical abuse. Their mandate is mostly, as the term suggests, to search for truth. There are also other types of commissions with similar missions, such as commissions of investigations and public inquiries. To seek the 'truth', they conduct detailed research of literature and documents, hold public and in-camera hearings into the facts, harms, and suffering caused by atrocities of the past, in circumstances such as historical institutional abuse, large scale systematic abuses of particular groups, or the behaviour of particular institutions, such as hospitals or banks or public institutions, when the actions of these institutions lead to private and public harms. Truth Commissions and commission of investigation and public inquiries enjoy a wider mandate than criminal trials, which enables them to delve into the underlying causes and consequences of the crime, conflict or wrongdoing and provide findings of truth and make recommendations for the future. They can address the harms and details of the violence or wrongdoing that a court cannot or will not ever address, either because the crime is legally prescribed, is difficult to prove legally or the victims are too numerous to address individually, as in the case of Apartheid in South Africa. Some groups of victims who may have traditionally been discriminated against or whose suffering remained within the private spheres, such as in the case of many

victims of sexual violence abused in institutional contexts, can provide some form of justice via these commissions and inquiries. Despite truth commissions, commissions of investigation, and public inquiries being seen as providing an opportunity to highlight neglected abuses, provide a forum for victims to seek a public 'truth' where past harm can be publicly acknowledged, and some where some forms of reparation and redress can be offered (Hayner, 2010; Zinsstag, 2008) there continues to be gaps in the administration of truth and justice in these fora too (see for example the problems in actually giving out the promised reparations in the South African TRC or the one in Sierra Leone).

3.2 Choice and restorative justice

Choice is an important concept in the context of sexual violence and restorative justice, as demonstrated by Keenan (2014) and Moore et al. (2021) in their respective studies. Kirkwood (2021) adds further that individual choice is a 'a master prudential value' when it comes to participation in restorative justice. Victims and offenders must have the choice whether to participate or not and as Shapland (2014: 121) explains 'the essential value of restorative justice is that it embodies what participants see as appropriate for that particular offence and conflict'.

Choice for participants, without coercion or manipulation is also in line with the now-famous Christie (1977) argument that the stakeholders involved in a crime (or conflict) must have choice and voice as to how to deal with the crime and how to respond to the harm that was done. In her comments on choice Herman (2005: 574) explains 'victims need an opportunity to tell their stories in their own way, in a setting of their choice'.

The right to choose whether to participate or not in a restorative justice initiative, for victims and offenders, has to be one of the main principles of such work. Choice and voluntariness, which go hand in hand, include the right to decide whether restorative justice is appropriate for this particular crime, harm, victimisation in the view of the particular victims and the particular offender, within a safe forum involving risk assessment and safety protocols and procedures to the best possible standard.

3.3 The feminist critique

With the fairly rapid development of restorative justice a number of concerns have been voiced in particular by feminists and other victims' representatives (see e.g. Cameron, 2006; Stubbs, 2002, 2007) in particular regarding its use in cases of domestic and sexual violence.[6] Many of these concerns are valid and are taken into

[6] All these writings have been used by many authors and activists to argument against the use of restorative justice after sexual and gendered violence more generally, when in fact they have been written

account and addressed throughout our work, and in the literature (see e.g. chapter one; conclusion; Marinari, 2021; Pali, 2017).[7] Goodmark (2018: 372) also explains

> although some caution is warranted, restorative justice serves the feminist goals of amplifying women's voices, fostering women's autonomy and empowerment, engaging community, avoiding gender essentialism and employing an intersectional analysis, transforming patriarchal structure and ending violence against women.

The main concerns regarding restorative justice in response to sexual and domestic crime are focused on a number of core themes including (1) the devaluing of gender-based harms; (2) the reprivatisation of violence against women in which restorative justice could remove sexual and domestic crime from scrutiny in the public sphere as a breach of the penal code and return it to the realm of the private, a sphere they have fought so hard to bring it out from; (3) the inability of restorative practitioners to guarantee safety for people subjected to abuse and address the power imbalances involved in sexual and domestic crime; (4) the potential manipulation or coercion of victims by perpetrators, families or professionals to participate in restorative justice meetings; and (5) the adequacy or inadequacy of the training for restorative justice practitioners, especially concerning the dynamics and particular traits of sexual and domestic violence which makes it problematic for facilitators to address these dynamics appropriately in the restorative process. Service providers and advocates for victims stress the needs for safety, collaboration, trust, empowerment and choice values that also concur with restorative justice practitioners. Goodmark (2018) believes that much of the critique comes from fear that safety cannot be guaranteed in providing restorative justice in complex and sensitive cases. The need for collaboration in the provision of these services and for further dialogue is clearly indicated.

How punishment for sexual and domestic crime is to be administered is also of concern for domestic and sexual violence service providers. 'Where does punishment fit in restorative justice?' is often a question raised. 'Is public condemnation by the criminal justice system the only adequate mechanism to publicly express the wrongness of such crime?' How can accountability be guaranteed by restorative justice without the arm of law enforcement to enforce accountability? Is restorative justice too lenient on offenders? Often the perceived solution is for 'stronger punishments' and better judicial accountability. The call for more punishment and

mostly about domestic violence. As we argue elsewhere in the book, although there are of course common traits between domestic and sexual violence, there are also many very unique traits to each of those types of victimisation, and we therefore do not think that all the arguments used in those articles are actually relevant here.

[7] See also e.g. the debate between Cossins and Daly (2008) in the *British Journal of Criminology*.

more law enforcement has often been attributed to a strand of feminism called carceral feminism (Goodmark, 2018). Law (2014: 1) suggests carceral feminism lobbies for 'increased policing, prosecution, and imprisonment as the primary solution to violence against women'. Other feminists disagree with this approach to responding to violence and against women (see chapter one; conclusion; Goodmark, 2018; Pali, 2017 for more on this).

Since most sexual violence does not end before a court and even less with a conviction and a sentence, restorative justice might have something to offer victims of sexual crime, who are successful in either securing a conviction or who do not go that route, and may have something to offer before, during, or after criminal proceedings in providing some form of justice as defined by them. This is our focus and while the feminist critique often involves domestic as well as sexual violence and abuse the focus of our work here is on sexual violence as the index offence. Restorative responses to domestic violence require an entirely different study. We feel ethically obligated to respond to improving the research and practice literature on this topic given the body of research which indicates that survivors clearly state they want choice, voice, and options in how their justice needs and interests, which are varied, should be addressed (see e.g. Daly, 2017, forthcoming; McGlynn & Westmarland, 2019; Moore et al, 2021; Zinsstag & Keenan, 2017). It is no longer defensible to withhold opportunities for restorative justice for victims of sexual crime who wish for it. As baliga (2008) explains the person harmed is enabled to define the harm in her own terms and define the route of some resolution and closure. It creates the possibility of a safe dialogue, where the voice of the survivor is heard and acknowledged. Marinari (2021: 21) explains

> the ability of the person harmed to articulate that harm, in their own voice and to be heard by others, is frequently identified as the justice outcome most likely to be provided by restorative justice and which is constrained with the conventional criminal justice system.

3.4 A note on restorative justice, the law, and criminal justice

Restorative justice is sometimes portrayed as offering an *alternative* to conventional forms of justice, administered through criminal justice systems, by the police, legal professionals, the probation service, and the courts, the starting point for this argument is often the fact that many victims have little chance of justice through criminal justice because of the high rates of attrition (Kelly, Lovett, & Regan, 2005; Temkin & Krahé, 2008) and where there are criminal proceedings victims are almost totally left out of the process, as we have noted earlier and will get back to later in the book. The counter argument is that restorative justice offers a 'diversion' from courts for sex offenders, and it is too lenient on offenders (see e.g.

discussion in Daly & Stubbs, 2006). There is concern that restorative justice must not be used as diversion in sexual violence cases. Other scholars present restorative justice as a complement or parallel initiative to criminal justice (see e.g. CIF, 2014; Miller, 2011) and they suggest that any antagonism between both is inaccurate since the two approaches serve different purposes; one aims to gather evidence and try and punish wrongdoing; the other to repair harm. Both are interested in offender accountability. Restorative justice in complex and sensitive cases, such as sexual violence, is victim focused; criminal justice is offender/accused focused.

There are significant distinctions to be considered however when comparing both approaches to justice and criticism of restorative justice emerge from such analyses: as noted above some of the potential problems in restorative justice practice which have been identified are 'victim safety', 'manipulation of the process by offenders', 'pressure on victims', 'mixed loyalties', and 'cheap justice', but as Daly and Curtis-Fawley (2006: 234) explain in reviewing this list, some of these elements may also feature in sexual assault cases dealt with in courts. Victims can be intimidated by offenders in the court room; there are just as likely to be mixed loyalties; if an offender is not convicted, he may believe he did nothing wrong; and often the penalties handed down in court could be deemed 'too lenient' (Daly & Curtis-Fawley 2006: 234). Miller (2011, 159–160) also explains that restorative justice generally attempts to 'correct a harm' and 'favour dialogue' with an interest in victim justice while the criminal justice system, with its offender focus, attempts to give a 'proportionate punishment' in an adversarial system.

That said, the use of restorative justice as a strategy to deal with sexual violence cases is still both controversial and quite understudied (see Cossins, 2008). As can be seen in chapter two, legislation on restorative justice and violent crimes and in particular on sexual violence is extremely diverse. In some countries legislation explicitly excluded restorative justice in cases of sexual violence, such as Brazil or Spain or Norway at different points. Even when there are no legislative prohibitions some restorative justice programmes have tended to voluntarily stay outside this field in order to avoid undesired complexities, or because of fear and lack of experience of sexual violence work on the part of the mediators, such as in Norway or Scotland.

However, in further refinement of the argument against the use of restorative justice in sexual violence cases, Scheuerman, Gilbert, Keith, and Hegtvedt (2021: 5) argue that the nature and type of offense may affect the way in which restorative justice practices are appropriate and perceived as procedurally and interactionally just. Indeed, they argue that the severity and degree to which individuals may consider the offense as being 'unforgivable' will affect how both the victim and offender react within the restorative justice process. More specifically, MacDougall (2009: 92) suggests that distinguishing between types of sexual crimes is an important factor in determining whether a given case ought to be handled restoratively. For example, it is often argued that sexual violence in the context of domestic

violence and intimate partner violence should be excluded from restorative justice processes due to the risk of ongoing re-victimisation (Hopkins & Koss, 2005: 708–709) or the victim being re-traumatised (Hovey, Rye, & McCarney, 2020: 264) during and/or after the restorative meeting. Importantly, due to the ongoing power imbalance involved in these relationships, sexual crimes associated with domestic violence are often excluded from some programmes (Koss, 2014). We agree these cases need particular risk assessments and particular safety safeguards, but we are concerned that blanket restrictions by offence type rather than by victim choice go against the needs of the survivors.

Hargovan (2005: 54) maintain that the suitability of a sexual assault case for restorative justice should be determined on a case-by-case basis and not on the basis of a crime category or type. Furthermore, Zebel, Schreurs, and Ufkes (2017) argue that merely assessing an offence type or category is unlikely to be informative as the same offence 'might inflict a (very) different level of harm between two victims depending on their individual and psychological characteristics' (2017: 395). Instead, it is argued, an assessment of the 'harm experienced' rather than offence 'type' is a more useful mode of assessing suitability for restorative justice processes.

A strong argument exists for the perspective that *all* offence types (including different categories of sexual offences) are suitable for restorative justice, especially those that involve identifiable victim and offenders (Daly, 2006a; Roberts, 1995). This view however is not without its critics. McDonald & Tinsley (2011: 420) for example argue that restorative justice may not be suitable for sexual violence in every case (see also Cameron, 2006). In line with this perspective rather than focusing on offense type, some practitioners carefully screen victims and offenders for participation in restorative justice, assessing the readiness and psychological wellbeing of the participants as a factor to determine their suitability for restorative justice (Jülich et al, 2010; Umbreit, Vos, Coates, & Brown, 2003a). We return to these issues time and again throughout the book.

4. Methodology and data collection techniques

The project on which this book is based was a broad one involving different research activities including extensive literature reviews, a large survey to attempt to map the field of practice both quantitatively and qualitatively, study visits during which we interviewed a large number of stakeholders, two specialist workshops for exchange of views, and a large conference where we presented preliminary findings and received feedback and discussed and examined the data in depth. We also gathered narratives of experiences both from direct survivors and from stakeholders, all of which added a richness to the text and help put context on much of the data we had gathered through the various methods. The book thus emerges from a mixed method approach to a point of saturation, which we believed was

crucial for a project of this nature. Heap and Waters (2019: 1) explain about mixed methodologies

> It is an approach where both quantitative and qualitative methods and data are employed in the same research project, and it is now frequently used across many disciplines in the social, behavioral, and health sciences in situations where it can greatly assist in the exploration of complex and multi-faceted phenomena.

This research approach has enabled us to collect invaluable and rich data, which demanded a complex set up, but which is representative of the complexity of the field. We were also gathering data in a field that was not much evident in the literature and one which we hypothesised took frequently place 'under the radar' (see O'Nolan, Zinsstag, & Keenan, 2018). We have brought this work above the radar now and are pleased to do so. We will briefly explore some of the research techniques used and methodological challenges encountered.

We have employed both an interdisciplinary and a mixed method approach for this project and subsequent writing up of this book, with a variety of different approaches, disciplines and methods. However, our research was predominantly qualitative (Bryman, 2016; Mills & Birks, 2014), with some quantitative aspects emerging from the survey which we developed further (see chapter five). As Heap and Waters (2019: 2–3) explain

> the quantitative strategy prioritises numbers. […] The qualitative strategy prioritises the production of data that usually takes the form of words […] Qualitative research involves the collection of data through the process of, for example, interviews, focus groups, or observations, it tends to be much more open-ended than quantitative research.

A mixed methods approach was crucial for researching the possibilities offered by restorative justice for sexual violence in about bringing these quantitative and qualitative research strategies together to reflect the richness and complexity of the topic and to enable reliability, validity and transferability of knowledge (Bryman, 2016; Heap & Waters, 2019).

Our research included systematic reviews of the relevant literature; (Bryman, 2016) study visits involving a number of semi-structured interviews with a wide variety of stakeholders (Brewer, 2000; Bryman, 2016); interviews regarding programme innovations and case studies based on individual experiences. We used comparative research methods (Heidensohn, 2008) to analyse and compare data across five European countries (see chapter six, see also Keenan, Zinsstag, & O'Nolan, 2016). We also used a survey method to collect qualitative and quantitative data from restorative justice practitioners across the globe (n = 74) (Bryman, 2016). The survey was designed and distributed through the online platform

Survey Monkey (for more information, see chapter five). Finally, we also used narrative methodology to relate stories of programmes and individual experiences which put into context some of the data analysed throughout the book (Bold, 2012; Presser & Sandberg, 2019).

5. The structure of the book

This book examines the literature and practice of restorative justice in cases of sexual violence, both theoretically and empirically, in Europe and internationally, through an interdisciplinary and mixed methods research approach.

This research focused on the broad remit of intra- and extra-familial sexual violence that has been committed against adults and children, by male and/or female youth and/or adults, including persons of authority, family members in both 'historical' and contemporary times. The sexual violence may or may not have resulted in criminal or civil court proceedings. The book draws on research with victims and perpetrators of sexual crime and to some extent with the communities in which they are embedded.

In essence, this book examines the potential and capacity of restorative justice to address and respond to the different types and levels of seriousness of sexual violence, bearing in mind the specific needs for safety for individual children and adults, the power imbalance involved in sexual crime and the risk of reprivatisation of sexual crime, which must be avoided. In undertaking this task, the research considered the risks of re-victimisation for victims and the human rights considerations of restorative justice approaches for victims and perpetrators, for which there is an emerging and developing literature (see e.g. Jülich & Thorburn, 2017). By critically examining the theoretical and empirical literature and by carrying out some primary research on existing initiatives and practices we aimed to assess whether the putative characteristics of restorative justice mechanisms would allow for an improved response to the various protagonists involved in sexual crime and its aftermath and also to advance the theory of restorative justice for responding to this particular type of crime (see also e.g. Keenan & Zinsstag, 2014; McAlinden, 2007; Pali & Madsen, 2011). While restorative justice methodologies are known to be varied and include victim–offender mediation/dialogues, restorative justice conferencing, and restorative justice circles, we also included Circles of Support and Accountability (COSA) and truth commissions in in the remit of this study. In essence, the breadth and depth of restorative justice theory and practice in cases of sexual crime have been reviewed.

The book is based in part on a collective piece of research undertaken by various researchers who participated in the research project '*Developing integrated responses to sexual violence: an interdisciplinary research project on the potential of*

restorative justice'.[8] Some of the chapters are original and written by us solely for the book and some have been co-authored by one or several of the researchers with us—when this is the case, we mention it in a footnote at the start of the relevant chapters.

The book starts with this introduction which is chapter one. The book is then divided in three main parts comprising nine chapters. Part one entitled 'Theoretical and legal considerations' is made up of four chapters. The first Chapter entitled 'Understanding sexual violence: victims, offenders, and society' examines sexual violence, its main causes and aetiology, the main typologies, the consequences it may have for victims, offenders and to some extent for their communities. The chapter also explores the ongoing needs of the different stakeholders. Chapter two 'Sexual violence, criminal legal frameworks, and the need for reform' examines the legislative frameworks for responses to sexual crime across jurisdictions and analyses traditional legal and social responses to victims and perpetrators of sexual crime. Three countries are compared on specific aspects concerning their responses to sexual violence: Ireland, the Netherlands and Australia. The chapter four, 'International policy drivers and contexts: restorative justice after sexual crime' examines the different international instruments available currently at European level and beyond, in particular those developed by the United Nations (UNODC). The chapter examines the arguments for and against the practice of restorative justice in sexual violence cases through the lens of these different policy tools and instruments. The fifth and final chapter of part one of the book, 'Restorative justice after sexual violence: reviewing selected empirical research', explores the empirical and practice literature on restorative justice as a response to sexual violence.

Part two of the book is entitled 'Empirical realities'. During the project on which this book is partly based we undertook an examination of the extent and form of practice of restorative justice in cases of sexual violence across the globe and attempted to offer (as much as possible) a global overview of the current field. Chapter five, 'Restorative justice after sexual violence: mapping the international field of practice', offers an in-depth analysis of the global survey we undertook. Chapter six, entitled 'A thematic analysis of policies and practices in five European countries: Belgium, Denmark, Ireland, the Netherlands and Norway', describes the characteristics of each of the countries visited and thematically analyses a number of points of comparisons between them. Chapter seven, 'Past and current initiatives: examples of programmes from six jurisdictions', describes a number of carefully selected programmes in existence or having previously existed in six different countries including Belgium, the United Kingdom, the Netherlands two in the United States of America and one that is cross-borders, to show examples of

[8] Daphne III—JUST/2011/DAP/AG/3350.

practices and approaches in different jurisdictions. In chapter eight, 'Four personal narratives of restorative justice practices following sexual violence', we present the testimonies, in their own words, of different stakeholders having participated in restorative meetings following sexual violence. Together with the description of a number of international programmes (chapter seven), the thematic analysis of restorative justice in five countries (chapter six) and the survey data (chapter five), the narratives contribute to developing a comprehensive picture of current practice, of the strengths, limitations and challenges of the various approaches and initiatives that are available in many jurisdictions.

Part three of the book is entitled 'Exploring the future'. Chapter nine, 'Training and guidelines for restorative justice practices after sexual violence' systematically explores different types of training and what it should include, offering guidelines on how restorative justice in cases of sexual violence can and should be done with an emphasis on best practice. Much of this guidance is based on the theoretical and empirical research gathered in the course of the research for this book as well as author practice experience. In the conclusion, 'Addressing the justice gap: the potential for restorative justice after sexual violence', we reflect on the findings of the study and offer further thoughts on the feminist critique of restorative justice, our position on a reformist restorative justice in criminal matters and particularly in the context of sexual violence and the possibilities for a much needed restorative way forward.

1
Understanding sexual violence
Victims, offenders, and society*

1. Introduction

Sexual violence is not a minor social problem that impacts a minority of adults and children (European Agency for Fundamental Rights, 2014: 167). Unfortunately, it is a major international problem, known in every country across the globe (Jewkes, Sen, & Garcia-Moreno, 2002). Sexual violence is primarily a gendered problem (Herman, 2005) with other power-based non-gendered features. It takes place within specific cultural contexts in peace times and in times of war.

Restorative justice theory and practice in its modern version were developed primarily with reference to non-violent offences, which attached no stigma to victims, and involved young offenders who generally admitted to the crime. In its early days restorative justice focused on attempts to reduce youth offending and divert young people from a life of crime by means of this 'informal' community justice approach. While often linked to 'formal' criminal justice systems, its less formal structure than for example court proceedings, its flexible approach to the chosen methodology (in theory), and its attempts to include the key stakeholders (where possible) (as distinct from centring criminal justice actors), gave it its 'informal' title. Sexual and domestic violence were not in evidence in this early work, even when adult offenders began to be considered for restorative justice (Shapland et al., 2011: 199). As time went on, non-intimate violent offenders and victims and secondary victims of such crimes appeared in restorative justice practice and research (Umbreit et al., 2003a, 2003b). Some scholars also grasped the 'gender-based violence'[1] nettle, sometimes from a theoretical perspective; sometimes from an

* This chapter was written in collaboration with Gunda Wössner.

[1] We want to say something about using the label 'gender-based violence' for sexual violence as it is not considered to be an inclusive concept by some, despite its theoretical significance and the gendered reality of sexual crime as evidenced in the prevalence rates of sexual violence perpetrated by males against females. As this chapter demonstrates while the majority of victims of sexual violence are women and children, including male and female children, adult males also experience sexual violence. We do not exclude these victims from consideration in our work. Thus, while there is a strong gender dimension to the prevalence of this crime, gender does not explain all.. We adopt a third wave feminist position for this research (see later in the chapter) and we see sexual violence as a power-based as well as a gender-based crime of violence that is inclusive of all victims and perpetrators (see also Keenan, 2012: 115–125 for further elaboration on power and gender).

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empirical perspective (Daly, 2002b, 2006a, 2008, 2011a, 2014a, 2017; Keenan, 2012; Marinari, 2021; McGlynn et al., 2012; Ptacek, 2005, 2010; Strang & Braithwaite, 2002; van Dijk, 2013; Zinsstag & Keenan, 2017). Right now, change is coming again in relation to sexual violence and restorative justice. This time it is not just scholars or advocates who are examining the case for restorative justice in cases of sexual violence; victims of sexual crime are speaking out themselves and asking for innovative as well as criminal justice to be available for them (Keenan, 2014; Marsh & Wagner, 2015; Moore, Keenan, Moss, & Scotland, 2021). Restorative justice is part of that call.

However, there is much to consider and get right in this endeavour. Sexual crime is a wholly different type of crime to non-violent crime. While all crimes of violence can have traumatic impacts on victims, and the impact of victimisation is subjective rather than defined by legal categorisation, sexual crime can shame and stigmatise victims, by design, and is successful in this for the most part. It can be reasonably argued therefore that restorative justice theory and practices must be reconsidered (and perhaps modified) for their application to crimes involving sexual violence. For the same reasons, offender initiated restorative justice models must be put under the philosophical, theoretical, and practical microscope when being examined in response to sexual violence.

As chapter 2 points out, conventional criminal justice fails victims of sexual crime (Herman, 2005; Keenan, 2014), and it also fails offenders (Keenan, 2014) (for different reasons). Restorative justice after sexual violence cannot be allowed to fail them again, and it therefore must not fall into the same traps, albeit from different justice directions. If legal considerations,[2] criminal justice processes and procedures, and rape myths are the culprits in current criminal justice failures (or limitations), it cannot be assumed that restorative justice (in its traditional configuration), or any version of 'informal' community justice will do any better. Restorative justice must be reconsidered and examined for this challenge.

As Herman (2005: 598) points out, the community cannot be counted on to do justice for victims any more than criminal justice can because public attitudes toward sexual crimes 'are conflicted and ambivalent at best'. As the participants in her study explained: they were as likely to be shamed and humiliated in their own families, schools, or churches as they were in the police station or the courtroom.

Herman's (2005: 598) views are important here when she argues:

> when a public consensus uniformly supports the victim and condemns the crime, offenders can be held accountable and be welcomed back into the community through the restorative process of 'reintegrative shaming'. In crimes of sexual and

[2] Such as the evidentiary rules, and criminal procedures.

domestic violence, by contrast, the person who needs to be welcomed back into the community, first and foremost, is the victim.

Daly (see Daly, 2005, 2015, 2017; Daly & Bouhours, 2010, 2011) forensically examines sexual victimisation and restorative justice and makes important observations that are pertinent to the Herman's fears for informal community justice. First she has consistently argued that restorative justice is not a 'fact' finding legal procedure in the legal evidential sense of finding 'fact', and for this reason restorative justice cannot ever replace criminal justice with its focus on 'evidence' as part of determining 'legal' guilt, and ultimately punishment of wrongdoers. She further argues that restorative justice is premised on the understanding that an offender admits 'responsibility' for the offence and that the 'facts' are not contested before restorative justice takes place. While this is to some extent true it is not altogether true, as acceptance of the 'full facts' may not always be acknowledged before restorative justice can take place; partial acknowledgement of facts and acknowledgement of wrongdoing on the part of the offender are however essential. Choice then defers to the parties, most especially the victim whether or not to proceed in full knowledge of this information. Acknowledgement of wrongdoing on the part of the offender (or accused) *is certainly* a prerequisite for participation in restorative justice, but responsibility taking (and the even acceptance of 'facts' once minimised or denied) often increases during the restorative process, as experience indicates (see Griffith, 2018, Keenan & Griffith, 2019; 2021).

Restorative justice thus can sit alongside, inside, or outside of criminal justice, depending on the needs and interests of victims, offenders, and the state, and may paradoxically actually contribute to greater honest 'fact-finding' and truth-telling than that which occurs during criminal investigations and trials (see Keenan, 2014, chapters 3 and 6). Challenging 'facts' or victim blaming has no place in the actual restorative justice face to face victim offender meeting or conference, and this must be anticipated by skilled, appropriately trained practitioners, and clarified and addressed in advance during the preparation meetings for restorative justice (see Keenan, 2018, also on the need for facilitators to have an understanding of the law and due process). Developing ways of blending criminal, civil,[3] and restorative justice mechanisms, must be part of an expanded and elaborated justice imperative (Keenan, 2017), something that may go some way towards assuaging Herman's (2005) legitimate concerns.

[3] Civil law is often based on the law of tort and involves a different evidential threshold, 'on the balance of probability', to that of the criminal law 'beyond reasonable doubt' but it nonetheless involves an adversarial process with the powers of the court only to judge the evidence on the balance of probability and award compensation. The civil courts have no powers to impose terms of imprisonment or other community based penal sanctions on persons judged to have committed wrongdoing according to this evidential threshold.

For all these reasons the first chapter of this book focuses on sexual violence and positions an understanding of sexual violence at the heart of our work on sexual violence and restorative justice. Examining and adapting restorative justice theory and principles to the crimes of sexual violence is the focus of the remainder of the book.

The chapter is divided into five sections. The first section introduces the chapter. Section two sets the scene and provides an overview of prevalence, definitions, and key dimensions of the problem. While adult males are the main perpetrators of sexual violence and adult females and children the main victims (see e.g. Brown & Walklate, 2012; Neumann, 2010) this chapter also considers sexual violence perpetrated against males and sexual violence perpetrated by juveniles, females, and in times of war. The third section examines the impact of sexual victimisation on children and adults. It addresses the role of 'rape myths' as part of the social context for sexual violence and its contribution to further trauma for victims. It also considers the resilience that mediates many of the worst impacts of sexual crime for some survivors.[4] Section four focuses on perpetrators of sexual violence and provides a note on adult male, adolescent, and female perpetrators. Section five offers several explanatory but not excusatory theories of sexual violence, including feminist, psychological, and biological theories of explanation. Theories range from single item explanations to overarching integrated theories, and both are presented here. The chapter closes with some final remarks.

2. Sexual violence: prevalence, definitions, and dimensions of the problem

2.1 The prevalence of sexual violence

Data on the extent of sexual violence stem from official police records, victim surveys, and academic research and each has its limitations (see UNODC, 2010). Part of the problem lies in definitional and methodological differences making comparative work across jurisdictions and across time difficult (for fuller discussion, see Stoltenborgh, van IJzendoorn, Euser, & Bakermans-Kranenburg, 2011). To add to the complexity, some prevalence studies do not differentiate between child, adolescent, and adult victims. In addition, significant cultural differences impact the willingness of victims to disclose sexual violence and to report to the police (see Jewkes, Sen, & Garcia-Moreno, 2002; Pereda, Guilera, Forns, & Gomez-Benito, 2009; Stoltenborgh et al., 2011). Countries with an inadequate legal system in which to prosecute sexual crime and an absence of investigative

[4] The terms 'victim' and 'survivor' are used interchangeably throughout this book.

journalists to investigate these 'under the radar' problems further add to the limitations of trying to compile relevant comparative data. It is thus not surprising that mixed conclusions about the incidence and prevalence of different forms of sexual violence emerge (Saltzman, 2004). In this context, the *International Crime Victim Survey* (ICVS) attempts to capture and collate comparative crime data across the globe; in the case of sexual crime by using the same questionnaire regarding sexual violence experiences in all the participant countries. This work is still a work in progress.[5]

Despite the limitations of prevalence data some important trends are notable: sexual violence is a grossly underreported crime (Gillen, 2019; O'Malley, 2020; Lovett & Kelly, 2009) with researchers noting significant differences in prevalence from self-report studies when compared to data from informant studies. Self-report studies yield a 30 times higher prevalence rate than that reported in informant studies (see Stoltenborgh et al., 2011: 87). Higher prevalence for females than for males for sexual violence across the life course is also consistently reported (see McGee, Garavan, deBarra, Byrne, & Conroy, 2002; Stoltenborgh et al., 2011). Findings from several national and international surveys have indicated a lifetime prevalence rate for sexual victimisation of up to 35.6 per cent for females (Borumandnia et al., 2020) and up to 16 per cent for males (Krahé et al., 2015). In their Irish study McGee et al. (2002: xxxiii) found that 42 per cent of females and 28 per cent of males experienced some form of sexual abuse or sexual violence over their lifetime. A recent EU-wide survey on various forms of violence against women found that every third woman (33 per cent) has been exposed to some form of physical and/or sexual violence since the age of fifteen (European Agency for Fundamental Rights, 2014: 167). Every second woman had experienced one or more forms of sexual harassment (p. 167).

While women and girls remain disproportionately affected by sexual violence, male sexual victims have been relatively invisible in the discourse on sexual violence, but significant efforts have been made to provide more inclusive conceptualisations, through research, policy, legislation, and interventions. Prevalence rates of sexual assault for males range from one to 73 per cent (see Peterson, Voller, Polusny, & Murdoch, 2011: 18), depending on the definition of sexual assault. In ten European countries, the prevalence of forced non-consensual sexual contact varied from less than 6 to almost 42 per cent of men across countries, with an overall prevalence of 16 per cent (Krahé et al., 2015). In a review of the literature Turchik and Edwards (2012) reported that the prevalence of rape and attempted rape among men varied between 3 and 10 per cent

Prevalence data on child sexual abuse are mainly derived retrospectively, with crucial factors in sample selection directly influencing the findings. Prevalence for

[5] See https://wp.unil.ch/icvs/ for recent updates.

child sexual abuse of female children is reported as from 18 to 20 per cent, whereas for male children the figure is from 8 to 10 per cent (Finkelhor, 1993; Pereda et al., 2009; Stoltenberg et al., 2011). O'Leary and Barber (2008) caution that when using clinical as opposed to a non-clinical samples, it is likely that male subjects (boys and men) are underrepresented (see also Putnam, 2003). According to Peterson et al. (2011) researching sexual abuse and violence against males can be even more complex than researching sexual violence against females with definitional and methodological problems around every corner.

Most sexual victimisation surveys refer to sexual violence in peace times. However, sexual violence in times of war and during civil conflict is a pervasive mass phenomenon.[6] During almost every recorded armed conflict, sexual violence has been perpetrated against women in various ways (De Brouwer & Chu, 2009). This explains why women in Uganda, Colombia, or Albania reported a higher incidence of sexual violence in the above-mentioned ICVS than women from other countries of their continent. Sexual violence during armed conflicts is often used as an effective means of torture (Zinsstag, 2008). The number of victims of sexual violence in times of war and conflict run from thousands (e.g. in Kosovo) to tens or hundreds of thousands of women (e.g. Asia and Europe during WWII, Bangladesh, Cambodia, Democratic Republic of the Congo, Rwanda, and Sudan) (see Chang, 1997; Zinsstag, 2008). Men are also affected by sexual violence in times of armed conflict and war, although this fact has only come to public awareness in relatively recent times (Carlson, 2006; Sivakumaran, 2010).

2.2 Defining sexual violence

Defining sexual violence poses challenges since different nation states have different legislation and social definitions of rape, sexual assault, child sexual abuse, other forms of sexual crime, online child exploitation, pornography, and sexual violence in armed conflicts. Despite these definitional complexities sexual violence is reported in every part of the world in one form or another, with uncanny regularity and similarity across the globe. According to the World Health Organisation (Jewkes et al., 2002: 149) sexual violence is defined as:

> any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise redirected, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.

[6] See e.g. a study on the continuum of sexual violence between peace and conflict situations in Boesten (2014).

The WHO definition goes on further to remind that sexual violence encompasses acts that range from verbal harassment to forced penetration and a range of other types of coercion, from social pressure and intimidation to physical and sexual force. Sexual violence includes, but is not limited to rape within marriage or dating relationships; rape by strangers or acquaintances; unwanted sexual advances or sexual harassment (at school, work etc.); systematic rape, sexual slavery, and other forms of violence, which are particularly common in armed conflicts (e.g. forced impregnation); sexual abuse of mentally or physically disabled people; rape and sexual abuse of children; and 'customary' forms of sexual violence, such as forced marriage or cohabitation and wife inheritance (Jewkes et al., 2002: 149; Freedman, 2013; Neumann, 2010).

It is important to note that coercion encompasses a whole array of activities and behaviour: physical force, psychological intimidation, threats and emotional blackmail, and the inability of a victim to give consent by virtue of age or otherwise while drunk, drugged, asleep, or mentally incapable of understanding the situation (Jewkes et al., 2002: 149; Wertheimer, 2003). Sexual violence is also not only limited to contact crimes. The definition also encompasses non-contact child abuse, such as online child exploitation involving the use of communication technology and sex trafficking.

2.3 Rape and sexual assault

The definition of rape varies between nation states and has been the subject of ongoing legislative revision in many jurisdictions.[7] Rape has long been limited to the understanding that a male person forces a female person to have intercourse with him without her consent (Stefiszyn, 2008; Wertheimer, 2003). According to the World Health Organisation (Jewkes et al., 2002: 149) rape is understood as 'physically forced or otherwise coerced penetration—even if slight—of the vulva or anus, using a penis, other body parts or an object'. This definition not only covers sexual intercourse between a male and a female person but also includes any kind of penetrating incidents, including with implements, between an offender and victim of the same sex.

Sexual assault also refers to forms of assault other than rape involving sexual organs or contacts between mouth and penis, vulva, or anus (Jewkes et al., 2002: 149). When we use the term sexual violence and rape in the remainder of this chapter, we also include sexual assault (and child sexual abuse) and we do not differentiate between rape and sexual assault for ease of readability.

[7] See e.g. Cossins (2020) and Temkin (2002).

2.4 Child sexual abuse

Child sexual abuse is usually understood as any sexual activity with a child before the legal age of consent and this can vary across countries. It can contain different sexual acts such as sexual intercourse or attempted intercourse, including penetration and sexual touching, (with or without clothing), oral-genital contact, exhibitionism, or exposing children to adult sexual behaviour or pornography (such as included in definitions set out above on sexual violence). The definition of child sexual abuse encompasses sexual acts with minors of both genders and of transgender children. As mentioned above, a crucial factor for the abusive character of sexual contact with minors is that children are not capable of giving consent by definition and the sexual activities of an abusive nature in an abusive context may interfere with a healthy and normal psycho-sexual development and cause severe harm at various stages of their psychosocial and sexual development (see Bagley, 1996; Van Der Kolk, 2014). It is also important to note that the child may not recognise the sexual character of the abuse, mainly because of trust in the offender and age-related lack of understanding (Fowler, 2008). The intention of the offender in child sexual abuse always has a sexually motivated component, as discussed later, to a greater or lesser extent (Finkelhor, 1984; Keenan, 2012).

2.5 Other types of sexual violence

Exhibitionism is a further specification of sexual violence. It is classified as a paraphilic disorder in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR, American Psychiatric Association, 2000: 569) and involves the exposure of one's genitals to a stranger. Both adults and children may be victims of exhibitionists. It is assumed that the onset of exhibitionism usually occurs before the age of eighteen and is noted that only few arrests are made of offenders older than 40 (DSM-IV-TR, American Psychiatric Association, 2000). While until the 1970s, exhibitionists were supposed to be neither dangerous nor assaultive (so called *nuisance offenders*) more recent research showed that exhibitionism can be related to other sexual offences too (Bader, Schoeneman-Morris, Scalora, & Casady, 2008; Freund, 1990; Sugarman, Dumughn, Saad, Hinder, & Bluglass, 1994) and with non-sexual offences (Bader et al., 2008; Blair & Lanyon, 1981). Beier (1998) distinguishes three types of exhibitionists: the *typical* (normal family background, unobtrusive social and occupational development), the *atypical* (adverse upbringing, dissocial lifestyle) and the *paedophilic oriented* (corresponding to the typical type but with child-victims only) exhibitionist.

In recent times new media has given rise to another form of sexual violence, namely, *online child sexual exploitation*, which involves the distribution of graphic material with sexual content, often of children, via social media and mobile devices.

The graphic content can be of different types often related to children's experiences of victimisation on and offline for this trade, both when children are exposed to online child pornographic material (often as a grooming technique) (McAlinden, 2012) and when children are 'used' to produce such pornographic material (Webster, Davidson, Bifulo, & Gottschalk, 2012). According to Taylor, Quayle, and Holland (2001) the grading of the content can range along a continuum from an indicative characterisation of the material (i.e. non-erotic, non-sexualised pictures showing children in their underwear or swimwear) to sadistic content (of children being raped). All are used for the purposes of online child sexual exploitation and in some cases become part of the move to contact sexual exploitation and abuse (Webster et al., 2012).

Mercado, Merdian, and Egg (2011) offer four primary, not mutually exclusive purposes for sex offenders using the internet for illegitimate purposes: (1) the production and distribution of online child exploitation material with financial profit as the primary motive, (2) the viewing of online child exploitation material for sexual arousal and pleasure, (3) the identification and grooming of potential victims, which could, in some cases, lead to offline meetings, and (4) the creation of networks among perpetrators of child sexual abuse in order to share child exploitation images and materials or to validate sexually deviant beliefs by discussing them with others who have the same interests (see also see Fowler, 2008: 32). The internet allows for relative anonymity and less socially regulated behaviour for those who seek to use it for sexually exploitative reasons (Bargh & McKenna, 2004), increases accessibility to child sexual exploitation content, and decreases the costs of production and distribution of online child exploitation materials (Klain, Davies, & Hicks, 2001). As a result, internet sex offending has sparked a new wave of focus from law enforcement and international law enforcement co-operation with an increasing number of arrests and convictions in many jurisdictions (Webb, Craissati, & Keen, 2007).

Grooming is a universal process in child sexual abuse (see McAlinden, 2012) and although it can be the case that while the first time of abuse may be 'accidental' with no grooming involved, second and subsequent abuses of a child are always by design and with sexual intent (see Keenan, 2012). Perpetrators often establish trust and affection with the child by tactics of emotional seduction which can take several months before any physical sexual abuse of the child will actually take place (Salter, 1995).

Regarding the relationship between internet sex offenders and previous convictions for contact sexual offences there are different findings. Webb, Craissati, and Keen (2007) found that the internet offenders had significantly fewer previous sexual convictions than other child molesters. Seto and Eke (2005) reported that 24 per cent of the internet sex offenders had prior contact sexual offences. They concluded that online child sex offenders who had ever committed a contact sexual offence were the most likely to reoffend. However, the overall rate of sexual recidivism

was low (4 per cent). They also found that online child sex offending seems to be a strong indicator for paedophilia (see also Seto, Cantor, & Blanchard, 2006).

2.6 Rape myths, sexual violence, and society

Sexual violence is not simply a private, personal matter between the victim and the offender; it is also a matter that has social, public, and political dimensions and has its genesis in social and cultural conditions (Gillen, 2019) as well as the psychology and disposition of offenders (Marshall & Barbaree, 1990; Ward & Siegert, 2002). Its resolution must be public and political as well as private and personal. Feminists have long argued this position. The reaction of the community to the victim is known to influence the victim's well-being (Koss & Harvey, 1991). Similarly, the response of a community to an offender can lead to stigmatisation and marginalisation of them and their families, with equally devastating consequences (Jahnke, Imhoff, & Hoyer, 2014). How victims and offenders are responded to by both statutory and voluntary services is not only reflective of public norms, values, and attitudes that contain oppressive stereotypes and myths (Gillen, 2019) but it also in turn creates them (Keenan, 2012). Such myths add to the trauma for all.

'Rape myths', which are certain beliefs about sexual violence that are held by a large populace, usually related to 'victim blaming', not only impact victims following sexual violence (Logan, Evans, Stevenson, & Jordan, 2005; Peterson et al., 2011) but also form part of the social context in which sexual violence is committed (Godden-Rasul, 2017; Krug et al., 2002). General common rape myths include such widely accepted beliefs as 'you cannot be raped by someone you know', 'many women secretly desire to be raped', 'if a woman says no, she means maybe or yes' (Neumann, 2010: 37). The misconception that women who dress 'provocatively' are to be blamed for being raped is never too far away from popular discourse either (Neumann, 2010: 38). Rape myths contribute to the difficulties many victims of sexual violence have in reporting the crime as they fear they will not be believed or they will be held responsible for the assault (Jülich et al., 2011). They also affect the way the criminal justice system deals with victims of sexual violence, and they affect the victims' care and treatment. In contrast positive experiences with investigators and criminal justice agents have been reported by some victims as being crucial for their healing and well-being (Patterson et al., 2011).

Rape myths not only affect female victims of sexual violence, but they also impact on male victims of sexual assault. According to Peterson et al. (2011: 2) commonly held myths suggest that 'men cannot be raped or sexually assaulted and that, if men are sexually assaulted, they are unharmed by the experience and may even find it pleasurable'.

3. Victims of sexual violence

In general, the term 'victim' is attributed to a person who has been offended against, particularly in terms of the law. This is the most basic definition. Other attempts to define the term are significantly more complex. The term can hold subjective meaning for many harmed individuals even when there has been no transgression or proven transgression of the law. In the words of Paul Rock (2002: 13), a person becomes a victim if she or he encounters an alleged transgression and transgressor and then,

> directly or indirectly, an array of witnesses, police, prosecutors, defence counsel, jurors, the mass media and others who may not always deal with the individual case but will shape the larger interpretative environment in which a complaint of wrongdoing is lodged.

Karmen (2013: 460) defines victimisation as an 'asymmetrical relationship that is abusive, painful, destructive, parasitical and unfair'. Fattah (1991) suggests that victimisation implies injury, hurt, and suffering. Dignan (2005: 31) emphasises that once a victim has been recognised as a victim of crime, 'this will normally set in motion a range of other processes over which the victim has little or no control'.

In relation to sexual violence, victims often report secondary victimisation as well as primary victimisation (Campbell, 2008; Campbell et al., 1999; Campbell & Raja, 2005). Whereas *primary victimisation* encompasses the direct physical, emotional, and behavioural consequences of the actual sexual offense(s), *secondary victimisation* refers to effects that are indirectly related to the experience and aftermath of the offence, such as the responses of communities of care to the disclosure or engagement with criminal justice systems. Secondary victimisation includes reactions by third parties that are detrimental to the victim, including close relatives and friends; negative social reactions such as in the community or the media, and the responses of criminal justice systems and its representatives (such as police, law enforcement or criminal investigation authorities, medical staff, lawyers, prosecutors, and judges). In this manner victims of sexual violence often report being victimised for a second time. Because of the vast evidence of the problem of secondary victimisation by the criminal justice system for victims of sexual crime (Gillen, 2019; O' Malley, 2020) the behaviours and responses of stakeholders in the criminal justice system and those close to the victim have a crucial impact on the victim's well-being. In recent decades fundamental developments in the field of victimology have greatly shaped and influenced attitudes towards victims of sexual offences (Kilcommins, Leahy, Moore Walsh, & Spain, 2018). These attitudes shape the agenda of how a society deals with victims, including victims of sexual violence.

3.1 Short- and long-term impacts of sexual violence for victims

The extent to which the experience of sexual violence affects one's well-being and the likelihood of developing post-traumatic stress disorder depends on the severity of the offence itself as well as the affected individual's subjective disposition and resilience (see Fischer & Riedesser, 1998; Newsom & Myers-Bowman, 2017). Survivors of severe sexual violence frequently develop posttraumatic stress disorder. Post-traumatic stress disorder is defined by three clusters of symptoms that result from a serious threat of injury or death accompanied by extreme fear, helplessness, or horror (Fischer & Riedesser, 1998; Keane, Marx, & Sloan, 2009). The symptoms include recurrent and intrusive recollections and dreams of the incident, hyperarousal such as an increased startle reaction, sleep and/or concentration difficulties, and finally trying to firmly avoid cues or reminders of the trauma. Avoidance symptoms may also encompass emotional numbness, i.e. the inability to feel any positive emotions such as love, satisfaction, or happiness (Keane et al., 2009). The victim may well exhibit typical trauma symptoms such as intrusions, numbed feelings, increased arousal, and a lower threshold for anxious arousal too. The experience of post-traumatic stress disorder can be complex for victims of sexual crime. While individuals who experience trauma due to a loss, for instance, feel sadness, bereavement, and sometimes anger, victims of a crime, especially of sexual violence, may also feel humiliated, injured, shamed, dirty, belittled, and guilty (Herman, 2015; Ochberg, 1988). In addition, the traumatic situation for the victim can be even more complex if the offender is a related party or a loved one (Keenan, 2014). Loss of confidence, security, and the trust in the world can be deeply shaken.

3.2 Rape trauma syndrome

In 1974, Burgess and Holmstrom developed a model for understanding the experiences of victims of forcible rape or attempted forcible rape known as the *rape trauma syndrome,* which usually involves a range of symptoms experienced by the assaulted person. As a result of the rape or sexual assault the victim can initially feel completely disorganised. A wide range of expressive emotions such as shock, disbelief, fear, and anger are often displayed in a myriad of emotional releases such as sobbing, crying, restlessness, and smiling. These emotional expressions can alternate with very controlled behaviour in the immediate period after the rape (see Keenan and Griffiths, 2019; 2021). In the weeks following a rape, somatic symptoms can also be experienced, including muscle tension, headaches, fatigue, sleep disorders, gastrointestinal irritability, and gynaecological symptoms. Emotional reactions during this acute phase may include self-blame, fear, embarrassment,

anger, and revenge (see e.g. for a study on the continuum of sexual violence between peace and conflict in Boesten, 2014; Burgess & Holmstrom, 1974).

In addition to these short-term effects some victims also experience significant long-term psychological and social impacts following rape and sexual violence (Herman, 2015). Some studies (see Gage & Hutchinson, 2006) have established a strong relationship between depression, suicidality, and anxiety disorders linked to sexual violence. Dissociative disorders have also been linked to sexual traumas (Cloitre, Petkova, Wang, & Lu, 2012). In general, the mental and physical health effects of sexual violence are very well established. Gage and Hutchinson (2006) showed a higher risk of post-traumatic stress disorder, anxiety, depression, suicide (attempts), and/or substance (ab)use for victims of sexual violence. They also report on several research results that documented detrimental consequences with regard to reproductive and physical health, including chronic pain, gastrointestinal and gynaecological problems, as well as sexually transmitted diseases. Financial loss and economic hardship are also reported as one of the long-term effects of sexual victimisation (Dignan, 2005). Sexual victimisation reinforces the fear of crime in general in females and sexually victimised women limit their movement to a restricted radius, resulting in a loss of social freedom (Koss, Bachar, & Hopkins, 2003). Post-traumatic stress disorder in the case of rape victims 'is characterised by high levels of anxiety and social withdrawal' (Jülich et al., 2011: 226).

3.3 Child sexual abuse and trauma

Similar to the effects of sexual assault and rape for adults, child sexual abuse related impacts can be divided into short- and long-term consequences. Common direct symptoms in sexually abused children are aggression and sexualised behaviour as well as underperformance in academic work (Fowler, 2008). Fear, self-blame, and guilt are also reported (Fowler, 2008). Other symptoms include substance abuse especially in male victims, self-mutilation especially in female victims, rage and anger manifested as aggressive behaviour, depression, or withdrawal, violence, or misogyny (Sidebotham & Appleton, 2021; Summit, 1983;). Not all sexually abused children suffer from clinically relevant symptoms immediately following sexual abuse. Nonetheless, studies show that asymptotic children can deteriorate over the twelve to eighteen months following the abuse (see Putnam, 2003). However, a considerable proportion of sexually abused children are resilient and do not develop clinical symptoms. These children develop defence mechanisms which prevent the abuse from impacting on their lives (Fowler, 2008: 18). The caretaker response to the abuse disclosures also impact the trauma and a good response contribute to building resilience.

Some victims of child sexual abuse develop thinking strategies in the wake of the abuse to help them cope. They might adopt the offender's belief system (such as 'children enjoy sex') or they excuse the abuser (such as 'he only did it because he was drunk'). Some children think they have to protect other children, including younger siblings, with thinking such as 'better he abuses me so he would leave the other children alone'. Such thinking can render these children even more vulnerable for further abuse (Fowler, 2008: 20).

A major methodological issue with regard to determining the long-term impact of child sexual abuse on adults is the retrospective nature of the research on which most knowledge of the long-term effects of child sexual abuse is based. Despite this we have learned a lot from such retrospective work. In his review, Putnam (2003: 271) came to the conclusion that 'the lifetime prevalence of major depression in women with a history of child sexual abuse is typically three to five times more common than in women without such a history'. Depression is the most frequently established clinical symptom in numerous studies (Putnam, 2003). Anxiety disorders, but also ongoing post-traumatic stress disorder and dissociation also often present themselves in adults who have been sexually abused during childhood (Briere, 1992; Salter, 1995). For some victims one common long-term effect of child sexual abuse is the inability to build trust in relationships or to engage in sexual relationships at all (Salter, 1995).

The majority of sexually abused children show moderate to severe psychiatric symptoms at some point in their recovery journey, but in most cases, these children recover over time (Putnam, 2003). Further research is required on whether this is an effect of spontaneous recovery, of community and familial support, of psychotherapeutic or other treatment, or of good outcomes in criminal justice or some combination of all.

3.4 Impact on male victims of sexual assault

In recent years studies and reports on male sexual victimisation have come to the fore (Fisher & Pina, 2013; Peterson, Voller, Polusny, & Murdoch, 2011). Some of these studies have identified gender specific consequences of sexual violence for men. Sexual dysfunction or confusion about sexual orientation after the assault has been reported by male victims of sexual violence (Peterson et al., 2011). Male victims also tend to withdraw from their family and friends and their interpersonal functioning can be disturbed (Peterson et al., 2011). Physical as well as psychological injuries play a crucial and traumatic role in many cases of male sexual assault. When the sexual assault takes place in the context of a prison the physical injuries can be especially severe (see Peterson et al., 2011).

3.5 Sexual violence in war and armed conflict

Sexual violence against women during wartime is well reported in the literature (Eriksson Baaz & Stern, 2013; Zinsstag, 2008). Emotional and mental harassment, fear, expulsion, separation from their children, physical violence, and violence against close relatives, and in the worst cases against their own children, are part of the long list of forms of violence against women during war times and periods of armed conflict (Nikolic-Ristanovic, 2000: 32). Sexual attacks in such contexts are usually particularly heinous with in some cases the sexual attacks being used as a *weapon* of war (Eriksson Baaz & Stern, 2013; Guenivet, 2001),[8] or as torture, retribution, spoils of war, an economic strategy, and in some cases as an ethnic cleansing tool or as a genocidal strategy (Zinsstag, 2008). Basically, this means that victims are faced with a particularly high risk of suffering from a variety of acts, with severe consequences for them. In some situations, the physical and psychological consequences are extremely grave and medical care in regions where armed conflicts take place can be difficult to access (Medica Mondiale, 2004; Zinsstag, 2008). The socio-cultural context of sexual assault during armed conflicts can also be particularly devastating as it may also affect the victim socially and economically. Women raped in such circumstances can be rejected by their close family, lose their subsistence means, housing, possibilities of education, and social status, having to resort to begging or fleeing to survive. The attack may be denied or blamed on the victim, leaving her alone with the ordeal and trauma she has experienced. The fact is that victims of wartime sexual violence may suffer from multi-layered victimisations as a consequence (Medica Mondiale, 2004; Zinsstag, 2008).[9] Increasingly the literature is also noting males as victims of war time sexual violence (Gorris, 2015).

3.6 Resilience and victims of sexual violence

Sexual violence may have a devastating effect on victims as outlined above but some victims exhibit no symptoms whatsoever. In fact, some victims of sexual violence, both children and adults, demonstrate quite a high level of psychological functioning that might not have been expected given the trauma they endured (Herrenkohl, 2013). In recent years, researchers have tried to identify the protective factors that contribute to psychological well-being in individuals in the aftermath of trauma and adversity. In relation to sexual violence there are many differences noted in individuals with regard to the factors that contribute to resilience from the

[8] For an overview of the different types of sexual violence during armed conflicts, see Zinsstag (2008).

[9] For more on the topic, see e.g. Bolya (2005), Buss et al. (2014), Guenivet (2001), Medica Mondiale (2004), Swaine (2018), and Zinsstag (2008).

impact of the trauma (Domhardt, Münzer, Fegert, & Goldbeck, 2015; Herrenkohl, 2013). However, there are some recurring trends in the literature. In relation to resilience in abused and maltreated children Herrenkohl (2013) found that positive self-esteem, ego over-control, low emotionality, or high sociability are core protective factors. Further factors that were important in developing resilience were a supportive adult–child relationship and secure attachment (Herrenkohl, 2013, Spaccarelli & Kim, 1995). Social support in general is an important factor in fostering resilience in children (Herrenkohl, 2013).

The individual's coping style is also seen as important in how individuals respond to experiences of sexual violence (see Dufour, Nadeau, & Bertrand, 2000). Coming to terms with questions such as 'Why me' and addressing questions such as 'Am I responsible for the abuse' are important in relation to whether responsibility for the offence is internalised or externalised and ultimately in whether the victim feels safe and confident (see Dufour et al., 2000). Researchers emphasise the importance of disclosure, of not keeping the crime as secret and of making sense of the trauma in developing resilient cognitive strategies (Dufour et al., 2000; McElvaney, 2015). In contrast, denial and avoidance are associated with psychological impairment. All in all, the ability to cognitively redefine and appraise the traumatic event and re-narrate their experience is one of the most important resilient resources that a victim can possess (White & Epston, 1990). It is important that the world is perceived as comprehensible and that the victim continues to have a belief in the world (Janoff-Bulman & Frieze, 1983; Spaccarelli & Kim, 1995). Meaning making of the traumatic events, comprehending what had happened as well as redefining the consequences of the trauma are important individual resilience skills too (Keenan, 2014).

Meichenbaum and Firestone (2011) summarised a number of general factors of resilience as: a sense of personal control, the ability to experience positive emotions and to self-regulate 'negative' emotions, the skill of being cognitively flexible, the proficiency to engage in activities that are consistent with personal values, belief in having a stake in the future, the availability of social relationships, and the ability to access and use social supports. Resilience is an individual resource with dynamic interpersonal dimensions, and it is enhanced by a shared collective resilience experience that is based on solidarity and support (Drury, Cocking, & Reicher, 2009; Herrenkohl, 2013; Sousa, Haj-Yahia, Feldman, & Lee, 2013).

4. Perpetrators of sexual violence

4.1 Typologies of the sex offender

In trying to understand the heterogeneity of rape and child sexual abuse perpetrators, several researchers have tried to classify different types of men who

rape and child sexual abuse perpetrators. In a seminal work on rape Groth (1979) discerned three rapist subtypes: anger rapists, power rapists, and sadistic rapists. For offenders who commit *anger rape* the sexual assault is 'a means of expressing and discharging feelings of pent-up anger and rage' (p. 13). This kind of rape is committed with brutality since the aim of the assault is to hurt and humiliate and degrade the victim. As Groth (1979: 17) puts it 'his weapon is sex, and his motive is revenge'. In contrast, *power rape* originates in the desire for authority, mastery, control, and identity (p. 17). The power rapist's primary goal is not to humiliate the victim but to experience power and this is why he only uses as much force as necessary to reach a feeling of control and power. Finally, Groth (p. 17) detected a third pattern of rape that he calls *sadistic rape*. Sadistic rapists find pleasure in tormenting and maltreating their victim. Their only aim is to make the victim suffer and feel helpless and anguished because this is their only way to be sexually aroused. A specific characteristic of the sadistic rape is the intentional injury and mutilation of the sexual organs or other intimate body parts of the victim.

Groth's (1979) also distinguished between the 'fixated' and the 'regressed' child sex offenders. The 'fixated' child sexual offender is seen as a person whose primary sexual orientation is to children. A 'regressed' child sexual offender is one whose primary sexual orientation is to adults, but who in certain circumstances and under certain conditions sexually abuses a child (Groth, 1979; Finkelhor, 1984; Keenan, 2012). Howell (1979) differentiated between the 'preference molester' and the 'situational molester'; the preference molester being akin to the fixated in Groth's (1979) typology and the situational molester being more opportunistic and circumstantial in his offending, similar to Groth's regressed type. Some scholars have questioned the dichotomous classification of 'fixated' and 'regressed' offenders (see Studer, Sribney, Aylwin, & Reddon, 2011).

Knight and Prentky (1990) distinguished between eight types of rapists. Their typology is elaborated using the continuum of two axes: (1) use of aggression and (2) impulsivity in personality types. They developed a typology of eight subtypes from these categorisations. High lifestyle impulsivity is empirically related to a higher number of rapes among adults (Knight & Prentky, 1990). Knight and Prenkty's (1990) types bear some resemblance to Groth's (1979) types.

Rape and sexual abuse can also occur in different settings involving differing contextual dynamics, each requiring specific explanation (Daly, 2014). Examples of rape in different settings including campus rape, date rape, gang rape, homosexual rape, prison rape, marital rape, inter-racial rape, serial rape, institutional abuse, and rape during war and as a war crime (Freedman, 2013; Neumann, 2010). All of these contexts can involve children or adults as victims. Some rapes and sexual abuses are considered as pre-meditated; some are considered as opportunistic.

Child sexual abusers who have a persistent primary sexual orientation towards children (up until the age of twelve) are classified as paedophilic in psychiatric classifications (American Psychiatric Association, 2013, DSM-V), although this definition has its limitations and has been subject to many refinements in the psychological literature (Marshall, 1997: 169; Polaschek, 2003: 159). Child abusers who have a persistent sexual interest in pubescent or post-pubescent children are described as ephebophiles, a classification that is also contested in psychological literature (Marshall, 1997; Polaschek, 2003). Psychiatric classifications of child sex offenders see them as suffering from a mental disorder; a primary sexual orientation towards children.

Paedophilia is a clinical diagnosis, not a legal or criminal term. However, as Harrison, Manning, and McCartan (2010: 285) point out, this distinction, made in the clinical literature, is rarely made in other discourses, such as in the public or legal debate. All adults who offend against children are often labelled as 'paedophiles' in public and legal discourses, which in clinical terms is not accurate (Harrison et al., 2010: 486). It has important implications for some judicial interventions whether a convicted person is diagnosed with paedophilia or not, such as preventive detention, imprisonment for public protection, or indeterminate detention, whereby in some jurisdictions such persons can be placed on detention orders long after their prison sentence is served (Pretrial Justice Centre for Courts, 2017). It can also influence attitudes towards innovative justice responses to them.

Sex offenders are reported as neutralising their offending behaviour with defence patterns such as minimisation, denial, rationalisations, justification, fabrications, and attacks (Hall & Hall, 2007). They also display what is regarded as cognitive distortions (such as 'the child came back repeatedly, he/she wanted it'; 'children can decide upon their own whether they want to have sexual contacts') in order to justify their offending. These justifications also act as maintenance factors for their continued offending. It is generally accepted that incest offenders, who sexually abuse their own children, are the subgroup of sexual abusers with the lowest risk of reoffending (Hanson, 2002). However, some research indicates that incest offenders often sexually abuse outside of the home too (Keenan, 2014).

4.2 Sexual violence perpetrated by juveniles

A particular manifestation of sexual violence is that perpetrated by juveniles (Fortune & Lambie, 2006). A considerable proportion of child sexual abusers are minors themselves, i.e. under the age of eighteen (Young, Grey, & Boyd, 2009). Estimates suggest that one quarter to one third of all sexual violence and abuse is

committed by children and adolescents (see Hackett, Phillips, Balfe, & Masson, 2014). Scholars suggest there is a usefulness in differentiating between (1) youth perpetrators with deficits in psychosocial functioning, (2) youth perpetrators exhibiting conduct problems and delinquent behaviour in general, and (3) youth perpetrators with paedophilic interests (see Leversee, 2011). While some researchers focus more or less on the psychology of the juvenile offender, others stress environmental factors in the pathway to offending, such as dysfunctional familial environment (Borduin, Henggeler, Blaske, & Stein, 1990; Hackett, Phillips, Balfe & Masson, 2014). A meta-analysis by Seto and Lalumière (2010) revealed that antisocial problems did not explain juvenile sexual violence. However, the degree to which family difficulties and social incompetence contribute to sexual offending in the young is not clear. Other research suggests that juvenile sex offenders do not generally differ from other youth but more often have an abuse/violent family background and are more likely to be socially isolated than their 'normal' peers (see Ryan, 2012).

Sexual violence and abuse perpetrated by children and adolescents is referred to in the literature as sexually harmful behaviour (Mercer, 2020). Studies on juveniles who have sexually harmed often ask if they are at particular risk of reoffending later in their lives (Vandiver & Teske, 2006: 152). While this is not the case for the majority of youths who exhibit sexually violent behaviour, about 10 to 15 per cent are sexual recidivists in their twenties (see Chu & Thomas, 2006). It is also repeatedly emphasised however that working backwards many adult sex offenders began their offending behaviour in adolescence (Becker, Cunningham-Rathner, & Kaplan, 1986; Borduin et al., 1990, Worling & Curwen, 2000). It is therefore important to find the appropriate intervention for this group of young people.

It must also be noted that the perpetration of sexual harm by the young is a complex issue, with normative sexual behaviour changing over time and between developmental stages (Barbaree & Marshall, 2006: 6) and what is unusual for a certain age group might be considered normal at a later developmental stage. In addition, in assessing sexually harmful behaviour in this cohort, the age difference between the perpetrator and the victim is crucial: a peer-to-peer relationship between friends under the age of consent would not be considered as 'criminal' or 'problematic' unless the difference in their ages exceeds a certain range; for small children a two year age gap, for older children a five year age gap (i.e. if the victim is twelve years old and the perpetrator seventeen years old) (Barbaree & Marshall, 2006). Adolescent sexual violence is also seen to have occurred where there is a victim that has not or could not have given consent and where there is power imbalance by virtue of age, ability, disability, race, class, or gender (Rich, 2003: 35; see also Freedman, 2013). Despite this, it is important when dealing with young people who have offended that they are not categorised as sex offenders (Rich, 2003: 33). Children and adolescents who commit sexually harmful behaviour is the preferred way of describing their sexual abuse.

4.3 Sexual violence perpetrated by females

Female sexual offending has for a long time remained an under-researched phenomenon. A review of literature in 2014 suggests that female sexual offenders 'are more likely than their male counterparts to abuse their biological children … or children for whom they provide care' (Williams & Bierie, 2014: 3). They are also more likely than male offenders to sexually abuse biologically related children; 10 per cent as compared to 6 per cent of male offenders (p. 235). Clinical experience found similar; female offenders offend against babies, pubescent males (whom they see as a 'love relationship', such as in a teacher–pupil relationship) or in an aiding and abetting way with male offenders (Keenan, clinical experience). Most studies on female sexual offenders are based on small sample sizes and surveys of particular regions i.e. single cities (Williams & Bierie, 2014), thus limiting what can exactly be discerned more generally. However, Williams and Bierie (2014) found that female sexual offenders are less discriminative with regard to the gender of the victim than are male offenders.

Mathews, Matthews, and Speltz (1989) identified the following types of female sex offenders: (1) teachers/lovers who are sexually 'involved' with adolescent and/or pre-adolescent boys sometimes abusing them under the guise of 'teaching' them about sex or 'falling in love'; (2) female offenders who initially abuse with a male accomplice, sometimes coerced by him, but may later abuse independently; (3) offenders who have been sexually abused themselves from a very young age.

The clinical features of female sex offenders often suggest a number of causative factors for female sexual offending. A range of studies reported that female sex offender samples had drug and alcohol problems, but the drug and alcohol problems ranged from 5 per cent to 50 per cent in the studies examined (see Tsopelas, Spyridoula, & Athanasios, 2011: 122). Tsopelas et al. (2011) also found female adult sex offenders to be diagnosed with borderline and antisocial personality disorder. Sometimes these disorders are thought to mediate the relationship between the female perpetrators' own sexual victimisation and later offending (Tsopelas et al., 2011).

Young female sexual offenders account for fewer than 10 per cent of sexual offences committed by youth (Tsolepas et al., 2011: 122; Vandiver & Teske, 2006). They offend above all against relatives and acquaintances (Vandiver & Teske, 2006). Robson and Lambie (2013) reported that young female sexual offenders who underwent psychotherapeutic treatment showed anger and outward aggression in their 'normal' sexual behaviour, but they were more covert and devious in their sexually harmful behaviours. Their ability to self-regulate emotions was severely impaired and they exhibited mood swings. Tardif, Auclair, Jacob, and Carpentier (2005) also found that almost half of the young female offenders had a history of violent behaviour against others and drug abuse. In addition, learning disabilities are frequently found in young females who sexually offend (Tardif et al., 2005).

5. Explanatory theories of sexual violence

5.1 Feminist theories: power and control

Feminist approaches to explaining sexual violence against women and children trace it to societal patriarchal social structures. Feminists argue that men's violence towards women and children can be seen as an extreme expression of power and social control often resulting from a sense of entitlement and proprietary rights to domestic and sexual services (Cowburn & Dominelli, 2001: 401; Kelly, 1997: 10; Mercer & Simmonds, 2001: 171). This perspective suggests that traditional gender role allocation leads to a power imbalance between males and females. According to this view, the 'roots of violence against women lie in historically unequal power relations between men and women and pervasive discrimination against women in both the public and private spheres' (UN Secretary General, 2006: ii). This dynamic, it is argued, leads to the objectivation, devaluating, and degradation of females; an argument for which there is empirical support (Krug, Dahlberg, Mercy, Zwi, & Lozano, 2002). Studies show that the number of rapes is higher in societies that hold traditional gender role stereotypes where gender inequality is rife compared to societies that are considered to be more emancipated and where gender equality is a value, if not fully realised (Brockhaus & Kolshorn, 2005).

According to the feminist argument children may become objects for the sexual desires of some men for whom it is easier to live up to the culturally embedded requirements of masculine identity based on dominance, using power and control to access children rather than negotiate sexual relationships with adult females (Finkelhor, 1984: 39). According to Rush (1980), the socio-structural approval of patriarchal authority facilitates or legitimates incestuous behaviour by men. Violence against women according to the feminist perspective is seen primarily as an issue of gender inequality.

The feminist analysis of sexual offending, however, is more varied than is generally appreciated, and the progression in feminist thought over time has been significant (see Keenan, 2012: 115–120). First wave feminism placed the issues of women, sexuality, gender, and sexual and domestic violence on the public agenda, challenging patriarchal culture and the patriarchal 'ideal', and brought issues to the fore that had been heretofore considered private and taboo. This led to the development of much needed services for women and children and to a proliferation of scholarly and other work on rape and sexual violence (p. 116). However, as feminists continued to fight hard to enact the necessary change in social attitudes, law, and social structures, ideological splits began to occur within the movement and the earlier concepts were taken up by second wave feminists in a manner that seemed to essentialise some of these liberating ideas in absolutist terms.

The third wave in feminism brought forth third wave feminists who were sceptical of theories that posit universal explanations for sexual violence that miss a host of victims and are not sufficiently self-critical (Featherstone & Fawcett, 1994: 64; Featherstone & Lancaster, 1997; Keenan, 2012; Lancester & Lumb, 1999). They are concerned with identifying the effects of sexual oppression and inequality more broadly than merely along gender lines and are focused on abuses of power within multiple cultural and structural situations of inequal power relations (Keenan, 2012: 117). Third wave feminists argue against essentialising power as fixed and stable, while recognising the empirical reality of the prevalence features of sexual violence. Instead, they argue for more elaborated explanations for sexual violence as not solely caused by the 'gender dividend' in the structure of gender relationships (Featherstone & Fawcett, 1994; Featherstone & Lancaster, 1997; Keenan, 2012; Lancaster & Lumb, 1999). Third wave feminists argue that individuals do not inhabit single identity categories that are determinant of behaviour, but rather that individuals are much more complexly positioned in life in relation to gender, race, class, sexual orientation, religion, age, physical appearance, physical ability, fitness, mental ability, and more (Keenan, 2012: 117). All contribute to a greater or lesser extent to the individual's decision to sexually offend. Power position and opportunity make it possible. For third wave feminists the dichotomised analysis of gender in relation to sexual violence that served so well in the beginning is no longer adequate for the explanatory task in hand; it is necessary but not sufficient.

Rather than merely engaging with one dimension of power as institutionalised in gender, third wave feminists engage with power as relational, complex, and shifting (Lukes, 2005), and as omnipresent in both normative structures (such as the courts) and discourses, that regulate and constrain individual behaviour, but that also create consensus, thereby excluding marginal voices (Foucault, 1991). These three views of power as located in individuals, in relationships and omnipresent in discourses must be involved in any analysis of a subject as complex as sexual violence. Third wave feminists adopt this position; a position also that seems to resonate with Walgrave's (2000, 2008) maximalist definition of restorative justice (or consequential restorative justice as he now prefers, 2020) which must be more than a purist / minimalist restorative justice *process* [author inserted italics] of 'non-coercive dialogues among the main stakeholders' (Walgrave, 2020: 435), co-opted by the top down criminal justice system which tames its innovative potential. Instead, a consequential restorative justice must 'penetrate[s] the criminal justice itself' (p. 435) with an emphasis on giving preference to examining *all* [author inserted italics] the individual, relational and social suffering and harm caused by crime and considering 'the possibilities to repair, restore or at least minimise these' (p. 435).

5.2 Single factor psychological theories

Psychological theories of explanation focus on the psychology of the offender and their cognitive, emotional and affective capacities. The *psychodynamic* perspective concentrates on conflicts and deficits within the range of the male identity, aggression, self, or relationship skills. The sexual deviant behaviour is thus seen as a means of expressing the offender's needs and feelings. The victim represents an object the offender wants to control, punish, destroy, or defeat (Maschwitz, 2000). Advocates of the psychodynamic approach claim that during his/her childhood the offender had been abused, tortured, rejected, exploited, or abandoned; an experience that markedly interfered with the child's psychological development and maturation (Groth & Hobson, 1986). Later in life, they argue, the complex matrix of decreased self-esteem, dysfunctional relationships, dysfunctional coping mechanisms, and feelings of frustration and anger is a risk factor for sexually aggressive behaviour.

Attachment perspectives are closely related to psychodynamic theories. The basic assumption is that the failure of individuals to form early secure attachments with their parents leads to the development of an insecure or ambivalent adult or adolescent attachment style (Rich, 2006: 171). This diminishes the capacity of the adult or developing adolescent for forming and maintaining stable and satisfying intimate relationships and gives rise to other deficits such as low frustration tolerance, anger, interpersonal conflicts, and feelings of powerlessness and loneliness (Rich, 2006). According to Bowlby (1946) such dysfunctional attachment styles also result in a lack of interest in others. Coercive sexuality in this view is therefore theorised as an attempt to satisfy the underlying need for emotional closeness and connection, which is played out as violent or coercive in an individual who lacks empathy or interest in others because of childhood attachment problems. Some authors argue that an insecure attachment style is a typical risk factor for child sexual abuse perpetration (Marshall, Hudson, & Hodkinson, 1993; Marshall & Marshall, 2000; Marshall, Serran, & Cortoni, 2000) and that dysfunctional-mental-representations arising from insecure or ambivalent attachment styles in individuals so affected are significant for sexual offending.

A further variable associated with attachment theory and sexual offending is the link between attachment and self-esteem. Sex offenders are seen as having self-esteem that is 'fragile and unstable—with a sense of self that is vulnerable to assault and feelings of shame, without adequate resources to make repairs when damaged' (Anechiarico, 1998: 18f).[10] Within this context the lack of internalised feelings of affirmation and connection with others as well as the lack of experience and confidence in close intimate relationships may result in the compensatory

[10] On the topic of shame, see also e.g. Sharratt (2011).

behaviour that serves to restore self-esteem, albeit in an inappropriate and abusive way. Sexual aggression (rape, exhibitionism) and sexual exploitation (child abuse, sexual voyeurism) are thus theorised as providing 'the illusion of acceptance and love . . . through exploitative sexual encounters' (Anechiarico, 1998: 19).

(Social-) Learning theories, theorise sexual deviance as a result of observing abusive behaviour which is then imitated, adopted, and internalised as the norm. Such learned behaviour can become patterned by further positive rewards for the specific behaviour (Bandura, 1977). When applied to sex offending it is thought that sex offending is caused by deviant sexual preference, the acquisition of which is the result of a conditioning process whereby the sexually inappropriate stimuli (e.g., a child) is reinforced through sexual pleasure when the deviant adult acts out sexually with the child. This pattern is then further reinforced through masturbation to the deviant fantasy, further enhancing sexual arousal, which reinforces the deviant behaviour in ever increasing depth. In this context sexual abusers are sometimes thought to have been victims of childhood sexual abuse themselves and that deviant sexual arousal problems emanate from this experience (Finkelhor, 1984). Finkelhor (1984: 41) suggests that this traumatic event 'facilitates an imprinting or conditioning process'. On the other hand, not all children who have experienced sexual abuse develop a sexual interest in children or become sex offenders and a linear relationship between both is well contested (See Keenan, 2012).

Attempts to explain sexual violence also employs *cognitive theory,* drawing on the idea of *cognitive distortions.* Individuals who suffer from cognitive distortions are said not to process information correctly, leading them to misread situations and social and emotional cues (Beck, Rush, Shaw, & Emery, 1979). In the 1980s, Abel, for the first time, applied the concept of cognitive distortions to sexual offending, suggesting that child sex offenders held belief systems about sex and about children that were supportive of sexual contact with underage persons (Abel, Becker, & Cunningham-Rathner, 1984; Abel, Gore, Holland, Camp, Becker, & Rathner, 1989). Theorists of sexual offending then used terms such as excuses, justifications, neutralisation, or rationalisations as the techniques sex offenders employ, based on their cognitive distortions, to facilitate their sex offending (see Ward, Polaschek, & Beech, 2006: 117). From this perspective sex offender often hold beliefs that minimise the offence; their responsibility for the offence; the harm to the victim or the planning that went into their offending (Marshall, Anderson, & Fernandez, 1999: 63). The typical cognitive distortions often seen in child sex abusers include the following: that no coercion took place (the child agreed); that the child consented (that the child 'wanted' it); that it was an expression of love or that they were merely educating the child. The typical cognitive distortions often seen in men who rape, also known as 'rape myths', range from arguments such as the victim was promiscuous; she led the man on by her behaviour or dress; beliefs that the woman 'wanted' it; she said 'no' but she meant 'yes'.

Cognitive distortion thinking has also been extended to elaborate a dysfunctional coping style that is said to also operate as a precursor to sexual offending (Milner & Webster, 2005). From this perspective events are seen as being processed via a deeply rooted maladaptive schema or belief system that triggers emotions and coping strategies that lead to the offending (Milner & Webster, 2005). Schemas refer to an underlying maladaptive belief system that is akin to cognitive distortion; a distorted way of seeing the world, usually related to some kind of emotional need. Milner and Webster (2005) compared the schemas of violent offenders, child sex offenders, and men who rape. The dominant schema evident in violent offenders was complaining and revenge; the prevailing schema among child sex abusers was worthlessness and the dominant schema in rape offenders was mistrust and hostility. Further, other schemas often evident in sex offenders are those of sexual entitlement, dominance, or of being disadvantaged (see Marshall et al., 1996: 177f).

The idea of *poor emotion regulation* as contributing to sex offending is closely related to the theory of cognitive distortions (Charles & Carstensen, 2009: 316). Successful emotion regulation is associated with gaining cognitive control in high-risk situations (Pithers, Marques, Gibat, & Marlatt, 1983). Proulx, McKibben, and Lusignan (1996) found that both rapists' and child abusers' negative moods increased the frequency of deviant sexual fantasies and accompanying masturbation resulting in the propensity to sexually offend. Hanson and Harris (2000) found that there were certain acute mood changes prior to their sexual offending that distinguished recidivists from non-recidivists. Cortoni and Marshall (2001) suggested that both rapists and child sex offenders cope with strong negative emotions through sexual activities and, in the case of child molesters in particular, by sexually abusing children. It has to be emphasised that although general psychological problems or maladjustment has not been directly linked to sex offending, acute negative mood states have been associated with sex offending (Hanson & Bussière, 1998; Hanson & Harris, 2000).

The core idea of the *empathy deficit theory* is that sexual offenders lack either particular victim or more general empathy (Marshall et al., 1999; Ward et al., 2006). Empathy is defined in a general sense as understanding the feelings and viewpoint of others and empathy is considered as essential for individuals to act in a prosocial manner (Marshall et al., 1999). When an individual has diminished empathic capacity, the theory suggests that sexually harmful behaviour is possible as the person lacking empathy does not put himself into the position of the victim and what it might be like from their perspective. In contrast, an empathic person who knows what harm could be done to a victim is likely to desist from such behaviour. Marshall, Hamilton, and Fernandez (2001) suggests that sex offenders lack empathy for specific victims, rather than a generalised lack of empathy per se, and the indication of distress in their specific victim does not preclude them from their offending behaviour. Empirical research however has yielded inconsistent findings as to whether it is victim specific empathy or more generalised empathy that is

lacking in sex offenders (Hanson, 2003; Hanson & Scott, 1995; Marshall, Hudson, Jones, & Fernandez, 1995). A basic assumption is that empathy comprises both cognitive (perspective taking) and affective (emotional sympathy) components.

Biological theories of explanation focus on an increased sex drive in men, possibly associated with the hormone testosterone (Schwartz, 1996). In 1993 Raine emphasised that most of the studies investigating the meaning of the testosterone level for sexual violence are methodologically weak but, nevertheless, concluded that 'a potentially causal relationship exists between testosterone and violence' (Raine, 1993: 207). Some etiologists claimed a neuronal triad between sexuality, dominance, and aggression (Eibl-Eibesfeldt, 1971). However, these assumptions were very likely to be based on traditional role stereotypes with males as the active dominant party and females as passive (Krafft-Ebing, 1924). However, with the increasing renaissance of interest in biological theories of explanation for psychological and social problems and the growth of interest in neurobiology and modern imaging techniques to explain social and psychological phenomena, it is not surprising that biological theories of explanation are also appealing to theorists trying to explain or make sense of sex offenders (Dressing, Sartorius, & Meyer-Lindenberg, 2008). However, neurobiological attempts to explain sexual violence or deviance have not been as yet empirically demonstrated. At best, there are single case analyses on brain abnormalities resulting in paedophilic interests (Schiffer et al., 2007).

Single-factor, cause-and-effect theories, such as those presented above, can hardly provide appropriate consideration of the complexity of sexual offending. Thus, several scholars have developed multifactorial theories that might better understand the complexity of the dynamics leading to sexual violence. Some theorists focused on 'how' the offending occurs; others focus on 'why'. It is key aspects of this body of work that we now turn.

5.3 Multifactorial theories of explanation

In 1984, Finkelhor (pp. 53–62) presented one of the earliest multifactorial models, The Precondition Model, to attempt to explain 'how' child sex offending occurs. The 'Precondition Model' proposes that there are four steps that must be taken before a sexual offence on a child will occur and these steps must be met in sequence. These factors involve (1) factors concerning motivation to sexually abuse; (2) factors relating to overcoming internal inhibitions; (3) factors relating to overcoming external inhibitors (such as the child's parents or superiors or organisational context); and (4) factors relating to overcoming the child's resistance. In relation to motivation Finkelhor (1984) identified four factors that may be implicated here: (1) emotional congruence; (2) sexual arousal to children; (3) blockage; and (4) disinhibition.

According to this model, child sexual abusers have a sense of *emotional congruence* with children due to their own childish emotional needs, low self-esteem, and low self-efficacy. Relating to a child is thus congruent for them because it gives them a feeling of power, omnipotence, and control (Finkelhor, 1984: 38). With regard to the second precondition for the sexual abuse of children, *sexual arousal to children,* Finkelhor (1984) hypothesised that sexual arousal to children could be a deeply embedded sexual orientation or it could represent a situational response to a situation (similar to fixated or regressed offenders mentioned above) and that the consumption of child pornography might also promote the development of sexual arousal to children. The third precondition in order to commit child sexual abuse is *blockage,* defined as the inability to satisfy sexual and emotional needs in adult relationships. Finkelhor (1984: 43) suggests here the presence of psycho-social factors that make it difficult for adult men to negotiate healthy sexual relationships with adults. For Finkelhor (1984) this might explain why child molesters are often described as timid, unassertive, and socially awkward, with poor social skills. The fourth necessary precondition for child sexual abuse according to Finkelhor (1984) is *disinhibition*. An individual for whom the three aforementioned prerequisites apply will only 'cross the Rubicon' to sexually abuse children if some kind of disinhibition takes effect. Low self-control, alcohol abuse, or other forms of psychological states that lower one's self-control (e.g. psychosis, great personal stress) may be disinhibiting factors that act in such circumstances (Finkelhor, 1984).

The merit of Finkelhor's (1984) precondition model is that it was one of the first approaches to take an interdisciplinary view of sexual violence and it can be useful in the clinical situation (see Keenan, 2012: 86). Criticism of his model is that it makes many assumptions about normative relationships that require further empirical testing and that many offenders offend against children while they are already engaged in adult sexual relationships and activities, raising doubt about the 'blocked' argument (p. 86).

Further integrative theories of sexual offending have evolved since Finkelhor's (1984) original work. The 'Integrated Theory' presented by Marshall and Barbaree (1990) not only focuses on the development of sexual offending but also on its maintenance. According to these authors, the crucial causative factors for sexual offending are negative childhood experiences (e.g. neglect, physical, or sexual abuse), biological influences (e.g. hormonal changes during adolescence), sociocultural context (general cultural features and the availability of pornography), transitory situational factors (e.g. substance abuse, a certain emotional state, or the presence of a potential victim), and the interplay between all of these factors. As a result of negative *developmental experiences,* insecure attachment leads to difficulties in relationships with other individuals and further assets such as emotional regulation problems, low self-esteem, impulsivity, and low self-efficacy. These psychological deficits become more problematic during the individual´s life. *Biological influences* become particularly relevant during puberty. The adolescent must learn

to distinguish between sexual and aggressive impulses, which are mediated by the same neural substratum.

For Marshall and Barbaree (1990) individuals who are already prone to antisocial behaviour (caused by adverse early experiences) are not able to cope with the biological changes that occur during puberty. For them the *sociocultural context* (especially the acceptance of interpersonal violence, male dominance, and negative attitudes towards females) provides a social climate which interacts with the results of their poor parenting to increase the probability of their sexual offending. *Transitory situational factors*, which encompass environmental circumstances as well as personal internal states, produces a disinhibition of control in the offender (Marshall & Barbaree, 1990: 268) who will identify certain situations as opportunities to offend and depending on their momentary vulnerability (influenced by situational factors) they will make use of this opportunity to offend or not. Some of the achievements of the integrated theory by Marshall and Barbaree (1990) is that notion that vulnerability towards sexual offending can be offset with the development of resilience and this can provide a starting point for clinical interventions. Criticism of the integrated theory turns to the inability of the theory to explain differences between different sexual offence types.

Hall and Hirschmann (1991) originally presented their 'Quadripartite Model' to explain rape, and later they reformulated the model (1992) to also include the sexual abuse of children. They suggested that while the individual problems outlined earlier in this chapter (such as attachment difficulties, low self-esteem, cognitive distortions, emotion regulation problems, and empathy deficits) may contribute to sexual offending, usually one factor is prominent for each offender and constitutes a primary motive. According to the theory the activation of one factor functions to increase the intensity of the others and this may in turn propel the potential offender above the critical threshold for performing a sexually abusive act. This represents different pathways to sexual offending and different types of offenders who can be distinguished by their primary pathway. Criticism of the theory primarily focuses on the missing explanation of the development of these factors.

Another way of understanding how some men commit sexual offenses was offered by Ward and Siegert (2002) in their 'Pathways Model'. In developing this theory, they knitted together the best elements of the multifactorial theories described above to explain child sexual abuse. They propose four clusters of problems (clinical phenomena) that are regularly found among child sex offenders: deviant sexual arousal, intimacy deficits, inappropriate emotions, and cognitive distortions. Each of these pathways also involves developmental influences and the opportunity to offend. Based on these clusters, the authors identified five causal pathways to sexual abuse: intimacy deficits pathway; deviant sexual scripts pathway; emotional dysregulation pathway; antisocial cognitions pathway; and the multiple dysfunctional mechanisms pathway. The Pathways Model attempts

to explain the causal underlying mechanisms of child sexual abuse for different types of offenders and likewise the need and starting points for different treatment approaches.

A theory that claims to integrate previous theories and to explain sexual deviance holistically is the 'Integrated Theory of Sexual Offending' (ITSO) by Ward and Beech (2006). These theorists contend that the majority of the previously existing theories focus 'on the surface level of symptomology and fail to take into account the fact that human beings are biological or embodied creatures' (p. 45). Their theory represents an attempt to correct this position. It is underpinned by the idea that human behaviour is generated by the interaction of three sets of factors that are continuously in relationship with each other. These factors are biological factors (influenced by genetic inheritance and brain development); ecological factors (such as social, cultural, environment, and personal circumstances); and neuropsychological factors (such as motivation, emotion, action selection, control, perception, and memory). According to the theory sexual offending occurs through the ongoing interaction of these three factors which interact to generate the clinical problems evident in sex offenders (Ward & Beech, 2006: 50).

In both the United States of America (USA) and in Europe, a few spectacular cases of heinous sexual crimes against women and children, mostly but not only committed by repeat offenders, have raised a storm of public concern (Golding, 2010). The 1990s heralded the development of a risk management approach to dealing with sex offenders involving multi-agency public protection programmes, sexual offender notification and registration laws, and electronic monitoring of released sexual offenders, in many parts of the world (Golding, 2010; Harrison, 2014; Haverkamp & Wößner, 2014; Thomas, 2005). The strong urge for public protection and for justice for victims in the face of high attrition for sexual crime rings at intervals of resounding regularity. The situation speaks to the need for innovative ways to doing justice for victims and accountability for offenders while the ongoing need for reform in conventional criminal justice must continue. The need for healing for victims and rehabilitation for offenders cannot be estimated. We believe restorative justice can play a role in justice for victims, accountability for offenders, and healing for all.

6. Final remarks

The focus of this book is sexual violence and restorative justice and how safe and effective state-legitimated restorative justice interventions can be developed for victims of sexual crime who want justice, choice, and agency in the decisions that affect their lives. It is also a book about restorative justice mechanisms that can facilitate accountability for offenders, and bring healing to all, in a safe, facilitated, and state legitimated restorative justice intervention. In this, the theory and practices of

restorative justice are re-examined to ensure they are responsive to the challenges of sexual violence and create a reliable context of support for victims and for this work. But this book is about much more than restorative 'processes'; it is also about how restorative justice can prioritise a response to sexual offences that not only focuses on the individuals and their needs and interests, despite their central significance and importance, but also on the social harms caused by sexual crime and the context in which sexual crime is created. It is interested in how restorative justice interventions and philosophy can combine with 'coercive judicial interventions, often taken in the interest of public safety or public order, to engage with restorative or reparative considerations' (Walgrave, 2020: 435) although this aspect of the book remains more aspirational than accomplished for now. As Walgrave (p. 435) put it, a consequential restorative justice 'seeks to penetrate the criminal justice system itself to modify its premise'. He argues further (pp. 435, 436):

> The current basic assumption that an offence is to be responded to by inflicting a proportionate punishment is modified [by restorative justice] into an assumption that the harm (in the broad sense) caused by the offence must be repaired as much as possible. Such 'restorative criminal justice system' leaves ample space for deliberation among the stakeholders and, if need be, the use of coercion is imbued with as much as possible restorative solicitude.

We are not against punishment or imprisonment for the wrongdoing of sexual crime, but we are interested in the use of coercion being permeated with as much restorative consideration as possible. That is quite a challenge, but one befitting a civilised society.

By way of setting the scene for this work we felt it important to set out the realities of sexual violence in this first chapter. A selection of important scholarship on the dynamics of sexual violence and its impact on victims highlights the trauma that results from such violations and abuses for many victims, with many victims suffering long-term effects. We also noted the resilience of victims in facing live following such harms and injuries. We considered rape myths and their impact on victims and their role in the genesis of the problem of sexual violence. We considered feminist as well as psychological theories of explanation for sexual violence.

The chapter provided an overview of prevalence, definitions, and dimensions of the problem, the impact on victims, offender characteristics, and types. In analysing the impact of sexual victimisation on children and adults we noted that sexual violence takes place in all genders, class, social, economic, and political circumstance. Having said that, more females than males are victims of sexual violence across the life course. Males are the main offenders; females and children the main victims, making sexual violence a significantly gendered and power-based problem. In this chapter the social and cultural context in which sexual violence is embedded was returned to again and again and the omnipresence of rape myths

cannot be ignored for their contribution to the justice gap for victims, accountability gaps for offenders, healing and social integration gaps for all. Rape myths and the social conditions of inequality are positioned as part of the genesis of the problem. Equality in relations is positioned as part of prevention. The research presented in this book forms the basis for advancing the argument for a role for restorative justice in closing these justice, accountability, healing, and integrative chasms. The next chapter turns attention to the strengths and limitations of formal legal perspectives.

2

Sexual violence, criminal legal frameworks, and the need for reform*

1. Introduction

This chapter turns attention to the legal context of sexual violence and legislative frameworks that apply in such cases. While studying various legislative frameworks and the roles and rights attributed to victims and accused therein, traditional legal and social responses to victims and those accused of sexual violence are also addressed. These responses have oftentimes led to legal reform of criminal legal systems in order to better address the concerns and needs of victims. However, in light of the limits of legal reform from the perspective of the victims in particular, the question is raised from a legal perspective too as to whether new innovative approaches to justice must be considered, and new roads travelled, one of which would include restorative justice. Like other scholars who address similar topics (see for example Terwiel, 2020) we prefer to use the term 'criminal legal system' rather than 'criminal justice system' throughout this chapter in order to unsettle the assumption that the criminal justice system delivers justice, based on the overwhelming evidence to the contrary.

To address all of these issues, this chapter is divided in five sections. The first section introduces the chapter. Section two discusses legal frameworks in different criminal legal systems as it relates to victims' rights generally and cases of sexual violence specifically, including definitional and procedural issues of relevance to sexual violence crime. It also includes legal frameworks related to offenders of sexual violence. The third section deals with the underlying assumptions and beliefs of victims of sexual violence in their determination to either report sexual violence to the judicial authorities or to abstain from doing so. The fourth section elaborates legal reforms in criminal legal systems designed to engender more victim-focused and victim-friendly proceedings. It also raises the question as to what extent criminal legal systems can provide justice to victims of sexual violence. In other words, are there limits to legal reform? In these sections a broad international perspective is offered that can at best indicate international trends. International comparative work in such a complex field of law is difficult if not

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impossible, despite the aid of international instruments. National norms, cultural contexts and philosophical law traditions make for differences in legislative provisions that are simply impossible to rigorously compare. Despite this limitation these sections indicate trends and advances in thinking and practice across several jurisdictions. The fifth section deals with the question of whether new paths to address the needs and concerns of victims of sexual violence outside the criminal system should (additionally) be advocated for, such as through restorative justice. The chapter concludes with some final remarks.

2. The legislative framework across jurisdictions

This section deals with the legal frameworks in different criminal legal systems as it relates to victims' rights generally and cases of sexual violence specifically, including definitional and procedural issues of relevance to sexual violence crimes. It also includes legal frameworks related to offenders of sexual violence.

2.1 Legal definitions of sexual violence crimes

Historically, very few crimes of sexual violence were criminalised, with the exception of rape and incest. In the case of rape, it was often confined to unlawful sexual intercourse with a woman against her will. Beginning in the 1970s, sexual violence crimes were redefined in law to reflect the experience of victims and the recognition of sexual violence, in particular rape, as a crime against sexual integrity/self-determination/autonomy and marital rape was criminalised in many jurisdictions.[1] These developments were also reflected in the revision of procedural and evidentiary rules, which will be discussed in the next paragraph.

With regards to sexual violence committed against adults, a differentiation can be made in law between rape and other offences, with rape usually involving penetration and other offences falling short of penetration. This differentiation can be observed in most Council of Europe member states and Western states, even though a small number of states still consider 'sexual intercourse and acts comparable to it', 'coercion to perform a sexual act' or 'all sexual acts' as rape (Hagemann-White, Kelly & Römkens, 2010). It should also be noted that rape is not always legally labelled as 'rape'. In Australia for instance, rape is labelled 'rape' in Victoria, Queensland, South Australia, and Tasmania. By contrast, it is called 'sexual assault' in New South Wales, 'sexual intercourse without consent' in the Australian Capital Territory and the Northern Territory, and 'sexual penetration without consent' in

[1] For more information on the history of rape and sexual violence, see e.g. Bourke (2007), Brown and Walklate (2012), Neuman (2010), and Vigarello (2001).

Western Australia.[2] Acts of sexual violence other than rape are also labelled differently across the board, ranging from 'sexual assault', 'sexual violence', 'indecent assault', 'violence indecent assault', or 'sexual abuse'.

Two main issues with regards to the definition of rape in domestic jurisdictions are of particular importance: the gender neutrality of the definition and the emphasis on consent. Regarding the former, gender neutrality can be indicated by the means of committing rape. For instance, England and Wales only recognise men as potential perpetrators of rape.[3] Few states only recognise women as potential victims of rape. The tendency has been towards a gender-neutral approach, within and outside of the European Union (EU), aiming at including both women and men as victims and perpetrators of rape, mainly through expanding the means to commit rape to objects and any body parts rather than restricting it to the penis of the perpetrator. However, a minority of states has retained, at least in the wording of legislation, archaic understandings of rape as a 'crime against morality' (Hagemann-White et al., 2010).

The second issue at hand here is that of the place of consent in the definition of rape (and other sexual violence crimes). Traditionally, rape definitions required the use of force and the victim to physically resist the attack. With progress made in the 1970s, the requirement of the use of force was gradually modified or replaced with an emphasis on consent. Most states have moved towards a consent-based definition of rape although heterogeneity still remains important in this regard. Few states have a solely consent-based standard for rape while others seem to mix force and lack of consent and the ones that use a solely force-based standard usually raise the issue of consent during criminal proceeding (for different typologies of rape definitions, see Hagemann-White et al., 2010; Lovett & Kelly, 2009). States have also defined consent differently (see e.g. Wertheimer, 2003), with some of them providing a fairly narrow definition and list of circumstances leading to lack of consent[4] while others, such as New Zealand, provide an extensive list of circumstances which result in lack of consent, such as inebriation or finding oneself under the influence of drugs.[5]

Sexual violence committed against children is consistently criminalised in domestic legislations. However, generalisation is lacking with regard to the age of consent (Hagemann-White et al., 2010). Just as in sexual violence committed against adults, legislation has evolved towards gender-neutrality. Nevertheless, some gendered crimes still exist such as in Bulgaria where only female minors can be victims

[2] Information retrieved from the Australian Law Commission's website, at http://www.alrc.gov.au/publications/25.%20Sexual%20Offences/%E2%80%98rape%E2%80%99-penetrative-sexual-offence.

[3] For the UK, see Sexual Offences Act (2003), para. 1(a) which reads: 'A person (A) commits an offence if—(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis'.

[4] Usually limiting circumstances leading to lack of consent to specific vulnerabilities such as mental impairment.

[5] For New Zealand, see Section 128A of the Crimes Amendment Act 2005.

of rape, or Cyprus where only girls can be victims of defilement and only males can be convicted of incest (Hagemann-White et al., 2010). Domestic legislation has moved towards a discernible tendency, but in no way a homogenous practice yet, to criminalise 'breach-of-trust' offences with various family members or persons in position of authority (Hagemann-White et al., 2010).

The issue of age is also prominent with regards to juvenile sex offenders. Australia and the UK, for instance, have adopted a low age of criminal responsibility, namely ten years old (Warner & Bartels, 2015). However, Australia provides for a *doli incapax* presumption for children aged from ten to fourteen years old.[6] Other countries have adopted higher minimum age for criminal responsibility: twelve years old in Canada, thirteen years old in France and fourteen years in Germany (Warner & Bartels, 2015).

At the regional level, the evolution aforementioned in how rape and sexual violence crimes and their impact on victims were to be understood has also taken place. At the EU level, progress first came with the 1986 European Parliament Resolution on Violence against Women, which urged member states to clarify, in their legislation, the distinction between rape and sexual assault, to criminalise marital rape, and remove references to chastity.[7] The resolution also makes a series of recommendations in order to ensure that victims of sexual violence are provided with the necessary support when they report the crime to the authorities and when prosecution ensues. In 2011, the European Parliament again adopted a resolution on the New EU Policy Framework to Fight Violence against Women.[8] In this latter resolution, the European Parliament reiterated its demand that member states criminalise marital rape and that support be provided to sexual offences victims.

At the Council of Europe level, three main instruments are relevant to our discussion. The first one is the recommendation Rec (2002)5 adopted by the Committee of Ministers[9] in which the Council of Europe set a consent-based standard for sexual offences and urges member states to penalise any sexual act perpetrated against non-consenting persons, to remove physical resistance from the definition of rape and criminalise every sort of penetration, of any nature and by any means. A year later, the European Court of Human Rights issued its judgment in the *M.C. v. Bulgaria* case. In its decision, the court explains that a narrow definition of rape relying on force and resistance failed to protect women.[10] Finally, more recently the Council of Europe Convention (2014) on preventing and

[6] This provision means that a child aged between ten and fourteen years old can only be found criminally responsible if the prosecution can prove that he or she had the capacity to know that their behaviour was wrong.

[7] European Parliament, Resolution on Violence against Women, 14 July 1986, Doc. A2-44/86.

[8] European Parliament, Resolution on the New EU Policy Framework to Fight Violence against Women, 5 April 2011, P7_TA(2011)0127.

[9] Council of Europe, Recommendation Rec(2002)5 of the Committee of Ministers to member states on the protection of women against violence, 30 April 2002.

[10] *M.C. v. Bulgaria*, Application No. 39272/98, Judgment, 4 December 2003.

combatting violence against women and domestic violence provides a wide and firmly consent-based definition of rape and sexual violence.[11]

It is interesting to note that all these regional instruments are framed within the fight of violence against women. Even though their definitions of rape and sexual violence are usually gender neutral in the wording, the documents within which these definitions are enshrined give the impression that sexual violence is mainly a 'women' problem. This problem of gendered crime, however, is absent in regional instruments aimed at protecting children from sexual violence. For instance, the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse only uses the gender-neutral term 'child'.[12] In this convention, Article 18 criminalises sexual abuse perpetrated from a position of authority or trust.

At the international level, the first *ad hoc* jurisdictions—the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—had the responsibility of defining rape in international criminal law and were not mandated to prosecute other types of sexual violence in their own right. The first definition was provided by the ICTR in the *Akayesu* case and consisted of a wide understanding of the crime of rape, in gender-neutral terms, which was based on coercive circumstances rather than lack of consent.[13] However, the ICTY *Kunarac* case marked a turn towards a consent-based definition, which may not be the most appropriate in cases of mass violence, such as genocide, crimes against humanity and war crimes (De Brouwer, 2005; Viseur Sellers, 2007).[14] The entry into force of the Rome Statute and the establishment of the International Criminal Court (ICC) marked a return to a coercive circumstances-based definition of rape. The ICC Elements of Crimes build a definition of rape around coercive circumstances—not lack of consent—which need to be proven.[15] In 2014, before the ICC in the case of the accused Katanga (DRC situation), this interpretation was confirmed.[16] Consent is still mentioned regarding

[11] Council of Europe, Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), entered into force on 1 August 2014, Article 36.

[12] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention), entered into force on 1 July 2010.

[13] *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, 2 September 1998, para. 598. A similar definition was later used by the ICTY in the *Furundzija* case.

[14] *Prosecutor v. Kunarac, Kovač and Vuković*, Case Nos IT-96-23-T & IT-96-23/1-T, Trial Judgment, 22 February 2001, para. 460.

[15] For rape as a crime against humanity, see ICC Elements of Crimes, Article 7(1)(g)-1. In this definition, consent however exists when it comes to persons incapable of giving genuine consent, such as persons affected by natural, induced or age-related incapacity. The same elements of the crime of rape exist for rape as a war crime.

[16] In the *Katanga* case, it was noted that, with the exception of the specific situation in which the perpetrator takes advantage of the inability of a person to give genuine consent, the Elements of Crimes do not refer to the absence of consent and this factor does therefore not need to be demonstrated. Instead, the Chamber found that it is sufficient to demonstrate one of the circumstances of a coercive nature listed in the second element of the crime of rape, noting that this interpretation is confirmed by Rule 70 of the ICC's Rules of Procedure and Evidence. See *Le Procureur c. Germain Katanga*, Jugement Rendu en Application de l'Article 74 du Statut, No. ICC-01/04-01/07, 7 mars 2014, paras 964–966.

rape but in the sense that, when raised by the Defence in an *in camera* (closed) procedure, it cannot be inferred from words or conduct undermined by coercive circumstances.[17] By contrast with the ICTY and ICTR, the ICC also has jurisdiction over a variety of other sexual violence crimes, such as sexual slavery, enforced prostitution, forced pregnancy and enforced sterilisation.[18] All these crimes are defined in a gender-neutral manner (except, of course, for forced pregnancy).

2.2 Legal framework for victims and offenders

In this section, the development of evidentiary rules in line with a modern understanding of rape will be examined, along with the roles given to victims and accused in various legal systems, namely civil law, common law, and international criminal systems. It is worth noting that developments in evidentiary rules, procedural rights and victim participation can be attributed to various groups, mainly victim advocacy groups. Nevertheless, sporadically, a story makes the headlines and leads to serious legislative change. This process was in place in for example the State of Virginia, where highly publicised cases of sexual assaults on university campuses spurred a legislative effort, with proposed pieces of legislation, to deal with these situations.[19] Examples of successfully adopted legislation relating to sexual violence and sexual offenders include Megan's Law in the US[20] and Sarah's Law in the UK[21], the latter spearheaded by a British tabloid *News of the World*.

2.3 Evidentiary issues: the balancing act between reform and the rights of the accused

As sexual violence crimes came to be more and more recognised as crimes against sexual autonomy/integrity, evidentiary rules pertaining to the prosecution of sexual violence increasingly provided protection for victims. Traditionally, sexual violence victims could be extensively examined and cross-examined about their sexual history (in general and with the accused) as a way of undermining victims' credibility. What came to be known as 'rape shield laws' prohibited, to a certain extent, the Defence from inquiring about the victim's sexual history in court. Other

[17] ICC Rules of Procedure and Evidence, Rule 70.

[18] Rome Statute, Articles 7 (crimes against humanity) and 8 (war crimes).

[19] See for instance Sizemore, 'No consensus on campus sexual assault legislation', Associated Press, 22 January 2015, retrieved from http://hamptonroads.com/2015/01/no-consensus-campus-sexual-assault-legislation.

[20] See for example https://www.meganslaw.ca.gov/About.aspx

[21] See for example http://www.bbc.com/news/uk-25489541.

evidentiary reforms have included the prohibition of a corroboration requirement for sexual violence crimes.

It should be noted that these reforms have not completely prohibited these practices. For instance, in the case of the interdiction of raising the victim's sexual history in court, most legislation allows it with more or less stringent admissibility criteria. For instance, in Ireland, if the accused claims that sexual activity was consensual and that the previous sexual history of the victim is relevant to the issue of whether he/she consented to the act in question, it is necessary to make an application to the trial judge. The application will be heard in the absence of the jury and should it be granted the victim has a right to his/her legal representation during the proceedings dealing with his/her past sexual history. In making a decision, the trial judge relies on the legislation on this matter. According to the legislation, the judge must only grant leave if he/she is satisfied that it would be 'unfair' to the accused to refuse the presentation of the evidence or the question to be asked. The 'unfair' character of the decision is to be measured against whether the evidence would make a difference in the jury's verdict. The assessment of fairness is left at the discretion of the judge, with research showing that such leave is granted very often (Leahy, 2013). More stringent criteria for the admissibility of the victim's sexual history exist in Canada. Such history may be allowed if it meets three criteria: (a) it relates to specific instances of sexual activity; (b) is relevant to an issue at trial; and (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.[22]

In the same vein, the disclosure of the victim's medical history is allowed in twenty-one EU member states with only a minority of them having specific rules on admissibility. Allowing the disclosure of the victim's medical history can harm the victim's credibility in important ways because information about the use of contraception, the resort to abortion or a history of mental illness is then made available to the Defence (Hagemann-White et al., 2010).

With regards to the second type of evidentiary reform—no corroboration requirement—this has not taken hold as yet in many jurisdictions. The Irish Criminal Law (Rape) (Amendment) Act 1990 for example allows judges to give juries a 'corroboration warning' (Keenan, 2014; Leahy, 2013). This corroboration warning consists of the trial judge telling the jury to be careful about convicting an accused when the victim's testimony is uncorroborated or when there is little corroboration. The problem with this rule is that there is little guidance to help judges decide when such warning is absolutely necessary. Again, as with the admissibility of the victim's sexual history, this matter is left to the discretion of the judge (Leahy, 2013).

[22] Criminal Code of Canada, Article 276(2).

The combination of reforms of the definitions of sexual violence crimes and of evidentiary rules has attempted, and sometimes partly succeeded, in shifting the burden of proof from the Prosecution to the Defence (or from the victim to the accused). The goal was to change the focus from the victim's character to the accused's behaviour (Cossins, 2020; Daly, 2011a/b) by removing the requirement of physical resistance to a proof of non-consent. However, in some countries, legislation has not gone far enough to ensure a significant shift. For instance, the Netherlands uses a force-based definition of rape which does not explicitly include lack of consent.[23] Even though not mentioned, consent plays a great part in interpreting the meaning of 'force' which is viewed to be applied only if the accused intentionally caused the victim to do certain acts against his/her will. The problem with this approach is that it relies on a certain amount of resistance and that the victim may stop resisting at some point during the assault. In this later case, proving lack of consent becomes more complicated (van der Aa & Römkens, 2010) and the victim's behaviour is again put under scrutiny (Gillen, 2019).

In common law systems, the most valued right in criminal proceedings is usually that of the presumption of innocence of the accused. As such, for all types of crime, the burden of proof is squarely based on the Prosecution with the Defence having to only disprove the Prosecution's case. In the case of Ireland, the definition of rape is solely consent-based. In itself, this shift should allow the burden of proof, or at least part of it, to be placed on the accused's behaviour rather than the victim's.[24] However, the provision of consent also says that the accused did not commit rape if he/she had 'reasonable grounds' to believe that the victim consented to the sexual activity.[25] With rape shield laws put in place, the range of 'reasonable grounds' are diminished but it still means that attention is drawn to the victim's behaviour rather than that of the accused.

A similar analysis can be made with regards to Australia. Legislation on rape differs from one state/territory to another. However, they all have in common that the prosecution must prove, beyond reasonable doubt, that: (a) the victim was not consenting; and (b) the defendant was aware that the victim was not consenting. Again, attention is drawn to both the victim's and accused's behaviour. Just like in Ireland, if the accused had a belief that the victim was consenting, no rape occurred. In Queensland and Tasmania, the defendant is required to show that his belief was reasonable, and this can be demonstrated by, for instance, the steps the accused took to ascertain consent. This interpretation of 'reasonable belief', in addition to rape shield laws, helps shift focus from the accused to the defendant.

[23] Rape is defined in Article 242 of the Dutch Penal Code.

[24] See the Criminal Law (Rape) Act 1981, Article 2(2) and Criminal Law (Rape) (Amendment) Act 1990, Article 9.

[25] Criminal Law (Rape) Act 1981, Article 2(2).

Fileborn (2011) contends that the behaviour of the victim is still under too much scrutiny, especially compared with that of the accused.

International criminal law has also protected sexual violence victims from unnecessary and irrelevant questioning regarding their past sexual history and the need for corroboration. Such evidentiary rules were first enshrined in the ICTY and ICTR Rules of Procedure and Evidence.[26] The ICC Rules of Procedure and Evidence likewise state that the testimony of a victim of sexual violence does not need to be corroborated at all, as long as the judges find it reliable and credible, and that evidence of prior or later sexual history is not admissible.[27]

The combination of the definitions of rape with reforms in evidentiary rules has led to a lot of discussion about the party on which the burden of proof lies. For example, in situations involving conflict related sexual violence it has been argued that the consent-based definition of rape provided by the ICTY in *Kunarac* put an unjustifiable burden of proof on the prosecution given the context of conflict situations where conditions of force and threat preclude any freedom to consent (De Brouwer, 2005; Viseur Sellers, 2007). With the ICC definition of rape, the burden of proof has partly shifted back to the Defence because, in the event that the accused wants to raise consent on the part of the victim, it can only be done in a closed session hearing, where the judges first test the credibility of the Defence's arguments before the victim is confronted with this question.[28]

2.4 Protective measures and procedural rights: the accused and the victim

Reforms of evidentiary rules aforementioned show that inasmuch as sexual violence crimes have been recognised as specific offences whose victims require some protection regarding the type of evidence which can be brought up at trial, these reforms have also attempted to protect the rights of the accused as much as possible. This is also the case when it comes to procedural rights and protective measures.

Protective measures vary greatly among states. In general, it is possible to say that child victims of sexual violence benefit from stronger protections than adults. For instance, in a majority of states, children do not have to testify or provide evidence at trial and instead their tape-recorded interviews can be played in court or the police officer who interviewed him/her can be asked to take the stand (e.g. the Netherlands, as explained below). Another example of child-specific measures includes an automatic publication ban (including the disclosure of the identity of the

[26] Rule 96 for both Tribunals.
[27] ICC Rules of Procedure and Evidence, Rules 63(4) and 72.
[28] ICC Rules of Procedure and Evidence, Rule 70.

victim) in Canada when minors are involved in sexual violence cases (as a victim or a witness).[29]

In the case of adult victims, states have adopted different approaches which also differ in degree. For instance, during the investigation and criminal proceedings, most sexual violence victims do not benefit from specific protection from the accused. Some countries present as exceptions, such as Germany and Spain, who have specific rules in this regard. The German Act on Protection Against Violence[30] and the Spanish Organic Law 1/2004 on Integrated Protection Measures against Gender Violence provide the possibility of protection orders to victims, including through civil restraining orders (Hagemann-White et al., 2010).

During the proceedings, victims in some jurisdictions may be provided with the opportunity to give evidence *in camera*, the judge may exclude the public/journalists from the courtroom, to ensure some degree of anonymity to the victim and allow the victim to provide evidence via a video link (Hagemann-White et al., 2010). Some of these measures can already be said to encroach on the right of the accused to, for instance, a public trial. While the provision existed for the complainant to give evidence from behind a screen in Northern Ireland during what is known as 'the Belfast Rape Trial' in order to protect her identity, the cross examination of her was daily headline news for several weeks (Gallagher, 2018) and some believed her identity was barely veiled. However, while the complainant was not named during these proceedings, the identities of the four accused were, with all four being photographed and filmed as they attended court over the eight-week period. Despite these men being acquitted, their personal, social, and professional lives became fodder for public commentary and condemnation.

However, some rights of the accused have superseded the interests of victims, such as the right of the accused or his legal team to question the victim in court in person, a right protected in a vast majority of jurisdictions and accommodated despite the distressing experiences of sexual violence victims. This right has raised several issues with regards to the treatment of victims. Within the EU, most member states still witness unnecessarily intrusive, extensive, and repetitive questioning of victims (Hagemann-White et al., 2010). In the case of sexual violence committed against children, a majority of states have adopted legal or quasi legal provisions to limit the number of interviews of victims (Hagemann-White et al., 2010). Examination and cross-examination can be particularly traumatic for victims (Gillen, 2019), even more so when the accused is using his/her right to represent him/herself. In this unlikely case, Canada provides for the possibility of appointing a counsel who will solely be in charge of cross-examining the victim. Once this is done, the accused can resume defending himself.[31] The judge can deny

[29] Criminal Code of Canada, Section 486 (1.1).
[30] Entered into force on 1 January 2002.
[31] Information retrieved from: http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/guide/secf.html.

this application for a counsel if he/she believes that it would affect the accused's right to a fair trial. The accused's rights are further protected through rules that exempt him/her from taking the stand for example.[32]

Special attention has also been given to accommodating the rights and needs of juvenile sex offenders. Such care has taken the form of specialised children's courts in Australia (Warner & Bartels, 2015). These courts typically only have summary jurisdiction powers and therefore some offences, considered particularly serious, can be outside of their jurisdiction. For example, juvenile courts in New South Wales do not have jurisdiction over crimes of aggravated sexual assault (aggravated rape), and rape or aggravated sexual assault perpetrated by a child above fourteen years old must be dealt with in the Supreme Court of Tasmania (Warner & Bartels, 2015). Even though juvenile courts have the power to transfer a case to an adult court, it very rarely happens (Bouhours & Daly, 2007).

International criminal law has provided similar protective measures to victims of conflict-related sexual violence whilst at the same time guaranteeing the rights of the accused. Protective measures were set out for the first time in the Statutes of the ICTY and ICTR.[33] The ICC expanded these measures to, among others, (a) protection from the accused and his counsel (also referred to as anonymity measures—although its application is contested and has only been applied once before the ICTY); (b) protection from the press and the public, such as the use of pseudonyms for victims and witnesses and closed session hearings, which in the case of victims of sexual violence would in principle need to be ordered automatically (also referred to as confidentiality measures and the most commonly used protective measures by the Court); and (c) protection from re-traumatisation, such as measures that avoid face-to-face confrontation with the accused (for more information, see De Brouwer, 2005).[34]

2.5 The role of victims in criminal proceedings

The position of victims in domestic criminal proceedings, including victims of sexual violence, varies considerably.[35] Traditionally, more extensive participatory rights have been granted in the continental legal systems, where victims may sometimes participate in criminal proceedings as civil parties to the extent necessary

[32] Information retrieved from: http://www.sexassault.ca/criminalprocess.htm.
[33] Rule 96, Rules of Procedure and Evidence for both Tribunals.
[34] Rome Statute, Articles 68 and 69(2); ICC Rules of Procedure and Evidence, Rules 87–88.
[35] It is not possible to provide a comprehensive overview of the differences between the civil (or continental) and common law systems regarding victims' rights in light of the diversity in domestic systems. Although the classification among these lines is therefore somehow misleading, a discussion in terms of more abstract models is still necessary and valuable (De Brouwer & Heikkilä, 2013). On adversarial criminal trials—ie common law systems—and sexual assault, see the comprehensive study by Cossins (2020).

to substantiate their claims for damages (Brienen & Hoegen, 2000). Examples of countries in this category include Austria, Belgium, Denmark, France, Germany, Greece, Iceland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Poland, Portugal, Russia, Sweden, Switzerland, and Turkey. In other countries, victims may also (or alternatively) participate in the prosecution of the criminal offense as private prosecutors, secondary prosecutors and/or auxiliary prosecutors (Vasiliev, 2009). This is, for instance, the case in Argentina, France, Spain, and some common law countries, such as England and Wales, Cyprus, Australia, and New Zealand (private prosecutor), Austria and Norway (secondary prosecutor), Germany and Austria (auxiliary prosecutor). All these prosecutorial roles are subject to certain variations depending on the type of crime or public prosecutor's decisions. For example, the 'private prosecution' model is 'largely limited to minor crimes in which there is no public interest in the prosecution' (Brienen & Hoegen, 2000: 1063; Joutsen, 1987; Vasiliev, 2009). In a few states, victims enjoy full prosecutorial rights (such as in Spain) or have recourse to all three modes of participating in the prosecution (such as in Sweden) (Brienen & Hoegen, 2000).

It can therefore be concluded that in many countries all over the world victims have various forms of participatory rights of their own in the criminal process (Chan, 2008; Groenhuijsen, 2004, 2009) with some common law jurisdictions being the most limited in this regard (such as Ireland). While the pre-requisites differ, the participation may also take the form of bringing and establishing civil claims and/or prosecuting the case or seconding the prosecutor in doing so. The development of participatory rights of victims reflects the fact that the interests of the general public and the victims' interests do not always coincide. Furthermore, victims should arguably not be excluded from the proceedings in which their own victimisation is addressed. Participatory rights of victims therefore underline that crimes are not only violations of public order but entail individual loss and harm. In other words, doing justice requires more than just punishing the offenders; one of the goals of criminal justice should be also to provide justice for victims (Groenhuijsen, 2008).

In legal systems following the common law tradition, victims usually have fewer procedural rights than in continental or civil law jurisdictions. With the abovementioned exception of those countries where the 'private prosecution' model is allowed, victims can participate in the proceedings only as witnesses. Such a limited role for victims is often based upon the argument that the main function of a criminal trial is to investigate the criminal responsibility of the accused person in a fair way and that active victim participation can interfere with the achievement of this goal. The concern is that the delicate power balance between the prosecutor and the accused person would be disturbed by putting more than one player on the accusing side. It is then generally assumed that the prosecutor simultaneously protects both the interests of the public and the interests of the victims in the criminal proceedings. In such legal systems, the interests of the victims may be considered

in other ways, for example, through comprehensive compensation schemes or through progressive witness services, which do not have to form part of the criminal trial proceedings at all. It is thus not surprising that victims, including victims of sexual violence, often have difficulty understanding their marginal role in systems following the common law tradition (Herman, 2005; Keenan, 2014, 2017).

Another instrument that enables certain victims, including victims of sexual violence, to participate in the criminal justice procedure is the right to deliver a Victim Impact Statement (VIS); an instrument that can both be found in common and civil law jurisdictions. A VIS can only be delivered if a conviction is secured. A VIS can vary in form from a written statement to an oral statement that may serve a function in awarding compensation or influence the sentence given to the offender. All have in common that as a part of the court proceedings they allow victims the right to express the harm they have experienced (Erez, 2004; Lens et al., 2013). Empirical research has indicated that delivering a VIS does not give rise to direct 'therapeutic' effects (emotional recovery); rather that feelings of anger and anxiety decrease for victims who experience more control over their recovery process and that they experience higher levels of procedural justice (Lens et al., 2015.

The right of states to organise their criminal proceedings in different ways in relation to victim participation is generally accepted. However, the recent trend in many domestic legal systems is to grant victims more rights, oftentimes differentiated by the right to information, treatment and protection, and reparation (Chan, 2008; Groenhuijsen, 2004, 2009). This trend is also reflected in some regional and international legal instruments. For example, the 2012 EU Directive establishing minimum standards on the rights, support and protection of victims of crime (replacing the 2001 EU framework decision on the standing of victims in criminal proceedings), which has as its goal the approximation of the EU Member States' practices in relation to victim participation and rights, illustrates the regional tendency towards rejecting domestic models in which victims have no real standing.[36] However, the framework decision does not oblige Member States to provide victims the treatment 'equivalent to that of a party to the proceedings' and it still allows for many different procedural models.[37] Nonetheless, overall while attempts at accommodating victims' rights during the investigation and prosecution of sexual violence have varied across countries, the tendency towards providing victims of sexual violence with a right to information about all stages of the criminal process and the possibility to submit a VIS can be observed.

[36] Directive 2012/29/EU, OJ L 315, 14 November 2012; Council Framework Decision 2001/220/JHA, OJ L 82, 22 March 2001. There are many other similarly important regional and international instruments on victims' rights, such as the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) and the Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure (1985). See Groenhuijsen and Letschert (2012) for an overview and discussion of these instruments.

[37] 2001/220/JHA, OJ L 82, 22 March 2001.

In New South Wales, the government adopted the Charter of Victims' Rights through the 2013 Victims and Support Act,[38] which is regularly revised. The eighteen rights outlined in the Charter provide the rights of all victims of crime. Sexual violence victims benefit from the most protection available under the Charter. Victims hold the right to be informed about the investigation and prosecution process and need to be consulted by the prosecution if it is thinking about changing or dropping the charges. In addition, victims have the right to submit a VIS to the court. The Charter specifies that victims can ask for help and support in this regard. In terms of protective measures, the Charter guarantees a certain amount of anonymity to victims by ensuring that the victim's address and phone numbers are kept private.[39] Importantly, the Charter protects victims from offenders by ensuring that offenders cannot contact victims and victims can apply for special protection if the offender applies for bail. Finally, victims have the right to be informed about the imminent release of the offender from prison[40] or when the offender has applied for parole. In the latter situation, the victim has a right to submit his/her opinion about the offender's application. Outside of purely legal matters, the Charter ensures the right of victims to receive free counselling and financial assistance along with medical assistance through the Victims Support Scheme funded by the government. Besides being binding on public services, the Charter applies to any non-governmental agency that provides support to victims and is funded by the State. As a result, the reach of the Charter is quite wide-ranging.

Another example to have been implemented in Australia is that of a specialist court, namely specialist prosecution and court activities (Daly, 2011a/b). In the State of Victoria, a specialist sexual offences list in the magistrates' court was first set up in 2004 for cases of sexual violence committed against children and then extended to adult victims in 2006. A Specialist Sex Offences Unit in the crown prosecutor's office was later put in place. This later unit has proven to improve the provision of support to victims both before and during the prosecution process. The use of crime-specific technology, such as video-recorded interview has been made readily available in several Australian States[41] in the case of child sexual abuse.

Finally, other initiatives have been put in motion in Australia in an effort to help victims through criminal proceedings such as the Wrap Around Program in the Australian Capital Territory (Daly, 2011a/b). This programme aims at coordinating the work of the main criminal justice, medical and victim support agencies in order to better help victims. This programme was inspired by the Independent

[38] For the Charter of Victims' Rights, https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2013-037

[39] Privacy is possible, not mandatory. The court may ask for such details to be public if they are vital to the case.

[40] Either when the sentence has been fully served or when the offender is on day release.

[41] Western Australia, Victoria, and New South Wales.

Sexual Violence Advisor initiative, in England and Wales, who acts as a contact between victims and all types of support and justice agencies.

In the Netherlands,[42] the position of victims within the criminal procedure has also changed significantly over the years. From not having any legal status other than that of witness, the victim has become a recognised legal subject within criminal proceedings and can benefit from psycho-social support from the police and the public prosecutor's office. This change was effected over time through different instruments.[43] As of now, the Netherlands provide for sex offences committed against adults and children to be investigated and prosecuted by specially trained police officers and prosecutors, for trained medical examiners, for the anonymity of victims to be guaranteed to the greatest extent possible, for the public prosecutor to refuse to call the victim to the stand and instead provide the video-recorded interview of the victim in court, for victims to be informed on decisions in his/her case and to have conversations with the prosecutor, to challenge a decision to dismiss the case and to provide a VIS. If a victim is awarded damages, the offender has to pay these damages in full.[44]

From a procedural point of view, victims are still not full-fledged parties to the proceedings, but they have the right to inspect and add information to procedural documents, to retain legal counsel (free legal aid), to have an interpreter and to be informed of the release of an offender who has served time. Other protective measures include separate waiting areas for victims and offenders in court and restraining orders against offenders.[45] Sexual violence victims do not have the right to specialised victim support, but they do, however, have the right to any kind of support (legal, practical and psycho-social) provided by Victim Support Netherlands. Amendment of the law in 2015 made it possible for victims to make representations to the court on the sentence as well as on the guilt of the offender.[46]

It is important to note that the new victims' rights were predominantly not created at the expense of the offenders: victim emancipation has never been considered a 'zero-sum game' (Chan, 2008; Groenhuijsen, 2008). For that reason, most of the international instruments in this area explicitly state that the introduction

[42] The example of the Netherlands is based on Van der Aa and Römkens (2010).

[43] These instruments include the Victim Support Act (1995), the Victim Care Guidelines (first published in 1999 and revised regularly), the Guidelines on Victims of Vice Offences (2008) and on Victims of Child Abuse (2009), the Guidelines on Investigation and Prosecution of Sexual Abuse (2008), and the Act for the Improvement of the Position of Victims in Criminal Procedure (2010).

[44] According to the Act for the Improvement of the Position of Victims in Criminal Procedure, victims should receive the full amount of the awarded compensation within eight months after the sentence has become final. Should the offender not be able to pay the amount in time, the government will provide the difference and the Central Fine Collection Agency will be responsible for recovering the rest of the compensation from the offender.

[45] Protective measures for victims against offenders can go as far as putting victims in witness protection programmes but this course of action is highly exceptional.

[46] See: http://www.rijksoverheid.nl/nieuws/2014/11/13/teeven-kiest-voor-onbeperkt-spreekrecht-slachtoffers.html.

of victims' rights in criminal proceedings shall not prejudice a fair trial for the accused. It has been contended that victims should not be given more rights in the proceedings, because they bring emotions and a desire for revenge and for higher penalties for the accused into the courtroom, which is detrimental to the rights of the accused and influences judges to rule in favour of the victims (Herman, 2005). However, empirical research has established that these assumptions are not generally correct (Herman, 2005; Pemberton & Reynaers, 2011).

In the case of international criminal justice, the ICTY, ICTR, and Special Court of Sierra Leone follow a 'common law approach' to victims that restricts victims to the role of witnesses. Within these tribunals, victims do not have the possibility to participate in the trial or to receive reparation.[47] By contrast, the Statutes of the ICC, the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon grant extensive participatory rights to victims, namely participation, protection and reparation. Victim participation has been seen by some to affect the procedural position of the accused person in many different ways. For example, it has been found problematic in light of the presumption of innocence, as the granting of victim status demands the establishment of some connection between the accused's alleged wrongdoing and the harm suffered by the victim at very early stages of the proceedings (Jorda & Hemptinne, 2002). However, the ICC's Rome Statute explicitly states that victim participation shall not be inconsistent with or prejudicial to the rights of the accused.[48]

2.6 Sentencing and post-release supervision of sex offenders

The sentencing of sexual offenders can take a wide range of forms, from probation measures with special non-residential treatment conditions to a prison sentence or a sentence served in psychiatric hospital. The prison sentence can include a treatment programme for sex offenders but not always. In the case of sentence to be served in a psychiatric hospital, detention of this sort is imposed if the offender suffers from mental disorders. The treatment to be dispensed there aims at reducing the risk of recidivism. In some states, if the risk of recidivism is not significantly reduced through treatment, the measure can be extended indefinitely (e.g. the Netherlands).

[47] It should nevertheless be noted that some forms of 'victim participation' exist at the Tribunals, which, however, cannot be understood as victim participation proper. These forms include victim participation through victim impact statements, *amicus curiae* intervention, and addressing the Office of the Prosecutor directly. In addition, the right of victims to reparation is existent at the ICTY and the ICTR in the sense that victims could receive forms of reparation but not request for it themselves. Yet, it has never really been asserted by these Tribunals. The Tribunals, despite their ability to do so, never ordered the restitution of property nor did they deliver judgements by which compensation could be awarded to victims through competent national authorities.

[48] Rome Statute, Article 68(3).

In the case of prison sentences, the ranges vary greatly from state to state. For instance, minimums range from three months to six years while maximums go from nine years to life imprisonment. Sentences tend to cluster around minimums. Maximums are reserved for sexual violence crimes, mostly rape, with aggravating circumstances such as the victim's maiming or death (Daly, 2011a/b; Hagemann-White et al., 2010; Keenan, 2014). Research shows that there is a feeling in society that sentences for serious sex offences are usually too lenient (Daly, 2011a/b; O'Farrell, 2010).

With respect to post-release supervision, states have again adopted diverse approaches. Common mandatory measures include the registration of sex offender on dedicated registries, community notification, residential restrictions, satellite tracking, mandatory psychological counselling, the interdiction of working with children (Daly, 2011a/b; Hagemann-White et al., 2010; Keenan, 2014), and post-sentence detention such as the system of 'civil commitment' which can last indefinitely.[49] Some traditional post-release supervision initiatives are voluntary, such as chemical castration (e.g. the Netherlands in van der Aa & Römkens, 2010).

The effectiveness of significantly punitive responses to sex offenders, such as the ones mentioned above, has led to the idea that post-release sentences act as 'a life sentence' and 'no life' for many convicted sex offenders (Keenan, 2014: 21). These criticisms have spurred new approaches, such as Circles of Support and Accountability, first set up in Ontario, Canada (Daly, 2011a/b; see also chapter 6). The aim of these circles is to provide social support for released sex offenders and involves regular meetings with community members.

In the case of juvenile sexual offenders, sentencing practices have demonstrated, in several countries, an attempt to strike a balance between a retributive (punitive) model of justice and a 'welfare' model of justice aimed at rehabilitation and based on the assumption that juvenile offenders' behaviours can be changed, even though political rhetoric tends to emphasise punishment (Bouhours & Daly, 2007). According to Bouhours and Daly's (2007) analysis of juvenile sex offending cases in the South Australia Youth Court, the most common form of sentencing for juvenile offenders was an order to 'be of good behaviour'. Other sentences included supervision by a Families and Youth Services worker, a referral to various therapeutic programmes and/or to education or job training programmes. Detention was imposed in several cases but almost always suspended. A more recent study, conducted by Warner and Bartels (2015) in Australia, indicates that community supervisions or work orders are the most common sentences imposed on juvenile sex offenders. Most juvenile courts in Australia also have the discretionary power

[49] For a description of the legislation, see https://law.lis.virginia.gov/vacode/title37.2/chapter9/ and for an analysis of the legislation, see Ridgeway, 'How "civil commitment" enables indefinite detention of sex offenders', *The Guardian*, 26 September 2013, http://www.theguardian.com/commentisfree/2013/sep/26/civil-commitment-sex-offenders.

of not recording convictions against juveniles as a way of protecting the future of the convicted youth. As a further example of Australia's balance between rehabilitation and punishment is that of Victoria's 'dual track' system, whereby a court can order the sentence of an eighteen- to twenty-year-old person to be served in a youth justice centre rather than an adult prison. This order can be issued if the court believes that the offender is particularly impressionable or immature (Warner & Bartels, 2015).

Other countries, such as the US and the UK, allow for community notification for extended periods of time for adolescents convicted of sexual offences (Bouhours & Daly, 2007). In the same vein, adolescents who are prosecuted and convicted for sexual offences in adult court must register with the police in Canada (Bouhours & Daly, 2007).

3. Reporting and non-reporting of sexual violence to judicial authorities

Research across multiple jurisdictions indicates that only a very small percentage of sexual violence cases pass through the criminal legal system (Daly & Bouhours, 2010; Lovett & Kelly, 2009). Some studies, with a focus on the US, indicate that about 16-36 per cent of all sexual violence that takes place is reported to the police (Kilpatrick et al., 2007; Rennison, 2002) and that only 14–18 per cent of cases is subsequently prosecuted in court (Bouffard, 2000; Campbell et al., 2001). The process by which sexual violence cases fail to proceed through the criminal legal system is commonly referred to as 'attrition'. From the moment victims report sexual violence to the police to the moment a case is concluded—which includes, after the reporting phase, the phases of prosecution by the prosecutor, adjudication in court and conviction—the percentage of sexual violence cases has thus significantly dropped.

3.1 Non-reporting of sexual violence to judicial authorities

Much has been written about the reasons why victims of sexual violence do not report their case to the police and participate in the criminal trial process. Among the many factors contributing to this are: (1) victims' feelings of shame or self-blame for what happened to them; (2) safety concerns (fearing revenge from the perpetrators when seeking help from the legal system); (3) belief they did not experience a 'stereotypical rape' 'real rape scenario' (hesitating to report when the sexual violence was not committed by a stranger with a weapon resulting in physical injury to the victims); (4) disbelief in the criminal legal system (thinking the police will blame them for the sexual violence and/or that they will be poorly treated in court

by court officials); (5) fear that they will not be believed by their own social network (e.g. family, friends); and (6) awareness of the low conviction rate for sexual violence in comparison to other non-sexual violence crimes (e.g. Kilpatrick et al., 2007; Patterson & Campbell, 2010; Resnick et al., 2000; Temkin & Krahé, 2008; Thompson, Sitterle, Clay, & Kingree, 2007).

3.2 Reporting of sexual violence to judicial authorities

Less research exists, however, as to why victims do report sexual violence to the legal authorities (e.g. Kilpatrick et al., 2007; Konradi, 2007).[50] The most reoccurring factors why victims of sexual violence wish to have their case prosecuted by criminal justice include their wish for vindication and validation (acknowledgement and recognition of the harm caused), voice (ability to tell the story of victimisation), reparation (compensation and other forms of assistance), participation (sense of control in the justice process) (e.g. Daly, 2011a/b; Kirchhoff, 1994; Shapland et al., 1985) and to ensure future child and adult protection (Keenan, 2014). According to Patterson and Campbell (2010)[51], the following two reasons influence the decision of victims to report the crime to the police first and foremost: (1) to prevent the perpetrator from raping again (other women or themselves), in particular when their life was in danger during the rape or when they had medical concerns, such as sexually transmitted diseases; and (2) encouragement by others (e.g. friends, family, via helplines).

Patterson and Campbell (2010) studied the factors influencing victims' choice to continue their participation in criminal proceedings after reporting. The factors influencing victims' choice to continue with the process included: (1) to prevent their perpetrators from raping anew; (2) confidence about their ability to endure the process and/or the strength of their case after interactions with the forensic nurse examiners and the police; (3) respectful treatment by system personnel; and (4) a sense that it was not possible to withdraw from the process.

3.3 Rape myths, the impact of legal definitions, and social responses to (non-) reporting

It has generally been posited that attitudes towards women who have been sexually violated are profoundly influenced by 'rape myths' as discussed also in chapter 1: 'attitudes and generally false beliefs about rape that are widely and persistently held,

[50] See also *the Guardian* article on non-reporting of sexual assault by Topping (2021)

[51] Their study included a small number of participants, namely twenty adult female survivors of rape in the US.

and that serve to deny and justify male aggression against women' (Lonsway & Fitzgerald, 1994: 133; also Bohner et al., 2009; Gerger, Kley, Bohner & Siebler, 2007; Neuman, 2010).[52] The most common recurring responses to sexual violence include attributing responsibility or blame for it on the victims ('she provoked him', 'she must have done something'), disbelief ('it wasn't really rape', 'she exaggerates', 'you cannot rape a woman if she doesn't want it'), and minimising the severity of the sexual violence or its impact (Bourke, 2007; Gerber & Cherneski, 2006; Lonsway & Fitzgerald, 1994). The persistence of rape myths not only marginalises the suffering of the victims, but also demonstrates 'the immense cultural sympathy for the sexual abuser' (Bourke, 2007: 48). Rape myths underscore the reality that sexual violence against women is to a large extent condoned, normalised, denied, and recast as acceptable, resting on the assumption that women's sexuality is available, particularly when the victim and perpetrator know each other. The net result is the social and cultural stereotyping, marginalisation, and silencing of the victims (Horvath & Brown, 2009; Gillen, 2019). The fact that the concept of 'date rape' was only introduced in the early 1990s illustrates how pervasive the myth is that only rape committed by a stranger, counts as 'real rape' (Bohner et al., 2009; Estrich, 1987; Kitzinger, 2009, Neumann, 2010).

Moreover, in a number of countries (e.g. Afghanistan, Algeria, Egypt, Laos, Sudan), there is no legal recognition of marital rape as men are understood to have unrestricted sexual access to their wives.[53] However, the majority of cases of sexual violence involve a known perpetrator (partner, ex-partner, date, or acquaintance), which go mostly unreported, adding to the invisibility of rape in partner relationships as a legal concern (Mouzos & Makkai, 2004). When sexual assault is perpetrated by someone known to the victim and there are no witnesses, the victim's lack of consent is, from an evidentiary perspective, difficult to prove. This is one of the factors contributing to the high rate of rape attrition in a legal context (Daly & Bouhours, 2010), notably in jurisdictions where the legal definition of rape is based on 'lack of consent' or 'force' and when the suspect claims (as is often the case) that consent was given (Hagemann-White et al., 2010). In addition, there are also jurisdictions, in particular those based on Islamic Sharia laws, which require several witnesses to testify to the rape in order to prove rape. In such jurisdictions if the prosecution is not successful the victim will likely be prosecuted herself for having had sex outside marriage.

Rape myths are deeply gendered and have a direct impact on court officials and society at large (including victims' own family members and friends) in terms of looking at the victims and the way they are subsequently treated by them in and outside the criminal legal system (Herman, 2005; Temkin & Krahé, 2008).

[52] This paragraph is partly based on Chu, De Brouwer, and Römkens (2011).

[53] Information retrieved from http://en.wikipedia.org/wiki/Marital_rape. More examples of countries where marital rape is not a criminal offence can be found here. See also Neumann (2010).

In the courtroom, victims of sexual violence have suffered from aggressive and intimidating questioning by the Defence, in order to intimidate the victim, make the victim less credible and to make the victim think she is not believed (Cossins, 2020; Gillen, 2019). At times, the judges have not stopped the Defence from doing so (Herman, 2005). When victims of sexual violence are treated with indifference and disrespect by court officials, victims see this as a confirmation of their dishonoured status and as an endorsement of the perpetrator's attitude of contempt (Herman, 2005). It is therefore not surprising that many victims of sexual violence choose not to disclose their victimisation in public and not to pursue their case in the criminal courts. In addition, as mentioned earlier, the focus of these discussions seems to be still rather female orientated, while male victims of sexual violence may possibly need to overcome even more stigmatisation (as discussed in chapter 1).

4. Legal reform and the limits of legal reform

In light of the under-reporting and under-prosecution of sexual violence before national courts, to a large extent influenced by rape myths, a number of amendments have been made to the law to make the law more victim friendly. These law reforms have largely taken place since the 1970s in several Western countries (in particular the USA, Australia, Canada, and New Zealand), due to lobbying and pressure by women's groups on behalf of victims of sexual violence.[54]

4.1 Legal reform

As outlined above legal reform has meant that in many legal systems the substantive and procedural criminal law was changed to accommodate victims' concerns and experiences of sexual violence as outlined above. Changes in the substantive and procedural laws were made, and changes on the institutional level have also been instituted as it was recognised that the attitude of those involved in the criminal legal system is of paramount importance (Daly, 2011a/b). Patterson and Campbell's study (2010), for example, shows that the role of the police, forensic nurses and lawyers play a significant role in victims' reporting, withdrawal, or continued participation in the criminal legal system.[55] According to them:

[54] For a comprehensive look at reforms of rape laws, see e.g. McGlynn and Munro (2010) and Cossins (2021)

[55] It is a fact that some victims report having been and being re-victimised by the police, the courts etc. which is certainly a factor in the hesitation to come forward or pursue their case in the court.

> Survivors felt more at ease about their participation when they were treated with respect by formal support providers. In addition, some of the formal supports helped survivors feel more confident about their participation in the criminal justice process by validating their decisions to participate, providing information especially about injuries and identifying the survivors' strengths to endure the challenging nature of the criminal justice process. Survivors regarded these formal supports as experts; thus, they accepted their opinions and began feeling confident about their ability to participate (Patterson & Campbell, 2010: 202).

This is even more so the case in common law countries, where the victims' role is relegated to that of witnesses only (Herman, 2005).

4.2 The limits of legal reform: the 'justice gap'

Despite all of the above changes in the criminal laws and procedures and the institutional support to make criminal legal systems more accessible and less intimidating for victims of sexual violence in the past thirty years, it has been held that to date legal reform has achieved insufficient reform for victims of sexual violence (e.g. Daly, 2011a/b; Larcombe, 2014; Lonsway & Archambault, 2012; Temkin & Krahé, 2008).

Most cases of sexual violence continue to remain unreported or underreported to the legal authorities (Gillen, 2019; Herman, 2005). The reason for this low reporting rate can be found in the lack of confidence that victims of sexual violence have in court procedures and the treatment that awaits them there. Victims of sexual violence continue to think that, despite the legal reform, shame, isolation, and stigmatising is what awaits them when they engage with the criminal justice process. This thought is further influenced by the low conviction rate in cases of sexual violence (Cossins, 2020; Gillen, 2019; Herman, 2005; McGlynn & Munro, 2010). In fact, Daly (2011a/b) found that, despite thirty years of legal reform, conviction rates even went down in Australia, Canada, and England and Wales. Temkin and Krahé (2008: 1) similarly refer to the discrepancy between reporting sexual violence and convictions thereof, despite the significant law reform measures over the last thirty years and refer to this phenomenon as the 'justice gap'. Therefore, even after over thirty years of law reform, attrition rates continue to be extremely high in cases of sexual violence.

Research indicates that the cause of this 'justice gap' can be found in victims' dissatisfaction with the authorities dealing with their cases and their experience in trial (Temkin & Krahé, 2008). The crux of the problem is to be found in cultural beliefs about gender and sexuality, which undermine the good intentions of rape law reform (Daly, 2011a/b; Temkin & Krahé, 2008). In other words, legal reform

does not achieve anything for victims of sexual violence, if community attitudes and the attitudes of all court officials involved in sexual violence cases are not changed. Attitude problems of court officials may play a significant part in explaining the 'justice gap'. The perceptions of court officials and juries on what constitutes sexual violence are oftentimes influenced by stereotypes, bias, and gender prejudice. For example, if court officials do not consider a rape as a 'real rape' (as in committed by a stranger with a weapon), the more likely the accused will be acquitted (Temkin & Krahé, 2008). As mentioned, 'real rape' stereotypes stress the victim's responsibility for being assaulted, minimise the seriousness of sexual assault, and exonerate the perpetrator. According to Temkin and Krahé (2008) judges are in fact often part of the problem when it comes to cases of sexual violence. Unconscious bias and the prevalence of rape myths are not challenged or acknowledged. Temkin and Krahé (2008: 50) suggest judges often find fault with others, such as the police, defence counsel, prosecutors, and juries without reflecting on their own positioning. In addition, although 'rape myths' are more accepted among men than women, women also need to be trained on these biases as well (see further e.g. Gillen, 2019; Krahé & Temkin, 2009; Temkin, 2010). Temkin and Krahé (2008) highlight the importance of influencing students, the public, upcoming law professionals as well as the judiciary and others to understand and address the 'rape myths' that still prevail in society. In summary, under current sexual violence legislation as practised, most offenders will not be prosecuted and punished for sexual crime, even if offences are reported to police, and victims will require 'fortitude, perseverance and certain attributes that juries associate with credibility in witnesses' if a sexual violence complaint is to be prosecuted successfully (Larcombe, 2014).

Under-investigation and prosecution of sexual violence crimes remains an important challenge for international criminal courts as well, and can be attributed to a slow recognition among court officials of the severity of the crimes in comparison to other non-sexual violence crimes and the existence of 'rape myths' among court officials (e.g. Jarvis & Salgaldo, 2013; Marcus, 2013; Sharratt, 2013). In order to address 'rape myths' among court officials, including judges, Sharratt (2013) suggests that they are properly trained on all possible biases concerning sexual violence cases. Indeed, research conducted by Horn, Charters and Vahidy (2009) with 171 witnesses who testified before the Special Court for Sierra Leone indicated that they evaluated their participation in court as positive when they were treated with respect by court personnel. They, for instance, referred to the importance of thorough preparation prior to testifying (by their legal teams and others responsible for providing support) and preparation for the cross-examination process. In sum, there is therefore still a substantial need to identify and challenge the biases that court officials may have regarding victims of sexual violence in order to make law reform really work for victims of sexual violence.

5. More law reform and/or restorative justice?

After many years of legal reforms which have sought to accommodate the needs and rights of victims of sexual violence, one may wonder to what extent even more reform of the continental legal systems and systems following the common law tradition would be effective. In this context many feminists now doubt the usefulness of law and law reform when it comes to achieving social change and, in particular, behavioural or cultural change that would prevent sexual violence (Armstrong, 2004; Carmody & Carrington, 2000; Graycar & Morgan, 2005). As Carmody and Carrington state, 'much misplaced hope has been invested in legislative reform as a means of preventing sexual violence' (2000: 344).

5.1 More law reform?

The need for more law reform in certain areas regarding the legal response to sexual violence cases has been reported in multiple studies and reports in many jurisdictions (for excellent overview see for example Cossins, 2020; Gillen, 2019; Leahy, 2021; McGlynn & Munro, 2010; O'Malley, 2020; Temkin & Krahé 2008). Recommendations can be broadly grouped to include the following:

(a) Measures to address rape myths and their influence on juries and trials such as the increased use of expert evidence to address the common misconceptions concerning victims of sexual violence; public education on the meaning and importance of consent in the context of sexual relationships and sexual activity (Gillen, 2019; O' Malley, 2020); the introduction of guidance for juries to provide direction not only on consent but also on the avoidance of reliance on stereotypes or misperceptions about rape and rape victims in trials (Leahy, 2021).
(b) Measures to end delays in criminal proceedings, such as the introduction of preliminary trial hearings in those jurisdictions where they do not exist and establishment of a formal code of practice to govern the collection and disclosure of a victim's digital material and electronic data such as text messages, social media and internet usage (which increasingly delay trials from proceeding) (Gillen, 2019; O'Malley, 2020).
(c) Measures to try to bring more 'balance' to the criminal proceedings, such as the granting the right to separate representation to complainants from the outset (Gilllen, 2019) in jurisdictions where this does not exist; introduction of the evidence of the 'good character' of the victim to be presented during proceedings as happens with the accused (Temkin & Krahé, 2008) or abandoning this 'good character' evidence in sexual violence cases altogether (Keenan, 2021).

(d) Measures to ensure victims are informed of their rights at all stages of the criminal justice process by means of the police, victim liaison services, government websites, court accompaniment officers and legal advisors (O'Malley, 2020).
(e) Measures to educate and train the judiciary, the police, public protectors, defence council, and all members of the criminal legal system in matters to do with consent and with the principles and practices to be followed when engaging with victims of sexual crime, and with other witnesses (including suspects) who may be vulnerable by virtue of trauma, age, disability, or some other factor (Gillen, 2019; Leahy, 2021: O'Malley, 2020; Temkin & Krahé, 2008).
(f) Measures to respond to community, public interest, and media reporting of sexual crime, such as preservation of the anonymity of victims irrespective of the outcome of the trial unless they waive this right (Gillen, 2019; O'Malley, 2020); preservation of the anonymity of accused persons until found guilty (this is controversial in some jurisdictions such as Northern Ireland); and legislation to cover / prohibit / curtail the publication of trials in electronic media, including social media (Gillen, 2019; O'Malley, 2020).
(g) Measures for alternative criminal justice approaches, such as specialist sexual assault courts (Temkin & Krahé, 2008); restorative justice guilty plea,[56] (Combs, 2007; Daly, 2011 a/b); additional and alternative justice responses, including an entirely victim-led concept of restorative justice both inside the criminal legal system and in parallel to it (Gillen, 2019).

Focusing on legal reform while important, also has significant limitations (e.g. Daly, 2011a/b; Herman, 2005; Keenan, 2017, 2020b; Zinsstag & Keenan, 2017). Scholars contend that increased criminalisation, increase in legal proceedings, and increased penalisation of offenders while important are of themselves not likely to yield constructive outcomes for the range of justice needs and interests of victims (e.g. Daly, 2011a/b; Herman, 2005). As expressed by Larcombe (2014: 68),

[56] This was an idea put forward originally by Combs (2007) as an imaginative proposal to combat the problem of accountability in prosecuting mass atrocities, genocide, and war crimes, where it is prohibitively expensive to prosecute and bring to trial all those accused. The idea has been taken up by Daly (2011a/b: 18) for sexual violence cases in times of peace. Combs (2007) argued for an aggressive policy of plea bargaining, carried out with a credible threat of prosecution. This idea is relevant for sexual violence cases in domestic courts when considering ways to combat low attrition rates. Combs argued that the guilty plea hearing can be made more meaningful if it includes truth telling and victim participation, factors that she associates with restorative justice. Truth telling is the defendant describing what he or she did in detail and answering the victim's questions. Victim participation is the victim/survivor making any statements he/she wishes, including telling the defendant about the impact of the offence. It also affords space for the victim's questions. This activity would take place in a regular courtroom of formal justice, but it contains elements of informal justice processes (dialogue and exchange) by the direct protagonists, or a representative of the victim if he/she chooses not to be present. Courts could impose penalties, redress, and or negotiate Agreements following these restorative plea-bargaining hearings.

all law has limits: principled as well as practical limits. In the area of sexual violence, where regulation of interpersonal conduct is increasingly complex in late-modern, multicultural societies, the limits of the law in addressing and resolving the problems of sexual violence are becoming increasingly evident, despite strong demand for increased regulation and security. The fact that the criminal law is not the only norm-setter in relation to sexual conduct means there is always the potential for legal norms to face resistance or be undermined in the community by competing cultural, social or moral norms (Larcombe, 2014: 78). The norms of law 'on the books' (p. 71) are undermined by the persistence of rape myths and victim-blaming attitudes in social as well as criminal legal decision-making (p. 78). These tensions and challenges continue to persist and it is unlikely that more law reform, while necessary, will be adequate to address or prevent the problems of sexual violence at a social level. At the level of the victim, Herman (2005: 574) adds further thought:

> the wishes and needs of victims are often diametrically opposed to the requirements of legal proceedings. Victims need social acknowledgement and support; the court requires them to endure a public challenge to their credibility. Victims need a sense of power and control over their lives; the court requires them to submit to a complex set of rules and bureaucratic procedures that they may not understand and over which they have no control. Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative. Victims often need to control or limit their exposure to specific reminders of the trauma; the court requires them to relive the experience. Victims often fear direct confrontation with their perpetrators; the court requires a face-to-face confrontation between a complaining witness and the accused. Indeed, if one set out intentionally to design a system for provoking symptoms of traumatic stress, it might look very much like a court of law.

As highlighted in chapter 1 the needs and interests of victims are varied and no one legal or justice instrument will meet the justice interests of all victims. In addition, victimhood is not an event, it is a process, and while as Herman (2005) points out, victims often fear direct confrontation with the offender at one stage, at another it is exactly what they desire (See Keenan, 2014; Keenan & Griffith, 2019, 2021; Lara's story, chapter 7; McGlynn et al., 2011; Moore et al., 2021). It is for these reasons that some authors propose that, despite legal reform, alternatives to criminal justice must be found, in particular, restorative justice approaches

To understand what victims of sexual violence want, one has to turn to victims as key stakeholders (Bolitho, 2015; Herman, 2005; Keenan, 2014, 2020a; Keenan & Griffith, 2019, 2021; Marsh & Wager, 2015; Moore et al., 2021). In general, it

can be said that victims of sexual violence look for validation, vindication, voice, participation, offender accountability, and to prevent further victimisation of children or adults (Daly, 2011a/b; Herman, 2005; Keenan, 2014). This includes, for instance, validation by people near to them, including community members, and it means that the responsibility for the crime is put on the perpetrator and not on the victim (Herman, 2005). Revenge is not something most victims desire and they are divided over the issue of forgiveness and reconciliation (see Keenan, 2014; Moore et al., 2021). In Herman's (2005) study, a minority of victims expressed a wish to be reconciled with their perpetrators, but the majority of victims instead expressed the importance to free themselves of anger and indignation by forgiving the perpetrators (Herman, 2005); a finding also reported elsewhere (see Keenan, 2014, chapter 4). Of the four basic aims of criminal justice that Herman (2005) identified—deterrence, retribution, incapacitation, and rehabilitation—the group of victims of sexual violence that Herman (2005) interviewed only endorsed one: incapacitation (safety for themselves and others, rather than punishment for what they did). Other studies endorsed rehabilitation as well as incapacitation (see Keenan, 2014; Moore et al., 2021). Participants in these studies have a vision of justice that combine criminal justice (or retributive) and restorative elements. It becomes evident from these studies that alongside more legal reform in conventional criminal justice, which is essential, the case for innovative justice measures is also beyond dispute (see Daly, 2011a/b; Keenan, 2014, 2020b; Moore et al., 2021; Zinsstag & Keenan, 2017). Innovative justice responses are described by Daly (2011a: 9) as

> a variety of newer practices that seek to address victims' justice needs, including an acknowledgment of wrongdoing and mechanisms of redress or repair. They may be part of the criminal justice system, work alongside of it, or be independent of it.

5.2 The 2012 EU Directive on victims' rights, supports, and protections

The 2012 EU Directive establishing minimum standards on the rights, support and protection of victims of crime (replacing the 2001 EU framework decision on the standing of victims in criminal proceedings), has, as its goal the approximation of the EU Member States' practices in relation to victim participation and rights.[57] The Directive obliged governments to examine how their legislation can improve

[57] Directive 2012/29/EU, OJ L 315, 14 November 2012; Council Framework Decision 2001/220/JHA, OJ L 82, 22 March 2001. There are many other similarly important regional and international instruments on victims' rights, such as the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) and the Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure (1985). See Groenhuijsen and Letschert (2012) for an overview and discussion of these instruments.

victims' rights and to transpose it into law by 16 November 2015, which many Member States have now done.

As for victims of sexual violence, several important provisions can be found in the EU Directive. For example, it is held that specialist support services shall, as a minimum, develop and provide

> targeted and integrated support for victims with specific needs, such as victims of sexual violence, victims of gender-based violence and victims of violence in close relationships, including trauma support and counselling (Article 9(3)(b)).

This group of victims is again mentioned—in Article 22—as a particularly vulnerable group that may be in need of specific protection needs, and therefore need to be identified based on individual assessments. Furthermore, Article 23 states that a number of measures shall be made available during criminal investigations to victims with specific protection needs, including that

> all interviews with victims of sexual violence, gender-based violence or violence in close relationship, unless conducted by a prosecutor or a judge, being conducted by a person of the same sex as the victim, if the victim so wishes, provided that the course of the criminal proceedings will not be prejudiced.

A number of protective measures can be implemented during the trial proceedings, such as closed session hearings. According to Article 26, Member States are held to take appropriate action aimed at raising awareness of the rights set out in the Directive, reducing the risk of victimisation and minimising the negative impact of crime and the risks of secondary and repeat victimisation, of intimidation and of retaliation, in particular by targeting groups at risk, such as children, victims of gender-based violence, and violence in close relationships.[58]

The above provisions make clear that the 2012 EU Directive on Victims is in many ways quite progressive. However, a close reading reveals that several provisions provide a lot of leeway to the Member States, especially regarding some of the procedural rights, perhaps because of the different structure of criminal legal systems and the different roles victims play in them in different Member States as discussed above. As outlined above in some Member States victims can have a legal status as civil party, in others they only play a role as a witness, and still in other Member States the victim can play a role in criminal proceedings, through the use of victim impact statements, without the possibility of legal status as a party to the proceedings. Various provisions in the Directive are qualified by recourse to national law, both in the application of the right itself and in the procedure to be

[58] Note that children as a vulnerable group in need of specific support and protection are also mentioned throughout the EU Directive.

adopted to achieve it (Blackstock, 2012). The provision states that the right concerned will be applied 'in accordance with the victim's role in the relevant criminal justice system'. This means practically that the role of the victim in the relevant criminal legal system will determine the direction for the implementation and the extent of some of the key rights of the Directive (Buczma, 2013).

One of the main characteristics of the Directive overall is the choice of a 'personalised approach' towards victims of crime. The Directive obliges Member States to ensure that victims are recognised and treated with respect and that their needs are addressed on the basis of an individual assessment. Despite this, it remains to be seen whether the EU Directive becomes effective in practice. Even when it has been transposed in national legal orders, as has happened in Member States now, challenges remain. According to Pemberton and Groenhuijsen (2011) there is good reason to assume that its effects will be less pronounced in countries with relatively poor standards of protection of victims' rights (in particular countries in Central and Eastern Europe that joined the EU after 2004). Thus, while the provisions are transposed, they are not necessarily enforced in practice. According to Pemberton and Groenhuijsen (2011: 535):

> These differences between Member States within the EU greatly reduce the likelihood that the Directive will serve to close the gap between more and less victim-friendly countries and even raise the minimum standards of protection across Europe.

Pemberton and Groenhuijsen (2011) point out, there are different 'worlds of compliance' of EU legislation across European Member States, a point proven in a European Commission Report (2020b: 7) on the implementation of the Directive which noted that many countries have not transposed all the required safeguards for victims, while others 'have no specific measures in place' to facilitate the referral of people to restorative justice services. As Lauwaert (2013) also argued, the effectiveness of implementation will not only depend on the already existing 'victim-friendly climate' or the lack thereof, but related to that, the presence or absence of strong victim support organisations which can advocate the strengthening of victims' rights. The role of the Directive in relation to restorative justice is taken up in the next chapter.

5.3 Restorative justice approaches to sexual violence

Restorative justice approaches to crimes vary across jurisdictions (e.g. Carpentieri (undated); Kelly, 2010; Miers & Aertsen, 2012; Smyth, 2005; Zinsstag & Keenan, 2017) and meets mixed reaction in relation to its application to crimes involving sexual violence. Some victim advocates on the one hand are concerned that

restorative justice approaches could result in re-victimisation or re-traumatisation of the victim (for overview see Daly, 2002a/b; Hudson, 1998; Keenan, 2017; Keenan & Zinsstag, 2014; Miers & Aertsen, 2012; Zinsstag & Keenan, 2017). Defence lawyers on the other hand are concerned that the due-process rights of offenders could be at stake (McAlinden, 2006a/b; Keenan, 2017; Zinsstag & Keenan, 2017). And some legal scholars are concerned about the 'informality' of restorative justice and fear it will fail to deliver *public* justice in the public interest, and instead focus on the more *private* needs and interests of participants, as they see it (Meier, 1998). Despite these challenges restorative justice has been applied in cases of sexual violence (for both adult and youth) in a number of countries and jurisdictions throughout the world, with good outcomes reported for victims and offenders of sexual crime[59] (see chapters 4 and 5, also Daly, 2006a/b; Griffith, 2018; Keenan, 2014, 2020a; Keenan & Griffith, 2019, 2021; Koss, 2014; McGlynn et al., 2012; Zinsstag & Keenan, 2017). Supporters of restorative justice see it as a powerful alternative and / or addition to conventional criminal legal systems in cases of sexual crime. Victims who have their testimony used by a prosecutor to secure a conviction in traditional criminal justice, but are otherwise essentially left out of the justice process, apart from Victim Impact Statements, have an opportunity in restorative justice to define what 'accountability' and 'justice' mean to them, to participate fully in the process and to have their voice heard. The offenders, or people who cause harm, get an opportunity to deepen their sense of accountability and responsibility taking measures by speaking openly and honestly and to right their wrongs to the extent that is possible (Keenan, 2014).

But participants in restorative justice have to feel safe enough to be honest in the restorative justice encounters—whether in direct or indirect meetings—and this raises the issue of confidentiality in the restorative justice process, and legal 'privilege' for those conversations. Confidentiality is a principle of restorative justice, and a firewall of confidentiality exists between criminal and restorative justice in those jurisdictions where both systems work in parallel (such as in Belgium and New Zealand). Guidelines accompanying the legislation in those jurisdictions specify when and in what circumstances reports of the restorative justice meeting can be given to a trial judge with the agreement of the parties and when and in what circumstances the trial judge can take the report into account.[60] Concerns and challenges regarding the issue of legal 'privilege' for restorative conversations arise for practitioners in jurisdictions that do not have legislation for restorative justice, and particularly in relation to sexual violence cases that have not been reported to

[59] More specific research on outcomes for different categories of victims and offenders of intimate and non-intimate violent and non-violent crime would enhance knowledge in this regard

[60] These decisions are specific to the domestic legislation and guidelines for each country or jurisdiction.

formal criminal legal systems (for discussion on 'the moral conundrum' for practitioners see Keenan, 2017).

Many victim survivors of sexual crime do not pursue justice through formal criminal justice means for a variety of reasons as set out above and restorative justice gives them a much-needed option for pursuing justice and accountability through alternative routes. Some survivors do not want to go through the often retraumatising process of reporting to the police, especially when they know the attrition rate, and to read the stories of secondary victimisation reported in the media. Others are looking for alternative forms of redress, and for their abusers to take responsibility for the hurt they caused.[61] The victim can specify what they need from the restorative justice process which can be tailored to what they want. Procedures for managing the issue of legal privilege for restorative justice are therefore important.

Of course, there are far more barriers to expanding the use of restorative justice in response to sexual violence than just the issue of privilege. Concern for the public good and public protection from sexual crime is also moot (see Keenan, 2017 for fuller discussion) and must part of the bigger picture. Sliva, Porter-Merrill, & Lee (2019) also point to persistent reluctance among judges and prosecutors in the US to use restorative justice, even when their state has passed legislation authorising it, and, as chapter 5 of this study shows, some mediators and restorative justice practitioners themselves are reluctant to process sexual violence cases even in jurisdictions whose legislation provides for this work (such as Norway). Restorative justice is a challenge to those who currently hold power in the criminal legal system and this must be countenanced in the development of all restorative initiatives.

Restorative justice is a justice mechanism that is yet to find full acceptance in the sexual violence field, although there is evidence that this development is becoming almost inevitable, mainly because victims of sexual violence want it (see chapter 8 for further discussion, also Keenan, 2014; Marsh & Wager, 2015; Moore et al., 2021). According to Herman (2005), the concerns of victims may not be sufficiently represented when restorative justice approaches are applied to victims of sexual violence if these approaches look for reconciliation, which may not always be in the best interest of the victims (Daly, 2002a/b; Herman, 2005; Stubbs, 2002). It is our contention that restorative justice must be modified and re-conceptualised for its application to sexual violence cases, a crucial part of the project of this book.

On the international criminal justice level, it needs to be recognised that international criminal legal responses are also not the only means available and not always the most effective means available, for victims of sexual violence. National and local courts (influenced by the latest developments of the UK led initiative on developing an International Protocol to document and investigate sexual violence),[62]

[61] This is particularly the case in intrafamilial sexual violence.

[62] See further: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/598335/International_Protocol_2017_2nd_Edition.pdf

Truth and Reconciliation Commissions, symbolic reparations (e.g. commemoration memorials), cultural forms of recognition (e.g. theatre), media (e.g. documentaries, movies), Victims' Tribunals (in a similar vein to the 2000 Women's Tribunal in Tokyo created to address the crimes committed against women who were held as sexual slaves by the Japanese during WWII), and education initiatives (e.g. in schools, museums, and books) are some other measures through which victims of sexual violence could obtain some form of justice and reconciliation (see also Chinkin, 2001; Dembour & Haslam, 2004; Mertus, 2004; O'Connell, 2005, Zinsstag, 2008). The diversity of victimisation requires similarly diverse and multifaceted responses, and more research on the appropriate measures and how current mechanisms can be improved is needed (see for some research on this: for International Criminal Tribunal for Rwanda (ICTR) see (International Criminal Tribunal for Rwanda, 2014);[63] for the International Criminal Tribunal for the former Yugoslavia (ICTY), see Stover (2005); for the Special Court for Sierra Leone, see Horn et al., 2009; on transitional justice mechanisms for sexual violence generally, see Zinsstag & Busck-Nielsen, 2017; Zinsstag & Busck-Nielsen Claeys, 2018). The international recognition of sexual violence is but a first step towards justice for survivors of conflict-related sexual violence and it is vital that the next steps involve their consultation. If they are no longer to be silenced, their participation in preventive strategies, in justice measures and reconciliation efforts will be important for any meaningful form of justice and redress.

6. Final remarks

Despite legal reform and reforms in the criminal legal system– on the substantive, procedural and institutional level—to better accommodate the needs of victims of sexual violence, the legal court setting is not always the best place for victims of these crimes. Many argue it is not always the best place for offenders either, neglecting their rehabilitative and restorative needs, which are almost an afterthought. However, while prosecuting sexual violence crimes in the criminal courts must always be an option for victims who desire this justice response and in the public interest of protection and punishing wrongdoing, the need for improvements in conventional criminal legal systems continue to be important. However, at the same time alternative restorative justice options should also be available as an additional justice response in the interest of victims, offenders, and their communities in recognition of the limited effect of current approaches, and the failure

[63] International Criminal Tribunal for Rwanda (2014). *Best practices manual for the investigation and prosecution of sexual violence crimes in situations of armed conflict: lessons from the office of the prosecutor for the International Criminal Tribunal for Rwanda*, retrieved from https://unictr.irmct.org/sites/unictr.org/files/legal-library/140130_prosecution_of_sexual_violence.pdf (last accessed 8 September 2021).

in many cases. Early practice in restorative justice after sexual crime has shown some positive outcomes for both victims and offenders (see chapter 4, Griffith, 2018, Keenan & Griffith, 2019, 2021; Koss, 2014; McGlynn et al., 2012; Zinsstag & Keenan, 2017) and therefore requires more attention and research. A number of European and international instruments have also set out the parameters of restorative justice over recent decades and it is to an examination of the strengths and limitations of these instruments in relation to sexual violence that we now turn.

3

International policy drivers and contexts

Restorative justice after sexual crime

1. Introduction

International instruments have existed for some time for restorative justice[1] and a number of the more recent policy developments are pertinent to any discussion of sexual violence and restorative justice.[2] This chapter examines these developments. The chapter is divided into seven sections. The first section introduces the chapter. Section two focuses on the European Union (EU) 2012 Victims Directive on victims' rights, supports, and protections as it pertains to restorative justice (chapter 2 discussed the Victims Directive in relation to victims and criminal justice). What is important about the 2012 EU Victims Directive is its binding nature on Member States, in contrast to other EU guidelines discussed below, which are not binding. The third section examines the Council of Europe Convention on preventing and combating violence against women and domestic violence (2011) (also known as The Istanbul Convention, (2011)), which was established to protect women against all forms of violence, and prevent, prosecute, and eliminate violence against women, and is often invoked as a barrier to restorative justice in response to sexual crime. Section four examines the Council of Europe Recommendation CM/Rec (2018)8 concerning restorative justice in criminal matters. Section five examines

[1] See for example (Council of Europe (1999). *Mediation in penal matters*. Recommendation No. R (99) 19. https://www.euromedjustice.eu/en/system/files/20100715121918_RecommendationNo.R%2899%2919_EN.pdf; UN Economic and Social Council (ECOSOC) (2002), *UN Economic and Social Council Resolution 2002/12: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, 24 July 2002, E/RES/2002/12. www.refworld.org/docid/46c455820.html; UN Office on Drugs and Crime (2006). *Handbook on restorative justice programmes*. Vienna: UN Office on Drugs and Crime.

[2] See for example (Council of Europe, 2018a. *Restorative justice in criminal matters*. Recommendation CM/Rec(2018)8 https://www.coe.int/en/web/prison/home//asset_publisher/ky2olXXXogcx/content/recommendation-cm-rec-2018-8; Council of Europe (2018b). *Commentary to Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning restorative justice in criminal matters*. Strasbourg: Council of Europe. https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808cdc8a; UN Office on Drugs and Crime (UNODC) (2017). *A summary of comments received on the use and application of the basic principles on the use of restorative justice programmes in criminal matters*. New York: United Nations. https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_26/E_CN15_2017_CRP1_e_V1703590.pdf; UN Office on Drugs and Crime (UNODC) (2020). *Handbook on restorative justice programmes* (2nd ed.). Vienna: United Nations.

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the Milquet Report (2019) on compensation for victims. The sixth section briefly examines the European Strategy on Victims' Rights 2020–2025 and the final section of the chapter focuses on UN developments on restorative justice. These instruments and guidelines were specifically chosen for inclusion in this book, as these international policy drivers for restorative justice shed light on the international 'mind' that must be engaged.

2. The 2012 EU Victims Directive 2012/29/EU (on restorative justice)

There is clear recognition of the benefits of restorative justice for victims of crime in the 2012 EU Victims Directive 2012/29/EU (European Union, 2012). Several articles make recommendations regarding the provision of such services.

Article 12 provides for rights to safeguards in the context of restorative justice services. In an explanatory note to Article 12 it is written that:

> Restorative Justice services encompass a range of services whether attached to, running prior to, in parallel with or after criminal proceedings. They may be available in relation to certain types of crime or only in relation to adult or child offenders and include for example victim-offender mediation/dialogue, family group conferencing, sentencing circles and restorative circles. The purpose of this Article is to ensure that where such services are provided, safeguards are in place to ensure the victim is not further victimised as a result of the process. Such services should therefore have as a primary consideration the interests and needs of the victim, repairing the harm done to the victim and avoiding further harm. Participation of the victim should be voluntary which also implies that the victim has sufficient knowledge of the risks and benefits of restorative justice in order to make an informed choice. It also means that factors such as power imbalances, and the age, maturity or intellectual capacity of the victim, which could limit or reduce the victim's ability to make an informed choice, or could prejudice a positive outcome for the victim, should be taken into consideration in referring a case for restorative justice and in conducting a restorative process. Whilst private proceedings should in general be confidential, unless agreed otherwise by the parties, factors such as threats made during the process may be considered as requiring disclosure in the public interest. Ultimately any agreement between the parties should be reached voluntarily.
>
> This is an important article which is very clear on the conditions necessary for the provision of restorative justice in sexual violence cases.

2.1 Information on restorative justice to be made available to victims

Article 4 obliges Member States to ensure that victims are offered information on the available restorative justice services, without unnecessary delay, from their first contact with a competent authority (Article 4.1(j)). This provision takes a clear stand on the question whether it is acceptable and useful to inform victims about restorative justice possibilities soon after the crime has occurred. Criminal legal authorities and victim support practitioners were in the past rather wary of providing such information, arguing that it might be upsetting or retraumatising for victims (Lauwaert, 2013), especially victims of sexual violence. Research and practice (as in Belgium, Denmark, see chapter five) have shown that simply providing the information is actually an important step, and provides victims with the chance to ask for further details then or at a later stage, if they wish for restorative justice is a right. As evidenced in Keenan and Griffith (2019) this opportunity is something Griffith would have welcomed soon after the offence against her was committed, but it was many years later in a random encounter with Keenan that she was to access restorative justice and face the man who had assaulted her, which she wished to do for such a long time (see also chapter seven). However, whether providing information alone will in practice increase accessibility to restorative justice will depend to a large extent on whether and how this information is relayed. This provision therefore relies a lot on Member States to interpret and implement. As chapter five demonstrates, even in countries where legislation makes provision for restorative justice in cases of sexual violence, other factors prevent such services being offered to victims (for example in Norway, Finland, where practitioner reticence can inhibit the service being routinely offered to victims of sexual crime).

2.2 Restorative justice should be used only in the interest of victims

Article 12.1(a) recommends to Member States that restorative justice services should only be used if they are in the interest of the victim. This requirement for restorative justice to be in the interest of the victim may in the first instance be aimed at preventing the victim being used in restorative justice processes, which at the time of the Directive, 2012, were mainly offender oriented. This is a longstanding and still legitimate concern (Aertsen, 2004; Mika et al., 2004) and one that is of significance in relation to sexual crime (Keenan, 2021). That a restorative justice meeting or conference should not be organised when to do so would be against the victim's interest is common sense (Lauwaert, 2013: 422). However, the recital seems to go further, stating that restorative justice services 'should ... have as a primary consideration the interests and needs of the victim, repairing the harm done

to the victim and avoiding further harm' (recital 46). This obligation is important for and gives assurance to those in the sexual violence sector who are concerned that the victim could be used in the interest of the offender, such as for his rehabilitation or some other motive. The victim-related context of the Directive can partly account for this emphasis, and it lays down an important marker theoretically, philosophically, and ethically in relation to sexual violence and restorative justice. However, is the victim focus is not completely fitting with some perspectives on the core principles of restorative justice and needs some elaboration.

Lauwaert (2013) argues one of the core ideas of restorative justice is to find a balanced approach, striving for a reaction to crime which can benefit and takes into account the interests of both victim and offender. The Council of Europe recommendation CM/Rec(2018)8 and its commentary (Council of Europe, 2018a, 2018b), discussed below, argues for a 'neutral' process, which should not be designed or delivered to promote the interests of either the victim or offender ahead of the other (Rule 15). Rather, it should provide 'a neutral space' where all parties are encouraged and supported to express their needs and to have these satisfied as far as possible (Rule 15). Chapman (2012) argues that the safety and effectiveness of restorative processes stems from their ability to balance the needs and interests of all the stakeholders. Marder (2020: 411) argues that practices which promote one party at the expense of the other 'echo the false dichotomies that criminal law and justice impose on citizens, while individualising crime in isolation of its wider social context'. He goes further to suggest that the risks of serving these regressive goals exist not only because individual practitioners might facilitate cases imperfectly, 'but also because the concept itself may be framed and understood in a manner that negates its core safeguards' (p. 411).

We believe a number of issues are conflated and confused in the above commentary and they are particularly pertinent to sexual violence and restorative justice. First, 'the disposition towards the crime', and 'the disposition towards the facilitation of the restorative justice process' must be separated, and often in restorative justice literature they are not—they are seen as one and the same. The facilitator's disposition towards the crime can differ from his or her disposition towards the restorative justice process.

On 'the disposition towards the crime' issue restorative justice facilitators cannot be neutral. Ethics and moral thought are involved here. Sexual crime is not a conflict to be resolved. A law has been broken, a victim has been harmed and an offender has either pleaded guilty to the offence or admitted wrongdoing. Research evidence indicates significant trauma for many victims of sexual violence, some lasting for many years after the crime (see chapter one). Second, sexual violence involves structured inequality and abuses of power. Restorative justice dialogue models that ignore these power abuses and inequalities risk replicating the societal structures that foster the disempowerment of the victim by the crime in the first instance, particularly when there is a gendered nature to the offence. Clarity on the

part of restorative justice facilitators on the nature of sexual crime as a crime of violence, based on inequality in power by virtue of age, size, gender, ability, and a host of other social factors, must takes precedence over the personal circumstances or explanations offered by offenders for their offending, regardless of the importance of the offender's perspective. Restorative justice practitioners cannot be neutral on sexual crime.

When it comes to 'the disposition towards the facilitation of the restorative justice process' issue, while notions of a third party 'neutral' facilitator in sexual violence cases is here again neither desirable nor possible, the process must be fair and respectful and a dignified experience for all parties, irrespective of past actions. Even-handedness and fairness in the process itself are essential. The role and disposition of the facilitator is crucial to creating this context. Coker (1999) argued that a neutral practitioner runs the risk of ignoring past injustices between the victim and the offender especially when one considers the structural disadvantages that women in particular have experienced in domestic and sexual crime. She suggested further that restorative justice facilitators have a role in actually challenging victim blaming or gender biased explanations offered by offenders, or run the risk of reinforcing the offender's belief and value systems. For us, challenging offenders may be more a function of certain forms of therapy than of restorative justice; the aim of which is to truly allow victims to make statements and ask questions and hear answers directly from the person who has harmed them. Jülich and Buttle (2010) like Coker (1999) also argued that facilitators need to move beyond neutrality and impartiality in the restorative justice process and be prepared to intervene to protect the victim/survivor. For us, providing opportunity and support for victims to exercise voice and choice in the restorative justice process is more important than intervening to protect them, which we fear can have unintended 'disempowering' consequences.

The aim of restorative justice after sexual crime is not to find 'a middle ground' or a solution, based on 'give-give' between the parties, as in civil mediation or dispute resolution. Rather, dialogue, achieving justice, accountability-taking, rebalancing power, and healing for all are the more usual aims based on victim and offender perspectives (Keenan, 2014).

By adopting these positions we do not deny the realities of the impact of sexual trauma or the power imbalances involved in sexual violence. Rather, we support the agency of victims and see restorative justice as both supporting victims to experience justice and reclaim power, while supporting offenders to give honest accounts of their lives. The practice model must take account of the imbalance of power that is at the core of sexual violence. Further, the aim is to engage with, rather than ignore, the ethical challenges and complexities involved in the dual and triple role functions for restorative justice practitioners in these cases (for further discussion see Keenan, 2018; and Ward, 2017).

A thorough preparation of the parties for restorative justice after sexual crime is essential; one in which the power imbalances and dynamics of sexual violence are anticipated and discussed by well-trained highly skilled restorative justice practitioners. In addition, excellent safeguards and procedures must be developed for any restorative justice 'meeting' or 'conference' in these cases, including the use of the time-out function. The aim is to enable the restorative justice process to work as safely as possible in the interest of justice for victims, accountability for offenders and healing for both.

The EU Victims Directive 2012 is correct to emphasise the victims' interest aspect of restorative justice, particularly in sexual crime, but to emphasise a victims' interest *only* approach may be misleading, in light of the amount of restorative justice practices that work in the interest also of some groups of offenders, such as youth offenders, for example in Northern Ireland (see Maruna, et al., 2008) or in restorative justice practices that do not include the victim, such as healing circles for offenders in prisons.

As is the stance taken in this book, restorative justice must be a consequentialist restorative justice that focuses not only on micro level restorative justice activities, based on a 'process' definition of restorative justice, but one that also works on on macro level activities, such as in attempting to change the culture of criminal justice more broadly to infuse it with restorative ideals and ideas as much as possible (see Walgrave, 2020; chapter one and concluding chapter for further discussion).

2.3 Offender must acknowledge the basic facts of the case

Article 12.1(c) recommends that restorative justice will only be possible if 'the offender has acknowledged the basic facts of the case'. What can be required in terms of confession and admission of guilt has been an object of vigorous debate in literature for many years. Lauwaert (2013) summarises the debate succinctly. From a legal perspective, there are legal and due process concerns that if a defendant admits to the crime or the facts broadly described he or she is effectively waiving his or her right to the presumption of innocence and his or her right to silence (see also Joyce-Wojtas & Keenan, 2016). For some legal scholars such a scenario is deemed unacceptable if the restorative justice process would not involve some form of an agreement that might result in an end to the offender's criminal prosecution (Vervoir, 2008) or involve some mitigation for the offender in subsequent sentencing (see Keenan, 2014). In cases involving sexual crime such diversionary measures are generally not acceptable as a norm. However, there may be circumstances where such diversion is desired by all parties, for example in historic institutional sexual abuse cases or in historic intrafamilial sexual abuse. Whatever the case a broad acceptance of the harm done is a necessary pre-requisite for offender participation in restorative justice after sexual crime (Keenan, 2017, 2018).

Acknowledgement of harm done is not the same as an admission of legal guilt, which can only be adjudicated in a court of law—which restorative justice is not. It is often argued that from a psychological point of view an offender's admission of full guilt should be a condition of the victim-offender mediation proceeding. This perspective does not adequately take account of how restorative meetings can actually enhance the acknowledgement of full guilt and accountability taking (see Keenan & Griffith, 2019, 2021).

The Directive takes a position which is somewhere in-between all of these concerns, and according to Lauwaert (2013), fits well with her practice-based evidence (Lauwaert, 2008). While an admission of full guilt is not a pre-requestite for participation in restorative justice, an acknowledgement of the basic facts of the case is according to the Directive recommendation,. This confirms the position taken in the Council of Europe Recommendation of 1999,[3] which states that 'without such a common understanding, the possibility of reaching an agreement during mediation is limited, if not excluded' (Explanatory Memorandum, 28). The strict minimum required for participation in restorative justice is that the defendant does not totally deny the facts. An admission of having caused harm, or a partial confession, can be sufficient to commence the communication and restorative justice process. As practice demonstrates (see chapter five) this minimum acceptance of the facts can develop into much more fulsome acceptance of responsibility and accountability on an emotional as well as a cognitive and legal level by offenders, as the restorative justice process progresses. The need for a firewall of confidentiality and for adequate procedural safeguards between criminal legal processes and restorative justice processes also needs to be established and clearly understood in the interest of procedural fairness for all parties. Guidelines for such practices are best established by nation states.

2.4 An agreement may be taken into account in any further criminal procedure

The provision that 'any agreement may be taken into account in any further criminal procedure' (Article 12.1(d)) keeps the link between restorative justice and the criminal procedure possible and prevents restorative justice from developing completely independently of the criminal legal system. By doing so, the efforts that victims and offenders make in a restorative justice process can be valued in the criminal procedure.

[3] Recommendation R (99) 19 concerning mediation in penal matters, adopted by the Committee of Ministers of the Council of Europe on 15 September 1999, and explanatory memorandum.

2.5 The importance of training for restorative justice practitioners working with victims

Article 25 refers to the importance of training practitioners working with victims, including those on restorative justice (for further reflections on this see chapter nine, also Keenan, 2018). Member States shall encourage their trainings so that they are able to treat victims in a respectful, professional, and non-discriminatory manner. The training of criminal legal professionals on victims' needs may create greater awareness of what is important for victims and lead to a more open and positive attitude towards restorative justice.

Overall, as shown above, the main focus of the restorative justice provision in the Directive is on the provision of safe and competent restorative justice services (Article 12.1) and on ensuring safeguards for victims who participate in restorative justice to protect them from secondary and repeat victimisation, intimidation, and retaliation. While these provisions are important, they hide the even more pressing need for better accessibility to free restorative justice services for victims of crime, including the possibility of direct access or self-referral for victims to restorative justice for all types of crime, including sexual crime (Lauwaert, 2013). Member States are not obliged to introduce restorative justice services if they do not have such a mechanism in place in national law.t. This caveat, that Member States are not obliged to use restorative justice for all offences has also been confirmed by the Court of Justice of the EU.[4]

Limited accessibility to restorative justice is probably the most important obstacle to the further development of restorative justice in the near future and in the EU Victims Directive 2012/29/EU (European Union, 2012) policymakers did not make the accessibility of restorative justice services a priority. Despite the mild approach adopted to restorative justice, some jurisdictions however have included restorative justice in their domestic legislation, and in policy guidelines, when they gave effect to the Directive in national law (see for example the Victims and Witnesses (Scotland) Act 2014). In other jurisdictions, despite the mention of restorative justice in national legislation (see for example in Ireland, The Criminal Justice (Victims of Crime) Act 2017) access to restorative justice services as a right for victims, including victims of sexual crime, remains elusive. Some see the EU Victims Directive 2012 as a missed opportunity for a wider development of restorative justice in the coming years (Lauwaert, 2013).

[4] CJEU rulings in cases C-205/09 Eredics and Joined Cases C-483/09 and C-1/10Gueye/Sanchez35.

3. Restorative justice and the Istanbul Convention

The Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul[5] (2011) was established among other things to (a) protect women against all forms of violence, and prevent, prosecute, and eliminate violence against women and domestic violence, and (b) contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women (Article 1). It is often invoked by the sexual and domestic violence sector as prohibitive of restorative justice when restorative justice is being considered for sexual or domestic violence. For these reasons the Istanbul Convention will now be discussed in relation to sexual violence and restorative justice as there are many issues that require clarification.

Article 48 of the Istanbul Convention sets a prohibition of *mandatory alternative dispute resolution* processes, including mediation and conciliation, in relation to all forms of violence covered by the Convention. The Convention is concerned about *compulsory mediation* in civil, criminal, and family proceedings. It does not mention restorative justice, but it can be implied that restorative justice is to be subsumed under the umbrella 'mediation'. The Explanatory Report to the Convention[6] further elaborates Article 48: (252).

> While the drafters do not question the advantages these alternative methods present in many criminal and civil law cases, they wish to emphasise the negative effects these can have in cases of violence covered by the scope of this Convention, in particular if participation in such alternative dispute resolution methods are mandatory and replace adversarial court proceedings. Victims of such violence can never enter the alternative dispute resolution processes on a level equal to that of the perpetrator. It is in the nature of such offences that such victims are invariably left with a feeling of shame, helplessness and vulnerability, while the perpetrator exudes a sense of power and dominance. To avoid the re-privatisation of domestic violence and violence against women and to enable the victim to seek justice, it is the responsibility of the state to provide access to adversarial court proceedings presided over by a neutral judge and which are carried out on the basis of the national laws in force. Consequently, Paragraph 1 requires Parties to prohibit in domestic criminal and civil law the mandatory participation in any alternative dispute resolution processes.

[5] Council of Europe (2011) Istanbul Convention on preventing and combating violence against women and domestic violence. Council of Europe Treaty Series 210, Report available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008482e.

[6] The Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, Council of Europe Treaty Series 210, para 251–253, available at https://rm.coe.int/16800d383a.

The Explanatory Report in sections 251–253 of Article 48 highlight the power imbalance between victims and perpetrators and the risks of re-traumatisation, reminding states of their obligations to provide access to formal justice processes. Without mentioning restorative justice, the Explanatory Report seems to reveal a *skepticism against the use of restorative justice* (or penal mediation as it is called in parts of Europe) in addressing sexual or gender-based violence. Effectively, the Explanatory Report is concerned (a) that mediation (restorative justice) may have negative effects for victims, especially if it is *mandatory*, because of the high vulnerability of gender-based violence victims and (b) that restorative justice may have negative effects socially because of the danger of the re-privatisation of gender-based violence seeing it as 'alternative dispute resolution' outside of criminal justice, thereby replacing adversarial court proceedings. In relation to sexual violence and restorative justice both of these issues can be addressed.

3.1 Concern for possible negative effects on victims

Neither mediation nor restorative justice should be *mandatory* in any context. One of the core principles of restorative justice is its *voluntariness*. Restorative justice is always based on the *informed and free will of all participants* and on the empowerment of the victim, and it is never introduced when one of the parties is not ready. These conditions are always carefully checked before entering any restorative justice process. Specific risk assessments for participation in restorative justice is the norm in cases relating to sexual violence (see Keenan, 2017; Mercer, 2020). The need for such risk assessments is also emphasised in advanced specialist facilitator training for restorative justice after sexual violence (Keenan, 2018; Mercer, 2020). It may be a misunderstanding of the Istanbul Convention that restorative justice could be *mandatorily* enforced. On the other hand it may reflect a deep concern that victims could be coerced into restorative justice by families or former partners or former offenders. While this is a concern that must be taken into account during the assessment for participation part of the restorative justice process, the peremptory exclusionary rule for restorative justice in sexual violence cases in Paragraph 1 of Article 48 is not serving victims who want choice in the form of justice they require to best serve their needs (see Daly, 2017; Keenan, 2014, McGlynn, 2012; Moore et al., 2021).

'Dispute resolution' or 'conflict' are not terms that apply to sexual violence, which is a crime perpetrated by one person against the other. The terms 'violation', 'violence', and 'abuse' are more applicable in this context. Restorative justice in gender-based or power based interpersonal violence, such as sexual violence, does not aim to resolve 'disputes' or 'conflicts' as might be the case in civil matters. Restorative justice in response to sexual crime is a mechanism of justice for victims to have their questions answered and their voices heard in a safe and facilitated

process, that also provides for the possibilities for deeping the acknowledgement of the harm done.

The Explanatory Report explains that victims of gender-based violence can never enter the alternative dispute resolution processes on a level equal to that of the perpetrator. It correctly points out that it is in the nature of such offences that victims of such crimes are invariably left with a feeling of shame, helplessness and vulnerability, while the perpetrator exudes a sense of power and dominance. However, restorative justice can help with rebalancing such power, in cases of sexual violence (See Griffith, 2018). Restorative justice after sexual crime is developed not as alternative dispute resolution as noted above. Rather it provides a victim-initiated approach to justice that must be trauma-informed, evidence led, and victim centred.. Physical, emotional, and procedural safeguards for participants are established and specifically tailored for individual cases, based on the risk assessment of the power imbalances and power dynamics as part of the preparatory process.

The high risk of secondary victimisation in all justice processes, including restorative justice, implies the need for special caution in assessing a victim's wish to freely choose restorative justice without pressure from any individual or institution. The need for highly trained restorative justice facilitators in the dynamics and risks of violence against women cannot be over emphasised in this context, and this need for training should also include judges, prosecutors, and any professionals involved in this work. The peremptory exclusionary rule for restorative justice in Paragraph 1 of Article 48 of the Convention, which is assuaged in the GREVIO Reports of already monitored countries,[7] recognises this fact and encourages state parties to make a careful check of the victim's will regarding participation in mediation (and restorative justice) to ensure that the informed, voluntary, and free consent of the victim is carefully checked (which is in line with the EU Victims Directive 2012/29/EU), (and multiple national and international policy and legislative drivers as mentioned in this chapter).

It becomes evident from an analysis of responses to Article 48 in the mid-term Horizontal Review of GREVIO[8] in 2021 that GREVIO is focused largely on domestic violence situations, and not on sexual violence as the index offence. As mentioned earlier, restorative justice responses to domestic violence and sexual violence situations must be considered separately, as domestic violence situations involve significant additional complexities that require consideration in their own right. Sexual violence that takes place within the context of domestic violence must be addressed within the aggrevating context of domestic violence. Sexual violence

[7] See GREVIO Reports https://www.coe.int/en/web/istanbul-convention/country-monitoring-work

[8] Mid Term Horizontal Review of GREVIO (p. 140 ff) available at: https://rm.coe.int/horizontal-review-study-2021/1680a26325

outside of domestic violence can be addressed as a separate crime. It becomes evident in an examination of Article 48 of the Istanbul Convention (Council of Europe, 2011) that domestic violence and sexual violence are seen as one and the same; all part of gender based violence. While there are overlaps and similarities in the dynamics and impacts of sexual and domestic violence, there are also significant differences between both offences and they require separate policy responses, particularly as pertaining to restorative justice.

3.2 Danger of re-privatisation of sexual- and gender-based violence

The Istanbul Convention (Council of Europe, 2011) and Explanatory Report are keen to avoid any circumstance or recommendations that would lead to a return to gender-based violence being seen or treated as a private matter. It is further concerned with any circumstance that would reduce gender-based violence to a 'conflict' between spouses, to be managed as a family issue. An important aim of the Convention is to improve attrition and ensure that criminal and social sanctions apply to perpetrators, endorsing the commitment that gender-based violence cannot be tolerated. For this reason, restorative justice is not proposed as an alternative to criminal justice, or as a replacement for a criminal trial.

Feminist critics, some influenced by the Istanbul Convention (Council of Europe, 2011), fear that using restorative justice to respond to gender-based harms will re-privatise those harms. But as Goodmark (2018) argues, domestic and sexual harms are much more likely to be shielded from community view when handled by the legal system. Notwithstanding the existence of a few highly publicised trials, the existence of the #MeToo movement and the work of investigative and court reporters, most cases involving gender-based and sexual violence, are invisible to communities because the community has no role to play in witnessing or adjudicating those harms. The majority of cases are not reported, or settled by plea bargain or by a trial before a judge, and juries hear only a small fraction of criminal sexual violence cases in the legal system. Attrition rates are very high in sexual violence cases (see chapter two for full discussion). Trials and other legal matters are held in spaces that many in the community would far rather avoid than engage (Goodmark, 2018). Only if they happen to be in the vicinity will members of the community be aware of the outcomes of cases with which they are not directly involved.

Restorative justice *can* represent a pathway to justice for victims of sexual crime that lies between the silence and disempowerment of attrition and a full criminal trial, giving victims in some cases an opportunity for justice and offender accountability that they would not otherwise have. Restorative justice can also provide for a more fulsome experience of justice for victims of sexual crime who feel voiceless

and marginalised, even when they have received a criminal legal outcome (see Griffith, 2018; Keenan & Griffith, 2019, 2021). Restorative justice can provide opportunity for victims to ask questions, make statements, or arrange agreements for future behaviour of the offender..

In those cases that do not proceed to trial or in cases where victims are not willing to make a criminal complaint for reasons related to their personal circumstance as outlined earlier, restorative justice might provide the only route to justice for them. Providing for restorative justice in circumstances where a criminal trial is not possible does require special consideration and can be done in consultation with police, public prosecutors, legal professionals, victims, victim advocates and can involve an agreement as part of the process, involving specific conditions, such as attendance at sex offender therapy and other specifications for the offender. In this sense, restorative justice is not a way to avoid a criminal trial but rather offers a way to overcome the silence of sexual- and gender-based violence and contribute to access to a fuller experience of justice for victims, accountability for admitted offenders, and healing for both.

4. Council of Europe Recommendation CM/Rec (2018)8 concerning restorative justice in criminal matters

In late 2018, the Council of Europe adopted Recommendation CM/Rec (2018)8 concerning restorative justice in criminal matters. According to its preamble, this 'builds on Recommendation No. R(99)19 concerning mediation in penal matters', the first international instrument to promote mediation in criminal cases. Crucially, Council of Europe frameworks—unlike EU Directives—are not legally binding on its Member States; their influence correlating with the willingness of local policymakers to embrace their contents.

The Recommendation CM/Rec (2018)8 encourages policymakers and practitioners to be proactive in making restorative justice available and in increasing local knowledge about restorative justice. It outlines protections for the participants and notes the importance of giving all parties a chance to express their needs and to have these met. It is unequivocal that any offence could be suitable for restorative justice, at any stage of the criminal legal process. It also explicates the restorative principles and outlines how these may help change institutional cultures (Marder, 2020). While some have sought to change institutional cultures to become more receptive to restorative justice, few criminal legal institutions have taken the next step to utilise the restorative framework to underpin cultural change. The Recommendation's support of restorative institutional cultures is among its most important attributes. That is, according to Marder (2020) commenting on the Recommendations, restorative justice is *both* an intervention *and* a series of principles to be applied across all criminal justice work, seeing the latter as a shift in

ways of working that requires proactive applications of restorative principles and practices.

The Recommendation clearly states that restorative justice should be equally available to all who may benefit from participation. It builds on this, adding that one's access should not be contingent on 'the type, seriousness or geographical location of the offence', as is currently the situation across Europe (Dünkel, Grzywa-Holten, & Horsfield, 2015). Rule 19 specifies that victims and offenders should have access to restorative justice 'at all stages of the criminal justice process' and should receive 'sufficient information to determine whether or not they wish to participate'. The general message behind the Recommendation is that governments and criminal legal agencies should not impose blanket bans on participation based on case or personal characteristics. Prospective participants should have access to an individualised assessment process in which an experienced practitioner supports them to make an informed decision about participation.

The Recommendation's main limitation is its omission of a Rule providing for a right of access. The reluctance to include such a Rule—even though the document is non-binding—suggests that some ministries in Member States do not perceive a need to provide restorative justice for all their citizens. A further limitation of the Council of Europe Recommendations is its failure to tackle the issue of sexual and domestic violence—which is left implied but not adequately addressed. Increasingly it becomes apparent that merely rolling all types of crime together, without disaggregating them and focusing on their particular and unique features, especially in interpersonal crimes of violence, is no longer adequate in policy documents dealing with restorative justice. Further theorising and conceptualisation is required, with the policy and practice implications that follow spelled out. . We have attempted to do this in this book..

5. The EU Milquet Report on Compensation, 2019

The Milquet Report (2019: 7) recently surveyed 'the main problems that victims of crime currently face when claiming compensation in [the] European Union', while aiming to 'take a holistic view to compensation'. Among its suggestions lies the recommendation to include, potentially within a revised EU Directive, provisions that promote 'the use of a pre-trial mediation/ restorative justice as part of a compensation to the victim' (Milquet, 2019: 56). While the Milquet Report focuses on reconciliation and cash or in-kind payment of compensation prior to the trial in less severe cases (for example those punishable by less than five years custody sentence) the Milquet Report may have something of importance to offer also in relation to crime of sexual violence, if not as prescribed above. As Marder, (2020: 409) observes its language adopts a 'holistic' view of compensation that 'is not limited

to the pecuniary aspects' (Milquet, 2019: 56) and this aligns well with restorative values. Some victims of sexual crime who get no justice through criminal justice seek redress through civil courts and at the moment the only mechanism generally available to the civil courts is to put a monetary value on the suffering, as well as making statements about culpability 'on the balance of probability'. Offering a restorative justice component to these compensatory judgements could indeed enhance the pathways to justice for victims and accountability for offenders and healing for both.

Agreements, including assurances of future behaviour or rehabilitative therapy for offenders, and supportive therapy for victims if required, could form part of the restorative justice component of the civil compensation. As Hansen and Umbreit (2018) point out, victims often experience these components of an agreement as equal to, or more important than, monetary compensation. In addition, the Milquet Report (2019) recognises the role diversion from court can play in access to justice for victims, denied them otherwise caused by lengthy procedural delays and high attrition rates in sexual violence cases (Fair Trials International, 2020; Gillen, 2019; O'Malley, 2020). Diversion in sexual violence cases is not accepted by some feminists, as argued earlier, who fear the informality of restorative justice would lead to a re-privatisation of sexual crime. However, the reality of high attrition must be balanced with access to justice. Where restorative justice is arranged in collaboration with the judiciary,public prosecutor and law enforcement, without formal criminal trials in those cases deemed suitable, such measures could enhance the pathways to justice for victims who otherwise do not have access to justice by any other means. Milquet proposes diversionary restorative justice to help ensure access to justice for victims, and with the correct governance structures such measures could improve access to justice for sexual violence victims too.

6. European Strategy on victims' rights 2020–2025

In early 2020, the European Commission published its new Strategy on victims' rights for the period 2020–2025 (European Commission, 2020a). The Strategy makes little reference to restorative justice, apart from noting its importance for victim empowerment (p. 3), the need for safeguards, and that its 'potential benefits ... depend on the availability, accessibility and quality of restorative justice services in the Member States' (p. 6). Despite the recognition that the benefits of restorative justice are contingent on the service being available and accessible, it does not make the promotion of restorative justice a priority or for Member States to develop greater capacity to deliver restorative justice. In this, the Strategy in relation to restorative justice is in line with the EU Directive (Marder, 2020).

7. The United Nations on restorative justice

The UN published a number of documents on restorative justice over the past twenty years that are important for the current study; the UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (Economic and Social Council, 2002), a first and later a revised second editions of the Handbook on Restorative Justice Programmes (UNODC, 2006, 2020), and an international survey drawing attention to relevant legal provisions and restorative programmes in a range of countries (UNODC, 2017).[9] It is widely accepted that the Council of Europe Recommendation (1999) concerning mediation in penal matters, which promoted mediation as a 'generally available service' influenced the UN Basic Principles (Economic and Social Council, 2002; van Dijk, 2013) and the first edition of the United Nations Office on Drugs and Crime's Handbook on Restorative Justice Programmes (UNODC, 2006). In his observations van Dijk (2013) noted that political support for restorative justice had lost some of its momentum on the global stage around 2000 and this was reflected in the UN Basic Principles (2002).

As part of ongoing efforts towards the implementation of restorative justice the United Nations Office on Drugs and Crime (UNODC) engaged in a survey (UNODC, 2017) that sought comments on the use of restorative justice from all Member States (in November 2016), from relevant intergovernmental and non-governmental organisations, institutes of the United Nations crime prevention and criminal justice programme networks, and other relevant stakeholders with experience in restorative justice processes. As of 15 May 2017, UNODC received a total of fifty-nine responses, including from thirty-one Member States, two United Nations entities, one intergovernmental organisation, seven entities of the United Nations crime prevention and criminal justice programme networks, thirteen non-governmental organisations and five other relevant stakeholders (p. 3). The findings noted amongst other things the need to carefully balance, or prioritise, the rights and needs of victims vis-à-vis those of offenders when using restorative justice.. It was pointed out that one of the aims and potential benefits of restorative justice was that the rights, interests, and dignity of all parties would be respected. Despite the centrality of this aim, respondents noted that many programmes tend to be more offender-centred than victim-focused (p. 44). Many replies also noted that, although the use of restorative justice has significantly increased since the adoption of Basic Principles (ECOSOC, 2002), it is still underused or not well-known in many parts of the world (p. 44). While there has been an expansion in

[9] UN Office on Drugs and Crime (UNODC) (2017). *A summary of comments received on the use and application of the basic principles on the use of restorative justice programmes in criminal matters.* Retrieved from https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_26/E_CN15_2017_CRP1_e_V1703590.pdf.

what is understood to be a restorative process since the adoption of Basic Principles (ESOCOS, 2002)

> States could consider, wherever appropriate and applicable, further developing or revising their policies and procedures and widening the application of programmes and in doing so, ensure compliance with international standards in the area of crime prevention and criminal justice (208) (p. 44).

Many respondents also noted that, based on their implementation and/or research on the topic, many questions concerning the use of restorative justice in specific contexts, including domestic violence, sexual offences, or crimes that cause harm to a group of individuals, remain unanswered (p. 45). It recommended that as the use of restorative justice programmes increases, and its concept and scope continue to evolve, the application of restorative justice in specific types of crimes, involving different dynamics is becoming an even more important enquiry (p. 45). In this regard, the current study fills some gaps in knowledge.

In light of the survey results and other related matters, the Secretary-General was requested to convene a meeting of restorative justice experts … in order to review the use and application of the basic principles on the use of restorative justice programmes in criminal matters, as well as new developments and innovative approaches in the area of restorative justice, subject to extrabudgetary resources (p. 45).

In 2018 a Resolution adopted at the Commission on Crime Prevention and Criminal Justice gave the UNODC a mandate to update the 2006 Handbook (Economic and Social Council, 2018) to 'offer training and other capacity-building opportunities' (p. 30), and to undertake other activities and provide support to Member States on the development of restorative justice. Marder (2020) commented on the mild wording of the 2018 Resolution (27/6 on Restorative Justice) when compared to other UN Resolutions and suggests it exposes a certain scepticism in some parts of the world, or resistance in others, to restorative justice as a pathway to justice in modern criminal legal systems. It is notable that the UN texts on restorative justice were adopted not by the General Assembly but by the considerably less authoritative ECOSOC and the language used continues to show lack of political consensus (Marder, 2020; van Dijk, 2013). It suggests that at least some countries represented in ECOSOC are ambivalent regarding the use of restorative justice. Despite the hesitancy of the 2018 Resolution (27/6 on Restorative Justice) the UNODC published its second, revised edition of the Handbook in 2020 (UNODC, 2020). In his review of the new Handbook Walgrave (2020) remarked that the simple fact that this Handbook is published under the United Nations umbrella makes it an important document.

The Handbook (UNODC, 2020) suggests that member States build the capacity of restorative justice services with special attention being given in this edition to

accessibility regarding serious offences. This was a departure from the first edition's reference to serious crimes, when it asserts 'there is little basis for the view that restorative programmes are only appropriate for less serious offences or first-time offenders' (UNODC, 2006: 45). The second edition progresses this perspective, dedicating a full new chapter to 'restorative justice responses to serious crimes' (UNODC, 2020: 67–79). Its introduction ends with a clear statement regarding such offences:

> While the controversy continues over the appropriateness of, and the risks associated with, restorative justice in situations involving serious crime, enough progress has been made to conclude that restorative justice can be blended with conventional criminal justice responses to address some of the gaps left by mainstream justice responses and be more responsive to the needs of victims (p. 68).

It proceeds to detail how practitioners can manage issues around safety, support, trauma, and power imbalances, before contextualising these safeguards in different serious offences (including sexual offending, intimate partner violence, and hate crime), and citing research and guidance that aim to ensure restorative justice is applied appropriately, with minimal risk, in serious cases. Walgrave (2020) and Marder (2020) note that the fact that the Handbook prioritises practical guidance on restorative justice in serious cases rather than debating its merits further signifies a growing acceptance of its general applicability. However, this may actually be overstating the case. The need to secure further acceptance for the general applicability of restorative justice in cases of serious crime continues to be a challenge and requires commitment to engage fully and wholeheartedly with the sexual violence and domestic violence sectors whose reservations about restorative justice cannot be ignored.

According to Marder (2020) the new Handbook (UNODC, 2020) stops somewhat short of proclaiming that its goal is to institute widespread cultural change in criminal justice and lacks a section specifically on that topic. It sees cultural change in criminal legal systems as both a prerequisite for implementing restorative justice and a consequence of exposure to it. It also points to non-dialogic (or 'quasi-restorative') interventions and predicts that experience of using restorative justice may lead to other changes in criminal legal cultures. It recognises the particular benefits and dynamics of victim-offender dialogue, and the potential to provide a range of restorative-informed interventions that apply when one party does not wish to participate or cannot do so safely. However a significant limitation of the Handbook (UNODC, 2020) is its emphasis on restorative justice as a tool for practitioners, thereby limiting the transformative potential of restorative justice for criminal justice systems (Marder, 2020; Walgrave, 2020). Research suggests that, far from transforming institutional cultures, restorative justice processes, if

institutionalised, are shaped by existing institutional goals, rationales, and ways of working.

However, neither the Handbook nor the Recommendations of the Council of Europe seem to be able to fully address how institutional and organisational change can come about. Organisational culture is phenomenally difficult to change (Keenan, 2012) as power relations and vested interests often lie at the core. Unless there are accountability mechanisms in place for actions taken and for inaction at all levels of the institution, with governance structures willing to regulate and enforce these guidelines, talk of cultural change will remain just that: talk. As Lee and Dandurand (2020) note there continues to be low level of referrals for restorative justice, as well as hesitation or resistance on the part of criminal justice systems to take on restorative justice ideas. Victims thus have difficulty accessing restorative justice in many jurisdictions. Findings from our global survey further confirmed (see chapter five) there is community resistance in some sectors to restorative justice, poor governance and funding of programmes, poor efforts at capacity building and sustainability, and other challenges experienced on a daily basis by restorative justice advocates and practitioners across the globe. As Walgrave (2020) further observes, without a clear vision of what restorative justice is and can be in relation to the justice system, restorative justice will remain at the margins of criminal justice and aspirational at best.

We have come to the same conclusion as Walgrave (2020). Developing the vision of restorative justice, and how it can inspire legal justice systems to embrace and reimagine a truly restorative criminal justice system requires further theorising and philosopising and less programmatic 'how to'. As Walgrave (2020: 434) pointed out '[A] consistent theoretical vision, reflections on socio-ethical grounds for the option for restorative justice, and a consideration of the possible juridical problems' are sorely needed, and they are absent or barely dealt with in the new version of the Handbook (UNODC, 2020). We believe there is a stronger potential role for the UN in driving restorative justice worldwide in different cultural and institutional contexts, addressing different problems, with different levels and types of education and training. As Walgrave, (2020) points out the lack of a clear theoretical basis puts restorative justice at risk of losing its innovative appeal and being marginalised or co-opted into the existing punitive criminal legal system, and the limitations of the new Handbook (UNODC, 2020) are regrettable in this regard.

The new Handbook (UNODC, 2020), like the Council of Europe Recommendations (Council of Europe, 2018a) does not place legal obligations on countries to act to develop restorative justice services. Keeping in mind that EU Directives are legally binding, it remains to be seen how much Member States might learn from these documents, and how far the EU will go to promote the accessibility of restorative justice services and restorative-informed cultural change.

8. Final remarks

The 2012 EU Victims Directive, which replaced the 2001 Framework Decision on the standing of victims in criminal proceedings, is more explicit about restorative justice than its predecessor. The recognition of the benefits that restorative justice can have for victims of crime and the attention paid to safeguards in restorative justice processes are commendable. The concerns of the Istanbul Convention 2011 regarding revictimisation of women and child victims of sexual crime by mediation/restorative justice and of the re-privatisation of sexual crime were addressed in this chapter and will be taken up further in the conclusion. Concerns of the sexual violence sector must continually be addressed and one way forward is to develop collaborative relationships between the sexual violence and restorative justice sectors (some practitioners are experienced in both) to continually develop new pathways to justice for victims, accountability for offenders, and healing and safer societies for all.

The 2012 EU Victims Directive falls short on measures to increase free state legitimated accessibility to restorative justice services for victims of crime as a right, including sexual crime. This is regrettable. Although some attention is paid to the provision of information about restorative justice and the training of criminal legal professionals, other issues remain unaddressed: the need for general availability of restorative justice services, free services, the possibility of self-referral, and access to restorative justice for all types of cases. Similar limitations are evident in UN policies. If the EU and UN are serious about recognising the benefits of restorative justice for victims of crime, they should take firmer action on these matters in the coming years. Otherwise, the risk is real that widespread limited accessibility to restorative justice particularly in relation to sexual violence will remain one of the main obstacles to the further development of increasing the justice options for victims and to the further development of restorative justice.

4

Restorative justice practice after sexual violence

Reviewing selected empirical research*

1. Introduction

The ever-growing body of literature surrounding sexual violence frequently cites the deep sense of dissatisfaction that many victims of sexual violence feel towards traditional forms of criminal justice. It comes as no surprise then, that victims, academics, and practitioners alike have sought to use alternative forms of justice in addressing such forms of crime (see for very different examples of this, Burns & Daly, 2014; Pelsinger, 2019; Zinsstag & Keenan, 2017). While restorative justice practices offer an alternative, complementary, or supplementary process to traditional criminal justice procedures, the application of restorative justice in cases of sexual violence remains highly controversial and subject to significant criticism (Gang, Loff, Naylor & Kirkman, 2021). While Keenan (2018: 291) argues that it is 'easy to understand' why some may have reservations about the use of restorative justice in cases of sexual violence (see also chapters two and nine), its use has continued to expand in recent years mostly due to the agency and need of vindication by victims (Keenan, 2014; Moore et al., 2021).

Restorative justice involves formal restorative justice methodologies including victim-offender mediation/dialogue, restorative conferencing, and healing circles, which involve a direct or indirect communication between the parties affected by the crime and may involve the participation of other relevant stakeholders (see e.g. Zinsstag et al., 2011). In other words, fully restorative justice initiatives involve the three main stakeholders affected by the crime: victims, offenders, and their communities of care as well as the wider community in some cases. Other approaches, sometimes referred to as restorative practices,[1] in the aftermath of sexual crime, are influenced by the restorative philosophy and principles but does not include victims and offenders either directly or indirectly in actual restorative meetings (what we also call

* This chapter was written in collaboration with Caroline O'Nolan and Virginie Busck-Nielsen. Daniela Bolivar and Niamh Joyce participated to early drafts of this literature review as well. Thank you to Jennifer Watson for her research assistance on this chapter

[1] On restorative practices, see Zinsstag et al. (2011), as well as e.g. Aertsen (2020) and Calkin (2021).

Sexual Violence and Restorative Justice. Marie Keenan and Estelle Zinsstag, Oxford University Press.
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alternative or quasi-restorative justice). Restorative practices often focus on one of the parties while holding another 'in mind', such as victim empathy work in sex offender therapy. This work is *not* the focus of this chapter although we do introduce briefly some quasi- or alternative practices as they have been considered when we conducted our international mapping exercise and wanted to introduce them, some of their characteristics, use and further potential for sexual violence (see also chapter five for more detail). However, the majority of the chapter concentrates on the literature on what we refer to as 'fully restorative justice' work in all its complexity and challenges.

While much academic literature on restorative justice after sexual crime focuses on the values, principles and outcomes of these processes as well as the challenges and controversies, there is a lack of information in the academic literature on how restorative justice is operationalised (Shapland, Robinson & Sorsby, 2011: 43). This chapter aims to address some of these gaps by integrating some practical and empirical research and considerations, although we acknowledge that this is incomplete as it is a subject which evolves rapidly, and we also have a space limit here. Section one provides an introduction to the chapter , section two begins by providing a detailed overview of restorative justice in response to sexual crime. This section includes an examination of the aims of restorative justice after sexual crime; restorative justice methodologies most suited for sexual crime cases; eligibility, suitability and risk assessment for participating in restorative justice; an exploration of procedural safeguards and post process monitoring. Section three turns its attention to the analysis of the empirical literature on outcomes and other ways to measure the success of restorative justice for victims and offenders and the potential effects it can have on recidivism. The chapter concludes by offering some thoughts about limitations of this review and needs for further research.

2. Restorative justice and sexual violence: criminal justice, methodologies, and criteria

2.1 Relationship between criminal justice and restorative justice

Sexual violence is a crime with very high levels of attrition (McGlynn & Munro, 2010; Temkin, 2002), for which victims may feel discouraged or even punished for coming forward and sometimes re-victimised by the criminal justice system and other institutional processes (see e.g. Bourke, 2007). It is a widely recognised fact that the current and traditional approach to 'justice' (that procured in a formalistic way by police authorities, the court system, the prison, etc.) is limited in what it can offer in terms of 'justice' to either victims or offenders of sexual crime, in part because of its structure and aims. This type of 'conventional justice' is intended to establish culpability for wrongdoing under the law of particular jurisdictions, mostly within a highly adversarial system (see Cossins, 2020; McGlynn & Munroe, 2010; see also chapter two).

Empirical data on the point at which restorative justice should be offered is somewhat limited. While a study by Marsh & Wagner (2015) suggests that victims have mixed views as to when and if they should be notified about the possibility of restorative justice, analysis elsewhere suggests that it is best to offer restorative justice at all stages of the criminal procedure so that the parties themselves can choose the right moment to engage in restorative processes (Buntinx, 2007: 3; see also de Haan & Destrooper, 2021; Keenan, 2014; Moore et al., 2021). Mash and Wager (2015: 349) found that 44 per cent of those in their study felt that restorative justice should be highlighted to them when they have initial contact with any authority following their assault. However only 26 per cent suggested that the offer should be made post-conviction. Koss & Achilles (2008: 3) found that pre-charging diversions are considered less positively than post-sentencing approaches by legal professionals and some advocates for victims. Early offers of victim-offender mediation is perceived as too soon for victims or that offenders could benefit from the process by receiving a more lenient sentence (Buntinx, 2007, see also National VAW Network, 2021). These considerations are addressed fully later in this review with some strong argument for the need for possible referrals being made available to victims at all stages of the criminal justice process giving them the choice of when they feel most ready and depending on their needs (Shapland, Robinson & Sorsby, 2011: 183).

The question of who initiates the process of restorative justice can be an important factor for participants (Hagemann & Emerson, 2020: 239; see also Moore et al., 2021). In some jurisdictions, such as Belgium, Australia, and some states in the USA referrals made to restorative justice programmes come from public prosecutors at the post-charge or pre-sentencing stages of the criminal justice system and methodologies exist for the relationship between criminal and restorative justice mechanisms (Couture et al., 2001; Daly, 2006a; Jülich et al., 2010; Koss, 2014). Pre-sentence referrals are also most common in services dealing with young offenders (CIJ, 2014; Vanseveren & Van der Bracht, 2012).[2] Other jurisdictions and states confine referrals for restorative justice in cases involving sexual violence to those that are post-sentence (Buntinx, 2006; Miller, 2011; Miller & Hefner, 2013; Roberts, 1995; Umbreit et al., 2003a).

In some jurisdictions restorative justice practices for sexual violence are facilitated by victim and advocacy services outside of the criminal justice system entirely, often by victim advocacy and therapy services (De Jong & van Burik, 2011; Keenan & Joyce, 2013; Stulberg, 2011). There is no wrong stage for restorative justice after sexual violence according to some scholars (Shapland, Robinson, &

[2] In Australia, for example, restorative justice in cases of sexual violence is explicitly excluded for adult offenders. This is not the case for juvenile offenders, indeed: restorative justice has become a well-established practice to deal with sexual violence cases involving juvenile offenders in a number of territories (CJI, 2014).

Sorsby, 2011: 183). Even in those countries in which legislation allows both victim and offenders to ask for mediation or any other restorative justice meeting at any stage of the criminal justice process, parties do not receive the information about the existence of the restorative justice in equal amounts with victims often not knowing this is a possibility for them. Indeed, as Hagemann & Emerson (2020) argue, to many people, the process of restorative justice remains relatively unknown. With the majority of cases being referred via criminal justice professionals, and the reluctance of victims to use restorative justice, there is little awareness of the benefits which restorative justice can offer (2020: 240).

One of the recurring and important debate relevant around the development of restorative justice and its sustainability revolves around the question of its institutionalisation or not (Aertsen, Daems & Robert, 2006; Lemonne, 2018; Wood & Suzuki, 2016). The questions and arguments around this important issue are multiple, and include for example the idea of regulation, how much regulation is needed to make a practice sustainable and safe? How much can or should it be regulated so that it does not impede on the flexible approach characteristic of restorative justice? Many supporters and practitioners use this as an argument in favour of its development and clear contrast with the criminal justice system. There are also other questions, such as how can funding be found for a practice if the practice is not prescribed by law? How can cases be referred if the criminal justice system is not involved or refuses to be? Should the facilitators be paid professionals or volunteers who are independent and can be used ad hoc? Should restorative justice be part of the criminal justice system or should it be completely separate? Do we need a change of system or change the system? (on these discussions see e.g. Aertsen, Daems, & Robert, 2006; Aertsen & Pali, 2017; Lemonne, 2018; Walgrave, 2008; Wood & Suzuki, 2016).

2.2 Restorative justice methodologies most suited for sexual violence

In this next section we will review some of the different methodologies used or considered to be suitable in the context of sexual violence and restorative justice practices. They include mostly the fully restorative justice methodologies as well as some alternative or quasi-restorative ones.

Several types of practices are dominant in the context of fully restorative justice practices for sexual violence: victim-offender mediation/dialogue (VOM/VOD), restorative conferences or what is also now called in some jurisdictions simply restorative justice meetings, and healing circles. Other restorative justice models such as sentencing circles and reparation panels have not featured in the literature on restorative justice in sexual violence cases, although they are considered to some extent in chapter five of this book. Other alternative or quasi-restorative

justice methodologies such as Circles of Support and Accountability are described in more length in chapter seven and we will briefly examine truth commissions and commissions of inquiry at the end of this section.

One key feature however, before describing each method briefly hereafter, is the fluidity that is characteristic of these practices, these methodologies, the flexibility and adaptability to each context. This also means that they tend to change meaning in different contexts, being used differently in different jurisdictions, for example we have during our study visits heard descriptions of what our respondents called a mediation which from our definition certainly sounded like a conference because of the number of people that were involved. However, it is clear that mediation in the form of VOM remains the most common restorative justice method used on continental Europe and restorative conference is more common in English-speaking countries (Liebmann, 2007; Zinsstag et al., 2011). Nevertheless, the variations within these jurisdictions and methodological approaches are important too. The number of persons in attendance at the restorative event is one of the key variables—including family members, support people or professionals—which tends to vary according to the restorative justice models used (Shapland, Robinson, & Sorsby, 2011: 117). The conferencing and circle models will include a number of participants in addition to the victim and offender. While conferences afford the victim and offender most of the speaking time, with some time given to supporters or professionals for their comments, circles are careful to give equal speaking time and participation to all attendees so that no voice is marginalised or silenced (Liebmann, 2007; Shapland, Robinson, & Sorsby, 2011; Van Ness & Heetdercks Strong, 2010). The VOM/VOD models generally only involve the victim, the offender, possibly a supporter each if they wish, and the facilitator(s). Victim-offender mediation and restorative conferences can involve direct or indirect communication between the parties. Indirect mediation is referred to as 'restorative sessions' in some programmes (Stulberg, 2011: 7). Similarly, in some jurisdictions direct victims are absent from restorative justice conferences and the direct victims are replaced by surrogate victims, the indirect variation of conferencing is often referred to as a 'panel' even though the process otherwise retains all the features of restorative justice conferencing (Jülich, Buttle, Cummins, & Freeborn, 2010: 20). It is clear from practice and the literature however that direct meetings tend to be more beneficial, satisfactory, and impactful for the stakeholders and is even seen as the 'ideal' in some contexts (Liebmann, 2007: 76). Nevertheless, it is simply not always possible, or available and therefore alternatives are being used in a number of cases too, with the use of letters, various technological tools or with surrogate victims and/or offenders or yet simply through the use of a facilitator who navigates between the victim and offender and other possible parties (Liebmann, 2007; Zinsstag et al., 2011).

2.2.1 Victim-offender mediation or dialogue

These two methodologies are certainly the most common restorative justice methodologies used nowadays in the context of sexual violence. Although both were developed to enable some exchange and resolution between the main stakeholders in a crime or conflict. The key differences between them are their general aims. For VOM, it is first for the parties to meet, which means the process and second and most important one is the result or outcome. Indeed, here the result, outcome, or agreement is what is most thrived for (Zinsstag et al., 2011). For VOD, the main aim is the dialogue, the process in itself by which the stakeholders manage to communicate, exchange and enable some healing and closure (Miller, 2011; Vos & Umbreit, 2000).

VOM/VOD involves either a face-to-face meeting between the victim and the offender and a mediator or an indirect communication between the parties (Miller, 2011; Patritti, 2010; Roberts, 1995). Direct VOM/VOD meetings are distinct from conferencing and circle models as the number of participants is usually limited to the victim, offender, possibly a supporter each, and one or two facilitators (Roberts, 1995; Umbreit, Vos, Coates & Brown, 2003a). It is a 'one-to-one meeting between the crime victim and the offender […] generally facilitated by a specially trained mediator who helps the parties to achieve a new perception of their relationship and of the harm caused' (Zinsstag et al., 2011: 44). The fact is that in this context the mediator is the one who decides on who will participate and will be leading the meeting. S/he decides on the structure and rules of that meeting and is expected to stay impartial and neutral and as said already, it may be a direct or indirect encounter (see generally Raye & Roberts, 2007; Zinsstag et al., 2011). Through the specific characteristics and nature of sexual violence for victims—feelings of shame, guilt, etc.—mediation has been seen in a safe environment as favouring feelings of empowerment and autonomy instead (see Madsen, 2004). It may be through the exchange of letters, face-to-face meetings between the two main stakeholders or through surrogates, sometimes with the involvement of support persons (but not as a rule) (Miller, 2011; Pali & Madsen, 2011). Indirect VOM/VOD takes place via letter, video, or shuttle dialogue, whereby the facilitator acts as a go-between (Roberts, 1995: iv).

There is however a certain reluctance in some contexts, to use the wording of 'victim-offender mediation' as it has been considered to give too much emphasis on the offender's needs and puts him/her at the same level as the victim. In the context of sexual violence this is problematic and as we have already explained a victim-initiated meeting is the most if not the only acceptable option. Therefore, other terminology has been used to describe such a meeting between the victim, offender, one or two facilitators, and sometimes support persons, such as e.g. a 'restorative justice meeting' (see e.g. Moore et al., 2021).

2.2.2 Restorative conferences or restorative justice meetings

Within conferencing there are different models, such as Family Group Conferencing (FGC) which was initiated in 1989 in New Zealand in order to tackle the over-representation of Maori youth in the criminal justice system and aimed to involve the families of the youth having committed a crime in its resolution. This was based on ancient Maori practices, and was very much based on social welfare but was redeveloped and included in the New Zealand criminal justice system (Raye & Roberts, 2007). This was formalised when the *Children, Young Persons and their Families Act 1989* was passed (Levine, 2000; Maxwell & Morris, 1993; Zinsstag et al., 2011). Within FGC, again there can be quite some variations with different names and slight adaptations to the methods in e.g. 'community conferencing', 'restorative conferencing', 'family group decision-making', 'restorative justice conferencing', 'group conferencing', 'diversionary conferencing', or simply 'conferencing' (see Zinsstag et al., 2011). While these variations have often been debated, it is a fact they are a key feature of restorative justice, which is to be adaptable to the needs of stakeholders and to local customs.

About the same time, another conferencing model was developed, inspired by the New Zealand one, in Australia to be used by the police to divert young offenders from the criminal justice system. It became known as the 'Wagga Wagga' model (Van Ness & Heetderks Strong, 2010). It is basically police led-conferencing, another important model within conferencing, which was developed by the New South Wales Police Service and taking inspiration from the FGC model and integrating some of the theories developed concurrently by John Braithwaite (Moore & O'Connell, 1994; Zinsstag et al., 2011).

The main difference with other restorative justice programmes is the involvement of additional people, in particular the family or close friends, also called the community of care. They are invited to join to support the main stakeholders. Members of the community, social workers, police officers and even sometimes lawyers may also be invited if relevant to the case, sometimes representing the community's point of view (Raye & Roberts, 2007; Zinsstag et al., 2011).

Restorative justice conferences are usually conducted by one or two facilitators (Daly, 2006a; Jülich et al., 2010; Koss, 2014; Mercer, 2009). The facilitator(s) after a thorough preparation, invites the parties to a meeting in a neutral place, s/he decides together with the main parties who will be present. S/he is expected to remain neutral and impartial, however s/he will lead the meeting and is the one who decides on the structure and main rules. The seating arrangements have generally been decided beforehand between the participants, but they are generally seated in a circle with the victim coming in first. If the victim does not wish to attend the conference a surrogate victim may be involved in the conference (Jülich et al., 2010; Koss, 2014). During the conference, both the victim and the offender speak about the agreed items in turn, sometimes this can include discussion about the offence

and how it impacted on the victim (Goldsmith, Halsey, & Bamford, 2005; Jülich et al., 2010; Koss, 2014; Mercer, 2009; Miller & Hefner, 2013). The family, friends, and professionals often then speak in turn about how they have been impacted by the incident and their hopes for the victim and offender (Koss, 2014). With the permission of all participants Project Restore (New Zealand) audio record all restorative justice conference to aid the accurate writing up of the conference proceedings (Jülich et al., 2010: 20).

It is a fact however that there are different methods as to the arrangement of the meeting, it can be scripted with a series of questions to be followed or not—this generally depends on the training of the facilitators and can be adapted to the needs of the case (see e.g. Van Ness & Heetderks Strong, 2010). Conferences are generally aimed to end with an agreement between the parties for possible initiatives to be undertaken to contribute to a form of resolution of the case, to offer reparations, to ensure non-reoccurrence etc. (see Zinsstag et al., 2011).

2.2.3 Healing circles

Circles, also known as sentencing circles, community circles or healing circles are also based on indigenous practices and first emerged from the First Nations communities in Canada and North America in general (Raye & Roberts, 2007; Van Ness & Heetderks Strong, 2010). Circles, such as the Community Holistic Healing Circle in Canada and the Milwaukee Archdiocese Restorative Circle, involve a larger number of participants than either conferences or mediations and usually include wider representation of the community than is present in conferences (Couture, Parker, Couture, & Laboucane, 2001; Geske, 2007). The participants are similar to those taking part in conferencing, although here the emphasis is even more on the involvement of the community, generally approached by the facilitator, called here the circle-keeper, but the methodology differs. The circle-keeper decides together with the main stakeholders who should take part, and the circle keeper is expected to be impartial but not neutral as s/he takes part in the circle in an egalitarian way, they can be directive but should not be dominant. Participants are seated in a circle and there is a 'talking piece' chosen by the circle-keeper which is passed around and only the person holding it may talk, while the others have to listen and not interrupt. The decisions here are reached by consensus (Fellegi & Szego, 2013; Raye & Roberts, 2007).

2.2.4 Alternative/quasi- restorative justice mechanisms: Truth Commissions (TC) and Commissions of Inquiry (CI)

Truth commissions (TC) and to some extent to commissions of inquiry (CI) have been developing their work around sexual violence and for this reason are included in this chapter of the book. There is some debate over what constitutes a TC or CI *per se*. Some authors, such as Hayner (2010), do not see a strong distinction between these two bodies. Typically, CI have a mandate, which is more limited in

time and scope than truth commissions. Overall, however, the objective is always the same: to allow parties to tell their story or 'truth', to receive acknowledgement of their victimisation, and to begin restoring their lives (Hayner, 2010). For ease of reading, we will refer to both systems as TCs. TCs and CI are temporary, non-judicial fact-finding bodies, which are authorised by the state. Both mechanisms focus on human rights abuses which occurred during a specified time, address the needs of victims that have arisen and recommend measures of redress and to prevent the repetition of such abuses (Hayner, 2010; Sarkin, 2019). TCs and CI have been implemented officially since the 1970s.

a. Truth Commissions and their relationship to the formal judiciary

The use of these alternative restorative mechanisms in societies in transition may primarily stem from the absence of a functioning court and security system (Llewellyn, 2007). Often transitioning societies will not have sufficient judges, lawyers and security staff to ensure the functioning of a formal judiciary. Additionally, in many cases courts are not effective (due to corruption or a lack of capacity) or too difficult/costly to access (Sarkin, 2019; Studzinsky, 2012). Interestingly, some countries do have a functioning court system but victims, including victims of sexual violence, appear to prefer alternative, community-based, mechanisms (see eg Burns & Daly, 2014; Zinsstag, 2013). The choice may be linked to the inclusion of the victim, offender, and community elders in the process and hence a restorative approach, which is absent from the formal courts. In addition, because reparation is decided by the parties and the community, they tend to have a much greater chance of being implemented than those awarded by the courts (see e.g. Burns & Daly, 2014).

When TCs are established they are sometimes organised to collaborate with an existing formal court system, if it exists, just as they are sometimes able to do so with Informal Justice Systems (IJS) (Zinsstag, 2013; Zinsstag & Busck-Nielsen, 2017). For Minow (1998) formal justice systems and TCs can coexist and, with careful planning, they may even complement each other with TCs establishing accountability for widespread human rights abuses and, hence, augmenting the work of prosecutions. In some cases, the existence of a dual justice system (formal and informal justice system) exists *de facto* in some transitioning societies, such as in Liberia or Sierra Leone, and in others, such as in Rwanda legislation, stipulates how rights and procedures are shared between the *Gacaca* courts (for more information, see Clark, 2010) and informal justice mechanisms (until May 2012). The links between TCs and the formal judiciary are sometimes very apparent, for example in Argentina, Chad, and Sri Lanka where information the TCs collected eventually led to prosecutions. In other cases, TCs themselves have the ability to grant amnesties (as in South Africa or Kenya) and therefore to halt prosecutions (Zinsstag & Busck-Nielsen Claeys, 2018).

Most commentators today would admit that restorative justice is not oppositional to criminal justice (see e.g. discussion in Llewellyn, 2007). Experience in transitional societies in particular, demonstrate what Daly (2000) has observed, namely that informal social controls which are non-discriminatory and non-stigmatising together with dialogue should have a larger role in the justice system.

b. Sexual violence and truth commissions

When TCs are set up in the aftermath of an authoritarian regime, it seems government forces are mainly to blame for perpetrating sexual violence (see the TRC reports for Peru, Guatemala, Haiti, or the Chilean National Commission's findings). In the aftermath of civil war, sexual violence may have been perpetrated both by government forces and also by rebel groups. In both cases, this form of violence is part of a campaign of terror and torture intended to degrade, intimidate, and target specific sectors of population, as well as force them to migrate (ICRC, 1999; Swaine, 2018).

Rebuilding in the context of sexual violence is difficult on a personal and societal level but some TCs have chosen to address this openly, by organising sessions dedicated to violence against women specifically or sexual violence in particular (Sarkin, 2019; Swaine, 2018; Zinsstag & Busck-Nielsen Claeys, 2018). In doing so, many have specifically referred to local, alternative, restorative justice mechanisms to ensure healing is both meaningful for victims and perpetrators and to avoid the process being held up by lack of political will. In Latin America, for example, several TCs mention sexual violence specifically: Ecuador (TRC, 2007), Haiti (1995–1996), Peru (2001–2003). In Africa, Liberia (TRC, 2009), Sierra Leone (TRC, 1999) clearly focuses extensively on the issue (the DRC TRC does so also although this was not done comprehensively and lacked credibility). Timor Leste's TC (through the Serious Crimes Panels and the Reconciliation Commission) also focused on sexual violence. In the latter case, sexual violence was considered in relation to women, sometimes with regards to children and more rarely with regards to men.

A number of TCs have decided to include key issues on the agenda from the moment the TC is designed, so that substantial attention can be awarded to them throughout the TC process (fact finding, hearings, report, and recommendations). This has notably been the case for sexual violence for the Sierra Leone TC and Timor Leste's TC. Other TCs, such as Peru, Guatemala, the Solomon Islands, did not have sexual violence in their mandate at the outset but have chosen to address this in their final report and recommendations.

If the process is done in close co-operation with local leaders and associations, and if it is done with a clear focus on fair trial standards, it may be a flexible and appropriate mechanism to deal with sexual violence cases. As women victims of sexual violence themselves indicated in the TC's consultations in Liberia, victims appeared to prefer alternative restorative justice mechanisms to the formal judiciary to assist them in coming to terms with their past.

It Haiti, Sierra Leone, and East Timor, on the other hand, there was always a strong emphasis on sexual violence (and gendered violence generally) as it was seen as an essential component of the truth and reconciliation process. Unfortunately, this is not to say recommendations in the final report were specific or creative. The Sierra Leone final report, although it does focus on sexual violence, offers only general recommendations. Nevertheless, the process of truth telling, the attention to the plight of certain groups during conflict and also within the wider community outside conflict seems to have had an important impact on victim recognition and on their renewed sense of citizenship. It may also have practical repercussions, such as legislative changes for certain groups victimised during conflict or authoritarian regimes (women and certain indigenous groups in Peru, such as the Ayacucho) or changes in relation to sexual violence. The work of the TC of the Solomon Islands, for instance, demonstrated sexual violence was prevalent against men as well as women during civil conflict. As a consequence, changes were made to the Penal Code so as to extend sexual violence to include men also. Similarly, the Equity and Reconciliation Commission of Morocco (USIP) advised changes in the Criminal Laws and Procedures so as to include sexual violence and the Chilean Truth and Reconciliation Commission recommended that national laws be brought in line with international human rights standards (Chile TRC, Final report, 1990).

2.3 The different stages in a restorative justice meeting

The restorative justice process comprises five parts: the preparation stage, the meeting, the agreement, follow up, and evaluation. It is important to consider preparation as a core part of the restorative justice process in cases of sexual violence, as the preparation process alone can have significant positive outcomes for victims in terms of healing and justice, regardless of whether a meeting ever takes place in the end with the offender (Umbreit et al., 2003b: 14; see also Corker, 2020 and chapter nine in the book).

Cases involving very serious offences, such as sexual violence, require extensive preparation prior to a face-to-face meeting according to the United Nations (2006: 60; see also Keenan & Zinsstag, 2014) and this is reflected in practice (Achilles, 2000; Buntinx, 2006; Jülich et al., 2010; Koss, 2014; Mercer, 2009; Patritti, 2010; Madsen, 2004; Umbreit et al., 2003a; Van Eynde & Jammaers, 2004). Therapy sessions form a part of the preparation stage of some restorative justice programmes whereby time is spent with individuals working though deep emotions in discussing or contemplating the original offence (Jülich et al., 2010; Roberts, 1995; Stulberg, 2011).[3] Although the methods used to prepare participants for

[3] In Roberts' 1995 study of VOMP, staff provided one or more therapy activities to victims in 62 per cent of cases, and to offenders in 50 per cent of significant activity cases.

restorative justice vary, the over-arching goals of preparation are similar: to equip the victim with enough emotional control and confidence to attend the meeting without being re-victimised; to ensure that the offender is ready to accept responsibility and reach an agreement and to participate in a healing dialogue without resistance; and to see to it that all attendees are clear about the ground rules of the restorative justice process and what will be discussed during the meeting (Koss, 2010: 232). Clear objectives for the meeting will also be established with both parties and agreed in advance of the restorative justice event. Preparation may also involve the inclusion of support people (family or professional) for the victim and the offender (Van Eynde & Jammaers, 2004).

Although the particular individuals in attendance at the restorative meeting will vary with each method, the restorative process is ultimately characterised by respectful treatment of all parties (UNODC, 2006: 9; UNODC, 2020). The process promotes the participation and to a varying extent, the empowerment of all parties who participate in the process. The process functions best when it remains clear and predictable, yet flexible and responsive to the individual circumstances of each case (UNODC, 2006: 9; UNODC, 2020).

2.4 Eligibility, suitability, and risk assessment for participation in restorative justice

A controversial issue in restorative justice in cases of sexual violence is whether participants should be required to fulfil specific requirements in order to take part in restorative justice. Keenan (2018) submits that 'in all restorative justice practices, the safety, psychological and emotional needs of sexual violence victims and perpetrators during the restorative justice process must be placed at the centre of practitioners' concerns' (2018: 292). A useful distinction for this discussion is the one which differentiates between eligibility and suitability. While eligibility implies the selection of cases according to objective criteria, suitability involves a more subjective, specialist, and complex process. These two concepts refer to two different steps in the evaluation of appropriateness of victims and offenders for restorative justice. According to some research this two-step process may ensure that 'all these basic criteria are ultimately satisfied before any conference [RJ meeting] takes place' (CIJ, 2014: 47). However, this is a contested issue and not all practitioners use specific suitability criteria other than that the parties volunteer and give consent and are well prepared for the process. From this perspective the personal agency of victims and offenders are considered and respected. The discussion here is whether specific suitability criteria such as risk assessments are used for the purposes of excluding certain participants or as an input of information that may guide the subsequent restorative justice intervention. The issues of eligibility and suitability must therefore be considered with caution.

As discussed in chapter two, local legislation may establish a first stage in terms of eligibility criteria by defining what cases can be dealt with by restorative justice interventions. Additional eligibility criteria are proposed by Umbreit & Greenwood (2000: 7) who suggest that each restorative justice programme should have its own criteria for case selection, such as the age of offender, first-time offence, or multiple offences. Project Restore in New Zealand usually accepts victims over the age of 18, although it occasionally accepts a victim who is a young person or child (Jülich et al., 2010: 92). In cases involving child-victims, particular care is taken to protect the child and to ensure that their consent is truly voluntary (UN, 2006: 61, see also UNODC, 2020). Some jurisdictions, such as Denmark, engage in restorative justice with child victims in the context of therapy, while other jurisdictions are less prone to do so, such as Norway.

According to the CIJ (2014: 47) in Australia, victims' core eligibility requirements are as follows: the victim has the capacity to consent, the victim provides free and informed consent and the victim fully understands his or her rights. Similarly, offender's eligibility criteria are that the offender takes responsibility for the offending, has capacity to consent, fully understands his rights and is ten years or older. Umbreit & Greenwood (2000: 7) have set out eligibility criteria for offender participation, including the age of the offender and the offender's past criminal history (i.e. whether he/she is a first-time offender or has committed multiple offences). Some practices reviewed in this section however are less prescriptive as regard to eligibility criteria for offenders including their past history (Jülich et al., 2010; Miller, 2011; Miller & Hefner, 2013; Roberts, 1995; Yantzi, 2006), and have fewer exclusionary criteria, with the exception of age specifications for juvenile sex offender programmes (Daly, 2006a, Daly, Bouhours & Curtis-Fawley, 2007; Mercer, 2009). Suitability criteria for the victim, when applied, are often premised on an evaluation of the psychological needs and emotional readiness of the victim to meet the perpetrator (Jülich et al., 2010; Koss, 2014; Pali & Madsen, 2011). In this regard risk assessment are undertaken to ensure that victims are psychologically and emotionally suitable for the restorative justice process (Koss, 2014).

In the Netherlands, victims need to be in or have had therapy in order to initiate a mediation process in cases of sexual violence, as well as having professional therapeutic care after the mediation process. In addition, the views of treating psychologists are taken into account in determining whether a mediation will be processed (Internal document SiB). The CIJ (2014: 50) propose that suitability is assessed on a case-by-case assessment based on a suitability evaluation process and they recommend that the following dimensions are considered:

- Personal characteristics of the victim and offender, including age, background and psychology
- The nature of the offending including the level of violence used and harm caused

- The nature of the relationship between victim and offender
- The victim and the offender's cognitive capacities
- The offenders' criminal history
- Whether the offender poses an unacceptable risk and should therefore be dealt with in the criminal justice system
- The level of remorse demonstrated by the offender
- Willingness to participate in treatment –both sex offender specific, and broader relevant treatment, such as drug and alcohol counselling
- Potential power imbalances
- The broader family and community context in which the offending occurred (CIJ, 2014: 50).

Suitability criteria for offender admission to a restorative justice programme in some programmes include consideration of the potential risk of further harm to the victim, psychopathic tendencies and position on responsibility for the offence (Hargovan, 2005: 54). For participation in other programmes the perpetrator must not have intentionally administered drugs to the victim (voluntary intoxication by alcohol and other drugs at the time of the offence by either or both the victim and the offender is permitted) and the offender must have no prior convictions for interpersonal violence or repeated arrests for domestic violence (Koss, Bachar, Hopkins, & Carlson, 2004: 1448). In the Netherlands, when an offender is in therapy, the therapist's approval for the mediation is a condition for participation in restorative justice, as well as there being the provision of therapeutic care for the offender following the restorative justice process (Internal document, SiB).

In relation to risk assessments for victim and offender participation in restorative justice a number of issues arise should risk assessments be used as an instrument for establishing suitability for restorative justice and should risk assessments be used as a tool to evaluate what may be needed during the restorative justice process and is a risk assessment in such cases necessary at all? While many disagree with their uses in restorative justice and others point out the distinctions between risk assessment for participation in restorative justice and criminogenic risk assessment involving the assessment of sexual offenders, there is little dispute regarding the potential uses of risk assessment with vulnerable victims who wish to participate in restorative justice, such as young victims, victims with mental disability, vulnerable victims at risk of further victimisations and in intra-familial cases (CIJ, 2014, see also Mercer, 2020).

Corker (2020: 56) states that all restorative justice programmes should engage in screening and significant preparation before any dialogue meeting occurs. However, not all programmes use risk assessment to exclude participants from restorative justice although it may inform the approach taken and the safeguards put in place. In the case of Belgium, a letter offering mediation is sent to victims and offenders at the same time. Experience in Belgium suggests that victims do

not present a negative reaction to the letter offering victim-offender mediation and both parties are aware that participation in mediation is their own choice (Van Eynde & Jammaers, 2004).

The literature draws attention to an additional factor for consideration in determining suitability for participation in restorative justice and that refers to the nature of the relationship between the victim and the offender prior to the offence being committed. As the victim-offender relationship in restorative justice processes is already complex because of power relations, and the restorative justice processes must attempt to re-balance what has been an unbalanced relationship (Shapland, Robinson, & Sorsby, 2011: 511). Consideration of the concept of equal treatment is of particular importance in cases of sexual violence. As Jülich and Thorburn (2017) argue, the act of sexual violence negates the notion of pre-existing equality between victim and perpetrator (2017: 34).

Adding further complication, some scholars argue where the victim-survivor and the offender are acquainted or involved in an intimate relationship prior to the offence, the possibility of re-victimisation in the restorative justice process may be greater than otherwise (Daly & Curtis-Fawley, 2006: 624). Despite this empirical suggestion, many restorative justice programmes that process sexual offences do so when there is a prior existing relationship, such as in intra-familial child abuse, but they build in the necessary safeguards (Daly, 2006a; Jülich et al., 2010). Slachtoffer in Beeld (SiB) in the Netherlands takes specific additional safeguards involving cases of repeated victimisation against the same victim, that is, when there is prolonged, systematic abuse or there is an accumulation/repetition of traumatic experiences. In Finland, preparatory meetings are an essential part of the screening process. The purpose of such meetings to discover any power imbalances or feelings of pressure of the victim (Lünnemann & Wolthuis 2015: 13). What is clear, is that special conditions for these cases are important since the dynamics of such offenses are complicated, and the sexual offence is often only one aspect of the abusive behaviour.

Keeping with the core principles of restorative justice, which puts the victim and offender rather than professionals at the centre of the decision-making process, every effort must be made to facilitate the wishes of victims to meet with offenders or engage in restorative justice, within the parameters of best practice and the optimum conditions for participants' safety. In the spirit of restorative justice, professionals must be cautious not to take important decisions about their lives away from victims or offenders, in effect and take away further power, but at the same time restorative justice practitioners must prepare victims and offenders well for what restorative justice might offer. For some programmes, such as Suggnomè/Moderator in Belgium, there is no pre-selection of victims or offenders for restorative justice because mediation is considered to be a choice that belongs to the stakeholders, i.e. the victim and offender.

2.5 Time limits

The literature offers some thoughts on the timing of restorative justice in sexual violence cases with the literature increasingly favouring the timing being a choice for the victim, in line with the principle of restorative justice after sexual crime being victim initiated and victim centred (Moore et al., 2021, see also de Haan & Destrooper, 2021 on the idea of temporality of restorative justice). However, a range of perspectives can also be found in the literature.

When cases are diverted from the criminal justice system to restorative justice, or when restorative justice programmes receive referrals post-sentencing or outside of the justice system restorative justice programmes are not necessarily required to adhere to a specific timeframe in processing a case to completion (Buntinx, 2006; Daly, 2006a; Keenan & Joyce, 2013; Miller, 2011; Miller & Hefner, 2013; Roberts, 1995; Stulberg, 2011; Umbreit et al., 2003a). Koss (2014) argues that a significant lapse of time between the offence and the restorative justice process may reduce the effectiveness of the process. However, Zebel et al. (2017) suggests that it is not only the time that has passed since the offence which plays a role in the effectiveness of restorative justice, but also the interaction between the degree of harm and the time elapsed (2017: 38). For Zebel, understanding the harm experienced in combination with the time elapsed since the offence allows restorative justice professionals and facilitators to be in an 'improved position to accommodate and facilitate victims' needs and desires regarding contact with the offender(s)' (2019: 39).

Some court referrals for restorative justice at pre-sentencing are often determined by court-imposed time restrictions (Jülich et al., 2010: 53). Project Restore in New Zealand for example is usually given a four-to-six-week timeframe to complete a case before it must be returned to court for sentencing. However, the programme is not strictly curtailed by these time limits since the courts are usually willing to extend the time limit upon the request of Project Restore (Jülich et al., 2010: 53).

Nonetheless the literature suggests that greater consideration should be given to time limits, particularly in the context of pre-sentencing to ensure adequate time is given to preparation and to the process itself.

2.6 Procedural safeguards and post process monitoring

Restorative justice practice in the area of sexual violence needs to be 'rooted in a clear set of values and principles', including victim safety (Hargovan, 2005: 55), although procedural safeguards are also in place to protect offenders (Keenan & Zinsstag, 2014). Quality assurance and the setting of minimum standards of practice are essential (Hargovan, 20015: 55). Keenan (2018: 298) submits that facilitating restorative justice in cases of sexual violence differs from the facilitation

of other types of crime. In addition to the foundational skills required for restorative justice work, facilitators in cases of sexual violence must have '(1) a deep appreciation of sexual trauma and its impact, (2) an understanding of the psychology of the offender and (3) a working knowledge of the dynamics of sexual offending' and (4) an understanding of due process and the law.

Facilitators may enforce procedural guidelines, which include the prohibition of hostile, blaming, or profane language (Koss, 2010: 223). Project Restore in New Zealand emphasises an ethical duty at each stage of the process to ensure physical and emotional safety for participants (Jülich et al., 2010: 45). In Belgium, the practice of mediation is based on the following principles: (a) neutrality of the mediator; (b) strict voluntariness; and (c) flexibility of the practice to respond to the needs of the participants (Buntinx, 2007). While neutrality of the mediator is crucial in all mediations, mediation starts with the recognition that one party has been harmed and the other party is responsible for the harm caused and once this is acknowledged, the neutrality of the mediator requires that the mediator respects and takes care of the interests of both parties during the process.

Physical safety needs of all parties are taken care of in all restorative projects and where uncertainties arise regarding a participant's safety, indirect mediation can be offered (Roberts, 1995: 56). Ensuring the emotional safety of all participants takes place during the preparation as well as during the meeting itself (Umbreit et al., 2003b: 12). Confidentiality is a contentious issue in the context of procedural safeguards, with some programmes holding the restorative meeting as confidential while others do not see it as such. Project Restore in New Zealand for example, provides written reports to the courts detailing the events of the restorative justice meeting (Jülich et al., 2010: 52). The results of mediations in Belgium are only provided to the courts with the written consent of both parties. In a European context, Article 12 of the *EU Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime* (2012) specifically provides for confidentiality safeguards in restorative processes.

Post-process monitoring of offenders is essential to ensure that any agreements reached during the restorative justice process are completed (Bazemore & Umbreit 2001: 3). Follow-up with both victim-survivors and offenders are part of most programmes and practice differs regarding the number of follow-up meetings offered and whether the meetings take place separately or together (Roberts, 1995; Umbreit et al., 2003a). Post-process follow-up may also involve monitoring of an agreement made during the restorative justice meeting (Jülich et al., 2010; Koss, 2014), regular post-restorative justice correspondence with the participants (Roberts, 1995; Umbreit et al., 2003a) or monitoring of the offender participation in a treatment programme (Daly, 2003). While some programmes measure case completion by reference to the completion of an agreement (Couture et al., 2001; Daly, 2006a; Jülich et al., 2010; Koss, 2014) when agreements are not reached it may

be difficult to pinpoint the moment when a case is officially 'completed'. The completion of a case may be largely dependent on how far the victim wants to go in the process until he/she feels satisfied (Umbreit et al., 2003a: 332–333) and some cases were still 'open' at the time of programme evaluation (Roberts, 1995: 74; Umbreit et al., 2003a: 85). In summary, the literature highlights the important role of regular monitored post-process follow-up.

3. Consequences, effectiveness, and possible outcomes of restorative justice after sexual violence for victims and offenders

The following section provides an empirical evaluation of existing research on restorative justice practices for sexual crime in Australia, Belgium, Canada, Denmark, Ireland, New Zealand, the UK, the Netherlands, and the USA. Using a comparative framework, the aim is to assess the evidence presented in the literature to date regarding the effectiveness of restorative justice programmes for sexual offences.

We begin by acknowledging the paucity of evidence available to assess the outcomes following restorative interventions in cases of sexual violence (Bolitho & Freeman, 2016; Godden, 2013: 158). Indeed, as Suzuki (2020) argues, while studies of restorative justice have been conducted in the context of 'what works', knowledge as to 'how it works' is more limited. By this, he means in what conditions, and for whom restorative justice works (2020: 536). This is particularly true for the use of restorative justice in cases of sexual violence. It is also notable that most of the evidence that is available refers to very small samples (Bolitho & Freeman, 2016; Daly, 2017, forthcoming). However, while remaining cognisant of this reality, it is important to consider the evidence that is available although its limitations mean that our conclusions must be tentative.

Barton (2002) points out that the assessment of effectiveness must be based on criteria which are both offender and victim focused. Umbreit, Vos, Coates, & Brown (2003b: 15–16), suggest the following criteria for measuring the success of restorative justice for serious crimes such as sexual violence: (1) participants' satisfaction with the process; (2) life changes following the process, such as personal growth and healing and (3) the extent to which the meeting changed offender's understanding of how the crime impacted others (see also discussion e.g. in Doak & O'Mahony, 2019).

The following section will consider two specific outcomes (i) participant satisfaction and (ii) well-being/reintegration. It will do so in the framework of two types of restorative justice models: restorative justice conferencing; VOM/VOD and Circles. Satisfaction and well-being/reintegration are considered for the victim, the offender and their respective family and friends.

3.1 Consequences and outcomes for victims

3.1.1 Measuring success of a restorative justice process for victims

Satisfaction has been used as one possible measure of outcome for all participants in a restorative justice process, but it is noteworthy that evaluations of this outcome have primarily concentrated on victim 'satisfaction' (Shapland et al., 2007: 7). This measure has however been criticised recently. Another measure of success emerging in the literature has been the narrative experiences of victims who have recounted their experiences and the impact of restorative justice for them (see for example experiences of victims, chapter eight; Keenan & Griffith, 2019, 2021; McGlynn, Westmarland, & Godden, 2012; Nodding, 2011).[4] Van Camp and Wemmers (2013) put into question satisfaction as an appropriate or relevant measure for evaluating restorative justice as they claim that victims might be not be due to the restorative meeting but may have to do more with procedural justice and its factors 'such as trust, neutrality, respect and voice and that procedures can be assessed irrespective of their outcome' (p. 117). McCold (2003) submits that there is no particular standard for measuring participant satisfaction, but he does put forward the following elements to consider: the way in which a case was handled; the fairness of the process; fairness of the outcome; the facilitator's role; whether participants would recommend the programme and whether they would participate again under similar circumstances.

Specific outcomes related to satisfaction include: adequate preparation for the restorative justice meeting; empathy for the offender; a sense of empowerment (Keenan & Griffith, 2019, 2021); a sense of justice being done (Bolitho, 2015); an emotional exchange of some sort (this may constitute dialogue, apology/forgiveness, an agreement/commitment); the offender taking responsibility for the harm caused; healing; closure.

Victims view the success of the preparation stage of the conferencing process as a key outcome of restorative justice. There was a strong endorsement of preconference/meetings among victims participating in many restorative justice conferences (Jülich et al., 2010; Koss, 2014; Nodding, 2011; McGlynn, Westmarland, & Godden, 2012). Victims participating in VOM/VOD also reported high levels of satisfaction with the preparation stage of the process (Roberts, 1995: vii; Umbreit, Vos, Coates & Brown 2003a: 105, 238). Only two out of the forty victims taking part in the study of VOD in Texas and Ohio reported that they were 'somewhat unsatisfied' with the preparation they received (Umbreit et al., 2003a: 105, 238).

In relation to the actual conferencing meeting, the programmes reviewed report high levels of satisfaction (Goldsmith, Halsey, & Bamford, 2005: 25; Jülich et al., 2010; Koss, 2014; Mercer, 2009: 25; Nodding, 2011; Van Camp & Wemmers, 2013).

[4] See also Why me? at https://why-me.org and the film *The meeting* at www.themeetingfilm.com

The following were identified as contributing to victim satisfaction in the restorative justice process: accountability and choice in whether to engage in direct or indirect mediation.

Following their restorative meeting, conference or circle victims tend to feel the responsibility for the crime has shifted away from them to the offender (Couture & Laboucane, 2001: 18; Jülich et al., 2010: 50). Many victims report that the process confers a sense of empowerment on them because of their participation in decision-making and in the desired outcomes (Daly & Curtis-Fawley, 2006). Some victims even find the conference enables them to develop a degree of empathy for the offender (Geske, 2007: 658; Goldsmith, Halsey, & Bamford, 2005: 27; Miller & Hefner, 2013: 15; Van Camp & Wemmers, 2013: 123). This is interesting as it challenges the view of some commentators (Cossins, 2008; Hudson, 2002; Naylor, 2010) that restorative justice can have a negative impact on power dynamics.

Another interesting observation is the fact that apology and forgiveness are generally not key to the satisfaction of victims in the restorative justice process (Daly, 2006a; Jülich et al., 2010; Keenan, 2014; Keenan & Griffith, 2019, 2021; Koss, 2014; Monk-Shepherd & Nation, 1995; Umbreit et al., 2003a), although apologies were a compulsory element of the restorative justice programme run by RESTORE (US) (Koss, 2014). The literature highlights the fact that the suitability of direct or indirect restorative justice interventions depends on the needs of the individual victims. Victims who primarily want to voice the impact the crime had on them are more willing to engage in face-to-face meetings (see e.g. Daly & Wade, 2017; Van Camp & Wemmers, 2013) while victims who want information about the offender tended to seek indirect processes such as letters or videos (Roberts, 1995: 93). In the context of conferencing, Koss (2014) found that 100 per cent[5] of victims who attended RESTORE's (US) conferences were satisfied with the conference. However, 7 per cent[6] of the surrogate victims were dissatisfied (see also discussion in Van Camp & Wemmers, 2013). This is in contrast to findings presented by Geske (2014) who suggested that surrogate victims found participation in restorative justice circles to be enormously enhancing for their lives, even in cases where the restorative justice involved meeting with offenders who did not offend directly against them.

In the aftermath of the restorative justice conference, victims' satisfaction stems from a reported sense of closure and an on-going sense of empowerment and healing (Jülich et al., 2010: 56; Koss, 2014; Miller & Hefner, 2013: 11; Nodding, 2011; Van Camp & Wemmers, 2013) with some victims suggesting they can 'put the crime behind' them following restorative justice (Koss, 2014). Nine out of ten

[5] Eleven survivors actively participating in the restorative justice conferences were interviewed at intake and seven post-conference.

[6] Fifteen survivors who were absent from the restorative justice conferences (survivors with minimal participation) were interviewed at intake and thirteen were interviewed at the follow-up stage.

victims interviewed as part of the study of VOD in Texas and Ohio stated that while they had already made some progress towards healing and closure prior to VOD, they were surprised at how much VOD contributed to furthering their healing and feelings of closure (Umbreit et al., 2003a: 16).

Related to the overall satisfaction felt by victims is their feeling of 'justice'. While the body of research on the 'justice needs' of victims of sexual violence is limited (Richards, Death, & Ronken, 2020: 3), it is an important consideration when using restorative justice to address sexual violence. McGlynn and Westermarland (2018) argue that in the context of sexual violence, 'justice' is commonly equated to achieving 'positive outcomes'. Daly (2017) has also made an important contribution to the topic when exploring the victims' justice interests after having been victimised by sexual violence. Given the widely acknowledged low prosecution rate of cases of sexual violence, restorative justice practices may offer a unique opportunity to understand and address the myriad ways in which victims may feel their justice needs have been met. For example, Richards, Death, and Ronken (2020) argue that meeting the justice needs of victims may be simply preventing the offense recurring (2020: 11). Moreover, the consequences or outcomes that victims seek can vary over time (McGlynn & Westmarland, 2018: 187). While retribution was the initial desired form of justice for some victims, this desire changed over time. The notion that not all victims of sexual violence are seeking retribution is exemplified by the experience of victims in the RESTORE project. Jülich & Landon (2017) argue that victims of sexual violence are 'not always seeking imprisonment as an outcome of reporting sexual abuse' (2017: 202). Moreover, McGlynn and Westmarland (2018) suggest, a sense of justice of victims can come in the form of recognition. Given the importance of recognition of harm in the restorative justice process, it may be the case that restorative justice has the ability to meet the justice needs of victims beyond that which may be achieved through traditional criminal justice processes.

3.1.2 Victim well-being/reintegration

A growing body of studies report improvements in victims' wellbeing in the aftermath of restorative justice. Improvements in victim well-being are especially important in the context of sexual violence (Keenan & Griffith, 2019, 2021; Koss & Achilles, 2008) as trauma can be extreme (DeValve, 2005: 72). Improved victim well-being and psychological benefits, such as reductions in post-traumatic stress, reduction in fear and improvement in social and relational life are important outcomes reported by survivors participating in restorative justice processes (Shapland, Robinson & Sorsby, 2011: 144–146); see also discussion in Lloyd & Borrill (2019). Being able to talk about the offence and its resultant harmful effects—a key feature of restorative justice—is therapeutic in itself and a growing body of empirical evidence points to the therapeutic impact of the restorative justice approach for victims (Gustafson, 2005: 199; Wemmers & Cyr, 2005: 540).

An Australian study found that victims suffering from high distress as a result of the crime are far more likely to remain angry and fearful of offenders, and to be negative towards them following the restorative process, than survivors suffering from lower levels of distress (Daly, 2005: 162–163). However, psychometric assessment of victims participating in RESTORE (US) pre- and post-restorative justice conferencing revealed that while many (82 per cent) met diagnostic criteria for PTSD at intake the symptoms were not exasperated by participation in conferencing and fewer (66 per cent) met PTSD criteria post-conference approximately three months later (Koss, 2014). When the restorative justice process is provided in conjunction with therapy, some studies suggest that this provides a strong combination for improving victims' emotional well-being (Jülich et al., 2010: 45; Stulberg, 2011: 4). In situations where victims participate in therapy and restorative justice it can be difficult to delineate between the positive effects of restorative justice and the effects of therapy.

Studies of VOM/VOD programmes found that victims experience improved well-being as a result of participating in restorative justice (Gustafson, 2005: 221; Stulberg, 2011: 8; Umbreit et al., 2003a: 122). Gustafson (2005: 221) notes that victims participating in VOMP in Canada frequently report the restorative justice process contributed to their trauma recovery in profound ways, including a diminishing of severe symptoms of post-traumatic stress disorder. Victims are adamant that they have experienced restorative justice as a healing intervention, eclipsing other attempts at remedy, enabling them to achieve therapeutic goals that have eluded them in other processes.

Findings from Circle programmes, such as the Community Holistic Circle Healing programme and the Milwaukee Restorative Justice Circle, interestingly demonstrate that healing is also a key outcome experienced by victims participating in restorative justice circles (Couture et al., 2001: 19; Geske 2007: 657). Empirical evidence suggests that victims are happier and more emotionally stable as a result taking part in circles (Couture et al., 2001: 52). Victims' relationships with family members and the wider community also benefit from the circle process, which contributes further to their emotional health and well-being (Couture et al., 2001: 52).

3.2 Consequences and outcomes for offenders

3.2.1 Measuring success of a restorative justice process for offenders

Although evaluations of restorative justice programmes mainly focus on outcomes and satisfaction for victims (Robinson & Shapland, 2008), some research has been undertaken to evaluate offenders' satisfaction levels and their perceptions of the fairness of restorative justice programmes (Bergseth & Bouffard, 2012; Bouffard, Cooper, & Bergseth, 2017; Latimer et al., 2005; McCold &

Wachtel, 1998; Shapland, Robinson, & Sorsby, 2011) while others focused on the willingness of offenders to participate in restorative justice and their reasons for doing so (Keenan, 2014). This section considers these studies for three different types of restorative justice models (conferencing, VOD/VOM and circles). Overall, the limited evidence available points to high levels of satisfaction amongst offenders participating in all restorative justice models under review (Bouffard, Cooper, & Bergseth, 20170).

The preparation stage of a restorative justice process is crucial in encouraging offenders to 'revisit the crime and its associations' (Gustafson, 2005: 220). In the programmes reviewed, offenders appear to have high levels of satisfaction with the preparation before conferencing (Goldsmith, Halsey, & Bamford, 2005: 36; Jülich et al., 2010: 48; Koss, 2014). In the programme RESTORE in the USA, for instance, 100 per cent of offenders,[7] felt that they received good preparation (Koss, 2014). Offenders similarly expressed satisfaction with the preparation stage of VOM/VOD programmes (Miller, 2011; Miller & Hefner, 2013; Roberts, 1995; Umbreit et al., 2003a). Satisfaction with preparation is also important for circles with the Community Holistic Healing Circle in Canada even predicating offenders' progression to the next more advanced stages of the circle process (Couture et al., 2001: 89–90).

In programmes reviewed, offenders also reported high levels of satisfaction with the restorative justice meeting itself (Bouffard, Cooper, & Bergseth, 2017; Couture et al., 2001: 18; Geske, 2007: 657–658; Goldsmith, Halsey, & Bamford, 2005: 35; Jülich et al., 2010: 48; Koss, 2014; McGlynn, Westmarland, & Godden, 2012: 229; Miller & Hefner, 2013: 13; Stulberg, 2011).

In the context of conferencing, offenders often report satisfaction with the restorative justice meeting and would recommend it to others (Koss, 2014). Offenders also report high satisfaction with procedural fairness (Koss, 2014; Miller & Hefner, 2013: 12–13), although the lack of confidentiality safeguards can have an impact on these perceptions (Goldsmith, Halsey, & Bamford, 2005: 36; Jülich et al., 2010: 53).

A review of the VOD/VOM programmes similarly indicates that offenders are extremely satisfied with the restorative justice meeting and rate the process highly in terms of procedural fairness (Libert, 2006; Miller & Hefner, 2013: 19; Roberts, 1995: 76; Umbreit et al., 2003b: 16).

Accountability was cited as important as it enabled offenders to take full responsibility for the harm caused (Goldsmith, Halsey, & Bamford, 2005: 33; Jülich et al., 2010: 38; Keenan, 2014; Koss, 2014; Libert, 2006; Miller, 2011: 199; Miller & Hefner, 2013: 7, Umbreit et al., 2003a: 164). Offenders generally seemed 'quite keen' to take such 'responsibility for their actions' (Goldsmith, Halsey, & Bamford, 2005: 33) and the perception that they were helping with the survivors' recovery

[7] Twenty offenders were interviewed at intake and post-conference.

further increased this sense of accountability (Miller & Hefner 2013: 17). Of note, however, is the fact that three of the offenders participating in VOD in Ohio did not accept full responsibility for the harm caused (Umbreit et al., 2003b). This finding highlights the fact that while accountability is an important outcome for offenders during the restorative justice process, not all offenders accept full responsibility for the harm caused.

Empathy,[8] which is measured according to the related outcomes of remorse and apology, is another important outcome for offenders, whether they participate in conferencing programmes (Goldsmith, Halsey, & Bamford, 2005: 31, 37; Koss, 2014; Miller & Hefner, 2013: 16) or VOD/VOM programmes (Miller, 2011: 199; Monk-Shepherd & Nation, 1995: 29–30; Roberts, 1995: iv; Umbreit et al., 2003a: 286–287). Offenders gain substantially from the restorative justice meeting in terms of understanding how their actions impacted their own lives and those of their victims (Goldsmith, Halsey, & Bamford, 2005: 34).

Remorse is an important outcome or reason for participation for offenders participating in restorative justice conferencing (Keenan, 2014; Koss, 2014; Miller & Hefner, 2013: 7) and an important qualifier of offender remorse is the regret expressed for the harm caused to the survivor (Goldsmith, Halsey, & Bamford, 2005: 30). However, there is a lack of consensus among restorative justice conferencing programmes regarding apology as an outcome of the restorative justice meeting. For example, apology was a compulsory outcome for offenders participating in RESTORE in the USA with 94 per cent of offenders submitting they were sincerely sorry (Koss, 2014). However, the compulsory nature of the apology could indicate a lack of sincerity in certain instances and Koss found that 6 per cent of offenders apologised without being sincerely sorry (Koss, 2014). Other conferencing programmes do not make it compulsory for offenders to apologise (Daly, 2006a; Goldsmith, Halsey, & Bamford, 2005; Jülich et al., 2010). As the offender's ability to apologise is to some extent predicated on his ability to empathise and understand the impact of the harm done (Jülich et al., 2010: 37), programme flexibility with regard to apology is important.

In VOM/VOD programmes apology is not considered to be a compulsory outcome even though an apology is often made during the actual restorative justice meeting (Libert, 2006; Miller, 2011: 64–65). Apologies were offered by offenders in some VOD cases in Texas and Ohio (Umbreit et al., 2003a: 117) and although forgiveness is not a goal in itself, thirteen of the twenty offenders participating in the

[8] Bletzer and Koss (2012) interpret empathy as perspective taking (wherein the offender starts to understand the viewpoint of the survivor) that leads to recognition of the harm caused and results in sincere remorse and apology. Therefore, empathy is not a measurable outcome in itself but is measured on the basis of the related outcomes of remorse and apology.

Ohio study made some reference to seeking forgiveness, with two offenders naming it as part of their reason for participating in VOD (Umbreit et al., 2003a: 290).

Literature has suggested that offenders prefer direct restorative justice to indirect restorative justice as they consider the face-to-face process more beneficial. For example, research by Roberts (1995: 94) indicates that offenders who took part in indirect VOM would also be willing to attend a face-to-face meeting. Keenan (2014) found that offenders would be willing to engage in restorative justice with their victim if requested by the victim to do so.

In the aftermath of restorative justice conferences research indicates that offenders show a desire not to re-offend (Jülich et al., 2011: 226; Koss, 2014; Sherman et al., 2015; Stulberg, 2011: 22) and remain committed to action plans developed during the conference (Jülich et al., 2011: 226; Koss, 2014). Participation in treatment programmes during or following the restorative justice process also demonstrates offenders' motivation to address various aspects of their lives (Miller & Hefner, 2013: 20).

Outcomes for offenders in the aftermath of VOM/VOD tend to focus on healing, re-integration, and personal growth (Miller & Hefner, 2013; Roberts, 1995; Umbreit et al., 2003b). However, offenders have also expressed a willingness to desist from further offending following VOM/VOD (Miller, 2011). Offenders also found that in the aftermath of VOD, they were motivated to follow through with help in various aspects of their lives (Miller & Hefner, 2013).

3.2.2 Offender well-being/reintegration

There is a growing body of research on the effects of restorative justice on offenders' psychology, behaviour and well-being (Goldsmith, Halsey, & Bamford, 2005: 34; King, 2008:1106; Koss, 2014; Miller & Hefner, 2013: 15; Shapland, Robinson, & Sorsby, 2011; Stulberg, 2011: 8). In addition to offender well-being, a key value for restorative justice is that offenders, having taken responsibility for their wrongdoing, should have an opportunity for reintegration into the community (Shapland, Robinson, & Sorsby, 2011: 134).[9] However, different measures of well-being can often be involved in the various studies, with some programmes such as VOMP in Canada describing the process as 'deeply healing', while other programmes such as VOD in Texas and Ohio allude to 'personal growth'. This militates against comparisons of outcomes and more consistency is thus required regarding well-being indicators in various studies and reviews. Similarly, many studies reviewed fail to discuss the important issue of reintegration of sex offenders.

[9] Although this particular research project was with general offenders rather than specifically sex offenders, their results should apply also to sex offenders, depending on adequate supports and risk assessments, which is where COSAs can play an important role.

Findings from studies on conferencing suggest that restorative justice can contribute to improved offender wellbeing (Goldsmith, Halsey, & Bamford, 2005: 34; Koss, 2014; Miller & Hefner, 2013: 15; Stulberg, 2011: 8). Perpetrators of intrafamilial sexual abuse are generally encouraged to participate in therapy, which may be an important outcome of restorative justice for offenders insofar as it promotes improved well-being for them and enables them to address their sexual offending (Jülich et al., 2011: 225–226; Stulberg, 2011: 8). Participation in restorative justice conferences also helped with offender reintegration in a family context (Jülich et al., 2011: 225–226; Mercer, 2009: 25; Stulberg, 2011: 22).

The available literature that measured offenders' wellbeing and integration following VOM/VOD found that offenders benefited from VOM/VOD with respect to improved emotional well-being (Miller & Hefner, 2013: 7; Roberts, 1995: vii; Stulberg, 2011: 8; Umbreit et al., 2003b: 16) and with respect to reintegration (Stulberg, 2011: 22; Gustafson, 2005: 212). On subjective measures, offenders participating in VOMP in a Canadian prison described the process as 'deeply healing', with therapists and prison facilitators reporting significant commitment to relapse prevention in those men who participated in restorative justice (Gustafson, 2005: 200). Restorative justice also encouraged some offenders to explore ways in which they were victimised as children or youths, which in time contributed to their improved emotional well-being (Roberts, 1995: 106). With respect to reintegration, in the aftermath of VOMP, more than half of the offenders surveyed reported an opening up of relations with their family and friends, which they attributed to their participation in restorative justice.

3.2.3 Desistance and recidivism

There is a growing body of literature that focuses on the ways in which restorative justice in cases of sexual violence can contribute to offender rehabilitation and to desistance from further offending (Bouffard, Cooper, & Bergseth, 2017; Keenan, 2018; Sherman et al., 2015).[10] Regarding restorative justice conferencing, Daly's (2006a) Sexual Assault Archival Study, which is one of several studies that Daly has conducted in the context of the South Australian Juvenile Justice Intervention programme, includes data on recidivism that suggests that restorative justice led to a reduced likelihood of reoffending (Daly, 2005: 166). Higher levels of recidivism were reported in those cases, which were adjudicated for in court only (66 per cent) as compared to those offenders who had participated in conferencing (48 per cent). Daly did note however, that participation in a therapeutic programme,

[10] More generally on recidivism and restorative justice, see e.g. Bouffard, Cooper, and Bergseth (2017) and Robinson and Shapland (2008). On restorative justice and desistance, see e.g. the special issue guest edited by Lauwaert and Maruna (2016). See also e.g. Sherman et al. (2015) for their study on whether restorative justice conferences can be effective on reducing re-offending.

known as the Mary Street Programme, was associated with the lowest prevalence of re-offending. Daly speculates therefore, that participation in the therapy rather than the restorative justice conference may have contributed to the lower rate of recidivism (Daly, 2006: 349).

In a review of the dataset evaluated by Daly in 2005 and 2006, Daly, Bouhours, Broadhurst, and Loh (2013) found that non-sex offenders who had participated in conferencing were less likely to reoffend than similar offenders who had been referred to the court system. However, they also found that levels of recidivism for sex offenders was the same for both groups (8–9 per cent) suggesting that conferencing was not linked to lower rates of recidivism for sex offenders. In contrast Stulberg (2011: 22) found that, in follow-up sessions with clients and their referral sources, over a twelve-month period following VOD/VOM no new instances of sexual violence were reported. Stulberg acknowledges that further follow-up of recidivism is required to track any new sexual crimes committed by the offenders (p. 22).

While some are of the view that qualitative research is more important than quantitative when measuring the success of restorative justice (Jülich et al., 2010: 55), it is evident that quantitative data is important in measuring recidivism (see e.g. Sherman et al., 2015); thus both quantitative and qualitative data are necessary in this as in all research endeavours. There is also a case to be made for including follow-up recidivism data as one of the measures to be evaluated when considering the outcome or effectiveness of a given restorative justice intervention, especially in relation to cases involving sexual violence. However, as the results of the survey that are discussed in chapter five noted and indeed was commented in our comparative analysis between different jurisdictions in chapter six—restorative justice is actually not primarily aimed at reducing recidivism (see also discussion in Robinson & Shapland, 2008)—although that is to be welcomed in the case of sexual crime and it may be a positive by-product of restorative justice, other aims and objectives that meet the justice needs and interests of victims are core to restorative justice in cases of sexual violence.

4. Final remarks

In undertaking this literature review we recognise that the sample size of some of the studies included in the review are small and we recognise that there are other limiting factors, such as some studies reporting on an array of serious crimes including but not limited to sexual offences. These factors make it difficult to distinguish the outcome data between different classes of offences within the serious category of crime and results must therefore be considered cautiously if positively. Clearly the need for further research on the micro details of the restorative process

that work well in sexual violence cases is indicated and importantly the need for further outcome data is evident. The literature that focuses on restorative justice in response to sexual violence is still nonetheless growing (Keenan, 2014; Zinsstag & Keenan, 2017; Moore et al., 2021) and the current study will significantly add to this emerging field of knowledge.

5

Restorative justice after sexual violence

Mapping the international field of practice*

1. Introduction

In order to establish as comprehensive a picture as possible of existing worldwide practice of restorative justice in cases of sexual violence we devised a self-administered web-based questionnaire for completion by practitioners engaged in restorative justice and restorative practices across the globe. When we undertook an examination of cases reported in the literature in 2014 only a small number of studies described or presented details or evaluations.[1] Some studies did not include the number of cases that formed part of the study at all (see e.g. Van Burik et al., 2010; De Jong, & Van Burik, 2011; Zebel, 2012; Laxminarayan, Lens, & Pemberton, 2013). Much of the academic literature that considered the potential for using restorative justice as an option in sexual violence cases, either in addition to conventional criminal justice or, as an alternative to judicial interventions, did so largely from a theoretical or hypothetical perspective (Ptacek, 2005, 2010; Strang & Braithwaite, 2002). Despite these limitations we were interested in discovering the extent of restorative justice practice in cases of sexual violence at that time, and the extent of the work being done and evaluated.

In the reported literature we found four programmes processed sexual violence cases in Australia (see Daly, 2006a; Daly, Bouhours, & Curtis-Fawley 2007; Daly, Bouhours, Broadhurst, & Lohs, 2013; Daly & Curtis-Fawley, 2006; Daly & Wade, 2012; Goldsmith, Halsey, & Bamford, 2005; Miller & Hefner, 2013), three in Canada (see Couture, Parker, Couture, & Laboucane, 2001; Gustafson, 2005; Roberts, 1995; Yantzi, 1998), two in Ireland (see Keenan & Joyce, 2013), one in the Netherlands (see De Jong & Van Burik, 2011; Laxminarayan, Lens, & Pemberton, 2013; Van Burik et al., 2010; Zebel, 2012), two in New Zealand (see Jülich, Buttle, Cummins, & Freeborn, 2010; Kingi, Paulin, & Porima, 2008), three in the United Kingdom (UK) (see McGlynn, Westmarland, & Godden, 2011; Mercer, 2009; Monk-Shepherd & Nation, 1995; Nodding, 2011; Williams, 2011),

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[1] See the Daphne Report by Zinsstag, Keenan, & Aertsen, (2015) for a table of the key literature examined in the first part of this review.

Sexual Violence and Restorative Justice. Marie Keenan and Estelle Zinsstag, Oxford University Press.
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and seven in the United States of America (USA) (see Geske, 2007; Koss, 2014; Libert, 2006 (Documentary); Miller, 2011; Miller & Hefner, 2013; Patritti, 2010; Stulberg, 2011; Umbreit, Vos, Coates, & Brown, 2003a/b). In total they reported on approximately 341[2] cases (133 involving youth offenders and 208 involving adult offenders) and while the sample size for all studies was not reported (e.g. De Jong & Van Burik, 2011; Patritti, 2010; Van Burik et al., 2010) one programme, The Hollow Water Community in Canada, had worked with 107 offenders and 400–500 victims in their healing circles by that time.[3] While the majority of the programmes dealt with sexual crime perpetrated by adult offenders, only three accepted juvenile offenders (The AIM project in the UK, the South Australian Juvenile Justice Intervention programme) and The Oakland Family Therapy Restorative Justice Project in the US which processed sexual crimes perpetrated by both adult and juvenile offenders.

To add to the above literature we also wanted to find as many 'under the radar' restorative justice initiatives in the context of sexual violence as possible at that time across the glove. We defined 'under the radar' as services and cases that were not reported in the academic literature. While some of these restorative justice services had links on related service websites, which included some relevant documentation, they were not reported or analysed in international published academic literature. From undertaking previous research (Zinsstag, Teunkens, & Pali, 2011) and practice experience (Keenan) we ypothesized that the practice was ahead of the academic field on sexual violence and restorative justice and we wanted to examine if this was so (see O'Nolan, Zinsstag, & Keenan, 2018).

We indeed did find 'under the radar' practices and programmes from further searches and from correspondence with key scholars in the field. For example, Godden, (2013: 163) reported in her doctoral thesis that the Youth Justice Agency in Northern Ireland used restorative justice processes in the context of juvenile sex offending, and that thirteen cases had been referred to the Youth Conferencing Service in Greater Belfast alone between April 2009 and April 2011. Similarly, the REMEDI programme in England (2013, correspondence via email) processed several sexual crime cases which had not been examined in any literature. Many individual facilitators in the UK were also processing sexual offence cases that had not been evaluated (Shapland, 2013, correspondence via email), a pattern that we felt could be evident throughout the world. Non-reported programmes and practices

[2] Koss (2014) provided an evaluation of the application of restorative justice to cases of sexual violence at the RESTORE project in Arizona, which offered restorative justice conferencing as an alternative to conventional justice in cases of felony and misdemeanour sexual crimes. The cases were prosecutor referred. In total sixty-six referrals were made during the period of operation, which resulted in twenty-two conferences (which represented 91 per cent of cases in which both the victim and offender consented to participate in the programme). We have counted sixty-six as the number of cases in this study for the purpose of establishing the estimated extent of the restorative justice work taking place internationally

[3] See Couture, Parker, Couture, & Laboucane, 2001 on Hollow Water Community Healing Circles.

were therefore the target of our survey. We wanted to know the extent of practice in this field, in so far as possible, and to know, if possible, how many victims or cases the programmes handled in their time in operation.

The web-based survey was the only research instrument used to generate quantitative data in what was an otherwise qualitative study. In conducting the survey, we sought to identify as many practitioners and programmes as possible around the world which offered restorative justice in sexual violence cases. We wanted to examine the context in which restorative justice programmes emerged (funding/legislation); to assess the type and scale of cases processed; to compare the models of restorative justice used; to identify the mechanisms used to ensure the physical, emotional, and procedural safety of participants, and to discover the main challenges and difficulties encountered by practitioners and stakeholders. As both theory and practice are evolving in this area, we wanted to provide our research respondents with an opportunity to share their knowledge and experiences as fully as possible. Therefore, a survey instrument that included both open and closed questions was deemed to be most appropriate.

This chapter focuses on that survey, which we sometime refer to as 'the mapping exercise'. The survey was divided into three parts. Part One gathered demographic and quantitative data on the respondents and was completed by all participants. Part Two was completed only by participants describing themselves as undertaking 'fully restorative justice' work. Part Three was completed only by participants who engaged in 'alternative' or quasi restorative justice practices. To address all of the issues involved, this chapter is divided in five sections. Section one provides an introduction to the chapter. The second section gives the background to the research, including the research design and research methodology and elaborates the reasons for selecting a self-administered web-based questionnaire for conducting this research. The third section introduces the research findings and presents the first tranche of survey results; answers to questions that were administered to *all* survey participants. The fourth section of the chapter elaborates and analyses the research findings from participants engaged in fully restorative justice work. The fifth section analyses the survey responses from the alternative/quasi restorative justice practices. The chapter concludes with some final remarks.

In recognition of the absence of any standard approach to restorative justice in sexual violence cases the survey provided respondents with definitions of both *fully restorative justice work* and *alternative or quasi restorative justice practice* to which they were then directed. Fully restorative justice work was defined as those practices that use formal restorative justice methodologies, such as victim-offender mediation (VOM)/victim-offender dialogues (VOD) or restorative conferences, usually involving direct or indirect communication between the victim *and* the offender, and other stakeholders as relevant, such as family, community members and members of criminal justice agencies.

Alternative or quasi restorative justice practices were defined as practices that incorporate some of the guiding principles and values of restorative justice, but do not fully follow restorative justice methodologies. In order to help clarify this definition the survey pointed to some examples of alternative/quasi restorative justice practices. These included practices that promote the victim dimension when working with the offender, such as victim empathy modules, practices that focus on reparation for victims or circles of support and accountability for offenders. In other words, any practices that fitted within the core values and principles of restorative justice were to be included here.

2. The research methodology

The choice of a web-based survey for the aspect of the research being discussed in this chapter was made after consideration of the advantages and disadvantages of various survey formats. Web-based surveys have advantages related to the speed and cost of data collection, as well as data quality (Cook, Heath, & Thompson, 2000; Couper, 2000; Kaplowitz, Hadlock, & Levine, 2004; Kraut et al., 2004; Lozar Manfreda, Berzelak, Vehovar, Bosnjak, & Haas, 2008; Shin, Johnson, & Rao, 2012). They also have advantages in relation to the potential for global reach, as the contact list can snowball as the project evolves. This was an important consideration for the current study. Web-based surveys are now used in great numbers by a wide range of organisations. However, we were aware that we were working in a 'crowded field' in which 'survey fatigue' (Grimes, 2012; Porter, Whitcomb, & Weitzer, 2004) and 'survey overload' (Holley, 2012; Leppik, 2014) are concerns (see *inter alia* Baruch & Holtom, 2008; Curtin, Presser, & Singer, 2005; De Leeuw & De Heer, 2002; Hox & De Leeuw, 1994; Stoop, 2005; Tolonen et al., 2006).

Given the exploratory nature of our survey and the unknown dimensions of the target population it was considered that the disadvantages associated with web-based surveys, including low response rate and non-representative responses, would not unduly impact the planned survey, as we anticipated a high level of interest in our target population (Boyer, Olson, Calatone, & Jackson, 2002; Cook et al., 2000; Couper, 2000; de Rada & Domínguez-Álvarez, 2014; Denscombe, 2006; Kaplowitz et al., 2004; Kraut et al., 2004; Kwak & Radler, 2002; Lozar Manfreda et al., 2008; Schaefer & Dillman, 1998; Shin et al., 2012; Tourangeau, Rips, & Rasinski, 2000). Also, Gosling, Vazire, Srivastava, and John's study (2004) found that web-based surveys can generate samples that are at least as diverse as traditional surveys with respect to gender, socioeconomic status, geographic region, and age. It was decided therefore that a web-based survey provided a format which was cheaper and easier than other approaches to implement and had the potential to deliver higher quality responses than other survey formats.

2.1 Design phase

The email inviting participation in the survey stressed the importance of learning about restorative justice in the area of sexual violence. While the target population was invited to participate in the survey on multiple occasions, considerations of cost, convenience, and speed meant that only email invitations were used. While cognisant of the higher item non-response rates associated with open questions (see *inter alia* Andrews, 2005; Israel & Lamm, 2012; Silber, Lischewski, & Leibold, 2013) we nonetheless decided to include a considerable number of open questions in the survey. By providing respondents with multiple opportunities to answer questions in an unstructured manner we sought to uncover as much information as possible, rather than to confirm an existing body of information or existing theories.

The first section of the survey included twenty questions to be answered by all respondents. Question twenty asked respondents to indicate whether they were engaged in fully restorative justice work or alternative/quasi restorative justice practice (based on the definition already provided). Respondents were then streamed to either version 'A' for fully restorative justice work or version 'B' for alternative/quasi restorative justice practice. Many questions were included in both sections but the different streams meant that some questions were specific to either fully restorative justice work or alternative/quasi restorative justice practice. Respondents engaged in fully restorative justice work were asked to complete a total of ninety-two questions, while a total of eighty-seven questions were directed at respondents in alternative/quasi restorative justice practice. During the design phase of the study the survey was piloted by four restorative justice practitioners; two from each of the sub-categories identified. Following the piloting process a number of refinements were suggested by the pilot respondents. Two of the pilot respondents were not native English speakers and found the language used in the survey was too complex for participants for whom English was not their first language. In recognition of this difficulty efforts were made to simplify the language to make the survey more accessible. In addition, a number of respondents answered open questions in their native language and these were later translated into English by multi-lingual members of the research team.

2.2 Survey implementation

Our target population was persons who engaged in restorative justice practices in the area of sexual violence. While some of this work is conducted by, or sponsored by, government agencies, much of the work also takes place by non-governmental organisations or voluntary or faith based organisations. Due to the diversity and fragmented nature of restorative practitioners and programmes across the globe

the task of identifying potential survey respondents was particularly challenging. We compiled an initial list of potential respondents based on our literature review, personal knowledge and contacts of the authors and associates and from information compiled during study visits (see chapter 6). This initial list was amended and expanded during the implementation of the survey, as we became aware of other potential respondents, or in some cases found that programmes were no longer in operation. In an effort to expand our search for respondents we provided details of our survey to a number of international restorative justice organisations who circulated this information to their members. For example, the American based National Association of Community and Restorative Justice circulated a flyer about the survey to members, which was headed up 'Do you work with cases of Sexual Violence?' We also contacted the author of a recent report on restorative practices in Australia who provided us with relevant contact details of persons in various states in Australia.

The software programme used (Survey Monkey) linked responses to individual email addresses, and the questionnaire sought details of the particular respondent and their organisation. This ensured that non-respondents and multiple replies from any respondent/organisation could be identified. Two waves of reminders were sent by email to non-respondents. The original email was forwarded with each reminder. In common with the initial email, the reminder emails stressed the importance of expanding the knowledge base of restorative justice in the area of sexual violence. It is interesting to note that the second reminder proved more effective than the first. It is possible that the timing of the second reminder (July) may have affected the response. Respondents who partially completed the survey were also contacted and asked to complete the survey. The survey remained open for five months.

3. Demographic survey findings

The first part of the survey applied to all respondents and consisted of twenty questions of which two were open questions. In this section of the chapter we present the analysis from the first part of the survey.

We do not know how many restorative justice practitioners or programmes engage with cases of sexual violence in the world and therefore the size of our target population. Hence, we are unable to assess the response rate of the survey. Over 250 surveys were sent out to potential respondents and 81 respondents replied. All completed questionnaires were carefully reviewed and discussed by the research team. Following this initial review it was decided that six questionnaires should be eliminated from the survey as they were either not engaging with cases of sexual violence (three) or were not providing fully restorative justice or quasi restorative justice practices (three). A further questionnaire was eliminated because

it was identified as a duplicate response. The number of questionnaires analysed was therefore seventy-four.

Survey respondents were geographically dispersed and included respondents in Europe, North and South America, Oceania, Asia, and Africa. However, respondents were heavily concentrated in Europe (EU: 58 per cent; Non-EU: 3 per cent) and North America (26 per cent) with just thirteen per cent of respondents located outside these regions. In Europe respondents were located in the United Kingdom (10), Belgium (8), Denmark (8), France (5), Ireland (4), the Netherlands (3), Spain (2), Norway (2), Finland (1), Latvia (1), and Bulgaria (1). Twelve respondents were located in the United States and seven in Canada. It is notable that all of the survey respondents, with one exception, were located in countries with a very high human development index (HDI) (see http://hdr.undp.org/en/countries). The exception noted is located in a country with a medium HDI.

3.1 Restorative justice model employed

Respondents were provided with a list of eight different restorative justice models and one as part of therapy for victims or offenders and were asked to identify the model(s) employed by them in their practice or programme. The nine models listed were: Conferencing; Victim Offender Mediation (VOM); Victim Offender Dialogue (VOD); Circle; Reparation Panel; Truth Commission; Commission related to the Church/Other Institutions; Circles of Support and Accountability (COSA); and Therapy for victims and/offenders. Responses are represented in Figure 5.1 below.

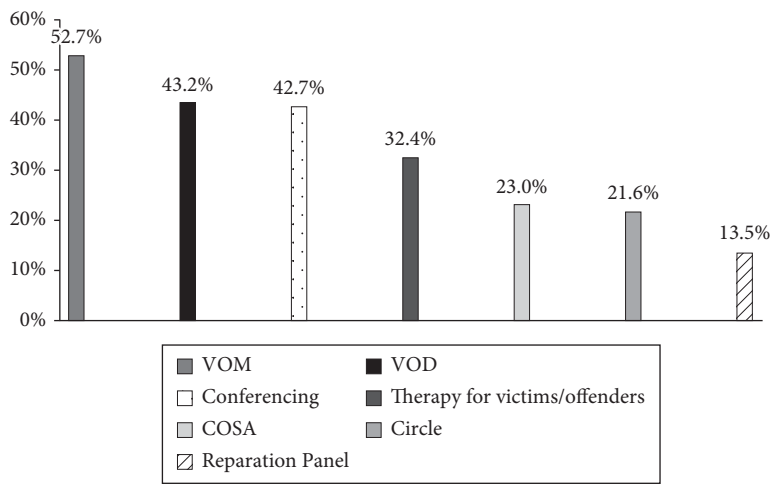

Figure 5.1 Restorative justice model employed

As Figure 5.1 (above) illustrates many respondents indicated that they employ a number of different restorative justice models and practices. The most commonly identified models were VOM (52.7 per cent), VOD (43.2 per cent) and Conferencing (42.7 per cent). Almost a third of respondents (32.4 per cent) indicated that their model provides therapy for victims and/offenders while just over one in five respondents identified their model as a Circle of Support and Accountability (COSA) (23 per cent) or a Circle (21.6 per cent). Just 13.5 per cent of respondents indicated that they employ a reparation panel.

Respondents indicated that their restorative justice work operates in a variety of institutional settings, such as criminal justice, health, child protection, and victim services. They also collaborate with a variety of institutions and agencies, such as the criminal justice system, health services, and child protection services. The inter-agency and inter-disciplinary nature of the work was consistent across the survey, with many respondents identifying more than one institutional setting with which they collaborate. The most commonly identified institutional settings with which our respondents collaborated specifically in relation to restorative justice after sexual violence were: the criminal justice system (criminal justice system 48.6 per cent; prison 24.3 per cent); independent/community organisations (NGOs 33.8 per cent; community organisation 24.3 per cent); health systems (mental health services 16.2 per cent; hospitals/other health services 12.2 per cent); other social services (social welfare 17.6 per cent; youth services 16.2 per cent); and education (schools/other educational settings 6.8 per cent).

3.2 Participants

Just over one third of respondents (34.2 per cent) indicated that their restorative justice involves both minors and adults; four in ten (42.5 per cent) deal with adults and almost one in four (23.3 per cent) mainly deal with minors. A majority (60.3 per cent) of respondents work with both victims and offenders. It is interesting to note that almost a third of respondents (32.9 per cent) indicated that they work mostly with offenders compared to just 8.2 per cent of respondents who work mostly with victims. Just over one third of respondents (34.2 per cent) also work with the community, including family and friends (65.3 per cent), the wider community (52.8 per cent), and the police and other public authority agents (23.6 per cent). Over two-thirds of respondents (68.5 per cent) believed the community's role is to offer support to the offender. A similar but slightly smaller proportion (61.6 per cent) of respondents believed the community's role is to offer support to the victim. Almost half of the respondents also considered that the community's role is to assist in the re-integration of the offender (47.9 per cent). More than one in ten respondents (11 per cent) indicated that the community had no role in their restorative justice work.

3.3 Type of cases

Respondents were asked whether their restorative justice involves other types of criminal cases as well as sexual violence. Almost six out of ten respondents (57.5 per cent) indicated that other types of criminal cases are also included in their restorative justice work. Those that deal with other types of criminal cases were asked to provide additional details of the type of cases handled in their restorative work. The answers provided revealed that many respondents and their agencies engage with very serious criminal cases. A summary of the answers provided is set out in Table 5.1 below.

To illustrate the seriousness of the cases dealt with, some of the answers provided are set out below:

> *Different serious crimes such as homicides, murder, manslaughter, aggravated assault and specific traffic offences (somebody has died as a consequence of the offence).*
>
> *The range of violent assaults; robbery, motor vehicle accidents causing death or serious bodily harm, sexual assault (including rape); manslaughter, attempted murder, murder and others.*
>
> *Predominantly murder but also attempted murder, assault, burglary and sexual offense.*

3.4 Number of restorative justice cases, in particular cases of sexual violence

Respondents were asked to provide details of the number of restorative justice cases (i) referred and (ii) processed by their programme/agency over the previous three years. This was asked of all respondents. In addition they were asked to provide details of the number of cases of sexual violence referred and processed over the

Table 5.1 Other types of cases handled by restorative justice programmes/practitioners

Type of crime	% of respondents
All kinds of crime	22.0
Violent and serious crime	29.3
Crimes which involve an identifiable victim	12.2
Crimes committed by juveniles	9.8
Other	26.7

previous three years. Only thirty-one of our seventy-four respondents answered these questions. We also found that many respondents (both those engaged in fully restorative justice work and those engaged in alternative/quasi restorative justice practices) did not delineate between cases referred and cases processed (which may have been a fault of the survey language). Consequently many respondents gave the same response when asked about cases referred and cases processed. Further, many respondents in fully restorative justice services did not numerically disaggregate the sexual violence cases from other restorative justice cases in the survey responses. Many of the respondents from alternative/quasi restorative justice services did not disaggregate data for their restorative justice work from their broader scale of referrals for therapy and rehabilitation, of which restorative aspect was a small part.

As it is considered that the answers provided in the survey to these questions are not fully reliable for the reasons outlined, no detailed analysis is included here. However, a few trends are discernible. The respondent settings vary considerably in scale. Many restorative justice services are operating on a very small scale (e.g. 16, 18, cases per year) but others deal with substantial numbers of restorative justice cases (e.g. 1815 cases). Many of the alternative/quasi services that provide therapeutic services for victims or offenders show similar variation in scale of service provision. The number of sexual violence cases processed via restorative justice within respondent services also vary, perhaps related the overall scale of the setting. However, our survey points to a finding that a higher number of sexual violence cases are processed via restorative justice than previously reported in the literature. In our review of the twenty-two studies reported in the literature up to 2014, the majority (77 per cent) analysed eight or fewer cases. This is not the case from our research, both from the survey responses and study visits, with programmes responding to more substantial numbers of sexual violence cases than previously reported. Despite the limitations of the survey data in response to number of cases processed by survey respondents, the trend can be discerned that services are processing sexual violence cases 'under the radar'. The scale of the programmes or restorative justice is linked to funding and legislative provisions for restorative justice in the relevant country/region.

3.5 Types of sexual violence cases

Restorative justice programmes that engage with cases of sexual violence more commonly deal with the more serious than with less serious forms of sexual violence. More than 90 per cent of respondents indicated that their restorative justice programmes deal with cases of rape, while just over half (54.1 per cent) deal with cases of sexual harassment. Five respondents also noted that they deal with cases of cyber child pornography. One respondent also noted that their programme only

deals with cases sufficiently serious to warrant a prison sentence of two years or more for the perpetrators.

3.6 The context of sexual violence

Many respondents ticked multiple options to the question regarding the context of the sexual violence cases with which they work. As can be seen from Figure 5.2 the most common context identified was incest (72.1 per cent).

Several additional comments provided us with further insights into the prominence of intra-familial sexual violence. Relevant comments include:

> *Intra-familial mostly—the offender is a parent, sibling, cousin or stepsibling.*
>
> *In more than 80% of the cases, victims and offenders are known or part of the same family, in 20% they don't know each other.*

The answer 'via communication technology' was also selected by almost half (45.6 per cent) of all respondents. This finding is especially interesting in light of a

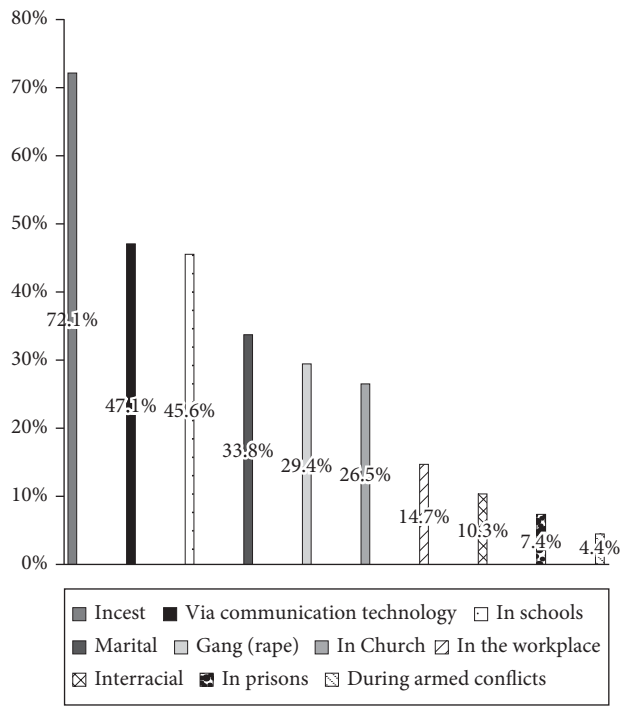

Figure 5.2 Context in which sexual violence occurs

number of respondents specifically pointing to cyber child pornography as a type of sexual violence dealt with by their restorative justice programme. It is also noteworthy that almost half (45.6 per cent) of the survey respondents identified schools as a setting in which sexual violence occurs. Three respondents did not identify any of the options listed but appended comments which made it clear that sexual violence can occur in any context. Several respondents also added comments which pointed out that they also deal with date and acquaintance rape. Representative comments include: (i) 'combined with alcohol and partying among peers'; (ii) 'friendships'; and (iii) 'in addition to the items checked, the sexual violence we deal with occurs among acquaintances'.

3.7 Funding of programmes

Question ten asked respondents to identify the types of funding received by their agency. Respondents were asked to select from three answers (government funding; private funding; and, no funding) and to tick all relevant answers. The answers identify the importance of government funding for restorative justice programmes which engage with cases of sexual violence; almost eight out of every ten respondents (79.2 per cent) indicated that they receive government funding, while just one in five respondents indicated that they receive private funding. Of significance is the finding that more than one in seven respondents (15.3 per cent) indicated that their agency does not receive any state funding. A number of comments appended by respondents highlighted that funding is often precarious and uncertain. Relevant comments include: (i) 'we only really receive verbal support'; (ii) 'charitable funding competitively sought'; (iii) 'all volunteer and benefit events to raise money'; (iv) 'we have received some limited charity funding'; and (v) 'small church donation'.

3.8 Number of years in existence

Although the suitability of restorative justice for cases of sexual violence is the subject of some debate and contention in academic and public discourse, as discussed in chapter 3 and 4, it is interesting to note that more than six out of every ten respondents (47/63.5 per cent) indicated that their restorative justice programme or they themselves had been dealing with cases of sexual violence for more than five years, and thirty-one (41.9 per cent) of respondents were working in settings that have engaged with restorative justice in cases of sexual violence for more than ten years. One programme was still in the development stage and three programmes were no longer processing sexual violence cases.

Respondents who indicated that their agency was no longer processing cases of sexual violence were asked to specify why this was so. The answers provided reinforce the unstable and inadequate nature of funding, already highlighted earlier. Respondents explained the cessation of their programme by citing 'lack of funding' or explaining 'the Project ran on a succession of short term funding arrangements which finally expired at the end of 2012'. Another comment highlighted a loss of funding but also noted a series of other difficulties that resulted in the cessation of the programme:

> *Lost funding; federal policy unfriendly to restorative justice, advocate opposition, apathy in criminal justice system and private funders unwillingness to be associated with rape.*

Restorative justice that deals with cases of sexual violence often depend on a small number of key individuals who champion the work. The loss of those individuals can result in the restorative justice ceasing or losing momentum. This problem was noted by one respondent attached to a long-standing programme:

> *Facilitator left the hospital and though the program is still officially an option it is in practice no longer available in the [name of centre].*

3.9 Aims of restorative justice work in sexual violence cases

Respondents were asked to identify the aims of their restorative justice when dealing with cases of sexual violence. In answering this question they were asked to select from a menu of fifteen answers and to tick all relevant answers. Eight of the answers listed aims that could be described as victim oriented and the remaining seven were offender oriented. The responses received are set out in Table 5.2 below.

Interestingly the three aims most frequently identified are all victim oriented; (i) opportunity for victims to receive information from the offender; (ii) opportunity to improve victims' relationships with family/friends; (iii) opportunity for victims to participate in the resolution of their case.

3.10 Timing of restorative justice interventions

There has been some debate regarding whether restorative justice in cases of sexual violence should run in parallel to or after criminal proceeding or indeed be positioned as an alternative to criminal proceedings entirely. The survey explored the timing of the restorative justice process and asked respondents to indicate the

Table 5.2 Restorative justice aims when addressing cases of sexual violence

Aims	% of respondents
Opportunity for victims to receive information from the offender	85.1
To improve victims' relationships with family/friends	82.4
Opportunity for victims to participate in the resolution of their case	73.0
Opportunity for offenders to involve their significant others in the resolution of their case	73.0
To avoid/prevent re-offending	71.6
To help/contribute to offenders' psycho-social process of rehabilitation	71.6
To increase offenders' responsibility for the offence	70.3
Opportunity for victims to receive reparation	70.3
To offer the opportunity to express/share the harm caused by the offence	66.2
To help with the social integration of the offender	66.2
To help/contribute to victims' process of restoration	66.2
To avoid/prevent re-victimisation	62.2
To improve offenders' relationships with family/friends	62.2
Opportunity for victims to involve their significant others in the resolution of their case	52.7
Opportunity for offenders to participate in the resolution of their case	51.4

point at which cases of sexual violence and other cases were referred to them or their programme. Three response categories were provided (pre-sentencing, post-sentencing, and outside the criminal justice system) and respondents were asked to select all relevant answers. The answers provided are set out in Figure 5.3 below. We can clearly see that responses in respect of cases of sexual violence and all other cases are strikingly similar.

Responses indicate that cases of sexual violence are slightly less likely than other cases to be referred to restorative justice programmes pre-sentence (58.3 per cent: 60.5 per cent) and more likely to be referred from outside the criminal justice system than other cases (45.8 per cent: 41.9 per cent). The proportion of respondents indicating that cases are referred post-sentencing was almost identical for cases of sexual violence and other cases (76.4 per cent: 76.7 per cent).

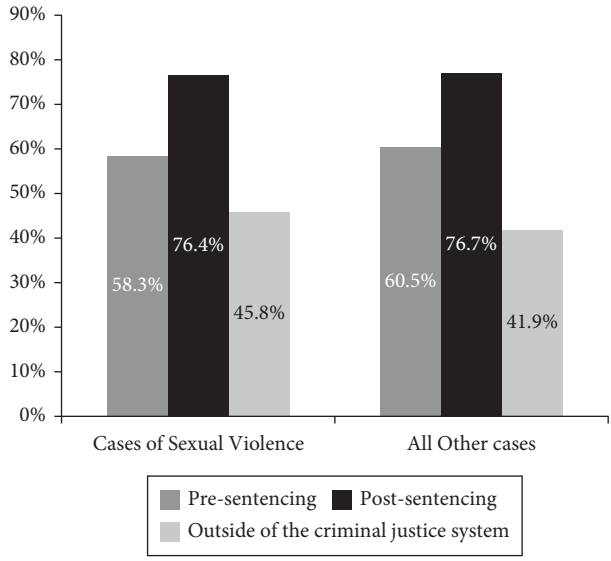

Figure 5.3 Timing of restorative justice intervention

Table 5.3 Source of referrals

Source of Referral	% of respondents	Source of Referral	% of respondents
Victim (self-referral)	49.3	Judge	39.7
Offender (self-referral)	47.9	Prison authorities	39.7
Probation	45.2	Lawyer	32.9
Police	43.8	Health services	31.5
Therapist/counsellor/ mental health service	42.5	Child protection services	28.8
Victim services	42.5	Member(s) of the community	23.3
Prosecutor	41.1	Schools	17.8

3.11 Referral sources for restorative justice

Respondents were asked to identify the actors or agencies that refer cases for restorative justice from a list of fourteen different options. Table 5.3 below

summarises the responses received. Most respondents identified multiple sources of referrals. It is interesting to note that the most commonly indicated sources of referrals are victim and offender self-referrals. Referrals from criminal justice actors and agencies also feature prominently.

4. Fully restorative justice interventions in cases of sexual violence: survey findings

Having completed the demographic aspects of the survey 50 per cent of the survey respondents (37 participants) completed the aspect of the questionnaire designed for practitioners engaged in fully restorative justice work. These responses are now presented and analysed.

4.1 Eligibility and suitability criteria for victim participation

A distinction is made in the restorative justice literature between 'eligibility' and 'suitability' for participation in restorative justice as discussed in chapter 4 (see for example CIJ, 2014: 47; Keenan, 2018: 292; Umbreit & Greenwood, 2000: 7; UNODC, 2006: 61; UNODC, 2020) and we were keen to see how these factors are represented with restorative justice practitioners in sexual violence cases internationally. Eligibility refers to the fact of having the necessary qualities or satisfying the necessary conditions. Suitability refers to the fact of being acceptable or right for something or someone.

More than six out of ten respondents (62.9 per cent) indicated that they apply eligibility criteria, beyond being a victim or perpetrator of sexual crime, to decide which cases go further in the restorative justice process. More than one third of respondents (36.4 per cent) who apply eligibility criteria indicated that they have strict criteria, but half of these respondents also indicated that the criteria are applied flexibly. More than three quarters of respondents (76.9 per cent) who do not apply eligibility criteria indicated that any case of sexual violence can be referred to their programme, and the remaining proportion (23.1 per cent) noted that eligibility test is applied by the referral institutions who decide which can cases proceed in the restorative justice process.

Respondents were provided with a list of seven suitability criteria in relation to *victim* participation and asked to indicate which of the criteria listed they normally take into account in deciding on whether a victim participates in restorative justice. The results are set out in Figure 5.4 below.

Almost three quarters of respondents (72.2 per cent) indicated that they apply the criterion that 'victims cannot be at risk of re-victimisation', while half (50 per cent) answered that victims should have the agreement of a therapist/counsellor or

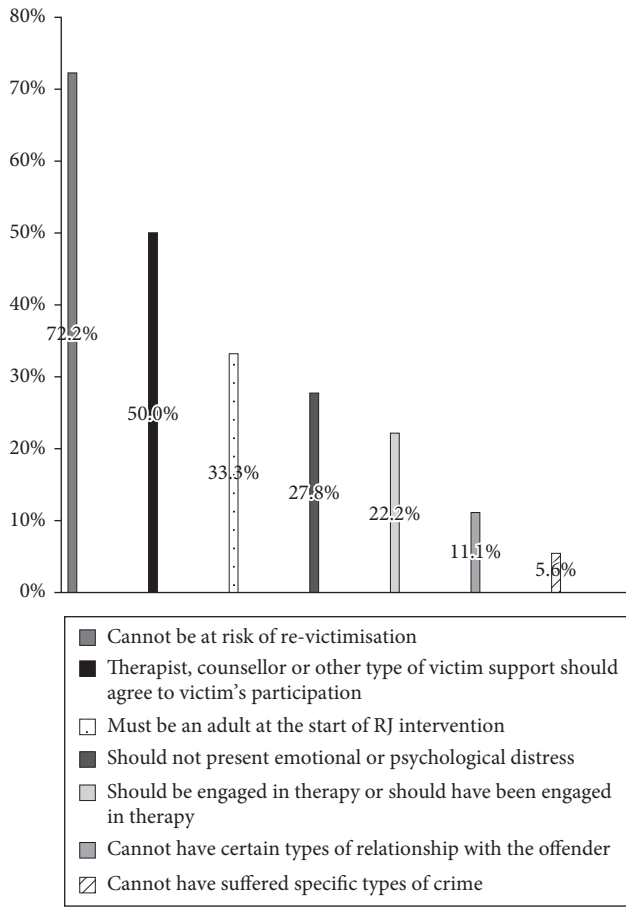

Figure 5.4 Criteria applied for victim participation

other type of victim support service to participate in their restorative justice service. A third of respondents indicated that participation in their restorative justice service is limited to adult victims. The results indicate that the criteria most commonly applied are oriented towards ensuring the safety of the victim and suggest that criteria are rarely applied to filter out victims on the basis of the type of sexual violence.

A small number of insightful comments regarding eligibility and suitability were also added by respondents. Several comments stressed the agency of the victim to decide whether the restorative justice process should proceed:

[Risk of victimisation] depends on what level and whether the victim still wants to participate and fully understands and is aware of the situation;
[The] survivor is actively seeking the process, the decision to participate is made for her/his own reasons (not to please others).

Other comments pointed out that participation of the victim is decided on a case by case basis:

[We] look at each case being individually notified if mediation [restorative justice] is the appropriate process given the request, and if mediation can offer an added value for the parties, and maybe some other options meet better the expectations and needs. We pay attention to above checked items, but that does not mean that they exist as laws. We differentiate herein case by case.

4.2 Eligibility and suitability criteria for offender participation

Respondents were also asked a series of questions in relation to decisions regarding the eligibility and suitability of *offenders* to participate in restorative justice following sexual crime. A list of eight criteria was provided and respondents were asked to select all those that they would usually take into account when deciding whether offenders participate in restorative justice. Figure 5.5 below sets out the responses received.

As Figure 5.5 highlights, the results point in particular to two criteria for offenders which were selected by a significant majority of respondents. Almost all respondents (95.2 per cent) indicated that offenders should accept responsibility for the offence. More than four in five respondents (81 per cent) also indicated that offenders must be willing to listen to the other party. Many respondents also indicated that offender participation in restorative justice in their agency was limited to either adults (61.9 per cent) or minors (33.3 per cent). The results indicate that only a very small proportion (4.8 per cent) of respondents consider that an offender should be in prison during the restorative justice process or that restorative justice should not be made available to offenders if they have a previous criminal record (9.5 per cent).

One respondent commented that acceptance of responsibility on the part of the offender may be partial as many offenders may initially only accept a certain level of responsibility, but the restorative justice process may cause them to re-assess this and prompt them to 'hopefully grow in capacity to accept fully responsibility'. Another respondent commented that acceptance of responsibility on the part of the offender is only considered to be an eligibility criterion if the offender initiates

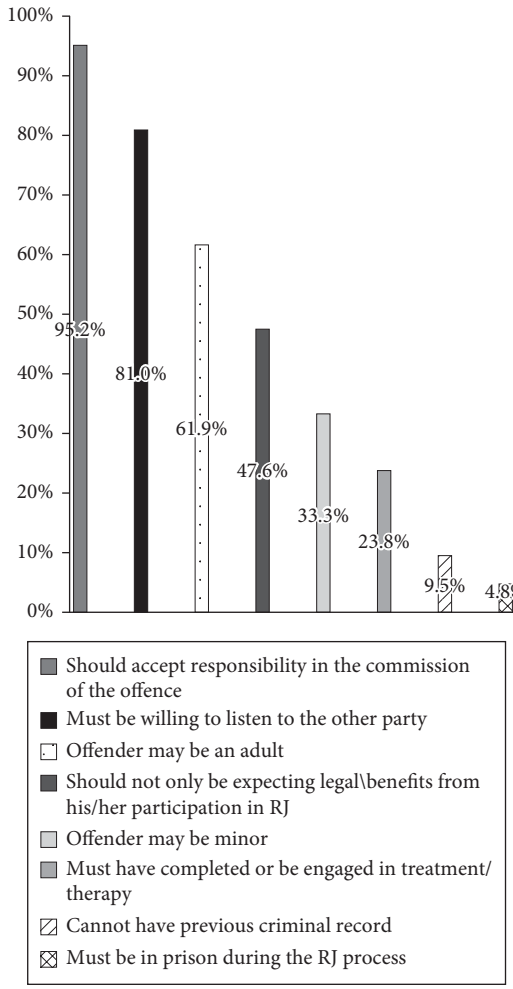

Figure 5.5 Criteria applied for offender participation

the restorative justice process. The respondent noted that when the victim initiates the process:

> *. . . and it does not matter to him/her whether the perpetrator takes its responsibility, then this point of view is nuanced. The wishes and needs of the parties herein are leading, not our rules.*

However, this view was not shared by another respondent who provided a lengthy (1,022 words) and detailed answer regarding the eligibility criteria for offenders. The response related to a restorative justice programme that only processes cases

initiated by victims and applies eligibility criteria for both victims and offenders. The respondent noted that the decision to proceed with restorative justice in cases of sexual violence requires the agreement of a restorative justice co-ordinator, who holds a post of responsibility in this particular programme's structure. If this agreement is forthcoming the case is then referred to the manager for restorative justice. The manager for restorative justice who is senior to the restorative justice co-ordinator may decide that the case should *not* proceed to restorative justice. However, if the manager agrees with the assessment of the restorative justice co-ordinator the case will be referred to another staff member, the clinical co-ordinator of the sex offender programme, and finally to the director of the offender services and programmes. In this programme it is clear that risk avoidance rather than the wishes of the parties is dominant in this service ethos.

4.3 Risk assessment

The responses received in relation to the risk assessment of *victims* revealed that fewer restorative justice practitioners and programmes carry out risk assessments of victims than of offenders. Almost six out of ten respondents (59.4 per cent) indicated that they carry out risk assessments for all victims and a further 6.3 per cent indicated that risk assessments are only carried out in cases that do not fulfil all the eligibility criteria. More than a third (34.4 per cent) of respondents indicated that their programme does not carry out a specific form of victim risk assessment.

When questioned regarding risk assessment of *offenders* two thirds (67.6 per cent) of respondents indicated that they carry out risk assessments for all offenders and a further 5.9 per cent indicated that risk assessments are only carried out in cases that do not fulfil all the eligibility criteria. More than a quarter (26.5 per cent) of respondents indicated that their programme does not carry out a specific form of offender risk assessment. Interestingly, one respondent noted that the risk assessment focuses on the relationship between the offender and the victim. Another commented that they have access to criminogenic risk assessments carried out by other services when offenders are in prison.

Respondents were also asked to indicate the type of risk assessment carried out by their programme by selecting all relevant options from a menu of three forms of risk assessment for both victims and offenders (assessment based on interview/standardised instrument/offender's file). Interviews of both victims and offenders are very commonly used as forms of risk assessments. Risk assessments of victims rely almost wholly on interviews (more than 90 per cent). Other forms of risk assessment of victims are less frequently applied; such as risk assessments based on reviews of the victim's file (28.6 per cent), or use of a standardised risk assessment instrument (23.8 per cent). While interviews also feature prominently in the risk assessments conducted of offenders (used by 88 per cent of those who conduct

risk assessments), risk assessments more commonly refer to offenders files (48 per cent) and use of standardised instruments (44 per cent) than is the case for victims.

Respondents who provided further details of the risk assessment criteria for both offenders and victims on average gave both lengthy and comprehensive answers. Some respondents focused on the aim of the risk assessment:

> 'What we want to find out is: Is the offender "willing" to speak openly with the victim, and to hear what the victim is telling? More than the capacity we are looking for the willingness to communicate in two directions and which skills the person has. If we can install a balance between victim and offender, we can start communication. Finally we find out if there's any support in the context'.

Another response noted the imperative to prevent re-victimisation but also pointed out that victims are rarely disqualified from the restorative justice process on this basis; instead the service are committed to ensuring that the risk assessment of the offender influences the safety protocols for the restorative justice process:

> 'I know the dialogue will always be very challenging but I do not want a survivor who is so fragile that this exchange runs a high risk of harm to her (re-victimization). There are very few victims who are excluded for these reasons'.

4.4 Preparation for restorative justice

Respondents were asked a series of questions regarding the work conducted in preparation for the restorative encounter. The responses received indicate that pre-meeting preparation is used by almost all respondents (94.3 per cent). The small number of respondents who indicated that they do not carry out pre-meeting preparation are attached to restorative justice programmes which do not engage in direct encounters between victims and offenders. When asked 'what usually happens before a restorative justice meeting' almost all respondents (94.3 per cent) selected the response 'We meet each party as many times as necessary'. In addition, 60 per cent of respondents also indicated that they contact and coordinate meetings with each party. Almost all respondents (97.1 per cent) indicated that pre-meeting preparations focus on both victims and offenders. More than one third (37.1 per cent) indicated that the preparation also focused on the community.

Respondents were also asked to indicate the average length of time of the preparation process. Four respondents commented that the length of the preparation process varies on a case by case basis. Another respondent commented that there are no constraints on the length of the preparation process, although the restorative justice process in that agency is required to be completed in six months. 'Given

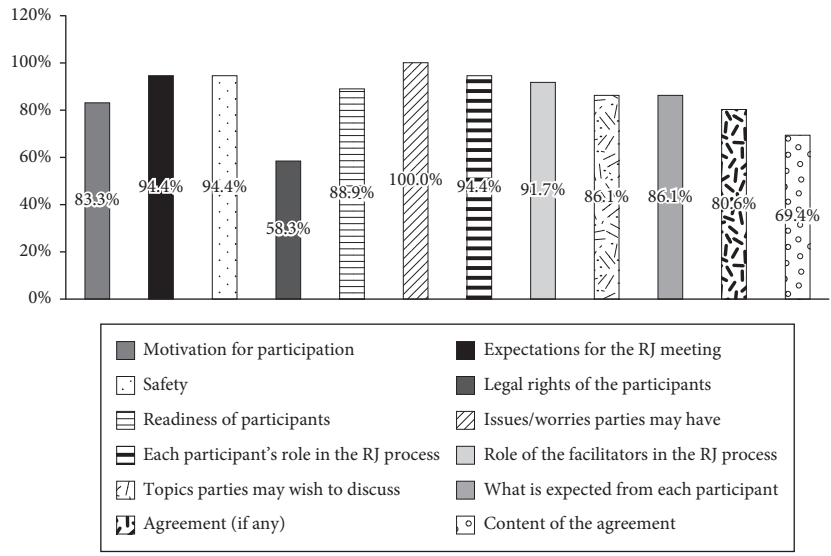

Figure 5.6 Topics covered in the preparation phase

the serious nature of the crimes, it is not less than three months. It may take our clients years to be ready to interact in a constructive manner.'

The questionnaire provided a menu of twelve topics and asked respondents to identify the topics covered in the preparation process from the menu of topics provided. Figure 5.6 below sets out the topics listed and the percentage of respondents who selected each individual topic.

As Figure 5.6 above shows, all respondents indicated that the issues and worries of the parties would be covered in the preparation process, and more than 90 per cent of respondents also selected: expectations for the restorative meeting (94.4 per cent); safety (94.4 per cent); each participant's role in the restorative justice process (94.4 per cent); and the role of the facilitators (91.9 per cent). Ten of the topics listed were selected by over 80 per cent of respondents. A smaller but substantial proportion of respondents selected the content of the agreement (69.4 per cent) and the legal rights of participants (58.3 per cent). Overall, the responses indicate that the preparation process is very wide ranging and generally covers all important topics. One respondent also noted that the preparation process covers the 'worst case scenario' to prepare participants in the event that their expectations are not fulfilled.

4.5 Interaction with other services

Respondents were asked if their restorative justice service interacts with other systems, such as the criminal justice system or child/youth protection services. More

than 90 per cent (91.7 per cent) of respondents gave positive responses to this question. A considerable number of respondents (17) also elaborated on their answer by adding comments which included the following:

> 'All systems that are involved in the clients' lives are in integral part of the problem/solution context such as: The criminal justice system, Department of Human Services (foster care and protective service), foster and biological parents, siblings, relatives, attorneys, and other clinicians or programs involved in the case';
>
> 'In every case there is a complex multi-disciplinary context which must be engaged and worked with'.

4.6 Legislation

Two thirds of respondents indicated that their service operates in a country/region which has legislation for restorative justice. This result must be interpreted with caution as respondents were not evenly spread geographically and included several respondents from a number of specific countries. Respondents were also asked to elaborate on the legislative provision in their country/region.

While some answers noted that legislation provided for restorative justice for all crime types, others noted that the legislation restricted restorative justice to minor crime. In elaborating on the legislation in place in their jurisdiction a number of respondents also pointed to legislation that only referred to juveniles. Interestingly one respondent pointed out that legislation did not cover children under the age of fifteen (the age of criminal responsibility in the relevant country). Two respondents noted that the legislation did not extend to post-incarceration restorative justice. One respondent referred to the EU Directive on Victims' Rights. The answers also highlighted differences in the legislative provisions in various US states.

When asked if legislation allowed restorative justice participants to have access to legal advisers, 60 per cent of respondents answered affirmatively. When asked to provide more information regarding the role of legal advisors in restorative justice in general, the respondents indicated that the role of the legal advisors was somewhat limited. The responses indicate that legal advisors may play a pertinent role in relation to an offender's decision to participate in restorative justice but does not normally actively participate in the restorative process itself, except in relation to written agreements. A sample of the answers provided is set out below:

> '[T]hey can give advice about choosing or not for a mediation. They can e.g. come with their legal advisor, lawyer, to the mediation to have support, but they cannot be represented. We need the parties themselves';

'Victims and offenders can always consult their legal counsellor. We offer victim offender mediation process that run parallel to the criminal procedure. In these cases most parties have less interest in this [legal advice]. . . . In case a written agreement will be made, legal advice will always be sought from legal advisers'.

4.7 Stakeholder involvement in the restorative justice programme

Respondents were asked whether stakeholders from the criminal justice system or child/youth protection services are involved with their restorative justice programme at any point of the process. More than six out of ten (62.5 per cent) respondents indicated that professional stakeholders are involved in their restorative justice work. Respondents were also asked to describe the nature of the interaction between them and the stakeholders in relation to the restorative justice work. The answers provided suggest a variety of approaches rather than a dominant approach that is consistent with the different institutional/legislative/cultural contexts in which respondents were operating and also reflects the different restorative justice models in use. A number of responses pointed to a collaborative inter-agency working relationship:

We are in close contact with social workers, in order to motivate victim, offender and family.

There is a collaborative relationship between all of the stakeholders so that everyone's goals are met.

Others pointed to the use of other stakeholders to provide relevant supports:

If child/youth and his family need any support, then concrete representative can be invited for participating at conferencing.

The use of stakeholders as support persons in the restorative process may vary depending on the case, the age, and vulnerability of the victim and offender, and the restorative justice model adopted. One respondent commented that stakeholders 'are seldom present but we liaise, have stakeholder groups and meet regularly'. Another respondent noted that communication with other stakeholders was dependent on the permission of the parties:

They [stakeholders] will be made aware of the process with permission of key participants, allowed the opportunity to provide information, support and representation should that be desired.

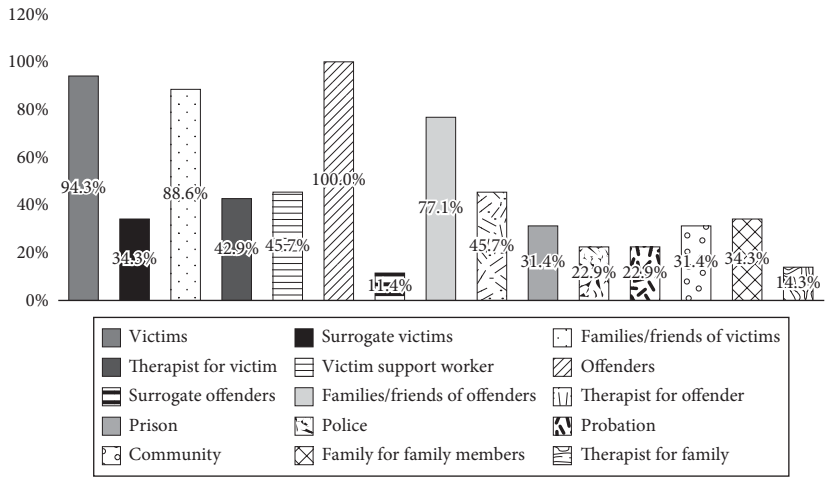

Figure 5.7 Persons who attend restorative justice meetings

The response below suggests that some restorative justice services which operate in parallel with criminal justice may have interaction with criminal justice stakeholders at the time the case is referred to them:

> *Lawyers can be involved in a mediation … and if an agreement is reached it will be delivered to the court after consent of both parties. Apart from that there is no interference by the youth protection services or the judicial authorities.*

4.8 The restorative justice meeting: participants and models

The survey then explored restorative justice meetings. Respondents were asked 'who attends the restorative justice meeting?' and asked to select all relevant persons from a list of fifteen options. Figure 5.7 below presents the survey responses. It was not surprising to find the two most commonly selected categories of persons were offenders (100 per cent) and victims (94.3 per cent).

The survey then went on to ask respondents to identify the type of intervention most frequently implemented from a list of nine interventions. As Figure 5.8 below reveals many respondents opted to select more than one type of intervention. The results point strikingly to the prominence of direct encounters (selected by 86.1 per cent of respondents). The responses indicate that indirect encounters via letter (52.8 per cent) and shuttle dialogue (33.3 per cent) are also commonly implemented. Other restorative justice interventions such as use of video conferencing,

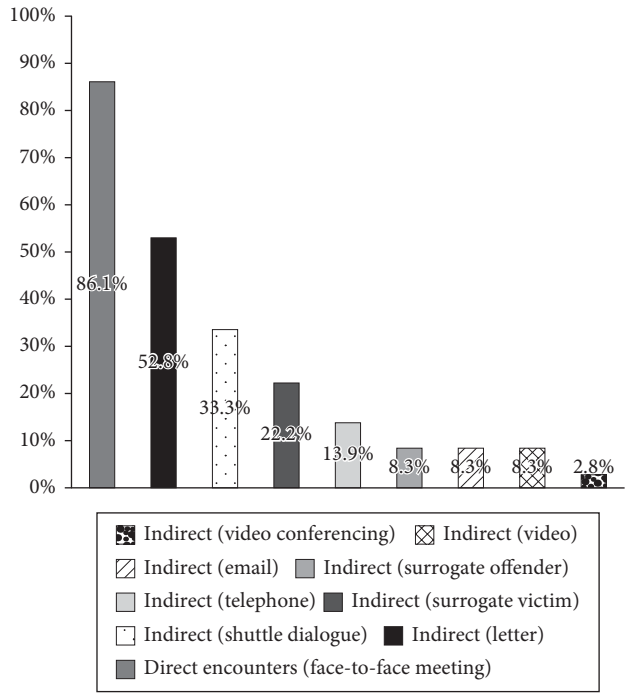

Figure 5.8 Type of intervention most frequently implemented

indirect video, indirect email, use of surrogate offender or surrogate victim or use of telephone appear to be used relatively infrequently.

4.9 Topics discussed at the restorative justice meeting

The topics discussed in the restorative meeting were also explored in the survey. A list of thirteen topics was provided and respondents were asked to select the topics mostly discussed at the meeting from the menu provided. Figure 5.9 below sets out the responses received; for the purposes of clarity only a limited number of data labels are included. Figure 5.9 highlights that the topics discussed at restorative justice meetings are generally very wide-ranging. The topic 'impact of the offence on the victim' is notable; all respondents selected this option.

The issues of apology and forgiveness are often discussed in the literature on restorative justice. It is useful therefore to point out that more than four out of five respondents (82.9 per cent) indicated that the issue of apology is mostly discussed at restorative meetings, while just over half (54.3 per cent) of respondents indicated

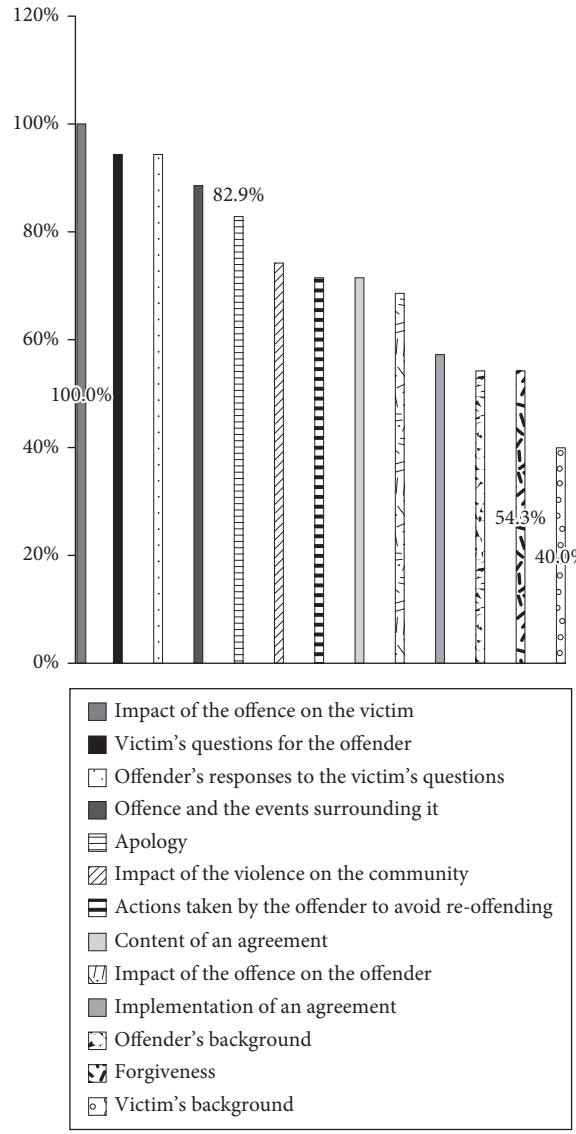

Figure 5.9 Topics mostly discussed in the restorative justice meeting

that forgiveness is a topic mostly discussed at restorative justice meetings. Two respondents appended comments in relation to the topic of forgiveness. The first comment was added by a respondent who indicated that forgiveness is mostly a topic of discussion:

> *[M]ostly is the operative word here. Any or all of these could be part of the discussion. IF FORGIVENESS [emphasis added by respondent] is raised, that discussion is initiated by the participants, and facilitators usually have some sense of what form that will take. Offenders often make significant apologies and amends commitments, to which victims sometimes respond with a statement of forgiveness. These can be highly nuanced, and are by no means coerced compassion.*

The second comment was added by a respondent who did not select forgiveness in response to this question:

> *Please note: Forgiveness is not checked here because we see it as a journey. As such, it underlies our meetings but may never be openly discussed as participants may not be ready for that conversation. Forgiveness is also seen as something which can be both the realm of the once victimized and the one having caused harm. In some cultures, it is the responsibility of the one who caused harm to take the steps to open the forgiveness journey. Too much more to share!*

The survey explored the use of scripts[4] in restorative justice meetings. Just over one third (36.1 per cent) of respondents indicated that a script is used by their restorative justice programme. When asked about the type of script used some respondents referred to specific standardised scripts (two respondents referred to International Institute of Restorative Practice (IIRP)[5] scripts and another referred to Transformative Justice Australia scripts).[6] One respondent described their restorative justice programme script as 'self-developed'. Others described the script used as an outline or simply a list of words. Another noted that the script is specifically tailored for each case.

Respondents were asked to indicate whether one of two facilitators are used in restorative justice meetings. While 60 per cent of respondents indicated two facilitators are used, several comments added by respondents suggest that the number of facilitators used is flexible and can be tailored to suit specific cases.

4.10 Apology and forgiveness

Respondents were asked further questions about apology and forgiveness, given its place in the literature, and were asked to define the role of apology and forgiveness in their restorative justice programme by selecting from a list of five statements

[4] A script usually involves a number of proscribed questions that are to be asked of the parties during the meeting.

[5] IIRP script contains four questions for victims and four questions for offenders.

[6] Transformative justice Australia scripts also involve specific questions used to guide the restorative meeting.

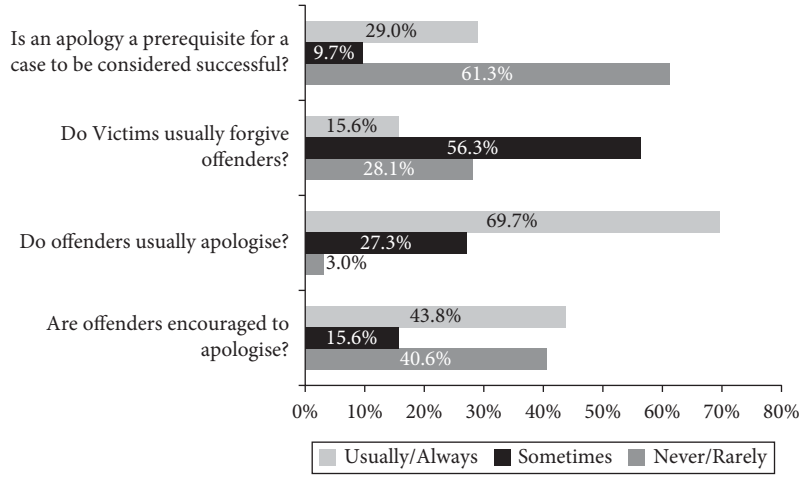

Figure 5.10 What is the role of apology and forgiveness in your service?

and answering as appropriate from five different options (never; rarely; sometimes; usually; always). The results are set out in Figure 5.10 below.

The results suggest that there is divergence in relation to the issue of apology. Almost one in three (29 per cent) respondents answered that apology is 'usually/always' a prerequisite for a case to be considered successful, but more than twice this proportion (61.3 per cent) revealed a very different view and indicated that apology is 'never/rarely' a prerequisite for a case to be considered successful.

A lack of unanimity regarding the issue of apology is also evident in the responses to the question 'are offenders encouraged to apologise'? While just over 40 per cent (40.6 per cent) of respondents answered 'never/rarely' a very similar proportion (43.8 per cent) answered 'usually/always'. Despite these differences more than two thirds of respondents indicated that offenders 'usually/always' apologise and just three per cent of respondents indicated that offenders 'rarely/never' apologise.

In response to the question 'do victims usually forgive offenders?' more than half (56.3 per cent) of respondents answered 'sometimes'. While more than a quarter (28.1 per cent) of respondents indicated that victims rarely/never forgive offenders almost one in six (15.6 per cent) respondents indicated that victims usually/always forgive offenders.

A number of respondents added comments which emphasised the agency of the parties in the restorative justice process in determining these issues:

> *[O]ur facilitators do not provide direction to participants about apology and forgiveness, the participants direct the process which may or may not include these two things.*

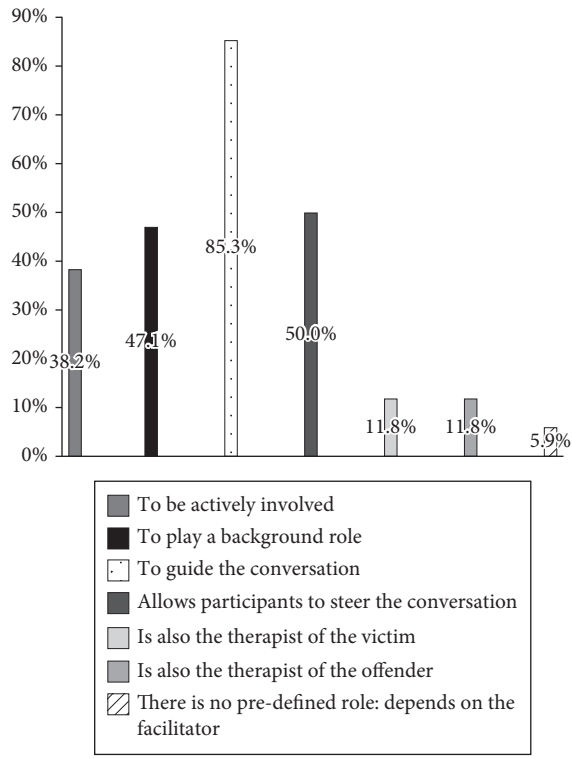

Figure 5.11 Role of the facilitator

> *Offenders are supported to apologise rather than encouraged and they are supported to do this only after a fully understanding of the impact of their behaviours on the victim/others.*

Another respondent commented that the issue of forgiveness is complex and sensitive and contended that apology and forgiveness should ever be used as measures of the outcome of the restorative justice process.

4.11 The role of the facilitator

The next topic explored in the survey was the role of the facilitator. Respondents were asked to pick from a list of seven descriptions of the role of the restorative justice facilitator and tick all that they considered appropriate. Figure 5.11 below sets out the responses received.

Several insightful comments regarding the role of the facilitator were also added by respondents. One respondent described the role of the facilitator in the following terms:

> *Facilitators are actively LISTENING, and vitally PRESENT, but they do not direct the conversation, beyond ensuring that the stated agenda for the parties is covered. The facilitator MAY have played a role as therapist for either or both parties, but this is not axiomatic, and as caseloads have increased, is less frequent. Our preference is for the parties to have their need for prior therapeutic work done in the context of other professionals [Emphasis added by respondent].*

Another noted:

> *We focus upon dialogue driven models where the mediators/facilitators role is to enable the conversation and encounter using either a mediation or family group meeting model.*

Several commented that the role of the facilitator depended on the case and the needs of the parties and therefore was variable rather than fixed.

The training, experience, and education background of the restorative justice facilitators was addressed in the questionnaire by providing respondents with a menu of eight attributes. The two attributes most commonly identified by respondents were 'is a professional facilitator/mediator' (79.4 per cent) and 'has specific training in the area of sexual violence' (61.8 per cent). It is interesting to note that fewer respondents (41.2 per cent) identified specific *experience* in the area of sexual violence as a necessary attribute of a restorative justice facilitator engaging with cases of sexual violence. The support in this survey for professional training to facilitate cases of sexual violence is consistent with the relatively low level of support (20.6 per cent) for facilitators as community volunteers. In chapter 8 we discuss best practice and the place for specific training for restorative justice practitioners wishing to facilitate sexual violence cases.

Almost two thirds (63.6 per cent) of respondents indicated that a report is written in respect of each case at the end of the process and there is a role for the facilitator in report writing. In describing the purpose of the report eight respondents noted that it provided a record for both the court and the internal records of the restorative justice service. One respondent noted that the report is only provided to the court when it is requested. Two respondents also noted that they never report to the court. Several other actors/agencies were also noted as possible recipients of the report, including child protection services; case managers of offenders; schools; corrections; prosecutors; probation services; parole boards; and social/municipal authorities. This should only be done with the

agreement of the key parties. Four respondents noted that the report provides a record for the parties involved. It was also noted that the records facilitate the inspection/evaluation of the restorative justice service itself and a review of records can provide insights which can inform training and lead to improved service delivery.

4.12 Therapy

A series of questions explored the degree to which therapy interconnects with restorative justice in cases of sexual violence. Respondents were asked whether it is important that victims of sexual violence who participate in restorative justice are engaged in therapy. The same question was also posed in relation to perpetrators. The answers provided to both of these questions indicate that in general respondents regard therapy as being of more importance for offenders (51.5 per cent) in relation to their participation in restorative justice than for victims (29.4 per cent). One respondent commented in relation to offenders:

> *Given the level of violence with which our programme works, clients need to have gained not only the capacity to acknowledge harm done but understand how their lives/choices evolved to allow for this kind of behaviour.*

In a related question 26.5 per cent of respondents said it is *not* important for victims of sexual violence who participate in restorative justice to be engaged in therapy, but only 15.2 per cent of respondents said it is *not* important for perpetrators of sexual crime who participate in restorative justice to be engaged in therapy. A significant proportion of respondents answered 'depends' in respect of both victims and offenders indicating that the importance of therapy can only be decided in reference to the needs and capabilities of specific persons.

Respondents were asked to define the role of therapy (either provided directly or by another organisation), for both victims and offenders in their restorative justice services. Over two thirds of respondents encourage therapy before the actual restorative justice meeting for both victims (72.7 per cent) and offenders (68.2 per cent), whereas a considerably smaller proportion indicated that therapy was a pre-requisite for participation for either victims (27.8 per cent) or offenders (44.4 per cent). Half of respondents saw therapists as carrying out risk assessments of victims for restorative justice while 65 per cent of respondents saw therapists as carrying out risk assessment of offenders. Respondents also strongly agreed that therapists should or do play a role in following up the restorative encounter with both offenders (85.7 per cent) and victims (76.2 per cent).

4.13 Agreements

Respondents were asked about the outcome of the restorative justice interventions and in particular whether written agreements are possible or expected outcomes. Over a third (34.4 per cent) of respondents indicated that written agreements are encouraged, and almost half (46.9 per cent) said that written agreements are made only if it appears to be important for the parties. It should be noted that these answers were not mutually exclusive as respondents could select both. One respondent noted that written agreements never take place when the restorative justice work is running parallel to criminal proceedings. Another also noted that written agreements are not usual in crimes of severe violence. In a later question just over a quarter (26.5 per cent) of respondents indicated that agreements reached are legally binding.

4.14 Case completion, follow-up, and monitoring

The next issue explored in the survey was the measurement of case completion. Respondents were provided with four measures of case completion and asked to indicate all those used by their restorative justice service as a measure of case completion. Figure 5.12 below sets out the responses received.

The two measures of case completion most commonly selected by respondents were victim satisfaction with the process (79.3 per cent) and offender satisfaction with the process (69.0 per cent). The results also indicate that the parties coming to an agreement (37.9 per cent) and the implementation of an agreement (31.0 per cent) are used by a minority of respondents as measures of case completion.

Respondents were asked whether their restorative justice service provides follow-up and monitoring for participants. Only a very small proportion (5.9 per cent) of respondents indicated that no follow-up or monitoring is provided. Slightly more than half (52.9 per cent) of respondents provide follow-up and monitoring in all cases and a further 40 per cent (41.2 per cent) provide follow-up and monitoring selectively. The comments added by a number of respondents provided us with further details regarding the selective use of follow-up or monitoring. Two respondents noted that follow-up only takes place if there is an agreement and it is only to check if there has been compliance with the agreement. Another noted they provide limited follow-up when there is no external support available. Another respondent described the follow-up and monitoring as 'very limited' adding 'parties may always come back when they want to, no active follow-up from our initiative. This is a lack in our system I think?'.

Approximately three quarters of respondents that do provide follow-up and monitoring indicated that the monitoring is carried out by staff within the

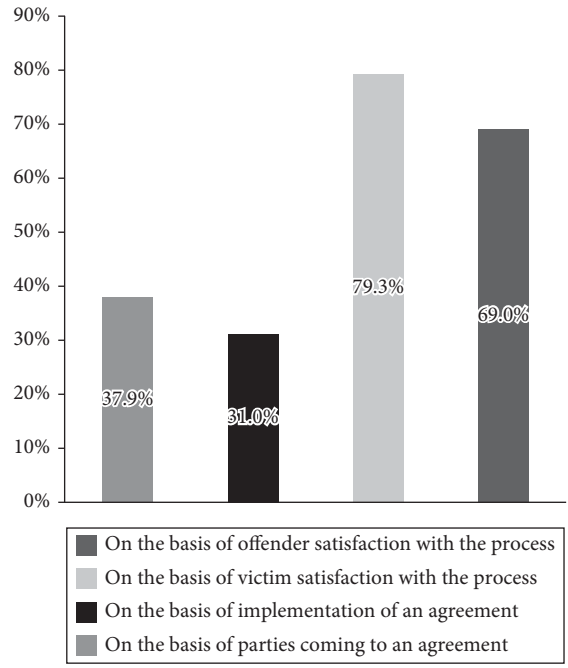

Figure 5.12 Basis used to measure case completion

programme (monitoring of offenders (78.8 per cent); monitoring of victims (72.7 per cent)) while around a quarter of respondents said that other professionals carry out the follow-up and monitoring. Some respondents referred to victim support agencies as services which provide follow-up for victims. One respondent commented:

> *Mediators make sure that parties will have support persons that can provide after care. We believe that support and after care coming from the network of the victim or offender is better than coming from the mediator.*

Two respondents also referred to offender monitoring by support agencies and probation services.

4.15 Safeguards for the restorative justice meeting

When asked if their restorative justice service has safeguards in place before and during the restorative justice meeting all respondents said their restorative justice services have safeguards in place.

Respondents identified physical safeguards in place by selecting all appropriate options from a menu of five options. The responses received are set out in Figure 5.13 below.

The responses point to the use of time out options as the most common form of physical safeguard in use by our respondents (82.4 per cent). Neutral place of meeting (76.5 per cent) and carefully planned seating arrangements (73.5 per cent) were also frequently identified as physical safety features in place. It was also interesting to note that the mode of restorative justice intervention may reflect safety considerations too as 41.2 per cent of respondents identified the use of indirect restorative justice as a form of physical safeguard.

Respondents were also provided with a menu of ten emotional safeguards and asked to identify all those in place in their restorative justice programme. The responses received are set out in Figure 5.14 below. More than 80 per cent of respondents identified two emotional safeguards (establishing the conditions of the meeting in advance (85.3 per cent) and careful preparation process (82.4 per cent)) as being in place in their restorative justice service. Other emotional safeguards frequently identified included presence of family/friends/others (79.4 per

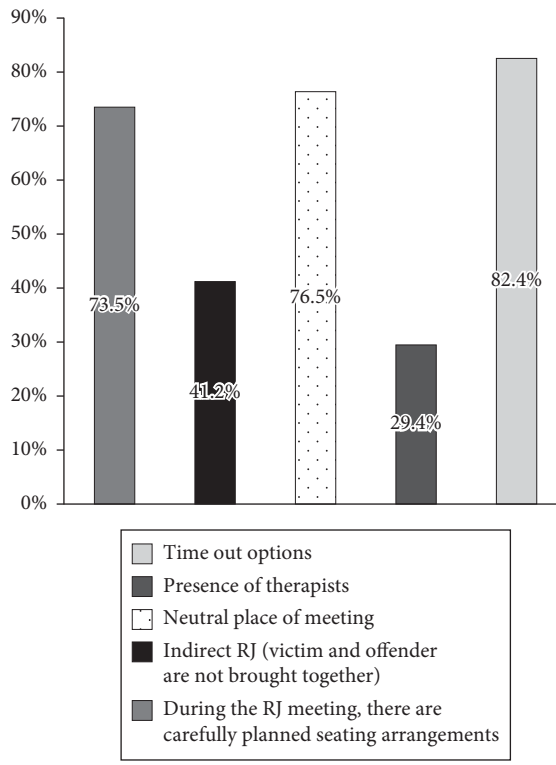

Figure 5.13 Physical safeguards

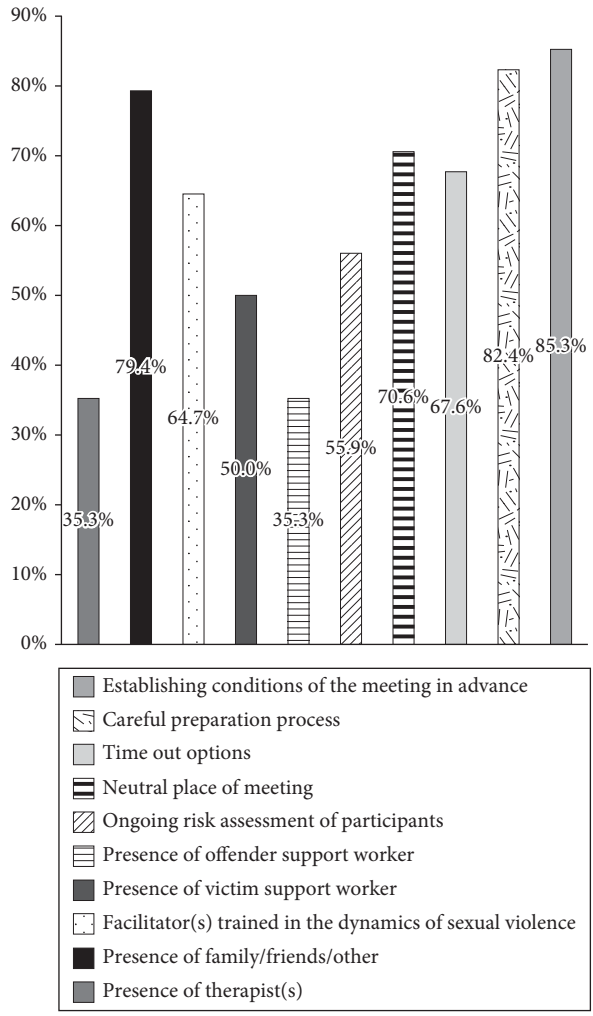

Figure 5.14 Emotional safeguards

cent); neutral place of meeting (70.6 per cent), time out options (67.6 per cent) and having the process facilitated by facilitators who were trained in the dynamics of sexual violence (64.7 per cent).

A third and final question on safeguards related to legal (confidentiality) and procedural safeguards. Less than ten per cent (9.4 per cent) of respondents indicated that their restorative justice service has no confidentiality safeguards in place. More than half of respondents (53.1 per cent) pointed to the existence of oral agreements regarding confidentiality within their services. Just under a third (31.3 per cent) of respondents noted that legislation is in place regarding the binding nature of the confidentiality of the restorative justice processes. The same proportion (31.3 per

cent) indicated that agreements regarding confidentiality are non-binding. It would seem that the remaining respondents (37.4 per cent) consider agreements regarding the confidentiality of restorative justice processes as being binding, despite the absence of legal provisions. One respondent suggested that the arrangements reached regarding confidentiality may not be enforceable but are rather symbolic.

A number of respondents elaborated on their answers regarding physical, emotional and procedural safeguards by adding additional comments. One noted that the safeguards in place would depend on the wishes of the parties. Several pointed out that the venue for the restorative justice meeting was not always a neutral place and could be a prison or a police station. One respondent also noted that while therapists were not always present they were always aware of the restorative justice meeting and on hand to offer support.

4.16 Outcomes and impact: victims

The questionnaire asked respondents to indicate whether their service assesses outcomes of restorative justice for victims and offenders. More than three quarters of respondents (77.4 per cent) answered that their service assesses outcomes for both victims and offenders.

Respondents were asked to indicate what they considered to be the main outcomes for victims. Eight statements set out outcomes for victims and respondents were asked to assess how frequently these outcomes were experienced by victims by choosing from the following options: never; rarely; sometimes; usually; always; or don't know. Responses regarding outcomes for victims are set out in Figure 5.15 below. For the purposes of clarity data labels have only been added to the category 'usually/always'.

Figure 5.15 illustrates that a preponderance of respondents consider that victims are 'usually/always' satisfied with preparation (93.1 per cent), satisfied with the restorative justice meeting (93.1 per cent), report satisfaction with procedural fairness (93.1 per cent) and are satisfied with the outcome of the restorative justice meeting (82.8 per cent). Almost three quarters of respondents (72.4 per cent) also indicated that victims 'usually/always' feel heard and recognised by the offender. The statement regarding 'victim satisfaction with follow-up' was positively supported by almost two thirds of respondents (65.5 per cent indicated that victims are 'usually/always' satisfied with follow-up) but also attracted a considerable proportion of 'don't know' answers. Almost a quarter of respondents indicated that they did not know if victims were satisfied with the follow-up. As already highlighted more than 40 per cent of respondents indicated that follow-up is carried out selectively and a small proportion (5.9 per cent) of respondents also indicated that their restorative justice programme does not carry out any follow-up. Therefore the relatively high proportion of 'don't know' answers is not surprising.

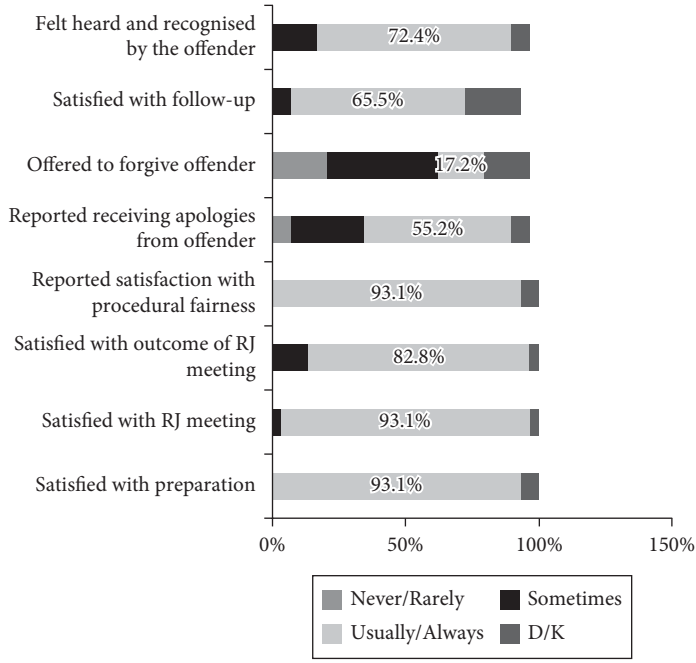

Figure 5.15 In your opinion what are the main outcomes for victims during the restorative justice process?

Slightly more than half of respondents (55.2 per cent) indicated that victims reported receiving apologies from offenders 'usually/always' and a further 28.6 per cent answered 'sometimes'. The statement that was least positively endorsed by respondents related to the victim's offer of forgiveness to the offender. Only 17.2 per cent of respondents answered 'usually/always' to this statement while 21.4 per cent answered 'never/rarely'. The most common response to this statement was 'sometimes' (42.9 per cent). The statement also attracted a considerable proportion of 'don't know' answers (17.9 per cent). These responses suggest that it is not standard for victims of sexual violence who engage in restorative justice to offer forgiveness to offenders during the restorative justice process.

The next issue explored in the survey was the impact of the restorative justice process on victims of sexual violence. The survey presented a list of twelve impacts that victims might experience as a result of the restorative justice process. Respondents were asked to indicate how frequently they thought victims experienced the impacts listed. The responses received are set out in Table 5.4 below.

The impact most positively endorsed by respondents was 'demonstrated improvements in emotional well-being'; three quarters of respondents considered that victims usually/always demonstrated improvements in emotional well-being.

Table 5.4 In your opinion what is the impact of the restorative justice process for victims?

Impact on Victims	Never/ Rarely %	Sometimes %	Usually/ Always %	D/K %
Demonstrated improvements in emotional well-being	0.0	14.3	75.0	10.7
Reported experiencing healing	0.0	17.9	64.3	17.9
Demonstrated improvements in post-traumatic stress	0.0	21.4	53.6	25.0
Felt that the offender was truly sorry	3.6	35.7	53.6	7.1
Felt that justice was served by virtue of participating in restorative justice	0.0	18.5	55.6	25.9
Would recommend restorative justice to others	0.0	22.2	55.6	22.2
Reported experiencing closure	3.6	35.7	46.4	14.3
Reported improved relationships with family and friends	0.0	37.0	40.7	22.2
Felt empathy for offender	15.4	34.6	34.6	15.4
Reported improved relationships within the community	7.4	25.9	29.6	37.0
Did not think the offender would re-offend	7.4	33.3	22.2	37.0
Felt that restorative justice experience touched them on a spiritual level	19.2	26.9	15.4	38.5

More than half of respondents also agreed that victims usually/always reported experiencing healing (64.3 per cent); would recommend restorative justice to others (55.6 per cent); felt that justice was served by virtue of participating in restorative justice (55.6 per cent); felt that the offender was truly sorry (53.6 per cent); and demonstrated improvements in post-traumatic stress (53.6 per cent).

As some of the impacts listed could not be assessed immediately, and the survey established that a considerable proportion of respondent restorative justice services do not provide follow-up in all cases, it was not surprising that the question on the impact of the restorative justice process on victims yielded more 'don't know' answers than the question on the outcome of the restorative justice process. This is certainly an area that warrants more research. One respondent commented that assessing the impact of the restorative justice process on victims 'requires a type of follow-up this programme doesn't provide' and another reflected that 'we have no idea of the effect in the long-term'. These comments highlight the absence of longitudinal evaluations of restorative justice programmes.

4.17 Outcomes and impact: offenders

After exploring respondents' views regarding the outcomes and impacts of the restorative justice process on victims the survey went on to consider the same issues in relation to offenders. Respondents were provided with a menu of eight possible outcomes for offenders and asked to assess the likely frequency of each outcome. Figure 5.16 below highlights clearly that a large majority (between 96.4 per cent and 71.4 per cent) of respondents considered that seven of the eight outcomes listed are usually/always experienced by offenders. For the purposes of clarity data labels have only been added to 'usually/always/answers in Figure 5.16.

The responses received in relation to one outcome ('on average offenders were offered forgiveness') were strikingly different from those received in relation to the other outcomes listed. Only 14.8 per cent of respondents thought that offenders were usually/always offered forgiveness while more than a third (37 per cent) of respondents considered that offenders are rarely/never offered forgiveness in the restorative justice process. It is worth noting that these responses are roughly consistent with the views expressed by respondents in relation to forgiveness as an outcome for victims (see Figure 5.15 above: 17.2 per cent of

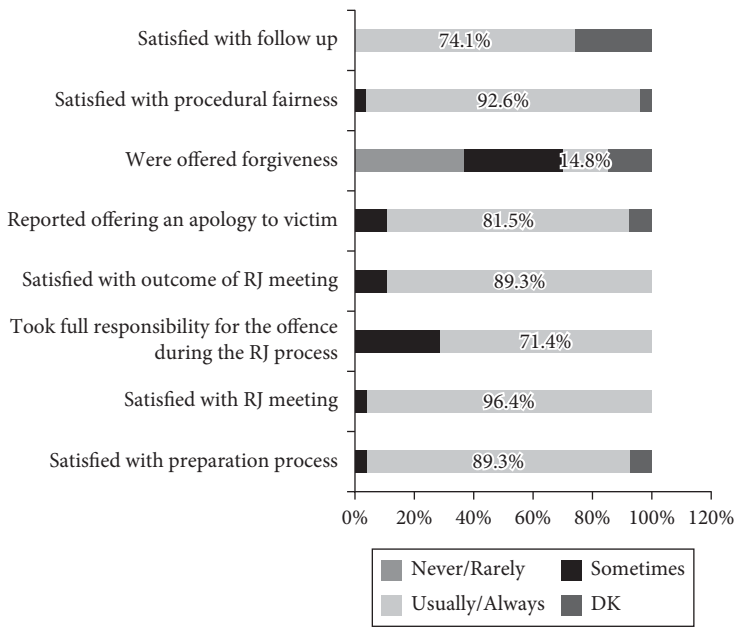

Figure 5.16 In your opinion what are the main outcomes for offenders from the restorative justice process?

respondents indicated that victims 'usually/always' offer forgiveness to offenders and 21.4 per cent of respondents considered that victims 'never/rarely' offered forgiveness to offenders).

Respondents were provided with a list of twelve potential impacts on offenders and asked to assess how frequently sex offenders who engage in their restorative justice process experience each impact. Respondents could answer never; rarely; sometimes; usually; always; or don't know. Respondents' views on the impact of the restorative justice process on offenders are set out in Table 5.5 below.

Table 5.5 show that more than two thirds of respondents considered that offenders usually/always experience the following impacts as a result of the restorative justice process; improved emotional well-being (69.2 per cent); felt truly sorry (68.0 per cent); felt empathy for the victim (68.0 per cent); and demonstrated remorse and regret for what happened (91.3 per cent). A majority

Table 5.5 In your opinion what is the impact of the restorative justice process for offenders?

Impact on Offender	Never/ Rarely %	Some times %	Usually /Always %	D/K %
Emotional well-being improved	0.0	23.1	69.2	7.7
Experienced healing	0.0	28.0	56.0	16.0
Reported experiencing closure	4.2	41.7	41.7	12.5
Felt truly sorry	0.0	24.0	68.0	8.0
Felt empathy for the victim	0.0	32.0	68.0	0.0
Demonstrated remorse and regret for what happened	0.0	8.7	91.3	0.0
Felt that the restorative justice experience touched them on a spiritual level	12.0	40.0	20.0	28.0
Reported improved relationships with family and friends	0.0	44.0	36.0	20.0
Reported improved relationships within the community	4.2	29.2	37.5	29.2
Felt that justice was served by virtue of participating in restorative justice	0.0	16.0	64.0	20.0
Said they would recommend restorative justice to others	4.2	20.8	58.3	16.7
Did not think they would re-offend	0.0	12.5	62.5	25.0

also felt the offenders usually/always experienced healing (56.0 per cent) and considered that offenders would recommend restorative justice to others (58.3 per cent). Interestingly the question on the impact of the restorative justice process on offenders attracted fewer 'don't know' answers than the same question in relation to victims and this may suggest offenders have more follow-up than victims following restorative justice meetings, particularly if they are in therapy.

Eleven of the impacts identified were the same for both victims and offenders. A comparison of the results for victims and offenders using the two key answer categories ('usually/always' and 'sometimes') is presented in Table 5.6 below.

Table 5.6 reveals that overall, respondents tended to assess the impacts of the restorative justice process on victims more positively and with less equivocation than they did for offenders. The statement on re-offending produced the biggest difference between the proportion of 'usually/always' answers for the two questions;

Table 5.6 Comparison of reported impacts of restorative justice process on offenders and victims

Impact	Offender		Victim	
	Sometimes %	Usually/ Always %	Sometimes %	Usually Always %
Emotional well-being improved	23.1	69.2	14.3	75.0
Experienced healing	28.0	56.0	17.9	64.3
Reported experiencing closure	41.7	41.7	35.7	46.4
Felt truly sorry	24.0	68.0	35.7	53.6
Felt empathy for the offender/victim	32.0	68.0	34.6	34.6
Felt that the restorative justice experience touched them on a spiritual level	40.0	20.0	26.9	15.4
Reported improved relationships with family and friends	44.0	36.0	37.0	40.7
Reported improved relationships within the community	29.2	37.5	25.9	29.6
Felt that justice was served by virtue of participating in restorative justice	16.0	64.0	18.5	55.6
Said they would recommend restorative justice to others	20.8	58.3	22.2	55.6
Did not think they would re-offend	12.5	62.5	34.6	34.6

62.5 per cent of respondents considered that offenders usually/always thought they would not re-offend after the restorative justice process whereas just 34.6 per cent of respondents considered that victims usually/always thought offenders would not re-offend.

When the two key categories of answers (sometimes and usually/always) are combined we can see that only minor differences remain between the answers provided for most of the impacts listed. Notable differences remain in relation to the issue of empathy and the impact of the restorative justice process at a spiritual level. The responses provided suggest that offenders are more likely to report feeling empathy for victims than victims are for offenders. They also suggest that offenders are more likely than victims to report that the restorative justice experience touched them on a spiritual level.

4.18 Outcomes and impact: community

Only a quarter (25.0 per cent) of respondents reported that their restorative justice programme assesses outcomes for the community. In contrast, and as noted earlier, more than three quarters of respondents reported that their restorative justice programme assessed outcomes for both offenders and victims. A majority of respondents consider that the community is usually/always satisfied with the various aspects of the restorative justice process identified (procedural fairness, follow-up, restorative justice meeting, and preparation). However a considerable proportion (between 29.6 per cent and 38.6 per cent) of respondents was unable to assess outcomes of the restorative justice process for the community. This is consistent with the general absence of robust and comprehensive evaluations of restorative justice programmes noted earlier.

A considerable proportion of respondents (between 50 per cent and 25 per cent) indicated that they were unable to assess the impact of the restorative justice on the community; this is consistent with the responses regarding community outcomes analysed above. Moreover, respondents who did provide an assessment of the impact of the restorative justice process on the community were more equivocal in their answers than they were when assessing community outcomes. A majority of respondents answered that community members of victims and offenders would recommend restorative justice to others (62.5 per cent) and a majority of respondents believed that community members would agree that justice was served by participation in restorative justice (54.2 per cent). Only one in five (20.8 per cent) respondents considered that the community usually/always thinks the offender will re-offend after the restorative justice process and a very similar proportion (19.2 per cent) of respondents indicated that the community usually/always thinks that the restorative justice process had an impact at the spiritual level.

4.19 Outcomes and impact: judicial decision-making

The survey listed five possible effects on judicial decision-making as a result of victim-offender participation in the restorative justice process. Respondents were asked to select all those they considered could be attributed to their restorative justice service. The effects listed were as follows: (1) when the restorative justice case was referred back to court, restorative justice had an effect on judicial decision-making; (2) the judge has taken offender participation in restorative justice into account when sentencing the offender; (3) the judge has taken the victim's experience of restorative justice into account when sentencing the offender; (4) victim-offender participation in our programme has limited effect on judicial decision-making; (5) victim-offender participation in our programme has no effect on judicial decision-making. It could be considered that some of these answers are mutually exclusive and that for example respondents who indicated that the judge has taken the victim's experience of restorative justice into account when sentencing the offender would not also indicate that victim-offender participation has no effect on decision-making. However, some respondents selected all five options provided. It is difficult to interpret these answers. It may be that respondents wished to indicate that the effect on sentencing is variable and dependent on the presiding judge. It is also possible that as this question came towards the end of a very long survey that some respondents did not read the question and answers carefully. We therefore suggest that the results, which are set out in Figure 5.17 below, should be interpreted with some caution.

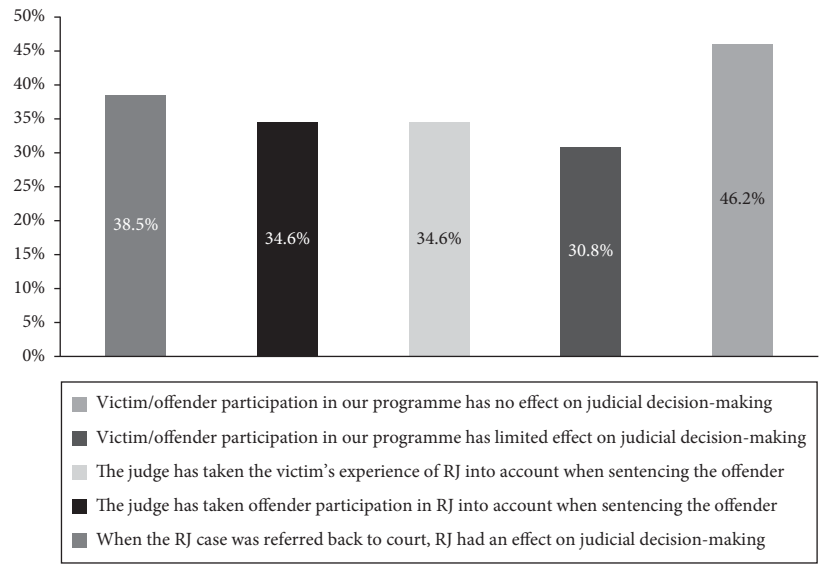

Figure 5.17 Effect of victim-offender participation in the restorative justice process on judicial decision-making

A third (34.8 per cent) of respondents reported that they believed the victim's experience of the restorative justice process is taken into account in sentencing offenders and the same proportion also considered that the offender's participation in the restorative justice process is taken into account in sentencing. More than a third of respondents (38.5 per cent) also considered that judicial decision-making is affected when the restorative justice case is referred back to court. However, just over one in three respondents (30.8 per cent) considered that it has a limited effect on judicial decision-making and almost half of respondents (46.2 per cent) indicated that victim-offender participation in the restorative justice programme has no effect on judicial decision-making. Three respondents commented that their restorative justice programmes only deal with cases of sexual violence post-conviction.

4.20 Outcomes and impact: re-offending

The survey went on to consider the measurement of re-offending rates following participation in restorative justice. Just over a third of respondents indicated that they measure re-offending rates generally (37.9 per cent) and a similar but slightly smaller proportion (33.3 per cent) measure re-offending rates in cases of sexual violence. One respondent also commented that re-offending rates are measured: 'for as long as we are able to have contact with our current and former clients'. When asked to provide estimates of re-offending rates most respondents either declined to answer or said they could not answer. However, respondents provided a number of insightful comments on re-offending which are set out below:

> *I am aware of only a few over twenty seven years; however, offences MAY have been committed which, like many, never came to the attention of the authorities or resulted in new charges and new sentences. (To believe otherwise would likely prove to be quite naïve).*
>
> *May be strange to say but preventing re-offending is not the aim of mediation. It is often one of the themes that victim and offender want to talk about, so we give them the opportunity.*
>
> *Might be a happy by-product of our practice but is not the primary focus.*

4.21 Achieving objectives and challenges

The final two questions in this section of the survey asked respondents to reflect and comment on how their restorative justice interventions deal with cases of sexual violence. Respondents were asked if they had a view on whether their

restorative justice service is achieving its objectives and to identify specific challenges in this regard.

Comments that focused mainly on the success of the restorative justice service included the following:

> 'There is no brief answer to this question. We have overcome enormous obstacles over time. We now enjoy the respect of most of the key actors in the victim service arena, who refer to us regularly, and more recent scholarship is suggesting that we have been empowering survivors in the ways they have sought for many years';
>
> 'Research findings (yet to be published) indicate high levels of success in meeting the stated unmet justice needs of victims, offenders and the community'.

Other comments focused mainly on the challenges faced by the programmes:

> *It has been a challenge to have the victim to participate in the process because we haven't had this kind of possibility for them before. So we have had to give information about this possibility for the public ([name of country] citizens) and in addition we have had to make clear that we are objective and not "postmen" for the prisoners.*
>
> *The largest challenge is the judicial perception of "Justice" and their ownership of all processes previously.*
>
> *We have encountered a recurring problem of sourcing sufficient funding to enable the work to continue. This represents the fragmented implantation of restorative justice in England and Wales and the reluctance to offer restorative justice in cases of a sensitive and complex nature.*

The final question asked respondents if they had any additional comments on restorative justice interventions in cases of sexual violence. As in the previous question some respondents focused on positive aspects while others focused more on difficulties and challenges.

The comment set out below focused on the potential for restorative justice in cases of sexual violence to yield positive outcomes particularly in relation to intrafamilial sexual violence:

> *Restorative justice in the HSB [harmful sexual behaviour] context has the enormous capacity to assist in the support to offender desistance, it works in a complimentary way to models of intervention such as 'The Good Lives Model' and provides the most sensitive and effective means of articulating the intense sense of shame associated with HSB offences. In terms of victim benefits it can assist in the articulation of a victim to survivor narrative, enable blame to be located appropriately, assist in victim safety planning, enable questions to be directed to the offender and hopefully facilitate healing. In familial terms it's often the only means by which the collective*

harm can be considered and the family empowered to address the future without being trapped in denial or minimisation.

Comments which pointed to challenges included:

Each case MUST [emphasis added by respondent] be viewed individually, there are cases where restorative justice would be dangerous, counter- productive but also cases where positive outcomes are very possible.

I hope for the future that we can discuss openly with therapists of victims and offenders of sexual abuse about possibilities and risks, that we can work better together on a multidisciplinary way. Now it's all very fragmented, and with distrust.

The final comment we note endorses restorative justice in cases of sexual violence but acknowledges a knowledge deficit in this area:

I believe it is an area that requires more research and learning for all involved. But I would fully support the development of restorative justice in this area.

5. Alternative/quasi restorative justice practices in cases of sexual violence: survey findings

Respondents who completed section three of the survey are involved in practices that fitted within the core values and principles of restorative justice but were not engaged in fully restorative justice work. Fifty per cent of respondents completed this section of the survey. In evaluating the results of this section of the survey it should be borne in mind that alternative/quasi restorative justice practices cover a very broad spectrum of practices and adopts a very varied range of approaches and modes of intervention in cases of sexual violence. Many alternative/quasi restorative justice practices do not directly involve victims and this was reflected in the generally lower item response rate for questions relating to victims compared to questions relating to offenders. For these reasons many aspects of the survey data in this part of the survey were more related to therapeutic work than to restorative justice per se and thus only those aspects of the respondent answers that we feel are of interest in relation to restorative justice are included in this next part of the chapter.

5.1 Type of intervention

Respondents were provided with a list of three types of interventions that forms part of their alternative/quasi restorative justice practice and asked to select all

those that they considered best described their restorative interventions. The three types of interventions named were psychological/therapeutic, social and judicial. Many respondents considered that their interventions could be described as being more than one of the types listed. Very similar proportions of respondents described their interventions as psychological/therapeutic (63.3 per cent) or social (60.0 per cent). The following description was provided by one respondent in respect of their alternative/quasi restorative justice practice, which they described as psychological/therapeutic:

> *Individual and group therapy for adult victims of child sexual abuse. Treatment programme for sex offenders. Advocacy programme for victims. Restorative conferencing for selected clients and their families.*

An alternative/quasi restorative justice practices oriented towards social intervention was described as follows:

> *We provide the social, and rely on professional services for the other interventions.*

Respondents were least likely to describe their programme as a judicial type of intervention (selected by 46.7 per cent of respondents).

A respondent who selected all three types of interventions described their alternative/quasi restorative justice practice as follows:

> *The psychological treatment of offenders is individual and in group. We incorporate the family. Regarding the social aspect, the treatment involves the offender, their families and their communities. Regarding the judicial aspect, we work with the prosecution office; the offender has to accomplish the measure or sanction oriented to avoid re-offending.*

The descriptions provided of the issues addressed by the alternative/quasi restorative justice services revealed considerable variation in their orientation. Some services were primarily focused on victims:

> *We focus on promoting the expression of feelings and emotions of the victims. Our beneficiaries are mostly indigenous adolescents who have difficulties verbalizing what they feel and what they think. Our work seeks to promote in them processing and verbalization of their emotions.*
>
> *. . . help the child to deal with the feelings and thoughts connected with the abuse, the reactions in their surroundings, with guilt and shame, with post traumatic symptoms plus disturbed relations etc.*

Other respondents described services that were primarily offender oriented:

Each circle is tailored to the individual offender's needs. Typically we address housing, employment, insurance/health care, education, transportation, support groups, treatment (chemical or sex offender), reconnecting with family/friends, parenting classes, writing an apology letter to the victim(s), paying restitution, etc.

Characteristics of the offender's problems, risk of violence, absence of empathy towards the victim, denial of responsibility of the offender … In short, the underlying issue is the ability of the offender to re-join or reintegrate into the community.

Others described their service as contributing to the well-being of both victims and offenders:

Help the victim avoid victimization, reduce health problems, help the victim with a good functioning in her everyday life. Help the offender take responsibility for his acts and through this be motivated for starting rehabilitation work. Integration in the local community, get treatment for the problems causing the offences he has done.

5.2 Stakeholder involvement

As already noted alternative quasi restorative justice practice is an umbrella term which we use to cover a very wide spectrum of practices and interventions that subscribe to (some of) the values and principles of restorative justice but are not fully restorative justice interventions. We were therefore keen to know who was involved in quasi restorative practices and how.

The survey provided a list of fifteen different categories of stakeholders, and respondents were asked to identify all those involved or those who can be involved in their service. The involvement of stakeholders is likely to be principally a function of the type of work undertaken by the service. In addition involvement of stakeholders may vary and be dependent on the wishes of the parties involved in individual cases. Perhaps not surprisingly the two categories most frequently identified were offenders (91.2 per cent) and victims (76.5 per cent). Two thirds of respondents (67.6 per cent) indicated that families/friends of victims and therapists for offenders are involved in their restorative work. Families/friends of offenders are also commonly involved (64.7 per cent) although therapists for victims are involved somewhat less frequently (50.04 per cent).

A very large majority of respondents (85.3 per cent) indicated that their service interacts with other systems such as the criminal justice system and child/youth protection services. Respondents indicated that they collaborate with mental health services (62.1 per cent), with probation (58.6 per cent); police (55.2 per cent); community organisation (55.2 per cent) and victim support organisations (51.7 per cent). Most of the descriptions provided suggest that in general

inter-agency interaction and collaboration is integral to the work of services with victims and offenders of sexual crime. It is therefore not surprising to see that respondents in this part of the survey identified a wide range of stakeholders with whom they collaborate. The extent of inter-agency collaboration was further probed with a question on involvement of stakeholders at various stages of the particular restorative justice practices. The responses indicate that stakeholder involvement is most common before the restorative justice focused work (69.2 per cent), although a majority of respondents also pointed to stakeholder involvement during (57.1 per cent) and after (58.3 per cent) the restorative work, depending on the wishes of the parties involved.

5.3 The role of the facilitator in alternative/quasi restorative justice services

Respondents were invited to provide a brief description of the professional facilitator's role in alternative/quasi restorative justice services. The descriptions provided varied considerably and reflected the diversity in the types of interventions employed.

To further probe the role of facilitators in alternative quasi restorative justice practices the survey provided a list of seven statements which might describe the skills, experience and training of mediators/facilitators. Respondents were asked 'what is the training, selection criteria, experience and educational background of professionals/mediators/facilitators?' and instructed that they could pick more than one answer from the list provided. The results are set out in Figure 5.18 below.

The attribute most commonly selected by respondents as necessary (65.4 per cent) was specific training in the area of sexual violence. A majority of respondents (53.8 per cent) also identified specific experience in the area of sexual violence as being a desirable attribute of a facilitator/mediator. A bigger proportion of respondents considered that mediators/facilitators should come from an area of intervention with offenders (46.2 per cent) than from an area of intervention with victims (30.8 per cent). This is consistent with the fact that some of the alternative quasi restorative justice interventions in sexual crime do not actively involve victims of sexual violence.

It is also interesting to compare the similarities and differences in the attributes of mediators/facilitators identified by respondents in alternative/quasi restorative justice practices with those identified by respondents in fully restorative justice services. As Figure 5.19 below illustrates, very similar proportions of respondents from both types of services identified certain attributes of mediators/facilitators as necessary or desirable. Over 60 per cent of respondents agreed that facilitators/mediators should have specific training in the area of sexual violence (fully restorative justice services (61.8 per cent); alternative quasi services (65.4 per cent)) but

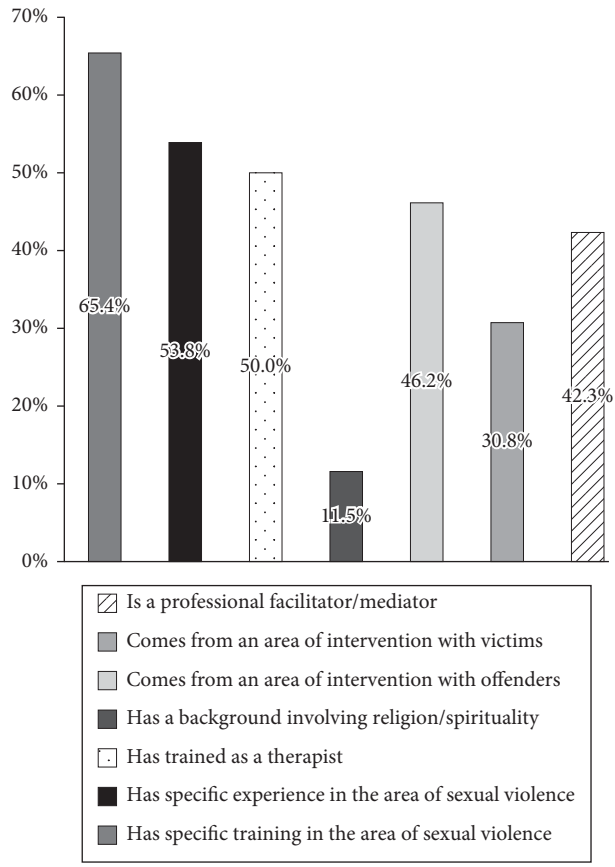

Figure 5.18 Training/Experience/Educational Background of Mediators and Facilitators

more of the respondents in the alternative quasi services (53.8 per cent) than in the fully restorative justice services (41.2 per cent) believed that the facilitators should have specific experience in the area of sexual violence, perhaps reflecting their professional backgrounds. Almost half of respondents considered that the facilitator should come from an area of intervention with offenders (fully restorative justice (47.1 per cent); quasi restorative justice practitioners (46.2 per cent)). A smaller proportion of respondents considered that mediators/facilitators should come from an area of intervention with victims and this attribute was selected more frequently by respondents attached to fully restorative justice programmes (38.2 per cent) than those in alternative programmes (30.8 per cent).

Significant differences between the responses of the two categories of respondents also arose. The biggest differences arose in relation to the professionalism of the facilitator and the training of the facilitator/mediator as a therapist. While over three quarters (79.4 per cent) of respondents in fully restorative justice programmes considered

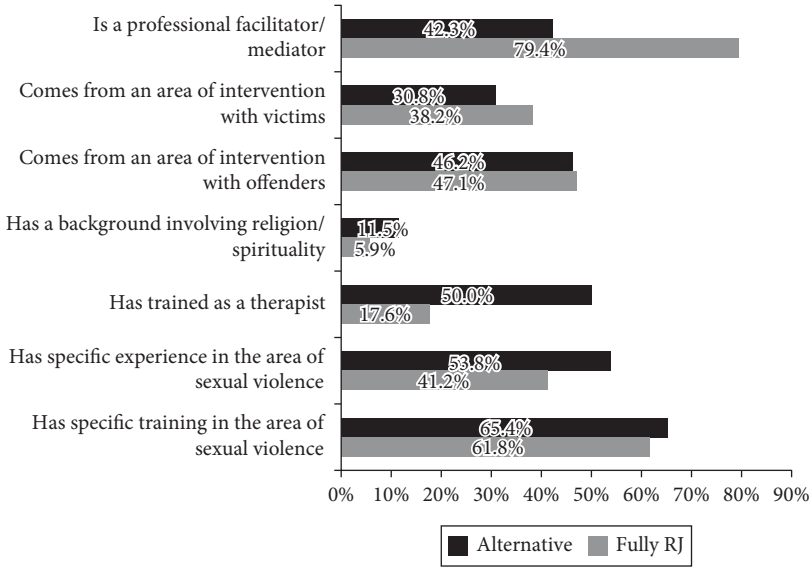

Figure 5.19 Comparison of fully and alternative quasi restorative justice services—Attributes of mediator/facilitator

that the mediator/facilitator should be a professional, less than half (42.3 per cent) of respondents in alternative programmes identified this attribute. There was also a marked difference in the support for the mediator/facilitator having trained as a therapist. Half of the respondents attached to alternative/quasi restorative justice services considered that the facilitator should be trained as a therapist whereas just 17.6 per cent of respondents in fully restorative justice programmes selected this attribute. In part some of the findings in this section may also reflect vested professional interest as well as a desire to do what is correct for victims and offenders.

5.4 Achieving objectives and challenges

The final two questions in this section of the survey asked respondents to reflect and comment on how their alternative/quasi restorative justice service deals with cases of sexual violence and to share their views on how their restorative justice practices are meeting their objectives. Comments that focused mainly on the success of their interventions included the following:

> *We work with children, victims of sexual abuse. Most victims come from indigenous communities and have difficulty verbalising their feelings. Our restorative practices program greatly helps the victims to express their thoughts and feelings freely.*

Our programme does an excellent job of assisting with re-entry and helping offenders be accountable and not reoffend. The primary challenge is funding at this point. We are able to keep going by the deep commitment of volunteers and staff who also volunteer much time.

Other comments focused mainly on the challenges faced by the service:

Challenges: common misconceptions; prejudice; the beliefs of some professionals who declare that a sex offender will always be a potential re-offender and that an abstinent paedophile will always be a potential offender; certain legislators who believe that making sentences more strict will prevent re- offending; the common idea that having empathy towards offenders is a mistake.

We could develop and improve our interventions but we are constrained by institutions working in isolation from each other. This, for us, inhibits the ability to consider a recipient comprehensively. Main obstacles relate to the sharing of information between professionals, absence of knowledge-sharing amongst professionals.

The final question asked respondents if they had any additional comments on alternative/quasi restorative justice services in cases of sexual violence. As in the previous question some respondents focused on positive aspects while others focused more on difficulties and challenges. Comment which pointed primarily to challenges included:

'As the core of restorative justice in these cases is, as far as we're concerned, victim-offender mediation, we think that what's most important is correctly profiling the concerned parties to check for compatibility. One must be sure that the meetings will be positive and productive. And in our experience one big source of incompatibility is the presence of trained professionals, as they more often than not are unable to get out of their therapeutic space and into our space of free expression and dialogue'.

Other comments used the opportunity to advocate for the greater use of restorative justice. It therefore seems appropriate to conclude our review of the survey findings with these comments:

A crime against any one individual is a crime against us all, especially the family, friends, and loved ones of the victim. Restorative justice interventions are the most effective and positive means to properly deal with such violent crime.

We think that restorative justice should be a normal part of most cases of sex offending, either as an alternative to or as a supplement to the traditional justice system.

6. Final remarks

With this survey we aimed to reach as many different practitioners as possible worldwide that practice restorative justice in cases of sexual violence. We hoped to find as many 'under the radar' and 'over the radar' services and practitioners as possible. Given the general difficulty in finding such practitioners and locating such initiatives we believe the survey has achieved a lot, presenting important data which will no doubt lead to further research and scholarship. The survey presents data from across the globe, from diverse populations and cultures and represents as robust a sample as is possible at this time given the 'under the radar' nature of many restorative justice programmes and practices in cases of sexual violence. Taking all things into account, including the methodological limitations of the survey, it can reliably be said there are more restorative or alternative justice activities taking place for sexual violence than readers may realise. The survey findings point to the need for further studies on sexual violence and restorative justice and alternative restorative justice practices in cases of sexual violence to bring those 'under the radar' programmes and practices out of the shadows to 'above the radar' so that the work can be highlighted, evaluated and contribute to knowledge. It also points to the need for collaborative work on sexual violence and restorative justice between practitioners and researchers across boundaries to try to establish what is known about this and other innovative practices in response to sexual violence. This is no small task, but an important challenge for researchers in this field.

In adopting a survey methodology we were at all times aware we were working in a 'crowded field' in which 'survey fatigue' (Grimes, 2012; Porter et al., 2004) and 'survey overload' (Holley, 2012; Leppik, 2014) are challenges to be overcome, and we took as many steps as possible to address these concerns, as outlined earlier. As anticipated, we received a high level of interest from our target population which enabled the type and quality of data to be generated that we have presented in this chapter. It may be that we have just barely 'scratched' below the surface of what actually happens in practice in restorative justice work after sexual violence. Despite this, we believe that the two categories which we used in the survey, fully restorative justice interventions and alternative/quasi restorative justice practices allow for a fairly comprehensive glimpse into how the principles, values, practices and methodologies of restorative justice are being applied in practice in cases of sexual violence across the globe. Chapters six, seven and eight explore and excavate these trends in more depth in the analysis of comparative reports of study visits in five different countries, a selection of programmes in six jurisdictions, and narratives of case studies from four different countries and contexts.

6

A thematic analysis of policies and practices in five European countries

Belgium, Denmark, Ireland, the Netherlands, and Norway*

1. Introduction

Restorative justice in the case of sexual violence varies quite significantly from one jurisdiction to another, from one programme to another, and certainly from one country to another. However, there are also a number of similitudes. In order to understand some of the unique as well as common characteristics, features, and challenges of these practices we undertook fieldwork which included study visits to four different European countries (Belgium; Denmark; Ireland; Norway)[1] in which we interviewed experts and stakeholders involved in restorative justice after sexual violence from five European countries (Belgium, Denmark, Ireland, the Netherlands, and Norway). The Belgian visit involved restorative justice practitioners from both Belgium and the Netherlands and related to restorative justice practice in both these countries. The study visits provided forums for restorative justice practitioners to outline their work in the area of sexual violence and to discuss features which facilitate their work and the challenges they face. They also allowed the research team to assemble a more complete international picture of restorative justice practices in the area of sexual violence than was previously available and provided a basis for comparing restorative justice practices in different European countries. In addition, the study visits were used as a vehicle for sharing information about practices and experiences in various jurisdictions and thus presented learning opportunities for all involved. We begin by presenting brief country profiles in respect of each study visit location and then present the key themes that emerged.

* This chapter was written in collaboration with Caroline O'Nolan. The data was gathered together with Caroline O'Nolan, Ivo Aertsen, Daniela Bolivar, and Virginie Busck-Nielsen. Many thanks also to Karin Sten Madsen (Denmark), Ivo Aertsen (Belgium), Annemieke Wolthuis, and Makiri Mual (the Netherlands), Karen Kristin Paus, and Catharina Borchgrevink (Norway) for providing some final updates on their countries just before publication.

[1] We have also published an article on some of these aspects, see Keenan, Zinsstag, & O'Nolan (2016).

Sexual Violence and Restorative Justice. Marie Keenan and Estelle Zinsstag, Oxford University Press.
 DOI: 10.1093/oso/9780198858638.003.0007

2. Country profiles

While all of the countries visited are ranked in the top tier of countries in terms of human development (UNDP, 2019) our study visits highlighted considerable inter-country variation in the extent to which restorative justice is applied in cases of sexual violence, and in the integration of restorative processes within national criminal justice systems. As responses to sexual violence are influenced by institutional structures and social, religious, and cultural norms (European Union Agency for Fundamental Rights, 2014) the country profiles set out below provide relevant contextual information for each of the five countries included in our study including details regarding population size; per capita income; religion; the welfare regime; political structures; gender equality; and the criminal justice system.

2.1 Belgium

Belgium is a country situated in the northwest of continental Europe which occupies a land mass of 30,280 square kilometres (World Bank, 2018) and has an estimated population of 11.5 million (Eurostat, 2020a). Individual incomes in Belgium are more than 10 per cent above the EU average (Eurostat, 2020b).[2]Although historically a predominantly Roman Catholic country recent surveys indicate that less than half of the Belgian population aged fifteen and over now identify themselves as Catholic (Billiet, Maddens, & Frognier, 2009). The Belgian constitutional monarchy's welfare regime promotes social cohesion, is moderately redistributive, and has been described as lying between the social democratic and conservative models (Kammer, Niehues, & Peichl, 2012).[3] Belgian's political and institutional structures are complex and tensions between the various tiers of government have contributed to ongoing shifts in the division of powers and responsibilities (Swenden & Jans, 2006). Since the 1960s, an ongoing development towards federalisation of the state structure

[2] The measure of per capita income used here and throughout our study visit report is Actual Individual Consumption (AIC) as this more accurately reflects the material welfare of households than GDP which measures economic activity (OECD, 2013)

[3] The welfare regime typologies referred to are based on Gosta Esping-Andersen's seminal work *Three worlds of welfare capitalism* (1990). Esping-Andersen developed three ideal types of welfare regimes (Liberal, Conservative, and Social Democratic) based on the degree of decommodification social stratification and the public-private welfare mix. Liberal regimes are market oriented and provide primarily residual, means-tested social benefits. In Conservative welfare regimes the family is the key provider of welfare. Social stratification is primarily by occupation, employment maintenance is prioritised, and welfare provisions are moderately redistributive. Social Democratic regimes are characterised by comprehensive and generous welfare provisions which is universalistic and egalitarian. In Social Democratic regimes the state is the primary provider of welfare. Esping-Andersen used these ideal types to identify clusters of similar welfare regimes in developed capitalist countries.

takes place, resulting in a Sixth State Reform operation that was politically reached in 2011.This redistribution of competencies, in particular the attribution of specific powers to the regional level (the Communities and the Regions) has also very much influenced restorative justice policies in the country. It is no longer the federal ministry of Justice that is responsible for restorative justice policies (both in the field of minors and adults), but the Flemish, French, and German speaking Communities respectively. Voter turnout in elections is high (around 85 per cent) and relatively stable (Delwit, 2013). Belgium is ranked 27th in the World Economic Global Gender Gap (Schwab et al., 2020) and its gender equality index of 71.1 is above the average for EU-27 countries (67.4) (European Institute for Gender Equality (EIGE, 2019).

Since the 1990s the Belgian inquisitorial criminal justice system has undergone a period of significant reform which has included a restructuring of the police forces, changes to the system of appointing judges and prosecutors, and an extension of victims' rights (Daems, Maes, & Robert, 2013). The prison population per 100,000 population is estimated as 88 (Walmsley, 2018) which is the highest of the countries visited and above the median rate in West European countries (Walmsley, 2018); overcrowding has been a feature of Belgian prisons in recent years (Daems, Maes, & Roberts, 2013) and prison conditions have been found to have breached the European Convention on Human Rights (ECHR 343 2014, 25/11/2014; International Centre for Prison Studies, 2015).

2.2 Denmark

Denmark is a northern European country with a land mass of 41,990 square kilometres (World Bank, 2018) and an estimated population of 5.8 million (Eurostat, 2020a). Personal incomes in Denmark are high and are estimated to be 15 per cent above the EU average (Eurostat, 2020b). In Denmark although there is religious freedom, the Lutheran Church (*Folkekirken*) is considered the national church and receives administrative and financial state support. Almost 80 per cent of the Danish population are members of *Folkekirken*[4] but only a small minority are active members of the church (UNHR, 2016). The Danish welfare regime provides generous and comprehensive social protection whilst also promoting active participation in the labour market (Madsen, 2013). Denmark is a constitutional monarchy with a unicameral parliamentary system.[5] In Denmark general elections attract a voter turnout in the region of 80–90 per cent (Danish Institute for Parties and

[4] For more information see http://denmark.dk/en/society/religion/.

[5] Unicameral parliamentary systems have one legislative or parliamentary chamber. Bicameral systems have two parliamentary chambers.

Democracy, 2012; Delwit, 2013), and as in Belgium the voter turnout rate has been relatively stable for some decades (Delwit, 2013). Coalition governments are an almost permanent feature of Danish politics and the legislative process is a product of negotiations and compromise (Storgaard, 2013). Denmark is ranked 14th in the World Economic Global Gender Gap (Schwab et al., 2020) and its gender equality index of 77.5 is the second highest in the EU (EIGE, 2019).

The Danish criminal justice system is based on the Continental inquisitorial system (Storgaard, 2013) and results from the European Social Survey indicate that the Danish population report particularly high levels of trust in the police and criminal courts (Jackson et al., 2011). Since the 1990s crime and punishment have become more politicised and the influence of academics and research on policy has waned (Storgaard, 2013). Despite the politicisation of crime and penal policy there has been no significant increase in the Danish prison population which is estimated at 63 per 100,000 population (Walmsley, 2018), a rate which is significantly below the average European rate of imprisonment.

2.3 Ireland

Ireland is a country located on the western periphery of Europe which occupies a land mass of 68,890 square kilometres (World Bank, 2018) and has an estimated population of 4.9 million (Eurostat, 2020a). Ireland has been particularly adversely affected by the recent economic recession and on average incomes are 6 per cent below the EU average (Eurostat, 2020b). In 2011 three in every ten (29.7 per cent) Irish adults aged 18–64 were considered to be at risk of poverty or social exclusion (Lopez Vilaplana, 2013: 3); within the EU-27 this proportion was only exceeded by Hungary, Latvia, Romania, and Bulgaria. Ireland is a predominantly Catholic country although religious observance has decreased in recent decades (O'Mahony, 2013). Ireland's welfare regime has been described as a 'hybrid' which 'relies to a high degree—by international standards—on the involvement of non-profit bodies' (National Economic and Social Council, 2005: xiv). Ireland is a constitutional democracy with a bicameral parliamentary system. Power is very heavily concentrated in national rather than local government and survey data indicates that public trust in national government is lower than in almost all other European countries (Hardiman, 2010). Voter turnout in Ireland has declined in recent decades and is the lowest of the five countries included in our study visit (Delwit, 2013). A particular feature of the Irish parliamentary system is the dominance of the executive over the legislature which largely disables 'active parliamentary engagement in policy debate' (Hardiman, 2010: 56). Ireland is ranked 7th in the World Economic Global Gender Gap (Schwab et al., 2020) and is attributed with a gender equality index (71.3) which is above the average for EU-27 countries (67.4) (EIGE, 2019).

Ireland has a centrally controlled common law adversarial criminal justice system although there are few jury trials due to the high rate of guilty pleas and the summary disposition of minor offences (O'Nolan, 2013). The incarceration rate of 78 per 100,000 is below the European median rate (Walmsley, 2018). However, the prison population has been limited by the physical capacity of the existing prisons rather than by sentencing policies; budgetary restrictions have delayed a planned expansion of the prison estate and resulted in the extensive and somewhat arbitrary use of 'temporary release' provisions to manage the prison population (Thornton Hall Project Review Group, 2011).

2.4 The Netherlands

The Netherlands is a densely populated country in the north west of Europe with a land mass of 33,690 square kilometres (World Bank, 2018) and a population of 17,3 million (Eurostat, 2020a). Individual incomes in the Netherlands are 13 per cent above the EU average (Eurostat, 2020b). The Netherlands has been described as a 'post-Christian' society although a majority of the population is still affiliated to some religion (Schuh, Burchardt, & Wohlrab-Sahr, 2012). Like its Belgian counterpart the Dutch welfare regime has been described as a hybrid which combines features of the social democratic and conservative models (Kammer, Niehues, & Peichl, 2012) and in particular an emphasis on labour market activation. The Netherlands is a constitutional monarchy with a bicameral parliamentary system. The proportional representation model is based on a list system and governments are always based on a coalition of parties (Timmermans & Moury, 2006). Although once characterised by stability, the political party system in the Netherlands has been marked by volatility in recent years, which is attributed at least partly to the increased prominence of socio-cultural cleavages (Andeweg, 2019; van Gorp, 2012). Voter turnout has declined in recent decades. However, the decline has not been precipitous, and the turnout level is between 70-80 per cent (Delwit, 2013). The Netherlands is ranked 38th in the World Economic Global Gender Gap (Schwab et al., 2020) and its gender equality index of 72.1 is above the average for EU-27 countries (67.4) (EIGE, 2019).

The Dutch code of criminal procedure has features of both inquisitorial and adversarial criminal justice systems. The increased prominence of the rights of the defence during trials in recent years is attributed to the influence of the European Convention on Human Rights (Hirsch Ballin, 2012). The prison population in the Netherlands of 61 is below the median incarceration rate for west European countries (Walmsley, 2018). In 2019 almost 10,000 persons were incarcerated. Until 2017 there was a decrease in the number of detainees, but since then there is a yearly increase, last year by 400 (CBS, 2020).

2.5 Norway

Norway is a country with a substantial land mass of 365,123 square kilometres (World Bank, 2018) which comprises the western segment of the Scandinavian peninsula and has an estimated population of 5,3 million (Eurostat, 2020a). Norway's oil revenues have contributed considerably to the country's high per capita income which is 35 per cent above the EU average (Eurostat, 2020b). In 2011 the proportion of Norwegian adults aged 18–64 at risk of poverty or social exclusion was 15.9 per cent (Lopez Vilaplana, 2013: 3), lower than in any of the other countries visited. The Evangelical Lutheran Church is Norway's state church to which, until changes introduced in 2012, the government was afforded a role in appointing bishops and deans (National Post, 2012). About 80 per cent of the population are members of the state church but religious observance is low and almost 40 per cent of church members never go to church (http://www.samfunnskunnskap.no/). The Norwegian social democratic welfare regime provides generous and comprehensive coverage and social benefits to its citizens and labour market participation rates are high (Halvorsen & Stjerno, 2008). Norway has a constitutional monarchy and although a member of the European Economic Trade Area it has opted not to join the European Union. While the traditional left-right cleavage is still relevant, party politics now divide on multiple dimensions (including environmental and moral issues) although there is 'little tendency towards polarisation' (Osterud, 2013: 2). Voter turnout has declined moderately since the 1980s and is in the region of 70–80 per cent (Delwit, 2013). Norway is ranked 2nd in the World Economic Global Gender Gap (Schwab et al., 2020). Norway is not included in the gender equality index produced by the European Union, but it is ranked 1st in the UN Gender Inequality Index Rankings for 2019 (UNDP, 2019).

The Norwegian criminal justice system is closest in character to those of its Nordic neighbours, and its contemporary penal policy, which is distinguished by low rates of imprisonment, 'normalised' prison regimes, and an orientation towards re-integration, is attributed to long standing socio-political forces and cultural norms (Pratt & Eriksson, 2011). The prison population in Norway of sixty-three is below the median incarceration rate for west European countries (Walmsley, 2018). Results from the European Social Survey indicate that in common with their Danish neighbours, the Norwegian public have very high levels of trust in the criminal courts and the police (Jackson et al., 2011).

3. Thematic analysis

The thematic analysis provides a structured account of restorative justice practices in the area of sexual violence in each of the five countries. Study visit discussions are analysed under seven key themes: (i) service development, pathways, and funding;

(ii) legislation; (iii) reporting duties; (iv) timing; (v) inter-agency communication and co-operation; (vi) training; and (vii) challenges. Restorative justice services and practices in each country are outlined under each theme (when relevant).

3.1 Service development, pathways, and funding

The study visits suggest that the development, referral processes, and funding of restorative justice services in cases of sexual violence, are inter-related and are shaped and influenced by a constellation of factors including institutional structures, social and cultural norms, and key individual actors. The analysis presented largely explains the different trajectories and speeds at which restorative justice has developed in the different countries.

3.1.1 Belgium

In Belgium a number of NGOs are contracted by the government (at regional level) to provide restorative justice services. The NGOs are language specific services, so French speakers and Dutch speakers are accommodated by different mediation services. The services are also differentiated by the age of the offender, so there are separate mediation[6] services for juveniles and adults. Restorative justice can be facilitated in respect to any crime reported to the police or justice system involving an identifiable victim and offender. Offenders may be juveniles or adults who must accept some level of responsibility to be considered for the restorative justice process. Adult victims and offenders have legally to be informed of their right to seek mediation once the crime is reported to the police and the restorative justice process can be initiated by either. Decisions regarding the referral of cases involving juvenile offenders to mediation are made by the prosecution service or the presiding judge. Referrals to conferencing programmes (carried out by the same mediation services) can be done by the youth judge. The referral of juvenile offenders to the mediation service is best practice in Belgium as written explanations have to be provided by the prosecution service to the court if a case is not referred for mediation.

For the most part restorative justice processes operate in tandem with and not as an alternative to conventional criminal justice processes. However, restorative justice interventions provided by the Confidential Centres for Child Abuse (*Vertrouwenscentrum Kindermishandeling*) in the Flemish region of Belgium may be provided independently of the criminal justice system when the sexual abuse

[6] Mediation and restorative justice are sometimes used interchangeably in some European jurisdictions. This is not the case in Ireland where mediation and restorative justice are seen as two separate but interlinked professions requiring specific skill sets and training. Mediation is said to apply in civil matters in most of Europe whereas restorative justice applies in criminal matters.

is intra-familial. Members of staff in the Confidential Centres have an obligation to help the children referred but have discretion regarding the reporting of abuse to the police. The Confidential Centres therefore provide an arena in which intra-familial child sexual abuse can be addressed without invoking a criminal justice response. Staff in the Confidential Centres argue that their freedom to respond to intra-familial child sexual abuse without the involvement of the criminal justice system contributes to a substantial increase in the proportion of referrals which originate from within families themselves. Only in circumstances where clients fail to comply with the prescriptions for treatment of the Confidential Centres are the Centres obliged to refer the case to the police.

A number of key factors have contributed to the development of restorative justice in Belgium. In Belgium, personal connections between academics and criminal justice professionals and other actors in the field facilitated the development of innovative approaches in the criminal justice arena; one of these innovations was restorative justice. Leuven was identified in the study visit as being a pivotal location for such innovations, with research emanating from KU Leuven contributing to a respectful, collaborative culture between practitioners and researchers. Restorative justice projects grew out of academic research supported by staff within the prison and prosecution service and from the outset in the early 1990s were targeted at serious crimes. In addition to benefiting the parties directly involved, the projects sought to incorporate restorative principles into the criminal justice system. In the late 1990s the Dutroux[7] case placed the Belgian criminal justice system in the media spotlight and prompted widespread public debate and calls for reform (Bauwens, Robert, & Snacken, 2012: 20). The resulting focus on the criminal justice system and appetite for reform provided an ideal context to expand and develop the pilot restorative justice projects.

The principal restorative justice intervention used is VOM; VOM can be direct or indirect but is most commonly indirect in most programmes. Family group conferences can also be convened for juvenile offenders but are used infrequently. Funding is provided by the regional governments, i.e. the regional Ministries of welfare and health.

Besides VOM and conferencing offered by NGOs, Belgium has a system of 'penal mediation' legally established in 1994. This concerns a form of conditional discharge of relatively minor offences at the level of the public prosecutor or judge. The mediators are civil servants ('justice assistants') based in the 'justice houses' which are present in each judicial district (arrondissement), but which currently also fall under the competence of the Communities.

[7] Marc Dutroux kidnapped, sexually assaulted, and murdered several young girls. Dutroux had a history of violent sexual assault and was under police surveillance but a seriously flawed police investigation and a lack of co-operation between services enabled him to continue offending, resulting in the death of several other young girls.

3.1.2 Denmark

In Denmark two distinct strands of restorative justice in cases of sexual violence have emerged. The first is *Konfliktraad* (Conflict Council or Victim-Offender Mediation) established by the National Police. The second is restorative justice interventions developed by hospital-based sexual trauma units and integrated into the therapeutic responses provided to victims and offenders. Both strands are described below.

Konfliktraad began in three police districts during a four-year (1998–2002) pilot scheme which began in the late 1990s. The scheme was almost disbanded in the years following the pilot due to funding cuts. However, a commission established by the Ministry of Justice in 2007 set out recommendations, based largely on the experiences of the pilot scheme, to establish a nation-wide permanent scheme (Justitsministeriet, 2008). The Law on Konfliktraad was then passed in 2009 and implemented in 2010 (LOV nr 467 af 12/06/2009).[8]

Konfliktraad takes place alongside the criminal justice process and is never an alternative to a criminal sanction. Participation is conditional on a full or partial confession. The participation of both parties must be voluntary and parental consent is necessary if a party is under the age of eighteen. Victim-offender mediation is possible for any kind of crime, at any time, and for parties of any age. Victim-offender mediation can also be provided in respect of certain non-criminal cases (e.g. civil restraining orders and evictions) and neighbourhood conflicts take up a lot of the time. Only a small number of cases of sexual violence have been referred to *Konfliktraad* since 2010.

Konfliktraad is financed by the National Police and came first under the ambit of the Council of Crime Prevention but is now placed within the National Police. In each of the twelve police districts a coordinator has been appointed (only very few are police officers) and made responsible for the local implementation of victim-offender mediation. Cases are predominantly referred by police officers and the mediation is facilitated by a lay mediator.

The second strand of restorative practices in cases of sexual violence is provided in medical/therapeutic units which address the needs of victims of sexual violence and provide treatment to sexual offenders. Restorative practices in therapeutic settings began in Copenhagen in Sct. Stefans Raadgivningscenter, a local authority in Copenhagen. In 2001 it was applied to a specialist hospital-based unit for sexually abused children (The University Hospital) and in 2003 it was applied to a Janus Centret—a special unit for young people displaying sexually harmful behaviour. Restorative justice for adult victims also began in the Centre for Sexual Assault in Copenhagen in 2002.

[8] For more information, see https://www.retsinformation.dk/eli/lta/2009/467.

Almost all of the abused children attending the University Hospital know their abuser and about half of the abusers were themselves abused as children. The restorative meeting is an integral part of the therapy offered and is focused on the needs of the child. Restorative justice is also integrated into the therapeutic approach adopted by the Janus Centret. Over the last ten–fifteen years approximately seventy restorative meetings have been convened; this represents around 30 per cent of the cases dealt with in the centre. About ten to fifteen restorative meetings take place in this unit each year although practice is diminishing and disappearing in other settings.

The practice of discussing the possibility of restorative justice with adult victims of sexual violence who present at the Centre for Sexual Assault in Copenhagen began in 2002.[9] In the following years victims have been informed about the option of making contact with the offender and when possible setting up a face to face meeting with the assistance of the centre. About fifteen victims took this option for contact to be made with the offender by letter resulting in five to six face-to-face meetings yearly. About one third of the letters results in a victim offender meeting.

While staff working with adult sex offenders have recently introduced restorative dialogues into their programmes, this work is conducted with 'imaginary' victims as the centre has no access to information about victims and at any rate there are often legal restrictions on offenders having contact with victims.

In Copenhagen the interest and application of restorative justice in cases of sexual violence spread among the therapeutic institutions dealing with victims and offenders of sexual crime with the movement of professional staff from one agency to another over time. This led to the establishment of an informal network which has been central to the development of restorative justice in Copenhagen and allows professionals to share knowledge and perspectives and discuss issues around best practice. The Copenhagen Network has also been keen to disseminate their knowledge and provide training to professionals throughout Denmark.

3.1.3 Ireland

In Ireland the provision of restorative justice in the area of sexual violence has to date largely stemmed from a small number of organisations in the voluntary sector and from individual practitioners working 'independently'. Clerical child sexual abuse has featured prominently in Ireland in recent decades and this form of sexual violence is also conspicuous in the restorative justice interventions developed to date. One form of intervention developed addresses historical cases of clerical child sexual abuse and provides for a restorative dialogue between the victim and the offender or a religious superior. This intervention provided by *Towards Healing*

[9] For more information, see also Pali and Madsen (2011).

is funded by the Congregation of Religious in Ireland, the Irish Catholic Bishops' Conference and the Irish Missionary Union.

A limited restorative justice service in cases of sexual violence is also facilitated by *One in Four* an organisation which was originally established to respond to the needs of adult victims of child sexual abuse in religious and institutional settings, but which now responds to a wider range of sexual violence and provides therapeutic services to both victims and offenders and advocacy services for victims. Restorative justice services are funded from a variety of sources including charitable donations, government funding and in some cases client 'contributions'. Due to resource limitations *One in Four* can only facilitate a small number of restorative mediations each year; most of these relate to intra-familial sexual abuse and in rare cases they have facilitated restorative meetings between victims of clergy and the designated authority person in the offender's diocese or religious community.

Although restorative cautions and conferences are a feature of the juvenile justice system in Ireland, the Garda Youth Diversion Office does not routinely seek to apply restorative interventions in response to harmful sexual behaviour by juveniles. However, restorative conferences have been convened in a small (three or four) number of cases.

Within the adult criminal justice system access to restorative interventions was limited until the Irish Probation Service established a Restorative Justice and Victim Services Unit in 2018 to provide (i) leadership and support for the consistent and integrated delivery of a range of restorative justice models within probation practice and (ii) a central point of contact to ensure an effective response to requests from victims, including requests for engagement in a restorative process. Few (one or two) restorative justice meetings have taken place in cases of sexual crime as yet. As the service is restricted to current clients of the probation service or imprisoned persons, victims of sexual crime whose offender is neither imprisoned or a current client of the probation service are not included in this service. A number of NGOs are also funded by the probation service to provide restorative interventions to offenders, mainly young offenders, but access is restricted by both the location and the seriousness of the offence. However, of late more serious offences have been referred to these NGOs by the probation services and a small number of victim-offender mediations has been conducted with the parties to a serious sexual crime.

Facing Forward is a member based voluntary organisation that acts as an umbrella group to support restorative justice practitioners in Ireland and to advocate for restorative justice. *Facing Forward*[10] was established in 2005 in response to gaps in the Irish criminal justice system and to support the introduction of restorative approaches based on best practice that had emerged in other countries. The

[10] See http://facingforward.ie/about/

management committee is made up of people from a variety of backgrounds including restorative justice, mediation, criminal justice, community development, and peace and reconciliation work. Individual independent practitioners facilitate victim offender mediation in cases of sexual violence in Ireland.[11] Independent practitioners facilitate healing circles and restorative conferences in response to historic sexual abuse perpetrated against minors in Irish Catholic schools.

3.1.4 The Netherlands

In the last two decades a number of organisations and initiatives have developed and have been actively promoting the practice of restorative justice in the Netherlands.[12] Many initiatives started bottom up and with youth projects. Several organisations such as Restorative Justice Netherlands (*Restorative Justice Nederland*)[13] created in 2010; an association for mediators in penal cases (*Nederlandse Vereniging van Mediators in Strafzaken: VMSZ*)[14] developed in 2015, and an organisation which specialised in family group conferencing called *Eigen Kracht Centrale*[15] launched in 2000, are all playing a vital role. Neighbourhood mediation as a voluntary service is available in almost all municipalities these days.

Regarding the practice of restorative justice for sexual violence, mediation in criminal cases is available, but it is also practiced outside the criminal justice system when parties are ready to deal with emotional recovery. The latter is carried out by an organisation that started under the name Victims in Focus (*Slachtoffer in beeld)*,[16] which is now called 'Perspective Mediation' (*Perspectief Herstelbemiddeling*).[17] This is an NGO, which facilitates victim-offender mediation ('encounters') for adults and juveniles throughout the Netherlands since 2007. With a head office in Utrecht, *Perspective Mediation* employs around twenty paid facilitators to facilitate restorative mediations throughout the country. The Ministry of Security and Justice provides the funding for this mediation service out of Victim Support budgets. The majority of those who apply for restorative mediation to *Perspective Mediation* are offenders (84 per cent in 2012) and in particular juvenile offenders (Sagel-Grande 2013). In 2019 they had 1,550 requests for mediation (Perspectief Hertellbemidelling, 2019). *Perspective Mediation* engages in direct and indirect VOM and also facilitates family group conferences.

The requests for mediation in sex offences to *Perspective Mediation* has increased from a previous six to seven per cent to a current 11 per cent, often resulting in

[11] For a useful award-winning Irish film depicting a minute by minute account of a restorative justice meeting based on the true story of Ailbhe Griffith who met with the man who sexually assaulted her see www.themeetingfilm.com

[12] For a good analysis of those developments, see Wolthuis, Claessen, Slump, & van Hoek (2019).

[13] For more information, see http://www.restorativejustice.nl.

[14] For more information, see https://vmsz.nl.

[15] For more information, see https://www.eigen-kracht.nl.

[16] For more information, see http://www.slachtofferinbeeld.nl/.

[17] For more information, see https://www.perspectiefherstelbemiddeling.nl/.

actual meetings between parties. In 2012, 4 per cent of offenders who applied for contact with their victim had committed sex offences (Sagel-Grande, 2013). In their most recent factsheet, it says that requests for sexual offences (*zedenzaken*) have in 2019 increased by 40 per cent meaning that they are now about 10 per cent of the total cases (Perspectief Hertellbemidelling, 2019b). Surrogate offenders have sometimes been used in restorative mediations in cases of sexual violence. The organisation has also collaborated with the Deetman Commission[18] which inquired into the sexual abuse of children in the Roman Catholic Church.

In the last decade victims' rights have improved in the Netherlands and were given a more central place within the criminal justice system, with as the so-called right to speak and more possibilities for compensation. Victims of crime are referred by the police to Victim Aid Netherlands and to more specialised centres such as the Centre for Sexual Violence (CSG). Victims interested in making contact with offenders are referred to the court or to *Perspective Mediation*.

The Restorative Justice Academy (part of RJN) and *Perspective Mediation* also provide courses to inmates in prison which can lead to victim offender mediation and is seeking to extend referrals within both adult and juvenile prisons and make prison staff work more restoratively and victim focused.

Mediation in criminal cases is also a structural possibility at court level for the past few years and is provided by the Mediation in Criminal Cases service.[19] In 2019 they had 1,472 referrals. More than 80 per cent are finalised with a written agreement. There is growth every year, but also a limited budget.

A number of alternative restorative justice initiatives in the area of sexual violence have also been developed in the Netherlands and were discussed during the study visit, with a number of stakeholders, practitioners, and policy makers.[20] These include Circles of Support and Accountability (COSAs) and a programme established by *Triptiek* (an NGO) which provides a restorative response to historical child sexual abuse by catholic clergy. Each of these initiatives is outlined briefly below.

Circles of Support and Accountability began in the Netherlands in late 2009 and are targeted at socially isolated medium to high risk convicted sex offenders following their imprisonment to help provide community accountability and support for offenders in living an offence free life. Initially, COSAs run in tandem with post-release supervision provided by the probation service but continue after the probation supervision concludes. The lead organisation for COSAs is the probation service, which provides the funding for the circles. Avans University provides

[18] For more information on the work of the Deetman Commission, see e.g. https://www.dutchnews.nl/news/2011/12/commission_identifies_800_prie/.

[19] For more information, see e.g. Wolthuis et al. (2019).

[20] Alternative restorative justice initiatives or approaches are practices that incorporate some restorative justice guiding principles and values but are not primarily identified as restorative justice.

training to circle co-ordinators. Over 200 volunteer COSA members have been recruited and 50 circles are now in place.

Triptiek was a foundation which provided victims of historical child sexual abuse committed by Roman Catholic clergy with a form of restorative mediation and financial compensation. Referrals and funding are controlled by catholic religious congregations. A detailed institutional profile of Triptiek is presented in chapter 6.

3.1.5 Norway

In Norway, both academic discourse (Christie, 1977; Mathiesen, 1971) and government policy, particularly in relation to juvenile offenders, has for some decades supported the need to develop alternative responses to crime (Paus, 2000). Norway's National Mediation Service (Konfliktrådene)[21] began as a pilot project in 1981 and is since 1991 regulated by law. The service was implemented nationwide from 1992–1994. Over time the seriousness of the cases dealt with by the mediation service has increased but referrals for mediation involving sexual or domestic violence has been slow. There has also been some reluctance on the part of mediators to encourage this work, although this practice is now changing with growing confidence and the emergence of international research. The service now deals with a small number of cases of violence including domestic and sexual violence. The practice of referring cases of sexual violence to the mediation service seems to have grown from contacts and communication with agencies outside the criminal justice arena rather than from within the criminal justice system itself.

The National Mediation Service is a subordinate agency in the Ministry of Justice and Public Security, Department for Crime Prevention. The National Mediation Service's Central Administration (Sekretariatet for *Konfliktradene*) has the function of a directorate and oversees the work of twelve mediation service districts with twenty-two office locations. The daily staff in the twelve mediation service districts and the central administration total about 140 employees. There are also about 570 volunteer mediators in total in the service appointed for four-year periods. The service has previously undertaken research on mediation with parties involved in domestic violence and was participating in a project on date rape, which was being undertaken in Trondheim. The view expressed during the study visit was that service development has largely been practice, rather than policy, driven.

There are two key sources of referrals to the National Mediation Service. The first is the Police and Prosecuting authority which refers cases to the mediation service as an alternative penal sanction. These are cases where investigation is completed and charges have been made, and where the offender has admitted guilt and both victim and offender have given their consent to resolve their case by restorative

[21] For more information see www.konfliktraadene.no.

process facilitated by The National Mediation Service (*Konfliktraadene*). The Police may also refer civil cases, meaning cases where charges for different reasons are dropped but the parties still could benefit from a restorative process, provided they consent to participate. The second source of referral is from the civilian population which can include prison inmates. Most cases of sexual violence dealt with by the National Mediation Service are not referred by the police. Referrals can come from either victims or offenders although the project on date rape is limited to victim-initiated mediation. Funding for the mediation service is provided by the government.

3.2 Legislation

The study visits highlight the importance of legislation in relation to restorative justice in cases of sexual violence. Legislation provides restorative justice interventions with an official imprimatur; this is especially important in the area of sexual violence, as the desire of professionals (both within the health and criminal justice systems) to protect victims from possible re-victimisation or re-traumatisation may result in their seeking to prevent victims from participating in restorative justice. While well intentioned, research indicates that this approach can be disempowering and indeed potentially harmful for victims who want choice in the decisions that affect their lives (Keenan, 2014; Moore, Keenan, Moss, & Scotland, 2021).

Legislation may also ensure that a stream of funding is secured for restorative justice. Guaranteed funding enables services to be developed and expanded and allows professionals develop the experience and skill necessary to deal with complex cases, such as sexual violence. The European Union Directive (2012/29/EU) Establishing Minimum Standards on the Rights, Support and Protection of Victims (4 May 2012) is a supranational instrument which has been a catalyst for legislative change in relation to victims' rights in EU member states.

3.2.1 Belgium

All of the participants engaged in restorative justice in Belgium considered the legislative underpinning of their work to be of vital importance. The key legislative provisions are set out—for adults in the Act of 22 June 2005 which introduced a new article on 'mediation for redress' into the Criminal Code of Procedure and for juveniles in the Youth Justice Act of 2006. This legislation for adults provides that mediation for redress is possible for all types of crime and for crimes of all degrees of seriousness and requires that mediation shall be available at all stages of the criminal justice procedure, including post-sentence. There is no legislative requirement that victim-offender mediation must influence the criminal sanction imposed, but legislation does stipulate that a report can be provided to the court at

the point of sentencing of the offender if both parties agree. The core principles of confidentiality, neutrality and voluntary participation are set out in the legislation. Until 2014, the funding and regulation of the mediation services were partly under the responsibility of the federal government, partly under the competence of the regions (Flemish and Walloon). However, from January 2015 onwards, the regions acquired full competence for the funding and implementation of mediation services, for both juveniles and adults.

3.2.2 Denmark

In 2009 legislation was introduced which provides for victim-offender mediation for any crime at any stage of the criminal justice process so long as there is at least a partial admission of guilt and an identified victim. If a victim or offender is younger than eighteen years of age participation is contingent upon parental permission. The legislation stipulates that mediation is confidential and, as a consequence, mediators are included under various legislative provisions which define criminal responsibility for civil servants who break confidentiality with a client. The legislation excludes specified professionals from testifying against the wishes of their client except when ordered to do so by the court (Storgaard, 2013). Mentally ill offenders can participate in a restorative meeting with their victims, even if their illness has meant that no criminal sanction has been imposed, if it is considered that the offender has the capacity to understand the purpose of the mediation. There is no legislative requirement that victim-offender mediation must influence the criminal sanction imposed but legislation does stipulate that cooperation and efforts on the part of the offender to repair the damage caused may be considered as a mitigating factor (Storgaard, 2013).

3.2.3 Ireland

Irish legislation does not refer specifically to restorative justice for victims of crime or for adult or young offenders. However, there are some recent innovations in Irish law which point in the direction of change in this regard. The Criminal Justice (Victims of Crime) Act 2017 which gives effect to the European Directive (2012/29/EU) recommends the development of restorative justices services for victims of crime emphasising the importance of informed consent for both parties (26), that victim participation in restorative justice is in the interests of the victim (26, (5) (b)) and that agencies administering a restorative justice scheme have regard to the need to safeguard the victim from secondary and repeat victimisation, intimidation or retaliation (26, (5) (c)). The Irish Programme for Government (2020: 86)[22] committed to work with all criminal justice agencies to build capacity to deliver restorative justice, safely and effectively. The Justice Action Plan (2021)[23]

[22] See The Programme for Government (2020).
[23] See The Justice Action Plan (2021).

is committed to tackling gender-based violence by building a new infrastructure on how sexual, domestic, and gender-based violence services are organised and supported across Departments (p. 28). The commitment is to put victims at the centre of the criminal justice response, bring perpetrators to justice, and ensure that victims know they will be supported. The Plan includes restorative justice among its nine strategic objectives to be prioritised between 2020–2023, under its goal of community safety, reducing reoffending, supporting victims, and responding to gender-based violence (p. 28).

The Children Act, 2001 provides for restorative cautioning as a means of diverting young people in conflict with the law from formal criminal justice processes and also provides for restorative conferencing of juvenile offenders at a number of different stages of the criminal justice process.

3.2.4 The Netherlands

Legislation (Article 51h (as amended in 2012) Code of Criminal Procedure) provided that the Department of Public Prosecution shall ensure that the police inform victims and suspected offenders as early as possible of the possibilities of mediation. Both parties are invited to voluntarily participate in the mediation. In mediation within criminal cases, all victim and offender issues can be discussed and dealt with. The legislation stipulates that agreements that stem from mediation regarding compensation should be taken into account by the judge or prosecutor when imposing a criminal sanction. If the mediation ends without an agreement the judge will not usually take this into account when deciding on the punishment to impose but may decree an amount of damages.

This article was important in establishing restorative justice in the Dutch landscape. It did not however, at the beginning, provoke a significant change in practices. The Ministry of Justice established a number of consultations and pilot projects to test mediation in penal cases in several courts and within the police and probation services between 2014 and 2016 (Wolthuis et al., 2019: 119–120). However, it was only in 2018 that structural funding was allocated in the national budget to establish the practice in the long term, following intense lobbying from the organisations for mediators in penal cases, and other civil society organisations. As a consequence, practice at a national level for courts to make referrals by either a public prosecutor or a judge truly started in 2018 (Wolthuis et al., 2019).

In 2013, a Bill on the registration of mediators was also introduced in the Netherlands (Sagel-Grande 2013) but as of 2021 it is not yet in place. The Bill sets out the educational qualifications and standards of good behaviour required of registered mediators. Mediators working in criminal cases need to have additional courses and qualifications.

3.2.5 Norway

First legislation for mediation was introduced in Norway in 1991 and has been revised and amended many times since then. The legislation provides a statutory basis for mediation as well as powers to make referrals to mediation and to discontinue criminal proceedings. In Norway, mediation is an independent criminal sanction which is included in the Code of Criminal Proceedings. Legislation introduced in 2004 transferred responsibility for organising mediation from municipal authorities to twenty-two public mediation services, fully state run, placed under the supervision of the Ministry of Justice and Public Security. The National Mediation Service handles both civil and criminal cases and thus has been described as a 'hybrid' institution (Dale & Hydle, 2008). Children under the age of fifteen cannot be referred for criminal mediation but may be referred to the civil mediation process.

The current law regulating the activities of the National Mediation Service came into force on 1 July 2014. The Law makes, as previously, restorative justice available for both civil and penal cases, and also includes new sanctions designed for young offenders including restorative processes and principles. Restorative processes (generally but also in cases of sexual violence) can be an alternative at different stages of criminal proceedings for prosecutor decisions or court decisions. It may also be used as a supplement to a sentence. In the Executing of Sentences Act, § 2 it is stated that 'there must be an offer to undergo a restorative process while the sentence is being served'.[24] In the autumn of 2020 there has been a hearing on further proposals of changes and adjustments to 'Konfliktrådsloven'—The Act relating to mediation by the National Mediation Service (The Mediation Service Act).[25]

3.3 Reporting duties

Legal and professional regulations in relation to reporting sexual offences to the police may act as a barrier to restorative justice interventions when criminal convictions have not been secured. If the confidentiality of disclosures in the restorative process cannot be guaranteed, and such disclosures could be used to secure a criminal conviction, sex offenders are unlikely to participate in a restorative process unless/until criminal proceedings are concluded. In some jurisdictions failure to comply with reporting requirements, which tend to be especially onerous for families and professionals, with mixed outcomes for children and families, especially in relation to child sexual abuse, can place professionals at risk of prosecution and at times lead to defensive or risk averse practice.

[24] See https://lovdata.no/NLE/lov/2001-05-18-21/§2.
[25] For more information see https://lovdata.no/dokument/NLE/lov/2014-06-20-49.

3.3.1 Belgium

Victims and offenders are mainly channelled through the criminal justice system to the mediation services in Belgium. The general rule is that only offences reported to the police or justice system can be referred to the mediation services. In an increasing number of cases mediation services may accept cases not reported to the police (e.g in cases where the statute of limitation has run out, such as in cases involving sexual abuse in the church). There is a financial disincentive to take on such cases, it thus seems likely that this will only happen rarely. In the main, parties to a crime cannot access the mediation service unless they first report the crime to the police, and although there is some leeway with mediation services, it remains predominantly true that only reported cases receive state restorative justice services. It is a fact that many victims of sexual violence do not report their experience to the police.

In Belgium reporting of child sexual abuse is not mandatory when the abuse is intra-familial. This allows professionals working with sexually abused children to exercise their discretion regarding the involvement of the judicial authorities and to focus solely on the needs of the child. The absence of mandatory reporting was presented to the research team as a feature of the Belgium child protection system which actually encourages family members to disclose concerns regarding child sexual abuse.

3.3.2 Denmark

Cases dealt with by *Konfliktraad* are referred by the police and have therefore already been reported to the judicial authorities. When restorative justice is provided in therapeutic settings the obligation to report sexual abuse to the criminal justice authorities varies according to the age of the victim and the offender. In Denmark child sexual abuse and suspicions of child sexual abuse must be reported to the child protection/welfare services and to the criminal justice authorities if the abuse is confirmed or there are strong suspicions that abuse took place. Therapeutic professionals have a legal obligation to make a useful intervention in cases of child sexual abuse and reporting to the criminal justice authorities is of secondary concern. As the age of criminal responsibility is fifteen years in Denmark, in cases of harmful sexual behaviour perpetrated by a young person under the age of fifteen the relevant reporting authority is the child welfare authority and the criminal justice system will not be involved. Professional staff who work with adult victims of sexual violence are not legally obliged to report instances of sexual violence to the police.

3.3.3 Ireland

Disclosures of child sexual abuse must be reported by health professionals and designated professionals, such as teachers, to the child protection agency and to the police. Concern has been voiced regarding the reporting requirements in relation

to historical cases of child sexual abuse (One in Four, 2012) and the potential use of notes of therapists/counsellors in legal proceedings (Gartland, 2014; Woods, 2014). Currently there is something of a 'legal lacuna' in relation to the disclosure of material held by non-parties, such as mediators/therapists, in criminal prosecutions (Law Reform Commission (LRC), 2014). The Office of the DPP has entered into a Memoranda of Understanding (MoU) with certain agencies (including agencies providing services to victims of sexual violence such as the Dublin Rape Crisis Centre, One in Four and Towards Healing), and there is ongoing dialogue with other groups regarding similar agreements. The agreements reached provide that disclosure of notes is made only with the informed consent of the person (usually but not always the victim) to whom the material relates (LRC, 2014).

There is no legal requirement to report disclosures of sexual violence made by an adult (victim or offender) unless the adult is a vulnerable adult as defined by the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012 (24/2012). However, the anecdotal evidence is that the practice of many professionals is to inform all clients that they will report disclosures regarding sexual violence to the police and to ask clients to provide signed consent in this regard. Ireland's history of inquiries and commissions of investigation into historical child sexual abuse and institutional abuse that criticised professionals for not reporting sexual abuse to the civil authorities in the past has influenced current reporting practices of professionals. Issues relating to reporting duties and the relationship between the civil authorities, restorative and therapeutic services is likely to continue to be a challenge for service development unless streamlined with victims' needs and interests at the centre.

3.3.4 Norway

As in Denmark the age of criminal responsibility is fifteen in Norway which means that harmful sexual behaviour committed by a young person under this age is treated as a child welfare issue rather than a criminal matter. This means the offending behaviour is only reported to child welfare authorities. It was noted during the study visit that the number of young sex offenders has increased in Denmark, and the average age of juvenile offenders has reduced. Given the absence of the involvement of the criminal justice system in such cases restorative justice was being considered by key services as an appropriate process for working with young offenders and their families.

When offenders are aged firfteen and over disclosures of child sexual abuse are normally reported to the police, but in instances of intra-familial child sexual abuse and in cases of historic child sexual abuse when the offender is considered to be very unlikely to re-offend, professionals may exercise their discretion and not report disclosures to the police. In some cases, child sexual abuse is reported to the child protective services instead of the police, but the two services often inform each other of new cases when this is appropriate.

In Denmark professional groups such as therapists, mediators, church representatives, teachers, and healthcare professionals have an obligation to report sexual violence if they have reason to believe that the offences might happen again. In general, however, none of these professional groups can be charged with an offence for not reporting sexual offences they may have heard about in their professional or clinical work, unless the risk of new offenses is obvious. In addition, the obligation to report is to a relevant service and professional and not necessarily an obligation to report to the police. If the case relates to child sexual abuse for instance, the therapist could report to a child protection officer if concerned about the safety of the child. Instead, the case could be reported to a family coordinator at a police station to discuss concerns for a child without delivering a formal report to the police. The obligation to report is restricted by the obligation to protect potential victims. There is no general obligation to report sexual violence disclosed in the course of therapeutic professional work except where there is a risk of further victimisation.

The Norwegian criminal law has a specific clause (§196) regarding the 'duty to prevent a criminal offense'. Not all criminal offenses are included in this clause. Sexual abuse of a child and rape are two offenses that are included in this clause. The failure to prevent a criminal offense is punishable in theory with a fine or up to one-year imprisonment. Very few people have been convicted of committing this crime. The aim of the law is neither to help the police to arrest more sex offenders or to gather better evidence for the criminal case, but simply to protect potential, high risk victims. There is no differentiating between child sexual abuse, rape, or offences against adult victims. The obligation to report is a general rule which applies to professionals as well as non-professionals. The study visit was told that mediators are not allowed to keep journals and do not record details of the issues discussed in the mediation.

3.4 Timing of restorative justice

Participation in restorative justice in cases of sexual violence cannot preclude criminal or other civil proceedings as this would effectively provide sex offenders with an amnesty from prosecution, which would be unacceptable to the majority of victims and civic minded professionals. However, many cases of sexual crime do not reach the evidential threshold for prosecution through the criminal courts. In addition, many victims do not wish to report their experiences to the police, in intra-familial sexual abuse or historic institutional abuse for example. It is often the case that those accused of sexual crime will not engage in restorative mediation unless they enter a guilty plea or are convicted. In other cases, victims are not ready or are unwilling to meet with offenders in the immediate aftermath of a violent sexual attack. For all these reasons restorative justice in cases of sexual violence must be available at all stages of the criminal justice process and outside of criminal justice

if the victim wishes and the offender is willing. However, there are variations in these practices in the five countries studied.

3.4.1 Belgium

In Belgium mediation is possible at any stage of the criminal justice process. It can happen after a crime is reported to the police but before it comes to court, during the court process, following conviction and during incarceration or implementation of a community sanction. The current mediation services do not extend to cases of sexual violence which are not reported to the police. In practice it appears that mediation in cases of sexual violence most often occurs post-conviction. As a statute of limitations determines the timeframe within which historical cases of sexual violence can be prosecuted, victims who disclose child sexual abuse as adults may not be able to seek justice through the conventional criminal justice system and may also be precluded from victim-offender mediation through the mediation services. This is a challenge when it comes to institutionalising restorative justice. However, in response to historical child sexual abuse in the Catholic Church in Belgium a Centre for Arbitration was established by the state with the co-operation of the Catholic Church involving restorative meetings and financial settlements.[26]

The timing of restorative meetings in cases of intra-familial child sexual abuse is decided upon on a case-by-case basis having regard to the needs and vulnerability of the child and the family dynamics.

3.4.2 Denmark

Victim-offender mediation can take place at any stage of the criminal justice process but for sexual offences mediation is most likely to take place post-conviction. It is noteworthy that sexual offenders in Denmark may be referred for treatment in lieu of a prison sentence but as offenders may be restricted by the court from having any contact with their victims, direct victim offender mediation may not be possible.

The timing of restorative interventions in therapeutic settings varies. While the possibility of a restorative meeting may be aired soon after therapy commences a great deal of preparation has to be undertaken before the meeting can go ahead. The option of contacting the perpetrator is discussed at an early point with adult victims of sexual violence who present at the Centre for Sexual Assault. Victims of rape are able to avail themselves of up to twelve sessions of psychotherapy at a reduced price and can therefore access on-going practical and therapeutic support if they decide to initiate restorative justice with the offender.

[26] http://www.centre-arbitrage-abus.be/

3.4.3 Ireland

The restorative intervention provided by *Towards Healing* deals with historical cases of child sexual abuse committed by Catholic clergy. The restorative justice process has no connection with any civil, criminal or canonical processes. Victims who participate have either already taken a legal action of some form or have indicated that they are not interested in taking a legal action. A contrasting position is adopted by *One in Four* which generally only considers restorative justice appropriate when legal processes are concluded. In exceptional cases restorative justice meetings have been convened post-conviction but pre-sentence.

Within the criminal justice system juvenile offenders may be offered the possibility of a pre-conviction restorative meeting convened by the Garda Youth Diversion Office while restorative meetings for adult offenders are only possible post- conviction by the probation service and are rarely facilitated by any statutory agencies in sexual violence cases, with no protocols being available within the statutory services for restorative justice for adults in the aftermath of sexual crime. Independent practitioners engage with pre- and post-conviction cases, and with historic sexual abuse cases with groups of victims who want facilitated restorative meetings with church or other authorities.

3.4.4 The Netherlands

In the Netherlands restorative interventions in cases of sexual violence dealt with by the criminal justice system can be mentioned by the police and be referred by the public prosecutor or judge. The option for a restorative encounter can be offered also post-conviction.

Victim-offender mediation may also be available in historical cases of child sexual abuse which are not the subject of criminal proceedings.

3.4.5 Norway

Mediation between the parties can take place pre-conviction or post-conviction. Cases of sexual violence referred to the mediation service pre-conviction are likely to be of minor gravity or cases where criminal prosecutions are unlikely to proceed. However, sometimes sexual violence is revealed when the offender has been charged with other less serious criminal charges. Post-conviction requests for mediation mainly come from incarcerated offenders. Victims of sexual violence can also seek civil mediation, but self-referrals are unusual. Indeed, the possibility to contact the mediation service directly and the availability of restorative processes is still not a well-known possibility for victims of sexual crime or the public in general.

3.5 Inter-agency communication and co-operation

Restorative processes are underpinned by assurances regarding confidentiality and by the independence and neutrality of the mediator. We have argued that 'neutrality' is not a principle that applies in relation to sexual crime and have replaced this principle with the principle of 'respect' with regard to the worker positioning. While confidentiality and independence may be especially important in restorative justice but at the same time inter-agency / inter-disciplinary liaisons add significantly to restorative justice process in relation to sexual crime including engagement with support services for victims and offenders. Our study visits brought forth a variety of perspectives on inter-agency co-operation.

3.5.1 Belgium

In Belgium the mediation services are mainly independent organisations which are separate from the criminal justice system but work in harmony with the public prosecutor or other justice authorities. In cases involving juveniles the services liaise with the prosecution services, but their work is carried out independently. In turn the mediation services may subsequently refer parties to support/therapeutic services, but they do not directly engage with such services. The independence of the mediation service is valued as it ensures that mediators are viewed as neutral impartial actors.

Support structures are in place to ensure that independent practice is not isolated practice. Mediators can refer to a deontological code which sets out guidance on issues such as confidentiality and neutrality. They can also consult with colleagues regarding difficult/complex cases and if necessary ethical dilemmas can be referred to the Deontological Commission which meets every two months to consider matters referred to it.

3.5.2 Denmark

In Denmark a hallmark of restorative justice initiatives within therapeutic settings is the high degree of inter-agency / inter-disciplinary co-operation and communication, especially in Copenhagen. The Copenhagen Network meets regularly and involves restorative justice practitioners and therapists involved in both criminal justice and therapeutic mediation services. This is especially evident in cases involving intra-familial child sexual abuse and harmful sexual behaviour by young persons. In such cases each family member may be in therapy and the various therapists may work towards the restorative meeting/conference. *Konfliktraad* mainly liaises with the police service.

3.5.3 Ireland

Collaborative networking in Ireland in relation to restorative justice has developed significantly in recent years with the development of The Restorative

Justice Strategies for Change stakeholder group, developed in 2019, that brings restorative justice practitioners and policy makers from all possible services together, for networking, training, discussion, policy development, research, and advocacy. Facing Forward as an active, member-based organisation also offers a forum for restorative justice practitioners and mediators to meet and engage in case and policy discussion. While evidence is not yet available to determine the impact of these networks on practice it would be surprising if the networks do not result in more inter-agency and inter-disciplinary collaborations in the restorative justice fields.

The NGOs engaged in restorative justice in cases of sexual violence largely work autonomously but in consultation with victim or offender therapeutic services. The probation service also engages with victim services for their restorative work. Individual independent practitioners collaborate with relevant colleagues in therapeutic or criminal justice services as the particular case determines. The police who provide restorative conferences with youth offenders work in collaboration with therapists and the probation service and with services as required.

3.5.4 The Netherlands

The professional mediators employed by *Mediation in Criminal Cases* are independent mediators who are qualified and registered via the Dutch Mediation Federation. If they also have done a specialisation for mediation in criminal cases, they can apply to be admitted to the list of the court in the region in which they are working.

The mediators working for *Perspective Mediation* are dispersed throughout the country and are employed on a freelance basis. They do not have to qualify in the same way than the mediators who work at the court. There is little interaction between the different services as far as we could understand.

COSAs work in conjunction with an outer circle of professionals which can include therapists/probation officers/police etc. The programme offered by Triptiek is largely conducted without liaison with other agencies. However, if victims are considered vulnerable, they may be referred to appropriate therapeutic/support services.

3.5.5 Norway

The mediation services (*Konfliktraadene*) have established links with various victim support and child protection agencies and this has led over time to a shift in the profile of the cases dealt with, which now include more serious cases including cases of sexual violence. The National Mediation Service provides a support structure to lay mediators and also to the professional mediators. They basically use lay volunteer mediators (recruited and trained and supervised by the service) but the employees (advisors) of the service may also take on the role

as mediator, sometimes in pairs with a lay mediator, e.g. in especially demanding and challenging cases. Difficult cases can be referred to a co-ordination group which offers support and guidance and includes child protection staff and police officers.

3.6 Training of restorative justice practitioners

The study visits revealed that facilitators/mediators of restorative justice in cases of sexual violence include people working in both a professional and volunteer capacity, people with and without a therapeutic qualification and people whose knowledge and experience of sexual violence ranged from expert to very limited. It is notable this is an area that is generally unregulated. However, in the Netherlands there are good trainings on sexual violence in the care sector. There is less in place for mediators, but the Restorative Justice Academy and individual experts are developing trainings on restorative justice in cases of sexual harm and also in domestic violence cases feeling the need for additional expertise also based on research.

3.6.1 Belgium

The training of mediators in Belgium appears to be largely 'in-house'. While some experienced mediators have received external training, expertise has largely developed through experience. It was noted that cases of sexual violence are dealt with by selected and generally more experienced mediators who opt to take on more complex and difficult cases.

Staff employed by the Confidential Centres come from a variety of professional disciplines including psychology, psychotherapy, and social work. In general, staff do not have specific restorative justice training.

3.6.2 Denmark

Konfliktraad employs the services of sixty 'lay' mediators. Many of those selected as lay mediators have a professional background in mediation. The mediators receive a one-week general training including: introduction to restorative justice, victim-offender mediation, criminal law, police procedures, court procedures, and victim support. The mediators are paid a nominal honorarium for each case they take on from the police.

In therapeutic settings professional staff from a variety of disciplines facilitate restorative meetings and dialogues. The staff members who pioneered the restorative justice initiatives have expertise in restorative justice practices and have developed training modules for other members of staff. Many of these practitioners in Denmark have also attended additional training provided by recognised international trainers.

3.6.3 Ireland

In Ireland the dominant provider of training in restorative justice is the International Institute of Restorative Practices (IIRP). Criminal justice agents who offer restorative justice services are generally trained by IIRP. Some organisations also use 'in-house' IIRP accredited trainers to train additional staff. The standard period of training with IIRP is three days which can be supplemented with an additional day of training for complex cases. The training promotes a scripted approach which could inhibit practitioners from developing the flexible reflexive approach which is necessary to deal with the complexities of sexual violence. Independent practitioners have trained largely by recognised international trainers and are trained in victim offender mediation / dialogue, healing circles and restorative conferences.

Independent practitioners and members of NGOs who currently engage in restorative justice practice in the aftermath of sexual violence tend to have extensive experience with and knowledge of the dynamics of sexual violence and the impact of sexual crime.

3.6.4 The Netherlands

For *Mediation in Criminal Cases* mediation bureaus are installed in all courts. The mediation staff working in these bureaus prepare the case, makes the first contact with the parties, and approach the two mediators for each case. There is a pool of 117 professional mediators set up by the judiciary. Perspective Mediation employ around thirty-five professional mediators on a freelance or contract basis. Perspective Mediation has their own trainings and qualification requirements.

In relation to COSAs circle co-ordinators are provided with training by Avans University who in turn train the volunteer circle members. The training focuses in particular on sex offenders with paedophilic tendencies. Mediators used by Triptiek are professional psychologists or psychotherapists.

3.6.5 Norway

The National Mediation Service (*Konfliktraadene*) in Norway has about 570 carefully vetted volunteer or lay mediators. The volunteer mediators—some of whom have related professional expertise—are provided with training which consists of an initial four-day course followed by six to eight weeks of observing mediation practice and a further three-day course. The mediators are supported through meetings, conferences, and individual guidance. Additional training is available for mediators in relation to sexual and domestic violence. It was noted that cases involving sexual or domestic violence would not be assigned to inexperienced mediators and in practice there is a small corps of highly experienced mediators who handle such cases. In the last few years there is an increased focus within the National Mediation Service on restorative processes in sensitive cases. Efforts are

made regarding the provision of specific guidelines, additional mediator training, guidance, and strengthening co-operations with professionals working specifically with victims.

3.7 Challenges

We begin this section by noting that in each of the countries we visited and where we spoke with different stakeholders, practitioners, and other representatives from policy and academia, the positive role that restorative justice interventions can play in response to sexual violence was outlined in some detail, and in general participants were optimistic regarding an expanded role for restorative justice in the area of sexual violence in the future.

3.7.1 Belgium

Restorative justice is part of the institutional response to crime in Belgium and while it is possible that budgetary restrictions could place limits on the mediation services their existence is guaranteed by legislation. However, there are important gaps in the services offered. Restorative interventions are not offered to many of those who experience or perpetrate sexual violence because the sexual violence is not reported to the police or in the case of historical abuse which fall outside the statute of limitation because no remedy is offered by the criminal justice system. Extra-legal restorative approaches are used in some cases of intra-familial child sexual abuse and this largely 'harm-reduction' model may provide the blue-print for extending services outside the criminal justice system.

3.7.2 Denmark

The success of *Konfliktraad* for restorative justice in cases of sexual violence depends on the support of the Danish police. An information and education programme is required for police officers to encourage them to consider victim-offender mediation in cases of sexual violence.

In the therapeutic arena there is concern that the impetus for restorative interventions may be too reliant on a small number of key individuals, largely based in Copenhagen, and the work in this area may therefore tail off when they reach retirement age. This probably also explains that a number of organisations we spoke to during out visit to Denmark have now more or less reduced or ceased this type of work.

3.7.3 Ireland

Funding is a key concern for the NGOs engaged in restorative justice in cases of sexual violence. *Towards Healing* relies on funding from various Catholic Church bodies which may reduce over time. In addition, the provision of funding by

church bodies has meant that some victims do not perceive *Towards Healing* as being sufficiently independent and neutral. The range of services provided by *One in Four* places great demands on its resources. A major expansion of restorative justice initiatives seems unlikely in the short term.

An expansion of existing restorative justice services funded and used by the probation services to provide restorative interventions in cases of sexual violence would require further training and recruitment of appropriately qualified staff.

The relationship between criminal justice and restorative justice in non-reported cases of sexual violence or those cases that do not proceed to trial is a problematic one in the context of reporting duties and the principle of confidentiality in restorative justice. These complex procedural relationships require addressing in order to lift some of the existing systemic barriers to restorative justice.

The absence of legislation in relation to restorative services for adults is seen as a considerable ongoing challenge in Ireland and this is impacts restorative justice sustainable innovations

3.7.4 The Netherlands

After a fairly slow start during which restorative practices developed within communities in a rather patchy and ad hoc manner that was dependent on the will and energy of local NGOs and other organisations, the Netherlands was lacking a national strategy for restorative justice for some time. The Netherlands now has legislation and funding to accompany the development of the practices at different levels.

Currently there is political attention on domestic violence and sexual violence and discussion about the suitability of restorative justice in these situations, and how these services could be structured by connecting different initiatives on intimate partner violence, child abuse, sexual violence, and restorative justice.

3.7.5 Norway

The Guided Dialogue project which was specifically targeted at date rape has had very limited success. The approach adopted has been overly tentative and risk sensitive. This is partially because of opposition from medical professionals who have resisted the initiative and have emphasised the potential for harmful consequences, while not recognising the potential for positive outcomes. To extend the application of restorative justice to cases of sexual violence it will be necessary to lower the resistance from gatekeepers such as doctors/nurses/therapists/victim support agencies.

4. Final remarks

The fieldwork from which most of the data stems for this chapter, originated in study visits undertaken in these various countries. This very rich source of data has allowed us to see first-hand practice 'in action' and compare between countries the different approaches, the pre-conceived ideas of some, and the very forward-looking ideas of others. The research study visits allowed us to discuss all of the above very openly with all our interviewees and partners. The five countries we chose to visit showed a diversity of legal landscapes, of restorative practices and we found that although they all are very different in the way they approach this topic, there are also clear overlaps between their practices. They encounter similar and different challenges. Ireland as a common law jurisdiction was different from the other European countries visited, with their more continental justice law traditions and philosophical dispositions, in the adversarial mindset we found in Ireland and concern for reporting to the authorities, that was less apparent elsewhere. We wondered if developing innovative justice practices as well as improving conventional justice practice was more challenging in common law jurisdictions for these reasons.

We discovered also during this research that without proper political will, institutionalisation and funding for restorative justice and innovative justice services, they remain at risk of disappearing again, as we have witnessed over the course of this study in several of the countries we discuss here; a finding that was also reported in our global survey analysed in chapter four. It was quite a challenge to stay abreast of developments in each of the countries during the writing up of this book.

The next chapter will present a number of initiatives and programmes from different countries which all offer in some form or other restorative justice practices in cases of sexual violence.

7

Past and current initiatives

Examples of programmes from six jurisdictions*

1. Introduction

In this chapter we have set out profiles of six initiatives or organisations which engage in different types of (full or quasi-) restorative justice practices in cases of sexual violence. Four programmes are currently active; two have ceased, the latter ones are also included here as they give important insights into the spread and variety of restorative justice work being done in many jurisdictions following sexual crime. The organisations/initiatives featured are located in Europe (Belgium, the United Kingdom, and the Netherlands), the USA (Wisconsin and Providence, Rhode Island) and one has been rolled out in several countries and thus here we offer a more general description of the programme process. The profiles highlight differences in the legal/social context in which the restorative justice programmes or initiatives operate. One programme does not use the term restorative justice but transformative justice[1] to describe their practices and there are differences in the manner in which the various initiatives discussed in the chapter are run and funded. The profiles illustrate how restorative justice programmes or initiatives can be tailored to engage with specific types of sexual violence and/or specific types of victims and offenders.

2. Suggnomè/Moderator: mediation for redress

The first institutional profile we present is that of Suggnomè/Moderator, a Flemish non-governmental organisation which provides a form of mediation known as mediation for redress, and which is currently funded by the Flemish Ministry of Welfare, Health, and Family. We begin by providing a brief outline of the origins of the programme.[2]

* This chapter has been written in collaboration with Caroline O'Nolan, Daniela Bolivar, Virginie Busck-Nielsen, Camila Pelsinger (Brown University TJ initiative), and Vince Mercer (AIM). Many thanks also to Ivo Aertsen for his help with final updates.

[1] For more information on transformative justice, see e.g. Mingus (2019).

[2] This organisation has changed name during the research and writing up of this book. It used to be called 'Suggnomè' and is now called 'Moderator'. For more information, please see https://moderator.be. This explains why we use both names here in the heading and throughout the section to

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In 1993 the programme of mediation for redress was established on a pilot basis in the Dutch speaking region of Belgium (the Flemish Community). The project was aimed at serious crimes committed by adult offenders. The initiative set out to be victim-oriented and to promote a more 'restorative' criminal justice system. In 1997 the extension of the pilot project led to the establishment of a non-governmental organisation (Suggnomè, now called Moderator) to provide mediation for redress to the Flemish community in Belgium. Through its local mediation services throughout the Flemish region, Suggnomè/Moderator seeks to provide a more participative response to criminality and to thus give conflicts back to the affected parties (Buntinx, 2006).

Mediation for redress mainly consists of indirect mediation in which the mediator acts as an intermediary between the victim and the offender. Communication between the parties may take the form of an exchange of messages, letters, or videos (Lemonne & Van Camp, 2005). Face to face encounters do take place but are not the primary type of intervention. Mediation always relies on the willingness of the parties to participate.

Until 2005 Suggnomè/Moderator only mediated in cases referred by the prosecutor or the investigating judge of the criminal court. However, some new articles in the Belgian Code of Criminal Procedure were introduced on 22 June 2005 which established that mediation can be offered for all types of crime and all degrees of seriousness and at any stage of the criminal procedure, thus making the scope of the mediation services broader and in particular providing for mediation whether criminal charges proceed or not. This provision is not necessarily an alternative to prosecutions. Mediation can also be provided post-conviction during the period of a criminal sentence; this can be particularly helpful in some cases of serious crimes. The revision to the Code of Criminal procedure also establishes mediation as a statutory service and directs that the option for mediation should be made known to all possible interested parties.[3]

Suggnomè/Moderator works in co-ordination with a variety of other organisations. At the local level, the work of the mediation offices is monitored by a steering group composed of representatives of the public prosecutor's office, the court, the bar association, probation ('justice house') and victim support, police services, and social work organisations. In some districts, representatives of the local correctional institution and of an educational or research institute also participate in the steering group. In addition, a support team is responsible for monitoring cases.

avoid any misunderstanding, it is the same organisation. The subtitle is the translation of the Dutch 'herstelbemiddeling' which can mean both 'mediation for redress' and 'restorative mediation' (the latter makes the difference with 'penal mediation' a bit more obvious) but from our discussions with representatives of the organisation then, we decided in favour of the former.

[3] For an analysis of the institutional developments regarding restorative justice in Belgium, please see Lemonne (2018).

This results in regular meetings between mediators and other service providers to discuss specific files.

The mediation services provide a communicative bridge between the parties (victim and offender) and the justice system; this not only assists the parties directly affected by a crime but also promotes restorative actions and restorative thinking within the criminal justice system (Aertsen, 2004). Although Suggnomè/Moderator works in collaboration with the judicial authorities, the mediation process is independent of the criminal justice system, (Aertsen, 2015; Aertsen & Peters, 1998). There is no pre-established link between mediation for redress and the processes of the criminal justice system. Mediators do not have to report to the court or the prosecutor on the mediation process or outcome, but they can do so, only with the explicit consent of both victim and offender. If they do provide information to the criminal justice authorities the mediation process or agreement may or may not be taken into account by the trial judge. The independence of the service ensures neutrality, voluntary involvement, and confidentiality.

Suggnomè/Moderator has also sought to promote public awareness of restorative justice and has participated in a number of media and artistic projects. Of particular relevance is the play *'Van de mens niets dan slechts?'* ['Can nothing good come from mankind?'] which tells the story of a mediation in a case of sexual violence. Other examples can be found on the organisation's website (http://www.moderator.be).

Cases may be referred by a variety of sources including prosecutors, investigating judges, and victim-support services. The parties themselves can also directly seek mediation. Most cases are offender-initiated or referred by offender-oriented organisations, which suggests that victims and offenders may not be equally informed about the programme (Bolivar, 2015). Cases referred to Mediation for Redress must have an identifiable victim (direct or indirect), the victim must have suffered material or moral damage, and the facts must be serious enough to be investigated by the magistrate (for more detail see http://www.moderator.be). The original orientation towards serious crimes has therefore become broader.

After a case has been referred the mediation service usually begins by contacting the victim. The first contact is usually made by letter and aims to provide general information about the existence of the service and its voluntary nature. Victims do not normally react negatively to the offer of mediation. Sometimes the parties may respond to the letter by contacting the mediation services, alternatively the mediation services may initiate contact with the parties, normally by telephone. Mediators encourage parties to talk about the offer with significant others (Van Eynde & Jammaers, 2004). At this initial phase, about a quarter of victims engage with the mediation service.

The mediation service engages in an honest and transparent conversation with the parties about all the aspects involved including the possible legal implications of participating in mediation (Van Eynde & Jammaers, 2004). Offenders'

participation in mediation is often at least partially motivated by an expectation that it will yield some form of benefit to them in relation to the criminal process. Transparency regarding this is crucial for victims. When a victim agrees to participate in mediation knowing that the offender's motivations are partially self-serving, the risk of re-victimisation is reduced. If the offender refuses to participate in the mediation process the victim may be at risk of re-victimisation. However when the service works with the victim to discuss the offender's response to the invitation to participate, it can ultimately be empowering for victims who can see the offender's lack of interest as a weakness rather than a strength and a rebalancing of power relations, even without ever meeting.

Risk assessments are part of the first interviews and take place in every case, regardless of the type of crime. They are not used to determine the eligibility or suitability of victims or offenders but rather to arrive at the best strategy to follow in order to make the encounter possible and safe when parties are willing to communicate with each other. There are no pre-selection criteria. Suggnomè/Moderator provides mediation services to victims and offenders willing to take part in mediation, even if the offender only accepts partial or even no responsibility. Participants are not required to be but may be receiving therapy. Minor victims may also participate; in such cases the parents or responsible adults are involved in the process. When minor victims are aged twelve years or older the mediation service sends a letter to both the child and the parents.

Parties are well prepared for the mediation and will be informed about the attitude of the other party; in this way their expectations of the encounter should be realistic and informed.

The mediation process is flexible; the length of the process varies from case to case and can extend to several months. Agreements are possible but not mandatory; victims may not wish to make an agreement. Mediation can be direct or indirect, interrupted or complete. The victim's ability to control the topics discussed and the pace of the mediation process can be empowering.

The general methodology used to deal with sexual violence cases does not differ from the methodology used for other types of serious crimes. However, mediators will be aware that the intimate nature of the crimes may constrain the ability of the parties to speak in the mediation meeting and will be particularly sensitive to possible power imbalances between the parties. The process is victim-oriented and starts by recognising the harm caused to the victim and defining the event as a crime. Mediation can proceed even if the offender is not willing to accept full responsibility for his actions but only if the victim is aware of this and is willing to participate. The emphasis is on allowing the parties as much control over the process as possible. Parties have the main voice in deciding how the process of mediation should be carried out, in terms of their own participation, the content they would like to share with the criminal justice system, the participation of others in the process, included professionals.

The safety and integrity of the mediation process is safeguarded by the neutrality[4] of the mediators, the voluntary nature of participation, and the confidentiality of the process. Although mediation starts with the recognition of one party who has been harmed and the other who is responsible for his acts the position of the mediator is neutral. She takes care of the interest of both parties and must respect both sides. However, in cases of sexual violence mediators must be very sensitive to power imbalances and the possibility of manipulation. Voluntary participation means that parties are not pressurised to participate and can disengage from the process at any time. Particular care may be required in certain cases (such as incest and stalking) to ensure that participation is wholly voluntary. The confidential nature of the mediation process means that information is only communicated to judicial authorities with the agreement of both parties, as mentioned above.

There are no prescribed follow-up procedures.[5] Post mediation contact is on an ad-hoc basis. Teamwork and supervision are considered essential for effective mediation. Mediators can seek support/advice from their immediate colleagues. In addition, every office of mediation participates in regular meetings with other institutions at the local level, where cases/files are discussed. Mediators therefore can receive feedback from other professionals working in the field and from different disciplines. In addition, a deontological and interdisciplinary commission is in place to ensure a uniform code of conduct for all mediation services.

2.1 Recent developments

On the initiative of the Flemish Parliament and Flemish government a 'Commission for Recognition and Mediation for victims of historical abuse' has been established in 2014, which was confirmed by law in 2018. The Commission addresses various forms of abuse and neglect (physical, sexual, psychological) from the past, committed within all types of institutions. The Commission is an independent body, actively supported by two professional mediators from Moderator and explicitly adopting restorative justice values and principles in its functioning. Moreover, Suggnomè/Moderator was asked to host the secretariat of this commission, which was done until 2020.

3. AIM Project

The second of the programmes profiled is the AIM project in England. This independent organisation is a registered charity and operated a restorative justice

[4] See discussions on the principle of 'neutrality' in introduction, conclusion, and chapter 3.
[5] See discussion on 'follow up' in chapter 9.

(RJ) programme from 2002 to 2012. The restorative justice programme engaged with juvenile offenders and offered both Victim-Offender Mediation (VOM) and Family Group Meetings (FGMs). The training aspect of the AIM Project continues. The AIM Project is credited with being an established authority in the United Kingdom with regard to effective responses to child and adolescent harmful sexual behaviour (HSB). A 2013 survey found that the offender assessment tools developed by AIM (AIM, AIM2, AIM3), along with the assessment tool developed by the Youth Justice Board (ASSET), are widely employed in the United Kingdom with regard to adolescent HSB (Smith, Bradbury-Jones, Lazenbatt, & Taylor, 2013: 26).

The work conducted by the AIM Project with young people who engage in harmful sexual behaviour highlighted the need for a more active inclusion of the victim experience and interests, especially where there was a close relationship between the offender and victim, and this was likely to endure in some way. The development of a restorative justice approach was considered to be consistent with the increasing emphasis on an integrated approach to HSB which advocates that the 'social ecology' of the offender and the wider context of harm are considered, as well as the 'formal' criminal definitions of the offence. This approach recognises that most adolescent HSB is characterised by its relational context; therefore, any response must be mindful of this, especially when concerned with addressing the harm caused. Thus, engaging with, and including the victim's perspective is essential to effectively addressing the behaviour. Moreover that 'victim' perspective is wider than the index or named victim and also includes the families of the victims and the young person who caused the harm and others. A further impetus for developing the restorative justice programme was the perceived effectiveness of restorative justice as a means of acknowledging and articulating the shame so central to the experience of offenders (and sometimes victims) touched by HSB.

Initial restorative justice work was conducted in partnership with the Greater Manchester Family Group Meetings Project and eventually AIM established a small restorative justice case load which ran on sporadic funding from a variety of sources until the end of 2012. Funding sources included ten Local Authorities in Greater Manchester; the National Society for the Prevention of Cruelty to Children (NSPCC); the Project's own funds generated by training/resource sales; the Lucy Faithful Foundation; and a two-year grant from the Lloyds TSB Foundation. The programme was suspended in 2012 when external funding ceased.

The AIM project offers training in restorative practices and sought to use its restorative justice caseload to establish principles of best practice, develop operational tools such as assessment frameworks, and create a more integrated approach to intra-familial harmful sexual behaviour (HSB). It generated three sets of Best Practice Guidance for RJ practitioners. The most recent 2020 *AIM Restorative Practice and Harmful Sexual Behaviour Assessment Framework and Practice*

Guidance, outlines the AIM approach and contains a very comprehensive restorative assessment framework (for more information see, Mercer, 2020).[6]

The AIM Project extended the scope of its restorative work to include cases beyond those going through a criminal justice process as time went on (although they have now stopped taking on any cases). Initially adolescent offenders were mainly referred by the Youth Criminal Justice service (Youth Offending Teams/Probation services) and occasionally by therapeutic agencies working with offenders/victims. In the main the adolescents referred had engaged in intra-familial HSB. Referrals were usually but not exclusively made post-sentence. While referrals usually came from Youth Offending Teams the programme worked collaboratively with all relevant services and engaged with therapeutic providers, Probation, Child Protection Services, etc. The project also actively engaged with victim support services and formed alliances with the National Society for the Prevention of Cruelty to Children (NSPCC) and the Victim Support Service. The collaborative engagement was multi-level. At a strategic level it took the form of joint funding bids, service provision, and training. At an operational level it consisted of joint direct work on individual cases including participation in multi-agency partnerships, and involvement in case accountability, and case evaluations. The work done in building relationships and communication with related professionals facilitated safe effective practice and also served to inform other professionals of the benefits of restorative approaches. It should be noted however that interactions with the criminal justice system were deliberately not fostered; this meant that the restorative justice process did not influence and was not influenced by sentencing or parole decisions.

Initially referrals were limited to cases where the offender was in the community under the supervision of the Youth Offending Team. However, for the last two years of the restorative justice project the referral criteria widened to include young people in custody and referrals also opened up to therapeutic providers. Young people (aged under eighteen) who engaged in HSB who were receiving or had completed some appropriate therapeutic work to address their offending behaviours and had been subject to a formal criminogenic (as opposed to restorative) risk assessment, were eligible to be referred to the project. An additional criterion for acceptance was the availability of funding. Offenders assessed as being at high risk of reoffending at the time of referral were not considered eligible for the programme. Reluctance on the part of statutory agencies to consider restorative justice approaches in cases of HSB resulted in a very limited caseload. The project sought to establish a stream of victim-initiated cases but all cases except one were initiated by or on behalf of an offender.

[6] The Project continues to offer a related training programme in support of this publication (for more information see www.aimproject.org.uk).

The Project developed the AIM HSB Restorative Risk Assessment Framework, which is a comprehensive framework to identify and estimate restorative risk and inform the shape and content of preparatory work necessary to deliver safe and appropriate restorative responses. This consists of a series of written assessments on issues relating to the offender, victim, parents/carers, supporters, and related professional concerns/issues. As an assessment its intention is to identify and highlight strengths and areas of particular concern. It is designed to inform and direct elements of the preparation process not as merely a mechanism to determine progression in restorative justice or not. There is no fixed number of visits/contacts to be undertaken.

The programme did not undertake cases where there was a tight time constraint on preparation (preparation time varied from as long as nine months to fewer than three months) and all preparation was co-worked, planned, and evaluated by the facilitators and delivered face to face. The use of a formal assessment system was not seen as a constraint on the personal agency and choice of participants. Professional staff involved in the AIM project considered that working to agreed practice standards, using effective assessment frameworks allowed them to demonstrate their professional capacity and resulted in referral streams opening up, something which was crucial in a multi-agency context such as HSB.

Decisions about suitability were made primarily through the assessment framework in conjunction with the core participants, the referees, and other concerned professionals. The primary reason for cases not going forward was that one core participant declined involvement.

The programme recognised that adolescents who sexually harm are not a homogenous group, and no single model/explanation can be applied. Consequently, the AIM programme adopted a multi-method approach to restorative justice in the belief that the type of model used should reflect the interests and needs of the core participants. The model adopted largely determined who attended the restorative justice meeting. For victim offender mediation (VOM) the core participants and the facilitators attended the meeting and sometimes support persons were also in attendance. The meetings were always facilitated by two facilitators (one male, one female). In the family group model (FGM) there was a role for core professionals such as youth offender team workers for some elements of the meeting, but crucially not in the family decision making part of the process. The FGMs were not open to legal representatives, therapeutic caseworkers, or members of the police. In FGMs wider participants were determined by core participants during the preparation process. Participant numbers varied but FGMs included as many as twenty-two participants. Support to core participants was actively encouraged and the focus was upon direct dialogue using core mediation/facilitation skills, not a scripted approach. The AIM programme sought to ensure that the restorative work was congruent with and complimented any therapeutic work being undertaken with the core participants. Liaison and communication with any caseworker was

considered to be an integral part of the role of the mediator/facilitator. On occasions participants were referred to support services if issues uncovered were not addressed or were clearly outside of the restorative role and function.

Agreements were not routinely drawn up as part of the restorative work. When agreements were drawn up the responsibility for follow up monitoring was assigned to some professional in the system network, but never to the facilitator. Reports were generated in some but not all cases. The reports varied in length according to their purpose and the complexity of the case.

In the AIM restorative justice programme a case specific flexible approach was emphasised. The approach adopted differed from that applied in other types of offences in that the dialogue did not routinely begin with an account of the offence. The extent of the discussion of the offence was directed by the victim and was discussed in the preparation phase. The AIM restorative justice programme was premised on a high level of facilitative awareness/sensitivity and skill as although difficulties in the dialogue phase were mitigated by effective and extensive preparation the process was by nature emotionally demanding and sometimes unpredictable. The primary safeguards employed were assessment, extensive preparation and high facilitation skill levels.

All cases were subject to internal evaluation which usually took place around four weeks after the restorative justice encounter. Funding restrictions precluded any external evaluation, but the internal evaluation conducted was structured and comprehensive and sought to establish if the expectations of the core participants had been met and if not, why not. The evaluation process also provided essential reflective practice feedback to inform general practice guidance/training. In general, the involvement of the Project ceased with the core participants after the case evaluation. The AIM project observed and complied with relevant Restorative Justice Council Guidelines which are endorsed by the Ministry of Justice (Restorative Justice Council, 2011/2020).

4. Brown University transformative justice initiative

In 2019, Brown University launched the nation's first Transformative Justice programme after a year of student advocacy and demand for non-punitive ways of addressing harm and violence on campus.[7] A year of focus groups and conversations with students and staff at Brown revealed there existed no support for survivors to respond to violence they had experienced outside of the university's adversarial disciplinary system or the criminal legal system.

[7] For more information on this programme see also Pelsinger (2019), Dolan (2020), and Kulman (2020).

Working in survivor support and sexual violence prevention for years at the university revealed that many survivors of interpersonal violence wanted above all for the person who harmed them to understand the impact of their actions and never harm anyone else again. However, college campuses usually offer two options in response to violence: file an official complaint and undergo an investigation and trial or remain silent about the experience with no way to ensure that the individual who caused harm will not continue to violate other people. Only a small fraction of survivors on college campuses choose to file complaints through university Title IX programs—research from the National Sexual Violence Resource Center (NSVRC) that suggests as few as 10 per cent of incidences of sexual assault on college campuses are reported (2015: 2).

Launched in August 2019 under the leadership of professional staff co-ordinator Dara Bayer and student staff co-ordinators Xochi Cartland and Camila Pelsinger, the Transformative Justice Initiative seeks to decentralise the resources and skillsets for students to address harm within their own communities and more broadly, to build sustainable networks of care and support that prevent harm before it occurs. Transformative Justice is a liberatory approach and set of practices for responding to interpersonal and structural violence that relies on community relationships to protect the safety and needs of survivors, while building systems of support and accountability for those who have caused and enabled harm. Transformative justice emerged from political movements and marginalised communities, including indigenous, Black, queer and trans, low-income, undocumented, disabled, and sex worker communities, that have built networks of mutual support as a way to survive and transform state and interpersonal violence (Mingus, 2019; Pelsinger, 2019). While transformative justice has many similarities to restorative justice, it is rooted in a penal abolitionist politic and as such, exists outside of the criminal legal system and any punitive or formal disciplinary systems.

In its current iteration, the Transformative Justice Initiative consists of three core elements, a student transformative justice practitioner programme, facilitation of community accountability processes, and a broader political education collaboration with organisations on and off Brown's campus. The transformative justice practitioner programme is a year-long apprenticeship cohort where twelve students engage in weekly or biweekly meetings to learn about transformative justice theory and praxis, while building relationships and modelling accountability with each other. These meetings are often grounded in Circle practice, a process that comes from various nations of the Original Peoples of Turtle Island (North America). In Circle, everyone is given an equal voice through the use of a Talking Piece as an invitation to share and listen from the heart. During Circle process, participants shared stories describing their lineages and values, which formed the basis of shared community agreements. Each week, participants learn and build skillsets including survivor support, trauma-informed practice, facilitating

harm circles to address low-level harm, de-escalation and safety planning, and co-ordinating support and accountability groups to address more serious instances of harm.

In addition to building capacity among student communities to address violence, the Transformative Justice professional and student staff co-ordinators also facilitate Community Accountability processes for students on campus seeking support in addressing harm in ways that centre healing and behaviour change, rather than punishment. Community Accountability is a central practice within transformative justice frameworks that centres the needs of those who experienced harm and uses community relationships to meet those needs and prevent harm in the future. The Just Practice Collaborative (2019) defines community accountability as a 'voluntary, long term, formal attempt to resolve past harms and involves a facilitator, support teams, and a designed plan for accountability that is co-created by the facilitators, the survivors, and the person who caused the violence.' While Community Accountability processes can take various forms based on the needs of survivors and the participants that choose to be involved, many are centred around three core components: a survivor support team, an accountability and support team for the person who caused harm, and a broader effort to examine and transform the community conditions that allowed for harm to occur in the first place. While the survivor support team helps to ensure the survivor(s)'s needs are met, the accountability team supports the person who caused harm in taking full responsibility for their actions, making amends where appropriate, and shifting harmful behaviour patterns in an effort to prevent further harm.

Finally, the Transformative Justice initiative collaborates with organisations on and off of Brown's campus to expand awareness of the programme, exchange resources with other groups grounded in similar work, and build political education around violence prevention and response. These collaborations take the form of workshops, information sessions, consultations, trainings, and protests. From skills based-workshop exchanges with Brown's Sexual Assault Peer Education program, to a webinar featuring local organisers mobilising mutual aid efforts during the COVID-19 pandemic to support disabled, undocumented, and incarcerated communities, these collaborations are grounded in the central organising principle that building networks of care and accountability is necessary for preventing and interrupting interpersonal and systemic violence.

Since its inception as a two-year pilot programme in 2019, the transformative justice initiative has been formally integrated as a core component of the Brown University's Office of Campus Life. Co-ordinators Bayer, Cartland, and Pelsinger have since supported efforts to develop resources to address violence through transformative justice frameworks at several universities across the country and around the world.

5. Triptiek

The next institutional profile we present is that of Triptiek, an organisation based in the Netherlands whose work with victims of historical clerical abuse is informed by restorative principles. The establishment of Triptiek stemmed from the efforts of a group jointly established by the Salesian religious congregation and KLOKK, an advocacy group for victims of abuse in the Catholic Church, to establish an alternative format to the committee established by the Catholic Church in the Netherlands to address historical clerical child abuse. This group approached a psychologist and mediator with extensive experience of sexual abuse who brought together the team which devised the programme. The programme initially operated as an informal collaboration of lawyers and psychologists but in late 2013 was set up as a foundation in the municipality of Tilburg in the Netherlands.

Triptiek deals with historical cases of child abuse perpetrated by Roman Catholic clergy. The programme provides restorative mediation which is usually in the form of indirect victim-offender mediation between the victim and a surrogate offender in the form of a superior of the religious order with which the offender is/was affiliated. Some of the clergy identified as perpetrators are deceased, others do not have the capacity to participate in the mediation process and some refuse to participate; therefore, direct mediation (with the offender himself) is mostly not possible. However, around 10–15 per cent of the mediations conducted have involved the offender (referred to in the programme as the accused). The programme is not underpinned by any legislative provisions.

The model is designed to meet the needs of both the victims' groups and the religious congregations and is specifically tailored to incorporate and acknowledge the institutional responsibility of the religious congregations. It incorporates contact between the two parties as a means of encouraging trust, understanding, and healing. It seeks to promote understanding and empathy for the suffering of victims among religious superiors (and through them religious congregations), whilst also creating an environment in which victims learn to trust the religious superiors. The model also reflects the practical reality that many of those accused are deceased, do not have the capacity to participate in the mediation process, or are unwilling to take responsibility for their actions.

The primary aim of the programme is to provide a forum in which sexual, physical, and emotional harm and neglect perpetrated by members of the Catholic clergy on children in their care is acknowledged and victims are offered an apology and financial compensation for the abuse they have suffered. Decisions regarding the amount of financial compensation can be referred by either party to an appeals board which is made up of lawyers and psychiatrists.

The programme is funded by various Catholic religious congregations who refer victims. The funding is on a case-by-case basis. Triptiek has no formal link to the Catholic Church or any other organisation.

No therapy is provided directly by Triptiek. Some victims are already engaged in a therapeutic process when they are referred to Triptiek. Victims may be referred to an independent therapist/counsellor/life coach. However, there are no formal alliances with specific organisations.

Triptiek collaborates on an informal basis with a number of victim advocacy groups. Triptiek has no established linkages with other programmes offering victim offender mediation and the programme does not collaborate with and has no relationship with the criminal justice system.

Victims are referred almost exclusively by religious congregations. Other sources of referrals are very unusual and participation in the programme is always dependent on the agreement of the relevant religious congregation. Triptiek accepts all cases referred. The normal eligibility criterion applied in respect of victims is that they have suffered abuse by a member of the Catholic clergy. Abuse includes but is not limited to sexual abuse.

The process is almost always initiated by the religious congregation. Victims are contacted after the case is referred by the congregation and the accused person, if alive, is always approached by the religious congregation.

Accused persons who are willing to participate in the programme are interviewed by Triptiek. On the basis of this interview a recommendation is made regarding whether or not the accused person should participate in the mediation process; however, the final decision is left to the victim. No formal risk assessment of victims is conducted. If there are concerns regarding the capacity or vulnerability of the victim efforts are made to ensure that the victim is assisted by a suitable person such as a therapist, a partner or a friend. The relatively informal approach to the risk assessment of both victims and offenders is informed by the considerable period of time between the mediation process and the offending behaviour, the involvement in most cases of surrogate offenders and the advanced age of accused persons who do participate in the process.

The process consists of an in-take interview, the proper face-to-face mediation and an assessment and offer of financial compensation. Preparation for the mediation takes place during the in-take interview. A period of three hours is allocated for this preparatory interview. If this is not deemed sufficient a second interview will be arranged; victims can also contact Triptiek by telephone if they wish to discuss any concerns.

The in-take interview is carried out jointly by a lawyer and a psychologist, both also experts in mediation. A staff member who takes minutes is also in attendance during this interview. The parties can have a support person present if they wish; many victims opt to have someone with them during the interview. The in-take interview is normally arranged at a time and at a neutral venue which is convenient for the victim.

During the in-take interview the victim is given the opportunity to recount his life story; in addition to providing details of the abuse he/she has suffered he/

she will also be invited to talk about life before and after the abuse. This can be an emotional and stressful process for the victim. The victim is also asked what they want to get out of the process and what questions they would like answered by the congregation/offender. Where possible the questions raised are addressed at the mediation.

Following the interview, a written report setting out the victim's claims and questions is prepared and sent to the victim. The victim has the opportunity to review the draft report and can suggest amendments. When the final draft of the report is agreed it is signed by the victim. In almost all cases a copy of the report is sent to the congregation/offender; the report will not be sent if the victim does not give permission.

In-take interviews are also conducted with accused persons and religious superiors. In-take interviews with religious superiors are not usually specific to an individual victim. If a congregation is referring twenty victims there will normally be just one in-take interview and indeed no in-take process is conducted when religious congregations have previously referred victims to Triptiek.

A mediation meeting usually takes place six to eight weeks after the initial interview. Those in attendance at the mediation meeting include the facilitator; a lawyer who is responsible for drafting the settlement agreement; the victim who will usually be assisted by a support person of his/her choice; and normally two members of the religious congregation. If the accused person participates too, separate mediation meetings will be scheduled; one with the accused person and one with the religious superior. An accused person may be accompanied by a member of the religious congregation, or he may opt to attend the meeting without a support person. The decision whether or not to bring a support person and who to bring as a support person rests with the parties but they are encouraged to bring a suitable person with them and can if necessary be provided with a support person.

The format of the mediation is flexible and responds to the needs of individual victims; a script is not used to structure the meeting. Normally the facilitator guides the conversation and when necessary, will seek to structure the conversation. The approach adopted responds to the attitudes and capabilities of those involved. If the victim or accused present as being particularly depressed or vulnerable the facilitator may suggest therapies to assist him/her. If it is considered that the mediation process is not progressing satisfactorily 'time-outs' may be used. During the time-out the facilitator will speak to each party separately before the process resumes.

The meeting always includes an apology, and this is normally responded to by the parties shaking hands or if appropriate sharing a hug, not with accused persons but with superiors or religious leaders. In a few cases victims have been unwilling to accept the apology offered and, in such circumstances the ritual handshake did not take place.

The dialogue part of the mediation process is concluded by a settlement agreement signed by all relevant parties. This agreement is legally binding. After the mediation the parties will be contacted (normally by email) by one of the legal professionals and asked for their views of the process and also how they are feeling since the process. Parties can also initiate contact with Triptiek if they require support.

The final stage of the process is the proposal for financial compensation. This agreement is drafted by a lawyer and is sent to both parties. Each party has the right to either agree to the proposed financial compensation or to refer the decision to the appeals board. If the proposal is agreed, it will be signed by both parties who will each receive copies of the signed agreements. After the financial compensation is agreed there is normally no further contact with the parties. A report and an agreement are written up for every case. No monitoring of the agreement is normally required.

The length of time that the process takes varies but a rough average is six months and the time taken can extend to a year. Time limits are only imposed in the final stage of the process when the financial compensation is offered.

The programme does not carry out any formal assessment of outcomes. The programme is evaluated by reference to the number of cases referred, the number of agreements reached, and the financial compensation agreed. The amount of financial compensation agreed is not used as a measure of success but rather as a comparison point to the official mediation process offered by the Catholic Church in the Netherlands.

The Triptiek staff include psychologists/mediators, lawyers and some secretarial support staff. The mediation role is undertaken by a psychologist. Knowledge of sexual trauma and experience of dealing with victims of sexual abuse is considered essential for mediators. Staff members have not been provided with any specific restorative justice training courses, but some members of staff may have undertaken restorative justice training independently.

6. Circles of Support and Accountability (COSA)

While one of the strengths of restorative justice is its capacity to respond to individual and community needs, some alternative mechanisms, such as Circles of Support and Accountability (COSA) also respond to individual and community needs in the aftermath of sexual crime.[8] While adhering to some key restorative justice principles and values, such as that crime is a violation of a person and of interpersonal relationships and the offender is accountable for the harm done

[8] See also Wager and Wilson (2017) for information on the programme, discussion on its restorative potential, and the role that victims can play in it.

(Dignan, 2004; Liebmann 2007; Pranis, 2007; Walgrave, 2008; Zehr, 1995; Zehr & Mika 1997) COSAs are not considered full restorative justice programmes in this book as their focus is on offenders and community safety but generally do not include the direct victims of a particular offender's sexual crime. Rarely is it the explicit aim of COSA to bring together the victim and the offender in an effort to repair the harm for the victim in the aftermath of sexual crime. The main objective of the COSA circle is to reduce reoffending by offering social reintegration for the offender. The motto of COSA is 'no more victims', 'no more secrets', and 'no-one is disposable' (Höing, 2011). The intervention consists of constructing a social network around medium to high-risk sex offenders who are re-entering society after a custodial sentence. The social network is both informal and formal which provides for both informal and formal social control (Höing, Boagerts, and Vogelvang, 2013).

Circles of Support and Accountability (COSA) first emerged in Canada in 1994 and have since been established in numerous jurisdictions including the USA, United Kingdom, the Netherlands, Ireland, and Belgium (Hanvey & Hoing, 2013: 376). COSAs attempt to help sex offenders successfully re-enter the community and, thus, increase public safety by providing them with social support as they try to meet their employment, housing, treatment, and other social needs (Duwe, 2013: 144). The COSA consists of an 'inner circle' of volunteers and an 'outer circle' composed of community-based professionals (such as psychologists, law enforcement officers, supervision agents, social service workers) who voluntarily give their time to support the inner circle in its work (p. 144). The offender or 'core member' is provided with a group of three to six trained volunteers, preferably from the local community, who meet with the sex offender on a weekly basis with the objective of helping the core member to desist from reoffending. The core member and volunteers constitute the 'inner circle'. The participation of the core member in the circle is voluntary. He/she must be willing to share information about his offence and his personal risk factors with the volunteers. The circle volunteers are recruited from the local community and are carefully selected, screened, and trained by a circle co-ordinator. The selection of volunteers reflects the diversity in the community and is constituted of both males and females from different age groups and different backgrounds.

The inner circle is supervised by the professional outer circle which is formed by the professionals who are involved in the core member's journey of reintegration. Usually forensic mental health care professionals, probation officers, local police officers, local welfare organisations, or housing institutions are represented in the outer circle. The role of the outer circle is primarily to support the core member in his functioning within the circle as an aspect of their own professional involvement with the core member, and to give advice to the inner circle volunteers through the circle coordinator, on any specific topics that arise. The outer circle monitors the inner circle process through regular updates from the circle coordinator. Usually,

a circle lasts for one and a half years, but in some cases, circles can last for an extended period and some suggest even for the lifetime of the offender.

Circles of Support and Accountability have been described as a 'restorative justice initiative' (Wilson & Prinzo, 2001: 60; see also Wager & Wilson, 2017). Critically, however, although the roots of the COSA approach are located in a restorative justice philosophy, COSA operates within a socio-political context in which concern for community protection is paramount (Hannem, 2013: 270). While the concept of community protection is not contradictory to the aims of restorative justice, it is commonly associated with reactive, punitive measures originating in the community protection movement that eclipse broader ideals of restorative justice, such as reparation and restoration of relationships (p. 270). Nonetheless, because the COSA model is characterised by redemptive and supportive functions, it represents a hybrid form of restorative justice and community protection (p. 270). While COSA cannot therefore be compared with full restorative initiatives such as VOM/VOD, restorative conferencing and healing and restorative circles, because COSA includes only some key elements of restorative justice, we include in this chapter because it offers useful thought on the broad reach of restorative possibilities.

Regarding reintegration, COSA has been proved to offer offenders an experience that could help them to face the obstacles they may find after conviction, such as rejection, stigmatisation and isolation (Höing, Bogaerts, & Vogelgang, 2013; Thomas, Thompson, & Karstedt, 2014). In a recent study[9] of the Hampshire and Thames Valley Circles Project in England, while there was no matched comparison group, the study found a number of benefits of COSA for the sixty offenders who participated in the study (Bates, Macrae, Williams, & Webb, 2011). According to the results of the study, 13 per cent of the core members received and felt that they benefited from circle support for drug and alcohol problems, with 50 per cent receiving support from the circle to pursue and access education and employment. In addition, nearly 50 per cent of the 60 offenders cited improved relationships with their families and other networks of support (Bates, Macrae, Williams, & Webb, 2011: 5). Höing et al. (2013) found that core members reported increased self-esteem, self-confidence, and improved social skills following their involvement in the circle. However, more research is needed to study the impact of the circles on the community in general (Höing, Bogaerts, & Vogelgang, 2013).

The empirical literature indicates trends in the effectiveness of COSA in reducing reoffending rates among sex offenders (CBML_BIB_000_0620Bates, Macrae, Williams, & Webb, 2012Wilson, Picheca, & Prinzo, 2007; Wilson, Cortoni, & McWhinnie, 2009). COSAs have also been shown to offer offenders an experience that could help them to face the obstacles they may find after conviction, such as

[9] The UK study reviewed sixty core members (offenders) of the circles.

rejection, stigmatisation and isolation (and to improve offender well-being and reintegration within the family and the community Höing, Bogaerts, & Vogelgang, 2013; Thomas, Thompson, & Karstedt, 2014). Höing et al. (2013) found that core members reported increased self-esteem, self-confidence, and improved social skills following their involvement in the circle. While COSAs are classified as 'quasi' restorative justice approaches in this study and have been criticised for its management and community risk focus. While COSAs have been criticised in some jurisdictions for stripping of its restorative justice philosophy and becoming a form of community surveillance (Hannem et al., 2013) on the other hand COSAs can be seen as a useful restorative approach for medium and high-risk sex offenders within the context of community protection, risk-management, offender well-being, and reintegration.

7. Healing circles: Green Bay Correctional Institute

The final programme profile presented here is an alternative restorative justice programme which facilitated healing circles bi-annually in Green Bay Correctional Institute (GBCI), a maximum-security male prison located in the State of Wisconsin, United States of America. The programme has unfortunately ceased since 2017. As a maximum-security prison GBCI houses offenders who have committed grave offences; about 11 per cent of the GBCI inmate population are serving life sentences (WDOC, 2014a: 16) and almost nine out of every ten inmates (88.7 per cent) have committed violent crimes which include rape and other sexual assaults (WDOC, 2014a: 17).

Healing circles are a model of restorative justice which promote inclusivity, interconnectedness, and mutual respect. The contemporary circle process is based on the traditional practices of First Nation people in North America. A talking piece is used and passed from person to person within the circle and only the participant with the talking piece has the opportunity to speak. This process provides all participants with the opportunity to have an equal voice and also encourages careful listening and expression (Greenwood, 2005). The healing circles in GBCI had been running for circa years and led by former judge also a restorative justice practitioner and advocate.

The aim of the circle programme was to provide a forum for dialogic interaction between men who have committed violent crimes, survivors of violent crimes, and community members. The survivors were described as 'surrogate victims' as they were not the direct victims of the offenders who participated in the circle. The conversations between participants and the methodology provided offenders, survivors, and community members with potentially transformative insights and opportunities to heal. The circles provided survivors with an opportunity to share their experiences and in so doing to promote their own healing as well as that of

the offenders. They also provided offenders with the opportunity to hear first-hand accounts of the effects of violent crime and give them a forum for relating their own often troubled histories. These dialogues and processes were designed not as a means of absolving offenders from responsibility but a means of promoting compassion for survivors and for one another and for all participants (Pope, 2011). For community members the circles humanised violent offenders who had committed serious crimes, while also highlighting the long-lasting impact of violent crime. It was also hoped that the circles would have 'ripple' effects beyond the immediate circles as the altered perspectives of offenders and community members would influence the views of those with whom they would come in contact.

The healing circles are co-ordinated and facilitated on a voluntary basis by a former judge, restorative justice practitioner, and advocate and legal academic, who was also the Director of the restorative justice initiative (RJI) in the University of Marquette. Students involved in the RJI in the university provided a stream of community participants for the healing circles. However, the retirement of the judge from her position in the university and other factors within the Corrections and prisons services heralded an uncertain future for the programme, which has since ceased functioning.

The healing circles were not underpinned by legislation and the programme relied on the support of the Secretary of Corrections, the prison warden and prison staff, and Victim Services within the Department of Corrections. Victim Services supported the healing circle in a variety of ways. They provided information about the restorative initiatives facilitated by the Department of Corrections,[10] and also offered a point of contact to victims who wished to receive more information about getting involved in the healing circles. Victim Services also supported the healing circles financially as they provided funds to reimburse victims for expenses incurred for participating in the circles.

The healing circles in the GBCI did not focus exclusively on sexual offences but rather on serious violent crimes. There were no formal links between the healing circle and organisations which worked in the area of sexual violence. However, some victims who participated in the programme were members of victim support organisations.

All referrals to GBCI were post-sentence and all offender participants were serving a sentence for a serious crime which has resulted in their incarceration. Healing circles in GBCI were not restricted to sex offenders; they included offenders who had committed a range of serious crimes. However, as sex offenders comprised a significant proportion of the inmate population in Wisconsin; one in four inmates in custody on 31 December had an active conviction for a sex offence (WDC, 2014b: 6) the proportion of convicted sex offender participation in GBCI was likely to be higher than the general prison population.

[10] See https://doc.wi.gov/Pages/VictimServices/RestorativeJusticeOverview.aspx

Inmates could volunteer for the GBCI programme, but they can also be nominated by social workers / counsellors / prison guards. Applicants were screened by teachers in the prison education unit. All those who wished to participate in the circle every time it ran could not t be accommodated and there was usually a waiting list of 150 men. The one absolute criterion for selection was that the men must not be in trouble in the prison or that they would not be disruptive during the circle. Inmates who were considered to lack the intellectual ability to participate meaningfully in the programme were also not selected for the programme. The seriousness of past offending behaviour was not a consideration for participation; participants have included men convicted of multiple homicides and multiple sexual assaults.

Survivors were often self-referred. They usually participated in the circle many years after their victimisation. The offenders who victimised them were never part of the same circle although from time to time they may have been incarcerated in the prison in which the programme was run. Some victims had heard about the GBCI through their association with a victim advocacy group or previous participation in VOD or they had heard public talks about the GBCI programme. Victims who wished to participate in the circle were required to attend a circle as a community member before they participated in the role as a survivor of a violent crime. Many victims participated in more than one circle over the years.

Community participants came from a variety of backgrounds. They included social workers, visiting academics and students, judges, police officers, community volunteers, and journalists. Community participants were also from geographically diverse communities and while many community participants came from Wisconsin some came from other states in the United States and from other countries.

The healing circle in GBCI were positioned within and as part of a broader sixteen-week course, known as 'Challenges and Possibilities', which aimed to improve prisoners' self-esteem and attitudes and promote a positive orientation towards the future. The topics covered during the course included general coping skills, accessing community resources, legal issues, conflict resolution, employment, and personal growth skills (Wisconsin Department of Corrections, 2014a: 6). By the time the course participants took part in the healing circle the men had spent ten weeks working together on the course. This provided the groundwork for their participation in the circle.

There was no formal risk assessment of participants in the programme but as noted earlier offenders were screened by staff in the educational unit of GBCI. Victims only participated in the circle when a considerable length of time, usually ten to fifteen years, has elapsed since their victimisation, which helped to ensure that they were not psychologically fragile. The interval between the violent event and the survivor's participation in the circle also served to highlight the enduring impact of violent crime for the offenders and community members who

participated in the circle. Although there were no formal risk assessments of participants the location of the circle in a maximum-security prison ensured that physical safeguards were ensured. The use of surrogate victims rather than direct victims reduced the risk of re-victimisation or traumatisation.

Each circle consisted of twenty-five to thirty offenders and twenty-five to thirty members of the community including a number of victim/survivors. The process was led by the facilitator and took place over three days. Before the circle commenced the community members were briefed by the prison staff regarding the prison code of conduct. The process began with participants sitting in a large circle; the seating arrangements being carefully organised to ensure that community members were interspersed with offenders. The talking piece was used to encourage both the dialogue and the listening. The programme over the three days included large circles and small circles and group exercises which were aimed at promoting interconnectedness and a sense of common humanity. The large circle was broken into smaller groups to promote active participation and learning. Inmates were often selected to present the work/views of the small groups, reinforcing their acceptance within the group and the programme. Offender participants also had a homework exercise to be presented on the last day of the circle programme.

On the first day of the circle victim/survivors were only identified as community members. Offenders were not asked to disclose details of their offending behaviour to the group although by the end of the three days most of the offenders do discuss their offending behaviour with the group. Large and small circle groups take part on this first day.

On the second day the victim/survivors took it in turn to relate their personal experiences of violent crime in a large circle. Community members (including the offenders) took it in turn to respond, using the talking piece, and to disclose and discuss personal resonances. The detailed accounts of the immediate and ongoing effects of violent crime prompted offenders to reflect on the long-term impact of violent crime and to respond directly to the victims. Offenders often also identified with the victims because many of them had also been victims of physical/sexual violence themselves. They recognised the authenticity of the victims' accounts, admired their courage, resilience, and bravery in voicing their experiences. This part of the circle was an emotionally draining process for all participants and prison staff were asked to be especially watchful of inmates on the second night. Offenders were asked to prepare a creative response to the victims overnight that would be presented on the final day. Many wrote songs or poems specifically focused on some aspect of a survivor account from the day.

On the final day of the circle programme all the participants sat in a large circle and the offenders presented their creative response to the victims. Community members also took time to respond to these offerings. The process ended with all participants taking it in turn to make a commitment to do something tangible as

a result of their participation in the course. The commitments made were diverse and very specific to the individuals in each circle. For example, participants made commitments to contact estranged relatives, look out for fellow inmates, continue to write creatively about important topics in their lives. When the circle ended the offenders continued with the remainder of the 'Challenges and Possibilities' course, which ensured they could more readily access emotional/psychological supports if needed, before they returned eventually to their normal prison routines. Survivors had access to support from the Victim Support service. Many survivors found the experience so rewarding and healing they applied many times to participate in further healing circles.

8. Final remarks

This chapter presented six programmes from four different countries and one is present in a number of countries. Each depict a very unique way of applying restorative justice to cases of sexual violence. Some are still active like Moderator or have started recently like the transformative justice programme at Brown University and some have stopped such as AIM or Triptiek for a number of reasons. We thought they were all important testimonials to show what is being done in practice, as they put into perspective the reality of these practices and the presentations depict well the variety, ingenuity, and commitment but also the challenges that are characteristic for this type of approaches.

The next chapter presents a number of different personal testimonies of restorative justice after sexual violence cases.

8

Four personal narratives of restorative justice practices following sexual violence*

1. Introduction

In this chapter, we are using narrative methodology, which means making use of a 'spoken or written story' (Bold, 2012) to relate examples of cases which we thought would be helpful to put in perspective what has been addressed in the book so far. Presser and Sandberg (2019: 131) explain that narratives are 'temporal accounts of events that give meaning to those events … they inform and animate us and thus guide our actions'. By helping draw the picture of an action, by giving it substance, we are hoping of help demonstrate what this means to the different stakeholders and for the development of practices. O'Connor (2015: 174) explains to that effect that 'Whether story is merely a sequence of events and narrative is the *shaping* of events, we must realise that the position of the teller is crucial.' We feel that the people whose stories we relate here are the ones for whom the sexual violence and the response to it are the most real, therefore their stories are the most genuine, truthful, the most directly relevant, and therefore with the most weight to explain what this means and what can be done with it.

The four cases we have decided to include here (there were many more we could have included, but due mostly to lack of space we have decided on those particular ones) are the stories of four very dissimilar cases, apart from the fact that all cases have taken place some time ago and are not being processed anymore. They address different types of sexual violence. The timings of when the restorative justice took place in each case is also very diverse and although the timelines span over several decades the restorative justice procedures and meetings (if a meeting took place) all happened in the last decade. The cases are also different because they occurred in different countries and contexts and involved different restorative justice methodologies. The cases differ in the way in which each story is told in content and detail, and from whose perspective—the facilitator, the victim, and the organisational representative. Three narratives represent peace time situations; one involves sexual violence during times of war. Despite the differences these narratives contain many parallels and between them enhance knowledge on restorative

* This chapter has been written in collaboration with Caroline O'Nolan, Virginie Busck-Nielsen, Vince Mercer, Lara Keegan, and Christine van Noort.

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justice after sexual violence and the contribution of this book. The organisations working with the first two cases ceased this to take on such work when funding was no longer available for the projects.

2. Mediation in a rape case by the AIM Project (United Kingdom): a practitioner's account

2.1 Background to the case

The case relates to a serious sexual assault (rape) committed by a young man (D) on an adult female victim (C).[1] D, aged seventeen at the time the restorative intervention began, had been sentenced some years earlier for the offence and received a substantial custodial sentence. At the initial point of referral, he was detained in a local Youth Offending Institution (YOI) but soon after transferred to a Local Authority Secure Unit as part of his rehabilitation.

The victim, C, made numerous requests following the court case for some form of restorative justice but on each occasion was told this was either not possible or not appropriate. Eventually, some years after the conviction she was allocated a new victim liaison worker who originated from New Zealand and was familiar with restorative approaches. C told the victim liaison officer she would like to meet D. This request was discussed with practitioners who were responsible for the offender work with D, who then discussed this request with D. He agreed to be approached to consider potential participation in a restorative justice intervention.

The therapy agency working with D commissioned (through direct funding) the AIM Project, a specialist restorative justice service with experience of restorative justice in the context of Sexually Harmful Behaviour (SHB) to explore a potential meeting between the victim and the offender. AIM established a contract to deliver the intervention and to set out the framework for the management of the intervention process. It was agreed that the work would be undertaken by workers experienced and trained in mediation with serious cases, and that the work would be delivered within the Standards set by the Home Office Best Practice Guidance (2012).[2]

The practitioner who was working with D in relation to his sexual offending met with the mediators to brief them on the complex background of D's case. D was a 'Looked After Child' having been taken into care following his mother's neglect,

[1] The AIM Project www.aimproject.org.uk. The case study is based on interviews done with the main stakeholders and a report written by Vince Mercer, AIM Project. Permission to use the data was granted by the main stakeholders after completion of the case, as long as confidentiality was respected. We have therefore changed the names of the victim and the offender to letters.

[2] For more information, see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217311/restorative-justice-action-plan.pdf

physical, and sexual abuse of him as a very young child. She had been sentenced to a period of imprisonment for the sexual abuse. There were also suggestions that D had suffered multiple abuses by other family members. Prior to making contact with either party the mediators viewed the casefile, read the court transcripts, and gathered all necessary background information.

Prior to any victim contact the mediators visited the victim liaison officer to discuss the case and to look through the probation file, reading additional court papers and, in particular, the victim impact statement which had been submitted at the time. They also viewed media reporting that had surfaced at the time of the court case. This media reporting was later to feature as a significant factor in the case.

The first meeting between the mediators and the victim liaison officer and C took place at C's workplace, and she was supported by a friend and colleague. During this meeting it was established that C was quite sure about wanting to have direct contact with D despite the potential challenges of restorative justice of which she was made aware. At that stage C was relieved her request was being heard at last and had prompted action.

The meeting did raise a number of issues that the restorative justice facilitator wanted to address before proceeding. The most significant issue was the lack of positive support from C's partner towards her desire for restorative justice (at C's request the meeting took place at her work so her partner would not be aware of it). It was also uncertain whether other professionals working with D, apart from his therapist, would support the restorative approach. The case also presented certain practical difficulties in respect of geographical accessibility for the mediation team to both the victim and offender. While the offender was housed geographically close to the mediation service, the victim resided over a four-hour drive away by car. The AIM Project also had guidelines that cases of severe SHB must be co-worked by a male and female worker and together these two features would add to the time and cost of the preparation for restorative justice.

2.2 Preparation

This first meeting was achieved in early April 2009. The victim liaison officer was keen that C's request for a restorative process was enacted as requested but at the same time her concern was that C would maintain the progress she had achieved in overcoming the trauma of the initial offence and its aftermath. As the offence and subsequent court process attracted considerable local and national interest from the media, which had a negative impact upon both C, her family, D and his family, both parties and their respective families/supporters heavily emphasised the absolute need for confidentiality in the restorative justice process. For all of

these reasons over one year elapsed between C's initial request to the victim liaison officer for restorative justice, and the *actual* restorative justice meeting.

C's motivation for restorative justice was that she no longer wanted to be a victim; her life and commitment to her work were too important to allow the offence to destroy it. She appreciated the support of people around her but felt some people struggled to see how she could ever 'recover' from the offence and continued to 'see me trailing a baggage of victimisation behind me … '. In addition, right from the start, C was motivated by wanting the meeting to be part of a process in which D would learn the reality of the impact of the offence, and reflect upon this, as part of coming to terms with his actions and as part of his efforts to progress and rebuild his life.

From the initial preparatory meeting C used the metaphor of 'journey' for rebuilding and progressing her life. She believed the offence could have destroyed her life but that she saw herself as a survivor of the harm and did not want to remain forever as a victim. The assault had the potential to bring her to collapse but instead she saw herself as asserting a sense of agency and strength. C did not want to be sucked into a narrative of defeat and passivity. The judge had said to the offender in the course of the court proceedings, 'you have destroyed this woman's life … ', but this was a view with which C vehemently disagreed with. C saw her journey as developing insight and understanding which she felt powered her potential for rehabilitation and restoration.

There were practical motivations for C's desire for restorative justice related to the fact that ultimately D would be released from custody and may return to settle back in the area in which she lived. C wanted an opportunity to address that issue in advance of this reality and to her concerns regarding any potential threat to her security from D. She did not want her recovery from the trauma of the offence to be jeopardised by a resurrection of fear or insecurity on D's release. C believed on reflection that D had planned the assault and it was not an opportunistic event and she wanted the possibility of exploring these concerns directly with the individual best placed to give her the answer, D. C was clear and persistent in expressing her motivation for restorative justice: a strong need for self-affirmation.

Prior to visiting D the mediators met with staff from the secure unit. The nature of D's response to being in the secure unit, the quality of his relationships including with staff, his rehabilitation programme, the partnership work being undertaken by the unit with his therapist for his sexually harmful behaviour, other related services, and D's family support person were all discussed. The restorative work was explained, including how it would likely progress. The mediators were keen that the restorative justice would complement the therapeutic work being undertaken with D, as well as any day-to-day behaviour management. An informal 'contract' regarding professional communication and access was agreed at this meeting. It was also agreed a key worker would be available to support D immediately after the preparatory restorative justice meetings if he needed.

In general, the secure unit staff welcomed the restorative process and saw it as an opportunity to expand the quality and range of work with D, especially in relation to his overall level of emotional reflection and emotional literacy. Concerns were expressed regarding D's emotional development and capacity to describe and reflect upon his emotive responses but that was part of the programme of work in the unit.

D presented as a quiet, warm, and amicable young man. The mediators explained the principles and practice of restorative justice and gave D sufficient information and time to make a considered choice about participation. D was not required to agree to participation at the first meeting. He was given time to raise and discuss questions with care staff in the institution. D quickly appreciated that this was a process that had originated from C and he was predisposed to 'do it for her'. This remained a consistent motivation for D, throughout the preparation phase of the work. D was tearful when describing his desire to meet C as she had requested 'because I did a really bad thing and now, I can do something good . . . '. Whilst this was a workable motivation the mediators were nonetheless keen to balance D's altruistic motivation and identify specific 'self-centred' motivations that would sustain D through the process. This was framed most usually in terms of acquiring insight and awareness which supported the therapeutic work being undertaken with him as well as giving the opportunity to explore a range of emotional experiences and consider his management of feelings of frustration, remorse and shame.

D had many questions: 'How is C now?' 'Is she angry with me?' 'How has she coped with what happened?' It soon became clear when discussing motivations for the meeting that D was experiencing very powerful emotional reactions but struggled to name and describe them. In addition, D was very keen to stress the need for confidentiality and expressed an acute concern that the media in general would not be involved or aware of the process.

C was anxious to know if D was committed to working towards a restorative meeting and was relieved when this was confirmed. Whilst restorative justice is a voluntary process there is a degree of good faith required that the other party will continue with the process once initial agreement has been gained. Apart from one party not turning up, a concern articulated by C was that D would walk out of the room in the course of the meeting and potentially deny her an opportunity to say what she needed, thereby abusing power and control over her again. All of these concerns and issues were discussed during the preparation meetings which continued with both parties separately, with questions such as: 'what would you like to say?', 'what would you like to hear?', 'what would be the most difficult thing for you to say?', and 'what would be the most difficult thing for you to hear?' From the responses to these questions the mediators were able to map out the areas of sensitivity that required particular attention in the meeting and in safety requirements.

Common practice is for the participant to identify a supporter to accompany them through the process. C chose a close friend and work colleague who was able

to attend all the preparation sessions. Early in that process the role of the supporter was clarified. A supporter is not permitted to speak on behalf of the participant no matter how well-intentioned or 'protective' as this can stand between the participant and their direct engagement in the restorative process. Rescuing participants or expressing feelings of indignation particularly on behalf of victims were not part of the role of supporter. Supporters were reminded that the restorative process is owned by, and in the service of the participants. C's support person fulfilled the role well and acted as an accessible 'sounding board' for C in the periods between the preparation visits, which in turn informed the preparation process further.

A number of issues arose in respect to preparations with D. As a young man with a troubled background and quite traumatic experiences in his early years there was a feeling that he was 'delayed' or lacking in key developmental milestones in relation to his emotional development. His experience of detention over a number of years, also impacted upon him and contributed to a young man who was characterised as emotionally underdeveloped for his chronological age. The mediators were keen to continue to explore his initial motivation to 'do the meeting for C' and to explore his understanding of how the offence had impacted upon C at the time and most significantly, in the present. They also explored his interest in how C had 'dealt' with the impact of the offence and the steps she was taking in a positive sense to overcome that impact. The mediators felt it was the fear that C may not have managed the struggle to recover that caused D most disturbance and was a potential terror for him about the meeting. Other issues that arose for him in relation to restorative justice concerned the need for family support.

In general D's family were supportive of the restorative justice, but they had some reservations about how it could impact him and the progress they saw him making. One member of the extended family expressed this concern forcefully during a formal review meeting at the secure unit. The mediators were concerned on hearing this that D was experiencing internal conflict as well as within his family as to whether to continue with restorative justice at all. The mediators undertook a direct visit to the extended family to give them an opportunity to voice their concerns and to explain the potential benefits of restorative justice for D as well as for C. Ultimately, D was able to separate out the motives and concerns of his family member as being 'well-meaning but misplaced'.

Critical to D's participation in the process was the role of a supporter. The supporter for an offender has the potential to resist or support the process and this had to be addressed. It was felt the supporter in D's case if a family member could help address any potential in the family to excuse or minimise the reality of the offence and D would benefit from having a support person within the family to do this. D's soon to be stepmother was agreed by D and the mediators as his support person as it was believed she had the necessary skills and insight to deliver effective support, both in the meeting and critically after the meeting. Separate work was undertaken with D's support person to ensure she understood the role and its responsibilities.

C pointed out later when reviewing the restorative justice that neither of the support persons were in C or D's lives at the time of the offence or its immediate aftermath. Thus, they could focus upon the reality of the present and the interests of both participants to consider the positive futures that they wished for. They had no 'history' in relation to the offence. Other survivors have commented on the importance of having a support person who was there from the beginning and who knows the whole story as it unfolded.

The final section of the preparation focused on the shaping of the actual restorative justice meeting itself. This covered issues such as:

- An agreed structure
- Ground rules for participants
- Role of the mediators
- The venue and room layout
- Timings and practicalities around managing the movement of people

A conventional dialogue driven victim offender mediation was chosen as the methodology for this meeting involving a short introduction by the mediators, an invitation to C to say what she wanted to say and ask what she wanted to ask, the same opportunity being provided for D, and for a dialogue to be facilitated in relation to the issues/interests and concerns that each brought into the room. The ground rules for the meeting were developed from the elements that both parties felt were necessary to create the safe space for dialogue. As such the 'rules', like the meeting itself, were owned by the participants in collaboration with the two professional restorative justice facilitators.

2.3 The meeting

The pre-arranged meeting took place at the end of January 2010. As agreed beforehand, D and his support person were already seated in the room with one mediator when the second mediator brought in C and her support person. This arrangement reflected C's feeling that to enter the room required a strong and assertive act of will and she wanted to retain that for herself, perhaps as an act of affirmation.

The meeting began with a brief welcome, an opportunity to both parties to become a little more familiar with the physical presence of the other, an outline of the ground rules and a reminder of the role of the mediators. C began by thanking D for attending the meeting and acknowledging that this must have been a difficult thing for him to agree to do.

C then gave an account of the court process and some of the issues that arose from this. This was the last time that C and D had seen each other. C challenged D on his initial denial of the offence. D explained this was due to the panic he felt.

D listened intently as C laid out in detail the impact of the judicial process upon her and her family. She then moved on to discuss the offence itself and conveyed very powerfully her absolute fear and shock. She asked her questions in relation to D'S planning and preparation of certain aspects of the offence. D responded and confirmed some of C's suppositions and was also able to explain that the planning element was limited to the opportunity that presented itself as he saw it on that specific day.

The dialogue widened to include the media interest in the case and the degree to which this was intrusive and disrespectful. D was visibly moved by C's account of this and had not previously been aware of this aspect of C's experience. Moreover, it corresponded to some extent with the experience of D's extended family. D's support person was able to briefly confirm this to be the case.

At this stage the dialogue was becoming more fluent and forthcoming from both parties. D was maintaining appropriate eye contact and bodily posture. He was clearly focused and engaged in what C had to say. He became tearful and moved by her account of the impact of the offence and the terror and confusion she felt during the assault. Whilst this was a very uncomfortable experience for him, he remained 'present' and in return C was able to talk fluently and powerfully about her experiences.

The dialogue moved on to the implications and impact that the assault had upon C professionally. This was a key concern that D had recognised in preparation and one of his questions was whether C had been able to return to work. She was able to strongly state the importance of her profession to her and how returning to that work had not been without difficulty, but she saw that as a critical element of her regaining control and affirmation. This in turn led to an exploration of the future plans that D had and into a more relaxed and lighter element of the meeting.

The transition from consideration of the impact and past experiences of the crime to the 'future focus' of the participants' lives is often characterised in restorative justice meetings by a lifting of the mood and sometimes an opportunity for humour. It can almost represent a 'gear shift' in terms of the dynamics of the meeting.

This occurred in the meeting with C and D when the issue of D's return to the community was raised. C stated should she accidentally encounter D in the future she would not feel scared or intimidated. This had been a primary motivation for C to participate in restorative justice and now the 'fears of the unknown' and the sense of having to look over her shoulder if he were released were being met head on by her.

The progress that D had made in custody was explored and C was reassured that good and meaningful work had been undertaken with D which would contribute to lowering the risk of D committing future offences. D explained how that work was now equipping him for an independent life when ultimately released. This information was important for C as she was aware because of her professional life of the potentially damaging effects of 'institutionalisation' on the developmental

growth of a child and adolescent. Whilst detention in custody was right and proper in respect of the offence seriousness C was also mindful of the consequences of this for D's future.

As the meeting moved into its final stage D expressed remorse and sorrow for his behaviour and the impact it had upon C. This was the only moment that warranted a direct intervention from a mediator when D was asked to think back to preparation and a phrase that he had used in discussion about the sense of remorse. D reached back into his memory and grasped the phrase 'proper sorry....' This had a resonance for C who understood the sincerity and genuineness of D's expression. He was then asked how he felt and if he had been able to demonstrate the reality of that remorse. D replied by saying 'making sure that type of behaviour could never occur again' … 'by understanding why it did and doing something about it … '. This response was an important moment for C, not because of the remorse and expression of sorrow but because of D's sincerity. He was committed to continuing to address the issues/risks/factors that would mean he would no longer present as a potential threat to her and significantly, other women, in the future. In response to D's apology C said she was able to forgive D for the harm, not to reduce or excuse the impact, but that she wanted herself to be free of that burden of grievance. She also said she hoped he could find it in his heart to be forgiving of himself. This statement impacted D and his support person who were both moved, especially by the latter part of the dialogue. D was also shaken and shocked by the 'gift' he had just received from C.

The meeting ended after one hour and twenty minutes; C and her support person thanked D and his support person for attending the meeting. They left the room and adjourned to the private rooms allocated to them for a debrief. D and his support person did the same and were joined by D's father who was waiting outside the meeting. Arrangements were made to complete an evaluation visit after sufficient time had elapsed to allow each party and their respective supporter to reflect upon the process and the meeting.

3. Mediation in a case of historical clerical sexual abuse in the Netherlands

3.1 In conversation with Guido Klabbers

3.1.1 Background

In 2010, Mr Klabbers started a victim support group called 'boys of Don Rua'.[3] The group was composed of twenty-two victims. In 2011, he formalised this assistance

[3] The case related here is based on two interviews conducted by Estelle Zinsstag and Virginie Busck-Nielsen in 2015, first with Guido Klabbers who was at the time of the interview the head of KLOKK, Koepel Landelijk Overleg Kerkelijk Kindersmisbruik (National consultative organisation on church

by creating a foundation, KLOKK.[4] It was a national umbrella organisation, which, at the time, represented twenty different groups representing child abuse victims of the Roman Catholic church in The Netherlands. Its main programme was 'fellow survivors for fellow survivors' and the victims were all victims of abuse in a church setting. At the time of the interview, it also dealt with a number of cases and received funding from the Dutch Ministry of Health, and it received funding until 2017. The main objectives of KLOKK were: victim support, recognition for victims of the church, proper compensation (although this was not necessarily a need for all victims), and psychological help to restore victims' lives.

The abuse suffered by children at the hands of the Catholic Church were multiple for some children (psychological, sexual, physical) and involved girls and boys, although an overwhelming majority of the victims were boys (80 per cent).The work carried out by KLOKK was essential in the context at the time to ensure some form of justice for the victims as the ordinary court system required considerable evidence 'beyond reasonable doubt' for a child abuse case to be heard. Often it was simply not possible to produce this evidence. KLOKK tried to work with such cases as victims who in many cases, needed to hear an apology of the church at the very least. The organisation also brought together victims of similar abuse and provided a forum where they could speak about their experiences and find support.

Many victims had waited decades before coming forward to report the abuse, either because it had taken them a long time to come to terms with their ordeal, or they feared they or their family being shamed, or illness prevented them from coming forward. A number of victims of clerical abuse seem to wait for their parents to pass away before coming forward to report the abuse. The issue of 'deadline' which was being imposed by the church for cases to be reported (May 2015) was a real challenge for many victims. For Mr Klabbers, the church had an obligation to deal with the harm caused by members of its congregation, regardless of the time it takes for victims to come forward. His organisation believed while there may have been a financial imperative for the church to decide a final deadline for the reporting of 'historical' cases the church needed to continue dealing with this issue after May 2015 because it was the right thing to do.

3.1.2 In the words of Mr Klabbers

Mr Klabbers was born in 1952, was the founder of and worked as President and Director of KLOKK in The Netherlands. There were two cases of abuse brought forward by Mr Klabbers against staff at a residential school for boys where he

child abuse), and a victim of historical clerical sexual abuse himself. The second interview was with a church representative of the Salesian order, Carlo Loots. Both have given consent to the facts of the case being mentioned and for their names to appear in the book.

[4] KLOKK stand for 'Koepel Landelijk overlog Kerkelijk Kindermisbruik'. The organisation has now ceased to exist.

studied from eleven to fifteen years of age. The school was run by the Salesians of Don Bosco, a Roman Catholic Religious Institute founded by Don Bosco in the nineteenth century. The Order of the Salesians of Don Bosco is primarily focussed on running shelters and schools for at-risk youth but also runs technical and vocational courses. The school attended by Mr Klabbers housed young boys, some of whom were destined to become priests, student-priests, and priests who were teachers. Each had their own quarters but, in practice, there was considerable contact between the young students and the rest of the staff since they were involved in cleaning duties in the housing quarters and shared some meals together.

The first case of abuse against Mr Klabbers concerns a priest who showed him inappropriate pictures. The pictures were in art books, but Mr Klabbers remembers they were accompanied by an unhealthy and very disturbing conversations in a disturbing atmosphere created by the priest. This shocked Mr Klabbers who experienced psychological intimidation at the time. The sexual abuse in this case was more of a psychological than a sexual nature.

The second case of abuse involved contact sexual abuse of a physical nature and was perpetrated by a priest who was also a teacher at the school, although he did not teach himself Mr. Klabbers. It later emerged this same priest had abused six other children in a similar way. Overall, the Deetman inquiry[5] into sexual abuse in the church in The Netherlands identified twenty cases of sexual abuse in this particular school.

At the time Mr Klabbers went to the Director of the school and brought the abuse to his attention. The Director said he would take action but, in the end, this resulted in Mr Klabbers being asked to leave the school. He had trouble finding a place in another school as places in Catholic schools in Utrecht were difficult to secure. Further his school results had dropped dramatically since the abuse and his attention span had deteriorated.

In Mr Klabbers case, no criminal proceedings were brought against the priests accused of the abuse. There was therapeutic support provided to him by the Order many years after the abuse. When Mr Klabbers was about fifty years of age he had a stroke and a 'break down'. Progressively the ordeal of the past resurfaced and he understood how much this was (still) impacting his life.

Mr Klabbers is the eldest of three children; having a younger brother and sister. He left the family home for the residential school when he was twelve years old and returned five years later to find he had no more common roots with his family. He noticed the same feeling with other victims. In the Netherlands at the time, it was usual to leave the family home much later in life, often at the point of marriage. However, for victims of abuse such as himself, or others supported by his

[5] For more information see http://www.onderzoekrk.nl/english-summery.html.

organisation, leaving home came early, particularly if they felt they had no support from families with regards to the abuse, and this was a trend his organisation noticed.

At the time of the abuse, he mentioned what had occurred to his family but received little reaction. Mr Klabbers believes his parents and siblings must have noticed something since he also suddenly began stuttering, was having uncharacteristically bad results at school and he was wetting his bed. When the Deetman report was published, Mr Klabbers invited his mother to his home. She came and he asked her if she had noticed anything at the time which could have led her to suspect his ordeal. His mother replied she had not noticed anything. Compensation from the Church was something that she believed should make him content. After that meeting the relationship between Mr Klabbers and his mother deteriorated. He did not discuss the issue of abuse with his brother or sister. At the time of the abuse, they also found it difficult to believe this had happened to him. Since the Deetman Report and his work with KLOKK he has received correspondence from his sibling indicating their pride in how he had managed a way to go forward in life.

3.1.3 The initiation of the process

In 2010, Mr Klabbers was part of the survivor group 'the boys of Don Rua' who had been abused as students of a Salesian Order school. These survivors found they understood each other and had similar experiences. When they received the names of the alleged offenders, they further realised the same names reappeared time and again. It was then they decided to act. They contacted the head of the Salesian Order to explain. In the first instance they wanted acknowledgment and recognition for what had happened to them.

The Bishop of the Diocese decided to address this situation too, despite strong opposition from the rest of the church at the time. The Vice Rector of the Salesian Province (covering Belgium and The Netherlands) was appointed to work with the Bishop on this case and was effective in doing so.

Mediation was arranged for the survivors initially by individual mediators and later by the organisation, Triptiek (described in chapter 6), which was paid by the church to conduct mediation on cases against members of its congregation. Mediation first centred on the notions of recognition, dialogue, and apology. Issues related to compensation were dealt with separately. Compensation was set at a ceiling of €100,000 per case. Triptiek had three objectives: 'recognition, mediation, compensation'.

A deadline had been established for cases to be brought against the church to Triptiek. Beyond that date victims were to be referred to a national mediation organisation Meldpunt. Mr Klabbers had mixed feelings about this situation as he felt Meldpunt has extensive experience of helping victims in crisis situations but they had little experience of helping victims in the specific area of clerical sexual abuse.

3.1.4 Preparation and the meetings

In relation to his own specific case Mr Klabbers had a long (two-to-three hour interview) preparation interview with a mediator who then drafted a report, on which Mr Klabbers was invited to comment. Further to this report, Mr Klabbers had two mediation meetings, one for each case of abuse he had suffered.

One of the offenders was a ninety-two-year-old priest. He apologised readily during the mediation for the physical sexual abuse and even wrote a letter confirming his apology, which was most unexpected for Mr Klabbers. This gesture was helpful in anchoring the feeling of recognition, which had eluded Mr Klabbers for so long. It also demonstrated to some extent the fact that the offender was taking some part responsibility in what had happened to Mr Klabbers, even if this had no specific consequences for him. Participation for offenders at these mediation meetings was voluntary, there were no pending criminal proceedings. There may have been pressure from the church to attend or sense of personal moral duty for some men to make amends and apologise. It seems the mediator may have encouraged the offender to write to the victims as other victims of this priest also received similar letters. This apology was important for Mr Klabbers. Other victims find the authenticity of the apologies difficult to accept.

In the second mediation case, which involved sexual abuse of a psychological nature by a seventy-two-year-old priest, the mediation did not reach recognition of the harm caused on the part of the priest. There was an apology, but Mr Klabbers did not experience it as sincere: 'I'm sorry if what I showed you caused you to feel upset … ' For Mr Klabbers this apology seemed to imply the feelings of abuse lay with the victim rather than the priest himself. There was no follow up letter of apology. Mr Klabbers explained that he had not been prepared for this outcome. Exploring all possible outcomes must be part of the preparation process in order to limit the risk of any possible secondary victimisation.

Each mediation meetings lasted for about one hour and involved Mr Klabbers, the mediator and the offender. Had Mr Klabbers wished to have a support person with him, this would have also been possible. There was no specific 'script', but clear questions guided the meeting focused on items discussed with the victim and offender in the individual preparatory meetings.

3.1.5 Reflections

Mr Klabbers found it strange that there were no moments during the mediation process for self-evaluation and, hence, for adjusting the process of the actual meeting itself to the needs of the parties. He found this a missed opportunity. There were no reports written on the cases, linked to confidentiality arrangements agreed by the parties in advance. The parties agreed not to speak publicly about the cases for a determined number of years and to make the reports anonymous before having them evaluated externally.

Mr Klabbers was questioning the lack of curiosity in general to explore different approaches to assisting victims. It has been many years now since the first victims came forward relating their stories of abuse in the church. He believed a survey with these victims would show how they felt the response had been for them and to evaluate how this response could have been improved. He was also surprised about the lack of knowledge of restorative justice in 2010, even in academic circles in The Netherlands. He had been contacted by academics for work they were doing on victims and the church, but they seemed to know very little about restorative justice at all.

Mr Klabbers further reflected on his concerns that the church was not dealing effectively with clerical offenders at that time. Mr Klabbers reflected on 'forgiveness', which for him is a concept difficult to understand in the context of the abuse of innocent children. He reflected further that some victims who were abused by clergy find it difficult to remain part of the church. Mr Klabbers found that whilst the church was now open to deal with sexual abuse within the institutional church they were less inclined to deal with other forms of violence, such as physical and psychological violence. The Deetman inquiry and report focussed on sexual abuse in the Catholic Church because of the volume of cases coming to light. He wondered if psychological and physical abuse were perhaps more 'tolerated' forms of violence. He believed that all these forms of violence cannot and should not have been separated in the way they were. Holistic multi-disciplinary approaches are required to help victims of the church to heal. Help is also required for the indirect victims such as their families. As the power of the church wanes at least in Northern Europe he believes, so it becomes more possible to speak out against its past abuses.

3.2 Some reflections by Carlo Loots, representative of the Salesians

3.2.1 Background

The Salesians House is the home of students studying theology, elderly Salesians, as well as the Officers of Don Bosco schools and members of the Board. There is also a training centre there (including for lay people) for staff working in centres for youth-at-risk. Youth cared for by these centres do not necessarily have a connection to the Salesian Order. The Salesian House also organises Sunday school classes and Summer school groups.

Mr Loots studied philosophy and gained a PhD in theology. He trained extensively in areas such as NLP (neuro-linguistic programming), personal guidance, and he is a certified supervisor. He is a member of the Don Bosco training Centre and, in 2011, he was appointe7d Vice-Provincial in charge of all sexual abuse cases brought against the church in the province of Flanders. Since

2005, The Dutch province of the Salesians became a delegation of the Flemish Province and, hence, he was also in charge of all cases of sexual abuse in the church in The Netherlands.

In 2010, sexual abuse cases were being brought forward against members of the Roman Catholic Church. The Salesian Order was particularly mentioned in the media and the Provincial at the time asked the Delegate of the Salesians in The Netherlands to investigate. In contrast to Belgium, Dutch victims were organising themselves into groups. One such group was called the 'Boys of Don Rua'.

Mr Loots noticed the victims' groups were wary of going to the courts as they did not trust procedures and often had difficulties in providing the level of proof required. These victims expected something else from the Salesians. The Salesians therefore began discussions to try to find a new way forward with the victims. At the time, the Dutch Delegate had an assistant with a personal experience of mediation. He suggested trying this approach with victims' groups. The Dutch Delegate at the time agreed and then approached specific mediators, to discuss the possibility of applying this approach to cases of church sexual abuse.[6]

In 2011, the Dutch Delegate himself was caught up in the middle of child pornography allegations and he had to be withdrawn from any involvement in the mediation with victims of church sexual abuse. It is at this point, that the Provincial asked Mr. Loots to take over the role of the Dutch Delegation in trying to address the cases in The Netherlands. Mr. Loots continued with the previous delegate's idea of applying mediation. In actual mediation meetings, Mr. Loots also took on the role of church representative whenever the abuser had died or was unable to participate.

In 2010–2011, many cases of church sexual abuse began emerging in Belgium. This followed the 'Vangheluwe' case[7] where the Bishop of Bruges was accused of sexual abuse on his nephew. A case team intervened in such cases (a so-called 'zorgteam' or care team) but there was no specific model or approach being used for addressing victims' needs. He therefore decided to replicate the model being used in The Netherlands: personal contact with the victim, meeting between victim and offender (to answer questions) and then consultation with the 'care team' to decide the next steps, if e.g. compensation was appropriate and at what level. He believed it was important to provide an opportunity for the victim and offender to meet, for acknowledgement to occur and for a possible apology. In addition, he explained that an actual meeting was also important for church representatives. It allowed them to be confronted with the consequences of harm caused and to come to terms with some of the 'dark pages' of its history. He sometimes participated in mediation meetings with victims as a representative

[6] For more detail, see chapter six on the organisation Triptiek.

[7] For more detail on the case, see https://www.france24.com/en/20100423-belgian-bishop-resign-child-sex-abuse-scandal-catholic-church-peadophile.

of the Salesians in circumstances where mediation with the offender had not been successful for the victim. He was able in many such circumstances to tell the victim that he believed him.

In the Netherlands, a National Commission, the Lindberg Commission, established the level of compensation to be awarded in church sexual abuse cases according to a specific scale (1–5). The maximum amount awarded was 100,000€. In Belgium, there was a similar scale (1–4) but the maximum award was 25,000€. In the Netherlands, Triptiek dealt with mediation meetings and as reported earlier the settlement of compensation claims were made separately. Although some victims did use the money they received for material things, many dedicated the sums to their family.

4. Restorative justice in a case of childhood sexual abuse in Ireland: Lara's Story in her own words

4.1 Background

I was thirteen years old when I was raped by a thirty-four-year-old man.[8] The perpetrator was known to me. I was spending a lot of time with my dance teacher and often took care of her three children. I had met my teacher's ex-husband, the children's father, a number of times and so it did not alarm me when he arrived at her house in the early hours of the morning on the long weekend in June. I was sleeping on the couch when I heard him tap on the window. After I let him in, I quickly realised he was drunk. We talked, and then he began to kiss and touch me. Initially I resisted. After he had persisted for a few minutes, I felt a strange wave come over me, like a force that drew me deep within myself, as if I had disappeared from the room. He lay me down on the floor and raped me. Afterwards he fell asleep in the armchair, and I sat staring into the emptiness of space.

There were two other adults in the house at the time. They had planned to go out that day and realising how drunk the children's father was, I was asked to stay there to take care of the children again. Despite the horror of the night, I could not find my voice to say no. When they left, I went upstairs to get dressed, and the man followed me to the bathroom. He raped me again on the bathroom floor. Afterwards I knew I had to get out of there, so I phoned a friend who lived close by. He was older than me and I told him I was in trouble.

I was aware of the pain in my body, but my mind felt fuzzy, and I could not think straight. It was two days before I disclosed what had happened. The police

[8] This narrative account was written by Lara Keegan at the request of the authors. Lara consented to her full name being published here.

were made aware, and so began my involvement in the criminal justice process. I attended the sexual assault unit at the children's hospital for a forensic examination. When questioned, the perpetrator denied ever touching me and accused me of lying. Fortunately, there was forensic evidence of the incident on my clothes. When this was discovered, he changed his story, insisting that I had initiated sexual contact and he told the police he believed I was older. There were discrepancies in our stories, and I was interviewed several times by the police who told me it was their job to play devil's advocate. I was questioned about why I had not fought him off or called out to the adults upstairs. This question tormented me as much as it puzzled them; I could not explain the profound experience of my mind leaving my body, or the regret I felt for my 'inadequate' response. The male police officer told me my body language was sexual, and that I appeared to 'have a shine' for him. He said he was helping me to see how my behaviour could lead to a similar situation. At thirteen, this powerful message confused and frightened me, and it stayed with me throughout my life.

The perpetrator was charged with statutory rape—not rape—which solidified the story in my mind that what had happened was my fault. He pleaded guilty, and eighteen months after the offence, I had my day in court. He was sentenced to two years in prison. I left the court feeling exposed, ashamed, and afraid. The shock from the incident was still deeply held in my body and my psyche. I experienced night-terrors as well as hallucinations of him standing in my bedroom or knocking on the window. I lived with the constant fear that he was going to punish me for ruining his life. My family relationships were severely impacted, as were my friendships and school-life. I was terrified of attracting the wrong attention again, but I had no idea how to prevent it, and no concept of how to keep myself safe. I felt rage towards myself for 'allowing' the attack on my body. My relationship with myself, my body, and my sexuality were damaged and dysfunctional.

I left Ireland when I was nineteen years old, but the impact of the trauma followed me everywhere. As a young adult, I was diagnosed with Inflammatory Bowel Disease, and had many years of medical investigation regarding unexplained pelvic pain. Despite all of this, I graduated university with a Master's degree in Criminology. It was during my studies that I first encountered restorative justice. Shortly afterwards, I moved to Australia with my boyfriend. It was during a family holiday that I met his father, who was a mediator, and we had a number of discussions about restorative dialogue.

By the time I reached my thirties and had male friends of the same age, my perception of the rape started to change. I could see the innocence and puerility of thirteen-year-old girls compared to adult men. For the first time, I was able to forgive myself for what had happened; this was replaced by rage and hatred for the man who harmed me.

4.2 How I found restorative justice

Life certainly unfolds in unexpected ways and in my mid-thirties my life was turned upside down by a health crisis that set me on a whole new trajectory. Returning to Ireland, the place of my nightmares, I began paving a new path. Remembering how inspired I had been by the conversations with my ex-boyfriend's father, I contacted him to discuss training possibilities, and he agreed to meet me. I began training as a mediator at a course he was facilitating, and he introduced me to a voluntary Restorative Justice organisation called Facing Forward. At a training event, we sat in circle discussing the concept of forgiveness. It had not been my intention to disclose my own experience as a victim of rape at that gathering, or the desire I had to be free of the hate I carried in my heart. Yet I heard those words come out of my mouth. After my sharing, one of the participants offered to put me in contact with a restorative practitioner (Marie Keenan) and a survivor of rape (Ailbhe Griffith) who had engaged in a restorative justice process. In that moment, it did not feel like restorative justice was a possibility for me. It felt abstract and distant—something other people did. Meeting Ailbhe was a turning point in my life. Seeing her courage and grace, and hearing the dignity in her story, I immediately began to feel a shift. The possibility of meeting the man who had caused me so much harm became very real.

4.3 Initiating the process

When I first met Marie to talk about the process, I was nervous. I had not told my story in a very long time. I had been running away from it my whole life, deeply ashamed and afraid of the questions and the judgement—"Why didn't you fight? Why didn't you call for help?" Marie had so much insight into the dynamics of sexual violence and a deep understanding of the impact of trauma I felt heard and understood. For twenty years, I had lived in fear of this man coming to find me. In my mind and in my experience, he was a monster of epic size, and I was only ever one step ahead of him, living with an eerie sense of his footsteps behind me and the constant fear that at any minute he would catch me. In deciding to initiate a meeting, I had decided the chase was over. I had stopped running. I was now turning to face him.

4.4 Preparation

We began to prepare, and it became clear to me I had no questions and no need for an apology. I simply wanted to face him. The act of doing so would communicate to him and to myself that I was no longer afraid. There is no statutory service for

restorative justice in the Republic of Ireland for situations such as mine and so we relied on Marie's experience and contacts to move the process forward. I had no idea if the perpetrator was still alive and if so where he lived or whether he had moved abroad. Thus, the quest to locate him began.

Marie also approached an agency to facilitate the meeting, with her as my support person, and they agreed. During my first encounter with the facilitator, I felt uncomfortable. I had been expecting a similar, positive experience to my first meeting with Marie but instead I was reminded of my interviews with the police as a child. Lots of things about that meeting did not feel right for me, including the interview room and the formality of the note taking, and I left feeling anxious, but concerned about offending the facilitator or seeming ungrateful. In the midst of this, an unexpected opportunity for healing emerged with the realisation that I was not a child or a victim in this process. I expressed my feelings to Marie and requested a different facilitator. I felt empowered for the first time in my life. I experienced this tiny moment as a major breakthrough; a huge shift in my capacity to take responsibility for my needs and speak up for the child who did not have a voice during the rape or the criminal justice process. I was learning that the process of restorative justice is a magical healing journey. The actual meeting itself was becoming less and less important. But of course, we continued to work towards a meeting. We enlisted the help of two new facilitators and had several preparation meetings.

In the meantime, Marie received notification from her contacts in the police service that the police were aware of the man's location and circumstances. They had found him. She was able to share with me that he had become homeless and was still active in his addiction to alcohol. I remember hearing these words—it was like my heart stopped momentarily. My memory of him was one of power and violence. Over the years, he had become a phantom, a demon in the shadows. To hear something real about his life made him human for the first time. His story had continued in such a sad way. The fear instantly dissolved and was replaced by pity.

4.5 The meeting

It was time for the letter to be drafted and delivered, inviting him into a process. When I thought of him receiving the invitation to meet me, I could feel my feet firmly on the earth, solid and strong. I also felt the compassion implicit in my invitation; my willingness to acknowledge his humanity, gifting him the rare opportunity to make amends for the harm caused. The power dynamic had now changed. I knew it would take exceptional courage and character to face me.

Marie contacted me with the news; he had said no. Momentarily, I felt my heart heavy with disappointment. This was quickly replaced by a deep sense of trust in the process. What could be gained by meeting a person who is not yet ready?

Restorative dialogue is simple, but it is profound and powerful. How many are accustomed to truthful, healing conversations? Some are still afraid. Relief flooded over me with an inner calm and smile. Now he knows I am not afraid. I am a woman, not a child.

For twenty-years I had been involved in a relationship with this man, bonded by an experience that had dramatically changed both of our lives. The unrelenting, permanent nature of this scar had kept me on the run, chasing me from facing its unbearable consequences. On reflection, I realised the invitation to meet represented my willingness not only to face him, but also to face the reality that this had happened. It was not his acknowledgment of harm that I needed; it was my own. I had thought restorative justice would be a process of letting go. Instead, it became a journey of acceptance.

This journey had started with a conversation about forgiveness during my circle training. Truly, I now know I had been trying to will myself free in wanting to forgive him—wanting so much to forgive him so that I could bypass my own pain. I believed that forgiveness would take me to a place where this horrible trauma had not happened, where I did not have to face it. Conversely, through restorative justice I began to move towards it. I began to integrate the experience, acknowledging that he will always be a part of my story. I realise now, the invitation to meet him was for a true meeting within. I invited that part of myself that had been ignored and forgotten. I invited that child who did not have a voice. I invited her to have a conversation. I invited her to a meeting to be recognised. What happened was awful—and it was not her fault.

4.6 Outcomes, reflections, and how I am now

The process has allowed me to step into a womanhood that was previously denied to me. It was the beginning of me relating to my body and myself in a way that is healthy, loving, and responsive. This growth has impacted all of my relationships, including the medical professionals who take care of my illness, to whom I had previously relinquished all control and responsibility for my health. My worldview is no longer hijacked by threat and helplessness. I am no longer living in a reality where people cannot be trusted and where I could never be safe.

When I learned about restorative justice in the academic literature, I believed it was about a meeting, the purpose of which was for the offenders to acknowledge the damage caused by their actions and make reparation. Before participating myself, I could not have understood the power and magic that the entire process contained. For me, the magic began when I stated out loud that I would like to forgive this man. The process was not quick or easy, and there were pivotal moments along the way that brought profound healing in ways that could not be foreseen, or even imagined, at the beginning.

I have come to learn that forgiveness is not about the other. I have accepted the circumstances that brought us together. I have made peace with the story. I have made peace with him.

5. A meeting between a rape survivor and her offender in the framework of *Gacaca* in Rwanda: Mariserina's account

5.1 Background to the case

The victim/survivor, Mariserina Bagakirwa,[9] was born in 1949 and is a widow of the genocide in Rwanda, which took place in 1994.[10] Before the genocide she was a farmer, and she still had the same occupation up at the time of interview. She knew the offender before the rape but in the meantime, he had died while in prison. He used to be a family friend, and they were neighbours.

When the rape took place, she was forty-five years old. She explained that she was pregnant during the rape and lost her baby as a consequence. It was a baby boy. They had to operate on her after the assault and remove the baby, as it was feared complications might occur. She was unable to bear other children after that.

Gacaca enabled for her and the offender to meet. *Gacaca* made Tutsi's and Hutu's one, and she feels that they are all now Rwandan. She forgave her offender and his family. They are all one now. '*Gacaca* made us forgive our offenders', she said.

The offender was aged thirty-four when he died in 2010. He was not married and was a farmer, just like the rest of his close family. At the time of the assault, he was seventeen/eighteen years of age. He was ordered to rape her by his parents. They asked him to 'use her as a toy' and he had to 'remove her baby with [his] hands

[9] This narrative for this case study is based on an interview conducted by Christine van Noort in Rwanda in October 2014 for our project. The survivor of sexual violence interviewed, Mariserina Bagakirwa, consented for the publication of her name here. The narrative here follows her retelling as closely as possible. For more information on *Gacaca* see e.g. https://www.un.org/en/preventgenocide/rwanda/.

[10] The Rwandan genocide was prepared over a long period of time and its possible causes range from Belgium's colonial legacy, the Tutsi's traditional leading role, and the Hutu's traditional oppressed position in Rwandan society, the genocide was executed methodically in merely three months, from April to July 1994 (Raper, 2005). The numbers of victims and perpetrators vary but reliable estimates say that between 800,000 and 1,000,000 people were killed and that there are at least 100,000 supposed perpetrators (Guenivet, 2001). The number of victims of sexual violence is unknown as many of the victims died from their injuries or were killed directly after their ordeal. However, a report by the UN Special Rapporteur on Rwanda in 1996 estimated that at least 250,000 women and girls had been the victims of sexual violence during those three months (Human Rights Watch, 2004). *Gacaca* courts, despite their restricted mandate could be confronted with defendants accused of genocide, war crimes, or sexual violence, who were not referred to the national courts before a given date. Consequently, sexual violence victims were sometimes asked to testify there as well as in the national courts. Some victims, who wished to see their cases dealt with, were required to renew their accusations, in order for them to be taken into account by the *Gacaca* courts. This exposed them to the community and to the family of the perpetrator, which put them at further risk (Human Rights Watch, 2004). For more information see also De Brouwer et al. (2009) and Zinsstag (2008).

out of her body, out of her stomach'. The young man later told her his parents had told him that she had money in her stomach. It should be two million Rwandan Francs.[11] That is why he did what he did. He told her this all while they were together in *Gacaca*. He later died in prison.

5.2 Institutional context of the meeting

Whenever she was in *Gacaca*, Mariserina always had someone to comfort her: people from Solace Ministries (a survivor-run organisation which supports genocide survivors) and people from outside (e.g. other widows). She always had someone with her there to comfort her and to make her strong. Because the preparation meetings for the *Gacaca* took place in private places, only one support person was permitted to go inside with the victim. Outside there were many people standing in support. The support person for each victim going inside to the preparation meetings was always the same person. This was a person from Solace Ministries, usually a counsellor. *Gacaca* preparation would not take long if the offender admitted directly to what he had done. The meeting could take place the following day. If you had forgiven the person, it would also reduce the time of the meeting. Mariserina approached Solace Ministries in 2007. She went to *Gacaca* with Solace Ministries in 2009.

Before the offender was brought to *Gacaca*, there was a process called 'gathering up information about what happened during the genocide'. After putting the facts together of what had happened and getting the story together, people were able to confirm who did what. Witnesses told what they had seen happening. Victims were able to discover the identity of those who assaulted or raped them. That is how Mariserina's offender came into *Gacaca*. Once the identity of who had done what was established a list was created with these names. That way victims could start looking for the people on the list. Short letters would be written with that information and would ask that certain people had to be in that court in that area. In prisons these names were read out, these were the names of the people that had to come in to *Gacaca*.

Before *Gacaca* was established in Rwanda many people had been imprisoned, including people who were innocent. Because of the *Gacaca* it was possible to establish who was innocent and who was not. Through this process innocent people could be released from prison. The survivors were sick, many were weak, and they were hungry, because there were food shortages in the country. When innocent people were released from prison they were able to start rebuilding and work for the country.

[11] The equivalent of about £1,500.

Mariserina did not ask for her offender to be brought to *Gacaca*. She had told her story to the *Gacaca* but when offenders from the prison were brought in front of the *Gacaca* she was asked to point him out, which she did not do. He told his story voluntarily to the *Gacaca*.

The *Gacaca* in Mariserina's case happened fifteen years after the sexual violence. The announcement of the *Gacaca* was made by government when *Gacacas* began in 2004 across Rwanda.

5.3 The preparation

Before *Gacaca*, AVEGA (an organisation for genocide survivors) took care of Mariserina as a survivor. They gave her counselling, support, food, and care. They made hospital visits possible and took her to the hospital for the operation she required after the assault. The organisation also gave her a goat, a cow, and they tested her for HIV. She was negative.

The preparation process for the *Gacaca* started for Mariserina in 2007 and Solace Ministries helped her during the process. Members of the organisation would meet on Wednesdays for prayers and could come together on evening hours to speak together and find victims willing to come to *Gacaca*. On Sundays members of Solace Ministries and survivors would meet to share ideas. Solace Ministries would organise meetings to tell the survivors that one of them could go to *Gacaca* and explain what would happen and that a person from Solace Ministries would join and support the survivor. In total the preparation took several years. The preparatory meetings took place at the offices of Solace Ministries.

Solace Ministries told her that: 'you should be fair, you should not lie, you should tell the truth, tell the story as it was. Do not add something that did not happen'. Solace Ministries told her to tell the truth so that even God would be behind her. Mariserina told her story and her neighbours confirmed it and she was believed because her story was confirmed by her neighbours.

5.4 The restorative justice process

Mariserina went into the *Gacaca* in 2009. She was one of the people who was asked to tell her stories for the area where she lived. Solace Ministries supported her during the *Gacaca* process. There were judges behind a table. The judges were members of the community. The community assisted to the process since *Gacaca* are public events. The support person for Mariserina was a Solace Ministries member. The offender did not have a support person with him. At least another 100 people were in attendance. *Gacaca* had to have witnesses so that the offender could not lie and to give survivors strength.

The process could be described as victim-offender dialogue. It was face to face, and the offender stood in front of the victim. In Mariserina's case the offender stood in front of her and said: 'In the name of God, I'm going to say what the story is. May God help me.'

While the offender told his story in the *Gacaca*, people could hear if he was telling the truth. He offered a verbal apology. He asked God, the Rwandese people in general, and the victim (personally) for forgiveness. Mariserina forgave him and his family. She believed he was used by his parents. Most of his family members had died at the time of the *Gacaca.*

'You could hear he was telling the truth' she said. Afterwards the judges left to discuss the case in a secret place. The offender was given a special period of community work for the country as well as a period in prison.

The decision of the judges in *Gacaca* came the same day as the meeting. There was no compensation for Mariserina. Compensation could only be awarded for property crimes according to the law. Since what he had destroyed could not be replaced there was no possible compensation. The offender had to go back to prison. Mariserina never met the perpetrator again and he died in prison.

Before the *Gacaca*, Mariserina had no hope for the future, and no hope for her life. She felt hurt and sick. After the *Gacaca* she had hope again. She had no fears anymore. *Gacaca* had enabled the truth to be known about what had really happened. *Gacaca* allowed public acknowledgement of what had happened. She felt this made her strong.

The meeting was everything she expected, and she felt it was done fairly. She explained 'The boy told the truth in the *Gacaca*. It was done in a clear way. It was clear because it was in a public place.' She explains further that: *'Gacaca* was important for us Rwandans. *Gacaca* made things clear.'

6. Final remarks

This chapter presented four case studies which depict a number of very different ways of using restorative justice in cases of sexual violence. They are important testimonials that they depict well the variety, differences, and challenges that are characteristic for this type of approach. The four cases were written in collaboration with the authors to give these courageous and insightful accounts. While the writing styles are a little uneven, we felt it was the most genuine and truthful way to relate these important testimonials.

The next chapter will reflect on a number of training and guidelines for practice for restorative justice in cases of sexual violence.

9

Training and guidelines for restorative justice practice after sexual violence*

1. Introduction

This chapter focuses on training, guidelines, and best practice for doing restorative justice work in cases of sexual violence. As has been highlighted in previous chapters, research and practice indicates that the very same reasons which prompt victims to engage in restorative justice in non-sexual violence cases, also apply in cases of sexual violence. These are to enable their voice to be heard and for the impact and aftermath of the trauma to be more profoundly and widely articulated. Daly (2017) summarised victims' justice interests from a range of empirical sources (for example Keenan, 2014; Koss, 2006, 2010; McGlynn, Downes, & Westmarland, 2017) as, participation, voice, validation, vindication, offender responsibility taking. Child and adult protection was added to the list by Keenan, (2014) based on her research. We also know that some victims want to express their resilience; that they have not been 'beaten' by the awful wrongdoing that was done to them (Keenan & Griffith, 2019). As Griffith (2018) articulated during her restorative justice meeting with the man who had assaulted her: 'when you said "you're not so glamorous after all", I knew that you were trying to destroy me; well I am not destroyed, not destroyed at all' (see www.themeetingfilm.com). Victims sometimes also want to ask questions, hear answers, and create a more meaningful level of accountability from the offender than they had previously experienced either in the criminal justice system, or sometimes in no justice system at all.

There is now a growing body of research evidence which supports the application of restorative justice in cases of severe harm, such as sexual violence (Angel, 2006; Keenan, 2014; Koss, 2013; Zinsstag & Keenan, 2017). There is also a growing body of research on the benefits of restorative justice for victims of sexual crime, including some case specific examples (Keenan & Griffith, 2019; McGlynn, Westmarland, & Godden, 2012, Zinsstag & Keenan, 2017). And there is a growing body of evidence that some victims of sexual crime want restorative justice after

* Much of the work presented in this chapter is based on the research gathered during this project, literature reviews of the relevant issues presented and referenced throughout previous chapters and clinical and restorative justice practitioner experience.

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sexual crime to be available for them (Keenan, 2014; Marsh & Wagner, 2015; Moore, Keenan, Moss, & Scotland, 2021).

Turning attention to admitted offenders, there is growing interest in how restorative justice in cases of sexual violence can contribute to offender rehabilitation and to desistance from further offending (e.g. Lauwaert & Maruna, 2016; Ward, Fox, & Garber, 2014). Research also suggests admitted offenders would be willing to participate in restorative justice if they were requested to do so (see Keenan, 2014). The offenders believed that restorative justice could provide them with an opportunity to repay a moral debt, to contribute towards the healing of the victim and secondary victims, to express sorrow and apologise.

Keenan (2014) also found that both victims of sexual violence and offenders want restorative justice to be facilitated by well trained professional practitioners in whom they can trust. Moore et al. (2021) confirmed this view from the perspective of victims. Findings from our international survey on restorative justice in cases of sexual violence (see chapter four) indicates that practitioners also want the facilitators of restorative justice in cases of sexual violence to be specifically trained and experienced, not just in the areas of restorative justice but in relation to the dynamics of sexual violence and the impact of sexual trauma (see also Keenan, 2018; Mercer, 2020). Training and guidelines for practice are therefore essential. These topics form the central focus of this chapter. While we accept that not all victims of sexual violence wish to meet with their offender; for those who do, voluntary, safe, and carefully facilitated engagement must be core.

In restorative justice practice, the physical, emotional, and procedural safety of all participants must be placed at the centre of practitioners' concern. Research on best practice is evolving (see Mercer, 2020; Mercer, Madsen, Keenan, & Zinsstag, 2014) and international and national guidelines are emerging all the time (see Council of Europe, 1999, 2018; European Union, 2012; Ministry of Justice, 2013, 2017; Restorative Justice Council, 2020; UN Economic and Social Council, 2002; UNODC, 2006, 2020). Despite the proliferation of guidance and advice, the potential for harmful practice in the area of sexual violence continues to be of concern for feminists and feminist scholars. It means also that restorative justice scholars cannot shy away from tackling training standards and the need for advanced training for practitioners in the fields of serious and complex harm.

A tension permeates the training standards debate in the restorative justice field. Nobody wants to have training standards that are restrictive of innovative practice, insensitive to context or blind to culture. Restorative justice training or practices that are not culturally and context specific run the risk of being oppressive and disempowering in and of themselves and this is not for a situation anybody would want. At the same time simply not doing anything about training standards is not an option either, as it leaves open room for bad or incompetent practice that can, particularly in the case of sexual violence, become part of another problem.

In order to address all of the issues involved this chapter is divided in four sections. Section one provides a general introduction to the chapter. Section two offers a general overview of existing training for restorative justice practitioners. Section three makes the case for specific training for those restorative justice practitioners who wish to practice in the area of sexual violence. Section four provides some guidelines for best practice in facilitating sexual violence cases. The chapter concludes with some final comments.

2. Current situation regarding training for restorative justice practitioners

2.1 Basic or foundational restorative justice training

There are various approaches to the training of restorative justice practitioners internationally, often underpinned by UN and EU international instruments as mentioned above (see Council of Europe, 1999, 2018; European Union, 2012; UN Economic and Social Council, 2002; UNODC, 2006, 2020), which give guidance on the foundational values and processes of good practice. The theoretical and empirical literature also sets out some generally agreed principles and values that guide much international practice (see Koss, 2000; Mercer et al., 2014; Zehr, 1990, 2014). In some jurisdictions, such as the United Kingdom, courses can be awarded a training provider quality mark by a national umbrella body or council (such as the Restorative Justice Council), for courses that meet specific benchmarks for training standards, in an attempt to set national standards for the work.

Most training courses in restorative justice involve didactic teaching, complemented by facilitated discussion, video, and interactive exercises, and they employ reflective practice pedagogies based on restorative justice values and principles. Learning is also acquired by role play and by doing. The initial training enables participants to develop the skills to apply restorative practices and restorative justice in community, educational, and other conflict situations.

The majority of basic/foundation training courses are short (three to five full days, or the equivalent on a part-time basis) and generally taken by individuals who have primary training or experience in a related or complementary discipline. On completion of the training, practitioners are free to practice alone or in collaboration with more experienced workers, the latter of which is preferred. In some cases, practitioners return for a one-day top-up course when they have had some practice experience. An additional more advanced training for a further two days offers participants an opportunity to develop the knowledge and skills to work as restorative justice practitioners in more complex cases, often involving situations of sexual violence and abuse.

In the research undertaken for this book we found that three primary approaches to training and practice appear to summarise the field, and *inter alia* practitioners have trained in one of these approaches: The Scripted or Five Question Approach; the Balanced Model Approach; and the Eclectic Approach (the latter of which we found to be in practice in most of Continental Europe, such as Belgium, Denmark, Norway, the Netherlands) (see Keenan, 2018 for fuller elaboration).

The Scripted or Five Question Approach is based on five questions that have been carefully crafted and developed over time, neatly presented on a card that is used to guide the restorative justice preparation and meeting. One side of the card contains five standardised questions for the victim and the other side contains the questions for the offender. The training tends to focus on victim-offender mediation but can also include separate days training on working with restorative conferences. The questions for the victim are: what happened, and what did you think when you realised what had happened; what have been your thoughts since then; what impact has this incident had on you and others; what has been the hardest thing for you; what do you think needs to happen to make things right? The questions for the offender on the other side of the card are: what happened; what were you thinking about at the time; what have you thought about since; who has been affected by what you have done and in what way; what do you think you need to do to make things right? These questions guide the preparation and restorative meeting itself and practitioners are trained to stick closely to the questions in the entire process.

The Balanced Model identifies three stages in the restorative process (inclusion, participation, and transformation) and the belief is that each stage requires a different set of skills for the facilitator. The approach to facilitation underpinning the Balanced Model is known as narrative dialogue. Practitioners are taught the skills to develop relationships with participants and to facilitate a narrative dialogue across all three stages of the restorative process. What distinguishes the Balanced Model from other models is its underpinning commitment to and equal concern for all *three* parties affected by events involving harm: the victim, perpetrator, and their communities. This commitment is operationalised by attempts to balance the needs and interests of all three parties. The premise is that unless the needs and interests of each of these parties are addressed to their satisfaction, they will not have an experience of justice (this model is taught at the University of Ulster, Northern Ireland and used in the training offered by Tim Chapman around the world).[1] The training is theoretically informed and largely experiential and takes place over five days. Significant attention is also afforded to trainees identifying and working with the strong emotions that crime can engender for all parties. Often the training focuses on the restorative conference approach to restorative

[1] see e.g. https://www.strath.ac.uk/humanities/lawschool/centreforlawcrimeandjustice/newsevents/restorativepracticesnewfoundationalskillscourse/

justice. The responsibility of the facilitator in the Balanced Model is to design and facilitate a restorative process tailored to all the parties rather than use a prescribed or scripted process which identifies participants who fit this approach.

The Eclectic Approach refers to the eclectic range of approaches to training throughout many European countries and several other jurisdictions. For example, the training of the mediator/restorative justice practitioners in Belgium appears to be largely 'in-house'. While some experienced mediators have received external training, sometimes in collaboration with the strong relationships fostered between restorative justice practitioners and the universities, expertise has largely developed through experience. In Denmark many restorative justice practitioners have a background in mediation with additional training delivered by recognised international trainers. In Norway, restorative justice practitioners are often volunteer mediators who are provided with training consisting of a four-day course followed by six to eight weeks of observing practice and a further three-day course. The mediators are supported through meetings, conferences, and individual guidance.

2.2 Current training for facilitators in sexual violence cases

Much of our study on restorative justice after sexual violence (reported in chapters four and five) reveals that facilitators of restorative justice in cases of sexual violence include people working in both a professional and volunteer capacity, people with and without a therapeutic qualification in a primary discipline, and people whose knowledge and experience of sexual violence range from expert to very limited. In some jurisdictions it was noted that cases of sexual violence are dealt with by generally experienced facilitators who opt to take on more sensitive, complex, and difficult cases. In some therapeutic centres for victims or offenders, which also offer restorative justice services, staff come from a variety of professional disciplines including psychology, psychotherapy and social work and often have limited or no specific restorative justice training. Restorative justice is a discipline that is generally unregulated, although in some jurisdictions, such as the Netherlands, processes are in train for the introduction of a register of restorative justice mediators. In many jurisdictions, as well as being guided by UN, Council of Europe, and EU directives on restorative justice that is also relevant for sexual violence cases (see Council of Europe, 1999, 2018; European Union, 2012; UN Economic and Social Council, 2002; UNODC, 2006, 2020) national governments or professional bodies also issue additional guides for restorative justice in sexual violence cases to accompany national legislation (see for example Ministry of Justice, 2013, 2017; Restorative Justice Council, 2020).

Summarising the state of the field it begins to appear that some practitioners of restorative justice in sexual violence cases have training in restorative justice but

not in sexual violence, some have training in sexual violence but not in restorative justice, or minimal training in restorative justice, and some have advanced training in both. It is also apparent that what is regarded as more complex and difficult cases, including sexual violence, are generally allocated to more experienced practitioners, whether professional or volunteer, some of whom have a prior primary qualification in health care, justice or psychotherapy and a minority who do not. In the course of the research for this book we encountered some professionals in the field who did not seem to be qualified for the work, in our opinion, because of having very little training, but who felt qualified or were told they were qualified by training providers in the training industry.

3. Making the case for additional specialised training for restorative justice practitioners after sexual violence

Sexual violence is different from other types of crime in the degree to which it impacts its victims in a very intrusive and personal manner and the degree to which it occurs in a relational context. Although stranger rape and sexual assaults involving strangers are often reported, in most cases there will be some form of past and perhaps present and even future relationship between the victim and the offender.

The nature and intrusiveness of the harm, the power imbalance associated with sexual crime, the perceived or actual menacing characteristics of offenders and fear of them by victims, the particular vulnerabilities of victims (in some cases because of young age or mental incapacity), the inadequacy of social support services for victims and offenders, and the anxieties and responses of communities to sexual violence, are many of the reasons why restorative justice as a methodology can be helpful in the aftermath of sexual crime. Further, the difficulty of reimagining a safer and positive future, or of at least knowing how to 'manage' the relationship with a family member or known associate in the future, is often one of the primary concerns of victims and secondary victims indirectly affected by the sexual crime. Very often the perceived 'safe' approach to 'manage' this tension is by separating the parties and removing the potential for ongoing contact. This approach, while helpful at certain times in the crime trajectory, is often not sustainable, or even desirable for some victims in the longer term, especially in familial, work, school, college, or sporting environments. Restorative justice offers a methodology to bring together the parties in such circumstances to address such potential contact dilemmas, as well as the harms that have occurred. For all of these reasons, it makes sense for restorative justice practitioners to proceed with caution and to develop sufficient skill and confidence to undertake this important work. Advanced specialist training is essential. The question is 'how do we deliver safe practice in a potentially risky operational environment?' It is no longer simply an option to adopt the view that 'restorative justice doesn't do sexual violence . . .'.

In acknowledging the differences between sexual and other types of crime, the case for excellent, reflective advanced training, over and above the 'basic' or 'foundational' training for restorative justice facilitators in cases of sexual violence is compelling (Keenan, 2014; Zinsstag & Keenan, 2017). However, we know there is a danger in even beginning to speak of specialist training for restorative justice practitioners and in running the risk of becoming overly prescriptive by the professionalisation of standards. Here however we are not talking about training standards that would be so prescriptive as to inhibit restorative justice innovation. Neither do we wish to make practitioners so frightened as to inhibit flexible practice. We instead recommend additional, specialist training to help practitioners identify, anticipate, and respond safely and competently to the potential risks of re-victimisation, re-traumatisation, and the subtlety of the power imbalances that can arise during the restorative process, mirroring the dynamics of the actual offense. Specialist training also enables practitioners be competent in their responses to the myriad of 'due process' and justice issues that are involved in working with victims and offenders of sexual crime. Putting it succinctly, there are three main reasons outlined below why such specialist training in restorative justice is required for working with sexual violence cases.

3.1 The therapeutic dimension

Victims and offenders of sexual violence need assurance that the facilitators involved in facilitating restorative justice in sexual violence cases will be trained to the highest standards and will be well placed to respond to their physical, psychological, and emotional safety needs (Keenan, 2014). This we call the therapeutic dimension (Keenan, 2018).

In order to meet this standard, it is necessary for restorative justice facilitators in sexual violence cases to have (1) a deep appreciation of sexual trauma and its impact, (2) an understanding of the psychology of the offender, and (3) a working knowledge of the dynamics of sexual offending including the dynamics of power and control.

As mentioned earlier sexual crime shows features which differentiate it from other types of violent crime: victims of sexual crime often experience potent and debilitating self-blame and take responsibility for the offence; the perpetrator in the majority of cases is someone known to the victim, loved by them and in a trusting position of power or responsibility in their lives; offenders in the majority of cases have used subtle techniques and strategies to groom and disempower the victim and overcome their resistance (McAlinden, 2012); the process of reporting the crime and pursuing justice through the criminal justice system is experienced as traumatic by victims and their families resulting in secondary victimisation for some (Patterson, 2011). Victims of sexual crime also

sometimes carry shame on behalf of offenders, through a series of complex dynamic relations, in which the offender has shifted responsibility for the offence to the victim. Offenders use techniques of minimisation, rationalisation, and justification in many cases to rationalise their offending (Marshall, Anderson, & Fernandez, 1999). Betrayal of trust and abuse of power are often core dynamics as mentioned earlier.

In these circumstances facilitating restorative justice in sexual violence cases is different from facilitating restorative justice in other types of crime. Additional practice skills are required which involve an ability to conduct restorative justice risk assessments and acquisition of the techniques and skills required for advanced emotional interviewing. Without these skills facilitators run the risk of practicing inadequately in such cases.

3.2 The ethical dimension

The tri-dimensional tension between (1) the concern for revenge, condemnation, and punishment; (2) for community safety; and (3) for the interests of forgiveness and redemption is mirrored in the triple focus of the criminal justice system on punishment, community safety, and rehabilitation of offenders. It is also mirrored in the triple role problem that also befalls restorative justice practitioners. Ward (2017) identified a dual role problem for restorative justice practitioners in the aftermath of serious crime, but Keenan (2018) has elaborated this perspective further to identify the challenge as a triple rather than a dual role problem for restorative justice practitioners in sexual crime cases. Building on and expanding the work of Ward (2017), the triple role problem emerges from a clash between three sets of ethical norms that are part of the work of restorative justice practitioners: those associated with community protection, those associated with justice and vindication for victims, and those associated with offenders' well-being and autonomy. The challenge is how to work ethically and transparently with competing ethical norms. Restorative justice practitioners do not escape this dilemma which we call the ethical dimension (Keenan, 2018).

Some restorative justice theorists and practitioners might disagree with Keenan (2018) and Ward (2017) and argue that restorative justice practitioners do not occupy a triple or indeed a dual role, nor do they have a triple or a dual focus, seeing the restorative focus as simply on *repairing the harm.* However, it can be argued (Keenan, 2018) that to adopt this position is to side-step important ethical issues that are at the heart of restorative justice, especially in sexual violence cases. Restorative justice is concerned with people, not abstractions, and engages with three sets of, at times, competing interests held by victims, offenders, and the community. According to Ward (2017: 93) the dilemma is this:

> how can practitioners adequately meet their ethical responsibilities to victims of crime and the community, while also assisting individuals who have committed offences to engage in a meaningful process of self-reformation and social restoration?

Whose interest is to be first served in restorative justice? Is the explicit focus to be on the victim's desire for justice or healing? Is self-reformation and social restoration for offenders explicitly or implicitly part of the restorative justice imperative? Do community safety concerns have any role in restorative justice after sexual crime? The complexities involved in working with these issues involving value pluralism need to be addressed by advanced restorative justice practitioners dealing with sexual violence cases (Keenan, 2018; Ward, 2017). Unless these tensions are addressed, as Ward (2017) argues strongly, restorative justice can result in practices that disregard the legitimate interests of victims, or of those who commit crimes, and/or of the community.

Additional specialist training for restorative justice practitioners to work with sexual violence cases must be philosophically and ethically rigorous enough to facilitate students to consider reflectively and theoretically these complex fundamental ethical dilemmas.

3.3 The legal dimension

Sexual violence creates needs and interests at public as well as private levels for citizens and the state in which restorative justice practitioners must be well versed. This requires attention to the need for public confidence in, and legitimacy for, restorative justice, especially if it is to gain social support as a legitimate justice mechanism in relation to sexual violence. To a greater or lesser extent every restorative justice process incorporates the *private* interests of victims and offenders as well as the *public* interests of communities, the law, and the state. If these public and private interests are not adequately countenanced and respected as part of the restorative justice imperative, public confidence and legitimacy for restorative justice cannot be secured. This is an ongoing dilemma that we met in the course of the research for this book. While criminal justice can be criticised for focusing on the public aspects of sexual crime (such as prosecuting wrongdoing, punishing offenders) at the expense of victims' private interests, restorative justice can be criticised for focusing on the private interests of victims and offenders, at the expense of the public need for justice, by means of holding offenders to account, punishment for wrongdoing, and community protection (see Meier, 1998). Restorative justice in sexual violence cases must address these issues and restorative justice practitioners who are undertaking work in the area of sexual violence must be trained in all such perspectives.

Restorative justice cannot be construed as a justice mechanism that is independent of criminal justice in cases of sexual violence if the starting point lies in the commission of a serious act prohibited by penal law (whether reported or not) (see Keenan, 2017). The rule of law, which is based on the laws of evidence and due process, also implies that the accountability which follows the commission of a sexual offence may lead to state sanctions including the loss of liberty for the defendant. All of these issues must be fully understood by advanced practitioners as part of the context in which they would facilitate sexual violence cases.

Due process consists of a series of rights which are essentially legal protections against a variety of possible abuses occurring during the arrest, interrogation, trial, sentencing and detention of suspects (Nickel, 2007). Due process dictates that those accused of crimes have a right to trial without excessive delay, that the proceedings are fair and open, and that the accused would enjoy the presumption of innocence, the right against self-incrimination, and the right to the assistance of legal counsel (Nickel, 2007). For restorative justice to gain legitimacy and secure public confidence restorative justice practitioners must pose no risk to undermining or restricting these moral legal norms involving the due process rights of accused persons. Keenan (2018) argues this legal dimension to the work requires specialist advanced training for practitioners, especially those working in the field of sexual violence. The fact that many sexual violence cases will not be dealt with by criminal justice (because of the high attrition rate), but which will still result in requests for restorative justice, necessitates that restorative justice practitioners adopt strong and clear internal ethical standards that will provide legal as well as procedural safeguards for all participants. This aspect of the work is discussed in the concluding chapter.

Restorative justice practitioners who have simply undertaken the basic or foundation training in restorative justice cannot be expected to have the level of understanding required to work in sexual violence cases as set out above. Hence the need for additional specialist advanced training. Without such training, the practice base for restorative justice in sexual violence cases is weakened and public accountability undermined.

4. Doing restorative justice in cases of sexual violence: some guidelines

4.1 Key principles and questions

In considering the case for restorative justice after sexual violence some important principles must apply: (1) no crime victim should ever be forced into a restorative justice meeting with a perpetrator, nor should she/he be denied the opportunity to do so if she/he desires (Koss, 2000; Moore et al., 2021); (2) no sexual violence

perpetrator should be forced into a restorative justice meeting with the person he/she has harmed, nor should knowledge of his/her willingness to do so be kept from the crime victim (accessible in a centralised register), who ultimately has a choice whether or not to initiate restorative justice; (3) the physical, emotional, and procedural safety of the process rests with the facilitator at all times; (4) the restorative justice process is a collaborative between facilitators and the parties involved, in which victims and perpetrators must have ownership of and control over the restorative justice decisions that will ultimately affect their lives; (5) facilitators must be trained to the highest standards.

Producing a restorative justice guide in the area of sexual violence however presents a number of challenges, mainly because of the range, nuance, and complexity of the varied manifestations of sexual violence and the desire not to present a fixed or prescriptive approach to the work. Also, restorative justice theory and practice continues to evolve, particularly in the area of sexual violence, and so knowledge is not fixed or complete as experience continues to shape developments. Therefore, to present anything that would be perceived as prescriptive or constraining, would not be at all wise. What is presented instead are some questions raised in the course of the research and some guideline based on the research and best international practice that may guide practice (see Ministry of Justice, 2013, 2017).

4.1.1 What is risk?

The starting point for safe practice is an appreciation of exactly what is meant by risk, how it is measured and how it can be addressed. It is a necessary first step to draw a clear distinction between what is meant by 'restorative risk' and how this differs from 'criminogenic risk'. Sometimes these concepts are confused in restorative justice practice. A restorative risk is any factor or consideration from a restorative practice perspective that would have the potential to create further harm for either party during a restorative process. A criminogenic risk is primarily focused upon the factors that led the offender to commit the offence and may influence the potential for it or a similar offence to be repeated (recidivism). It is not accepted universally that criminogenic risk would prohibit offender participation in the restorative process, as some practitioners argue that regardless of the criminogenic risk, the decision as to whether the victim should meet with the offender is rather one for the parties, primarily the victim, and not professionals. Adequate preparation and adequate safety protocols for safe practice are of course essential.

Offender behaviours, such as lack of victim empathy and denial of the full extent of the violence are often considered as restorative risks, while factors that are highly relevant to the evaluation of criminogenic risk (such as the choice of a stranger/adult victim by juvenile sex offenders) may be largely inconsequential in evaluating restorative risk. Restorative risks are used more as information to guide the restorative process rather than constrain or prohibit it.

Every human endeavour involves risk, and this is also so in the case of restorative justice after sexual violence. Nonetheless, this realisation must lead towards ensuring excellent practice and the very best of safety protocols, not inhibit the process.

Guideline 1: Restorative justice practitioners in sexual violence cases must acquire an evidence-based knowledge of the phenomenon of sexual violence and understand the criminogenic factors that are linked to sex offending. They need to understand the distinctions between restorative and criminogenic risk and interrogate the wider concept of 'risk' to have a much more precise understanding of what it means and how it is to influence any potential restorative process.

4.1.2 Risk assessment?

There is ongoing debate within restorative justice and academic fields regarding how far a formal risk assessment will enhance the restorative justice work, or whether it merely 'strengthens' professional control at the cost of weakening the participants' ownership and control of the process. Regulations and standards of practice in some jurisdictions may stipulate that formal assessment is required.

There is inevitably a degree of discomfort in relation to the notion of assessment being applied to victims of sexual violence. The victim did not choose the harm and they are entitled to sensitivity and respect in the exercise of voice.

When we talk about restorative risks from a victim's point of view we are primarily concerned with physical and emotional safety, not only during a meeting with the offender but before and after a meeting too. All possible safety measures and protocols must always be implemented to minimise harm to participants, whilst at the same time recognising that the risk of harm can never be completely eliminated, by definition. As chapter five elaborated, the use of time out options (82.4 per cent); the provision of a neutral place for the meeting (76.5 per cent); having carefully planned seating arrangements in place (73.5 per cent); establishing the conditions of the meeting in advance (85.3 per cent); engaging in careful preparation (82.4 per cent); and ensuring the presence of family/friends/others if the participants desire (79.4 per cent) are the most common approaches used by practitioners internationally to ensure the best possible physical and emotional safety for all participants in the restorative justice process.

It seems clear that most practitioners do make decisions about suitability and very few, if any, operate on a wholly 'open door' eligibility basis for victims and offenders. Therefore, some form of 'assessment' takes place, either formally or informally. A more formalised assessment process is often in place regarding offender participation, whereas interviews with victims is the preferred approach to victim 'assessment' (see chapter five).

The unease regarding the risk assessment of victims does not hold with offenders as they have perpetrated serious harm, and considerations regarding risk

are therefore more acceptable. The restorative justice assessment in their cases may involve formal or informal assessment protocols. Formalised assessments may include specialist multi-agency panels composed of forensic staff, offender, and victim specialists. Varying criteria can sometimes be applied to determine offender suitability for participation. Common criteria include acceptance of responsibility, remorse, functioning level of the offender, unmanageable power imbalances, and circumstances specific to the offence such as prolonged grooming patterns. Formal assessments of risk are used often with regard to sex offender participation in restorative justice. Some of the time practitioners will be working in a complex multi-disciplinary environment where they are required to demonstrate attention to safe processes and the potential vulnerabilities of participants. An argument in favour of formal assessment for restorative justice is that the existence of such can assist in establishing referral pathways. Formal restorative risk assessment can also enable decision making to be open, transparent, accountable, and amenable to review and challenge if appropriate.

Guideline 2: Facilitators of restorative justice after sexual violence must have a knowledge of how to apply restorative justice risk assessment instruments where necessary in the interest of safe practice. Risk assessments are used to guide rather than prohibit the restorative process.

4.1.3 Case suitability and case selection

The issue of determining case suitability for restorative justice after sexual violence is a somewhat problematic and contentious issue since it has the potential to take choice and control from those at the centre of the crime and place them at the mercy of those responsible for the delivery of the services: the restorative justice practitioner, manager, or other professional specialist. This represents a fundamental dilemma. How can those affected by the harm of sexual violence make choices and decisions regarding their participation in restorative justice, yet practitioners ensure they deliver safe, sensitive, and appropriate practice?

What is also central here are questions regarding suitability as well as eligibility. Whilst primary legislation or national guidance might promise eligibility, suitability in some jurisdictions is determined through a process of informal or formal assessment, as discussed above. This, in our view, is problematic; assessments as mentioned above ought to function to inform the process, not prohibit it. If victims want restorative justice, and the perpetrator is willing to participate, then a restorative process should take place. When a case of domestic violence is involved other factors also apply (full discussion of domestic violence is outside the scope of the current project).

Guideline 3: It is the choice of the victim of sexual violence whether to have a restorative meeting if the offender is willing to engage. It is the job of the facilitator not to inhibit this opportunity but to make the process as safe as humanly possible.

4.1.4 Victim or offender initiated?

This question is not only relevant for cases of sexual violence but also for all cases of serious crime involving personal injury that cause long lasting consequences for the victim. Offender-initiated referrals for restorative justice or restorative conferences are the norm in youth justice services and are enshrined in legislation in many jurisdictions. However, requests for restorative justice in complex or sexual violence cases involving youth as well as adult offenders are much more complex.

On one side of the argument an offender-initiated referral in cases of sexual violence runs the risk of the victims' experiences being used as 'rehabilitative material' for the benefit of offenders, or that offenders would be motivated to participate in restorative justice to gain benefits for themselves in the criminal justice system. Further, a request for restorative justice by an offender may also have power and control elements; to further traumatise the victim. For these reasons some restorative justice programmes and practitioners will only accept victim-initiated referrals. The victim initiated side of the argument suggests that the initiative for restorative justice after sexual violence should always come from the victim. She or he is the one who has been harmed and she/he has the right to choose whether or not to initiate a potential meeting with the offender.

Some practitioners argue however that a request from an offender to meet with the victim can bring forth new strengths and a renewed sense of control for the victim as she or he still has the power to consider whether to accept the request or not and under what conditions a possible meeting could take place. According to this argument, a request from an offender to meet with a victim should always be put to the victim, as there is a potential for empowerment for the victim either way. In addition, an offender-initiated approach with acknowledgement of the harm done can make a difference to the healing of the victim. Proponents of this position ask if it is paternalistic to withhold offender requests for a meeting with the victim and whether the preferred course of action would be to inform the victim and assist her/him in making the decision that is right for her/him?

The argument however is often made that a severely traumatised person is in a state of mind that calls for protection, not challenge. However, it can also be suggested that not all victims of sexual assault are equally traumatised and that the impact of trauma is not static. Timing is important here, and victim choice.

Guideline 4: There are clearly a variety of perspectives on victim initiated or offender initiated restorative justice in sexual violence cases and while every case needs to be carefully considered, and each case dealt with safely and appropriately, we believe that victim-initiated referrals in sexual violence cases is the appropriate approach to be adopted because of the power dimensions and inequalities involved in this particular crime. It is appropriate however that an offender-initiated referral be logged in an appropriate central agency or register so that the relevant information is readily to hand for victims should they wish to check or initiate a restorative process at any time in the future. It also does not prohibit criminal justice services

from providing offender restorative work in circles or conferences within a prison context with surrogate victims or involving other type of restorative methodologies. Offender type work of this nature would both evidence and contribute to culture change within the criminal justice system (see conclusion chapter for further discussion on role of restorative justice in changing the culture of justice).

4.1.5 Understanding trauma

Earlier in the chapter the importance of understanding the impact of sexual trauma was raised in relation to making the case for additional specialist training for restorative justice practitioners. Here it is discussed in and of itself. Every victim has their unique subjective experience of the harm that sexual violence brings. A multitude of intersecting factors shape that experience: the age of the victim, the age of the offender, the nature and circumstances of the offence, whether it was a one off or took place over an extended period, whether penetration took place or not, the nature of the relationship between the victim and offender, the strategies and disposition of the offender, familial and societal responses to disclosure, issues of blame and shame, the nature of the support available, the individual and collective resilience of the victim and their community of care, the response of criminal justice actors, and the outcome of criminal proceedings (see Jewkes et al., 2002 for good overview). Essentially the impact of trauma is subjective and personal, despite its common features. There is no standard victim, and no particular outcome from the violence which is deeply personal and influenced by context.

Sexual violence is a complex and varied phenomenon including contact and non-contact, penetrative and non-penetrative behaviours, and a wide variety of overt and covert violence. The highly subjective and life course responses of victims to this crime, from extreme post-traumatic stress disorder to relatively minor responses, must therefore be respected by practitioners (see Herman, 2005, 2015).

Many sexual assaults are perpetrated by someone known to the victim. The breach of trust in such situations can add to the trauma experience particularly in families and when the perpetrator was known and loved by the victim.

The sexualised nature of sexual violence adds a shame dimension to this problem for some victims and often prohibits victims from disclosing (see McElvaney, 2015). The forensic process, including intimate and medical examinations and treatment, and the need for photographic evidence of injuries of intimate body parts can be experienced as a prolongation of the initial traumatic event, no matter how benign the intervention or the care and sensitivity with which the process is undertaken. Even when the victim is fully aware that the forensic assessment is performed for his or her benefit, the process itself can be experienced as traumatic (Griffith, 2018). Similar experiences are reported in victims' interactions with the police. In the adversarial environment of criminal justice processes, victims subjected to cross examination can also question their own behaviour and actions as

they begin to doubt and question themselves and their actions at the time ('I should have tried to get away . . . I could have tried to stop him').

Guideline 5: The restorative justice practitioner must be familiar with the signs and symptoms of post-traumatic stress disorder and be aware of the potential impact of trauma on the victim prior to the restorative justice process beginning. Restorative justice in these circumstances must be trauma informed. In addition, the restorative justice practitioner needs to be aware of the potential for retraumatisation during the process itself and take steps to anticipate and address this problem, including the impact of trauma on the family of the victim. The facilitator must also be familiar with the trauma that the offender or his family may have suffered.

4.1.6 The right of stakeholders to ask for a change of restorative justice facilitator

Victims of sexual violence who wish to participate in restorative justice need to be supported to exercise voice in every aspect of the process. This includes having the right to ask to change the restorative justice facilitator if the 'fit' is not right (see Lara's story chapter seven), or if the victim is concerned the facilitator does not understand the complexities of sexual violence and its impacts. In order to exercise voice victims need to be supported to have their say. The power imbalance in restorative justice in response to sexual violence does not simply reside in the victim offender dynamic. Power imbalances also reside in the practitioner - victim dynamic and the practitioner - offender dynamic. The same right to request a change of restorative justice facilitator must also apply to offenders, if they have concerns. Care with such processes must be exercised to ensure such requests on the part of an offender are not serving other motivations regarding delay or hurt for the victim.

Guideline 6: Stakeholders must be supported to exercise voice in the restorative justice process particularly in the preparation stage. This also includes requests for a change of restorative justice facilitator. In order to provide the necessary supports for victims to exercise voice in all aspects of the restorative justice process in cases of sexual violence there should be two facilitators involved in each case, and the victim should have a support person also available to them. The same rights should be afforded to offenders.

4.1.7 What about offender responsibility taking and accountability?

Victims of severe violence often have feelings of unreality in the aftermath of a sexual assault. When the offender takes responsibility for the offence, he confirms the reality of the crime in a way that is important for the victim. Restorative justice in sexual violence cases demands a sophisticated understanding of the steps to offender accountability taking and the layers of denial or minimisation that can apply in these cases.

Minimising the offence and its impact can serve as a self-protection mechanism from feeling shame for offenders. The offenders' resistance to accepting full responsibility for the crime can be influenced by the social consequences that follow from acknowledging wrongdoing and the social ostracisation and isolation that can follow (Keenan, 2012, 2014). Whatever the reason, denial and minimisation can have a traumatic impact on the victim, beyond the impact of the actual offence. Therapeutic work with offenders often involves a journey from denial to gradual acceptance of responsibility. This progression can also be part of the restorative journey.

Guideline 7: While acceptance of responsibility for causing harm is a prerequisite for offender participation in restorative justice, acceptance of wrongdoing is sufficient for the process to proceed, as the process itself can help with offender responsibility taking and accountability. The distinctions between legal guilt and moral guilt must be understood by practitioners. Restorative justice forums are not courts of law; the facts of the case are not tried in restorative justice. Participants can discuss the offence and its impact once both agree. Practitioners need to ensure the safety of victims by recognising the hidden dangers of victim blaming by offenders who have not yet taken full responsibility for the crime, and practitioners need to take steps to anticipate this possible risk.

4.1.8 Is therapy for victims a prerequisite for participation in restorative justice?

Anticipating a meeting with an offender can evoke strong feelings of fear and anxiety in a victim as well as feelings associated with the assault, irrespective of the victim's therapeutic history. This anxiety can be evoked irrespective of whether the victim is attending or has or not attended for therapy. In the preparation for restorative justice facilitators must talk with the victim about any emotional pressure or anxiety she or he may be experiencing. Support needs to be provided for victims in these circumstances. Whilst the restorative process is primarily owned by the participants, the facilitator has a duty of care to ensure that no further harm is done. It is useful therefore for practitioners to be aware of locally available victim support services and their referral criteria in order to make smooth referrals for victims to such services if the victims wish.

Guideline 8: Therapy should not be presented as a prerequisite for victim participation in restorative justice. Victim choice must be respected and honoured in the entire process.

4.1.9 Is therapy for offenders a pre-requisite for participation in restorative justice?

While restorative justice is primarily owned by the participants, the facilitator has a duty of care to ensure that no further harm is done to *any* of the participants and this requires some assessment of the possible danger an offender could pose,

physically, emotionally, or spiritually to the victim, or to himself. It is useful therefore for practitioners to engage with therapeutic services for offenders when an offender is in therapy, and work in parallel with them. Not all offenders will be engaged in therapeutic services. However, restorative justice cannot be used as a mechanism to 'force' convicted offenders into rehabilitation or therapy. In the case of non-convicted offenders one of the elements of 'an agreement' as an outcome, agreed by the parties, may be for the offender to attend a rehabilitation or therapy programme. While one of the outcomes of restorative justice is to deepen the acceptance of responsibility in the offender and prohibit re-offending (some of which can also be enhanced by therapy), engagement in therapy must not be a prerequisite for participation in restorative justice. To make it so would deny victims an opportunity for restorative justice if the person who offended against them refused to participate in therapy.

Guideline 9: Participation in therapy must not be a prerequisite for participation in restorative justice for offenders. However, in the interest of creating a safe process, offenders who wish to participate in restorative justice need to be risk assessed. As outlined in Guideline 2 above, this risk assessment is used to inform the restorative process and not to prevent or inhibit it. Ultimately fully informed victim choice and support is most important here in progressing the restorative justice.

4.2 Further issues to be considered

4.2.1 Dealing with the possibility of re-traumatisation

Often a meeting with an offender can trigger strong emotions on the part of victims. Some emotions, such as anxiety, tension, and mild distress, can be situational; linked to the upcoming meeting. They are predictable and foreseeable and must be dealt with during the preparation process. A-face-to-face encounter with the offender can however also trigger emotions that are associated with the sexual assault itself and there may be a risk of re-traumatisation during the meeting (such as a re-living of the actual assault and a re-triggering of the traumatic feelings associated with it). If during preparation a facilitator is concerned there is a risk of re-traumatisation, a facilitator would need to attend to this issue with the victim and / or with the victim's consent refer the victim to a trauma therapist before the preparation is concluded.

4.2.2 Dealing with power imbalances and the possibility of re-victimisation

The power dynamics, which are often fundamental to sexual violence, and which may still be potentially present in the ongoing dynamic between the victim and the offender, especially if related, need to be addressed in the preparation for

restorative justice. The potential for these dynamics to be replicated in the restorative meeting must be countenanced and addressed as part of the preparation because of the potential for re-victimisation of the victim. It is essential to understand the power dynamics that were involved in the index offence and how they are evidenced. Subtle or discreet aspects of the intimidation and manipulation must be explored. It is essential for practitioners to be aware of the pressure that may be applied to victims to participate in restorative justice, particularly in inter-familial situations of sexual abuse. Once the potential for re-victimisation and its dynamics are understood, systems of response to such potential must be established for the meeting. It is always possible to anticipate and respond to such concerns, if not eradicate them entirely. As Jülich et al. (2011: 227) observed:

> in the case of sexual violence one person (the offender) has demonstrated absolute power over another (the victim-survivor). The imbalance of power typically persists through any justice process, including restorative justice. While a power imbalance can be addressed within a restorative process, it is more effective to accommodate it within the design of the programme which emphasis the preparation of the participants. The survivor and offender specialists challenge any distorted thinking thereby mediating the imbalance of power. Project Restore does not ascribe to the third party neutral model for facilitation typically associated with conflict resolution, instead it practises balanced partiality.

In some projects, such as Project Restore in New Zealand, roles of Offender and Victim Specialist exist in the agency to work alongside the restorative justice practitioner and the Dispute Assessment Officer and other members of the team as a safeguard against the re-establishment or continuance of abusive power relationships in the restorative process. The team is supervised by a senior clinical specialist. The use of 'codes' known only to the victim and the facilitators for trigger words or behaviours of the offender can also be helpful for other practitioners. The use of 'time out' protocols can also effectively be used in these situations. Victims, offenders, or facilitators can call 'time out'.

4.2.3 Restorative justice after sexual violence is not neutral

Restorative justice practitioners in the sexual violence field need to have experience in managing power relations and in anticipating possible abuses of power. Quoting 'neutrality' as a justification for ignoring potentially abusive power relations is not acceptable as safe restorative practice. Restorative justice after sexual violence is not a morally neutral endeavour. In a similar vein, restorative justice after sexual violence is not 'impartial' (Jülich et al. 2011), or cannot be impartial. At the same time restorative justice practitioners are not in the position of judge and

must adopt a disposition of 'respect' towards all parties, involving fair, respectful, and safe practice in their restorative justice work. The suggestion in this book is that the principle of 'respect' is a principle to be valued in restorative justice after sexual crime, replacing the principles of 'impartiality' and 'neutrality' in the actual process work (see longer discussion on 'neutrality' and 'impartiality' in chapter three).

4.2.4 Dealing with families of victims and offenders

The social consequences of victim-offender face-to-face meetings must also be considered during the preparation. A sexual assault provokes strong feelings in all people who are touched by the incident and surrounding events—the ripple effects of the crime—and the decision to meet with an offender may not be approved by the family, partner, or peer group of the victim or offender. Disapproval and lack of support for engaging in restorative justice can leave the victim lonely and compound a sense of isolation.

It is important to involve the family or support persons in the preparation process if the victim so wishes, to the degree possible, to ensure that the victim feels supported and safe. If a support person is involved in the preparation and the actual restorative justice meeting for the victim, the same offer of support should be afforded to the offender. One approach to support persons adopted by Project Restore in New Zealand is to have a Dispute Assessment Officer as part of the restorative justice agency to assess whether a chosen support person will be helpful in the restorative justice, and not likely to escalate the conflict (Jülich, Buttle, Cummins, & Freeborn, 2010). In other programmes, the restorative justice practitioner deals with these situations themselves as part of the preparation. Support persons need to be briefed on their role in the restorative justice process.

4.2.5 Dealing with rape myths

There are aspects of sexual violence which make it different from other types of crime and which therefore must be taken into account by restorative justice practitioners. Rape myths are found in most cultures and are profoundly and fundamentally gendered (Gillen, 2019). The prevalence of rape myths often influences the degree to which sexual violence against women is condoned, normalised, and its full extent denied (Gillen, 2019). The net result is the social and cultural stereotyping of women and the marginalisation and silencing of victims of sexual violence.

Rape myths impact common understandings of sexual assault and rape which are deeply embedded in most cultures, sublimely influencing most adults. Rape myths also impact victims who sometimes blame themselves for not having 'prevented' the assault or defended themselves adequately. This thinking can sometimes be found in the thinking of partners, parents, and peers who may hold or ignore rape myths (Neumann, 2010). Male dominated systems such as the police

and the judicial system can also evidence gendered perceptions of sexual violence (Gillen, 2019). It is essential that restorative justice practitioners are mindful of these issues.

Facilitators of restorative justice in sexual violence must therefore be reflective practitioners who are aware of rape myths and their potential to be present in how victims of sexual crime view themselves, are viewed by perpetrators and by their society and communities.

4.2.6 Dealing with breaches of trust

A sexual assault most often takes place between two people who know each other (See McGee et al., 2002). Some victims are related to the offender, some are acquainted, and some are friends. Betrayal of trust is evident in these situations. When the victim and the offender know each other, the ripple effects of the sexual violence may also be widely felt, involving multiple secondary victims. Cases involving intra-familial child sexual abuse can fragment families and tear them apart with divisive positions adopted towards the victim or the offender on all sides (Keenan, 2014). Peer groups can be divided when the victim and perpetrator are members of the same social network. The reactions of the 'communities of care' can have far-reaching consequences for family relations and community life.

Facilitators of restorative justice in sexual violence cases must have a working knowledge of the impact of sexual crime on the networks of victims and offenders and be aware of how to work restoratively with secondary victimisation and vicarious trauma.

4.2.7 Understanding the context of sexual violence

The context of sexual violence is different from other types of crime and the resultant harms vary from case to case. This requires a nuanced and sensitive adjustment of the restorative process, informed by knowledge and awareness of sexual trauma. In preparing for restorative meetings restorative justice practitioners must be aware of the context of the assault and the process must be sensitively adjusted accordingly. For example, in preparing for a victim-offender mediation in the aftermath of a robbery, the preparatory dialogue with the facilitators might begin with an account of what happened, who was hurt, by whom, and how. In a case of sexual violence, the actuality of the assault should not be avoided by practitioners, but the facilitation process can be amended to give the victim control and choice over how, when and if the account of the sexual crime is presented at all, both during the preparation and in the meeting with the offender. The intimate nature of sexual assault demands that the process is managed carefully and with sensitivity. A 'standard' restorative justice format is not replicated without carefully thinking through all the possible implications of the approach for the parties.

Other context issues that must guide the preparation and the actual meeting include: the age of the victim, the nature of the relationship between the victim and

the offender, the betrayal of trust, the power imbalance, the frequency of the assaults, the private or social blame levelled at the victim, any offender ambivalence regarding acceptance of responsibility for the offence and the level of harm done, specific participant vulnerabilities such as understanding or learning difficulties, mental health challenges, high levels of associated shame for both victim and offender, gender entitlement thinking, cultural perspectives on gender and sexuality, media and community interest and discourses, and multi-agency co-operation.

4.2.8 Ensuring safety in the entire restorative process

Some of the most commonly voiced concerns about restorative justice in cases of sexual violence relate to specific anxieties about victim safety, manipulation of the process by offenders, pressure on victims, conflicting loyalties, and the potential for restorative justice to position sexual violence as a private, personal, and intimate crime rather than a crime which has public, structural, and political dimensions that must be resolved in the public sphere (Hudson, 2002).

In relation to victim safety there are concerns that the informal nature of restorative justice when compared to the more formal criminal justice processes may place victims at risk of re-victimisation. In particular, there are concerns that unchallenged power imbalances may be perpetuated or made worse, and patterns of abuse may be reinforced. To address this concern restorative practitioners must ensure that while the process is informal and flexible it does not lack structure or formality. The structure and formality can create some of the procedural safety required for all parties. Concerns regarding the manipulation of the process by offenders show up as concerns that offenders could use the restorative justice process to minimise or diminish their responsibility for the offence, trivialise the abuse, or shift the blame to the victim. This must be addressed in the preparatory meetings with victims and offenders and if it emerges in the actual meeting itself a time-out break can be called by the facilitator to re-establish the rules of engagement in order for the meeting to resume.

In relation to concerns that victims might be under pressure to participate or to say certain things it is suggested that some victims may not be effective self-advocates and that other people's interest, such as those of the offender or the community, can be privileged over the needs and interests of the victim. This is likely to be especially the case when victims have particular vulnerabilities, such as mental health challenges, are marginalised in a family or social group, or are minors. In addition, if the restorative justice intervention seeks to arrive at a community, group, or family consensus, it could happen that the victim's voice or interests may be minimised or marginalised in favour of a more generalised goal. In such instances, victims may come under pressure to accept certain outcomes, such as an apology, even if it is felt to be insincere. They could come under pressure to offer forgiveness, or even to accept an offender back into the home when this is not what they want. Conflicting loyalties can occur in some forms of intra-familial sexual

violence when parents, siblings, and other family members and friends put pressure on victims to forgive the offender. This can result in victims being vulnerable to manipulation.

4.2.9 Avoiding the privatisation of sexual crime in restorative justice

Concerns that the public interest are not being served by restorative justice emerges from an idea that restorative justice is incompatible with the long-standing goal of the feminist movement to move violence against women from the private to the public sphere; from the personal to the political. The concern is especially relevant when restorative justice for sexual violence is seen as a means of diverting offenders of sexual crimes from the formal criminal justice system to a more private justice arena, in essence to avoid facing the rigours of the courts. Restorative justice practitioners must therefore be cognisant of these concerns and restorative justice in sexual violence cases cannot be advocated as an alternative to criminal justice, unless with the consent of all parties, such as in some cases of historical institutional abuse or historical intrafamilial sexual abuse. Restorative justice in sexual violence cases offers an additional justice mechanism for victims and an accountability mechanism for offenders, many of whom remain silent during criminal justice proceedings. Because of the high attrition rates in sexual violence cases whereby only a minority of victims get any justice whatsoever from criminal justice, it may be that in these non-tried cases restorative justice may be the only form of justice that victims ever receive or the only mechanism of accountability for offenders (this discussion is taken up in the concluding chapter).

In advocating for and in practicing restorative justice after sexual violence restorative justice practitioners cannot be morally neutral, even when they adopt a balanced approach to the work and respect the dignity of all parties equally. The ethical position of seeing sexual crime as a public and a private crime requiring formal and informal justice responses is not in conflict with the principles and values of restorative justice. Restorative justice practitioners in the area of sexual violence need to engage with these public and moral debates.

4.3 Preparation

4.3.1 Exploring motivations and expectations for participating in restorative justice

The motivation of people harmed by sexual violence for participation in restorative justice is not unlike the motivation of victims who have experienced other kinds of harms. Victims want to be heard, their harm to be acknowledged, to have a say, to ask questions, and receive an explanation. Some want revenge, some want an apology, and some want to see justice done by confronting the offender with the consequences of their actions. Others want to know the reasons for the offence,

the impact of the offence on the offender and how he/she will prevent further offending. Some victims have no interest in what the offender has to say but merely want to meet the offender in a safe environment before accidently meeting in some other context. Some want to 'change the memory card' of the assault (see Keenan & Griffith, 2019) and restore power. Some victims hope to achieve 'closure' by entering into a restorative process, whereas others do not use the word 'closure' but express a hope that they will be able to 'move on' once they have faced the offender.

Victims are not a homogenous group, and they react to the harm differently. Their motivation for participation in restorative justice can be complex and even contain conflicting feelings; 'I want to do it, and I don´t want to do it'; 'I want to see him, and I don´t want to see him'. During the preparation for restorative justice the facilitator can help the victim accept ambiguity and normalise what feels difficult or even wrong to them, while at the same time helping the victim clarify their motivation for participation.

Being clear about one´s motivation for meeting an offender is important, not only in respect of the possible meeting, but also in respect of dealing with opposing views and even scepticism from family and friends. Sexual assault creates strong feelings in everyone close to a person who was sexually assaulted and the motives of the victim to meet with the offender will often be challenged or opposed. Families and friends often feel protective of the victim and fear further suffering for them. The victim's credibility can also be questioned by some: if she/he wants to meet the offender then maybe she/he is not fully innocent of the offence! The victim can also lose support from family, partner, and peers, sometimes in the early stages of expressing an interest in restorative justice.

In relation to offenders and motivation for restorative justice the main concern of a restorative practitioner is to ensure that the motivation of the offender is not to inflict further harm or exert some other form of power or control over the victim. An understanding of the complexity of the power dynamics of the relationship, of sexual violence, and of the nature of trauma as mentioned above, are essential for restorative justice practitioners in such situations. Exploration of motivation is a key part of both the assessment and preparation process for offenders for restorative justice in such cases. A crucial aspect of this initial engagement and preparation stage of restorative justice for both victims and offenders is to facilitate the participants to identify the motivations, potential benefits and challenges of restorative justice for themselves and others.

Keenan (2014) found that men who had perpetrated sexual crime would be willing to engage in restorative justice, were they requested to do so. Part of their motivation was to repay a moral debt; answer questions honestly regarding the offence; express sorrow and regret; apologise; seek forgiveness; do something honourable in the face of such dishonour and maybe be allowed to see and meet with a family member again that they had previously harmed and sexually violated. Restorative justice practitioners have a duty to be mindful of the powerful nature

of reductive labels, such as 'sex offender' or 'victim', which often categorise individuals rather than see their individual interests and capacities. It is also important that the fluid nature of labels is remembered in restorative justice practice, and that offenders can also be victims, and victims can be offenders in different contexts. However, there can be no ambiguity when a restorative justice process takes place regarding who is the victim and who is the perpetrator, irrespective of the broader context of hurt and harm[2]. Examining motivation for restorative justice and exploring the expectations for the process are crucial aspects of the preparation stage of restorative justice, and this is applicable to both victims and offenders.

4.3.2 Exploring statements, questions, and possible responses

There is not one way to do preparation for restorative justice in cases of sexual violence. Preparation must be done on a case-by-case basis and the preparation in and of itself can, when done well, empower the victim (see Lara's story, chapter 7) and help the offender. What is most important is that the preparation process is flexible and adapts to the needs and interests of the key participants. As in other cases of severe violence the level of anxiety and emotionality can be high during the preparation, and sensitivity on the part of the facilitator is required so as not to force the pace at which the parties can move.

The preparation for the actual meeting usually begins with the victim. It is important not to cut corners or make compromises in the preparation process so that the needs, interests and concerns of all parties are addressed. Some victims want to make statements, others want to ask questions and some victims want to do both. Potential statements, questions and desired outcomes for the meeting need to be painstakingly moved through and rehearsed. The preparation then moves to the offender and his possible responses to the victim's 'hypothetical' questions and statements. The offender may wish to make statements too and these along with their hopes for the meeting will be painstakingly explored and rehearsed, as in the case of the victim. This process is repeated as many times as necessary with facilitators going from the victim to the offender and back again over days, weeks or months until all the issues for the actual meeting have been clarified and agreed. Only the issues that the parties agree to discuss will be on the agenda for the actual meeting. There should be no big surprise items for discussion at the meeting itself.

There are a number of factors to be borne in mind when preparing victims and offenders of sexual crime for restorative justice:

[2] Keenan has had occasions in restorative justice interventions involving intrafamilial sexual abuse that the perpetrator of one member was a victim of another. In these situations, different restorative justice meetings were arranged involving different familial cohorts so that the victimhood of the victim was always fully honoured without excuse making for victimhood on the part of the offender in that instance. Victim Offender meetings with such cohorts of family members can also be followed by one or more collective healing circles for healing for all.

I. Many victims do not think they will be able to express what they want to say and fear they will get too frightened, too angry, or too emotional to express their feelings and views. Here it can be useful to rehearse what is going to be said. Likewise, some offenders can profit from rehearsing statements they wish to make.
II. Language can be an issue that must be dealt with during preparation. Many victims find it both difficult and shameful to talk about what happened during the actual sexual offence and it is only if they wish to do so that this topic is discussed during the preparation. Many victims do not wish to discuss details of the sexual offence during the actual meeting with the offender. That must be the choice of the victim.
III. Most victims want to ask the question: 'why did you do it' 'why did you do it to me'? Very few offenders may be able to give a straightforward answer to these questions, and this could cause disappointment for victims. Part of the preparation is to anticipate this potential situation and help victims reframe the question into a question that is more likely to be answered in such circumstances. Some victims want to ask their questions irrespective of the answers they are likely to receive. As Griffith said (see Keenan & Griffith, 2019, 2021) she did not need to hear the content of perpetrator's answer to her questions 'Why did you do it, and why did you do it to me'? as she knew the answer for herself. Rather, she needed to ask the question and hear the perpetrator's response 'in his own words', irrespective of the content of his reply.
IV. Part of the preparation is devoted to identifying any issues which could impact the active involvement of the parties in the meeting, assess the impact that such issues might evoke and agree strategies and actions to minimise their effects.

In general, the process of preparation is a mixture of the giving and gathering of information: the restorative justice practitioner gives information about the nature of the process, asks questions, and gathers key information from the parties about their needs and interests, attitudes, and beliefs so that these can form the core of the actual meeting. The use of phrases such as 'what would you like to hear' and 'what you would like to say?' underpin the giving/gathering approach.

It is neither possible or desirable to be absolutely prescriptive regarding the preparation for restorative justice in sexual violence cases, either in terms of the structure, content or time taken, as there are many variables to be considered. It might happen for example that the victim clearly wants an apology, and this would feature as part of the preparation with both parties. However, an offender may not wish to offer an apology, and this situation is discussed with both parties individually, during the preparation. Ultimately victims have the choice to proceed or not with the actual restorative meeting, especially if some aspect of

what they hear during the preparation is not what they expected or hoped for. The same holds for the offender. Ultimately the negotiation and back and forth movement regarding these matters rest on the skill, knowledge, and sensitivity of the facilitators.

Small practical arrangements can help decrease the level of anxiety of parties in advance of the restorative meeting. The possibility of victim and offender arriving at the same time, or of sitting in the same waiting area could create a feeling of lack of safety and insecurity which can be addressed with clear planning in advance. Seating arrangements as well as greeting and leaving arrangements for entering and leaving the room are carefully worked out in advance. 'Will a handshake feel acceptable? Is "no touch" preferable?' Whatever the victim wishes in this regard must be passed on to the offender to avoid awkward situations on the day of the actual meeting. Choice and decisions regarding these practical issues are given to the victim during the preparation, and these choices are known to enhance confidence and help in the regaining of power and control. Agreeing ground rules which are owned and generated by the participants is a common task of preparation and the issues involved here do not differ significantly from arrangements in non-sexual cases.

Involving the families or a support person in the preparation for the restorative justice meeting can also be important. Some victims of sexual crime prefer not to have a support person in the room. However, ensuring that the victim and offender have at least one person who supports them during the process is important, even if the support persons are not present for the actual meeting itself. If support persons are attending the actual restorative meeting they too are entitled to a degree of preparation as part of the process; to identify their role and function and to gain clarity about the structure of the meeting as well as the practical arrangements.

Despite the best of intentions of facilitators, it is important to remember that not everything can be prepared. Surprises can occur on the day when new issues emerge in the course of the victim-offender encounter. These surprises are mediated by the parties with the help of the facilitators. The use of time out[3] if any of the parties requires time to allow emotion level off, or evaluate a situation, can be very useful in these situations and can serve to enhance safety. Time out can be called by victims, offenders, or facilitators.

It is important not to 'stifle' the content of the meeting by oversharing the perspectives and views of each of the core participants in advance of the meeting itself. Decisions regarding what to share and what not to share

[3] Time out is a process whereby any of the key parties; victim, offender, or facilitators, can ask for a short break from the meeting to allow emotion to settle or if someone is unduly upset, or for a private word outside the room with one of the parties. The facility for having a 'time out', which is known to all the parties during the preparation, enhances the physical and emotional safety aspects of the meeting.

involve skilled professional judgment, including the use of 'hypothetical scenarios,' and practitioners must always make these judgments on a case-by-case basis. For these and all the reasons outlined above staff undertaking restorative justice work in sexual violence cases must have excellent core skills upon which to draw.

4.3.3 Length of time for preparation

It is difficult to estimate exactly how long preparation for restorative justice takes in sexual violence cases as individual case factors vary including the vulnerabilities and needs of core participants, the number of supporters, the degree of other professional involvement, the choice of restorative model, and the availability of and access to both the victim and offender. Koss (2013: 1641) reports that preparation time in cases in Project Restore in the US averaged sixty-seven days and ranged from as little twenty-five to a maximum of 156 days. Evidence from the AIM Project in the United Kingdom (Mercer et al., 2014), suggests that an average of twenty-nine hours preparation time was involved in the preparation for complex cases such as robbery, burglary, arson, and sexual violence.

4.4 The restorative 'meeting': choice of restorative justice methodology

Are face-to-face meetings the most appropriate method for restorative justice after sexual violence or are other restorative justice methodologies more appropriate? This section deals with these questions.[4]

It is clear that restorative justice practitioners need flexibility to apply the most appropriate restorative justice model in any particular case. Some agencies specialise in employing only one method, such as victim-offender meetings, or restorative conferences, family group conferences or healing circles, while others employ all approaches (see chapter three for more detailed discussion of restorative justice methodologies).

Victim-offender meetings involve a small number of participants, usually the victim and offender and a supporter each. The process is dialogue driven, preparation is key, and there may or not be 'an agreement' (a written document specifying certain agreed outcomes) at the end of the process. Victim-offender meetings are ideally facilitated by two facilitators, one male and one female.

[4] As chapters five and six illustrated some practitioners we interviewed in the course of this research use one name for their practice (for example 'mediation') when they mean something else (for example a conference) evidenced by the number of people in the room for the gathering. The imprecise language used to describe practice was merely one of the problems we encountered in conducting this research and attempting to clarify the state of the field.

Restorative conferences accommodate more participants than a victim-offender meeting and can often involve family and community members as well as agents of the criminal justice system, such as police. Restorative conferences offer a structured approach to the dialogue with rules of who can speak and when and often has an agreement as part of the outcome. Preparation usually involves an understanding of a pre-arranged format for the meeting. Restorative conferences are usually facilitated by two facilitators.

Family group conferences are generally employed to address youth justice issues and follow a similar format to restorative conferences. Best practice would indicate facilitation by two facilitators, ideally of mixed gender. In cases requiring extended family involvement because of child protection or youth protection concerns, family group conferences often enable the 'professional voice' to be spoken alongside the voice of the family. In these situations, professional concerns as well as family considerations form part of the preparation for the meeting and the restorative conference itself. In this way the restorative dialogue is combined with therapeutic and other issues of concern.

Healing circles involve victims, surrogate offenders, (or offenders and surrogate victims) and family and community members who gather in a circle with the help of a facilitator and 'talking piece' to take it in turn to speak and 'listen from the heart'. A series of questions give format to the process and the questions are developed generally in individual conversations in advance with each participant. The first question is generally designed to 'build community'; the second and third are to address an issue pertinent to the group and the fourth to look to the future. (See the description of the Green Bay Programme in chapter seven for an example of an alternative healing circle format).

Although face-to-face meetings have the potential for the best outcome for victims and offenders in restorative justice after sexual violence it is crucial that other indirect options are also available for them, such as shuttle mediation, the use of video recordings back and forth recorded and seen by the individual participant in the presence of the facilitators, or the passage of written texts or letters back and forth between the parties via the facilitator. If the victim does not feel safe in engaging in a face-to-face meeting with an offender, an indirect meeting with the facilitator as a go-between can offer safety for the victim and nonetheless facilitate a restorative event. When indirect methods are being considered it is important to be clear about the role of the facilitator and for the process to be as transparent as possible.

Offering flexibility regarding the choice of methodology to be applied for restorative justice in sexual violence cases means that the specificities of the case and not dogma drive the process, which in turn is responsive to the particularities and needs of the individuals involved. The mantra 'processes for people … not people for processes …' takes on some real meaning here.

4.5 Follow-up

A follow-up meeting or more than one with the victim and the offender separately, following the actual restorative event is an important part of the process. In some circumstances a second meeting between the victim and the offender is required and although rare in sexual violence cases this can be arranged. Other follow-up or monitoring interventions can also be required, particularly if there is a written agreement with specified actions as an outcome of the restorative meeting.

In the Restore Programme in the US, victims are invited to attend a meeting of the 'Community Accountability and Reintegration Board' twelve months after the restorative meeting. At this stage the offender demonstrates his/her compliance with any conditions of the agreement if one was made during the restorative meeting and reads a prepared reflection and clarification letter indicating his/her progress throughout the year. 'This is the formal apology and marks his/her reintegration back into society' (Koss, 2013: 1630). Interestingly in Koss's (2013: 1652) study not a single victim chose to attend this 'final exit meeting' twelve months on, where the programme designers intended the formal apology would take place. Some offenders had apologised during the restorative meeting or conference itself (Koss, 2013: 1652).

According to Sherman and Strang (2007), restorative practices are supposed to engage individuals in a 'moral discussion' that would trigger 'an emotional revelation of the moral truth that harming other people is wrong' (p. 33). In a review of youth justice conferences Maruna (2008: 66) argued for 'final reviews' or 'follow up conferences' to be conducted for greater impact, largely on offender future conduct, to which victims could be invited. It is arguable whether a final review with the offender would be of interest or benefit to victims, especially of sexual violence, but endings and follow up for victims are certainly a topic worthy of further study.

In general terms, the dynamics of restorative justice in sexual violence cases do not require a greater use of follow-up meetings than in other types of offences. Often one meeting with the offender and one or more follow-up meetings with the facilitator can be sufficient for victims. Support people or therapists often then continue with the core parties as required. Best practice mandates however that the requirements for follow-up must in sexual violence cases be flexible and case specific.

4.6 Evaluation

Evaluation of restorative justice in sexual violence cases does not differ in many ways from evaluation of restorative justice practice in other sensitive and complex cases. In general evaluation fulfils four functions: (a) it offers a means for restorative justice practice standards to be held accountable to the direct participants;

(b) it offers a source or practice information for practitioners to reflect upon to improve their practice; (c) it offers an illustration of the benefits and challenges of restorative justice, which can be used to inform thinking and help other victims and offenders who are considering potential participation; (d) it can also help to promote restorative work; and (e) it demonstrates that practice is accountable to national and international practice and management standards where they exist.

In undertaking case evaluation, it is important not merely to focus upon the meetings itself, but to also include participants' views and experience of the initial engagement and preparation. It is helpful during the evaluation to capture information that illustrates the nuanced differences in the victim and the offender's expectations and perspectives. A further evaluation twelve months after the meeting to gather information on the well-being of participants and any changes that they can attribute to the restorative justice meeting would enhance the outcome literature and influence theory and practice.

As restorative justice in this context of sexual violence often takes place in a context of family and multi-agency involvement, it is important to include those family members, support persons and professionals in any evaluation process. These evaluations can also be used for comparative purposes to compare with other types of situations and offences (Koss, 2013).

4.7 Support for restorative justice practitioners who facilitate sexual violence cases

Facilitating sexual violence cases requires the reflective application of core restorative justice skills to a high standard, combined with additional contextual knowledge, specialist training and insight relating to the field of sexual violence, trauma work, and the criminal law. This approach is reflected in both the New Zealand and the Australian approach to restorative justice, which puts the restorative justice specialist practitioner alongside the offender and the victim and sexual violence specialists to do work restoratively as a team. All work alongside and in communication with each other on specific cases as required.

Facilitators of restorative justice in cases involving sexual violence can need support and supervision for this work because of the level of trauma expressed and witnessed and the heightened level of emotional intensity and complexity that such cases involve. Such supervision can help facilitators with the impact of the work and also help them stay within their roles as restorative justice facilitators and not as primary therapists in the case. Line management and case supervision may not necessarily be provided by the same person. In practice, the level of knowledge and expertise required to supervise such cases may not be located within the agency providing the restorative justice service but instead will be gained by access to local or national restorative justice networks. Networks of practitioners and interagency work as noted

in the case of the Copenhagen Network in Denmark or Facing Forward in Ireland (discussed in chapter six) can be an important source of support and development for restorative justice practitioners, as can the equivalent of the Deontological Commission in Belgium (see chapter six) for addressing ethical and high-level practice concerns and challenges. Collaboration with academics, as in the case of Belgium, advances the research, policy, and practice to the advantage of all.

5. Final remarks

Restorative justice in cases of sexual violence must be a victim cantered, trauma informed, voluntary process in which safety is a priority and the principle of neutrality is replaced by respect for all participants. Restorative justice practitioners who have simply undertaken the basic or foundational training in restorative justice cannot be expected to have the level of understanding required to work in sexual violence cases as set out above. As well as understanding the impact of trauma, the dynamics of sexual violence, perpetrator strategies and the law, restorative justice facilitators need to be culturally aware and sensitive to the contexts in which sexual violence occurs and the broader social context of inequality and discrimination, including those involving race, gender, age, abilities, class, ethnicity, sexuality, poverty, and more. The need for additional specialist advanced training cannot be overstated. Without such, the practice base for restorative justice in sexual violence cases is weakened and public accountability undermined.

Nobody in the restorative justice field desires legalistic regulation or to constrain or constrict restorative justice innovation and practice. However, it is possible that in relation to sexual violence cases we need frameworks on training standards at national level, maybe even international level, which can be managed by local or international umbrella organisations. Concern about the bureaucratisation and professionalisation that such initiatives could herald mean that this aspect of the discipline must always be held in tension. What Braithwaite (2002: 571) observed in 2002 still applies; the best way to assess whether a restorative justice training programme is up to standard, is in regulatory conversations with peers and stakeholders rather than by rote learning from a regulatory rule book. However, some values are so fundamental to justice and to restorative justice that they must always be included, and new ones added specifically for sexual violence work. Whatever we do or how we proceed on all of the above it must not deter us from continuing to rise to the challenge of providing restorative justice services to victims and offenders in the wake of the harm and suffering caused by sexual violence.

When it comes to best practice, this chapter suggests a number of guidelines that help guide the restorative justice practitioner in undertaking restorative work in cases involving sexual violence. Preparation is the key, and working to ensure procedural, physical, and psychological safety for all is paramount. Restorative justice

after sexual violence is a collaborative partnership between the victim and the offender and the restorative practitioners. Professionals do not own the process. The core participants must own the process. Professionals are accountable to their participants (Christie, 1977).

Two significant challenges exist from allied professionals in relation to restorative justice in cases of sexual violence. The first relates to the overestimation of risk posed by offenders, which makes allied professionals cautious regarding any possibility of 'dialogue and repair'. The second relates to anxiety regarding the possible negative impact of restorative justice for the victim, which can lead to 'victim rescuing' and professionals making decisions on behalf of victims rather than being accountable to them. These concerns enable the space between victims and offenders to be colonised by strong professional voices since 'offenders must be controlled' and 'victims must be protected'. The irony of this positioning is the profound disempowerment of those who are core to the harm and the crime, and it can replicate the disempowerment experienced in the index offence for the victim. Restorative justice seeks to create a different space which enables those harmed, those who inflicted the harm and all of those affected to articulate their own perspectives and reclaim their lives.

Restorative justice practitioners need to be mindful of the concerns of allied professionals and develop strategies and techniques to respond adequately to the concerns of colleagues. The positions, needs, and interests of allied professionals who are involved with victims, offenders and their families need to be addressed as part of the preparation for restorative justice and as part of the broader dialogue regarding restorative justice in relation to crimes of violence.

At the European and United Nations level, standards have been adopted in the field of victim assistance and victims' rights, which fully recognise the possible benefits of restorative justice for victims of crime in general, but also warn for the possible risks (see Directive 2012/29/EU). They also offer guidance on the rights of offenders and accused persons. These guidelines underpin the ethical and value base for good restorative justice practice.

Recognising that sexual violence is located in the broader cultural perspectives of gender and sexuality it is impossible to remove this type of harm from the cultural context in which it is located (Gillen, 2019). With this in mind, restorative justice practitioners who are interested in justice after sexual violence can no longer be content to practice behind closed doors. While restorative justice practice in the confidential space of the restorative encounter is clearly essential, restorative justice practitioners in cases of sexual violence must also be heard in the public sphere. An immensely private assault is also a public affair. The feminist movement have shown that sexual violence is not just a private issue warranting a private response, but rather is a public matter that must be continually framed and redefined as a site of justice and politics (see Benhabib, 1992; Coker, 2002; Schroeder, 2005). As Pali (2017) argues, one of the most important achievements of the feminist approach to

sexual violence has been the special attention paid to the gendered aspect of sexual violence, seen as the result of patriarchy and power relations (see also Schechter, 1982). Based on the importance of the symbolic, declarative, and normative function of law, the criminalisation and punishment of offenders are also important in affirming societal condemnation of this crime. But more law is not sufficient for addressing or preventing the problems of sexual violence.

Many feminists (see Dobash & Dobash, 1992; Edwards, 1989; MacKinnon, 1989; Smart, 1989) have argued that the law and legal justice alone cannot be expected to offer legal remedies to injustices until these injustices are first recognised as being underpinned by social injustice, structural inequality, rape myths, and individual offender factors and characteristics. Dobash and Dobash (1992:147) argued that

> it is impossible to use the law and legal apparatus to confront patriarchal domination and oppression when the language and procedures of these social processes and institutions are saturated with patriarchal beliefs and structures.

Smart (1989: 5) argues that 'it is important to think of non-legal strategies and to discourage resort to law as if it holds the key to unlock women's oppression'. In this, restorative justice as well as other approaches to justice must be considered. Smart (1989: 160) urges feminists 'to construct an alternative reality to the version manifested in legal discourse'. This is one of the challenges for restorative justice practitioners involved in the area of sexual violence.

Conclusion

Addressing the justice gap: the potential of restorative justice after sexual violence

1. Introduction

The research on which this book is based aimed to examine the degree to which restorative justice could contribute to a more enhanced, elaborated, and balanced justice response in cases of sexual violence than that currently offered by criminal legal approaches alone. We examined conventional and innovative justice responses to victims and offenders and their communities following sex crime and wondered if restorative justice could add a more layered response that was trauma informed, victim focused and sensitive to the particular context of each offence. We were also interested in examining whether restorative justice could contribute towards filling the substantial justice gaps that exist in current justice provision for victims of sexual crime. Starting with the right question was essential for this work. Rather than start with restorative justice we started with sexual violence and the impact of sexual violence on the lives of victims and all affected by this crime. We felt it essential to develop a deep understanding of the complex dynamics of sexual crime as a critical starting point for our research. We built on our insider knowledge of this field, based on previous clinical experience (see for example Keenan, 1998, 2002, 2009, 2011, 2013, 2015, 2016) which we developed further. We asked if restorative justice would be appropriate for this crime too. In asking this question we adopted a mixed method approach to the research, which included a global survey, country visits, interviews with practitioners for victims and offenders, personal testimonies of victims, interviews with practitioners about particular innovative restorative approaches, as well as examining the academic and policy literature as fully as possible. All aspects of the research have been presented in the preceding chapters.

A number of important issues emerged during this research which we would like to use the space available in this concluding chapter to elaborate further on. In order to address the issues involved the chapter is divided into five sections. Section one provides a brief introduction to the chapter. Section two integrates the main findings of the study with the empirical and theoretical literature. Section three re-examines the feminist critique. In section four we re-examine the definitions and principles of restorative justice, and drawing on the work of Walgrave

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(2008, 2020) we propose the appropriateness of a maximalist consequentialist theory of restorative justice for sexual violence which we elaborate. Drawing on the work of Walker (2006), section five offers a restorative justice framework for social and moral repair following the violations caused by sexual violence. We conclude by arguing for a reformed restorative criminal justice system.

2. Findings: asking and answering the right questions

We started this project with questions about sexual violence and felt this was philosophically, ethically, and practically important for our work. We wanted to know if restorative justice had anything meaningful to offer sexual violence victims and offenders and their communities, although the empirical work focused mainly on victims and offenders. The role of, and response to, communities after sexual violence was a smaller but nonetheless important part of the project, as a key pillar of restorative justice. However, we also believe an examination of the role of community in the aftermath (and genesis) of sexual crime warrants an entire study, perhaps a smaller study, in its own right. Given the justice gap that exists for victims in criminal legal offerings we wanted to know if restorative justice could offer victims of sexual violence some form of justice that would address some of the gaps in justice provisions for them.

Answering this question was complex for several reasons. First, we became quickly aware that in order to complement existing studies our research on restorative justice for victims of sexual violence needed to drill down into the very specific aspects of the interface of the crime, trauma, the law, justice, and jurisprudence. Second, we also wanted to keep victims, offenders, their communities, the criminal legal system, feminist advocates, sexual violence sector workers, workers with sex offenders, restorative justice advocates, and the state, in the field of vision and frame of analysis for our research. Third, sexual violence takes many forms, and it was important that we locate our work in an understanding of sexual violence. In this we examined sexual violence from a number of perspectives: psychological, sociological, feminist, and legal (chapters one and two), and analysed the principles that underpin how the law and international policy drivers address sexual crime (chapters two and three). In this discussion we included research on victims' justice interests and found that victims want validation, vindication, participation, offender accountability and responsibility-taking and child and adult safety and protection (see Daly, 2017; Herman, 2005; Keenan, 2014; Koss, 2013, 2014; McGlynn, 2011).We also found from previous empirical research (see Jülich & Landon, 2017; Keenan 2014; Koss, 2013, 2014) that offenders are willing to participate in restorative justice if requested to do so, and they have multiple reasons for agreeing to participate (Keenan, 2014) including to repay a moral debt, answer

questions about the offence honestly, sometimes for the first time, and to enable healing for the victim and themselves and their communities of care.

As well as examining the published literature on sexual violence and restorative justice from a theoretical and practice perspective (chapter four) this book also presents new data generated in the study on restorative justice after sexual violence (chapters five, six, seven, and eight) and we also offer guidelines for training and for practice based on this research (chapter nine). In this section of our concluding chapter we integrate that new and secondary research material and provide a thematic overview of the cumulative findings of the work that is presented in earlier chapters.

First, we identified many more services and innovative practices worldwide for restorative justice after sexual violence than we had anticipated at the outset of the research. It is clear that restorative justice in cases of sexual violence is happening globally 'under' and above the radar (O'Nolan et al., 2018). Legislation, funding, and the passion of key individuals are factors that contribute to the longevity of initiatives. The opposite is also the case; successful programmes often close when funding is withdrawn, or key personnel are not replaced on leaving the service. We found that the main instigators of restorative justice after sexual violence are direct stakeholders, in particular victims of sexual crime, who wish to confront the offender directly, make direct statements, receive answers to questions, have a more elaborated process of offender accountability by receiving direct responses to their specific questions, receive validation and social vindication and enable best possible child and adult safety and protection. Despite the fact that examples of restorative justice in cases of sexual violence can be found in many different countries throughout the world (as can be seen from data presented in chapter five), and some for extended periods of time, in excess of ten years, the practice internationally is diverse. While EU (Council of Europe, 1999, 2018; European Agency for Fundamental Rights, 2014; European Commission, 2020; European Union, 2012) and UN (ECOSOC, 2002; UNODC, 2006, 2017, 2020) instruments and guidelines (see chapter three) offer broad international guidelines for practice, at national levels there are few practice guidelines, few practice frameworks, and few checks and balances for the work, with some exceptions (see for example New Zealand, Belgium, Norway, Finland, Germany).

It is also clear that the practice of restorative justice in cases of sexual violence is well ahead of the theory. The need for theory development, new studies that examine all aspects of process and both qualitative and quantitative outcomes are well overdue. There is a case to be made for strong international research collaborations to forward this work. A database of research, key publications on sexual violence and restorative justice, information on programmes and relevant international activities in this growing field of work would enhance the research activity and ultimately the practice community. Such a database could usefully be co-ordinated by an international body such as the UNODC, the European Forum

for Restorative Justice or the National Association of Community and Restorative Justice, or all three, in a collaborative effort. The collation of disaggregated data on offence type, intervention type, processes, and outcomes are essential for knowledge building and for evidence informed work, as well as details of the number of cases being processed as well as other metrics of practices and research.

While findings to date indicate that restorative justice after sexual violence is most successful when it involves a direct, face-to-face meeting between the victim and the offender (Griffith, 2018; Keenan & Griffith, 2019; Koss, 2014; McGlynn et al., 2012) in some cases where victims are reluctant to engage in face-to-face meetings we found that indirect restorative justice can produce positive outcomes for victims too (Buntinx, 2007, Pali & Madsen, 2011). We found that participation in restorative justice can improve victims' perceptions of 'justice' as well as improve the victims' psychological well-being by, for example, reducing symptoms of post-traumatic stress disorder (Gustafson, 2005; Keenan & Griffith, 2019, 2021; Koss, 2014; McGlynn et al., 2012). Restorative justice provides victims with an opportunity to be directly involved in a form of justice process, sometimes the only justice process available to them, to speak directly to the offender about the impact of the offending, or about their strength and resilience in the face of such crime, to receive answers to unanswered questions, to resolve relationships with the offender or the family or broader community when appropriate, and to have an input into the outcome of their case, such as by having an important part in constructing an agreement, if that is desirable. Agreements can include details for recompense for harm and other conditions, such as attendance at therapy for the offender, therapeutic support for the victim, details of how any potential future relational engagement is to be conducted, for example between two students in the same university campus (CIJ, 2014; Keenan, 2014). The implementation of agreements needs to be supervised, perhaps by criminal justice agents.

Herman (2005) reminded that restorative justice for many victims may not work if the focus is on reconciliation. She further highlighted the victims' needs for reintegration into their families and communities and after sexual violence (Herman, 2005), making an important observation for restorative justice, as restorative justice is often preoccupied with offender reintegration.

Offenders can benefit from participation in restorative justice in numerous ways too: they can develop empathy for the victim (Miller & Hefner, 2013) and deepen their sense of responsibility for the harm they caused (Goldsmith, Halsey, & Bamford, 2005; Julich, Buttle, Cummins, & Freeborn, 2010; Koss, 2014; Mercer, 2009, 2020). Participation in restorative justice can also contribute to their own personal growth (Umbreit, Vos, Coates, & Brown, 2003a) as well as help with reintegration (Couture, et al., 2001; Geske, 2007) and repair of family relations (Daly & Curtis-Fawley, 2006; Jülich et al., 2010). Offenders who had perpetrated sexual crime believed they would be repaying a moral debt, and doing something honourable in the face of such dishonour if they agreed to participate in restorative

justice if asked to do so (Keenan, 2014). Even those who had participated in a criminal trial said they would have an opportunity to answer the victims questions honestly for the first time in restorative justice, despite their participation in a criminal trial (see Keenan, 2014).

In terms of recidivism and desistance, restorative justice is seen to play a role in desistance and in reducing recidivism (see Lauwaert & Maruna, 2016), although this is not the main aim of restorative justice. Nonetheless, in terms of measuring programme impact on re-offending, we note the importance of a rehabilitative follow-up for offenders, whether convicted or not, and perhaps the relationship between restorative justice and the kind of rehabilitative programmes which are more promising than others in terms of recidivism, such as, for example, the Good Lives Model (Walgrave, Ward, & Zinsstag, 2019; Ward, Fox, & Garber, 2014) or programmes based on elaborated cognitive behavioural interventions (Marshall et al., 1999).

It has been noted by some practitioners in our survey and on study visits that policy makers and practitioners, particularly from the offender side, often highjack restorative justice after sexual violence in an instrumental way for the purpose of offender management, or the promotion of desistance, at the expense of centring the victim's needs and interests. This emerges as a controversy in the field of restorative justice whose origins lie mainly in offender focused work—should restorative justice be promoted as an avenue for desistance for offenders while also as a justice imperative for victims? Victim initiated restorative justice work after sexual violence does not preclude the importance of offender rehabilitation. However, the concern of feminists that victims of sexual crime would be used in an instrumental way in the interest of offender desistance is real and cannot be ignored.

The practice evidenced throughout this book suggests that developing a good understanding of the specific personal, family, relational and social background of both the victim and the offender is a *condition sine qua non* for best practice. The process and practice model decided upon for each case must be trauma informed and sensitive to context (see chapter nine). The importance and benefits of preparation as a central part of the restorative process was emphasised again and again in the literature (Gustafson, 2005; Koss, 2014; UN, 2006, 2020; Zinsstag & Keenan, 2017) and by our research participants. We found what we consider to be a lack of adequate preparation in some circumstances. Research, such as presented in this book, can be helpful for practitioners and ultimately for victims and offenders. We found, like Bonta et al. (2006) one cannot evaluate the restorative justice encounter on its own, but that all evaluation must include also the preparation phase and the follow-up after the restorative encounter. Preparation and the provision of adequate physical, psychological and procedural safeguards are essential components of restorative justice services processing sexual offences (Jülich et al., 2010; Mercer, 2009, 2020).

We gave a lot of time and consideration to the quality of the training of restorative justice facilitators for sexual violence work during all aspects of our research. We found that procedural safeguards and facilitator training[1] vary from one restorative justice programme to the next. Given the cultural and legal differences in countries across the globe it is perhaps understandable that the practice of restorative justice in sexual violence cases varies across jurisdictions. While the UN and EU instruments can be enormously helpful, several departments have issued national guidelines to provide additional guidance for facilitators and practitioners in their jurisdictions. Whilst this variability and cultural sensitivity is to be welcomed, it cannot be at the expense of best practice; something we have addressed in chapter nine when we offer suggestions for best practice along with advice on training.

The need to understand the dynamics of sexual violence, the impact of sexual trauma, the specific context of the abuse, the law and due process, as well restorative justice principles, values and methodologies emerged as essential prerequisites for doing restorative justice work in this field (Keenan, 2018). The complexity of sexual violence in its many forms and manifestations needs to be understood in order to avoid (as much as possible) the risk of re-traumatisation, re-victimisation or unhelpful power dynamics being played out in the restorative justice process itself. It is also important that the legal rights of accused persons are not compromised during restorative justice encounters by well-intentioned but legally naïve practitioners who walk into a legal minefield when they do not understand the differences between the parameters of 'legal guilt' and the 'acknowledgement of wrongdoing' (see Keenan, 2018). These dilemmas are especially prevalent in cases for which there have been no formal criminal proceedings or in some cases no formal criminal justice engagement. At the same time, restorative justice cannot be used as another mechanism to 'punish' already punished offenders, who may already be serving terms of imprisonment as well as participating in the rigours of sex offender therapy programmes for their offending. However, restorative justice has something important to offer offenders and work in tandum with rehabilitation programmes; their goals are related but different. Deepening and enhancing accountability and responses to victims by offenders is wholly different from any attempts to use restorative justice processes to layer on additional psychological if not physical punishment. Physical, emotional, legal, procedural, and confidentiality safeguards need to be established at all times for every restorative justice encounter.

In terms of programme design, many of the respondents to our survey, which was presented in chapter five, argued that restorative justice after sexual violence offers a case sensitive, flexible, and responsive approach to justice, which puts

[1] It is crucial that facilitators and support staff of restorative programmes receive training, not only as facilitators in general, but also within the specific context of sexual violence (Jülich et al., 2011: 223).

victims first at the centre of the process as well as respecting the needs and interests of offenders and their communities (see also Godden, 2013: 145). This is the imperative, and one we support. However, in order to make this a reality, programme integrity is essential. The principles and value base underpinning programmes as outlined in chapter nine must not be compromised in the interest of expediency, agency, or political interests. The core values of voluntariness, respect, confidentiality, and, as much as possible, honest engagement, must be preserved. In addition, the potential trap for professionals in sexual violence cases of thinking they know better than the victim (in particular) or the offender, in relation to engaging in restorative justice, is to be avoided. This raises the issue of risk assessment for restorative justice which was thoroughly elaborated in chapters five and nine.

The question is often raised as to whether sexual violence cases should or can be successfully included in the remit of agencies providing general restorative justice services or if sexual violence cases require an entirely separate service altogether. Our research found that general restorative justice programmes (mainly victim-led, which tended to focus on victim-offender dialogues), have not excluded sexual violence from their sphere of activity, but our analysis of these services further indicates that in practice the number of sexual violence cases processed by these services remains low. We also found that in these particular services the programme designs were rarely adapted to the unique nature of the sexual violation. Programmes that were specifically focused on sexual violence, such as Triptiek in the Netherlands (see chapters six and seven), Project Restore in the USA (see Koss, 2013, 2014), or Project Restore, New Zealand (see Jülich & Landon, 2017) tended to be more sensitive to the complexities of sexual violence. We are therefore of the view that a separate service or at a minimum a specialist sexual violence team in a more generalist restorative justice service is necessary to facilitate restorative justice in sexual violence cases and to carry out the necessary social and professional networking to enable this work to thrive.

The question is also often raised as to whether sexual violence cases can be successfully included in the remit of agencies providing therapy services for victims or offenders or both. We addressed this question, including the relationship between therapy and restorative justice, in multiple fora (see e.g. Wössner, 2017) and devoted a two-day specialist workshop to the topic with international specialists in therapeutic work and with restorative justice practitioners whom we brought together in dialogue. Our research here produced interesting findings. In principle there is no reason why therapy agencies for victims or offenders cannot offer restorative justice services as well as therapy or advocacy, but with a number of provisos. Victims attending therapy services said they would want a firewall between therapy rooms and restorative justice rooms in the service building, and they would want to attend different personnel for each service. For example, victims would not want to engage in restorative justice preparation or meetings in the same room as that in which they attend therapy. The same applied to victims' views on restorative

justice facilitators; they preferred to work with different practitioners for therapy and for restorative justice, irrespective of whether the practitioner was trained in both. Offenders had no strong views about the requirement for separate rooms in a building for both services or for the inter-changeability of the practitioner.

In relation to the necessity for therapy for victims and offenders prior to or during their participation in restorative justice the views of practitioners were similar; attendance at therapy should not be a prerequisite for participation in restorative justice for either victims or offenders, but it might be preferable for both, for support. For non-prosecuted offenders, attendance at sex offender therapy could be discussed as part of a restorative justice agreement.

The literature and our results from the fieldwork demonstrate that therapy, rehabilitative work for offenders, and restorative justice can be combined as complementary approaches in the context of sexual violence (Jülich et al., 2010: 18). When therapy is used in conjunction with restorative justice to address sexual violence it may be beneficial for all parties on many levels. First, if the victim has a well-functioning therapy relationship and there is good liaison with the restorative justice providers and facilitators, this can contribute significantly to the gains the victim garners from this dual approach (Stulberg, 2011: 4–8). Second, therapeutic interventions may also be advantageous for offenders prior to, during and in the aftermath of the restorative justice processes (Daly, 2006a: 349) since therapy may address issues that may not be dealt with within the restorative justice process as they have different aims (CIJ, 2014). Third, therapy is often used for the families of victims and offenders, as the sexual violence has a ripple effect on family dynamics and relationships (Mercer, 2009, 2020). In addition, therapy can act as a procedural safeguard and assist in preventing restorative justice facilitators from stepping over the line into a counselling relationship with the participants (McPhillips, 2010: 8). Research indicates that restorative justice may be beneficial for all the main parties to sexual violence if it is used in conjunction with therapy (Stulberg, 2011: 4), provided that the restorative justice facilitator does not assume the role of counsellor or therapist.

In relation to societal support for restorative justice after sexual violence we found that resistance exists among certain professional groups, including those in political, judicial, legal and therapeutic fields, as well as in the media, partly because of concern for the re-traumatisation of victims or that offenders would use restorative justice in a manipulative manner for their own ends (see Keenan, 2014). Feminist advocates are also cautious and sceptical about the suitability of restorative justice for sexual crime, which we further discuss below.

However, we also found that the resistance to restorative justice is matched by strong advocates who see the potential benefits of restorative justice for victims, offenders and their communities, especially their communities of care. Ongoing collaboration between restorative justice programmes, victim and offender advocacy agencies, the violence against women sector, criminal legal systems, the judiciary,

politicians, and policy makers we believe is essential, once restorative justice is not a marginal activity or subsumed by criminal justice philosophies and agendas. In practice, such collaborations are difficult to maintain. In general the overall general low number of referrals from prosecutors and criminal justice personnel to restorative justice has been cited as a factor that hinders the progression of restorative justice in sexual violence cases (Couture et al., 2001; Jülich et al., 2010; Koss, 2014). We found that gaining social, statutory, and public legitimacy for restorative justice in the field of sexual violence requires the provision of safe and ethical practice, collaborative relationships, collaborative governance, supportive infrastructures and ongoing evaluative research. This also raises questions regarding the need for legislation and the pros and cons of the institutionalisation of restorative justice (see Aertsen, Daems, & Robert, 2006, for discussion on institutionalising restorative justice).

An important debate on the provision of restorative justice after sexual violence centres on the nature of the referrals and whether only those cases that are victim initiated rather than offender initiated should be processed. The same debate extends to whether restorative justice after sexual violence should be victim centred or offender centred or work in the interest of both parties. We found that while victims form the majority of those who initiate restorative justice after sexual violence (chapter five) some programmes offering restorative justice after sexual violence are not solely victim-initiated, although they claim to be victim focused once the work is initiated (such as Suggnomè, 2005). Our study found that restorative justice programmes provide a range of options in relation to who can initiate restorative justice (see chapter five), but all claimed to offer a victim focused or a balanced approach when the process began. None suggested that restorative justice meetings with a victim of sexual violence would be arranged with the sole purpose of serving the needs and interests of the offender. While much of the literature suggest that restorative justice in sexual violence cases are victim initiated rather than offender initiated (Centre for Innovative Justice, 2014; Dhondt, 2012; Jülich & Landon, 2017; Umbreit et al., 2003a) scholars and practitioners have argued that programmes can still be victim-centred or victim-led even in circumstances where the offender initiates the referral, as long as the decision ultimately rests with the victim as to whether or not to proceed with the restorative process (Bolívar, 2012; Roberts, 1995). It became clear to us during our research that victims of sexual violence are not always adequately informed about the possibility of restorative justice in cases of sexual violence, even in countries where legislation provides for such opportunities (such as Norway), a point made in other literature on the topic (APAV & INTERVICT, 2009; Matrix Insight & Andersson Elffers Felix, 2010). In other jurisdictions (such as Belgium), the systems and processes for informing victims of such rights are well developed and operationalised. Some practitioners suggested that victims of sexual violence are afraid of getting a negative reaction from their social networks if they voice an interest in meeting with the offender

(Bolívar, 2012; Kavanagh, 2017; Roberts, 1995) and in order to avoid such social opprobrium victims pull back from formally initiating such requests.

Research on victims of violent crimes in general indicate that victims tend to value the offer of restorative justice irrespective of the circumstances in which it is initiated, finding no evidence of secondary victimisation when victims are approached on behalf of an offender (see for example Bolívar et al., 2013; Laxminarayan, Lens, & Pemberton, 2013). Keenan (2014) found that some victims of sexual violence said they wished they had been offered an apology by the offender somewhere along the line and claim that would have made a difference to their lives, whether they accepted the apology or not. However, this finding is far from indicative that victims of sexual crime would want to be approached by an agent on behalf of a sex offender requesting their participation in restorative justice, and in this study, we urge caution in relation to offender-initiated requests for restorative justice for victims of sexual crime. The possibilities of secondary victimisation or re-traumatisation or for a distortion of power relations seem to us to be a risk in such a process. The pros and cons of such an initiative requires further empirical evaluation, particularly regarding the potential impact on a victim of historical crime or of violent stranger rape from an offender-initiated request for a restorative meeting. However, a central register of offender-initiated requests for restorative justice, in the aftermath of sexual crime which would log their details and addresses, could be a useful development in all jurisdictions for follow up by victims should they ever wish to proceed with restorative justice. In the Irish context Keenan (2021) suggested the development of a national statutory contact preference register for serious crime (NCPRSC) which would log the willingness of offenders to participate in restorative justice. Victims could check the register with officials when they wished. If persons relating to a particular crime are matched on the NCPRSC expressing a desire to engage in restorative justice, the referral is made to the relevant restorative justice service.

Local communities have played a significant role in the development and application of general restorative justice programmes in many jurisdictions (Bolívar, 2012; Jülich & Buttle, 2010; National Commission on Restorative Justice, 2009) but this is less evident in cases of sexual violence. Since 'community' remains vaguely defined in the restorative justice literature (Jülich & Buttle, 2010) and precision is necessary in this developing field, we adopted a layered understanding of community involving a number of levels: at a micro level we adopted a narrow and personally proximate definition of community as a 'community of care', which comprises networks of persons around an individual that are described by them as comprising their 'most meaningful personal relationships' (Bolívar, 2012: 17); at a meso level the community comprises the network of family friends, neighbours, work colleagues and peers, all of whom have a stake in the outcome of a crime. At the more macro level we include providers of social services, justice and legal services, religious services, the media, and the broader group of concerned citizenship.

We found considerable variability in the nature and extent of community involvement in any restorative justice process after sexual crime. This is something we believe the field needs to address going forward. The potential role for restorative justice in the prevention of sexual violence must be considered in this context, perhaps most importantly because of the position of 'community' in restorative justice thinking, and the potential in some models of restorative justice to effectively engage bystanders and community representatives in the justice response. The central role assigned to community involvement in restorative justice has a dual importance in the context of sexual violence (Randall, 2013: 473). Recognising the community as a key participant is significant in terms of understanding the ripple effects of sexual crime beyond the immediate victim, to the secondary victims (such as people in the victim's life, the offender's life) and further to people (unknown to them) in the broader community. Second, community inclusion in restorative justice fits with the idea of crime as both a product of the collective as well as the individual; structural as well as agentic factors are involved in the genesis of this crime. . Restorative justice's position on community engagement is different from the individualised model of the criminal legal system which frames crimes as wrongs perpetrated by citizens against the state (Randall, 2013: 473). The community-focused features of restorative justice resonate with the feminist analyses of violence against women in which the problem is conceptualised as both a public, political problem as well as one that has private and personal dimensions.

We found that participation of community is dependent on the model of restorative justice being used in the particular agency, rather than the needs of the individuals or the community, or even a community desire for restorative transformation. This is an important observation and something we wish to comment on further.

It became evident to us that some agencies 'do' victim-offender mediation/dialogues as preference; others 'do' restorative conferences, others 'do' healing circles, and others 'do' what they call restorative meetings which follow their own design. To this extent some agencies are more or less likely to involve the micro, meso, or macro community in the restorative process. Research on the relevance of case matching with the appropriate restorative method, and on the role of communities at micro, meso, and macro levels, is seriously lacking in the field. Randall (2013: 471) pointed to the importance of restorative justice conferences for gender-based crime. As a rule, prescribing a particular methodology for any case or case type may not be wise. However, there may be exceptions to this such as for example in domestic violence situations where an activated community engaged restorative process, such as in a restorative conference (as distinct from victim offender mediation), may offer protections for victims by virtue of having more 'witnesses' to the process (p. 476). We found that many victims of sexual crime prefer a victim-offender methodology, with or without support persons in the room (see also chapter five). We suggest therefore that the principle of allowing the case, and

mainly the victim, in collaboration with the facilitators, to determine the restorative justice methodology in sexual violence cases is a good one. We see no reason to depart from this principle, while recognising some restorative justice methodologies may be more suited to some cases because of the level of risk involved.

Restorative justice approaches should be flexible and case and context dependent with the voice of the victim central to the approach adopted. There is nothing to prevent a victim-offender dialogue, a restorative conference and even a healing circle taking place in the same case at different times, involving a combination of core and other relevant parties. The limit of these combined approaches is in the imagination of facilitators, combined with not listening carefully enough to what victims, offenders, former offenders, and their communities desire. This layered approach to restorative justice in sexual violence cases is underdeveloped theoretically and in practice.

Some scholars argue that while the community is absent in one-to-one restorative meetings, such as in victim-offender mediation, in fact the community is represented by the facilitator who is representative of the wider or macro community (Jülich & Buttle, 2010: 23). We are not persuaded by this argument. The need for further theorising and research on the role and possibilities for community engagement in criminal justice and the administration of justice, including restorative justice, in sexual violence cases, continues to be evident.

The variety of restorative justice mechanisms which prevail in societies transitioning away from a violent past demonstrate just how creative communities can be in searching for truth, renewed societal trust, and peace. In some jurisdictions (such as South Africa), official Truth Commissions (TC) became part of the way of finding truth and healing, and these have, depending on political will and context, been able to create a level of regained trust to a greater or lesser extent, either with links to the formal judiciary (such as in South Africa or Argentina) or as in a majority of cases, by links to Informal Justice Systems (IJS) and civil society groups (Zinsstag & Busck-Nielsen, 2017). These variety of truth-seeking commissions were often found to be reasonably able to restore individuals and consolidate reconciliation, including in some sexual violence situations. However, most truth commissions themselves note, and practitioners and academics agree, that great care must be taken when using the truth commission mechanisms in the context of sexual violence, to ensure that human rights standards are abided by, particularly for vulnerable groups such as women and children. Most also recognise that these systems hold potential for meaningful and flexible justice at a grassroots level. In post conflict situations truth commissions and restorative mechanisms must be appreciated on their own merits and understood as being only some of the measures amongst many used to address sexual violence in times of political conflict. They nonetheless constitute an important source of ideas when considering how to respond to sexual violence in both transitioning and post conflict societies (Zinsstag & Busck-Nielsen, 2017).

In summary, we found overall that restorative justice can enhance the repertoire of justice instruments for victims in cases of sexual violence and can complement traditional criminal and civil justice responses. We suggest that restorative justice needs to go further and percolate through criminal justice systems transforming it into a restorative criminal justice system in its response to crime, including sexual crime, which we discuss below. We also found that restorative justice can complement therapeutic work with victims and offenders, with good outcomes for both. Much of the practitioner knowledge and experience we uncovered in this study provides the evidence for these assertions; an international survey involving seventy-four restorative justice practitioners engaged in sexual violence cases on five continents; specific data from five country study visits; evidence from six international programmes and data from four case studies spread across the globe as well as critical engagement with the international literature.

3. Addressing the feminist critique

3.1 The importance of the feminist critique

When the idea of restorative justice was proposed as having potential for all types of crime, (including adult as well as youth offenders), policy makers, and feminist advocates, using a gender-based violence lens, questioned the appropriateness of restorative justice for sexual and domestic violence situations (e.g. National Commission on Restorative Justice, 2009; Busch, 2002; Stubbs, 2002; Zorza, 2011). Their concerns centred on the traumatic impact of sexual and domestic violence and the potential for re-traumatisation of the victim; the power imbalances that characterise these offences and the potential for re-victimisation; the potential for coercion of the victim to participate in the process; the potential for manipulation of the restorative justice process by the offender, and the potential for offenders to 'use' or 'abuse' restorative justice for their own ends, such as for more lenient sentences or earlier parole opportunities (see Keenan, 2017; Randall, 2013). Feminist advocates were also very concerned that restorative justice would lead to the reprivatisation of sexual and domestic crime and ultimately to their decriminalisation (see also chapter three; Gandy, 2012; Ptacek, 2010). A third strand of feminist concern centred on the potential for on-going violence in sexual and domestic violence cases, more particularly on the latter, in circumstances where women who are unable to express themselves freely without fear of retribution, might enter into unwanted agreements or make unwise concessions in restorative justice meetings (Goodmark, 2018). Further, in light of research that demonstrates that some domestic violence perpetrators will weaponise everything possible, including the courts (see Klein, 2019) and children, when women leave these abusive relationships, some feminists wondered what was to stop these offenders from

weaponising the restorative justice process too (Keenan, 2019). In essence, feminists and advocates for victims of sexual and domestic violence were wary of restorative justice and some could not see how meetings between victims and offenders would work in the interest of victims of sexual or domestic violence or both. These concerns needed to be addressed.

Feminist advocates and scholars working and writing in the sexual and domestic violence sectors are truly concerned about the potential negative impact of restorative justice for women and child victims in particular; it is not just ideological. Their concerns can result in part in the prevention or limitation of the development of restorative justice services for sexual and domestic violence cases by the state in some jurisdictions. The perceived risks of restorative justice for victims in practice must be addressed in collaboration with the violence against women service providers and advocates. As the focus of our work here is on sexual violence, and not domestic violence more broadly, which involves related but also different dynamics and risks (and requires further analysis), comment in the rest of this section will focus only on sexual violence.

3.2 Is restorative justice inconsistent with a feminist vision of justice?

Feminists have long argued that recognising 'the personal' as 'political' can alleviate the isolation and self-blame that beget many victims of sexual violence and can also motivate collective action for structural change in sexual and gender-based violence (Terwiel, 2020: 422). While this position is broadly accepted by feminists it would be mistaken to think that feminists speak with one voice when it comes to sexual violence and how to prevent and address it (see Pali, 2017). In essence, feminist concerns regarding how to prevent and address sexual violence can be positioned along a continuum, from carceral feminism at one end, abolitionist/anti carceral feminism at the other, and what we describe as restorative feminism in between. This position influences how restorative feminists visualise the use of restorative justice for sexual violence. Thus, whether restorative justice is consistent with feminism and with feminists' vision of justice depends on the type of feminism one embraces (Goodmark, 2018: 373)

The term 'carceral feminism' emerged first in the context of feminist debates about commercialised sex, prostitution, and 'sex work'. Feminist sociologist Elizabeth Bernstein first used the term in 2007 to describe contemporary feminists who seek to abolish prostitution through aggressive law enforcement (Bernstein, 2007: 18). She described how such feminists engaged with law enforcement to prevent prostitution, which they viewed as within the spectrum of violence against women. When the crime of human trafficking became evident, which also involved the sexual exploitation of women and girls in the sex trade, these feminists

captured both prostitution and trafficking under the rubric of 'modern slavery' (p. 130). Fuelling the antitrafficking coalition, Bernstein (2007: 147) argued, was a commitment to carceral paradigms of social and gender justice, which she saw as essentially support for a law and order agenda, drifting away from the welfare to the carceral state, as the best enforcement apparatus for the achievement of feminist goals (p. 143). For this feminist position, or carceral feminism as coined by Bernstein (2007), the problem was that unsuspecting women were being forced into sexual slavery by devious and criminal men, sometimes belonging to criminal gangs, a problem for which harsh punishment (of traffickers) and rescue (of women) were the solutions.

Missing from this 'carceral' approach, Bernstein (2007) argued, was a critique of neoliberal policies that fuel global economic inequality and make migrants and others who seek to escape poverty vulnerable to exploitation and abuse. Also missing, she claimed, is an appreciation of the injustices of the US criminal legal system, which has used antitrafficking laws primarily to punish poor Black men. Punitive antitrafficking laws should only look like a feminist solution, Bernstein argued, when radical feminist critiques (of heterosexist constructions of gender, sexuality, and the family) and emancipatory projects (of profound social, political, and economic change) had been lost (Bernstein, 2007, 2010). For Bernstein then, a rejection of carceral feminism does not simply translate into a rejection of prisons or criminal law, though she seems sympathetic to the prison abolition project (Terwiel, 2020: 428). Rather, as (Terwiel, 2020: 428) explains, carceral feminism (as an ideal type, if such were to exist) is weak on the feminist commitment to economic, gender, and racial justice 'that cannot be delivered through free-market capitalism and the punitive neoliberal state, but rather requires their overhaul'.

Other feminists (see Goodmark, 2018; Kim, 2018; Law, 2014, 2018; Taylor, 2018) have taken up Bernstein's carceral feminism concept and examined its relevance for sexual violence, and it is here that the concept becomes liberally interpreted. Broadly it is taken up to describe an approach to gender-based violence that sees increased policing, prosecution, and imprisonment as the primary solution to violence against women (see also Kim, 2018; Law, 2014). When applied to sexual violence, Goodmark (2018: 374) suggests that carceral feminism implies that 'because the state holds a monopoly on the ability to punish, the state should be the primary locus of control over those who do harm'. From this perspective criminal punishment is seen as essential for accountability for those who have perpetrated the crime and for the safety for those who have been victimised. For feminists leaning towards carceral feminism there is a reliance upon law enforcement punishing violence against women as the dominant intervention strategy in achieving the central goal of feminism, that of ensuring gender equality (Goodmark, 2018). Criticism of 'carceral feminism' including what Halley (2008: 345) also calls 'governance feminism' centred on concerns not just about feminist support for punitive

criminal laws but also about feminist depictions of women as subordinated to men through oppressive male sexuality (Terwiel, 2020: 430) Terwiel (2020: 433) further adds:

> [carceral] feminists successfully changed public perceptions of sexual violence as a serious and pervasive problem and achieved rape law reform, but in the process lent support to conservative law-and-order forces that depict the problem of sexual violence in individualist rather than structural terms.

Restorative justice is not in keeping with carceral feminist positions that prioritises state punishment as the primary response to gender-based violence. As outlined earlier a range of justice and state responses working collaboratively are required to address this problem. .

At the other end of the feminist continuum lies the abolitionist/anti-carceral feminist position (see e.g. Whalley & Hackett, 2017: 12) who argue for penal abolitionism in some cases and for informal community justice practices as the preferred response to sexual and gender-based crime (Terwiel, 2020: 423). Anti-carceral feminists are sceptical about engaging with the state, seeking instead to develop and strengthen transformative community-based responses to sexual violence.. They take their cue largely from activist-scholars of colour who tend to take an oppositional stance to carceral feminist positioning, which they see as constitutive of the same state violence that perpetuate a politics of confinement and imprisonment, and which inadvertently contributes to further power inequalities. These interlocking forms of anti-carceral feminism and abolitionism adopt the stance that the state, particularly the carceral state, has its roots in domination and control and therefore cannot provide the liberation and self-determination that oppressed communities seek.

Anti-carceral abolitionist feminists suggest instead that community-based social movements offer a way to address many of the harms of private and public violence, perpetrated by loved ones or state forces, that are both random as well as concerted and targeted towards individuals or entire social groups (Deer, 2015; Price, 2012).They argue that criminalisation, for example, has not curbed the issue of sexual assault or intimate partner violence and has, in fact, 'only fuelled the proliferation of policing and prisons that target communities already vulnerable to state violences' (Whalley & Hackett, 2017: 12). Many abolitionist community-based social movements seeking to end gendered violence have several guiding principles in common. They believe that working to end sexual violence outside of the criminal legal system is both 'absolutely necessary and desirable' (p. 12); they conceptualise violence as a collective phenomenon rather than a private, individual issue; they adopt multi-pronged interventions; they engage with all kinds of survivors; and they imaginatively seek to build a more just world, thereby rendering the need for prisons as unnecessary (Deer, 2015; Heiner & Tyson, 2017).

Anti-carceral feminist abolitionists have expressed concern that the #MeToo movement could also have the undesirable effect of increasing support for prisons as 'solutions' to sexual violence (see Press, 2018). Taking sexual violence seriously, they point out, all too often has been taken to mean the need to support more or harsher punishments for perpetrators. Some argue that movements or organisations that fight gender-based violence by calls for justice based on notions of arrest and imprisonment does not help achieve real accountability in sexual offenders (Whalley & Hackett, 2017). They argue that implementing harsher punishments and longer prison sentences always fall hardest on communities of colour, while failing to actually prevent violence or keep people safe (see for example INCITE, 2001, 2018). While anti-carceral prison abolitionist feminists generally respect an individual survivor's decision to press criminal charges, they strongly caution the feminist movement against enlisting the state's criminal legal system as the solution to gender-based violence. Past 'anti-violence' feminists, they warn, have inadvertently contributed to the rise of mass incarceration and the American prison state (Whalley & Hackett, 2017). So-called 'tough on crime' policies have been passed in the name of protecting women, but rather than diminish gendered and sexual violence. These measures, they argue, have expanded the hold of the punishment apparatus over racially and economically marginalised people of all genders. Anti-carceral abolitionist feminists hold joint concerns about intimate and state violence and are therefore against a reliance on policing, prosecution, and imprisonment to resolve gendered or sexual violence (Whalley & Hackett, 2017).

Anti-carceral abolitionist feminist suggest that advocates for restorative justice in cases of sexual and gendered violence who propose restorative justice as complementary to criminal justice systems, and not oppositional to it, (such as Joyce-Wojtas & Keenan, 2016; Koss, 2006) forgo the analysis of the violence in the criminal justice and social structure itself, and instead align with the functioning of state apparatuses. In this, restorative justice is said to ignore the role of the state in gendered violence instead of dismantling it, and as such, naturalises state power.

Somewhere between both ends of the feminist spectrum lies a growing movement of restorative feminists, including the two current authors (see also Daly, 2011a, Koss et al., 2004; Joyce-Wojtas & Keenan, 2016; Keenan, 2014, 2017; McGlynn et al., 2011, 2012; Randall, 2013; Terwiel, 2020; Zinsstag & Keenan, 2017) who advocate for a range of responses to sexual violence, that are both complementary and alternative to criminalisation, depending on the particular case and its nature. From this perspective, restorative and transformative interventions, as well as judicial justice interventions, combine to produce a new 'restorative criminal justice system' response to sexual violence (discussed in depth below). Restorative feminists however also problematise the 'taken for granted' criminal legal responses of conventional criminal justice systems through a restorative feminist lens. Restorative feminists refuse the binary choice of carceral and anti-carceral feminists for either engagement with the criminal legal system

(marked as carceral) or for informal, community-based justice (marked as anti-carceral). Restorative feminists, using a consequentialist maximalist definition of restorative justice (discussed l below), resists the carceral-anti-carceral feminist binary framework. Instead they ground their work in an expansive feminist and restorative justice politics that is both willing to engage with the state and the law, as well as with restorative and community transformative justice initiatives and philosophies. They do this in critically providing multiple pathways to justice for victims of sexual violence, accountability for offenders and healing for both and their communities, while keeping the reflective lens on a new restorative criminal justice collective effort. The crucial issue for restorative feminists in response to sexual violence is not *whether* to engage with the state and the law but *how* best to do so. Better still, restorative feminists are interested in determining what are the justice needs of the victims and adapt where possible in providing justice responses which fit those needs, while also responding to the offenders and the communities of both.

As adopted often throughout this book we use the term 'criminal legal system' rather than 'criminal justice system' similar to other feminists (see Terwiel, 2020) in order to unsettle the assumption that this system delivers justice, based on the overwhelming evidence to the contrary. Restorative feminists work as insiders and outsiders with criminal legal systems, bringing a feminist and restorative critical politics and lens that problematises the taken for granted, self-evident rules, practices, and institutional arrangements in forging a re-imagined restorative criminal justice system (discussed below). As Terwiel, (2020) observed, a problematisation approach, influenced by Foucauldian thought, (Foucault, 2012), makes clear that challenging conventional criminal legal systems rely less on developing new approaches that are uncontaminated by existing practices of punishment and understandings of justice, and more on collective efforts to make explicit, de-familiarise, and activate intolerance about those already existing practices and understandings. Problematisation 'aims to illuminate the logics that channel our thinking in order to unsettle them. It actively embraces the discomfort, disorientation, and unsettlement that accompany such radical thinking' (Terwiel, 2018: 72). This is part of the restorative feminist mission in relation to the prevention of and response to sexual violence.

We are drawn to restorative feminist ideas and practices that incorporates restorative justice and criminal legal systems into a new restorative criminal justice system that goes beyond restorative practices and processes, or ideas of punishment and penal restitution, to a restorative feminism that problematises structural violence at every level and works within and outside the criminal legal system, to create and forge a restorative criminal justice system re-imagined.

The restorative justice/criminal legal pyramids, outlined below, give hints as to how these ideas might be actualised. State criminalisation and harsh penalties are not sound methods to promote meaningful social change, but given the realities of

sexual crime the state cannot be ruled out of the picture altogether. A re-imagined restorative criminal justice system that invokes coercive as well as voluntary measures, incarceration as well as community-based options, restorative thinking in all that the justice system does, offers some promise. But essentially, restorative feminists adopt a definition of restorative justice that is not confined to 'process' but rather is of a consequentialist maximalist nature in that restorative justice both recognises the realities of gender-based and sexual violence yet avoids gender essentialism.

Restorative feminists see all individuals as complexly positioned in life in relation to gender, age, race, ability, religion, sexuality, class and more, and these features come together in various circumstances under certain conditions to produce structural vulnerabilities to power abuses, including sexual violence. In this, consequentialist restorative feminists employ an intersectional analysis of power relations and sexual violence, and work towards transforming patriarchal structures and ending violence against women and children and all victims through consequential restorative justice means, part of which involves a new restorative criminal justice system response.

4. A maximalist consequentialist theory of restorative justice for sexual violence

The second edition of the UNODC (2020: 4–5) handbook of restorative justice programmes adopts a process definition of restorative justice as 'any programme that uses restorative processes and seeks to achieve restorative outcomes' invoking a definition that was advanced in the *Basic principles on the use of restorative justice programmes in criminal matters* (ECOSOC Resolution 2002/12). The participatory 'process' is seen as

> any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator (UNODC, 2020: 5).

According to Walgrave (2020: 434) these definitions were written at a time, 2002, when restorative justice was still in the early stage of recognition by social, political and juridical authorities. He argues that with 'eighteen more years of increasing and more varied practice, deeper and more nuanced reflection, systematic research, different modalities in policy-making, more penetration in public opinion and other developments' (p. 434) one might have expected that the UNODC would go for a more elaborated version of restorative justice in its revised Handbook (UNODC, 2020) in light of these developments. But not so. The UNODC (2020)

went for a definition of restorative justice that positions 'the process' as the key characteristic of restorative justice. While recognising the importance of a participatory process among the main stakeholders in restorative justice, for Walgrave (2020: 434) this limited 'process' only definition fails to take account of the broader aims and philosophy of restorative justice:

> Sticking to this process-based vision of restorative justice keeps it at the margins of the institutional response after the occurrence of an offence, leaves the traditional criminal justice agencies as the gatekeepers and evaluators of restorative justice practice, and turns the eyes away from the many dysfunctions and malfunctions in the mainstream criminal justice.

This discussion about definition requires examination in the context of sexual violence; raising questions with which we have grappled. To what extent should restorative justice for sexual crime be provided as a stand-alone service independent of criminal justice or to what extent should it be part of, or embedded in, the criminal legal system? Are these the only institutional operational options available? On the one hand the UNODC, (2020: 85), points out that stand-alone services may have difficulty establishing legitimacy and getting referrals from the justice system, becoming what Walgrave (2020: 444) sees as 'aliens to the dominating gate-keeping criminal justice'. On the other hand, a restorative justice service that is embedded in the criminal legal systems 'may run the risk of being co-opted and having its restorative justice orientation diluted in favour of administrative expediency' (UNODC, 2020: 85) or 'under huge pressure to adapt to the traditional criminal justice principles and/or get only the cases which are not 'interesting enough' for the prosecutors' (Walgrave, 2020: 444). These extremes rests at once and perhaps primarily on the definition, principles and aim of restorative justice that the field adopts and these in turn influence what institutional arrangements are preferable to maximise the aims of the work.

If 'the process' definition prevails, and restorative justice is seen only as providing programmes or services involving non-coercive dialogues among the main stakeholders, then restorative justice will be positioned as beholden to the criminal legal system, marginal to its operations, and dependent on it for referrals. In this, the innovative potential of restorative justice in relation to crime is severely restricted by justice and political institutions (Walgrave, 2020). In contrast, a maximalist consequential restorative justice definition is offered by Walgrave (2008, 2020) to indicate that while restorative justice offers participative processes and encounters with the main stakeholders (the process definition), it also extends beyond that to the whole criminal legal system, to permeate the whole criminal legal thinking with restorative ideas, including in situations where for example meetings between the stakeholders are not always possible or achievable for a variety of reasons.. Walgrave (2020: 435) argues that failure to extend the concept of restorative justice

beyond 'the process between the key parties' (to also include restorative justice thinking and approaches at every level in the justice system), would leave many victims and offenders and their communities (where restorative victim offender meetings are not possible) to the criminal justice systems to respond in their traditional ways. In many ways this is 'focused on imposing a proportionate pain on the offender, leaving the victim alone with his/her grief' (p. 435).

The impossibility of organising a restorative process with the direct stakeholders to a particular crime should not mark the limits of restorative justice (Braithwaite, 2000; Walgrave, 2020). Even in circumstances of serious crime, such as sexual violence, where concerns for public safety and the breach of moral norms make coercive state power and a judicial intervention necessary, the need for public safety and 'punishment for wrongdoing' can be combined with restorative ideals permeating the entire justice system. A maximalist, consequentialist conceptualisation of restorative justice helps to bring into view a more pluralist view of justice, that extends beyond law and order and breaches of the moral code to relationships and harm at private as well as public levels.

Moving beyond definitions to the most desirable institutional arrangement for a maximalist consequentialist restorative justice imbuing every aspect of criminal justice, both systems may seem to be irreconcilable at first sight as they approach crime from different premises and are guided by different interests. Restorative justice asks questions about the harm of crime and whose responsibility it is to repair the harm, while criminal justice focuses on the law that has been broken and who was responsible for breaking the law. Restorative justice prioritises encounters, characterised by confidentiality, dialogue and emotion, while criminal justice delivers top-down decisions, based on power, legal codes and public control, in which certain forms of 'evidence' are centred and there is no place for emotion (Keenan, 2017; Walgrave, 2020). Restorative justice has been criticised for focusing on the private interpersonal aspects of crime at the expense of the public interest (of upholding norms and the penal code), while criminal justice has been criticised for neglecting individual suffering, focussing instead on the broader public interest (see Keenan, 2017). While many jurisdictions have tried to combine both criminal and restorative justice approaches to justice in various formats (see UNOCD, 2020), Walgrave (2020: 436) observed that 'almost all have forced restorative justice processes into a straitjacket of traditional judicial procedures'. If Walgrave's analysis is correct, which it is in part, it offers a challenge to restorative justice regarding how to advance.

We suggest the answer lies in the potential for a maximalist consequentialist restorative justice to influence the development of a 'restorative criminal justice system'. A maximalist consequentialist restorative justice (Walgrave, 2008, 2020) involves more than a tinkering at the edges of criminal justice. Providing short courses for judicial or selected criminal justice personnel on the principles of restorative 'practices' are insufficient to address the power relations involved in the

organisational and cultural all-system change that is required. Providing additional training for judicial professionals, or legal professionals alone will not be adequate to bring about fundamental change in criminal justice. Walgrave (2020: 436) suggests that '[s]uch training largely glance off the basic education guided by the punitive premise, the biased experience in the "echo chamber" of the traditional criminal justice system and the pressure of the hierarchical social environment within the judiciary.' Providing funding for stand-alone restorative justice services, while often welcomed as crumbs from the criminal justice table, is also insufficient to influence all system change either. Work for a restorative criminal justice system involves philosophical discussion on what 'justice' and 'accountability' involve, in light of new and emerging thinking, as well as action at political, judicial, and criminal justice levels. The potential for a restorative criminal justice system that locates the concepts of justice and accountability in a broader societal context needs to be continually advanced theoretically and conceptually rather than conceded by restorative justice practitioners and theorists.

Models for how a restorative criminal justice system could work are often presented in the form of pyramids that addresses the relationship between the complexity and range of crimes, the levels of seriousness, the need for more or less coercive state power and judicial interventions and the broad range of systemic restorative possibilities. Braithwaite (2000) presented a 'regulatory pyramid'; Dignan (2002) an 'enforcement pyramid' and Walgrave (2008) a 'pyramid of restorative law enforcement' to help advance the field conceptually. While the three pyramids are different in detail, similarities can be determined. At the broad base of the pyramid a wide range of opportunities can be provided for deliberation on resolving low level crime or crime involving young offenders by community responses, often involving diversionary restorative methods. Braithwaite also imagined communitarian responses to violence against women and girls as employing informal social controls at the base of the regulatory pyramid, which escalate upwards to more formal social controls depending on the gravity of the matters and the success or otherwise of the informal communitarian responses. In the middle of the pyramid where more serious offences, which incur higher penalties for the crime, are located, a restorative criminal justice system can regulate the level of coercive state intervention and restorative possibilities by means of risk, justice, accountability and restorative assessments, the outcomes of which may include the use of incarceration, residential treatment options, diversionary mechanisms as deemed appropriate, as well as and in relation to, every conceivable restorative possibility for victims and offenders. At the top level of the pyramid, where crimes involving high levels of seriousness are located, involving significant coercive judicial penalties, a restorative criminal justice system can combine judicial incapacitation, if deemed appropriate, alongside every conceivable restorative justice possibility for victims and offenders. In this conceptualisation the 'rights/procedural justice discourse percolates down into restorative justice' (Braithwaite & Parker, 1999: 116)

and restorative justice concerns 'bubble up the pyramid into legal discourse and procedures' (p. 116).

The restorative criminal justice pyramid presents a tool for analysing the current position of restorative justice and criminal justice and for grounding strategic considerations on how to come closer to the ideal of a restorative criminal justice system. It also helps to demonstrate that the introduction of restorative justice principles must be integrated into the basic education of all law students, future lawyers, prosecutors and judges, as well as that of other fields related to justice and crime, such as probation officers, prison officers, teachers, social workers and so on (Walgrave, 2020: 436).

In the case of sexual violence, a restorative criminal justice system provides space for the justice gap and the trauma of sexual violence to be met with restorative sensibility and determination for victims, to the extent possible, and for the use of coercive judicial interventions to be infused with restorative care and concern as much as possible in the case of offenders (Walgrave, 2020). Philosophical, social and ethical reasons exist to prioritise a response to sexual crime that responds to the private suffering of individuals as well as the public norm violation and social suffering of the collective caused by sexual crime (Keenan, 2017). All restorative criminal justice interventions after sexual crime would give preference to justice for victims, justice and accountability for offenders, healing for all, reaffirmation of the moral and social norms that have been broken, problematisation of norms that produce structural inequalities, minimisation of threats to public life, and social integration to the extent possible. A range of possible restorative interventions could form part of the reformed restorative criminal justice system including the following (which is not an exhaustive list): restorative plea bargains, restorative diversion (in certain cases), restorative rape courts, restorative rehabilitation, restorative incarceration and more, at different points of the restorative criminal justice process. Governance of restorative criminal justice systems must also involve new collaborative and inclusive thinking.

5. Restorative justice as moral repair

Violence, coercion, cruelty, force and manipulation go against many shared norms and values that form social stability and cohesion,[2] in the social world and when they act as threat to social life (Walker, 2006. 23) they need to be addressed and repaired. We suggest the principles of restorative justice presented in our work in this book can also offer a framework for moral repair after sexual violence once the following core principles, (adapted from Walker, 2006: 28) are held in full:

[2] While also recognising that social norms are not fixed or stable and continually need to be evaluated and reformed, including for example inequalities that continue to exist in relation to gender, age, race, sexualities, disabilities, poverty, class, and religion among other.

(a) The harm suffered by victims of crime are acknowledged and addressed and 'an experience of justice' (Zehr, 1990, 2001) is provided for them through truth-telling, apology, restitution, compensation and personal and socially shared validation and vindication (Walker, 2006: 16).
(b) Responsibility for the crime is placed on offenders and on others who share responsibility for wrongs, as distinct from victim blaming that is often at the heart of individual and institutional responses to sexual violence.
(c) The moral standards and norms that have been violated by the offender are authoritatively instated or reinstated, as well as the community's commitment to them, instead of 'normative abandonment' (Walker, 2006: 20) which many victims experience when other people and institutions 'fail to come to their aid, acknowledge their injury' (p. 20), reaffirm normative standards, or fail to place accountability appropriately on wrongdoers (see also Améry, 1980).
(d) Trust among citizens in the relevant norms of the society and the practices that express them are restored or created and there are adequate restorative criminal justice responses to their breaches, instead of leaving victims with the secondary system injuries they experience when they are ignored, denied credibility, or find that those institutionally empowered to deal with crime and violence do not seem to care about their experience of violence and its consequences (Brudholm, 2008)
(e) Hope is restored that the norms and individuals responsible for supporting them are worthy of trust by their actions in response to crime, and thereby ensure that the stability of the moral world and a collective sense of trust in it are re-established (Walker, 2006: 21).
(f) Adequate moral relationships among citizens and communities are re-established or established in the aftermath of serious crime. However this involves recognition that justice takes many more forms than most legal conceptions take into account (Gibson, 2004; Stover & Weinstein, 2004). These layered forms of justice must form part of a plan to re-establish adequate moral relationships between citizens including the immediate victim and offender and those beyond if that is their wish.

6. Final remarks

The research presented in this book has convincingly demonstrated in our opinion that restorative justice can be applied in a safe and effective way for victims, offenders, and their communities in the aftermath of sexual crime. Trauma informed, victim-centred, voluntary, legitimated, restorative justice interventions, in the aftermath of sexual violence has something important to offer victims, offenders, criminal justice systems and society more broadly. We have engaged

with and respected the feminist critique and discussed in depth and in detail how a number of physical, emotional, and procedural safeguards can be developed to address the power imbalances and potential risks of re-victimisation or re-traumatisation that could arise in the restorative justice process. We addressed the feminist concern that restorative justice would re-privatise and effectively decriminalise sexual crime and the concerns of the Istanbul Convention (European Agency for Fundamental Rights, 2014) in this regard. We suggested that the criminal legal system is effectively itself decriminalising sexual crime as evidenced by the pattern of high attrition rates internationally. We suggest further that restorative justice offers pathways to justice for victims of sexual crime, and for offender justice and accountability, that will never be served by criminal justice alone, because of the complexity, variation, and uniqueness of every victim's justice needs and interests.

The legal system's response to gender-based harms relies on stereotypes of victimised women lacking in agency. Women subjected to sexual violence, for example, are required to be weak, passive and blameless in order to satisfy judges of their need for assistance (Goodmark, 2008). Rape victims must have been overpowered by their rapists to be credible to judges and juries (Corrigan, 2013). Victims need to be both ideal victims (sufficiently weak and traumatised) and non-ideal (not too emotional or otherwise incoherent or irrational) at the same time, to be credible witnesses in criminal justice proceedings. The legal system assumes that gender-based harms debilitate victims to such an extent that they lack the capacity to define their justice goals for themselves or engage in any way with their offenders (e.g. by prohibiting restorative justice in cases involving sexual violence, regardless of the wishes of the person harmed). As Goodmark (2012) remarked, particularly in relation to the criminal system, women are disempowered by policies and practices in relation to domestic violence for example (like mandatory arrest and no-drop prosecution) that substitute the state's judgment about how to address gender-based harms for the justice goals of those who are harmed. But, as bell hooks (1984: 46) writes, empowerment is essential for women who experience gender-based harm:

> Women who are exploited daily cannot afford to relinquish the belief that they exercise some measure of control, however, relative, over their lives. They cannot afford to see themselves solely as 'victims' because their survival depends on continued exercise of whatever personal powers they possess.

Restorative justice provides victims with an outlet for seeking justice on their own behalf, on their own terms. Restorative justice fosters agency rather than demanding a disempowered stereotype of victimisation from those who have been harmed.

We adopted a maximalist consequential conceptualisation of restorative justice in this book and suggest that restorative justice can make a significant contribution towards a renewed restorative criminal justice system that would enhance the pathways towards justice for victims of sexual crime, justice and accountability for offenders and healing and integration for all, to the greatest extent possible. We recognise the challenge inherent in this proposal at multiple system levels. As McDonald (2020: 480) recently suggested 'the trial process *as a whole* is resistant to legal and procedural change .... [and] community-based change, rather than just law reform, must occur, along with the development of alternatives to prosecution'. Larcombe (2014) further pointed to the limits of criminal law for sexual violence prevention.

We note that most commentators recognise the importance of developing a menu of justice and accountability options, and multiple pathways to justice for victims of sexual crime (Henry et al., 2015: 3). This menu must include criminal and restorative justice in a transformed restorative criminal justice system. We found that one size does not fit all in justice and accountability responses to sexual crime. We found the need for new rituals of social and personal vindication and accountability to respond to victims' needs and interests, and the diversity of sexual crime contexts that exist, for example regarding the timing or the 'temporality' of interventions (de Haan & Destrooper, 2021). In relation to what constitutes effective justice and accountability in response to sexual violence, we found there is no single measure that can adequately address all situations. Multiple pathways to justice and accountability must be considered.

In considering debates about the degree to which criminal justice should be strengthened or abandoned we developed a restorative feminist position that engages both feminist and restorative ideas in a transformative restorative criminal justice system that avoids the binary of carceral or anti-carceral feminist positioning. Public as well as private interests form part of the reality of the impact of sexual violence and both must be engaged.

While we have not fully investigated new technologies as sites for informal justice (Killean et al., 2021; Powell, 2015) as well as for new harms (McGlynn et al., 2021), we suggest the need for more research in this emerging field. We note that despite the repeated evidence of the benefits of restorative justice for victims, when the restorative justice is victim centred, we found there continues to be a focus on offender focused restorative justice and on its potential for reducing crime. This bias in policy direction is something criminal justice agencies must re-consider.

In view of the severe and entrenched deficiencies in the traditional criminal justice system in processing of crimes of sexual violence, and because many of these crimes are filtered out of the criminal justice system altogether, as evidence in the high rates of attrition (Randall, 2013: 466), our research points to the appropriateness and in some circumstances the preferability for victims of sexual

crime to pursue a restorative justice remedy, or at least, for them to have this option available to them. As Randall (2013: 466) observes, 'it is arguably paradoxical to be deeply, even scathingly critical of the criminal justice system, while simultaneously being closed to considering a potentially viable, and in some cases more suitable, alternative' (such as restorative justice), or as we suggest a transformed restorative criminal justice system. A failure to consider the circumstances in which restorative justice might offer something better, another option in a legal landscape which Randall (2013: 498) describes as resembling 'a desert', is a failure to take seriously the feminist critique of the criminal justice system. It commits us to tinkering around the edges of a largely failed and certainly deficient system for victims of sexual crime, without in any way undermining the hard-won advances by feminists for justice delivery. If we want meaningful and progressive social change at both macro and micro levels, and if law and justice remedies are to be part of that, then we must expand and improve the options currently available to those harmed by sexual violence, to the offenders and to their communities.

To conclude, we suggest it is helpful to view restorative justice after sexual crime as not only possible but necessary in the ethical project of responding to sexual crime. This must be done in a manner that respects the humanity, agency, and voice of victims, the humanity of offenders and the need for social healing and integration after these violations. In this, we suggest a restorative feminist orientation, employing a maximalist consequentialist definition of restorative justice, in a transformed restorative criminal justice system offers much promise.

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