

CPCS Restorative Justice Working Group – May 2023

Scope of Work

The CPCS Restorative Justice Working Group was convened in 2022 to review our current understanding of Restorative Justice practices, to examine the potential for Restorative Justice across all practice areas at CPCS, to identify resources and community partners, and recommend internal policies and practices.

Introduction

Restorative justice is a process to involve, to the extent possible, those who have a stake in an offense and to collectively identify and address harms, needs and obligations, in order to heal and put things right as possible.¹ M.G.L. c. 276B defines restorative justice as “a voluntary process whereby offenders, victims and members of the community collectively identify and address harms, needs and obligations resulting from an offense, in order to understand the impact of that offense.”

Restorative justice is a process that supports an offender, who accepts responsibility for their actions and makes reparation to the victim or to the community they have harmed. It is also a process that supports the victim, by giving them an active role in discussing the impact of the harm done to them and in deciding what should be done to repair the harm.²

Restorative justice is a type of meeting, usually conducted in a circle, that is facilitated by a trained facilitator or circle keeper. For more complex issues, such as those involving crimes, there are often a number of preparatory meetings held in advance of the circle. Follow-up meetings are also common. Participants are usually required to sign confidentiality agreements, as it is believed that confidentiality encourages honest communication.

Historically, “Circles” are an indigenous practice, used to resolve issues, address harm, and restore balance to the community. “Restorative Justice” is a western construct and, therefore, a borrowed practice. It typically exists within or parallel to the criminal legal system. Restorative programs can be used as a form of diversion from the criminal process, as an alternative form of sentencing, or as a way to reduce a criminal sentence.³

Fundamentally, restorative justice involves a shift from passive responsibility to which offenders are held by professionals for something they have done in the past, to citizens taking active responsibility for making things right into the future.⁴

Participation in restorative justice circles reduces recidivism. While older studies have shown mixed results, recent studies that examined recidivism rates have become more definitive and in favor of restorative justice.^{5, 6}

¹ Howard Zehr, *The Little Book of Restorative Justice*, 2002.

² John Braithwaite, *Restorative Justice and De-Professionalization*, 13 *The Good Society* 28 (2004).

³ Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 *Buff. L. Rev.* 635, 637 (2021).

⁴ *Id.*

⁵ Hennessey Hayes, *Assessing Reoffending in Restorative Justice Conferences*, 38(1) *Australian and New Zealand Journal of Criminology* 77 (2005).

⁶ John Braithwaite, *Restorative Justice and De-Professionalization*, 13(1) *The Good Society* 28 (2004).

Review of Restorative Justice Practices and Current Understanding

The CPCS Restorative Justice Working Group was convened in 2022 to look at Restorative Justice, to identify issues of concern to defense attorneys and relevant to the mission of the Committee for Public Counsel Services (CPCS).

During 2022, the CPCS Restorative Justice Working Group examined the use of restorative justice at each phase of the criminal justice system and identified procedural and substantive issues that our clients might encounter if provided with the opportunity to participate in restorative justice. We also discussed the role of Defense Counsel in preparing clients for circle work.

Pre-Arrest Diversion

In Massachusetts, restorative justice is offered as a pre-arrest diversion in three counties – Middlesex County, Suffolk County, and Hampshire County – through the non-profit Communities for Restorative Justice (C4RJ). Under this model, participating police departments refer cases directly to C4RJ once they have found probable cause that a crime has been committed. Cases include misdemeanors and felonies, and are referred to C4RJ before a complaint is filed in criminal court.

C4RJ's model includes an intake process, an opening circle, facilitated meetings outside of the circle, and a final circle. Confidentiality forms are signed by all. Police are present in the circles, as they are considered to be part of the trauma cycle, though C4RJ's web site also states that they are there for safety purposes. C4RJ accepts referrals from all parties, though nearly all of their current referrals come directly from the 29 "member" police departments. There is a \$250 participation fee for each responsible party. Communities for Restorative Justice is currently expanding its model to offer restorative justice as diversion after arrest, and for pretrial and probation conditions.

The Working Group has not identified other restorative justice providers in Massachusetts who do pre-arrest diversion work.

Because restorative justice is offered before a criminal complaint is filed, Defense Counsel has also not been appointed. Therefore, the Working Group's concerns about pre-arrest restorative justice include:

- What documents are being used and signed to ensure confidentiality?
- Are there any other agreements, implied or expressed?
- Do any documents or agreements jeopardize a defendant's constitutional right against self-incrimination?
- Does participation in circle, and in any other meeting or conversation, jeopardize a defendant's right against self-incrimination?
- Is preparation in restorative justice circles coercive? Is there an implied or explicit understanding that participation will result in a reward or a consequence material to a criminal matter?
- Other than police officers, are mandated reporters involved at any stage of this process?

The Working Group looked to other models that utilize restorative justice in pre-arraignment diversion.⁷ In New Zealand, restorative justice is available for juveniles, but not adults. Arrests of young people are discouraged and cases are automatically diverted away from the criminal legal system.

Restorative Justice is called Family Group Conference, and is based on the idea that children are not criminals, but young people in need of guidance and support. Everything that happens in the Family Group Conferences is confidential. Offenders sign a waiver. Judges do not participate. Victims are entitled to attend, they are not required to participate. However, it is generally believed that when victims attend, there are better outcomes.

The role of Defense Counsel is to prepare the young person for the circle process, to help come up with a plan to repair the harm they have caused, and to encourage full participation in the circle. The focus of restorative justice in New Zealand is not on due process or on fact-finding, but rather on helping the young person take responsibility.

Restorative justice is not used as a healing tool in New Zealand, the way it is utilized elsewhere. Family Group Conferences are based on indigenous Mauri kinship patterns and ultimately are designed to return power to families and communities.

Pre-Trial Diversion

In Massachusetts, there are a few providers who provide pre-trial restorative justice to Defendant/Offenders. The Working Group looked at programming provided by Roca, Inc., the Transformational Prison Project, and C4RJ.⁸

Roca, Inc. gives credit to the Tagish Tlingit First Nation peoples who came to Boston to share and teach the circle process to them. Roca was given permission by the Tagish Tlingit to use and to share their circle practice. Roca considers peacemaking circles to be a sacred space that builds trust, respect, and mutuality.

Roca utilizes restorative justice peacemaking circles in their overall approach with at-risk youth to build positive connections with them and their families, and with community leaders. Roca peacemaking circles are adjacent to the criminal justice system, not connected to it. Because of that, Roca does not utilize confidentiality documents or waivers. Roca does not receive requests from the court to conduct circles with certain individuals who are court-involved, nor does it report back to the court any young person's participation in a circle.

Roca has a statewide presence, but is not fully available in certain counties in Massachusetts.

⁷ Ziyad Hopkins presented this information to the CPCS RJ Working Group. He is the Attorney in Charge of the Youth Advocacy Division in Quincy, MA. In 2015, he was awarded a fellowship in 2015 to study restorative justice in New Zealand's juvenile justice system.

⁸ In May 2022, the Suffolk County District Attorney's Office unveiled a restorative justice pre-trial diversion program in Roxbury, Chelsea, and Charlestown District Courts. Their named service provider was C4RJ. As of October 6, 2022, C4RJ advised the CPCS RJ Working Group that it had not received any referrals.

Though most of its restorative justice work is focused on re-entry efforts, the Transformational Prison Project has been used by Defense Counsel in Suffolk County to propose conditions of release under G.L. c. 276, § 58A.

Because counsel has been appointed by the pre-trial phase, they can play a role in preparing their client for circle work. Defense Counsel should:

- Review any documents, contracts, or waivers about the process
- Encourage the client to sign confidentiality documents or provide such a document
- Prepare the client to participate fully in the process, which includes the circle
- Advise the client of constitutional concerns when communicating about an open case
- Help the client come up with a plan to repair the harm they have caused

Post-Conviction Restorative Justice

The Working Group met with Maria D'Addieco to discuss her work as a federal probation officer and co-creator of the RISE program in Federal District Court.

Restorative Justice circles are a part of the RISE program in Federal Court in Boston, and are similar to other “problem-solving” court programs. The offender applies to the RISE after pleading Guilty. Sentencing is deferred for 1 year while they work on their list of goals. The offender must be out on release. Probation provides a very high level of supervision, and requires an offender to do a number of things before and after participating in the restorative justice circle.

No one connected to the offender's case is in the circle. Participation is voluntary, with about 84% of participants volunteering to continue. There is no carrot-stick incentive attached to a court case (e.g., if you participate in restorative justice circles, your sentence will be reduced). Ultimately, the offender's restorative justice coordinator reports back to the court that the offender completed the requirements of the program. There is no guarantee there will be an impact on sentencing, but judges tend to look favorably upon participation.

In the RISE program, the practitioners look for formal and informal strategies to process the harm. They work to shift the focus from “what laws were broken” to “what harm was caused,” from “who committed the crime” to “what do they need,” and from “how to punish the offender” to “what needs to be done to repair the harm.” Restorative Justice is always victim-centered and is always about making amends, of having, promoting a meaningful acceptance of recognition for the harm caused.

Everyone who participates in the circle is bound by confidentiality, except in situations where a person threatens harm to others or to self. People do talk freely, and many get close to over-sharing. The prosecutors who participate in the circle are not there in their prosecutorial role, but are in the circle to see how what they do creates harm.

Because participation in this type of restorative justice occurs after conviction, there is minimal constitutional risk. If appropriate, Defense Counsel can:

- Advise the client to avoid legal language like using “alleged” victim or “alleged” crime
- Advise the client of constitutional concerns when communicating about an open case

Re-Entry Restorative Justice

The Working Group examined two restorative justice being used in two different re-entry approaches. Attorney Belger has introduced restorative practices into her parole board post-conviction work, as a way to bring healing to people who carry a lot of shame and trauma, and to prepare her clients for re-entry.⁹

The Parole Board is very interested when a candidate conveys accountability and insight into his/her behavior. Those who participate in restorative justice tend to make more authentic apologies.

Robert Foxworth helps her with her restorative justice work with her parole clients, as he has used restorative justice to adjust to life outside of prison. She and Robert use a lot of books to have conversations about healing, readiness. Books help their clients process trauma.

In a restorative practice, the relationship is the most important. The skills of open communication, trust, understanding have to be learned and developed, and they take time. Circle work is based on trust. Circle work, inside prison, does not usually involve face-to-face dialogue with the victim. They use a surrogate. They work on the apology – verbally, and in writing. An apology is the debt they owe, regardless of outcome, based on the harm they have caused.

The Transformational Prison Project is led by formerly-incarcerated individuals who participated in and benefitted from restorative justice programs while incarcerated at MCI-Norfolk. Their work in restorative justice focuses on re-entry, not diversion. Their work includes a particular acknowledgement that offenders are often victims of violence in their communities, homes, and prisons. Their circle process is survivor-led.

The role of Defense Counsel should be collaborative and should support the work in the community. Healing and accountability – in and out of the circle – should be addressed by people within the community. The role of Defense Counsel should be to use our access to privilege to leverage their autonomy.¹⁰

Conclusion

In general, restorative justice can and should be used at multiple points along the criminal legal system. To date, there appears to be little or no collaboration or coordination between District Attorney offices and Defense Counsel with respect to any screening process or a referral to restorative justice programs.

⁹ Amy Belger is a post-conviction and appellate attorney, member of the CPCS Murder Panel, and the CPCS Innocence Program, talked about her use of Restorative Justice in her parole work. She was joined by her former client, exoneree Robert Foxworth.

¹⁰ Sarah Laughlin presented this information to the CPCS RJ Working Group. Sarah is a social services advocate for CPCS PDD Boston Office, and has done restorative justice work with the restorative justice program at MCI Norfolk and with the Transformational Prison Project.

In truth, a few safeguards can be put in place to protect offenders from legal jeopardy. Defense Counsel can provide necessary legal advice as well as play a role in preparing offenders to participate fully in restorative justice circles, to make amends, and to repair the harm they have caused.

Next Steps

Currently, there is a growing movement to use restorative justice in pockets of the United States within the traditional criminal justice system or as an adjunct to it.¹¹

At the moment, in Massachusetts, there is no system-wide effort to coordinate policies, procedures, or resources. To be sure, there are individuals and small organizations engaged in restorative justice development and implementation, but little is being done on a large state-wide scale in such a way that those who work in the trial courts could adopt and implement these practices in a consistent way.

However, in May 2023, Chief Justice Kimberly Budd convened the Supreme Judicial Court Committee on Restorative Justice to develop, implement, and oversee two pilot programs to make restorative justice available as an option in selected court cases for either (1) individuals at the pretrial/presentencing stage, or (2) individuals who have already been sentenced and are on probation.

Chief Justice Kimberly Budd has commented publically that restorative justice can and should play a role in addressing some of the challenges we face in our criminal justice system. She has recognized the need to “examine and formulate best practices and ensure their fair application across the Commonwealth for victims, offenders, and their communities,” including the need to provide education, resources, and support for judges. “As restorative justice programs expand, we will need to figure out how to develop a sufficient network of trained providers.”¹²

Restorative Justice at CPCS

The Restorative Justice Working Group will continue its work in the coming year, to examine the potential for restorative justice across all practice areas at CPCS.

In 2022, our work focused on the Public Defender Division (PDD) and the Youth Advocacy Department (YAD). In 2023, we will explore restorative justice for use by attorneys and practitioners in our Children and Family Law division (CAFL) as well as the new Emerging Adult Pilot Office (EAPO).

As the SJC/Trial Court works on developing pilot projects, the Working Group will collaborate with the Training Unit to provide support and direction.

¹¹ ABA Criminal Justice Section, Restorative Justice Resolution, (2020).

¹² Chief Justice Kimberly S. Budd, *Remarks on Restorative Justice*, Flaschner Judicial Institute Program, April 12, 2022.

Resources and Community Partners

The Restorative Justice Working Group will assess restorative justice practice in the communities we serve, and continue to work to identify external resources and community partners to help increase our understanding of and/or to help integrate this work with our mission.

Internal Policies/Practices/Training

The Restorative Justice Working Group will recommend internal policies and practices and develop organizational capabilities.

The Restorative Justice Working Group will make available opportunities to engage in restorative justice circle trainings to those who are interested in learning more or in expanding their knowledge and practice.

CPCS Restorative Justice Working Group Participants, 2022-2023

1. Kristen Graves, Chair, Staff Attorney Salem PDD
2. Allison Cartwright, Managing Director PDD, Central Region
3. John Lozada, CPCS Equity and Inclusion Director
4. Theresa Coney, CPCS Racial Equity Statewide Training Lead
5. Cristina Rodrigues, Staff Attorney Boston PDD
6. Sarah Laughlin, SSA for PDD Boston
7. Ziyad Hopkins, AIC Quincy YAD
8. Jill Klowden, AIC Quincy PDD
9. Katherine Grubbs, AIC Pittsfield PDD
10. Caitlin Perry, Staff Attorney Pittsfield PDD