



NOVA SCOTIA
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RESTORATIVE JUSTICE

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I. INTRODUCTION

What is restorative justice?

Restorative justice is a way of thinking about crime and conflict. It is not a particular practice or type of program, but rather a philosophy, or a set of principles. The United Nations Working Group on Restorative Justice defines it in the following way: a process whereby parties with a stake in a particular offence resolve collectively how to deal with the aftermath of the offence and its implications for the future. Restorative justice processes worldwide are premised on the following principles:

- holding the offender accountable in a more meaningful way;
- repairing the harm caused by the offence;
- achieving a sense of healing for the victim and the community;
- reintegrating the offender back into the community.

Why restorative justice?

Restorative justice has been shown to increase the satisfaction by individuals and communities affected by crime and ensures that those affected can have a voice and role in the process. This results in more meaningful and effective outcomes for both those affected and those responsible for harms. Offenders who participate in restorative justice are less likely to repeat their actions.

Restorative justice can take the strain off an already over-burdened criminal justice system and lessen systemic delay. It can also contribute to reducing over-representation in the justice system from vulnerable and marginalized communities or groups (see for example Policy for Fair Treatment of Indigenous People in Criminal Prosecutions in Nova Scotia).

In short, restorative justice offers:

- opportunity for more culturally appropriate, meaningful and effective justice process;
- reduction of harm for direct parties (trauma informed);
- potential for victim participation;
- enhanced opportunity for access to justice for affected communities – increased confidence in the administration of justice;

- opportunity to understand and consider root causes or systemic issues connected to the parties or offence;
- reduce over-representation in justice system for individuals from vulnerable and marginalized communities/groups;
- access to better supports and wrap around responses to parties needs.

How does restorative justice work?

The real essence of restorative justice is a facilitated session(s) involving the victim, the offender, and the community members. During this session:

- All participants are given an opportunity to talk about their concerns and to talk about the offence from their own perspective;
- The parties develop an understanding of the impact of the offence and the steps needed to make amends;
- An agreement is reached, outlining what the offender can do to make amends, such as restitution, personal service to the victim, community service, etc.

The process used for restorative justice will depend upon the circumstances of the case, when the case is referred to restorative justice and any traditions or preferences of the participants.

II. THE NOVA SCOTIA RESTORATIVE JUSTICE PROGRAM (NSRJP)

The NSRJP is authorized by the Attorney General and Minister of Justice of Nova Scotia pursuant to the authority in Section 717 of the *Criminal Code* (Canada), Section 7 of the *Youth Criminal Justice Act* (Canada) and Section 10 of the *Youth Criminal Justice Act* (Canada) as it pertains to police and Crown referrals, and operates pursuant to other authority and discretion at the Court and Corrections level, consistent with the roles and responsibilities. The four entry points of the Nova Scotia Program provide a continuum of opportunity for restorative practices to be used in the context of a criminal matter.

Four Entry Points

The Program integrates referrals to restorative justice at four stages of the criminal justice process. Referrals of both youth and adults can be made at the following four entry points:

- Police Entry Point – referral by a police officer **before a charge is laid** (pre-charge) where successful completion means the charge will not be laid;
- Crown Entry Point – referral by Crown Attorney **after a charge is laid** (post-charge) where successful completion means the charge will be withdrawn or dismissed; (Authorization pursuant to s.717 *Criminal Code* and ss.7 and 10, *YCJA*);
- Court Entry Point – referral by a Judge **after a guilty plea or finding of guilt** and before a sentence is imposed (post-guilty plea/finding/pre-sentence) where the Court will pass sentence after receiving information following a restorative process (pursuant to s.726.1, s.723(3), s.718(e) of the *Criminal Code*); or, incorporate a restorative approach as part of a sentence order;
- Corrections Entry Point – referral by staff of Correctional Services **after a sentence has been imposed** (post-sentence) (pursuant to policy) where the referral serves a reintegrative/rehabilitative/restorative end.

Additionally, victim-serving agencies may refer victims of crime in cases where no person has been charged or an accused is not willing or able to participate in restorative justice, or to support a victim regardless of an offender's participation.

Under the NSRJP, **all** offences are eligible for referral, except those where there is a provincial moratorium in place. **Presently, the moratorium applies to all cases involving intimate partner or sexual violence.** As well, the following offences are presumptively only eligible for referral at the **Court**-entry stage, after a guilty plea or finding of guilt, although this presumption may be rebutted:

- cases involving death (murder, manslaughter, criminal negligence causing death, impaired driving causing death);
- offences involving the abuse of a minor child (under 18 years old) or another vulnerable person, by a person in a position of trust;
- child pornography (adult);
- firearms offences;
- impaired driving (adult);

- serious crimes against the administration of justice (perjury or intimidation of a justice system participant).

Additionally, s.717 of the *Criminal Code* also requires, in the case of Crown Entry Point referrals, that certain criteria be met such as, that the offender accepts responsibility for the offence and that there is sufficient evidence to proceed with the prosecution.

The Department of Justice has entered into service agreements with a network of eight community-based restorative justice agencies and one tribal organization (Mi'kmaw Legal Support Network) which offers services specifically for Aboriginal persons. The community restorative justice agencies, together with Department of Justice Correctional Services Community Corrections staff, operate as Regional Restorative Justice Teams to deliver the Restorative Justice Program, grounding the Program in the community and bringing the voice of the wider community into the process. These agencies operate throughout Nova Scotia, working with youth, adults, victims, and communities from 9 separate community based locations.

It is the goal of the NSRJP to:

- **respond to needs of individuals and communities affected by crime:** With particular attention to the needs of victims and those harmed by crime (individuals and communities);
- **harm reduction:** Reduce cycle of harm and injustice, prevent further harm to vulnerable individuals and communities and reducing over-representation of marginalized individuals in justice system;
- **support individual and collective taking of responsibility for harm and public safety;**
- **increase access to justice:** more effective, timely, inclusive, equitable justice system;
- **provide responsive justice:** human-centered justice processes that consider root causes and seek meaningful outcomes and responses;
- **increase public confidence and accountability in the administration of justice;**
- **build and support healthy, safety and strong communities.**

III. EXERCISING CROWN DISCRETION: REFERRALS AT THE CROWN ENTRY POINT

Protection of the public is of paramount importance in Crown decisions; however, protection of the public does not require the full use of the criminal process in all cases. The needs and interests of society can, in appropriate cases, be better served through the exercise of prosecutorial discretion to discontinue the prosecution upon the offender's successful participation in a restorative justice process, rather than proceeding to trial.

Unless an offence is expressly excluded from restorative justice consideration by this or another policy, restorative justice **should be considered** in every case where the successful completion of a restorative justice agreement can achieve the most important objectives of a prosecution.

The most important objectives of a prosecution will vary with each case, based on its facts. Where, for example, a prosecution is intended to result in the separation of a violent offender from society by a period of imprisonment or in the imposition of a Court-imposed supervised probation program, restorative justice will likely be unsuitable. On the other hand, where the most important objectives are to promote a sense of responsibility in the offender and to obtain an acknowledgement of the harm done to victims, a restorative justice agreement will likely be able to achieve these objectives. Crown Counsel should adopt a principled and flexible approach to the determination of this issue, including whether a referral may be more appropriate at the Court entry stage, as part of the sentencing process.

Crown Attorneys should consider any reason put forward by a police agency as to why they did not exercise their discretion to refer at the police entry point, although such reasons are not determinative, and Crown Attorneys must exercise their own independent judgment. Where, however, a police officer is the victim of an offence, the views of the officer-victim should be given the same consideration as any other victim of crime would receive (see: What if the victim does not want restorative justice?)

Considerations tending to support a Crown referral:

The offender is a youth;

Where holding the offender accountable does not require the full weight of the criminal justice system;

Where the outcomes that can be achieved through restorative justice are not dissimilar to those that can be expected by the criminal justice system or are better;

Where the victim desires or would benefit from a restorative approach;

Where a referral would serve to reduce the over-representation of marginalized populations in the criminal justice system.

Where restorative justice would provide a more culturally appropriate justice process.

Considerations tending to support a referral only at the Court Entry Point (post-guilty plea/finding) stage:

Where separation of the offender from society for a period of time is necessary to protect the public (ie. incarceration);

Where Parliament has imposed a mandatory minimum sentence for the offence being considered;

Where long-term supervision in the community is necessary in the interest of public safety such as where treatment is required or an enforceable no contact provision is needed (ie. Probation/CSO);

Where ancillary Orders are desirable to protect the public or further the aims of the detection of crime or monitoring of the offender, such as DNA, SOIRA, firearms prohibitions, driving prohibitions, stand-alone compensation orders, and particularly where such Orders are mandatory upon conviction;

Where a therapeutic court program is better suited to address the offending (ie. domestic violence court, mental health court, drug treatment);

Where the recording of a conviction is an important objective in the circumstances of the offence and the offender;

Any offence in which a power imbalance between victim and offender would preclude meaningful victim participation, such as with threats and intimidation.

A Crown attorney wishing to refer an offence where any of the considerations noted above are present, or any offence listed as presumptively post-guilty plea/finding only, must first consult with their Chief Crown Attorney.

What if the victim does not want restorative justice?

Participation in the NSRJP is completely voluntary for all participants. One of the primary goals of the Program is to increase victim satisfaction in the system by giving them an active role in the justice process. Every effort will be made by the NSRJP to provide the victim with the information, preparation, and support they need in order to participate in a restorative justice process. If a victim does not want to participate in a restorative justice process, others including family or community members could participate on their behalf. These individuals could speak to the impact the crime has had on them.

The final decision whether or not a Crown entry point referral to restorative justice, rather than a prosecution, is in the public interest, is a matter for the Crown Attorney, not the victim. Crown Attorneys should however give consideration to any reasons put

forward by the victim in support of his/her opinion that the offence ought to be prosecuted. However, while the views of the victim are important, they do not operate as a veto on restorative justice. A Crown Attorney who is considering a referral to restorative justice should solicit the views of the victim either directly or through the police investigator or through Victim Services.

Opportunities for input:

Crown Attorneys weighing the merits of making a particular referral can avail themselves of two options to assist in their determination: consulting the regional RJ team lead for information, or requesting a case conference be convened with the regional RJ team leads, or a designated representative and other justice partners as appropriate, to consider the potential for a referral.

Timing:

Restorative Justice (Crown entry point) is to be considered as an option at the beginning stage of a prosecution. The Crown Attorney handling the arraignment (post-cells) of the accused should make the decision whether to refer and indicate that decision on the Crown Brief or referral form. A case should not be referred to restorative justice after a trial date has been set unless there are extenuating circumstances. These should be discussed and approved by the Chief Crown Attorney.

Delay:

Crown Attorneys should require a waiver of *Jordan* delay when making a referral.

IV. REFERRAL PROCEDURES

Referrals to the NSRJP must be communicated to the applicable Regional RJ Team using an approved form. The Regional RJ Team is responsible for considering the referral and making the final determination on whether the referral is appropriate.

The approved form provides a space for referral case notes to be made, communicating any relevant information concerning the offender, victim and community and/or public interest considerations the Crown Attorney wishes the RJ Regional Team to know. However, a Crown Attorney shall not dictate or set conditions or pre-conditions on the restorative justice process. The referral form should attach a copy of the Crown Brief, the offender's criminal history and any other documents or statements that would be of assistance to the RJ Regional Team in understanding the crime and its impact.

V. RETURN FOR PROSECUTION FOLLOWING CROWN REFERRAL

Section 717(4) governs the outcome of a case referred to restorative justice under a Crown entry point referral where the prosecution is continued despite partial or full compliance with the terms of the restorative justice agreement. Where the agreement is totally complied with, on a balance of probabilities, the Court will dismiss the charge. Where the agreement is only partially complied with, the Court can either allow the prosecution to proceed or dismiss the charge if in the Court's opinion the continued prosecution would be unfair

A Crown Attorney may consider re-referring a case that has come back as partially completed or unsuccessful only if there are sound reasons for doing so and *Jordan* concerns continue to be waived.

Section 717(3) provides that no admission, confession or statement accepting responsibility obtained as part of the restorative justice process is admissible in any subsequent proceedings.

Appendices:

Nova Scotia Restorative Justice Program Protocols, Referral Form and List of Regional RJ Teams may be found here: <http://novascotia.ca/restorative-justice-protocols/>