

# **RESTORATIVE JUSTICE DIVERSION PROJECT**

## **GUIDANCE FOR PROSECUTORS**

## 1. INTRODUCTION

- 1.1 The purpose of this guidance is to assist Crown Prosecutors in deciding when a case is eligible and suitable to be diverted to the Restorative Justice Diversion Project (RJDP) operating in London.
- 1.2 The guidance applies only to those London Boroughs operating the project and only for its duration.
- 1.3 The guidance is approved and issued by the Director of Public Prosecutions (DPP). It may be reviewed and revised periodically by the DPP in consultation with the Justice Research Consortium (JRC), the London Criminal Justice Board (LCJB), the Home Office and the Attorney General.

## 2. BACKGROUND

- 2.1 Restorative justice processes bring victims and offenders into contact to decide how to respond to the offence, and agree on how to repair the harm the offender has caused.<sup>1</sup> Restorative justice has been defined as “a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future<sup>2</sup>. The result of a successful restorative justice process will normally be an outcome agreement.
- 2.2 On 22<sup>nd</sup> July 2003, the Government published a restorative justice strategy document which set out the research evidence for restorative justice, and made clear the Government’s aim of maximising the use of restorative justice where we know it works well to meet victims needs and reduce re-offending. The Government’s strategy document can be found at: [www.homeoffice.gov.uk/justice/victims/restorative](http://www.homeoffice.gov.uk/justice/victims/restorative)

## 3. THE AIM OF THE PROJECT

- 3.1 The potential benefits of this project are to reduce re-offending and increase victim satisfaction through individual and community involvement. A *diversion* from the CJS may also:
  - Deal effectively and efficiently with some offences without the need for recourse to the courts;
  - Reduce the volume of cases proceeding to court, thereby freeing up court time for cases that really need it; and
  - Increase individual and community involvement in addressing criminal behaviour – and, in particular, encourage a greater focus on victims’ needs.

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<sup>1</sup> “Reparation” is any activity required by legal processes by which an offender attempts to repair the harm a crime has caused to a personal victim or a community.

<sup>2</sup> Marshall 1999

- 3.2 This project will complement research and pilots in other areas to provide robust information on the outcomes and processes involved in such an approach to inform future policy.

#### **4. THE MECHANISM BY WHICH DIVERSION WILL TAKE PLACE**

- 4.1 This diversion project will rely upon police decisions to divert offenders and not to proceed to charge, in consultation with Duty Prosecutors.
- 4.2 The Director's Guidance on Charging (Second Edition) allows the police to divert offenders from prosecution without referring the case to a Crown Prosecutor (paragraph 9.1). In cases in which the police do not wish to proceed with a prosecution, no reference need be made to a Crown Prosecutor unless the case is one involving an indictable only matter in which the Threshold Test is met (paragraph 8.3) In such cases, early Consultation with a Crown Prosecutor is encouraged within the Guidance at paragraphs 5.2 and 9.2.
- 4.3 The police, in consultation with JRC, will identify cases that are eligible for the project. The eligibility criteria are in Annexe A to this Guidance.
- 4.4 Cases identified for diversion to the project and proceeding to a Restorative Justice outcome agreement, will result in no further action being taken against the offender in respect of the offence(s) diverted, provided that conditions are completed. Cases identified for diversion to the project that fall short of a completed Restorative Justice outcome agreement, at whatever stage, will be referred back to a Duty Prosecutor for a charging decision when the file is complete.
- 4.5 In order to preserve public confidence, cases referred back to the Duty Prosecutor for a charging decision should, other than in the most exceptional of circumstances, proceed to charge if the case meets the required standard in the Code for Crown Prosecutors.
- 4.6 It is the responsibility of the Duty Prosecutor at the time of the early consultation with the police to be satisfied that there is sufficient evidence to pass the Code for Crown Prosecutor's tests (but see paragraph 4.8 below) but that it is also in the public interest for the prosecution to be suspended while the offender is given opportunity to be diverted from prosecution in the manner contemplated by this Guidance and completes all requirements satisfactorily.
- 4.7 Should the offender complete all the requirements of the diversion satisfactorily, the case will not require prosecution and the case can be finalised.
- 4.8 As diverted cases under this Guidance are currently not to be counted as offences brought to justice, for the purposes of diverting sufficient volume of cases for this project, it is not necessary for the police to provide all the documentation that would be expected under Manual of Guidance provisions for an expedited file for a charging decision when consulting with the Duty Prosecutor concerning a possible diversion. However, as the outcome of the consultation may be to divert an offender who may then

come into contact with a victim and in order to provide CPS endorsement of the diversion, the Duty Prosecutor should expect to see the key statements at least on which the decision to divert is being made and which would therefore be available if the case were referred back for prosecution.

- 4.9 Notwithstanding that a risk assessment of the offender will be conducted by the project team, the Duty Prosecutor should make enquiry about the defendant's previous convictions and behaviour during the offending, and the behaviour at the time of the arrest and during the detention period in custody. Diligent enquiry should also be made of the officer about the offender's background (physical, emotional and mental) and any other circumstances that may impact on the behaviour of the offender during the diversion period that is being contemplated and render a diversion of this type unsuitable for the CPS to endorse.
- 4.10 The full consultation process will be recorded on Form MG3 by the police and the Duty Prosecutor. This should include a list of the material shown to the Duty prosecutor and any discussion as to the sufficiency of evidence within the scope and reach of the investigation and any other relevant issue. Any advice on the public interest in diverting the case must also be recorded. The code to be used on Form MG3 to record disposals is "**Other: Restorative Justice**".
- 4.11 If the Duty Prosecutor is not satisfied that the case should receive the CPS's endorsement for diversion, the MG3 should be noted accordingly.
- 4.12 It is the responsibility of the Duty Prosecutor at the time of the early consultation to consider whether any advice should be given to the police about the public interest implications of diverting the case. In doing so, the Prosecutor should bear in mind that victim consent is a necessary first step to successful diversion. Without victim consent the case may have to return to the Duty Prosecutor for a charging decision.
- 4.13 In cases where the public interest is closely linked to the victim's wishes there is likely to be little difficulty in agreeing with the police decision to divert the case. However, in serious cases and cases where the wider public interest should be considered, careful thought should be given to whether diversion is appropriate. Reference should be made to the Offence Seriousness Factors (Annexe A to this Guidance) when making the decision. When considering the wider public interest it may be helpful to ask whether the victim's own wish for a Restorative Justice process must be disappointed in order to avoid possible damage to public confidence in the criminal justice system.

## **5. THE RESTORATIVE JUSTICE DIVERSION PILOT:**

### ***STAGE I - WHEN CAN DIVERSION TAKE PLACE?***

- 5.1 Following consultation with CPS, if the case is selected for diversion, JRC will then contact the victim and the offender to establish whether they are prepared to participate in the scheme. JRC will then assess the victim and offender to determine risk, suitability and views of restorative justice and reparation.
- 5.2 If both parties consent to participate in the scheme and the risk assessment concludes that diversion is appropriate, the case will be put forward to the scheme. In order that a sound and scientific basis for the findings in this project, only half of the cases will be selected at random to enter the scheme. The other half will proceed to charge in the usual way and their outcomes will be tracked for comparison with cases treated under the scheme.
- 5.3 If one of the parties does not wish to participate, or the risk assessment concludes that diversion is inappropriate, the case will be referred back to the prosecutor, under the normal charging arrangements, to decide whether the case should be prosecuted.
- 5.4 Prosecutors should give consideration to any reasons put forward by the victim in support of his/her opinion that the offence ought to be prosecuted. For example, the victim may provide further information in relation to the background or the impact of the offence. **However, the victim does not and must not have a veto on diversion or prosecution.** In rare cases there is provision to divert offenders to community reparation. These are cases in which the attempt to divert seems to have been unreasonably or unnecessarily frustrated through no fault of the offender and in which it would be unfair and damaging to public confidence to prefer charges or take no action at all. (See paragraph 9.3) However, the decision to make this request shall be taken in conjunction with a Level E lawyer assigned responsibility for this project and attached to London Area Secretariat.
- 5.5 Offenders participating in the project will be required to sign an “admission of responsibility” form produced by the police, to demonstrate that they take responsibility for their actions. Although this is deemed inadmissible as evidence in court, it provides some assurance, alongside the project’s procedures for assessing risk and motivation, of the offender’s good faith.
- 5.6 Offenders will be required to attend a Restorative Justice Centre at a specific time to discuss the detail of the process and later to attend either a meeting with the victim OR successive meetings with a facilitator.
- 5.7 If the case proceeds to restorative justice a record will be made and signed by the victim and offender as to what actions are required as part of the outcome agreement. The actions agreed must be reparative or rehabilitative in nature, must be capable of being complied with within a defined and reasonable period and must be proportionate to the offending. In summary only matters it is important to note any statutory time limits to enable a charge to be brought in the event of non compliance with the scheme
- 5.8 If at any time the offender fails to comply with the requirements of the restorative process without reasonable excuse, or the outcome agreement, the police will refer the case as an expedited file to the CPS for a charging decision to be made.

- 5.9 Prosecution may be as a result of an offender failing to keep appointments with police, or failing to attend a scheduled restorative meeting, or failing to perform the last remaining requirement. An example of the latter may be failure to pay agreed compensation or to write and hand to the facilitator a letter of apology. All of the above is subject to their being no reasonable excuse for failure to comply.
- 5.10 When addressing the public interest aspect of a decision about prosecution that results from a failure to keep any or all of the requirements of an outcome agreement, the Prosecutor will take into account whether the requirements were proportionate to the offending, the degree to which the agreement was met and the reasonableness of the timescale for performance.

## **6. STAGE 2 - IS THE CASE ELIGIBLE FOR DIVERSION TO THE PILOT?**

- 6.1 The decision to divert is a police decision in consultation with the CPS. It is not a charging decision but the Duty Prosecutor must be satisfied that the case would meet the evidential test through inspecting the components of the key evidence, which will normally be the statements (MG11s). It will not be fatal to the diversion if corroborative statements and ROTIs and photographs are unavailable, unless it would be impossible to make an affirmative decision without them. A verbal account of an interview conducted by the police officer will be sufficient at this stage. The considerations in section 4 of the Guidance should be applied to ensure that the conduct of this research is to the benefit of the wider public interest, without undermining public confidence.
- 6.2 For diversion from prosecution to restorative processes to be considered, the prosecutor must be satisfied that the following “eligibility factors” have been fulfilled:
- The offence must be one that the prosecutor would have prosecuted had restorative processes not been available;
  - The offender is aged 18 or over at the time of the offence;
  - There is an identifiable victim<sup>3</sup>;
  - The offence is *not* one of the excluded offences in Annex A.:
- 6.3 No indictable only offence is to be considered for diversion.

## **7. STAGE 3 - IS THE CASE SUITABLE FOR DIVERSION?**

- 7.1 Prosecutors have always been required by the Code for Crown Prosecutors to consider alternatives to prosecution. If the offender is *prima facie* eligible for diversion to be considered, the prosecutor must consider whether or not

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<sup>3</sup> For the purposes of the pilot the term “victim” excludes businesses, organisations or other corporate bodies where no individual can be identified as suffering harm. E.g. theft from or damage to a department store would be excluded whereas theft or damage to a small grocery store could be included.

diversion is appropriate having regard to the particular features of the case and the surrounding circumstances.

- 7.2 The restorative and reparative processes available for the restorative justice diversion project enables prosecutors to consider offences of a greater seriousness than previously for diversion. The general public interest factors against diversion (below) and the offence seriousness factors (at Annex A) are intended to guide prosecutors and police officers by outlining the parameters of the project in terms of the level of offence that should be diverted and the types of offender for whom diversion might be appropriate.

### **Public interest factors to be taken into account when considering whether diversion is in principle appropriate**

- 7.3 Where the basic eligibility requirements have been fulfilled, a qualifying offence ought generally to be considered in principle suitable for diversion unless the following general factors are present:

- The offence is too serious for any form of diversion to be justified in the public interest or is an indictable only offence (see offence seriousness factors at Annex A);
- A conviction is likely to result in a significant sentence<sup>4</sup>;
- The offender has relevant previous convictions<sup>5</sup>;

## **8. STAGE 4 - RISK ASSESSMENT AND RANDOMISATION**

- 8.1 Once a case has been referred to the scheme as provisionally suitable for restorative processes, the offender must agree in writing to fully co-operate with the researchers and participate in the conference. The offender will then be bailed for a period of 8 weeks for a case disposal decision to allow time for a restorative conference to take place.
- 8.2 The JRC will then conduct risk assessments of both the offender and the victim. Risk assessments are on-going throughout the process to prevent harm, physical or emotional, to any participant in the process. Risks identified can often be managed to allow victims potentially to benefit from the process.

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<sup>4</sup> Subject to application of this guidance and the offence seriousness factors, this may include cases that are not suitable for trial in the magistrates' court.

<sup>5</sup> Prosecutors should take into account any recent previous convictions or cautions that are similar to the present offence and any grounds for believing that the offence is likely to be continued or repeated. However previous convictions are not a bar to participation in this scheme as a restorative process may work to curb offending behaviour where other interventions have previously failed to do so. Previous convictions are just one of a number of factors to be taken into account when considering whether diversion is appropriate. The weight that should be placed on previous convictions depends on how recent they are, their seriousness, their relevance to the current offence, whether or not they relate to the current victim. However, they must be considered as part of the case as a whole. For example, a recent conviction for an offence committed on the victim may tend to weigh heavily against diversion but the circumstances of the latest offence and the attitude of the offender and the victim may tip the balance in favour of diversion.

- 8.3 Whenever a victim or offender declines to participate in the project the police prepare the case to enable a charging decision to be made. Whenever a victim declines to consent, the Duty Prosecutor shall always have the option to decide to ask the police to conduct a reparation agreement process.

#### **The views of the victim**

- 8.4 In cases where the victim is not favourable to restorative or reparative processes, but the offender is suitable under all other factors for diversion, the prosecutor may consider diverting the offender to reparative community work, managed by the scheme, with no involvement from the victim. However, the final decision on whether or not a prosecution is in the public interest is a matter for the prosecutor, not the victim.
- 8.5 Following informed victim consent to JRC staff, the case will be randomly assigned to receive a restorative intervention or the standard criminal prosecution

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