

# Developing restorative policing: using the evidence base to inform the delivery of restorative justice and improve engagement with victims

## Learning lessons from Belgium and Northern Ireland

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# 1. Developing restorative policing

## The project

The project 'Developing restorative policing' is being taken forward by the Universities of Sheffield and Leeds, together with Humberside Police and the PCC for Humberside, South Yorkshire Police and the PCC for South Yorkshire, West Yorkshire Police and the PCC for West Yorkshire, and Remedi. It started in September 2015 and finished in June 2017.

The aims of the project are to:

- develop greater understanding of restorative justice (RJ) principles relevant to policing and the research evidence base that informs good practices that are sensitive to the needs of victims;
- foster the means and capability to institutionalise means of delivering restorative justice in relation to policing, including self-evaluation of police restorative justice practices and work with partner organisations;
- assist the police in identifying means for front-line officers to assess which paths to use to facilitate restorative justice and how best to introduce restorative justice to victims.

The project is hence very much concerned with developing good practice in delivering restorative justice in relation to policing. We have interpreted that to mean restorative justice at the level of the police and prosecution, in which police officers involved in mainstream policing are directly involved. This is therefore primarily restorative justice pre-court, rather than restorative justice delivered pre-sentence or post-sentence. Police officers may be involved in providing information to others delivering restorative justice in later stages of the criminal justice process, but we have not included that in our research. The project is concerned both with adult and young offenders.

From our initial research in England, which will be the subject of a separate report to be delivered in September 2016, the research therefore includes:

- police officers themselves delivering restorative justice during their normal duties, often as neighbourhood officers
- police referring cases to others delivering restorative justice, who might be independent facilitators, youth justice workers or community panels or schemes.

We have also needed to consider how we define restorative justice for our purposes, given the considerable number of different definitions governing practice in different countries and stages of criminal justice. We see restorative justice as different from the broader concept of restorative practice and have adopted the definition, similar to that proposed by Marshall (1999), as 'a deliberative process governed by principles of procedural fairness in which the parties with a direct stake in a particular offence (or incident) come together (preferably face-to-face) in a encounter collectively to resolve how to respond to the offence (or incident) such that the harm caused is acknowledged and the implications for the future of the parties are considered with an emphasis on reparation and reintegration'<sup>1</sup>. We also note that the Ministry of Justice defines restorative justice as 'the process that brings those harmed by crime, and those responsible for the harm, into communication, enabling everyone affected by a particular incident to play a part in repairing the harm and finding a positive way forward' (2014: 3). Our definition therefore includes practices such as mediation (with victim, offender and mediator/facilitator involved), conferencing (with, additionally, victim and offender supporters present at a meeting, as well as possibly police), and panels. It includes both direct face-to-face meetings and also indirect or 'shuttle' mediation where a facilitator/mediator passes communications between victim and offender. It does not include more indirect restorative practices which do not involve the victim and offender of the same offence, nor does it include forms of community reparation, or victim awareness training.

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<sup>1</sup> Project proposal to the College of Policing, see Crawford (2010).

## The comparative part of the project

The project started by examining current practice in Humberside, South Yorkshire and West Yorkshire in relation to restorative justice and policing. Our findings and conclusions from that phase of the research were included in a report in September 2016 which was discussed with senior officers from those forces and the PCCs' offices (published in January 2017: Shapland et al. 2017). The research in England is using methods which have successfully been used previously in looking at restorative policing:

- Examination of current policy documents
- Interviews with senior officers, officers in charge of relevant areas and policy makers
- Observation with both response officers and officers engaged in neighbourhood policing
- Focus groups with front-line officers, often using scenarios to discuss when they would use restorative justice techniques and what they would take into account
- Interviews with restorative justice providers (managers and front-line staff) to whom cases are referred (e.g. Remedi) and as relevant youth offending teams.

The aim of the comparative part of the project, which is the subject of this report, was to inform the conclusions of the first stage report by considering practice and policy in two other jurisdictions, Belgium and Northern Ireland. These jurisdictions were deliberately selected due to their history of innovation in restorative justice. They are both places where restorative justice at the pre-court level has been in place for longer or is delivered more widely or to a greater range of people than in England & Wales. This comparative research intended to draw from experiences of innovations in practice from other jurisdictions and to learn lessons regarding the challenges of implementation and how these might best be overcome, often a critical stumbling block in realising the potential of restorative interventions. To this end, we explore policies and legislation, structures for delivering restorative justice at the pre-court level, current practice, evaluations of restorative justice, potential future developments and practitioners' and researchers' views on helpful elements and challenges. The aim has been to use similar methods to those deployed in the English fieldwork for this project, though not observation of policing or focus groups. We have not identified any individual respondents from the interviews in our study visits in this report, but have identified the agencies whose policies and practices we are researching.

The fieldwork for this report was undertaken in summer 2016 and results and views are those from that time. It does not cover any developments since autumn 2016.

In autumn 2016, discussions then took place with both senior and local officers in the three forces, together with PCCs, as to which tools or guidance or new structures should be developed and implemented in a part of each force to create good practice restorative justice delivery by officers and best use of referrals to other providers. Initiatives were chosen by the police in consultation with the researchers to undertake a trial of these suggestions. Progress and obstacles in relation to using the tools and delivering restorative justice will be evaluated by the researchers. A final report will be published in autumn 2017. We shall draw upon findings and lessons from this comparative work in our final report.

The legal system, cultural history and institutions of each jurisdiction are different, so we start the chapters on Belgium and on Northern Ireland with a brief background and history in relation to restorative justice. The importance of these comparative studies lies in their ability to point out potentially useful practices or procedures for England. Both doing comparative criminal justice research and transporting policies across borders are fraught with difficulty (Nelken 2002), not least because of cultural and legal historical differences. It is rarely useful or possible to transfer or try to replicate a policy or practice in its entirety and expect it to function in the same way in a different context (Jones and Newburn 2007). Moreover, delivery of restorative justice depends upon several agencies (for example, police, youth welfare personnel, education personnel, prosecutors) for both adult and young offenders and each of these agencies will have slightly different roles in each country and operate with a different occupational culture.

There is no concluding chapter in this report, because its function is to inform and provide valuable insights for the project as a whole, including the first stage report on current practice in the three

forces and suggestions to partners from the fieldwork, and the final report. We therefore provide some of our own insights which may be helpful in those regards in the chapters on Belgium and Northern Ireland, but do not attempt to compare between Belgium and Northern Ireland.

We have relied upon and benefited considerably from the expertise of members of our Advisory Network from Belgium and Northern Ireland, all of whom have substantial experience of restorative justice research and practice across different jurisdictions for this phase of the research. They have provided invaluable counsel and advice and helped to direct us to who we should see, as well as to the relevant literature and existing research. We are very grateful for their assistance in ensuring we got the most out of the very packed itineraries for our study visits. It is of course ourselves who are responsible for the views and comments in this report.



## 2. Restorative policing: comparative lessons from Leuven and Flanders, in Belgium

### Background

Restorative justice (RJ) is well established in Belgium where interventions are widely available for both adults and juveniles with regard to both pre-court and post-court provision. There is a particularly well-embedded recent history of restorative justice in the Flemish-speaking region of Belgium, most notably in the city of Leuven dating back (at least) to the late 1980s. With the support of the Catholic University of Leuven (KU Leuven), a scheme of restorative mediation was set up with the explicit focus on providing restorative justice for more serious crimes where the public prosecutor had already made a decision to prosecute. It was felt that much of the international success in restorative justice – from New Zealand and Australia notably – had focused more directly on less serious crime and on juveniles. So, the aims of the new initiative in Leuven at the time were: first, to elaborate and develop a model of (victim/offender) restorative mediation in cases of adult serious crimes<sup>2</sup>; and secondly, to explore the implications for the wider criminal justice system of the operation of the two different processes; namely restorative justice on the one hand and criminal prosecution on the other hand. In particular, the scheme's proponents were interested in the ways in which restorative principles might influence and prompt key actors – notably judges, prosecutors and police – 'to rethink in some way the objectives and rationales of the criminal justice system' (according to one of the KU Leuven proponents interviewed). This initial approach has influenced many of the developments, informing policy and practice both within and beyond Leuven, over the ensuing years.

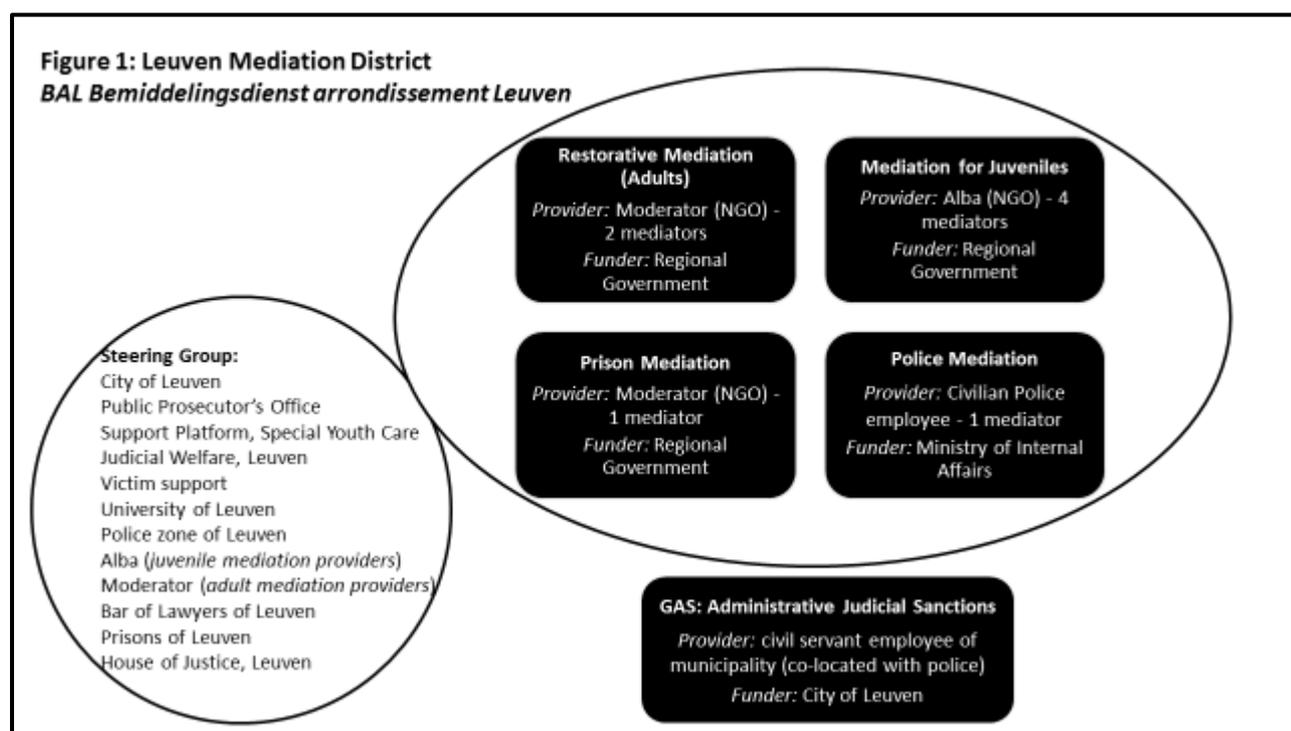
Examples of this include the establishment of a pilot project in 1998 in six prisons (in collaboration with the universities of Leuven and Liège) (Robert and Peters 2003; Aertsen 2005). In 2000, the Minister of Justice decided to implement the model across all prisons in Belgium supported by the appointment of a full-time 'restorative justice advisor' in each prison operating at the level of prison management to develop a culture, skills and programme to support victims' needs and restorative responses. Similarly, in the field of juvenile justice, the university was instrumental in establishing an action research conferencing pilot project in 2000 in four locations. The pilot was based on the experiences of the New Zealand model of Family Group Conferencing, but as well as the above mentioned adult scheme, it focused specifically upon more serious crimes (Vanfraechem 2005; Vanfraechem and Walgrave 2004).

In many ways, Leuven has been a generator and beacon of good practice in the field of restorative justice over a number of years, with models of practice developed in Leuven being adopted and adapted elsewhere in the country. The role of the university has been quite pivotal in this, serving as an international hub of research and theorisation in the field of restorative justice<sup>3</sup> and as a key centre for the diffusion of evidence-based practice and application of practical innovations. For instance, the European Forum for Restorative Justice, which promotes the application of restorative practices across Europe, has its base and its secretariat in the Department of Criminal Law and Criminology at KU Leuven (since it was established in 2000).<sup>4</sup> The university has played an important role in stimulating practice-based and policy innovations as well as informing city-wide multi-agency partnerships in promoting restorative approaches. In 1996 the mediation service of Leuven (*Bemiddelingsdienst arrondissement Leuven* - BAL) was established as a co-operation between the office of the Counsel for the Prosecution (the public prosecutors), the police, the city board of Leuven (municipal authority), the board of lawyers, the local Judicial Welfare Service and the probation service (working with offenders), Victim Support, a NGO juvenile justice service provider (then *Oikoten*, but subsequently *Alba*), a mediation service provider for adults (then *Suggnomè* but subsequently renamed *Moderator*), the prison service and the university. Consequently, developments in Leuven have benefited from this long-standing history of inter-organisational collaboration informed by an acute awareness of the evidence-base and conceptual clarity regarding the principles of restorative justice.

<sup>2</sup> See section on 'Restorative justice measures available and terminology' below.

<sup>3</sup> Over the years, the work of eminent scholars such as Professors Tony Peters, Lode Walgrave and Ivo Aertsen among others have been at the forefront of international research in restorative justice.

<sup>4</sup> <http://www.euforumrj.org/>



Source: Adapted from D'haese and Van Grunderbeek (2009)

The current organisation of restorative justice and mediation in Leuven is summarised in Figure 1. The multi-agency Steering Group acts as an important means of providing oversight and promotion. All the organisations represented on the Steering Group are signatories to 'a protocol of cooperation to develop policies on restorative justice in a coordinated way'. In Leuven, the role of the Steering Group has been instrumental in fostering dialogue, a culture of inter-organisational partnership and a trusting relationship between the agencies over a number of years. As an academic representative from KU Leuven noted:

It can work this kind of partnership. We can discuss things in a very open and frank way. We can really start to debate in a very frank way with the public prosecutor there in the meetings, I think, after all these years.

Similar steering groups exist in other parts of Flanders but not necessarily with the involvement of a local university. Leuven is regarded as a beacon of innovation and good practice to be emulated in other parts of Flanders.

In this chapter, we shall first provide an overview of the Belgian context in relation to criminal justice, before outlining the provisions which are available for restorative justice in some or all parts of Flanders. We then offer an overview of current provision and practice for each of the means of delivering restorative justice which are relevant to our focus on pre-court restorative justice involving the police.

## The Belgian context

This report focuses specifically on developments in the city of Leuven, but also situates these within the wider frame and context of experiences across Flanders and Belgium more generally. Under its constitution, Belgium is a Federal State comprising three (cultural) communities, three (economic) regions and four language areas. The names of the three regional institutions are derived from the name of the territory they represent: Flemish Region, the Brussels-Capital Region and the Walloon Region. The three communities are the Flemish-speaking community, the French-speaking community and the German-speaking community. Brussels has a bilingual status. The German-speaking community is the only community with an area over which they have sole jurisdiction as a community. It is located within the Walloon Region, which has even transferred some regional powers to the German-speaking community with regards to its area. The regions have legislative and executive bodies in the form of Regional Parliaments and the Regional Governments. There are 12

judicial districts across Belgium (reduced from 27 in 2014). In Flanders, the community and regional institutions were merged. Hence, in Flanders, there is one parliament and one government. Flanders is divided into five provinces which contain a total of 308 municipalities. The official language is Dutch.

Whereas the federal state retains the main competence for matters including justice, national defence and international relations, the communities are responsible for 'person-related' and social matters. Their powers have been extended in the course of the various government reforms. Belgium is currently undergoing its sixth State Reform (which commenced in October 2011) whereby additional competencies are being transferred from the federal level to the communities and regions.<sup>5</sup> This includes the 'Houses of Justice' and the partner organisations housed therein, including the mediation service providers – namely; *Moderator* in Flanders (previously known as *Suggnomè*)<sup>6</sup> and *Médiante* in Wallonia, the French-speaking region of Belgium. Consequently, these independent NGO providers of mediation and restorative services are no longer funded or subsidized by the Federal Minister of Justice but by the communities.<sup>7</sup> As a result, restorative justice straddles the competencies of both the federal and community levels.

Belgium is a civil law country in contrast to the common law tradition evident in England and Wales (and Northern Ireland). In keeping with other European civil law countries, the dominant legality principle leaves much less scope for discretion to be exercised by the police, prosecuting agencies and courts. This can leave the space for restorative justice and mediation to develop and take hold within the criminal justice system somewhat more precarious. Moreover, the requirement that restorative justice involves multiple parties, both in the process of deliberation and in the determination of outcomes, can conflict with the state-centred, rather rigid and centralised role of legal authorities in civil law traditions. As a consequence, it has been noted that: 'At first sight, restorative justice seems to prosper more easily in common law regimes than in civil law regimes' (Put et al. 2012: 85). The apparent lack of flexibility and hence space for creative problem-solving in civil law jurisdictions, is less evident in the juvenile system where legal authorities are less bound by imperatives such as proportionality.

In Belgium, the models of restorative justice that have developed – within a civil law context – have been heavily informed by a combination of their specific institutional origins and by the normative principles that structure their relationship with the judicial system. The constitutional principle of legality has meant that most of the measures have secured a formal legal foothold in legislation, where the law sets out the prescribed principles, processes and parameters. Most specifically, the principles of voluntariness, confidentiality and neutrality have both influenced and constrained the growth of restorative justice in Belgium, as well as structuring its relationship to the adult and juvenile justice systems (Vanfraechem 2009).

By way of context, it is also worth noting important jurisdictional differences between the roles, responsibilities and powers of various key legal professionals within the juvenile and adult criminal justice systems, particularly when drawing comparisons and contrasts with the situation in England and Wales.

**The police** in Belgium constitute an integrated police service structured on two levels – the federal and local. The police do not have the power to dismiss cases and police discretion is not formally recognised. As such, the role of the police as independent decision makers with regard to how a case or offence is to be treated or processed is considerably circumscribed, as compared to their UK counterparts. The scope of the police to initiate new measures or refer (or divert) cases to external resolution is strictly limited. Their primary role is to gather evidence in the course of the investigation and to prepare the dossier for the prosecutor.

According to an official Circular of the College of General Prosecutors and the Minister of Justice, it is the task of all police officers to inform victims and offenders adequately about the possibility of mediation (and victim assistance). Police officers across Belgium are required to make use of a standard form to be handed to victims, in which mediation is mentioned explicitly and the relevant services providers are named (i.e. *Moderator* and *Médiante*). As a result, there is a clear legal and

<sup>5</sup> A process that began in 1970 with the first state reform.

<sup>6</sup> In 2016 the organisation changed its name.

<sup>7</sup> In the 1980s competencies including counselling, education, social health and social assistance for prisoners were transferred from the federal to the community administrations.

## Restorative policing: comparative lessons from Belgium

official basis for the offer of mediation and restorative justice responses and an obligation on police to notify victims of this.

**Public prosecutors** (also referred to as 'magistrates') occupy the key role in relation to pre-court decisions. They have the determining role in 'controlling the steps taken by police officers in investigating offences' (Jehle et al. 2008: 164). They also have a monopoly to decide whether to take a case to court or not.<sup>8</sup> Consequently, the views and attitudes of individual public prosecutors and their receptiveness to restorative approaches can be pivotal in the successful implementation or otherwise of restorative justice and mediation initiatives.

**Youth justice** in Belgium is a system of 'youth protection' with a focus on non-punitive control aimed at rehabilitation for persons under 18 at the time of the offence. It authorises responses to juveniles who have committed 'an act defined as an offence'<sup>9</sup> and the restoration of the damage caused. This approach was elaborated in the Juvenile Justice Act 1965 and subsequently amended by the Youth Justice Act 2006. The youth justice system comprises a two phase procedure – the preparatory stage and the judgement. The public prosecutor alone decides whether a case will be referred to the youth court. Other options are to refer the case to youth care, drop the charges, issue a warning (written or oral) or propose mediation.<sup>10</sup>

The **youth court** and specialist **youth judges** can impose 'measures in the interest of the young person', rather than punishments, *per se*. Youth justice measures are called 'measures of care, preservation and education'.<sup>11</sup> They are intended to be prospective, with the aim of social rehabilitation not retrospective nor intended as a proportional sanction for the offence. The youth court has considerable leeway in deciding which measures to impose and whether the young person(s) should be detained in an institution or not.

**Houses of Justice** bring together the various 'justice assistants' involved in the administration and supervision of offenders in the community: probation, early release supervision, community service ('work penalty'), electronic monitoring, supervision of mentally ill delinquents and 'penal mediation'. They also have a task in victim assistance (at the prosecutor's and court level) and do perform social enquiries in the field of civil law (e.g. family disputes). Introduced in 1999, Belgium has 28 Houses of Justice: one in each judicial district. Brussels has two, one French and one Dutch-speaking, Flanders and Wallonia have 13 each. Their mission was formally set out by Ms Annie Devos, the Director General of the Houses of Justice, as 'social work under judicial mandate' (cited in Bauwens 2011: 17).

## Methods of data collection

This report draws on documentary evidence and a literature review, supported by a study visit conducted by Professor Adam Crawford during 14-17 June 2016.<sup>12</sup> In the course of the visit, interviews were held with the following key policy-makers and practitioners: a youth judge; a public prosecutor;<sup>13</sup> a police mediator (civilian staff employed by the police); a municipal administrative sanctions manager and mediator; two mediators from an adult restorative justice scheme (*Moderator*); a mediator from a juvenile restorative justice scheme (*Alba*); and two academic researchers at KU Leuven. In addition, a presentation by a mediator and researcher on restorative justice in Wallonia and the subsequent discussion with ten researchers based at KU Leuven on comparisons with Flanders was attended. In total, 12 hours of interviews were held and recorded, supplemented by two hours of presentation and discussion, all of which informed the data collection visit. The interviews were transcribed verbatim and analysed. Most interviewees also supplied additional (unpublished) documentary data and reports.

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<sup>8</sup> Article 1 Preliminary Title to the Code of Criminal Procedure.

<sup>9</sup> Article 36, 4° Youth Justice Act 2006.

<sup>10</sup> In the preparatory phase, the public prosecutor refers the case to the youth court judge for an enquiry (executed by social services) on the 'personality and the social circumstances' of the offender. The prosecutor can also request the judge to take provisional measures (Article 50 and 52 of the Youth Justice Act 2006.). The youth court judge is obliged to hear cases involving youths aged 12 and above, before employing a (provisional) measure.

<sup>11</sup> Article 37 Youth Justice Act 2006.

<sup>12</sup> The visit was ably assisted by colleagues at LINC in KU Leuven, notably Ivo Aertsen and Inge Vanfraechem.

<sup>13</sup> The interview with the public prosecutor also included a colleague working in the prosecutor's office who assisted with translation where necessary.

## Restorative justice measures available and terminology

In each of the judicial districts in Belgium the following types of restorative justice interventions are present in some form. Where there are developments unique to Leuven these are mentioned.

### 1. In relation to adult criminal law:

**‘Penal mediation’**<sup>14</sup> – largely seen as a diversionary measure for less serious crimes at the discretionary decision of the prosecutor.

**‘Restorative mediation’** – more accurately translated as ‘mediation for redress’ (*‘herstelbemiddeling’* in Dutch) includes more serious offences and can occur at various stages in the criminal process; pre-court, at sentencing and post-sentence (notably through prison-based mediation). Initially focused on more serious crimes (in its experimental phase in the 1990s), since its adoption into law in 2005, it has been available at all stages in the criminal justice process and should be offered to all offenders and victims in all cases.

**Restorative justice in prisons** – developed out of the pilot initiative involving KU Leuven mentioned earlier. However, the post of ‘restorative justice advisor’ was abolished in 2008 by the Ministry of Justice. Nevertheless, under the wider scheme of restorative mediation (above) and the 2005 law mediation is available between prisoners and their victims. Given that the focus of this research is on police involvement in restorative justice the use of restorative justice in prisons will not be discussed in detail in this report.

### 2. In relation to youth justice:

The Youth Justice Act 2006 provides the legal framework for both mediation and conferencing. It prioritises these measures stating: ‘mediation and conferencing are considered to be the primary responses to youth crime’.

**Mediation (Victim/Offender)** – this largely occurs as a form of diversion to specialist NGOs working with juvenile assistance. It can occur through decisions by the prosecutor, the youth court judge and the youth court. A third sector organisation called *Alba* provides these services in districts of Leuven, Brussels and Halle-Vilvoorde.

**Conferencing** – drawing inspiration from the New Zealand model of family group conferencing, this occurs on referral by the youth judge or youth court. Known as *Hergo*,<sup>15</sup> conferencing has been incorporated into legislation by the 2006 Youth Justice Act amending the 1965 Law on youth protection. Conferencing is seen as an offer, not as a compulsory sanction and, as such, is voluntary. The offer is made by the youth court or youth judge.

### 3. Other non-criminal contexts:

**Municipal administrative sanctions** (Gemeentelijke Administratieve Sancties or GAS) – since the law passed in 1999 introducing administrative sanctions, municipalities can sanction certain kinds of nuisance, harm and public disorder via an administrative sanction, fine or other measure, which are **applicable to both adults and juveniles**. The types of petty offending and acts of public nuisance covered are set out in municipal protocols which vary across municipalities and can change over time. In 2004, the law was broadened and extended. Mediation can be offered and in the case of young offenders mediation is compulsory. The procedure is administered by municipal civil servants without intervention or direct oversight of a judicial authority. In 2013, the GAS system was extended and enlarged once more to lighten the workload of the courts and police. In Leuven, it is used as a default response for all student-related anti-social behaviour and public nuisance (given the large student population in the city).

<sup>14</sup> The term is familiar in French speaking countries as ‘*La Médiation Pénale*’, but outside of these is often seen as something of an oxymoron as it conjoins two apparently incongruous concepts of ‘mediation’ and ‘punishment’.

<sup>15</sup> Hergo is an abbreviation for the Dutch name for group-work aimed at restoration (*‘herstelgericht groepsoverleg’*).

## Restorative policing: comparative lessons from Belgium

**Mediation by ‘justices of the peace’** – a civil judge – began as a project entitled ‘Prorela’<sup>16</sup> in Antwerp in 2002 in close cooperation with the local police and public prosecutor (Vynckier 2009: 27-28). Mediation is used to solve disputes between adults who are known to each other – i.e. family members, neighbours, etc. The justices of the peace use their reconciliation authority<sup>17</sup> – not their powers to hand down judgement – to resolve disputes through reparation of the harm done. The project has subsequently been taken up in a number of other judicial districts in Flanders without being nationally implemented.

In addition, whilst not explicitly recognised in these terms or encouraged in any formal sense, ‘**street RJ**’ – whereby police officers engage in problem-solving between victim and offender – was acknowledged to occur within a broad framework and culture of restorative approaches and in keeping with problem-oriented policing style responses. These informal practices were more often considered to be problem-solving work in relation to neighbourhood disputes and civil law conflicts. They were most likely to be utilised by ‘community inspectors’ with greater understanding of the local problems within a neighbourhood (and hence the people involved) and more aligned with the philosophy of community policing.

In some areas of Flanders – notably Leuven - restorative procedures are also operated by and within the police:

**Police mediation** – here mediation programmes, with the mediation facilitated by civilian staff, are provided within local police departments in relation to cases with adult offenders only. The main focus is on minor property and inter-personal (violence) offences, often where there is clear financial or material damage which might easily be repaired. Consequently, this practice is often referred to as ‘damage mediation’. Mediators are civilian staff working within the police, not warranted officers. Whilst this report focuses on developments in Leuven, similar schemes have developed in other areas of Flanders, namely in some municipalities in the Brussels region and Lier and Mechelen (see Lemonne and Aertsen 2003; Aertsen 2009).

## Current policy and practice in relation to forms of restorative justice involving the police

### Restorative justice for adult offenders

#### Administrative judicial sanctions

Under the system of administrative judicial sanctions (GAS), municipal authorities can pass a local police regulation to determine measures or sanctions to be imposed for certain breaches of local administrative regulations. These measures can include fines (maximum €350), the suspension or withdrawal of a licence, community service or local mediation. Reports of incidents are referred by the police (about 40% of cases in Leuven), municipal city guards and other city authorities or services to the GAS. Working within the framework and powers of a locally agreed protocol (which is publicly available), the ‘sanctioning official’ - a municipal civil servant - can determine the appropriate response. The police decision to refer cases is governed by the public protocol. Over time, there has been an expansion in the range of cases referred to the administrative sanctions system. This has shifted a significant workload from the courts to the municipal authorities and, as a consequence, has brought income, in the form of fines, to city authorities. These income revenue generating and diversion from court (as a means of demand management) aspects of the scheme have brought it some public criticism.

Local mediation can be proposed by the sanctioning official on the condition that: (i) its procedures and rules have been pre-determined in a municipal protocol; (ii) the consent of the offender is secured; and (iii) a victim has been identified. Within the law, mediation is defined as ‘a measure that permits the offender, with the help of a mediator, to repair or compensate the damages, or to relieve the conflict’ (cited in Aertsen 2015:55). Mediation is facilitated by a mediator directly employed within the municipal authority or by a certified mediation service. If mediation is refused or is unsuccessful

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<sup>16</sup> ‘Prorela’ is the abbreviation of ‘project relational problems’. Justices of the peace sit in ‘peace courts’ which are the lowest court in civil procedure. Their jurisdiction includes cases such as disputes over rent, family cases, confiscation, rights of way, agricultural matters and the mentally ill.

<sup>17</sup> Article 731 Judicial Code.

then the sanctioning officers can still impose an administrative fine. A record of imposed administrative sanctions and measures is kept by the municipal authority. Appeal is to the police court, but only with regard to the fine, not regarding other measures including mediation. In theory, the outcome of the mediation does not necessarily impact on whether or not a fine is eventually imposed. The sanctioning officer can still issue a fine where agreement has been reached. In reality, however, it was reported that this rarely occurs.

The specific regulations and protocols governing the use of mediation within the GAS system vary considerably across different municipalities. In Leuven, for instance, where there is considerable emphasis upon the use of mediation within the GAS system, all instances of public disorder or damage involving students are directly referred to mediation by default. The mediator is co-located within the main police station in order to encourage referrals, promote good inter-organisational relations and foster a good understanding of the use of mediation within the administrative judicial sanctioning process. The city mediator in Leuven felt that this co-location is important in assisting in raising awareness among police officers:

They [the police] see us as colleagues ... also they get good comments from civilians; who say to them, "thank you for sending us to mediation, it helped, my problem is okay now". So for them [the police], the good comments helps us convince them to send cases to us. So, when I look at the numbers there are lots of cases that don't come to us. I can't force them [the police] to send cases to us. And if I say that 40% [of cases are referred by the police] there is also the 60% that comes from other services.

Police officers are also drawn directly into the mediation process in cases involving minor offences against a police officer (i.e. insulting an officer or not complying with legal directions given by an officer) which are dealt with through mediation.

It is important to note that mediation is also used here in cases of 'victimless crimes' or at least crimes with corporate or diffuse public victims – such as vandalism, criminal damage, public nuisance (such as urinating in public), environmental harm or shoplifting. In these instances, the role of the victim is assumed by a representative of the municipality or private business, or alternatively the sanctioning official also speaks on behalf of the victim. The outcomes can include financial restitution, the performance of some service for the victim or public authority and/or an apology. In practice, according to those working in the GAS system in Leuven, there is a considerable focus on repairing the harm or damage done. According to their own data, in Leuven in 2015, some 60% of cases referred to GAS chose to opt for mediation of some kind. Furthermore, 77% of mediations were said to have had a positive outcome and in 2014 this figure was as high as 91%.

Neighbourhood mediation is also used in relation to instances of communal problems, such as noise and collective nuisance. In such cases, various people working with knowledge of the local community can be involved in the process – such as social workers, local police, employees of social housing, city wardens etc. In Leuven, volunteer mediators are also used within the framework of the GAS system, notably for neighbourhood mediation. There are also close links between the mediation scheme and the wider prevention services across the city.<sup>18</sup>

### Police mediation

Police mediation exists outside of a legal framework and is governed by an internal protocol. It has been a longstanding arrangement in the police zone of Leuven since 2003. It was originally established at the initiative of the Leuven-wide partnership – BAL – set up to promote restorative justice and mediation across the city and grew out of an existing project focused on 'damage mediation'. Consequently, its focus has been on the 'settlement of damage'. It aims to provide a prompt response to minor offences. Initially, the police mediation scheme was housed within – and the mediator employed by – the municipal authority of Leuven (not the police), albeit working under the supervision of the chief of police and co-located within police premises. Within a year of its commencement, the scheme subsequently moved under the auspices, direction and management of the police, in large part due to the active support of the then chief of the local police. Since then the scheme has been located within the Youth and Social Services division of the police (despite the fact that police mediation focuses exclusively on adults), which incorporates victims' assistance.

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<sup>18</sup> The mediator for the GAS in Leuven is also employed to work across the city promoting prevention.

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The scheme offers mediation for victims and offenders for minor adult offences. As the scheme appears to fall outside of the legal framework established by the 2005 Act, there is some uncertainty as to its connection with other forms of restorative justice and mediation covered by the Act. The suitability criteria are that: (i) the offender has admitted responsibility; (ii) the victim is known; (iii) the case involved material damage; and (iv) the incident occurred in the police zone of Leuven and either the victim or offender is a resident of the area. The police are themselves responsible for the selection of cases and for the offer of mediation. In practice, this means that the police mediator (a civilian police employee) actually goes to the police administration office and selects what are deemed to be appropriate files. The police mediator (in interview) explained the practicalities of the process:

So, now every day I go to the administration and there is a box and there are all the cases that will go to the prosecutor, and now I select all those cases [that meet the criteria] together, and say: "You shouldn't send this to the prosecutor right away; it can come to me".

Police inspectors may also refer a case to the mediation project and are encouraged to do so. Additionally, files may be referred by public prosecutors themselves. However, as the police mediator explained only some prosecutors actively engage with the scheme:

I can see it's always the same prosecutor who will always select files. So, I don't know if the others just don't have the files or are just not interested.

There is just one police mediator employed to deliver the service across the city of Leuven area, whose caseload fluctuates, peaking at 150 in one year and totalled 70 in the course of 2015 (which was felt by the mediator to be 'not enough').

A letter is sent out from the project to the offender and victim offering them mediation. The process may entail indirect or direct contact between the parties. However, police mediation is focused primarily on the restoration of material damage. It is estimated by the police mediator in Leuven that only 1-2% of cases result in face-to-face direct mediation. The rest entail various forms of shuttle mediation. It does not replace the judicial process, however, a successful outcome can influence the subsequent decision of the prosecutor to prosecute or not. A report on the mediation outcome is sent to the prosecutor and feedback is provided to police inspectors, if it is they who have referred the case (D'haese and Van Grunderbeeck 2009; Van Grunderbeeck 2014). The mediator also follows up the case to ensure reparation payments are made and agreements complied with. Feedback to police inspectors is seen by the mediator as an important way of making the police feel engaged in the process.

One of the challenges of police mediation is that the outcome of the case is still unknown. Regardless of what happens in mediation the prosecutor may choose to dismiss the case or to prosecute. This can mean that some cases that go to mediation are dismissed even where the offender decides not to engage in the mediation process, which can be frustrating for victims who have been offered mediation and are keen to participate. It also means that offenders who participate fully in mediation and make reparation may still be prosecuted. Despite these inevitable frustrations, the police mediator felt this to be a wholly appropriate approach from the perspective of restorative justice principles, notably the idea of neutrality and voluntary participation:

I think it's good because it means that you have to give people intrinsic motivation. It's like: "Sorry, I work for you and for the other person. But not in a way that you get benefits from it" ... because then I'm feeling like I'm really neutral. I'm working for the police, I'm working for the prosecutor, but it's not like they [the parties] get benefits out of it or I can influence what will happen later. They [the parties] can influence things but I cannot. So, for me it's like a clear role.

In interactions with the parties, the mediator also emphasises the independence of the role from the police as an organisation, in order to secure their trust:

Some offenders are really against the police, and I have to sometimes explain: "I'm not the police. And if you have any complaints about the police, I can show you the way to make complaints", things like that.

The mediator communicates to the parties that there is no interest in finding or determining the truth of what occurred (as the police might seek to do) and that both parties have an equal input into the process (D'haese and Van Grunderbeeck 2009). Given sensitivities about the neutrality of the scheme given it is based within the police, cases that involve police officers as victim or offender are excluded from consideration.

To foster a good understanding of police mediation among front-line officers (frequently referred to by interviewees as the 'sensibilisation of the police'), the mediator reminds police of the work of the service and the importance of early police contact with cases and how these should be treated. In interview, the mediator elaborated:

The quality of the police work is important for me. I have to explain, "When you're working with an offender like a bully, and two weeks later I send them a letter, they will not respond. So, please, the rights of the offender and the rights of the victim are really important. Not only their rights, but also your attitude towards people is really important". That's why I also think it's important that every year almost I go to the team of intervention, to explain what I'm doing ... So, I explain, "When you have a victim in front of you who will ask, 'what will happen with the file?' and you will say, 'okay, the offender will be heard and then it goes to the prosecutor', the victim will be very surprised when three weeks later they get a new letter from the police, because you didn't explain it. So, for me it's important that you can explain that it maybe goes to mediation and mediation is something that the police are offering. Because sometimes the victim is surprised, you're not giving the right information, and you're really sending the signal that you're not supporting mediation. So, for me it's important ... so is the quality of files. For me it's important when there's a discussion about damage. I have to explain to inspectors that when the file is not of good quality it can lead to a lot of discussion between people about the damage.

Given the police are usually the victims' and offenders' first point of contact with the criminal justice process, it is seen as vital that they provide the parties, from the outset, with clear and well-communicated guidance on the possible offer of mediation and the opportunities that this presents. Mediators also rely heavily on the police for the quality of the preparatory investigation and factual details regarding the offence to inform the process and to ensure that it does not get bogged down in disputes over facts.

### Penal mediation

Introduced in 1994 penal mediation is offered by the 'justice assistants' from within the public prosecutor's office in each judicial district. It is a diversionary measure for relatively minor crimes which attract a maximum punishment of no more than two years of prison sentence.<sup>19</sup> The cases are selected by the public prosecutor. The parties are then contacted by the justice assistant who facilitates or implements the preferred measure. Where mediation is initiated it largely takes the form of indirect communication focused on material or financial reparation, but may also include apology. Justice assistants are probation workers (with social work training) operating within the Houses of Justice.

Most penal mediation of adults involves property crime (about 30% in 2011) or inter-personal, violent crime (47% in 2011) (Aertsen 2015:71). Consistently since the mid/late 1990s around 6,000 cases per year in Belgium are referred to penal mediation (6,732 in 2011). These figures include all measures that are subsumed under the title of 'penal mediation' broadly defined, many of which do not constitute restorative justice in any real sense. Only about 35-40% of the 6,000 cases per year involve victim-offender mediation as such. The rest involve a variety of forms of community service (up to 20%), training (20-25%) or therapeutic programmes (10-15%). In some instances the different measures are combined.

### Restorative mediation – 'Mediation for redress'

The law of 22 June 2005 places onto a statutory footing the pre-existing system of 'mediation for redress' that had developed in Leuven initially, by introducing a 'general offer of mediation' in adult criminal law (Van Camp and De Souter 2012). As a result, mediation is available throughout the

<sup>19</sup> Currently, there is a draft law under consideration by the Federal Parliament which proposes to extend the application of penal mediation to cases where a prison sentence of over two years has been imposed. It also proposes to offer mediation at later stages in the criminal process and to extend the coverage to offences without a direct victim (such as drug related crime).

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criminal justice process at the stages of investigation, prosecution, court, sentencing and post-sentence. The law neither specifies nor excludes any types of offences as appropriate (or not) for mediation. It stipulates that 'every person who has a direct interest can request mediation at any stage of the criminal procedure'.<sup>20</sup> It goes on to oblige public prosecutors, investigating magistrates and judges to supervise the dissemination and communication of information about the availability of mediation to relevant parties in criminal proceedings.

In practice, most cases are identified at the pre-court investigatory stage within the public prosecutor's office (see below). Files (dossiers) are referred to the local mediation service for adults - *Moderator*.<sup>21</sup> A letter is sent out directly from the prosecutor's office to the victim and offender notifying them of the offer of mediation, which is also explained, as is how they can contact the mediation service. The mediation service can then follow this up with their own contact with the parties. Contact then follows a reasonably structured format, whereby the mediator talks separately with the victim and offender (often by way of a home visit), explaining the possible options and providing indirect communication between the parties. This may result in a direct, face-to-face meeting. However, this tends only to occur in about a quarter of all cases that commence some form of mediation (see below). The focus – largely due to the origins of the scheme in more serious crime - tends to be on non-material reparation, the emotional dimensions and psychological well-being of the parties through dialogue and information exchange. The outcome can take the form of a written agreement signed by the parties (which if they consent will be referred back to the court).

One interviewee described the 2005 Act as 'almost a model law for restorative justice'. The framing of the legislation was strongly influenced by the principles of confidentiality, neutrality and voluntariness, in large part, due to the influence of the mediation service providers in the drafting of the law and the history of earlier implementation.

A university researcher explained in interview:

The principle of confidentiality is very well embodied in the law of 2005. So, you can read there that nothing should be communicated to the judge. If something is communicated to the judge about what went on in mediation, without the consent of both parties, then the judge should consider that as void. He cannot allow, legally speaking, to take that into account in decision-making. That's written in the law. So, that's a very strong protection in a legal way of the principle of confidentiality. I have not seen another law on mediation in restorative justice in other countries that is formulated in such a strict, strong way.

The principle of confidentiality had been a major element in the early initiatives focused on more serious crimes; as the same interviewee went on to explain:

The mediators have always been convinced that in order to have these kinds of dialogue possible between victim and offender for more serious crimes have very personal consequences sometimes for people, that you must offer a very confidential space. Because if you do not offer this confidentiality to the offender certainly when it is pre-sentence then many offenders at least will not really talk, because they are a little bit apprehensive, because maybe something will go back to the public prosecutor and the judge and it can influence the sentence in a negative way.

A prosecutor, in interview, similarly reflected on the introduction of the law and the implications for the judiciary given the emphasis on confidentiality:

Opinions were divided on whether this restorative mediation would actually be efficient because for the cases that went to court obviously no feedback was given on what was discussed during those mediation sessions, because everything that was discussed in the restorative mediation was confidential and so for a lot of magistrates it was pretty frustrating that they were not getting any information on whether damages were being restored. ... It was possible to give information when parties wanted it but only what the parties want to give to the magistrates and the court was disclosed. And what frustrated a lot of magistrates is that we want to know what is discussed – perhaps it's relevant for our case. ... But, the trust between the parties is very important ... the fact

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<sup>20</sup> Article 553, §2 Code of Criminal Procedure.

<sup>21</sup> *Moderator* is the only certified NGO that can do victim-offender mediation for adults in Flanders. *Médiate* are similar service providers in Wallonia.

that the courts and the magistrates are not informed is very important, the independence of the mediator is very important, that it has to be an independent certified mediator.

For some, an additional frustration with the implementation of the legislation has been the relative shift to a focus on low-level offences (even in Leuven, albeit to a lesser degree), as the law allowed for this. The perceived rationale is linked to pressure from the Ministry of Justice to reduce the volume of cases that go to the courts and to encourage pre-court settlements. This has been welcomed by some prosecutors but viewed with a certain degree of scepticism among mediators; including the following mediator working outside the Leuven area:

The prosecutors they saw that in the dismissed cases, always the victims were frustrated, or could be frustrated, because there was no follow up on the case. And that was one of the reasons that they said: "Well, maybe we could try to offer mediation in those cases because we see there are a lot of frustrations with the victims." And the law on mediation does not exclude those [minor] cases ... [So] the prosecutor takes the decision to dismiss because of the large amount of cases, but they want to do something with those cases. You know? They don't just want to dismiss them. They want something done. And that's why they refer to mediation.

Some mediators highlighted the problem that whilst offenders are not told that the case will be dismissed; victims sometimes have been so informed. For mediators, this can constitute an issue for transparency and informed consent for the offender if one party is aware of important matters that are kept from the other party.

Integrated statistical data covering all types of restorative justice across Belgium do not exist. For restorative mediation, Aertsen (2015:72) reports that between 2002 and 2012 the number of cases referred to mediation grew from 394 to 2,065, whilst the number of cases started rose from 251 to 1,882. Numbers rose more sharply from 2008 once the implications of the new legislation had been fully implemented. They are also significantly higher than in the French-speaking Walloon community. The 2012 data show that:

- In 38% of the cases the offence concerned a violent interpersonal crime
- 32% of cases involved property crime
- In 22% of cases the victim and offender had a family relationship
- In about 25% of all concluded mediation cases a direct face-to-face mediation meeting took place
- In approximately 40% of the concluded mediation files an agreement was reached between the parties.

From 2002 to 2012, the proportion of direct mediations as a percentage of the total number of mediations in a given year ranged from 10% to 25%. Hence, the vast majority of cases entail indirect mediation only.

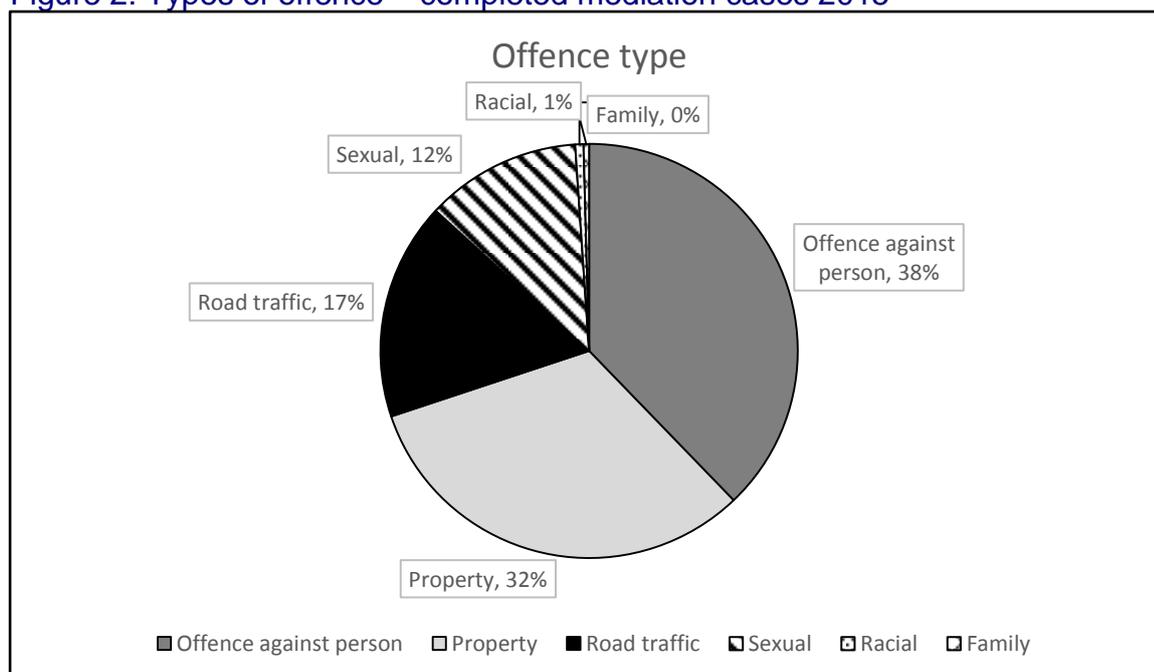
The *Moderator/Suggnomè Annual Report for 2015* provides some useful – more detailed and more recent - data with regard to mediation across Flanders. These reflect and reinforce wider trends across time (reported above and elsewhere) (Aertsen 2015: 72-73; Suggnomè 2013). The numbers of new cases in 2015 were:

- 3,463 cases in which the parties were informed about the offer of mediation;
- 2,202 cases in which one party responded (i.e. cases started);
- 2,007 cases that were taken up by the mediation service after a request for mediation;
- 570 cases in which at least one effective mediation took place (Suggnomè 2015: 14).

Of the 2,007 cases taken up by the service, 1,526 (76%) were referred by the public prosecutor's office at the investigation stage, 246 (12%) at the judicial stage by a judge (pre-sentence) and 219 (11%) at the sentencing stage.

In 2015, some 936 cases were completed in which some kind of mediation occurred between the parties. Of these, 663 (71%) had been referred at the investigation stage, 130 (14%) at the judicial stage pre-court, 6 (1%) at court and 137 (15%) at sentencing. Figure 2 shows the different crime types of the completed cases. Some 38% were offences against the person and 32% were property-related (theft or damage). It is striking that in 45% of the cases the parties knew each other in one way or another.

Figure 2: Types of offence – completed mediation cases 2015



Source: Sugnomè (2015: 14)

Just under one quarter of all closed cases - 228 (24%) – resulted in a face-to-face encounter (a total of 255 direct meetings).<sup>22</sup> Of these the vast majority - 192 (84%) – had been referred at the investigation stage: as compared to 24 (11%) at the judicial stage, pre-court; 3 at court; and 36 (16%) at sentencing. The relative distribution of the numbers of cases that resulted in indirect or direct mediation by the stage in the criminal justice process at which referral was made is set out in Table 1 below:

Table 1: Direct and indirect mediation in closed cases 2015

Stage	Indirect mediation (%)	Direct mediation (%)	Number of cases
Investigation	71	29	663
Judicial, pre-court	82	19	130
Court	50	50	6
Sentencing	74	26	137

Source: : Sugnomè (2015: 18).

Some 227 mediation cases were concluded with a formal agreement between the parties (24% of the 936 cases closed). Table 2 shows the relative numbers of cases that resulted in a formal agreement, as a result of mediation. These agreements were added to the judicial file in each case.

Table 2: Outcomes in closed cases 2015

Stage	No. resulting in agreement	Percentage of total	Number of cases
Investigation	179	27	663
Judicial, pre-court	26	20	130
Court	1	17	6
Sentencing	21	15	137

Source: Sugnomè (2015: 19)

Most agreements were made in cases involving offences against the person (105), followed by 85 agreements in crimes of property (theft/damage). There were 17 agreements in sexual offences, 16 in traffic cases and 2 in racism-related cases. In relation to the total number of closed cases, most agreements resulted from offences against the person (30%) and property-related cases (28%).

<sup>22</sup> Some cases resulted in more than one direct encounter.

As these data show, the volume of cases dealt with by way of restorative justice informed interventions still remains stubbornly low. This represents something of an unresolved paradox, as a public prosecutor noted in interview:

So now we have a framework, we have a possibility to mediate, there are a lot of advantages to mediation, and yet it is not used on a large scale yet, which is a strange phenomenon because there is a lot of belief; now also with the magistrates, a lot of people believe in the possibilities of mediation and yet they are not using it on a large scale. It could be used more.

One of the consequences of the implementation of the 2005 Act was that the focus of adult restorative mediation shifted from more serious offences to all types of (less serious) crimes. The law required that the parties be offered mediation at all stages in the process and for all offences. This served to confuse the extent to which restorative mediation operated as a 'parallel' procedure. In the absence of an offer of mediation, many less serious crimes would result in no further action being taken and the case being dismissed by the prosecutor. In such instances, mediation becomes an 'alternative' supplement to the criminal process. One interviewee elaborated:

So, is it a parallel system? Well, if you apply it for minor crimes, which normally are diverted, and there is no prosecution, then it is a kind of complementary or additional system ... that was not the [initial] ambition for us. If you apply it for more serious crimes it is done in parallel. Because that is often said: the criminal justice process is doing its thing, and we in mediation are doing ours. That could create the image of two parallel systems.

However, the same interviewee went on to explain that even in more serious cases where the notion of a 'parallel' process has greater resonance, nonetheless there remains a coming together of the two 'systems' in which they interact and possibly mediation can challenge the culture of the legal process:

Partly that's true but not totally, because at a certain moment if victim and offender agree they can send their agreement to the public prosecutor and the judge. Only with the consent of both victim and offenders ... But if they want they can do that and they can set up a kind of exchange communication within the system... Then of course the next step could be that this kind of dialogue between victim and offender is continued with the judge and the system. Also to inform the judge, but also maybe a little bit to challenge the judge. Is it done parallel? No, it's not totally parallel because there is, in some cases at least, a moment that the two systems can come together again, with unclear outcomes on these kinds of meeting. But at least it is a theoretical idea. And then it is not just parallel, as if both systems are not influencing each other. I think they are influencing each other or they can influence each other. So, it is not totally parallel.

### Restorative justice for young offenders

There is a long tradition of welfare or 'treatment'-oriented youth justice which is deeply rooted in Belgium. This has produced a developed network of social services and welfare agencies working in the field of families and child care: 'This network is characterized by close interaction between judicial institutions and a nexus of social workers, specialized educators, pedagogues, psychologists and psychiatrists' (Put et al. 2012: 85). The 'youth protection model' has meant that restorative practices have largely developed within a context of the educational objectives of juvenile assistance services in both Flanders and Wallonia. This was given renewed emphasis in 1999 when the Flemish government agreed to implement 'restorative justice programmes' in each judicial district. Under the broad umbrella of restorative justice three different models were sponsored: victim/offender mediation, community service and training programmes.

The Youth Justice Act 2006 prioritises restorative justice options largely in the form of mediation and conferencing, to the extent that these 'are now considered to be the primary responses to youth crime' (Put et al. 2012: 88). In every case, the prosecutor or youth court judge by law is supposed to offer the young person, his/her parents and the victim the possibility of mediation or conferencing. The only condition is that the victim is identified. Proceeding to the youth court can only be undertaken if there has been a prior referral to mediation or if the reasons for non-referral to mediation have been fully explained. Mediation or conferencing is initiated by the prosecutor/youth court judge who sends a letter to the parties to invite them to participate. In Leuven, staff at *Alba* go to the public prosecutor's office to read and help identify relevant files, so as to encourage the take up of mediation. However, the initial contact letter is sent from the public prosecutor and signed by the

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prosecutor, so as to guarantee the neutrality of the mediation service providers. The mediation service (*Alba* in Leuven) receives a copy of the letter and follows that up with an invitation to the parties, if they do not respond within a specified timescale (eight days). A worker at *Alba* explained:

If they don't contact us, we will contact them eight days later by announcing a visit at their place or calling them ... We will contact them if they don't contact us, but they can also say, "no, we're not interested; we don't want to do this". So they have the choice.

The same mediator went on to explain that the service providers try to meet the young person face-to-face, rather than by phone to explain fully the mediation 'offer':

It's always their choice to continue or not, but we insist a little bit on passing by, just to explain everything. Because by phone they go: "no, I have nothing to do with it. What is this? It has been a really long time. I don't want to talk about it." We just explain, "I understand, but is it possible that we just pass by, like, 15 minutes, 30 minutes? We just come by and we talk to you guys and we see what happened; what are your possibilities." So we can explain everything in the right way. But even then they can still say they don't want to.

One of the factors that is said to discourage some offenders from taking up the offer is that they are aware that if they do nothing the case may most likely be dismissed anyway by the prosecutor, given the caseload and relatively minor nature of many of the offences that are referred to mediation. Routine types of cases in Leuven were said to include fighting, theft and (increasingly) sending sexually explicit photographs by text or social media. Furthermore, some frustrations were expressed that the police sometimes inform offenders that their case will most likely be dropped by the prosecutor and therefore when the mediation service do approach the offender they are somewhat confused. So, whilst the police do not directly refer to the services, they were seen to be very important in the messages that they give to offenders and victims at the outset, as this can set expectations as to what may or may not happen later on.

Mediation and conferencing can only take place when all the parties voluntarily consent to participate. Victims also receive a letter from the prosecutor's office inviting them to participate. One of the challenges, here, can be the passage of time. In some cases, the incident may have happened some considerable time (possibly more than a year) earlier and victims may be reluctant to revisit the events, particularly if they feel that they have put the matter behind them. One mediator noted:

Yeah, the fact that some files are really old already. A few weeks ago I got a file from 2013. Then what do you tell people? "What happened with the file?" "Oh, it has been three years!"

Mediation staff at *Alba* confirmed that only about 20% of cases where mediation is commenced actually end up in any face-to-face meeting. Mediators also stated that 'confidentiality' is the most important guiding principle for their work:

For us the confidential thing is really important. That's also the thing we start with. So the youngster, even he or the victim tells us a lot more, we will never pass those messages on without their consent. For me, and I assume also for my colleagues, it's the most important thing, that they can trust us that we don't pass all the information they give us either to the other party or to the public prosecutor.

*Alba* do use some volunteers to organise and deliver mediation (which is relatively unusual in Belgium) but most facilitators are employed members of staff. One of the frustrations expressed by mediators is that the workload varies considerably. Sometimes there is too much work and at other times there is insufficient work. Some of the fluctuation was put down to changes in public prosecutors. To try to ensure continuity and confidence in the service, *Alba* staff try to have regular meetings with prosecutors.

A youth judge in interview commented on the opportunities for family group conferencing that the legislation opened up:

In 2006 we have the implementation in law and that was a very good thing. So now the prosecutor and the youth judge must follow the law and they must always think if the case is a case for a family group conference because when you have the law you have to work in steps ... So we have

to first think about keeping the young person at home [rather than in a youth institution]. So this was a very good opportunity, the family group conference, to try something new. And, for me, the most important thing is that I can ask to the offender, "You know something happened. What do you propose?" Because when I started [as a judge], it was always the judge [speaking] to the offender and I tried to think otherwise, "What do you propose? You know you have done something. Your parents are victims of what you do. There are victims. What do you propose?" And that's the energy, which comes from the offender not from me. And that was a very important thing for me to think about: "How can we work on the energy of the young person and his family?" And when it is a plan of the young person, I think it is a good thing because he will try to stick by his plan. When it is my plan it is too far away from his points of interest. So that was a very big change of thinking. It was a way of thinking that we must change.

Police are sometimes drawn into face-to-face conferences as representatives of the wider community, as a juvenile mediator working for *Alba* explained:

The police officer who is present can also suggest things that the youngster might do or might think about. So he represents the whole community and actually also the justice system, because they [the processes] all start with the police.

It was reported that whilst those individual police officers who get involved in delivering conferences are usually very supportive, they are not representative of most police who do not seem to know much about mediation services.

The people from the police who are present [at conferences] are mostly really, like, "oh, yeah, this is really interesting; we should do this". But to find those people is not always easy, because also in police departments they don't always know about it [conferencing] that it exists.

If an agreement is reached as a result of mediation or conferencing, only the agreement is sent to the prosecutor/youth judge and not the proceedings, as these are considered to be confidential. The prosecutor/youth judge must accept the agreement, unless in their judgement it would be contrary to public order to do so.<sup>23</sup> Since mediation and conferencing are considered to constitute 'an offer', the youth court can supplement additional measures. Agreements reached are monitored by the mediation service. When an agreement is reached and satisfactorily completed, a report is sent to the parties for their consent prior to it being sent on to the judge/court to be 'taken into account'. Where an agreement could not be reached, judicial authorities and relevant others are not permitted to use the mediation process or the outcome to the detriment of the young person.<sup>24</sup>

The operation of restorative justice in the juvenile system accords with the semblance of a 'parallel' process, where in theory the two systems - of restorative justice and traditional judicial procedure - operate independently. The clear intention of the 'parallel' processes was to safeguard the core principles of restorative justice, and at the same time to preserve the fundamentals of both the judicial system - with its right to a fair trial and due process - and the juvenile 'protection model', with its emphasis on welfare oriented interventions. However, there has been some considerable debate about the extent to which 'this parallelism really exists, and whether this leads to fruitful co-existence rather than to frustrating hybridism' (Put et al. 2012:89).

Since the implementation of the Act from 2007, the Flemish Community has increased funding to the mediation services to support growth in the number of people working in mediation and conferencing to deliver greater capacity. Research in Flanders shows that most public prosecutors propose mediation in most cases, as required by the 2006 Act. All prosecutors interviewed by Franssens and colleagues (2010: 197-205, cited in Put et al. 2012: 92) indicated that if mediation proceeded well, they would normally decide not to prosecute. The research also showed that at the level of the youth court, mediation and conferencing do not take a particularly central place as, in most cases, the proposal for mediation had already been formulated by the public prosecutor. To some degree this may relieve the responsibility from the judge to give great consideration to the possibilities for mediation or conferencing.

<sup>23</sup> Article 45quater, § 2, Article 37quater, § 2 Youth Justice Act. When an agreement is reached at the youth court level, this is added to the judicial file.

<sup>24</sup> Article 45quater, § 4 Youth Justice Act.

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Put and colleagues (2012: 90-1) provide data that show increases in the number of young people referred to mediation in Flanders from 1,604 in 2002 to 3,770 by 2010 with a peak of 4,349 in 2008 in the years after the implementation of the new legislation. The number of completed mediations nearly doubled, rising from 1,079 in 2004 (45.7% of those referred), to 2,060 in 2009 (some 37% of those referred). Hence, as the number of completed mediations rose, the relative percentage declined after implementation of the Act. Moreover, from 2008 onwards the number of referrals began to decline steadily. One explanation given for the decline in the percentage of completed mediations is that the capacity of the mediation services to respond to the demand in the labour intensive ways that are required, may have reduced the quality of the service provided. As a consequence, in many cases all that the parties were receiving was a letter with information which they were expected to respond to by contacting the mediation service if they wished to participate in mediation. Evidence suggests considerable variation between judicial areas in Flanders – with certain areas (where practices are more well-established) responsible for disproportionate numbers of referrals and completed mediations.

With regard to conferencing, the data are even more imprecise. Table 3 sets out the data available for the years from 2007 to 2009.

**Table 3: Referrals to juvenile justice conferencing**

Year	Young people referred to conferencing	Young people that took part in a conference
2007	44	15
2008	76	37
2009	114	33

Source: Put et al. (2012: 91)

What evidence is available suggests rather low numbers of referrals and successful mediations or conferences. Furthermore, the data available (reinforced in interviews both with a youth judge and mediation service providers) indicate that a significant majority of mediations and conferences entail forms of indirect shuttle mediation rather than face-to-face encounters. Estimates suggest that direct mediation is only realised in a minority of cases (20-30% at most) with fluctuations over the years, with most cases being handled through indirect, shuttle mediation (Aertsen 2015: 70).

Reasons given for the low take up of mediation and conferencing in juvenile justice include: first, some prosecutors misunderstand the procedures by sending a case to the youth court whilst at the same time beginning mediation, thus leaving no room for a conference at the later stage; second, a lack of knowledge of what a conference entails and/or the differences between conferencing and mediation; third, concerns about the capacity of mediation services to cope with increased referrals; and fourth, some judges fear a loss of authority and decision-making power if they refer a case to a conference.

The youth judge highlighted the pressures of workload on judges and prosecutors combined with a lack of commitment:

Some judges don't make time to try a different approach of the case. They have some routine and they keep going the routine and that's a pity, but that's the fact. And that's because we are too few people to do a lot of cases, that's the problem ... There is a difference in how the judge or prosecutor react, that's the difference. And I must tell, and that's the truth, that when we have a lot of, lot of work, that sometimes we say, "Oh not now. It's too much." But I'm convinced, so I always keep doing it, but I can understand that some colleagues, they say, "No, no, no I want to put him in a [youth detention] centre and then we will see and we forget about family group conference." I can understand it, yes.

With regard to perceptions about a loss of authority, the youth judge offered the following reflections:

But it's their [judges'] power also, their power, because they are used to telling someone else what to do and not to do and then you change this energy. And some of them [judges] are not able to do it, they don't want to do it.

In addition to mediation and conferencing through the youth justice process, the system of administrative judicial sanctions (GAS outlined earlier for adults) is available for juveniles aged 14 or over. The administrative fine is limited to €175 and in all cases there is a requirement that the sanctioning official offers mediation as a possible response. Furthermore, if mediation is not offered for any reason a fine cannot be issued. In addition, the parent(s) or legal guardian(s) must be informed and may (at their request) attend the mediation alongside the juvenile. Appeal against the decision of the sanctioning official is to the youth court.

## Summary of findings: lessons learned regarding implementation and growth of restorative justice

The following broad observations can be drawn from the experiences and lessons of implementing restorative justice in Leuven and Flanders:

- Through forms of mediation and conferencing, restorative justice is well established in Belgium (particularly Leuven) where interventions are widely available for both adults and juveniles.
- There is a particularly well-embedded recent history of innovation and multi-agency partnerships in the city of Leuven.
- There has been a progressive shift over time from an initial emphasis on restorative justice in more serious cases to the offer of mediation throughout the pre-trial, trial and sentencing stages. Consequently, mediation has become more routinely used for minor offences and mostly pre-court, whilst exemplary practices of mediation with serious types of crime persist, including post-sentence.
- The early initiatives that developed through local practices and partnerships have been (largely) supplanted by a more unified legal framework (notably the 2005 Act for adults and 2006 Act for juveniles).
- The principles of voluntary participation, confidentiality and neutrality are central to the approach to restorative justice and mediation (notably in Flanders).
- The notion of 'parallel' systems, whereby restorative justice and traditional judicial procedures operate side by side, in practice has eroded as the two approaches have become increasingly inter-connected and mutually influencing.
- Forms of mediation have increasingly come to be used as an alternative to dismissing cases by the prosecutors where no further action would have occurred. Moreover, mediation has come to be used where no (direct) victims are involved in forms of 'damage mediation' and administrative sanctions. Here the procedure is used to avoid the courts. However, it is unclear to what extent mediation is actually replacing case dismissals, as this has not been demonstrated in any statistically reliable way.
- The take up of mediation is still uneven and variable across judicial districts in Flanders and dependent on the support of key individuals – in the police, prosecutor's office and judiciary. Moreover, the use of restorative justice is much lower than almost all proponents and supporters both expect and hope.
- The issue of capacity is evident in influencing the level of use of mediation; both in terms of the capacity of prosecutors to manage their case files and the capacity of the mediation services to respond to the demand.
- There is a significant use of indirect 'shuttle' mediation in about three-quarters of all cases where mediation commences and in comparison to the level of face-to-face encounters (both for juveniles and adults).
- Mediation services are delivered by well-qualified and trained staff who are employed through single NGO providers: *Alba* for youth and *Mediator* for adults in Flanders and *Médiate* in

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Wallonia. There is no obvious competition between service providers nor competitive tendering process which provides stability and continuity.

- There tends to be a greater reliance on professionals to deliver and facilitate mediation and restorative justice interventions, with less involvement of trained volunteers (as compared to the UK).
- Administrative changes due to the relocation of competencies between levels of federal and local government have adversely impacted on mediation services.
- There appears to be less of an emphasis on managerialist performance measurement through specified goals and targets either imposed by government or from the courts/prosecutors (than present in the UK). Nevertheless, in more recent years there has been pressure to demonstrate the numeric take up of mediation and restorative justice services to justify their future investment and support.
- There are concerns about future political support for and funding of schemes, particularly given the lower than expected take up of restorative justice and mediation across Flanders, and against a background in which political priorities are focused elsewhere.

## The police role in restorative justice

There is little enthusiasm in Belgium for police officers directly to deliver mediation or restorative justice interventions, whilst there is general support for problem-solving approaches to community policing. Nonetheless, police are required to inform victims of the offer of mediation according to the College of General Prosecutors and Ministry of Justice Circular. Consequently, the police are vital first responders and gatekeepers in raising awareness among offenders and victims of the mediation 'offer', highlighting the possibilities and benefits of restorative justice, clarifying the facts of the offence for subsequent use in mediation and encouraging prosecutors (through information in the dossier) to use it for cases where mediation may be well received and appropriate. Police can also play important roles in face-to-face restorative justice encounters as representatives of the public and wider community, notably juvenile family group conferences, and as victims.

In Belgium, police involvement in the delivery of restorative justice is seen to present certain very real challenges for cherished principles of confidentiality, neutrality and voluntary participation. As a consequence, the only scheme to be based within the police ('police mediation' in Leuven), operates with a considerable degree of autonomy from the police and is delivered by civilian staff. Nonetheless, it does benefit from its close relationship with the police, in terms of enhanced engagement.

In relation to problems over confidentiality, many feel that the police role in investigating crimes and their close relationship with the prosecutor means that they find confidentiality problematic: 'anything said may be used in evidence against you...!' One mediator working on adult mediation commented:

Because we have a different role. A very different role. And we have our principles, our working principles. And the police don't have [the same principles]. So if we work with them, we have to make some agreements about how we are going to work together. And I think that is the greatest challenge ... we say we work in a confidential way with the parties. For the police, it's not that simple ... to work confidentially. He [the police officer] can write down everything he wants, he can report to the prosecutor what he wants. And I think that's a threat to mediation.

Similar concerns were raised about the lack of neutrality of police, given their direct association with authority and the distrust that some communities have for the police. Moreover, for neighbourhood police officers it is felt that their (potentially) long-standing relations with certain members of the community might leave them partial to certain interests or groups of people.

With regard to the principle of voluntariness, it was felt by many that the culture and working practices of most police meant that they are inclined to impose solutions rather than to facilitate party-centred dialogue, as one interviewee explained:

And that is difficult I think for many, many police officers to really adopt this kind of [principled] attitude and also adopt these kinds of skills. I do not say that they do not have communication skills, but it requires very special attitudes and skills, I think to bring people together and take your time and prepare them to direct meeting with the other party and so on. I think most police officers are a little bit too much action-oriented – but it's understandable of course. Therefore, I think for the average police officer it will remain very complicated to do [restorative justice]. Unless they apply the type of mediation that's very much settlement-driven, quick mediation, not too much blah, blah, blah; "Okay, you have done that. You pay. Sign this!

A public prosecutor added:

It's important that the police can actually orient the parties towards restorative mediation, and to initiate that restorative mediation as soon as possible in that first stage where the police actually intervene. But it is important that the principles of mediation be respected, so it is an impartial mediator, that the confidentiality of the mediator be respected, and I don't think that a police officer is the ideal person to do that. The problem is that the police would then have a very hybrid role because in the first phase it's very important that the police investigates the matter and then informs the prosecutor's office, and also shares all the information that they get with the prosecutor's office. Then the problem is - how will they [the police] mediate because how will they guarantee neutrality? How will they guarantee that what is said between the parties is not shared when their role is exactly to investigate and to share the information with the prosecutor's office? So, in that sense they would be very ambiguous, very hybrid, and it wouldn't be compatible.

More generally, however, there was considerable support for the idea that the police culture and policing strategies of crime prevention and community problem-solving would be well served by greater knowledge about and engagement with the values and practices of mediation and restorative justice. This, it was felt, would also encourage front-line police to reflect upon the possibilities for restorative intervention in cases that they are called to attend and raising the idea of mediation as an option from the outset with the parties.

## Supportive factors

Since the introduction of mediation in the 1990s - mainly over the past 15-20 years - appropriate infrastructure has been put in place to support the use of pre-court (as well as court referred or post-court) restorative justice. This has largely taken the form of victim/offender mediation but also includes forms of conferencing on the NZ model - for both adults and juveniles. This conducive infrastructure includes:

- The existence of policy 'entrepreneurs' who have helped implement new ideas into practice – notably from within the academic research community and among civil servants, prosecutors and judges - these individuals have inspired and promoted practical experiments and policy innovations acting as champions for restorative justice
- The support and active leadership from public prosecutors is essential for mediation schemes to succeed in Belgium: the support of key leaders in the police and judiciary has also proved to be of great assistance
- A sound legislative basis which secures a formal basis for restorative principles in law - in Belgium/Flanders this consists of the 2005 Act for adults and the 2006 Act for juveniles
- A clear philosophy of restorative justice premised on certain defined values and principles – in Belgium this constitutes the principles of voluntariness, confidentiality and neutrality
- The widely accepted idea of restorative justice and mediation as an 'offer' or 'service' throughout various stages of conflict processing and the justice system
- An explicit recognition and articulation that restorative justice has a role to play with more serious offences and is not restricted to minor crimes and public nuisance

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- A clear choice of various stages through the civil and criminal processes at which restorative justice can be accessed
- Established referral mechanisms and routes through which appropriate cases are selected
- High quality and well trained mediation and restorative justice service providers capable of organising and facilitating restorative justice
- A reasonably secure level of resources to the mediation services which has increased as legislation has been introduced (i.e. in youth justice in light of the implementation of the 2006 Act)
- Well-established and good quality inter-organisational relations and partnerships
- A supportive professional culture of organisational learning and reflexivity, informed by research evidence - in Leuven (and elsewhere).

One of the things that it was felt not to have sufficiently developed in Flanders (and across Belgium more generally) was a national body to oversee and guide improvements in the delivery of restorative justice and mediation and to commission research and practice guidance. One of the university interviewees commented:

Another thing for me is that we do not have that much research, empirical research on restorative justice. It's strange because we've done a lot of work on criminal justice here at Leuven at the local level and the European level ... But what they have not done is they have not created a kind of [national] umbrella overview structure that can do research work over time and can further develop the practices .... A national structure, a policy-oriented structure, that can really develop and coordinate the policies for restorative justice for juveniles and for adults, and at police level ... that was a step, a bridge too far!

The emphasis in the legislation and practice is upon a 'restorative offer' and providing opportunities for victims and offenders to take up the 'offer'. Key principles that inform the law and practice of restorative justice are: informed voluntary choice (the 'offer'), confidentiality, independence and neutrality.

One of the issues highlighted by the lessons and experiences from Belgium is the challenge of building a culture of inter-organisational relations conducive to restorative justice and mediation. A mediator explained:

I have learned there are few examples in services like ours, like in Leuven for instance, where there was a culture of RJ where it was easier to sit around with the right partners ... where a culture of RJ was implemented in some way or another. And that's not the case in many other districts in Belgium ... So I think that's a big lesson here. Meeting people, getting out and meeting with police officers, meeting people in prison, is a way, not to change a culture, but to try and get people on your side, and it's all about people and I think it's not about a law, because we have the law now for ten years, and the law alone does not mean it is a success [in its implementation]. An RJ project does not depend just on the law. It's a good structure and a basis, but to implement a law you need to have other factors that come into play.

## Challenges and barriers

However, despite progress, capacity and capability, there is a general consensus that not enough take up and use is being made of the provisions and services, despite the fact that approximately 13,500 cases go through mediation of some form per year (Aertsen 2015: 80). As one of the interviewees reflected ruefully:

We are already trying to improve [the take up of restorative justice] for 20 years now - I'm talking about Leuven – and still we have not found the right way to do it. So, I think it's fair to say that - potentially in quantitative way - it's certainly unused. Also because knowing that the infrastructure is there, the legal base is there ... The funding is there. We should not complain too much, for

juveniles, adults have a lot of funding; although it's never enough of course. And there are good organisations, well structured, Sugnomè/Moderator and Médiante, and there's a lot of expertise, the right people out there, well-skilled people, many people with a university degree, most of them in Moderator. So, the resources in some way are there; but still they are underused.

Some of the possible reasons given include, first, the reliance upon key individuals within the criminal justice system leaves restorative justice fortunes dependent upon the active decisions of key authorities – notably public prosecutors. As one interviewee commented:

We have done a lot of work in 20 years to work together with the public prosecutor, the youth judges and also with the police here in Leuven to improve and increase the number of referrals in all kinds of ways, we have tried out many methods. But still it relies a lot on the person, the public prosecutor or the police officer doing the cases, who is on duty for the incoming files on that day, on that week, whether they do it in a systematic way, referring cases or not.

The role of the prosecutor is pivotal in ensuring an appropriate volume of referrals. Consequently, changes in key personnel and leadership within key organisations can set back advances made – again most notably changes in prosecutors, some of whom are more committed to restorative justice than others.

Whilst some prosecutors are very supportive others see restorative justice/mediation as curtailing their authority and removing their control. Some prosecutors fear that they get little information back on the process and outcome of mediation that they might use - due to confidentiality. One interviewee commented:

This [strict confidentiality] is not pleasant for a public prosecutor or a judge because they often are aware that a lot of things have been communicated within mediation and that the mediator knows a lot and has information that a public prosecutor could very well use in order to make a good decision and to influence a sentence and so on. But still they're not allowed to ask the mediator ... That's frustrating.

A public prosecutor in interview suggested that there was both a lack of awareness among some prosecutors about restorative mediation, which was possibly due to a combination of the fact that they had not come across it in their judicial training and that the parallel nature of the process meant that prosecutors could ignore it even in cases where the offer to refer to mediation had been taken up:

Because it's a system that runs parallel, they don't look at it that much and are not interested as much because it would come as an 'extra' on top of all the things they already have to do. So it's important that we raise the consciousness of magistrates to use it more because it can in part resolve the issue that they [prosecutors] have a lot of work so that some cases can then be dealt with this way [through mediation].

Some prosecutors are concerned by the loss of discretion that restorative mediation entails and are frustrated by the lack of information that is forthcoming (due to legal limitations) as a result of referrals to the mediation services. When asked if this was an issue one public prosecutor in interview responded:

For me, it is not an issue to lose some control over cases if that goal of partaking in and providing a safer society for everyone can be reached through restorative mediation then it's not a problem ... For some criminal cases, of course, you need to have some control and supervision from the prosecutor's office at least, and of course we have that possibility under the parallel procedure of having both the prosecutor's office taking a role in those cases that need it and having a restorative mediation in parallel. So that's not an issue, and we can still decide whether we want to deal with the case or not ... Is this the case for all magistrates? Probably not. Some magistrates will not be all too happy with the limitations and the loss of control.

Reflective of this broader concern about loss of control, some prosecutors are critical of the GAS administrative sanctions system because they feel that some cases referred to GAS should more appropriately be directed to the prosecutor's office so that they are aware of these cases, which in their minds should not be dealt with purely administratively.

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Conversely, some prosecutors also felt that the volume of cases with which they had to deal and the lack of capacity among prosecutors to respond appropriately served to the detriment of the work of the prosecutors' office more generally and restorative justice in particular. In interview, one prosecutor outlined the possibilities that might derive from greater magisterial capacity, as a 'tipping-point':

Within the prosecutor's office there is a limited capacity – we don't have all that many magistrates to deal with all the cases ... If we can raise capacity we can actually trigger a different mind-set with magistrates and with people in general, and then the prosecutor's office can actually take a more subsidiary role within society. Due to the lack of capacity the mind-set can't be changed because you always use those traditional methods in so many cases and only for a very select number of cases you will use restorative mediation. Therefore, because in most of the cases, you use the traditional methods of prosecution, that mind-set trigger can't be initiated, so it's difficult to change people's minds if you can't use that mediation tool in enough cases.

A similar viewpoint was expressed by another interviewee from a different perspective:

These public prosecutors have to deal with many cases every day, and I think they still simply do not have the time, not enough mental room, to make the reflection all the time. "What was that here about that victim? Was there a victim in the crime or not?" Then on top of that you must think about the extent of dialogue with the other party. "Will there be something here?" So, that's a step too far for the capacities I think, also the practical capacities. It's an attitude, the mentality as well; as a lawyer, as the legal profession you're not trained to do these kinds of analyses. And also I think in practical terms it is too complicated, too difficult in a practical way.

Nevertheless, some prosecutors are attracted to restorative mediation, precisely because it allows some kind of formal response to cases which might not otherwise have been prosecuted to court (dismissed) given the workload of prosecutors.

This problem of capacity also had implications for the lengthy time taken within the criminal process before a prosecution referral might be made. This had implications for those delivering mediation services, both in the police (in Leuven) and among mediation service providers (such as *Moderator* and *Alba*) where particularly old cases often presented difficulties notably with regard to offenders (especially young people).

Establishing good quality referral mechanisms was seen as something that had proved difficult at various different stages in the process and for differing schemes. After over a decade of trying the police mediator in Leuven is still hoping to develop 'a linear offer of mediation' with similar and complementary processes across the different schemes.

Furthermore, ongoing changes to administrative and political arrangements as a result of shifting competencies between the Federal and local levels of government and the amalgamation of judicial districts was also deemed to have considerably disturbed referral processes. Mediators explained how a successfully established mediation scheme in Tongeren in the Province of Limburg was undermined in 2015 by an amalgamation of judicial districts between Tongeren and the city of Hasselt. As a consequence of the amalgamation the number of cases referred to mediation fell dramatically (almost completely drying up). Despite the considerable support of a new prosecutor, mediators have been struggling to re-establish the kind of case referrals that they had before the merger. One mediator commented:

But it's very frustrating also for our colleagues who had very good contacts with the prosecutors there [in Tongeren] and victim support services and all, and it just collapsed, and it's going on for two years now.

Changing professional attitudes through education and training was identified as an important aspect of culture change, particularly among those professionals working within the legal systems. The youth judge (in interview) highlighted the crucial role of universities in educating lawyers of the future to understand restorative justice and think differently:

Everyone who does a job as a judge must know not only the law and the articles of the law, but must know how to treat the other people, must know how to have respect for someone who has a

lot of problems ... My approach towards juveniles was new when I started. I'm now 20 years in this job and the first time I asked a juvenile: "How do you solve your problem? What do you suggest?" He didn't hear me. He said, "Oh heaven's here." And now we see that this is a very, very good approach. So I think it's a state of mind mostly.

There was general consensus among interviewees that there needs to be greater coherence and strategic coordination of the various different mediation and restorative justice services that have developed over the years. Dangers of fragmentation and confusion were highlighted and some pointed to the need for greater guidance about good practice and research evidence. Such coordination, it was felt, might also assist with securing and ensuring good quality referral processes. For some, this would provide a clearer focus for better public and political understanding of the benefits of mediation and restorative justice in conflict resolution.

A number of interviewees expressed fears about the future funding of restorative justice given the uneven and partial take up across Flanders – for instance the youth judge expressed the following concerns:

I'm very scared that they will take it out because it is not a big success story in a statistical way. But I don't want to have it like that, no ... Because it is always a question of money. Everything is a question of money. And then when you don't have a lot of cases, they will say, "We don't give money anymore". And that will be the end of the family group conference ... But we can avoid this by every new case that we have, we can think about family group conference and then I hope we can avoid it. But you know the main problem is that in Leuven it is okay, but other cities [sighs] they do not have five cases I think. So that's the main problem.

One of the dangers for mediation and restorative justice services is that where caseloads are insufficiently robust, services can get drawn into other forms of allied work, such as victim assistance, youth work or social services. The uncertainty over future funding also expressed itself in terms of the precarious nature of mediation as something that sits outside of the core activities of any one particular organisation but which impacts upon the work of many organisations. The police mediator in Leuven, commented:

I have the fear that one day, because of the money that goes to the police, they will say: "No". Every week they ask how many inspectors can go to Zaventem [where Brussels international airport is located] for surveillance? How many can go to the football matches? How many people can go for terrorism? So, they will say: "We have to take your money and take it elsewhere because mediation is a silk purse and it's nice but it's not our core business".

Whilst much has changed over the last twenty years in Flanders that is supportive of and conducive to the continued growth of mediation and restorative justice, the criminal justice system has remained 'more persistent than we were thinking years ago' (according to one Leuven interviewee who had been involved in the reforms for at least two decades). Due to the (over-) reliance on the criminal justice system to deliver referrals, some practitioners and scholars felt that one way to circumvent this is to foster a greater demand from the public for mediation. However, the current lack of public understanding and awareness of restorative justice militates against this. One interviewee suggested:

So, I think we must find other ways to inform people, the public about the offer of mediation through other channels; through social services, there are all kinds of social services where people have contact with for example; or just through the media and through other ways of communication.



### 3. Restorative justice and restorative practices pre-court: comparative lessons from Northern Ireland

#### Background

Restorative justice is now well established as a means of dealing with many criminal offences committed by young offenders (under 18), though it is very rarely used for offences and incidents committed by adults or young adults. The principle of using restorative justice for young people seems to be widely accepted within criminal justice agencies and also in the general population. The use of restorative justice has developed strongly after the end of the Troubles since the late 1990s in Northern Ireland, though there has always been significant interest in supporting victims and meeting victims' needs, as well as dealing with youth offending within communities and as far as possible informally. The development of restorative justice processes and structures, like other matters to do with criminal justice, has been and continues to be affected by the history of the Troubles and by current community relations, particularly with the police.

Restorative justice, in the form of youth conferencing, is currently available throughout Northern Ireland on a statutory basis upon referral by a prosecutor (from the Public Prosecution Service) to the Youth Justice Agency (part of the criminal justice system), as well as by the court before sentencing for young offenders. Community restorative justice in relation to both criminal offences and anti-social behaviour (by young people but also potentially by adults) is being undertaken by Northern Ireland Alternatives ('Alternatives') and by Community Restorative Justice Ireland (CRJI)<sup>25</sup> in particular areas. There seems to be very little restorative justice being undertaken by the police themselves, or through direct referrals from the police, though this may change, as discussed below. There is no province-wide or substantial voluntary sector provider of restorative justice (as opposed to the community schemes) to which criminal justice agencies can refer cases at the pre-court stage, though there are possibilities for referral post-conviction, particularly in relation to serious offences committed by adults, via the Probation Service Victim Liaison Officers. There is hence strong availability of restorative justice at particular criminal justice stages, for young offenders, together with support for this, but very little possibility at other stages or for cases involving adult offenders. At the time of the fieldwork there was no professional body for the delivery of restorative justice in Northern Ireland which could accredit practitioners, so no equivalent to the Restorative Justice Council in England & Wales. There is a Restorative Justice Forum, representing the key stakeholders, which acts mainly to promote the development of restorative justice in Northern Ireland.

In Northern Ireland, the relation between the police and prosecution is different to that in England & Wales. Following the Belfast Agreement (the Good Friday Agreement) in 1998, the Independent Commission on Policing for Northern Ireland chaired by Chris Patten in 1999, the Review of the Criminal Justice System in Northern Ireland in 2000, and the resulting Justice (Northern Ireland) Act 2002, there is now the Police Service of Northern Ireland (PSNI) and the independent Public Prosecution Service for Northern Ireland (PPS). The police may deliver an informed warning, or deliver a formally recorded caution, but only after approval by a prosecutor. All prosecutions have been overseen by the Director of Public Prosecutions since 1972, though many prosecutions were conducted by the police until the establishment of the PPS in 2005. Today, though the police investigate cases, all decisions to prosecute or to divert from prosecution are taken by prosecutors and it is prosecutors who determine the charge presented to the court and the court venue (magistrates' court or Crown Court).<sup>26</sup> Hence it is prosecutors who consider whether the case can be diverted to restorative justice (or another form of diversion).

The police have the power to administer a Penalty Notice for Disorder (PND) or a Community Resolution Disposal ('community resolution') without submitting a file to the PPS if the offence is a relatively minor offence and the offender is suitable to be diverted from prosecution in this way.

<sup>25</sup> These community organisations provide government accredited restorative justice interventions in discrete small geographical areas, which have, respectively, loyalist and nationalist sympathies (see below).

<sup>26</sup> A recent change in this regard is that the police may also deliver Community Resolutions themselves, as discussed below.

## Restorative justice and restorative practices pre-court: comparative lessons from Northern Ireland

These disposals combined account for approximately 10,000 disposals of reported cases per year. The PPS have a service level agreement with the police (PSNI) to quality assure these disposals to ensure that they are being administered properly. The community resolution disposal was introduced in June 2016 (just after our visit) and replaces the 'discretionary disposals' previously used by police. The community resolution arguably has a restorative justice element to it as it may require the offender to 'repay' the victim (where there is an identifiable victim) in some way as a pre-condition of the community resolution disposal being administered (though some community resolutions only include an apology rather than specific repayment). Officers are required to take into consideration the views of the victim, when considering administering a community resolution.

In terms of research and evaluation, the initial large pilot of youth conferencing was evaluated in 2005 by Campbell et al. (2005) before being rolled out province-wide. The Department of Justice researchers at Stormont have continued to monitor reoffending rates for youth conferencing since responsibility for criminal justice was devolved to Northern Ireland, and the Youth Justice Agency has participated in comparative EU projects (see for example Zinsstag and Vanfraechem 2012), with some more recent research into diversionary youth conferencing at the University of Ulster (particularly by Olivia Barnes on diversionary youth conferencing). Some initial schemes for delivery of restorative cautions by the police were evaluated by O'Mahony and Doak (2004), but these are no longer in existence. There has been substantial research into community restorative justice by researchers at the Queen's University Belfast (see McEvoy and Eriksson 2008).

Many of those currently acting as facilitators in different criminal justice agencies and in community restorative justice schemes have been trained by the University of Ulster on its Certificate, Diploma and Masters courses in Restorative Practice. This has provided a point of continuity and coherence in terms of what is seen as restorative justice and what is seen as good practice. The model which has been developed is a 'balanced model' (Zinsstag and Chapman 2012) which sees victims' needs and offenders as equally important, and which primarily uses conferencing (victim and offender meeting together with a facilitator and often victim and offender supporters) as the key process for delivery of restorative justice. Normally this would be a direct individual victim. However, youth conferencing uses victim representatives (suggested by the victim, who may be a relative, friend or from Victim Support) if the direct victim does not wish to attend. Because youth conferencing is available for all offences, it is also used for offences involving corporate entities or community facilities, such as burglary, theft or damage, which may send a representative. The term 'restorative justice' is therefore typically seen as communication, normally direct communication, between victim and offender, rather than other forms of restorative practices or victim awareness.

## Methods of data collection

This chapter draws upon official reports, previous evaluations and research into restorative justice in Northern Ireland and the results from a study visit conducted by Professor Joanna Shapland and Dr Emily Gray during the period 23-27 May 2016. The visit to Belfast was organised by Tim Chapman and Kelvin Doherty, to whom we are very grateful, and included interviews with key policy makers and practitioners, namely staff from the Probation Board of Northern Ireland, prosecutors from the Public Prosecution Service, a senior police officer of the Police Service of Northern Ireland, staff from the Youth Justice Agency, staff from Community Restorative Justice Ireland, staff from Northern Ireland Alternatives, and researchers from the University of Ulster. In addition, a diversionary youth conference was observed, with the agreement of all the participants and facilitator. Many interviewees provided data and reports from their agencies and their own work.

## Community restorative justice

### History of developing community restorative justice schemes in Northern Ireland

Community-based restorative justice schemes were established in around 1998 explicitly to find non-violent alternatives to paramilitary punishment attacks being used in both loyalist and nationalist areas in Northern Ireland to 'deal with' criminal offences (McEvoy and Eriksson 2008). Starting in areas with very strong community links and respect for ex-combatants released as part of the peace process, the schemes aimed to provide non-violent means of communication, deliberately using restorative principles, to allow communities to deal with incidents and problems, particularly those involving young offenders. CRJI started in nationalist areas of Belfast and Londonderry with four pilot projects,

working with referrals from members of the community about offending also from within the community. Initially, in common with the republican movement in general, there was no wish to have any contact with the police, though there were contacts with other statutory agencies, such as the Probation Service. Northern Ireland Alternatives (originally the Greater Shankhill Alternatives, now commonly known as 'Alternatives') came from loyalist areas of Belfast linked with the UVF. Both worked with young people under threat from paramilitary organisations (threat of violence, or of exclusion from the area or Northern Ireland), to undertake mediation or conferences between victims and offenders and to monitor resulting contracts/outcome agreements. Alternatives, which had some contacts with the police, also provided a range of restorative practices and worked with anti-social behaviour cases as well as criminal ones, including preventive work with young people thought to be at risk. In the mid 'noughties, CRJI were working with around 700 cases a year, whilst Alternatives were working with about 400 (McEvoy and Eriksson 2008). The cases were though all from within small tightly-knit community areas and much of Belfast (and other parts of Northern Ireland) were not covered.

Relations with the state, both in terms of criminal justice policy makers and criminal justice agencies, have tended to be complicated and fraught. The government felt initially that community justice schemes were trying to deal with crime themselves, with no reference to state agencies, carrying the possibility of double jeopardy for offenders and continuing paramilitary activity. Community schemes felt they were unappreciated for their efforts and indeed success in reducing violent punishment, and for their commitment to human rights principles and providing restorative means to justice for their communities. Bodies overseeing the implementation of the Criminal Justice Review and the peace process (the Justice Oversight Commissioner and the International Monitoring Commission) actively urged the government to provide statutory guidance to create means for the community justice schemes to relate to the statutory criminal justice agencies, and eventually a Protocol was agreed in 2007.

The Protocol (Northern Ireland Office 2007), which both CRJI and Alternatives agreed, provided government accreditation (and potential access to funding). In return, the schemes were to be inspected by the Criminal Justice Inspectorate, have trained staff and volunteers (much of the training was initially done by the University of Ulster), and have a complaints system run by the Probation Board. Moreover there is a lengthy process of deciding who can take ownership of the case; the community organisations are required to report cases referred to them by the community to the PSNI, which then must refer them to the PPS, which needs to agree to the community scheme working on the case. Hence after a report from a scheme, the PSNI needs to investigate the case and then the PPS must decide not to prosecute, before the scheme can work with the case. The Protocol applies officially to all cases where schemes seek to deal with criminal offences – and hence both those concerning adult and young offenders – but is intended for 'low-level' offences, which should not be sexual offences or cases of domestic violence.

In considering these developments, it is important to bear in mind that this is recent history. The schemes started in 1998, and eight years later were dealing with considerable numbers of cases, which implies considerable acceptance by those local communities. A further year on, and the government Protocol was in force. Our visit was only 9 years after that. There has been substantial high level support for restorative justice and community justice in particular over recent years from the First Minister, the Lord Chief Justice and the Criminal Justice Inspectorate.

## Current perspectives on community restorative justice

### The schemes

The main community restorative justice schemes remain Alternatives and CRJI, though Alternatives has spread out from its initial community work in a particular part of Belfast (the Greater Shankhill) to other areas in Belfast, in East Belfast, South Belfast and North Belfast, as well as in North Down, whilst CRJI has several offices in Belfast, Londonderry and Newry/South Armagh. These are the only two community restorative justice schemes accredited by the Stormont Government (from 2008) and, though both drew originally from the relevant paramilitary groups and involved ex-paramilitaries, neither, we were assured by all we met, is involved with active paramilitary personnel or groups. Currently, there are some new small schemes arising out of a different branch of Unionism and previous paramilitary groups, but they have not fully developed and their severance from paramilitary activity is more doubtful.

Because community restorative justice schemes need to stem from, be run by, and involve their community (in the sense, in Northern Ireland, of a small geographical area of housing and businesses), it is difficult for them to start up. It cannot be a top-down process. So, the existing two schemes have been able to work with people from other areas with similar cultural and political backgrounds to start up new offices, using their experience and training to branch out, but there has been no major expansion into other areas of Northern Ireland, particularly more mixed areas which may not have such close ties within the area. CRJI told us they would wish to expand into other areas, but current funding difficulties have prevented this.

The existing schemes work with people from their own community and are not normally able to work beyond their geographical boundaries, so would find it difficult to deal with offences occurring in the city centre, unless all those involved were from the community, or offences involving people from across the political divides. The result is that the original two schemes have expanded geographically, but there has been no 'roll-out' to or major increase among different kinds of communities.

Funding is a serious issue for both Alternatives and CRJI. Though accreditation brought the possibility of government funding, this was never very substantial and the recent austerity measures taken in Northern Ireland have, all agencies told us, decimated the funding available for new initiatives or pilots of any kind in criminal justice. So, for example, the Probation Board used to provide some funding to Alternatives, but that is not available for 2016/17. The Department of Social Development is providing some funding for new work with young offenders in relation to family issues and the Belfast courts. Alternatives' website lists some 17 separate funding sources, whilst CRJI lists ten, but it is clear that three year funding, for example, has not been available since 2011. It is not surprising that there are so many funding sources, given that the schemes fill holes in the provision of different statutory services (social services, youth services, housing related matters) to disadvantaged communities. In these areas, the Criminal Justice Inspectorate Northern Ireland indicated in 2007 in relation to Alternatives, the statutory services:

are felt to serve these communities poorly because they have distanced themselves from them. The feeling is that they have professionalised and bureaucratised themselves to such an extent that they are physically absent, inaccessible and unresponsive. The strength of Alternatives and its volunteers is that they are physically present, can empathise with the clients, and can act promptly. (p. 6)

Most recently, the Fresh Start Panel report has underlined our view that the accredited schemes are doing some very good work, but are 'still limited in scope, have difficulty securing sustainable funding to deliver and expand their services and could usefully be extended to become a more mainstream part of the justice system' (Allardyce et al. 2016: 16).

### The work of the schemes

The essence of the community restorative justice schemes is their embeddedness in their community and the service they can offer to that community. The positive side to this is the trust between them and the people in those (relatively small) community geographical areas, and the information they are able to acquire about what is happening, and what solutions may be possible to the conflicts brought to them. As CRJI said, to find the solutions to those problems also requires the participation of stakeholders in those communities, such as schools, youth workers and so forth. There is still a considerable need for work around conflict transformation, with some offenders being put under threat by ex-paramilitaries, and continuing community tensions around major violent crime. Alternatives suggested that around 5% of their work is connected to paramilitary-related problems. Both schemes are clearly working hard to defuse situations, in consultation with the PSNI.

The schemes were originally set up to deal with offending within the areas, particularly by young offenders, with Alternatives always having a major remit in relation to both youth crime and anti-social behaviour (though they do not deal with sexual offences or child sexual abuse). Alternatives told us that they still deal with much youth anti-social behaviour, which has become increasingly necessary with recent decreases in neighbourhood policing, so that it is consequently now more common for police response teams, rather than neighbourhood officers, to respond to calls from the public. Response officers though may have more difficulty in responding to such behaviour in a long-term manner. The range of work Alternatives take on they said was very wide, from parking issues and

family disputes, to more recent work on hate crime in relation to adults and youths. Belfast now has substantial ethnic minority populations, including recently refugees/asylum seekers. CRJI also have a wide range of work stemming from incidents within the community, for both young people and adults.

Both Alternatives and CRJI have multiple contacts with the police, both for more serious conflict-related matters and for more minor matters, where mediation is a valued means to deal with the incident or conflict. Alternatives said that family-related matters might be referred to them by the police. Alternatives give presentations to all new police officer recruits in South and East Belfast. However, both felt that their roles were not sufficiently formally acknowledged by the police or other criminal justice agencies.

The review of youth justice in 2011 (Department of Justice 2011) indicated that the number of referrals of young people to the community restorative justice schemes had fallen dramatically since 2007 when the Protocol was introduced. The review suggests that this is because 'families are unlikely to seek help for their child's offending if in so doing a court appearance, conviction and criminal record might result' (p. 49). It was clear to us that the number of referrals of young offenders by the community to both Alternatives and CRJI seemed to have decreased considerably since the early 2000s, though each office still had a significant caseload. There are many possible reasons for this. The Criminal Justice Inspectorate has suggested it may be due to increased confidence in the police and other statutory services (particularly on the nationalist side) (Department of Justice 2011). Precarious funding and consequent difficulties in paying staff for the schemes may be another reason. The major problem, though, seems to be finding a satisfactory process for dealing with offences brought to the schemes by members of the community but which may also involve or should involve the police/prosecution.

What is clear is that the 2007 Protocol has not been successful in smoothing communication on individual cases between community restorative justice schemes and the police/prosecutors and speeding a flow of cases back to the community schemes to take action. Both the schemes themselves and official reviews indicate that the process is too complex, its administration creates unacceptable delays and there is little confidence in it. Essentially the operation of the Protocol has stopped community restorative justice being used for more serious offences, because such cases need to be reported to the police (through the Protocol mechanisms).

To start the agreed Protocol procedure, a lot of information is required, which members of the community may not wish to provide. They will also be aware that following receipt of the form by the police, the police will investigate the matter, before passing the file to the PPS, which may be a deterrent to those bringing the matter to the scheme, and a reason for the low numbers (given that members of the public can also of course directly report a matter to the police). The process itself is complex, because it involves these different stages. It also seems to take a significant amount of time between initial report to the scheme and the result arriving back with the scheme. The schemes wondered whether the PPS had been trained on what to do with the Protocol cases, but all parties agreed that the cases were extremely rare in terms of numbers of cases reaching the PPS. Our PPS respondents said that they had seen only single figures in terms of numbers of files sent to them by the police, so the difficulty may be lying with the police deciding that it is appropriate. Alternatives said they had had only one referral back from the Protocol mechanism. CRJI said they had had three Protocol cases in 2016. The review of youth justice, the PSNI and the Criminal Justice Inspectorate have all suggested that the Protocol needs to be reviewed again (Department of Justice 2011), but this does not seem to be actively occurring. The result is that community restorative justice is only being able to input directly into and work with low risk cases.

## Criminal justice decision making to diversionary restorative justice for young offenders

We turn now to what happens in relation to offences which are reported to the police by members of the public or are discovered by the police, considering first the history of how offences have been dealt with and then current initiatives in relation to decisions about prosecution or diversion.

Northern Ireland, apart from violence associated with the Troubles, has always had a relatively low crime rate. There has also been a tradition of dealing with much youth crime relatively informally, without prosecution where possible. When there is a decision to divert from prosecution, which needs

to be made by the PPS, the young person may receive an informed warning (administered by the police upon the decision of the PPS to divert), a restorative caution (administered by the police, and with potential victim presence, again upon the decision of the PPS to divert) or a diversionary youth conference (administered by facilitators from the Youth Justice Agency, upon the decision of the PPS to divert). So, in 2010, of the 9,400 decisions on young offenders made by the PPS, about 35% were to prosecute, 28% were referred back to the police for a caution or informed warning and 7% were referred for a diversionary youth conference, whilst in almost a third of cases the PPS decided on 'no prosecution' but without further action. This might have been due to lack of evidence or that prosecution was not in the public interest (Department of Justice 2011). Since then, further discretionary disposal (decided upon by the police but with oversight by the PPS) has been introduced and has risen to about 14% of youth cases.

Part of this reliance on diversion, particularly for young people, has been due to a wish not to unnecessarily criminalise young people, by taking them to court. Part has also been driven by the considerable delays in court proceedings, including youth court proceedings. These were noted at the time of the Criminal Justice Review in 2000, but are also referred to in the Fresh Start Panel report in 2016 (Allardyce et al. 2016). Delays can be problematic in many ways – for youth cases because young people may feel the offence is 'old news', but also because it can cause disillusionment in communities about the justice system or even a feeling that some offending, particularly that linked to paramilitary activity, is immune.

### Police use of restorative justice

The police are able to undertake restorative justice themselves, in the form of a restorative caution (as above), particularly in areas where there is not a community restorative justice scheme. They may also be doing some entirely informal action involving restorative practices, where the matter is very minor. However, both of these would primarily be by neighbourhood based officers, who, as the PSNI told us, would be able to deal with both the harm done and issues of vulnerability. The extent to which the police are spontaneously doing RJ as a community resolution (previously a discretionary disposal) is not currently recorded or known. Given budgetary constraints, it is also likely that the police will need to focus more on serious crime.

There is no easy paperwork form for a 'community disposal' for the police to use. The form to be completed is a long one, with tear-off parts. This has arisen because of the need for the PSNI to operate in an atmosphere of accountability. Previous police discretionary decisions, which used a simplified electronic form, were criticised by the Police Ombudsman and PPS (see McCracken 2013), as well as by the Inspectorate, so that practice has now reverted to all having to be recorded in the same way (on 'Niche') as a crime to be prosecuted, resulting in a considerable form for police officers to complete – and so that it is now easier for a constable just to decide to move towards prosecution than to do a community disposal.

Most restorative justice at the level of the police has been with young people. There are ideas about an adult restorative justice pilot, which are at an early stage, which would give victims and offenders the option that the case would be referred to restorative justice. The Fresh Start report on transitioning from paramilitary activity (Alderdice et al. 2016), which was published just after our visit, talks about promoting 'active citizenship in building a culture of lawfulness' (p. 33). It suggests there should be a dedicated fund for restorative justice initiatives to 'provide enhanced levels of resource over longer periods of time to deliver positive outcomes for individuals and communities. This should include resourcing the proposal for a centre of excellence'. We heard support for such a centre both from the police and from community restorative justice schemes. There is also a proposal in the Fresh Start recommendations for a new initiative focused on young men who are at risk of becoming involved in paramilitary activity, as a collaboration between government departments and restorative partners, to combine restorative practices and peer mentoring with targeted support in respect of employment, training, housing, health and social services.

### Decision making by the Public Prosecution Service

As set out above, decision making on diversion, for both adults and young offenders, has to be by the Public Prosecution Service. The number of files coming to the PPS has decreased markedly over the last few years, from some 53,271 in 2011-12 to 45,000, though the steady decrease over recent years has been in more minor cases, with numbers in more serious categories (not relevant to our particular

research project) being sustained (PPS 2016). Currently, our PPS respondents estimated that around 33% of youth cases they see were being diverted, but only 10% of adult cases.

The extent of diversion from prosecution has been controversial in Northern Ireland. There has been concern that inappropriate cases have been diverted (as indeed there was in England & Wales when penalty notices for disorder and community disposals were introduced). So, in 2013, the PPS criticised the PSNI use of Speedy Justice, which involved the use of apologies or restitution ('discretionary disposals') for low level offences by both adults and young people (McCracken 2013). The criticism was on the grounds that the evidence might not be present (though the PSNI said that the problem was that the evidence was not properly recorded, rather than not being present) and possible net-widening.

The community resolution disposal was introduced in June 2016 and replaces the former discretionary disposals. It can be for adult or youth offenders. The police have written operational guidance on community resolutions. The PPS have a service level agreement with the police to quality assure these community resolution disposals to ensure they are being administered properly. The aim is to produce more victim-focused outcomes, both for adult and youth cases, and to seek the support of local communities. A 'suitable and proportionate resolution' might be an apology, to make good loss or damage, to attend a course or to not go to particular named places. The guidance will provide lists of suitable offences (on a 'traffic lights' system), and require an identifiable victim. It will first have to be considered whether sufficient evidence is present and there is a clear admission of guilt, and such a disposal will not be able to be given if there are previous convictions or ASBOs, nor if there are similar offences pending, if the offender has had a community resolution in the last 12 months or a penalty notice for disorder. Decision making will be by the police, but essentially this will result in community resolutions being only for first-time offenders and minor offences. In youth cases, the police Youth Diversion Officer must approve. The victim's views should be considered but will not be a veto or decisive. The PPS will be doing a 'quality dip sample' on cases to see how it is being implemented, with this commencing in September 2016.

It is the prosecutor who decides, having received the file from the police, whether a case is to go to a diversionary youth conference, the most serious option before prosecution, or whether it should be prosecuted. Initially, the PPS offered a youth conference to the young offender by letter, but the uptake was low (and no response led to prosecution). The current system of Youth Engagement Clinics (as below) is seen as far preferable, because the conference can be explained in person to the young person and their parents/guardian. There are guidelines regarding diversion from prosecution for the PPS, but no specific guidance as to which cases should be offered a diversionary youth conference as compared to other options. The prosecutor will think about the severity of the offence, any aggravating and mitigating factors, whether there is genuine remorse or the offender has tried to make restitution, whether there is a clear and reliable admission of guilt, and whether the victim would support this. Given the Victim's Charter (Department of Justice 2014), it is important for the prosecutor to know the victim's position, so it now has to be set out in the police file in the Prosecutor Information Form. The Victim's Charter states that victims of an offender under 18 *are entitled* to be offered the opportunity to take part in a youth conference, where appropriate and available (Standard 8.1). It is not clear to us how this sits alongside cases which are directed to a restorative caution or informed disposal where victim participation in the process does not seem to be necessary. Victim input on whether to divert per se is always necessary when the PPS consider diversion, as the prosecutor is obliged to enquire as to the views of the victim and to consider them, though not necessarily to follow them.

Prosecutors are also the relevant authority considering whether a diversionary youth conference has been successful and whether the proposed outcome agreement ('conference plan') is appropriate (see below).

In relation to restorative justice pre-court for adult offenders, it is not proposed that there should be any similar system of 'Adult Engagement Clinics' to the Youth Engagement Clinics, probably in our view because agencies were not able to think who should be there to provide relevant input. There is no equivalent of the Youth Justice Agency for adults which runs conferences. Nor are there currently different disposals (restorative or other) to make them appropriate. There is however a draft strategy plan and a desire to push forward on adult restorative justice, to make it more available. The Victim's Charter (Department of Justice 2014) states that victims of adult offenders *may* be offered the opportunity to participate in restorative justice interventions by the Probation Board or prison service

(post-sentence) and that restorative justice services are offered to all victims registered with the Probation Board's Victim Information Scheme. However, it does not refer to cases which are diverted from prosecution, which are the subject of this chapter.

Prosecutors clearly play a vital role in determining the path a case takes through the justice system once it has been reported to the police. Their work in terms of diversionary disposals, though, is entirely office-based and revolves around their decisions on files. There are no prosecutorial fines or other schemes run directly by prosecutors in Northern Ireland. Nor do they attend conferences at which cases are discussed, though they may well contact the police officers involved and, on occasions, victims (though the police may do this for them). Prosecutors' role is therefore more one of setting and administering policy and quality control of the results, rather than them having direct contact at Clinics or meetings, though in Northern Ireland there are specific Youth Prosecutors who both deal with files and prosecute at court. The advantage of this is that it does provide built-in accountability to counter any misuse of discretion by the police. The disadvantage in our view is that, though there is this dedicated team of youth case prosecutors who liaise with the police and Youth Justice Agency and prosecute at court, prosecutors may be seen by others as more remote from developments in restorative practice.

### The 'triage' scheme when young offenders' offences are reported to the police

In order to cut delays and find the most helpful disposal at a time of austerity, young offenders in cases reported to the police are now sent to a Youth Engagement Clinic, drawing upon the triage system developed in England. The police do a streamlined file for the PPS for them to consider forms of diversion prior to the Clinic and a Clinic meeting is held within six weeks after the offence (or the police becoming aware of the offence). The victim is not contacted specifically as to their wishes before the Clinic and does not attend the Clinic, but a statement from the victim should be there and prosecutors will insist on the police recording the wishes of the victim as regards diversion on the relevant form submitted with every file. If the result is an informed warning, that happens at the Clinic (which is attended by the young offender and his or her parents or guardian, a youth conference facilitator from the Youth Justice Agency, and a police youth diversion officer, as well as the young person's lawyer if they wish to come). If it is to be a restorative caution, then the police are supposed to contact the victim of the offence, but may not always do so. The Youth Justice Agency now offers support for both informed warning and restorative caution cases for work with the family, to be done within three months. If the decision is a diversionary youth conference, then the facilitator will explain the conference and if the offender agrees, a consent form will be signed at the Clinic (consent can be withdrawn at any stage).

Initially, when Youth Engagement Clinics were introduced, only small numbers of cases were being referred by the police. However, because the intention was that all cases potentially suitable for diversion should be taken there, the Youth Justice Agency said that they had trained all police sergeants on this and that numbers had significantly improved thereafter.

The effect of the introduction of Youth Engagement Clinics is clearly to speed up diversionary decision making, but it may also have had the effect of diminishing victim input and restorative practice. Its aim is also to provide an element of early intervention where appropriate, due to the participation of the Youth Justice Agency. Initially, this input with the family was supposed to be through referral, but, as we have seen at several points in the system, referrals did not always produce action, because of difficulties in case management. We are not able to say whether the system has been overall very targeted in terms of those young people being referred to it or has an element of net-widening, but the thrust of policy in Northern Ireland, as elsewhere, is now on early intervention whenever it is perceived there may be problems emerging with a young person.

At the time of our visit, there was no equivalent to the Youth Engagement Clinic for adult offenders, nor was it considered there was any funding possibility to start this, whether it be by the community restorative justice schemes or as an expansion of provision by the Youth Justice Agency.

## Diversionsary youth conferencing

### The use of diversionsary youth conferencing

Youth conferencing, both on referral from court pre-sentence and as a diversionsary measure with referral from the PPS, was introduced by the Justice (Northern Ireland) Act 2002. It is entirely voluntary on the part of victims and offenders as to whether they decide to participate, but it is available for all offences for which there is an identifiable victim (including corporate victims). Referral from the court at the pre-sentence stage is mandatory for most offences (except for indictable only offences), but as a diversionsary measure, the subject of this chapter, a decision to refer is at the discretion of the PPS. The conference procedure and preparation are very similar for conferences held because of referral from court and diversionsary conferences. Both are facilitated by facilitators from the Youth Justice Agency (who initially were situated in a separate part of the agency, the Youth Conferencing Service). Conferences must involve the facilitator, the offender and his or her guardian, and may involve the victim, legal representation for the offender, and victim and offender supporters. A police youth diversion officer also attends.

All those to whom we spoke were very positive about the principles of restorative justice being used both pre-sentence and as a diversionsary measure with young people, and praised the introduction of youth conferencing. There have of course been challenges in practice, as we shall discuss below. The most recent figures, from the 2014/15 Youth Justice Agency annual workload statistics show that there were 1,563 referrals to the Agency in 2014/15, of which 707 were court-ordered youth conferences, 661 were diversionsary youth conferences, 64 were for community orders (post-sentence) and 131 were other referrals, including early intervention cases (Youth Justice Agency 2016). Young people in contact with the Youth Justice Agency tend to be male and aged 16-17, from all the communities in Northern Ireland. The balance between court ordered and diversionsary referrals was around 50:50 for a long time, but this has dropped to 42% of diversionsary conferences in 2014/15, possibly as a result of the introduction of Youth Engagement Clinics and more cases going to police disposals.

The initial evaluation of youth conferencing by Campbell et al. (2005) was very positive, concluding that young people participated well and that victim satisfaction was high. The Review of Youth Justice in 2011 was also very positive, concluding that young people were fully participating, and that facilitators were well trained and professional (Department of Justice 2011). It indicates that Youth Justice Agency figures showed that victims were attending 74% of conferences, but this figure included both indirect and direct victims and victim representatives. Overall, individual personal victims were attending approximately half of all youth conferences. The victim satisfaction level in 2009/10 was 84%.

### Plans stemming from youth conferences

The proportion of conferences resulting in a plan ratified by the PPS in 2014/15 was 79%, down slightly from 83% in previous years (Youth Justice Agency 2014/15). Youth conferencing is a relatively fast process – the average working days from referral date to plan ratification date in 2014/15 was 38 for diversionsary conferences (very similar for court-referred conferences). This has substantially decreased since 2009/2011, when it was 57 in 2009/10 and 68 in 2010/11, with much longer time periods for diversionsary than court conferences. Most diversionsary plans are for periods of less than six months, but 30% in 2013/14 were for six months or more (court ordered plans tended to be for longer). The legislation on youth conferencing focuses on the date that the plan should start and how long it should last, which may explain the concentration in evaluation and targets on the length of plans (rather than, for example, the number of elements or the likely number of hours it will take the young person to complete it). The proportion of ratified plans that were completed in 2013/14 was 93%, a very similar proportion to previous years. The facilitator has to make a report to the PPS as to whether an agreed plan has been sufficiently completed, before proceedings are finally ended in terms of whether there will be prosecution.

### Challenges and solutions in the development of diversionsary conferencing

There have been a number of challenges in the ten or so years during which youth conferences have been running. These concern whether there should be multiple conferences for one offender, taking

on serious offences including sexual offences, delays, upholding the voluntary nature of participation, and the proportionality of conference plans. We discuss these in turn, because they are challenges which are likely to affect the use of restorative justice in any jurisdiction.

### (a) Multiple conferences

Concerns arose very early on after the introduction of youth conferences that some offenders might experience several conferences, primarily court-ordered conferences. This stemmed from two elements: first, that court-ordered conferences are the mainstream means for dealing with cases at the youth court and that some offenders do reoffend; and secondly, that instructions for offences occurring in care homes were that any offence should be reported to the police, and so was likely to lead to an appearance at the youth court. However, it was also quickly appreciated that both victim and offender were important, and that multiple conferences were likely to feature different victims, who should be enabled to take part in the conference process. The difficulty regarding care homes needed to be resolved by instituting restorative practices within the homes. None the less, though persistent offenders were a very small proportion of conferences (the proportion of young people referred to a conference more than three times was about 6%: Department of Justice 2011), it has been felt that there is a need for more intensive supervision and intervention for persistent young offenders and this is now in place (though it is primarily relevant for court-ordered conferences).

### (b) Serious offences

Diversionary conferences, we were told by our PPS respondents, are seen as the most serious option before a case would be taken to the youth court and prosecuted. They are seen as the 'most punitive' of the diversionary disposals. The PPS would divert to a youth conference offences including domestic burglary and sexual offences. The concept of proportionality is important to the PPS, so the decision is related to the possible nature of the plan resulting from the conference (which the PPS also has to approve), including the amount of community service included.

After an initial period, facilitators found themselves more confident in taking on more serious and more complex offences, and these include sexual offences (sexual assaults, indecency) for both court-ordered and diversionary conferences. The practice with sexual offences, where the victim and offender are usually both young people, is that two facilitators will work each case, one dealing with the victim and the other the offender. Longer preparation times are also normally required.

### (c) Delays

It is good practice in youth justice to minimise delays, so that the young person can still make the connection between the offence and the response, and so that the sanction does actually make sense in terms of the young person's current life. As youth conferencing has developed, targets have been set to minimise delays (which have, as we saw above, tended to be a particular problem in Northern Ireland in the youth justice system). The youth conferencing system itself (referral to agreed plan) has always tended to be quite quick, depending of course on the needs of both offender and victim. However, by 2011 delays were becoming problematic between the incident and referral to a conference, where the average was over 200 days (Department of Justice 2011). The young people interviewed in Barnes' (2015) research said that they found delays before diversionary conferencing very difficult, partly because they could not remember details of the incident but were being questioned about it by other participants at the conference, partly because the young person wanted to forget and move on from the offence, which seemed a long time ago. We do not know the current delays (for the police investigation and PPS decisions) in deciding to divert to a conference, but the Youth Engagement Clinics are intended to be held within 6 weeks of the incident.

### (d) Victim participation

The participation rate for victims in youth conferencing has always been far above that for many other forms of restorative justice, for example, the rates in England & Wales in respect of YOT restorative justice. However, earlier evaluation found that there was more effect in relation to young offenders when it was a direct, individual victim who was present rather than a victim representative (Campbell et al. 2005). Our YJA respondent indicated that since the Review of Youth Justice (Department of Justice 2011) their target for participation had been changed to reflect the need for victims where

possible to be direct individual victims. A corporate victim, on this new system, cannot be a direct victim.

(e) Upholding the voluntary nature of conferencing and maximising the input of young offenders

There have been significant concerns internationally about how to ensure that young offenders are able to participate fully and to ensure that their consent is informed and that they are not either overawed or feel powerless – what Kathleen Daly (2002) has called the problem of being one young person in a roomful of adults. The original evaluation of youth conferencing in 2005, concentrating on court-ordered conferences, found that facilitators strongly encouraged participation by young people, who were rated by observers as able to participate (Campbell et al. 2005). More recently, though, Barnes' (2015) research into diversionary conferences has criticised the practice of some facilitators. From observation and interviews with young people, she concluded that some conferences were too quick, such that young people could not participate, and that offering an apology was not just expected but really scripted, so that it did not feel genuine to them. Some of her interviewees did not feel they really had a choice as to whether to participate in the conference, because the alternative was court and obtaining a criminal record. She concludes that some diversionary conferencing has become too predictable and professionalised, losing its restorativeness and ability to adjust to individual young people's circumstances. Clearly this is a danger if staff have too high a caseload, which can happen, particularly when an agency is overstretched. The YJA itself has acknowledged some difficulties, but measures have been taken to help staff.

(f) The proportionality of conference plans

Perhaps the greatest challenge in relation to diversionary conferencing has been whether conference plans are seen as sufficient to mark the gravity of the offence. The procedure is that the participants at the conference agree a plan, which is then sent by the facilitator to the PPS (in the case of diversionary conferences) or to the court (in the case of presentence conferences). The court has the power to alter a conference plan, but the PPS only has the power to agree or reject the plan, though acceptance can be delayed for seven days for the facilitator to make adjustments.

PPS respondents told us that they have no guidelines specifically on what makes a conference plan acceptable (they have the power if necessary to stop the conference process and take the case through to court). They would consider particularly the proportionality of the plan to the offence, though also the offender's needs, given that they saw the purpose of the youth conference as being to divert the offender away from a criminal lifestyle whilst also giving something back to the victim. If they thought it was not acceptable, the facilitator might then be asked to modify the plan. Though the PPS told us that they considered the YJA facilitators and the agency itself to be expert in this area, it was less clear to us that the YJA saw itself as having the ability to determine the level of punitiveness of plans. If it was felt that a plan should be altered, then the facilitator would consult with the victim before that was done.

It was clear to us that there had been some discussion and misperceptions in the past over what this difficult equation of proportionality means in relation to diversionary conferences. The Review of Youth Justice found that plans had become disproportionate (too onerous) in their view, and we were told that this had occurred because facilitators had gained the impression that victims wanted more punishment than the level of plan was providing (Department of Justice 2011). The Review noted that since 2006 the length of plans had been increasing (from only 12% being over six months in 2006/07 to 56% in 2010/11). In response the YJA put in place a check that any diversionary conference plan over six months in overall length needed to be checked by YJA managers. As we saw above, the proportion over six months then fell to 30% in 2014/15 (Youth Justice Agency 2016). Equally, the PPS may ask for elements to address particular offenders' needs to be inserted (such as drug abuse) if they see past evidence of such a need in the file. Barnes (2015) also comments strongly on what she sees as the lack of ability for some young offenders to contribute to discussion of the plan in the conference and the onerousness of some conference plans (though half her respondents were positive about their plans).

There is no perfect equation to be found on proportionality, because public and professional views on what is reasonable and proportional will change over time. Some indeed would argue that proportionality is an alien concept to restorative justice, because any plan or conference outcome agreement should reflect all the circumstances of the offender and the needs of the individual victim,

rather than the seriousness of the offence being preeminent. Indeed, restorative justice theorists would argue that the plan should be constructed by the participants and not altered by others thereafter. The international instruments on restorative justice vary on whether proportionality is appropriate. However, the adoption of the 'balanced system' for restorative justice, which characterises the Northern Ireland model, suggests that proportionality is appropriate. Currently, the YJA and PPS are having meetings every quarter to review plans and processes and this seems the most sensible, given that the PPS primarily consider files and written sources, whereas the YJA has the experience of what is happening in conferences.

## Restorative justice related to criminal justice in cases with adult offenders

As staff from the Probation Board of Northern Ireland (PBNI) pointed out to us, there is no current legislative framework for restorative justice in adult offender cases, unlike in youth cases. As a result, PBNI strategy in relation to restorative justice is broad, with restorative justice potentially included within community orders, enhanced community orders and in work with victims of crime, but it is not a prominent area of work. Almost all of this work is post-court and indeed post-sentence, and so cannot be covered in detail in this chapter. Because there is no statutory provision pre-court for cases with adult offenders, it is difficult for funds to be allocated or pilots conducted in times of austerity, such as the current time. Moreover, practitioners have had to focus on their core work, which means that restorative justice is not very likely to be mentioned to offenders on community sentences or diversion programmes.

There are two post-court schemes administered by PBNI for victims. The Victim Information Scheme is a statutory scheme which provides information to victims about an offender's probation order. The Prisoner Release Victim Information Scheme provides information about offenders sentenced to custody. Services are provided on an 'opt-in' basis and in 2015/16 only 132 people registered for information. There also used to be some restorative justice work in prisons, but with changes in personnel that has ceased.

In contrast with the striking developments in relation to youth justice, Northern Ireland (and indeed the PBNI) have been slower to embrace restorative justice for adults. However, victims' issues have been strongly promoted since criminal justice has been devolved to Stormont, and the new Enhanced Community Order (an alternative to short term custodial sentences) can include restorative justice in the offender's plan. There are now tentative plans to develop restorative justice for adults, including using community restorative justice groups to deliver a restorative justice element. In 2015, PBNI funded work with CRJI using assets from the civil recovery scheme (from the proceeds of crime) to help CRJI to start work in Newtownards. However, that funding has now ceased and victim contact has tailed off. Yet most PBNI staff have had restorative justice training and it is felt that the fall in reoffending by young offenders when they become young adults (and come to the PBNI) has been due to youth conferencing (although clear evidence of this was not available). It was felt that, given strong leadership and some lessening of the pressure of austerity, there is no practical or theoretical obstacle to moving towards the provision of restorative justice in the case of adult offenders.

## Pointers in relation to the development of restorative justice in England & Wales

Restorative justice in Northern Ireland has only a short history in recent times, shorter than it has in England & Wales. Community restorative justice schemes started only in 1998, with restorative justice linked to criminal justice commencing in 2002. Yet all our respondents were very positive about restorative justice and saw it as capable of being expanded beyond its current provision and remit. All were clear about the principles of restorative justice. Key leaders in Northern Ireland, including in government, the Lord Chief Justice and the Criminal Justice Inspectorate have consistently voiced their support. This shows how swiftly it is possible to develop significant provision of restorative justice and considerable support for it.

There have been some challenges though, particularly recently because of austerity measures (and so lack of funding for any additional projects, whilst statutory agencies have tended to retreat to their core tasks). Moreover, there will always be changes in perspective in youth justice, with the most recent being towards early intervention – which has not been developed elsewhere to include

restorative practices. Criminal justice services, particularly if stretched, tend to be offender-oriented services, so it is remarkable that the balanced model of restorative justice, which looks to focus equally on victim and offender (and which is entirely compatible with the EU Victims Directive and the Victims Charter), has remained strongly underlying practice.

Provision in Northern Ireland though is patchy, not in the normal sense of only being available in certain geographical areas, but in terms of criminal justice, by age. Restorative justice in Northern Ireland is really only available for young offenders. However, it is not confined to minor offences or first-time offenders. The major reason for the considerable extent of current provision for young offenders is clearly the legislative framework provided by the Justice (Northern Ireland) Act 2002, following the Criminal Justice Review, which governs both court ordered conferences and diversionary conferences. Though there have been significant challenges to working out the best mode of operation for these provisions, which are meant to cover a wide range of offences, the basic model is still very much in operation.

Youth conferencing (both court based and diversionary) is embedded in the criminal justice system, with (almost) all cases being considered by sentencers and public prosecutors. It is delivered by a separate agency, the Youth Justice Agency, which is also responsible for overseeing the working out of conference plans. Hence it is not a referral system per se, where individual cases are selected for restorative justice, and this is key to its continuing use.

The recent development of Youth Engagement Clinics and resulting joint working between the police diversion officers and Youth Justice Agency, have provided a more rapid system of triage for youth cases. This kind of joint consideration of all youth cases does get over the referral problem. The more restorative disposals (youth conferencing, restorative cautions) have been reserved for more serious matters. However, with the future development of community disposals solely under a police ambit, it is less clear whether there will be victim consultation or input or restorative intervention to the same degree.

More minor youth cases may also receive restorative input, through restorative cautioning by the police (and informed warnings, which may include restorative elements when delivered by neighbourhood officers). However here it is less clear what current practice is and the extent to which victims are involved. Austerity measures, together with the occurrence of continuing serious crime linked to paramilitary activity, have worked against the use of neighbourhood officers in all areas and have affected the confidence of officers and their local knowledge to deliver restorative justice. The use and continuing presence of neighbourhood officers seems key to encouraging the police to use restorative methods themselves.

In contrast, there is very little restorative justice in relation to adult or young adult offenders, and it would seem little opportunity for victims to request it until a case has been sentenced at court.

Community restorative justice schemes have expanded since their successful introduction and are continuing to do very good work. They work primarily on youth cases, but also on adult cases. Their existence and expansion is however entirely dependent upon funding, largely from charitable sources. As in England & Wales, though they have received both government and criminal justice funding this has been very modest and short-term and though there is commitment, it is very difficult for them to plan or develop. Their strength though is their links with their own community and so it will always be difficult to have such restorative justice provision without grass roots willingness to support these schemes. They are now working with the police and other agencies within their own geographical areas.

However, the Protocol system set up for liaison between the police and community restorative justice schemes on individual cases, is simply not working in terms of those cases being sent back to the schemes for a restorative input. The problems are both lack of trust and cumbersome procedures, leading to significant delays. It is another instance of difficulty where bodies are working sequentially, rather than jointly, and where a referral system is adopted.



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