

The restorative justice process

What can I expect?



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Summary

In South Africa, it is an offence to undertake any prohibited or unauthorised activity in respect of any legally protected species, part or whole. Offenders can receive sentences of up to ten years imprisonment, fines of up to R10 million, or both. While this serves to punish the offender, the victims voice is often lost and it does not address the underlying reasons why the crime was committed, resulting in possible reoffending, and the offender does not directly repair the harms caused to the victim. Offenders and victims are also not usually able to directly communicate with each other, which means that offenders do not always fully understand the harm that was caused, and the victim may not learn about important details of the offence or circumstances leading up to it. Restorative justice seeks to address these limitations.

Restorative justice is an approach that aims to achieve justice by creating an opportunity for the offender to repair the harm caused to the victim as far as possible. Many countries, including South Africa, are now including restorative justice in their criminal justice systems (i.e. the conventional court system). If the victim and offender are willing to discuss the offence and together identify steps that can be taken to repair the harm, the results can be transformational.¹ Restorative justice is not a soft approach to justice, all penalties available under the conventional justice system are available when restorative justice is used.

This booklet provides a description of the restorative justice process for victims, offenders, community leaders, and others interested in learning more about the restorative justice process. A more detailed introduction to the role of restorative justice in addressing wildlife offences is provided in accompanying booklets available from the Endangered Wildlife Trust and its partners. These provide important information on the rights and responsibilities of each party, amongst other details. The contents of the booklet are informed by the practice standards developed by Frank and Skelton.²



In promoting justice, the government is responsible for preserving order and the community is responsible for establishing peace³



Introduction

Restorative justice is an approach to justice that focuses on the harm caused to the victim of an offence and creates an opportunity for the offender to repair the harm as far as possible. This approach has been found to be suited to addressing certain wildlife offences in South Africa.

The process involves facilitated face-to-face meetings between the victim, offender, their supporters and, depending on the circumstances, community leaders or others affected by the offence. During these meetings, the victim can directly talk to the offender and explain how the offence affected them. In turn, the offender is provided with an opportunity to explain why they carried out the offence and the circumstances leading up to it. This direct

communication can improve understanding between parties and help the healing process. Restorative justice depends on both the victim and offender being willing to participate and the offender being willing to accept responsibility for the harm caused by the offence.

Restorative justice processes are carried out by a facilitator who guides the parties in the meeting(s) and ensures that they are fair and follow legal requirements. Cases that are referred by prosecutors or the courts are first evaluated to assess whether both the case and the offender are suited to this approach.

Referral

For a case to be referred to restorative justice processes, there must be enough evidence against the offender to prosecute the case. Cases can be referred at any stage of the criminal justice proceedings. In South Africa, they are usually referred before the trial begins (known as diversion) or before conviction as part of a plea and sentencing agreement. In more serious cases, the referral is usually carried out later in the criminal justice proceedings.

The 'victim' of an offence is an individual or group of people who has suffered harm. In the case of a wildlife offence, this could be a private landowner, a ranger, a group of people or an entity such as a protected area or reserve, a representative of a reserve, a group of rangers or the section ranger on behalf of the rangers, or a community who has been affected by wildlife offences. The victim is approached first to find out whether they would be willing to participate in restorative justice. If the victim agrees, the offender is approached. Participation is voluntary, and parties should not be pressured to take part.

Before the parties agree to participate, the facilitator needs to provide them with the information needed to make an informed decision. Parties need to understand what restorative justice is, how the process is carried out, their rights and responsibilities, and possible outcomes. This information must be provided in a language that each party fully understands. A translator or interpreter may need to be provided if one or more parties do not fully understand the language or concepts.

Special care needs to be taken to ensure that offenders under 18 years of age understand all aspects of the case, their rights, and the options open to them. Apart from the right to legal advice, they must be accompanied either by a parent or guardian or court appointed official to assist them.

If the parties agree to participate, the case is referred. The restorative justice process includes four phases, namely:

1 Preparation; 2 Meetings; 3 Formal agreement; and 4 Post-agreement and follow up.



Note for the victim

The victim needs to confirm that they understand that if the restorative justice process fails, they may still have to testify in court at a later stage.

Note for the offender

The offender needs to be fully informed and understand their rights relating to legal implications of participation. If the offender has committed additional offences and admits to these during restorative justice, the additional offences will be reported to the police.

Note for the victim and offender

- Both parties must understand the charge and evidence before starting the restorative justice process.
- Both parties must confirm that they are participating voluntarily and have not been pressured, forced or otherwise persuaded to take part.
- Both parties must confirm that they understand that the willingness of the offender to participate cannot later be used in a court as evidence that the person admitted guilt. If the restorative justice process fails and criminal proceedings are carried out, the offender still has the right to be presumed innocent until proven guilty, as is the case in all criminal proceedings.
- Evidence that arises during restorative justice may not be later submitted if criminal proceedings go ahead.

If both parties agree to participate, the restorative justice process begins. The process can be divided into four phases: **1) Preparation; 2) Meetings; 3) Formal agreement; and 4) Post-agreement and follow up.**



Phase 1 Preparation

The victim, offender, and all other participants must be well prepared and able to participate fully and effectively in the restorative justice process. The facilitator sets up separate meetings with the parties to prepare them each.

Restorative justice meetings should be arranged for a time and place suitable to all parties. A neutral venue that is safe for all the parties will ensure that meetings are confidential, unless otherwise agreed (however, where the restorative justice process is part of criminal justice proceedings, the content of said meeting will be placed in a court report, which is part of public record). As these offences impact South Africa and South Africans broadly, it is encouraged that the parties do agree to waive confidentiality for a fully transparent process. In South Africa, some parties may be unemployed or earning low wages, and it is important to ensure that each party is able to get to the venue.

During preparation, each party must be provided with information on the process and their legal rights and responsibilities both during and after meetings. This phase is extremely important to:

- Ensure that parties know what to expect and what their responsibilities are.
- Confirm that the referral process was carried out properly and that each party fully understands key points relating to the case, as well as their rights, legal implications of participation, and other details.
- Ensure that all parties are able to participate fully. Language or interpretation difficulties will limit a party's ability to take part. Similarly, an imbalance of power between the parties could lead to one party dominating the other. Differences in cultural understandings could also influence the process.
- Ensure that parties understand the possible outcomes of restorative justice and manage unreasonable expectations.
- Confirm the parties are participating voluntarily, and understand that they may withdraw from the process at any stage and choose to go through the courts instead.

What to expect from the preparation phase

All parties need to be fully informed about the restorative justice process. The facilitator should explain how the meetings will be carried out, 'ground rules' that will help keep the process on track, how agreements are reached, and the types of actions or steps that may and may not be included in agreements to repair the harm caused.

Parties must be fully informed of their rights, which include:

- The right to participate voluntarily and the right to withdraw at any stage.
- The right to obtain legal advice at any stage during proceedings.
- The right to confidentiality, which can be waived.
- The right to not be pressured into agreements.

The facilitator will again remind parties of the principles and values of restorative justice, including the need to behave in ways that respect the dignity and rights of other participants. The process must not be humiliating, degrading, or cruel to any party.

The facilitator will review and remind parties of the legal limitations of participation, including:

- the use of evidence or information at a later stage.
- admission of other offences during the process will be reported to the police.

The facilitator will explain how the agreement will be monitored and the consequences should the terms of the agreement not be adhered to.

During the preparation phase, the victim and offender each have an opportunity to ask questions. The facilitator must double-check that parties understand the process and ask if they have questions. The parties should use this time to make sure that any uncertainties they may have are addressed.

The preparation phase is also important for those supporting or representing the victim or offender, including community members. All participants must clearly understand how restorative justice processes work and the details highlighted above, particularly the rights of both victims and offenders.



Phase 2 Meetings

Once parties have been prepared, the facilitator arranges the face-to-face meetings. At the start of the first meeting, the facilitator should explain their role and review the process. The parties will again be reminded of their rights and responsibilities.

The facilitator must also remind participants that the proceedings are confidential, unless waived. Parties may not discuss anything related to the restorative justice meetings with others not directly part of the process. This includes other community or family members, the media, and others, no matter how close they are to the parties.

Under certain circumstances, parties may agree that their right to confidentiality is not essential. But the reasons for this and possible consequences need to be fully thought through and understood by all parties, and all parties must agree to it. If parties give up the right to confidentiality, the agreement to this must be in writing. As these offences impact South Africa and South Africans broadly, it is encouraged that the parties do agree to waive confidentiality for a fully transparent process.

General rules during the restorative justice meetings

The facilitator will inform the parties about the rules for engagement during the meetings. These are usually related to the key principles and values of restorative justice, including:

- The harm caused to the victim and environment must be acknowledged by allowing the victim to explain how the offence affected them and giving the offender the opportunity to accept responsibility for the offence.
- The offender must be given equal opportunities for participation.
- Parties must treat each other with respect and dignity.

- The process may not be degrading or humiliating to the offender or anyone else.

The victim and the offender then identify ways by which the harm can be repaired. Community leaders and other community members may also provide input. If the victim accepts the suggestions on how the harm can be repaired, the facilitator will help the parties draw up an agreement that clearly shows how these will be implemented. When identifying harms caused and ways to repair the harm, it is important to balance the needs of the victim with efforts to reintegrate the offender into the community.

What can the victim expect?

The process should clearly acknowledge the harm caused to the victim and work to meet the victim's needs. These needs could include the need for acknowledgement and vindication, the need for answers, and the need for at least some of the harm caused to be repaired in some way.

What can the offender expect?

The process should respect the experiences and feelings of offenders. They should be allowed to explain why they participated and the circumstances leading up to the offence. They also need to be able to offer suggestions on how to repair the harm that was caused.

Phase 3 Formal Agreement

Drawing up the agreement. The facilitator must explain the types of outcomes and agreements that may be reached through restorative justice, and the details that need to be included in an agreement.

The rights of parties related to the drawing up and acceptance of agreements include:

- All agreements are voluntary. If either the victim or offender disagrees with the offer or specific terms of the agreement, they may decide not to accept it.
- No party may be pressured into accepting an agreement or any part of an agreement.
- Agreements may not include commitments that are overly harsh or cruel, or that humiliate or degrade either party.

Additional points that need to be considered when drawing up agreements include:

- The actions or terms of the agreement must be reasonable and achievable.
- The costs of repairing the harm caused by the offence should not be higher than the harm caused.
- Agreements need to be clearly written and

understandable to all parties. The agreement may need to be translated into the home language of parties.

- The agreement must include ways to monitor and evaluate whether the terms to repair the harm caused have been met.
- Agreements need to include the consequences of one or more parties not meeting their agreed responsibilities and obligations.

To ensure that each party meets their commitments, and to avoid possible disagreements in the future, the parties must identify ways to evaluate and monitor whether all parties met their commitments.

Depending on the circumstances, restorative justice agreements should also try to address the needs of the immediate and wider community. For example, factors that enabled the offender to carry out the offence should be listed and passed on to conservation authorities to assist them to prevent similar offences from being carried out in the future.



The terms of the agreement should include the names of the parties, details of the offence, the ways that the offender has agreed upon to repair the harm, and the other agreed upon applicable penalties. Each step or part of the agreement must be clear and understood by each party, and a specific time frame must be attached to each activity or step to repair the harm.

If both parties agree to all the points covered by the agreement, and accept it by signing, it becomes binding on the parties. This means that, by law, all parties have to make sure they carry out the terms they agreed to, or they will have to pay the penalties for not meeting their obligations, as specified in the agreement. In the offender's case, this could mean that the case is referred back to the criminal justice system.

Phase 4 Post agreement and follow up

The offender and any of the other parties who agreed to specific actions must carry out the agreed terms. At this time, the offender needs to repair the harm caused to the victim, as detailed during the restorative justice process.

All agreements must be monitored to make sure that the offender and any other parties carry out the terms of the agreement within the time frame they agreed to. Depending on the case, this could be done by a community corrections officer. Parties should be reminded of the consequences of not complying.

If the case was referred through the courts, a report on the outcome must be submitted to the prosecutor when the terms of the agreement have been met.



Evaluation of the process

When the case is completed, parties need to be able to participate in an evaluation to assess their experience of the restorative justice process. If the process were implemented within a restorative justice programme, the evaluation would usually be carried out by staff from the programme.

If victims, offenders or other parties are not satisfied with the process, they need to be able to lodge a complaint. If the case was referred by the criminal justice system, the prosecutor or the offender may appeal the outcome or parts of the agreement if there are legal justifications for not agreeing with it.

Restorative justice in action

The following example shows how the process would be carried out to deal with a wildlife offence

Two young men caught hunting with dogs

Two young men were arrested in a private nature reserve after a reed buck was killed while hunting with dogs. One of the offenders was an adult, and the other was 17 years old. Both had hunted with dogs previously.

At the start of the trial, the prosecutor evaluated the case and assessed whether the offenders would be likely to respond positively to restorative justice. Based on the circumstances of the case and the willingness of the offenders to admit to their wrongdoing and the harm that was caused, the case was referred, and the court appointed a facilitator.

The facilitator approached the owner of the nature reserve to invite her to participate in a restorative justice process. The facilitator explained the concept, process, legal implications, rights of parties, and other details and the owner agreed to take part.

The facilitator then met with each of the offenders separately to invite them to participate, providing the same information to make sure they could make informed decisions. The 17-year old offender was supported by his parents. Both offenders received legal advice through Legal Aid. The facilitator also explained the wildlife legislation and other legislation relating to wildlife offences, and the impacts of these illegal activities on wildlife and people.

Preparation

The facilitator set up separate meetings with the reserve owner and the offenders. All the parties were supported by family members. The offenders were also accompanied by the Induna of their village.

The parties were informed of their rights and responsibilities and reminded that the process is voluntary. The process was explained again, and they were given a chance to ask questions.

Restorative justice meetings

The facilitator then set up joint meetings between the reserve owner and the offenders. A translator had been engaged to make sure the offenders could fully participate. The parties were reminded of their rights and responsibilities, and given a summary of the process at the start of the meeting.

The reserve owner described the harm caused by the offence, particularly how illegal hunting with dogs was wiping out game numbers and preventing animals from breeding. She and her family relied on tourism and were afraid that the widespread illegal hunting occurring in the area would destroy their business. Her family were experiencing high levels of stress due to illegal hunting, as crime and violence in South Africa are high, and they feared for their safety and the safety of the reserve employees.

The 17-year old offender explained that he had not intended to cause harm and regarded hunting as a sport. He was deeply sorry and afraid, as he knew that a prison sentence could affect his future prospects of obtaining work. The offenders acknowledged the harm caused and expressed a willingness to try to repair the harm.

The parties then identified specific measures the offenders could take to repair the harm, with inputs from the Induna. The offenders agreed to undertake community service and participate in an environmental education programme run by a Not-For-Profit organisation in the area.

Agreement

A formal agreement was drawn up between the reserve owner and each of the offenders. The parties signed these, and copies were sent to the prosecutor, who agreed to the terms. The prosecutor agreed to two year suspended sentences, with the option to expunge the sentences after four years.

Post Agreement

A community corrections officer was appointed to monitor the activities identified in the agreement. Both offenders carried out the community service and other terms of the agreement within the required time frame and to the satisfaction of the owner of the reserve and the community corrections office. They also participated in the environmental education programme and no longer carried out illegal hunting activities. Each party was provided with an opportunity to provide feedback on the effectiveness of the restorative justice process, with the victims focusing on whether their needs had been met.

Conclusion

Restorative justice is being increasingly applied in conventional criminal justice systems in many countries to address some limitations of the existing ways we address crime. This document explained what parties can expect if they participate in a restorative justice process to address a wildlife offence. Further details on the impacts of wildlife offences and why restorative justice is an effective approach in dealing with them are provided in the booklets listed below, together with important details on the rights of parties and possible outcomes of the process.

Further information and resources

Booklets and pamphlets for the victims, communities, law enforcement, and prosecutors are available from www.ewt.org.za

Contact details

To report a case for potential referral to restorative justice or for further information, please contact:
The Endangered Wildlife Trust at rj@ewt.org.za

References

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3. Van Ness D.W. 1997. Perspectives on Achieving Satisfying Justice: Values and Principles of Restorative Justice. A paper presented at the 'Achieving Satisfying Justice Symposium', Vancouver, BC on March 21, 1997

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