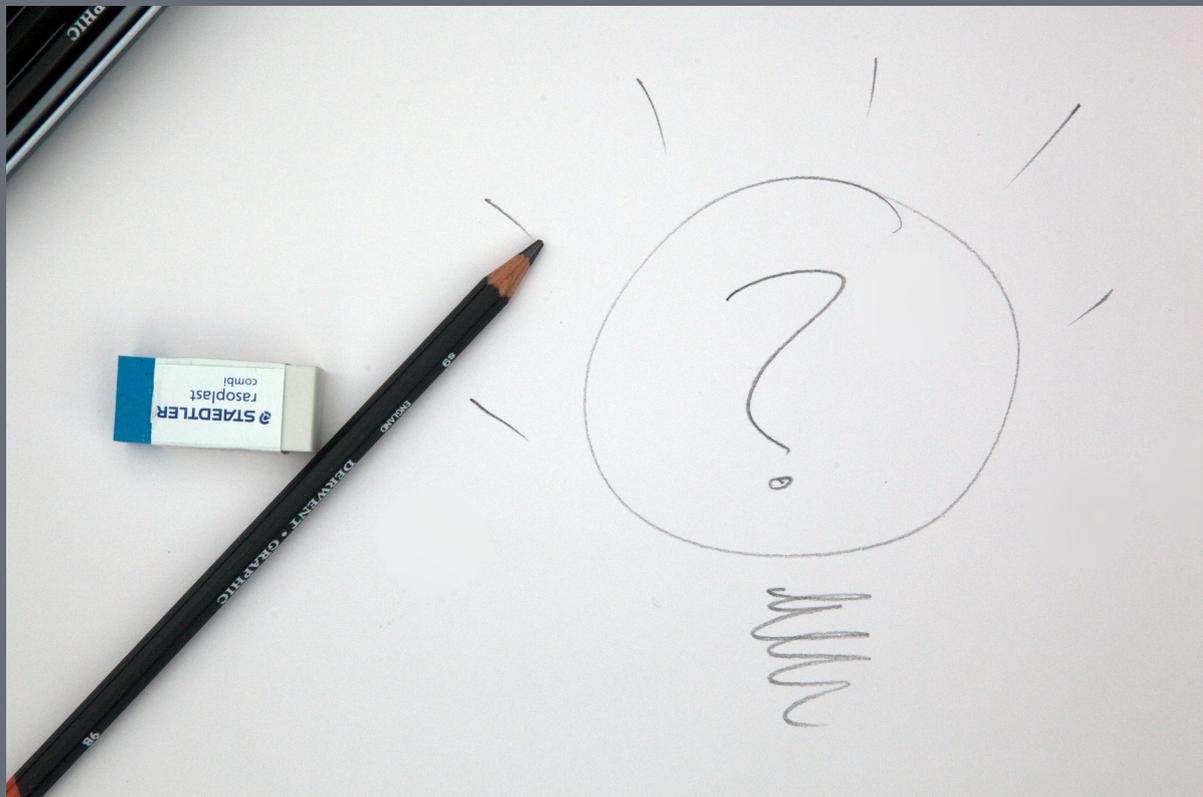




CSJ Counsel to
Secure Justice



Frequently Asked Questions

RESTORATIVE JUSTICE

Restorative justice – Frequently Asked Questions¹

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What is a restorative justice process?

Restorative justice processes are processes in which the parties most affected by a harm come together with the help of a facilitator and try to work on repairing the harm caused. The processes focus on repairing the harm by addressing 1) needs that arose from the crime, 2) the obligations of the person who caused harm and 3) the causes that lead to the crime.

What are the key features of a restorative justice approach?²

- Understands harms as a violation of people and relationships (not as a violation of law);
- Enables the affected parties to come together to address the harm;
- Focuses on addressing the harms and needs of those who have been harmed;
- Acknowledges that the person who caused harm has an obligation to repair the harm, and helps them to gain insight into the effects of their behaviour and take responsibility in a meaningful way;
- Helps prevent reoffending by addressing the underlying causes of the harm, by helping promote empathy for the person who was harmed, and by providing adequate support and accountability mechanisms;
- Is flexible to the circumstances of the person who was harmed and the person who caused harm, and allows each case to be considered individually;
- Respects the dignity and equality of each person and separates the action from the person. Restorative justice understands that the actions were wrong but the person who caused harm is not a “*bad person*”;
- Can be used along with traditional criminal justice processes and sanctions, though it may also be used outside the criminal justice system;
- Is suitable for dealing with many different kinds of harms and persons who caused harm, including very serious offences and for persons who have caused harm more than once.

² https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf

How does restorative justice differ from the existing criminal justice system?

Existing criminal justice system	Restorative Justice
Crime is a violation of the law and the state	Crime violates people and relationships
The focus is on what law has been broken and what punishment is applicable	The focus is on what harm has been caused and how the harm can be repaired
The process is between the state and the person who caused harm, and the victim is treated as a witness	The process involves the parties most affected by the harm including the victim, the person who caused harm, their support persons and community members.

What 'restoration' takes place in restorative justice?

Restorative justice recognizes that it is not always possible to replace what the harmed person has lost. It is impossible to 'restore' in cases of death or permanent loss, and wherever there is emotional harm. Restorative justice does not attempt to undo the harm, but it does attempt to fulfil the needs arising out of harm. Restorative justice:

- tries to repair the harm to the person harmed to the extent possible by addressing the needs arising out of the harm;
- aims to address the causes of the crime so that the person who caused harm doesn't offend again;
- hopes to restore any damage sustained in the community; and
- works on, when appropriate and desired, rebuilding a relationship between the person harmed and the person who caused harm.

Restorative justice is concerned with the construction of a better present and the future.

What are the values of a restorative justice process?³

- Inclusion of affected parties (victims, person who caused harms, community members);
- Voluntary participation;
- Empowerment of all participants and a belief that everyone can find their own solutions;
- Respect for all participants and a non-judgmental approach;
- Collaboration and consensual outcomes;
- Commitment of parties to agreement reached through the process;
- Flexibility and responsiveness of process and outcomes;

³ https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf

- Community empowerment;
- Addressing systemic oppression and privilege.

What are the objectives of a restorative justice process?⁴

- Put the harm redressal process into the hands of those most affected by the harm;
- Enable those who have been harmed to have a voice by participating in the justice process, expressing the impact of the harm and expressing what they need to move forward;
- Denounce harms as unacceptable and reaffirm community values;
- Encourage those who caused harm to take responsibility and work towards repairing the harm;
- Identify and implement forward looking outcomes which address the needs of the victims and also help to address the factors that lead to the harm;
- Prevent recidivism by encouraging change in individual persons who caused harm and facilitating their reintegration into the community.

What does a restorative justice process look like?⁵

A restorative justice process is flexible and could take many forms, including the following processes:

- Restorative justice dialogues enable victims and persons who caused harm to come together, to discuss the impact of the harm and to find ways to address the harm.
- Circles are similar to restorative justice dialogue but differ in that they involve not only the person who caused harm and the victim, but also their family members, community members, and even state representatives. The process proceeds with participants speaking sequentially. Conferencing programs are also similar to circles in terms of participation, but the order of speaking is not sequential and is directed by the facilitator. The order of speaking and questions are predetermined.

At what stage of the criminal justice process can a restorative justice process take place?

A restorative justice process can divert the case away from trial and take place at a pre-trial stage, it can take place before sentencing, post sentencing and post completion of sentence. The restorative justice process can also take place completely independent from the criminal justice system if all parties agree to participation.

⁴ https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf

⁵ https://www.just.ee/sites/www.just.ee/files/kunt_hermstad_restorative_justice_in_cases_of_sex_offenses.pdf

How do we assess whether a justice process is restorative?

A justice process is restorative when it:

- Focusses on the harm caused (rather than on the rules that have been broken);
- Is inclusive and offers participation to all those affected by the harm;
- Provide opportunities for direct and/or indirect dialogue between the affected parties;
- Participation and engagement is voluntary for all participants and at all stages;
- Encourages collaboration and power-sharing;
- Shows equal concern and commitment to victims, persons who caused harm, and their families, involving all in the process of justice;
- Works on addressing the needs of persons harmed and others affected;
- Supports the person who caused harm while encouraging them to repair the harm caused to the person harmed, by understanding, accepting and fulfilling their obligations;
- Encourages reintegration of persons harmed as well as those who caused harm;
- Involves and empowers the affected community to increase its capacity to recognize and respond to harm for all community members.

What is the minimum eligibility threshold for participation in a restorative justice process?⁶

- The person who caused harm must accept or not deny responsibility for their actions;
- Participation of all participants (including the person who caused harm) must be voluntary and informed.

Other suitability factors can be decided on case by case basis.

What are the factors looked at to examine the suitability of a restorative justice process?

An assessment of the risks involved for the parties is looked at including the following factors:

- How serious was the harm and what has been the impact on the party? (if the person harmed is severely impacted and if they are at an early stage of healing, the process may pose a risk to their safety and wellbeing)
- What is the person who caused harm's prior record of criminal offending and how serious are past offences? (if the person who caused harm has a prior record of committing the same

⁶ https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf



harm, it is important to ascertain their intentions about repairing the harm and refraining from harm in the future. If they are keen on continuing the life of harm, the process may not be effective.)

- What is the emotional state of the person who caused harm? Are they able to effectively participate in a restorative justice process? (if they are not able to comprehend the impact of their actions, or are very charged up, the restorative justice process may either require significant preparation or else, may not be the best option)
- Have there been any recent threats (or other forms of intimidation) made to the person who was harmed? (this may indicate that the person who caused harm is not ready to take accountability)
- Is the person who caused harm part of an organization or a gang? (this may indicate that they may be influenced to return to committing harms, and extra caution is required to counteract this influence)
- Is the person who caused harm related to the person harmed and, if so, how? (an existing power relationship requires focusing on the safety of the party that is disadvantaged)
- What is the extent of agency of the person who was harmed and the person who caused harm? (assessing the age, cognitive capability and emotional capacity, and influence of support persons is crucial for effective participation in a process)
- Is there an immediate risk of revictimization for the person who was harmed? (if so, the process should be delayed or avoided until the possibility of revictimization is mitigated)
- Have other support persons been identified who could be involved in the process to support the person who caused harm and the person who was harmed? (it may be necessary to have support persons who can help to comfort and advocate for the primary participants)

Why would a person who caused harm participate in a restorative justice process?

Research has shown that those who have caused harm are often driven by a wish to communicate with the other party and want to help them. They may also have a desire to undo the harm to the extent possible.

Restorative justice gives persons who have caused harm the opportunity to accept responsibility for their actions, to get an opportunity to take action to undo the harm and to be seen as more than the harm they caused.

If the program is diversionary, a desire to escape alternative sanctions may encourage the person to participate in restorative justice processes. Some people who have caused harm, especially those who are serving a sentence, may simply participate because they don't have anything else to do. As long as the victim understands what impact it may have before agreeing to take part, facilitators may take a calculated assessment and encourage participation of the person who caused harm even if they are not fully invested in the process.

What if the person who caused harm participates in restorative justice to avoid harsher punishment?

There is a real risk that the person who caused harm may say the things the process expects in order to avoid harsher consequences. Facilitators, during preparation, work on understanding the intentions of the person who caused harm and their motivations for participating. If the person who caused harm has motivations other than repairing the harm, the victim is informed and some victims may still choose to proceed with the process in order to get a chance to express the harm caused to them and to ask questions (“*Why me?*”, “*Why did you do this?*”). The process may offer the victim huge benefit, even if the person who caused harm’s motivations for participating are not centred around repairing the harm.

What if the person harmed does not want to participate in a restorative justice process?

Restorative justice processes can proceed only when all participants voluntarily want to engage in the process, based on informed consent (participation is voluntary for all participants including the person who caused harm).

Restorative justice aims to enable persons harmed to have an active role in the justice process. Victim satisfaction is directly related to the extent of their participation. Every effort is therefore made to provide the person harmed with the information, preparation, and support they need in order to participate in a restorative justice process.

However, there is no obligation or compulsion for the person harmed to participate. If the person harmed, for any reason, does not want to participate in the process, but consents to the case being handled by restorative justice, a restorative process could be carried out without them. This could be done in multiple ways:

- they could write a statement explaining the impact the incident has had on them,



- they could record a video and explain the impact, or
- they could send someone to represent them, such as a family member or friend.
- community members could participate on their behalf and speak to the impact the harm has had on them.

If they do not consent to any sort of participation, then only processes focusing on support and accountability of the person who caused harm could be carried out without any sort of participation or representation of the person harmed.

Even once the person harmed consents to participate in the process, they can choose to cease participation at any stage during the process.

What processes are possible when communication between the victim and person who caused harm is not desired or suitable?

Restorative processes (not restorative justice processes) involve one of the impacted parties, either the person harmed or the person who caused harm, and their respective family and community. These processes allow for space to collectively process the harm and to ensure support for the future. In addition, accountability mechanisms can also be ensured for persons who have caused harm. These processes are suitable when there is no desire/need to communicate with the other party or where there is significant risk assessed relating to a process.

What are the risks for the person harmed while participating in a restorative justice process?

Persons harmed' involvement and preparation for the process requires dealing with painful thoughts and emotions. Some may also experience re-victimization as new information related to the harm comes up. Persons harmed may get disappointed if the person who caused harm does not behave in the way they expected them to. Persons harmed may also get disappointed if the person who caused harm is unable to answer their answers or is unable to commit to the agreement plans.

Facilitators work with persons harmed at length to ensure that they are consensually participating in the process after understanding the risks involved and the strategies being used to mitigate these risks. They may also link them to external expert mental health help for processing the emotional ramifications of the process and the preparation. Facilitators also help them manage their expectations of the person who caused harm beforehand to a large extent. During the process,



facilitators are trained to look out for cues of manipulation or threats and to address these. Post the process, facilitators continue to follow up and assess how they are doing.

How is safety addressed during the restorative justice process?

Safety is paramount, and each case is carefully risk-assessed before deciding on a restorative justice process and throughout the process. Particular strategies are thought of in advance to mitigate any potential risk. Where risks are too high to be appropriately managed, other ways of facilitating communication are explored, or the process is even avoided.

Restorative justice processes try to foster safety (physically, emotionally, psychologically) for those participating. Appropriate preparation before a conference is fundamental and works on understanding and addressing participants' needs. Support structures are created within and around the restorative intervention so that participants can go to them or so that they can advocate on behalf of the primary participants. Facilitators focus on ensuring that the rights of participants are respected throughout.

The process can also help foster future safety. Outcome agreements can reflect mechanisms for this as and when needed. An example could be that the person who caused harm and the person who caused harm's family keep a distance from the victim's area of residence.

Can restorative justice processes take place when there is a power imbalance between participants?

In some cases, the power dynamics are such that the victim can feel threatened by the mere presence of the person who caused harm. In such cases, either the facilitators help the person harmed to emotionally move beyond these fears and ensure the power dynamics do not in any way affect the interaction. Facilitators are trained to identify manifestations of power dynamics and are equipped with tools to avoid collusion with the party who holds the power.

Breaks are scheduled at regular intervals during the process so that the parties can voice their concerns, if any, to their support persons, in case they aren't able to do so to the facilitator.

Best-practice restorative justice processes work through a trauma-informed lens, carefully accounting for the impact of trauma, preventing re-traumatization and intentionally enabling healing.

If the effect of the power dynamics is inevitable, the person harmed may communicate to the person who caused harm indirectly.



How does restorative justice benefit the victim?

As compared to the existing criminal justice system that does not provide a direct role for persons harmed (or a direct means of addressing their concerns), restorative justice places a priority on addressing concerns and needs arising out of the harm. Crime causes harm to victims. Research shows that restorative justice processes can help persons harmed recover from this harm by:

- Providing a means for persons harmed to talk about how the incident impacted them - to voice their story and the impact on them, to receive validation of their account of what happened, and to receive acknowledgment that they are not to blame for the harm.
- Giving persons harmed an opportunity to take back the power (as harms are a hugely disempowering experience) by actively participating in the justice process. The person harmed is enabled to define what the process would look like (direct meeting, indirect communication, circles, conferences, victim person who caused harm dialogues), when they would want to meet the person who caused harm, the questions they need to ask the person who harmed them, and decide who all will be present during the interaction.
- Offering therapeutic value by helping persons harmed move towards emotional healing, even to the extent of reducing post-traumatic stress symptoms⁷ and reducing the desire for violent revenge against their person who caused harm⁸.
- Providing an opportunity for persons harmed to receive reparation and/or an apology, which in turn, can significantly help their journey towards healing.
- Providing an intentional opportunity to have support persons, including family and friends, participate with them, listen to them, validate them and understand their needs.
- Working towards relationship repair, if that is a need. There is often significant effect on the familial relationships of victims owing to the impact of the harm and restorative justice provides a safe and structured environment for the victims and person who caused harms to express themselves to the family members and for the family members to express their perspectives about the harm caused.

⁷https://www.just.ee/sites/www.just.ee/files/kunt_hermstad_restorative_justice_in_cases_of_sex_offenses.pdf

⁸https://www.just.ee/sites/www.just.ee/files/kunt_hermstad_restorative_justice_in_cases_of_sex_offenses.pdf



Persons harmed report greater feelings of satisfaction and fairness, lesser feelings of fear and desire to seek revenge against the person who caused harm, and feeling better emotionally about their victimization, when they participate in restorative conferences.

What are the risks for the person who caused harm?

A person who has caused harm can be very apprehensive about facing the persons they harmed, and acknowledging their actions and the harm caused, while not offering any defence. They can also be apprehensive that persons harmed will use this opportunity to exact revenge, or threaten them, or ask for exorbitant amounts of restitution. However, facilitators work with the person who has caused harm beforehand to help them prepare for the process and to manage their expectations.

Facilitators also work with persons harmed beforehand to help them channelize their vengeful emotions into expressing how they have been harmed and what they need. They work on helping reduce the chance of the person who caused harm being shamed. Further, the entire process is facilitated by trained facilitators who will stop the process the moment there is an indication of risking the safety of the person who caused harm. Further, all process outcomes are decided consensually and the person who caused harm does not have to agree to anything he or his supporters think is not fair.

How does restorative justice benefit the person who caused harm?

- Allows them to face the human cost of their actions, and to better understand the implications of their actions;
- Focuses on addressing offending behaviour in a pragmatic and respectful manner without shaming them;
- Models socially appropriate solutions to conflict;
- Uses age and developmentally appropriate dynamics to change the young person's thinking and behaviour;
- Helps address the causes of offending behaviour;
- Avoids excessive and longer term criminal justice interventions which may cause harm;
- Encourages the family, family group and/or significant others to support their young person;
- Enables the young person to contribute to an outcome plan enabling them to take ownership of the process;
- Allows for reparation to the victim directly or indirectly where appropriate; and



- Facilitates an opportunity for restoration to the family, family group and reintegration within the community.

What if the person who caused harm is not available?

Restorative justice processes can be productive even without the participation of the person who caused harm, whether they are excluded for safety reasons or are otherwise unavailable or unknown. Programs for victims and their families (not involving the person who caused harm) have been established to help persons harmed speak about the harm that they faced, how they have been impacted, and the support and resources they require to heal. These programs have shown significant benefits for persons harmed and for their families.

Does punishment play a role in restorative justice?

Restorative justice does not insist on the elimination of punishment but on its transformation. Accountability is an integral part of restorative justice and can take multiple forms, including ones which may be difficult for the person who caused harm.

From a restorative justice lens, accountability is not necessarily deprivation (of freedom through imprisonment) or infliction of suffering, but is constructive, requiring the person to repair the harm caused to the person harmed. Accountability is usually tailored to meet the needs of the persons harmed and to repair the harm that has been caused specifically to the persons harmed (by returning stolen goods), or could also involve doing something for the community (teaching children in an orphanage), or getting the help they need to stay away from future offending (substance misuse treatment).

In the case of severe harms, restorative justice processes can operate in tandem with the existing criminal justice system and can even link to the existing punishments provided by the criminal justice system.

Thus, restorative justice caters to the emotional needs relating to punishment but understands that these needs are malleable and less punitive than is generally believed.

Does a restorative justice process result in an agreement?

Outcome agreements at the end of the restorative justice process can summarize key agreements made by participants during the processes. Outcome agreements need to be agreed to by all



participants. Outcome agreements can include an overview of the harm caused, the actions to be taken by the person who caused harm and the schedule of activities.

Reaching agreed outcomes is desirable but not obligatory; a restorative justice process itself has value for the parties, even in the absence of agreements.

Is forgiveness a part of restorative justice processes?

Forgiveness is a choice that is entirely up to the participants. There is never any pressure to choose this option and facilitators do not discuss forgiveness during the process unless the person harmed wants to talk about it.

At the same time, restorative justice provides a context where forgiveness may ensue, and some degree of forgiveness occurs much more frequently in restorative justice processes as compared to the adversarial setting of the criminal justice system. When forgiveness takes place, it provides the person harmed (the person forgiving) significant emotional benefit.

How do we deal with family and societal problems identified during the restorative justice process?

Restorative justice focuses on identifying the underlying causes which may have led to the harm. Restorative justice processes involve identifying key support persons who can assist the person who caused harm by providing support and accountability to address the issues which led to the wrongdoing.

The person harmed and the person who caused harm are provided with appropriate support mechanisms to deal with issues that are identified in the process.

The process also provides an opportunity to work in collaboration with multiple agencies (community-based organizations) in an attempt to address the underlying causes of crime.

How does restorative justice benefit the wider community?

- Acknowledges the harm caused to those who are not the primary person harmed, and works on addressing the harm;
- Promotes healing and restoration of harmony in the community;
- Reduces the level of fear of crime when the community is involved in creating a safer environment;
- Reduces the stigma attached to harms by involving the community;



- The use of restorative justice can save money by diverting people away from prosecution and by reducing reoffending
- Restorative justice can deliver significant cost savings to the criminal justice system and result in significant economic benefits.
- The efforts of community members to repair the injuries to persons harmed reinforce community norms, i.e., behaviour that is acceptable and that is not.

Is there evidence that restorative justice works?

An analysis of research conducted throughout the world that compared restorative justice with contemporary criminal justice found that:

- Persons harmed who receive restorative justice do better than victims who do not, across a wide range of outcomes, including experiencing reduced post-traumatic stress.
- Persons who caused harm who receive restorative justice commit fewer repeat crimes than those who do not (restorative justice reduces repeat offending more consistently with violent harms than with less serious crimes).

Can restorative justice be used in cases of serious harm?

Restorative justice has the potential to meet needs that are not currently being met by the existing system. For instance, the need for reconciliation of relationships, validation, apology and healing exists in the aftermath of all offences. More severe the harm, more pronounced are these needs. Renowned criminologists emphasize that no crime is too serious to be addressed by restorative justice: when the harm is severe, the need of restoration and repair is even bigger.

Research proves that restorative justice is, in fact, more useful for serious offences in terms of addressing the needs of the persons harmed, the person who caused harm and the community members. Restorative justice may even have a deeper healing impact on those who cause serious harms than on others. It also carries greater significance for the community when violent offences are involved. Contrary to assumptions that are often made, a restorative justice process can be very effective in cases involving serious offences or even people entrenched in patterns of serious crime. It can be successfully applied when the person who caused harm and victims previously had some form of relationship with each other, even when violence is involved.

Further, restorative justice is not necessarily a diversionary mechanism and if it is perceived that the offence is so serious that it merits existing punishment, the process can be used along with imprisonment, i.e. it can take place in addition to the criminal justice system's sentence.

Does restorative justice play a role in preventing crime?

Restorative justice plays a role in preventing crime in varied ways:

- Reducing re-offending by helping address the factors which resulted in the crime and by providing the person who caused harm with the needed support and accountability.
- Victim-oriented prevention takes place by reducing harm to the person harmed, future victimisation and possible future harms committed by the person who was harmed..
- Community-oriented prevention by reducing harm in the neighbourhood or community by involving wider stakeholders in participatory processes and through problem-solving while focusing on causes of harm. Restorative justice is also preventive in its orientation to crime by building on and strengthening the community and the state.

Can children participate in restorative justice processes?

Research has shown that restorative justice can meet the needs and rights of child victims while also maintaining their safety and wellbeing, even when dealing with some of the most serious forms of crime. For both child victims and people who've caused harm, restorative justice processes can meet children's varying needs, accommodate their coping capacity and level of development, and avoid traumatization because of the difficult and unfriendly adversarial process. The success of such an approach, from a child's rights and needs perspective, depends on whether there is adequate preparation, support, and debriefing, as well as whether the child is participating freely and without pressure.

Is restorative justice the same as mediation?

Though many restorative justice programs evolved from mediation, there is a clear distinction between the two

	Mediation	Restorative justice processes
Moral balance	Assumes a moral balance between all parties	Assumes that a moral imbalance has been created between parties owing to the harm
Accepting actions	Wrongdoer does not need to accept their actions beforehand	Wrongdoer needs to accept their actions beforehand



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Who speaks first	The mediator normally begins with asking who would like to speak first. No one has an entitlement of speaking beforehand.	It matters very much who speaks first in a restorative process (varied models differ on who goes first but this is based on cogent reasoning accounting for the fact that it is not a level playing field)
Focus on agreements	The primary aim is to 'resolve the conflict' and reach an agreement	People focussed and relationship focussed, and the process is as important as the outcome, or even more important.
Language	Morally neutral and refers to 'conflict', parties as disputants	Parties are not called disputants; language of 'harm', person affected by harm