

# Alberta Courts' Restorative Justice Pilot Project Framework

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## Referral Guidelines

*For the sake of the pilot, this framework is designed to ONLY address criminal matters in which charges have been laid, and does not include specific reference to the role of police in making RJ referrals as an alternative to charging.*

### 1. Definition

Restorative Justice (RJ) is:

*...an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime.<sup>1</sup>*

Additionally, RJ:

*... is concerned with the restoration of the parties that are affected by the commission of an offence. Crime generally affects at least three parties: the victim, the community, and the offender. A restorative justice approach seeks to remedy the adverse effects of crime in a manner that addresses the needs of all parties involved. This is accomplished, in part, through the rehabilitation of the offender, reparations to the victim and to the community, and the promotion of a sense of responsibility in the offender and acknowledgment of the harm done to victims and to the community.<sup>2</sup>*

Key Principles:

Victim Centred:

*Restorative justice processes should hold "victims needs... as central concerns in practice, and... their needs are to be held on at least an equal footing with offender and community needs."<sup>3</sup>*

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<sup>1</sup> *R v Gladue*, [1999] 1 SCR 688, at para 71.

<sup>2</sup> *R v Proulx*, 2000 SCC 5, at para 18.

<sup>3</sup> Just Outcomes, *Serving Victims of Crime Through Restorative Justice*, 2018.

Offences with no identifiable victims such as drug offences often have a significant and harmful effect on entire communities. In cases dealing with this type of societal harm, community representatives or citizen's groups could participate in the RJ process to speak about the effect the crime had on the community. The offender's family members may also speak about the impact of the crime.<sup>4</sup>

Indigenous Origins:

- *Restorative Justice is a relatively new name for a set of ideas and principles steeped in Indigenous culture and traditions.*<sup>5</sup> Recommendations from the Truth and Reconciliation Commission, the Standing Senate Committee on Legal and Constitutional Affairs, the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, and the *Gladue* decision refer to the need for Indigenous communities (both rural and urban) to have access to RJ processes appropriate to traditional practices and belief systems of Indigenous victims and offenders in order to address issues of over-representation and to better and more appropriately serve Indigenous victims and offenders.

## 2. Introduction

This Pilot Framework provides guidance on appropriate referrals to RJ programs. In the context of this pilot, RJ process means:

*... any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator...*<sup>6</sup>

RJ programs and practices include, but are not limited to:

- Community Conferencing
- Victim Offender Dialogue
- Circles of Support and Accountability
- Family Group Conferencing
- Peacemaking Circles
- Youth Justice Committees

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<sup>4</sup> <http://www.rjvictoria.com/uFAQs/9-is-restorative-justice-appropriate-for-victimless-crimes/>

<sup>5</sup> Just Outcomes, *Serving Victims of Crime Through Restorative Justice*, 2018.

<sup>6</sup> *United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, as found in Annex II of the *United Nations Handbook on Restorative Justice Programmes* (2006).

### 3. Legislative Authority

The use of restorative justice measures are supported through both federal and provincial legislation, and are available at a number of points along the continuum of the criminal justice system.

For adults, section 717 of the *Criminal Code* authorizes the diversion of matters away from the formal criminal justice system through the use of alternative measures if the offender accepts responsibility for the offence, and the referral is not inconsistent with the protection of society.

Where an accused pleads guilty, or is found guilty of an offence, section 718 articulates several relevant objectives of sentencing, including:

- (e) that sentencing should provide reparations for harm done to victims or the community, and*
- (f) that a sentence should promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.*

Restorative justice is also referenced in section 8 of the *Alberta Police Act* and the federal *Victims Bill of Rights*.

### 4. Justification for Referral to RJ

Referrals to RJ should be made with the purpose of accomplishing one or more of the following objectives:

- Repairing the harm to victims, relationships and communities resulting from crime;
- Providing an opportunity for a culturally appropriate, meaningful justice process;
- Reducing further harm for all directly involved parties (trauma informed);
- Facilitating direct and informed victim participation;
- Enhancing access to justice for racialized and other marginalized communities;
- Building public confidence in the administration of justice;
- Providing an opportunity to understand and consider root causes or systemic issues connected to the parties or offence; and
- Facilitating access to better supports and wrap-around responses to parties' needs.

Particular consideration should be given to referral to RJ if a person in conflict with the law:

- identifies as an Indigenous person;

- identifies as any other racialized or marginalized population; or
- is recognized to be a vulnerable individual (e.g. a person with FASD, someone who is homeless or living in poverty)<sup>7</sup>.

## 5. Scope

For the purposes of the Pilot, and subject to the limitations set out in this document, all matters coming before the criminal courts are eligible and should be considered for referral to an RJ process.

Depending on the circumstances of the case, use of an RJ process may be appropriate as either an alternative to the formal criminal justice system, or as a process to augment and enhance the outcomes of the formal criminal justice system.

Referrals to an RJ process may occur through one of the following referral streams:

1. Pre-Plea/Diversionary RJ Referrals; or
2. Post-Plea/Pre-Sentencing RJ Referrals.

### ***Pre-Plea/Diversionary RJ Referrals***

Prosecutor consent is required in order to make a pre-plea/diversionary referral to an RJ process. Pre-plea/diversionary RJ referrals are encouraged wherever an approved RJ process exists and diversion would be consistent with the protection of society and in the public interest.

A referral to a pre-plea/diversionary RJ process requires a written acknowledgement of responsibility by the accused. A guilty plea is not necessary for a pre-plea/diversionary referral to proceed.

Successful<sup>8</sup> completion of a pre-plea/diversionary RJ process will result in the withdrawal of the charge(s).

In determining whether a pre-plea/diversionary RJ referral would be consistent with the protection of society and in the public interest, prior to authorizing a referral, prosecutors should consider the list of factors set out in Appendix A to this document.

Particular attention must be paid to the cases of Indigenous accused and victims to ensure that no systemic barriers preclude appropriate diversionary referrals to RJ processes. The individual circumstances of an Indigenous accused or victim should be considered in the context of the distinct situation of Indigenous persons in Canada.

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<sup>7</sup> Referral considerations for vulnerable Albertans must consider an accused's capacity to accept responsibility for harm done, and the ability to follow through on conditions set to right the harm.

<sup>8</sup> Considerations of what makes a process successful will be defined by the Prosecutor in consultation with the RJ service provider and the victim, when involved.

### ***Post-Plea/Pre-Sentence RJ Referrals***

In cases in which a prosecutor determines that a pre-plea/diversionary RJ referral would be inconsistent with the protection of society or not in the public interest, the use of a post-plea/pre-sentence RJ process as an enhancement to the traditional criminal justice system is encouraged.

A post-plea/pre-sentence RJ referral may be made at any stage of the proceedings, however, a referral to a post-plea/pre-sentence RJ process should only proceed following the entry of a guilty plea or a finding of guilt, or following a clear understanding being reached between counsel as to what pleas are expected to be entered following the completion of the RJ process.

Prior to a post-plea/pre-sentence RJ referral being made, the accused must clearly accept the facts establishing the elements of the offence being referred. In the normal course, an agreed statement of facts should be prepared and accepted by the Crown prosecutor, defence counsel, and the accused prior to a referral being made.

### ***Agreements***

An RJ process may result in the production of an agreement or plan identifying expected future actions and outcomes, which will vary depending on the situation, circumstances, issues and needs involved in each case. The agreements and expectations that form the plan should be shared with the parties and other justice stakeholders, and should inform any future steps taken. Any recommendations or agreements resulting from an RJ process are not binding on a sentencing court.

### ***Post-Sentence RJ Referrals***

Given that RJ processes require the informed and voluntary participation of all parties, probationary conditions requiring that an offender must attend at an RJ process are inappropriate, and should not be sought or imposed. In suitable cases, a probationary condition acknowledging the existence of RJ programs, and encouraging a referral if all parties voluntarily agree may be appropriate.

## 6. Minimum Requirements

Before a matter will be considered for referral to an RJ process, there must be<sup>9</sup>:

1. A written acknowledgement of responsibility;
2. Acceptance of the facts of the offence being referred; and
3. Voluntary, informed consent of all participating parties, which would generally include, at minimum, both the accused and the person who has been harmed (or their surrogate), along with community and personal supports.<sup>10</sup>

Additionally, absent express agreement of both the prosecutor and defence counsel, no referral to an RJ process should be made where there are unresolved cases pending against any alleged co-perpetrators or co-accused.

## 7. Referral Protocol

Referrals to RJ must be made to one of the agencies identified on the Restorative Justice Service Provider Roster, who will carry out the restorative justice process, in consultation with the referral source. The RJ Service Provider and the referring party will use a set of standardized forms for the purposes of this pilot that will be inclusive of demographic information, contextual information, reporting requirements, confirmation of appropriate victim support, and protection of participant privacy.

For situations involving Indigenous victims and accused who live in or are connected to First Nation or Metis communities, special effort should be made to refer appropriate cases to Peacemaking or other RJ programs located in the participants' home community.

For accused with cognitive challenges (e.g. FASD or other brain injury) that impact their ability to meaningfully accept responsibility for the harm they have caused, a closer assessment should be carried out to determine the ability of the individual to meaningfully participate in RJ processes. If the case is determined to be inappropriate for this reason, efforts may be made to refer the case to specialized programs that exist in some communities (e.g. those run by FASD Networks that use restorative practices to support people with FASD navigate the court system) or mental health courts as an alternative.

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<sup>9</sup> While there is a primary role to be played by the courts/Prosecutors/Defence in determining adherence to these minimum requirements, there is also a second level of vetting that occurs once a referral is received by a service providing agency. Based on prior experience, approximately 25%-30% of referred cases are not accepted for RJ at the service-provider level.

<sup>10</sup> Note that many Indigenous communities that use Peacekeeping Circles do not require the victim to participate; this acknowledges the intergenerational trauma experienced by FN and Metis communities, and centres the healing at both the individual as well as collective level. The goal in Peacekeeping Circles is often on healing the offender and the community through traditional practices, and is an acceptable use of RJ under these guidelines.

In cases involving sexual or gender-based violence, careful consideration must be given to the current capacity of service providers in Alberta to respond to the unique needs inherent in such cases. When dealing with such a case, all parties should be aware of the factors set out in Appendix B when considering whether an RJ referral is appropriate.

Once a referral is made to an RJ Service Provider, that provider will undertake a thorough assessment to determine the case's appropriateness for an RJ conference, Peacemaking Circle or other RJ process. This will consist of in-person interviews with the accused and the person harmed and their supports (when appropriate). If a case is deemed not appropriate to adjudicate through an RJ process, it will be sent back to the original referral agent. If the case is deemed eligible, the RJ Service Provider will alert the referring body and the process will begin independent of the involvement of the courts.

Issues including length of time to adjudicate the case through RJ, the impact on the length of the case (including any *Jordan* implications), capacity of service providers to take the referrals, and any other system-based, logistical concerns should be discussed between the referral agent and the RJ Service Provider prior to the acceptance of a referral for RJ.

## APPENDIX A

### **Pre-plea/Diversionsary RJ Referrals**

Although not an absolute bar, a pre-plea/diversionary RJ referral will generally not be consistent with the protection of society or in the public interest in the following circumstances:

- Where separation of the offender from society for a period of time is necessary to protect the public;
- Where long-term supervision in the community is necessary in the interests of public safety, such as where treatment is required or an enforceable no-contact provision is needed;
- Where ancillary orders are desirable to protect the public or further the aims of the detection of crime or monitoring of the offender, such as DNA, SOIRA, firearms prohibitions, driving prohibitions, or stand-alone compensations orders, and particularly where such orders are mandatory upon conviction;
- Where a specialized court may be better suited to address the offending behaviour (e.g. intimate partner violence court, mental health court, drug treatment court);
- Where the recording of a conviction is an important objective in the circumstances of the offence and the offender; and
- Where any power imbalance between the victim and the offender would preclude meaningful victim participation, such as with threats, intimidation and harassment.

#### ***Chief Prosecutor Approval***

The prior approval of a Chief Prosecutor (or designate) from the Alberta Crown Prosecution Service (ACPS) or the Chief Federal Prosecutor (or designate) from the Public Prosecution Service of Canada (PPSC) is required to make a pre-plea/diversionary RJ referral for the following categories of offences:

1. Offences resulting in the death of an individual;
2. Offences involving the use of violence or the threatened use of violence reasonably likely to result in harm that is more than merely transient or trifling in nature;
3. Offences involving the use, or threatened use, of a weapon;
4. Offences affecting the sexual integrity of a victim;
5. Offences resulting in a serious impact upon the victim (physical, psychological, or financial);
6. Offences involving violence against a victim under 18 years of age committed by a person in trust or authority towards the victim;
7. Offences involving the use of violence or the threatened use of violence against an intimate partner;
8. Offences involving the infliction of pain, suffering, or injury to an animal;



9. Offences involving vulnerable victims (for example, children, the elderly, etc.);
10. Offences demonstrating sophisticated planning (for example, the offence was part of an ongoing criminal enterprise);
11. Driving offences under the *Criminal Code*; and
12. Offences that are punishable by a mandatory minimum sentence of imprisonment.

A Chief Prosecutor (or designate) from the ACPS or the Chief Federal Prosecutor (or designate) from the PPSC may approve a pre-plea/diversionary RJ referral for the offences listed above where exceptional circumstances exist. If such a referral is made, the exceptional circumstances supporting the RJ referral must be set out in writing on the file.

Exceptional circumstances approval will only be granted where the use of a pre-plea/diversionary RJ referral is consistent with the protection of society and in the public interest. In assessing whether exceptional circumstances exist, account should be taken of:

- Indigenous identity of the accused or victim;
- The personal circumstances of the accused, including:
  - any mental illness; or
  - disability;
- The personal circumstances of the victim, including:
  - the victim's desire to engage in an RJ process; and
  - the degree of any harm done;
- The circumstances of the offending behaviour; and
- The existence of a suitable RJ process in the local community.

## **Restorative Justice Referrals for Gender-Based Violence and Sexual Violence Matters**

Widely accepted best practice for making referrals to Restorative Justice for criminal matters involving gender based violence (GBV) and sexual violence (SV) acknowledges that “the use of restorative justice processes in cases of ... sexual violence must be very carefully considered, and advice from those knowledgeable in responding to ... sexual violence should always be sought.” (Law Commission of New Zealand, 2015)

RJ service providers and victim advocates across the province continue to express an interest in alternative justice measures to address these complex matters. A majority of victims hesitate to report offences for a variety of reasons, including cultural and gender norms, relationship or family dynamics, or fear of a court process. SV and GBV cases that are mediated through the traditional justice system often leave victims further traumatized. While the need for alternative processes is demonstrable, there are many factors limiting the widespread use of these processes.

This Appendix aims to clarify the current state of the capacity of service providers in Alberta to respond to any Restorative Justice referrals that may be considered.

At present, Alberta lacks the capacity to take on a significant increase in RJ referrals for sexual and gender-based violence. Very few referrals are made currently for these matters, and these require the involvement of highly skilled facilitators. Currently, Alberta has only a few independent service providers able to take these cases, and almost no formal agency-based programs.

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This Appendix outlines key considerations when making referrals to RJ for SV and GBV charges.

1. Victim and Public Safety Considerations
2. The Need for Risk Assessment
3. Service Provider Training

### **1. Victim and Public Safety Considerations**

The Law Commission of New Zealand (2015) identified several reasons why some limits on the eligibility of cases might be imposed based on victim safety or public safety:

- a. “The perpetrator may pose an ongoing risk of committing acts of sexual violence against others in the community;

- b. The public might consider the acts of sexual violence to be of such a character that they must be dealt with in the criminal justice system.
- c. The dynamics of some cases may make them unsuitable for the alternative process, [for example] where the victim is at risk of secondary victimization or further emotional harm from the perpetrator, where there is a significant age gap between the parties, or where there are coercive pressures on the victim or parties to participate.”

(Law Commission of New Zealand, 2015)

Note that the needs of victims/survivors in these matters should always be highly emphasized. This impacts several components of RJ referrals and practice:

- The needs and desires of the victims/survivors should be taken into account in these matters at all points in the process including before RJ referral.
- For GBV and SV matters, RJ should be considered only if the victim consents freely and voluntarily and with an understanding of the proposed RJ process or program being considered.
- Wherever possible, victims should be given access to appropriate community-based and victim service supports, ideally those supports that specialize in the area of gender based or sexual violence.
- In general, the accused should not be the primary instigator of the RJ referral. Best practice allows only the victim to trigger the exploration of an RJ referral.<sup>11</sup>
- If the victim/survivor is highly motivated to participate in an RJ process *instead of* a conventional CJS process, then that should be taken into account in terms of the decision to refer, even in cases where an RJ referral would not normally be considered.
- Victims should not be made to feel compelled or forced to participate in an RJ process, and it should be made clear that they are free to change their mind about participation at any point in the RJ process.
- If a diversionary referral to an RJ process is being considered, special attention should be given to the fact that withdrawal of charges will preclude the imposition of longer-term court enforceable conditions and orders, such as:
  - No contact provisions;
  - No go/non-attendance or area restrictions; and
  - Ancillary orders (e.g. DNA, SOIRA, firearms prohibitions, compensation orders, etc.)

## 2. Risk Assessment Requirements

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<sup>11</sup> Note that some offender only programs for GBV, SV and Intimate Partner Violence exist that use restorative principles to underpin their program, but these are not included for consideration in this document.

Best practice also points to the need for a significant risk assessment to be carried out prior to a referral being considered. The risk assessment should include but not be limited to:

- a. “The characteristics of the victim, including age, background, cognitive capacity, sensitivities, needs, trauma experience, and psychological concerns [this list is not exhaustive];
- b. The characteristics of the perpetrator, including age, background, cognitive capacity, sensitivities, needs (including drug and alcohol abuse), and psychology, including an assessment of personality pathology in any previous antisocial behaviour or previous criminal history;
- c. The level of insight and remorse demonstrated by the perpetrator;
- d. The nature, seriousness and circumstances of the act of sexual violence including whether the behaviour was ongoing and chronic or circumstantial; whether violence or other criminal offending was involved; or whether deception or concealment was involved;
- e. Whether multiple perpetrators or multiple victims were involved; and
- f. The broader family, cultural and community context in which the act of sexual violence occurred.”

(Law Commission of New Zealand, 2015)

### **3. Service Provider Training**

Any service provider who mediates SV and GBV RJ processes require highly specialized training. Specialists must be able to “identify and respond safely and competently to the risks of re-victimization, re-traumatization and the subtlety of the power imbalances that arise during the restorative justice process itself.” (Keenan) Assuring the service provider has appropriate cultural competence for any particular matter and awareness of the gendered power relationships within which sexual and gender based violence occur is also critical to a trauma informed RJ practice for GBV matters.

This training must include (but not be limited to):

- a. Training in the many layers of trauma that often attend to these cases - including single-incident trauma, and specific trauma responses to sexualized violence (SV) and intimate partner violence (IPV), betrayal trauma, complex trauma, and traumatic sexualization;
- b. Training in the realities, dynamics, and nuances of IPV perpetration and victimization;
- c. Training and education regarding the links between adverse childhood experiences (ACEs) and SV/IPV perpetration. (Alan Edwards, Alberta Restorative Justice trainer, facilitator and educator).

Note that this list is not complete. In the absence of a formal provincial program, strategy, or policy regarding SV, GBV and IPV referrals to RJ in Alberta, we must rely on best practices in other jurisdictions to guide our approach.

#### **4. Summary**

Currently, a comprehensive program for mediating SV and GBV cases through Restorative Justice processes **does not formally exist** in Alberta. There are few trained facilitators in Alberta who are qualified to handle these cases, but they are in high demand, so access will be limited. RJ referrals should be made only in circumstances where all of the criteria outlined above can be met.

Some Indigenous communities with Peacemaking programs have a wider range of experience with some matters relating to GBV, SV, and IPV, and should be contacted for further conversations about specific matters relating to Indigenous victims/survivors and accused , as per the official RJ Service Provider roster supporting this project.

Note that RJ referrals can occur at any point in the criminal justice system process. If a referral to RJ for GBV/SV is determined to be appropriate, and there is an appropriate RJ Service Provider to facilitate, then the process can run either instead of, concurrently with, or after the criminal justice process is complete.

**Please refer to the RJ Service Provider Roster for further information regarding RJ service providers with experience in SV and GBV cases.**