

# Review of Racial Bias and BAME Representation in the Criminal Justice System

June 2016



**The IARS**  
**International Institute**

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Community-led solutions for a fairer society

## IARS Publications

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IARS is a leading, international think-tank with a charitable **mission to give everyone a chance to forge a safer, fairer and more inclusive society**. IARS achieves its mission by producing **evidence-based** solutions to **current** social problems, sharing best practice and by supporting **young people** to shape decision making. IARS is an international expert in restorative justice, human rights and inclusion, citizenship and user-led research.

IARS' vision is a society where everyone is given a choice to actively participate in social problem solving. The organisation is known for its robust, independent evidence-based approach to solving current social problems, and is considered to be a pioneer in user-involvement and the application of user-led research methods

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**Table of Contents**

**Open Letter to Mr. David Lammy MP by Dr. Theo Gavrielides, IARS Founder & Director .....4**

**About the IARS International Institute .....6**

**Overview .....6**

**Parameters of the Review: Our concerns and recommendation .....7**

**Let’s talk about race when we talk about race .....7**

**Focusing on Race Equality in Probation .....8**

**Considering Restorative Justice ..... 10**

**Building confidence among BAME communities ..... 12**

**Examples of good practice ..... 13**

## Open Letter to Mr. David Lammy MP by Dr. Theo Gavrielides, IARS Founder & Director

Thank you for the invitation to feed directly into your review of racial bias and the representation of Black, Asian and minority ethnic (BAME) communities in the British criminal justice system. I was honoured by your invitation to attend your roundtable, and my Institute welcomes your work, which we understand enjoys bipartisan support. Further to the roundtable discussions, we are pleased to submit this formal response to the review. I am also happy to give oral evidence should you chose to hold further inquiries.

At the time of writing, the UK is trying to get to grips with the results of the EU Referendum. At the same time, our cities have been hit by unprecedented waves of hate incidents. Ignorance and misinformation once again have led selected groups to act shamefully when the British are known to the world for their tolerance, deep commitment to human rights, and their passion for education and knowledge. As a Greek Londoner myself, I fear for what is yet to come for my family, my international team of staff, my volunteers and students, and myself. Hence, your review could not be more timely.

This submission is focused on issues that I believe will complement other statements while using evidence from our existing and past projects as an international research institute that is registered as a charity and has no political allegiances.

A word of warning as you conduct your review - having worked in the BAME sector as the Chief Executive of Race on the Agenda as well as through my own research on race, I have concluded that to truly have a debate on race, first there needs to be an acknowledgement that such a debate is needed. Are we truly ready to have this debate? I fear for yet another “ticking box” review, having observed the many inquiries that followed the Stephen Lawrence murder. Let me explain.

Many have argued that the ‘Trojan horses of race’ (Kang, 2005) make it difficult for the white decision-maker to overcome the implicit bias that is ingrained against racial minorities notwithstanding sincere self-reports to the contrary. This sub-conscious resistance is also experienced from non-white groups.

This submission assumes an acceptance of the term ‘race’ within a sociological understanding. This might indeed be a challenge for some who seem to be focused on a ‘Black’ interpretation of the term. In my view, focusing exclusively on Black communities does not fully reflect the impact of power structures that affect us all, and indeed on how society uses the term ‘race’ to refer to all those affected by such dynamics. (Let me be clear that specialist services and focused research and programmes must continue in order for practices and policies to be effective).

**It is the power structures within our society and our criminal justice system that I want to bring to the attention of your review and race discussions more generally.** I have launched a research programme<sup>1</sup> to this effect and a call for case studies has been released – see

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<sup>1</sup> Gavrielides, T. (Forthcoming in 2018). *Race, Power & Restorative Justice: The dialogue we Never Had*. Abingdon: Routledge. ISBN 978-1-4724-8835-0.

<http://www.theogavrielides.com/#!racerj/c1kfd> I would be happy to send you the results as these accumulate over the years.

Putting our emphasis on bringing balance to the power structures that racialise us all and cause pain, suffering and discrimination in public services (and the criminal justice system), we find alternative ways of delivering fairness. That is why for the last 15 years I have been a student of restorative justice, a concept and a practice that has been revived in the hope of bringing balance between the state and the parties in conflict (victims and offenders). The restorative process demands power-sharing that is based on the premise that all parties in conflict are equal in the identification of harm, and in reaching an agreement for restitution (Gavrielides, 2014)<sup>2</sup>.

Some argue that one of the reasons that restorative justice was brought back into the modern world of policy and practice is the growing disappointment in our criminal justice systems (e.g. Newburn and Crawford, 2002; Pavlich, 2005). These writings tend to quote the increasing incarceration rates, recidivism statistics, the rising costs of justice and the inability to protect the public from current and new forms of criminality. Over the last few years, we have seen an unprecedented interest by government in restorative justice. This interest is welcomed, but the policies and funding that have resulted from it are deeply concerning. I have provided evidence to this effect<sup>3</sup> expressing my view that the top down support that has been provided reproduces the power structures that the very notion of restorative justice was meant to address. Notwithstanding, restorative justice will continue to be delivered by communities with or without formal support. I ask that you look into the potential of these programmes as well as other user led and user focused practices that are scrutinised by BAME individuals and their sector. In this submission I have included examples of user led practice focusing on probation. These are examples that we have identified while working in partnership with London Probation Trust aiming to shape a probation system that is informed and quality controlled by users including those from BAME backgrounds<sup>4</sup>.

Relinquishing power within the current philosophy of adversarial justice and economics is in itself a challenge. Relinquishing power within a system that is challenged by the implicit biases and 'Trojan horses of race' is an even more complex matter. I acknowledge the difficult task that you are undertaking and thus, I wish you the very best in your endeavour. The IARS International Institute and myself are at your disposal should you require clarifications and further evidence. As a membership organisation we also aim to share this submission with our members and database subscribers. We would also be happy to share any response that you might have to what we have proposed.

Best wishes

[Professor Theo Gavrielides](#)

IARS Founder and Director

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<sup>2</sup> Gavrielides T. (2014). "Bringing Race Relations into the Restorative Justice Debate". Vol. 45: No. 3, Journal of Black Studies, pp. 216-246.

<sup>3</sup> Gavrielides, T (2013). "Where is restorative justice heading?". Probation Junior Vol 5:1, 79-95.

<sup>4</sup> See Gavrielides, T. (2013). "Mind the Gap: Quality without Equality in Transforming Rehabilitation", British Journal of Community Justice, Vol 11 (2-3), pp. 135-149.

## About the IARS International Institute

The [IARS](#) International Institute is a user-led charity with a mission to give everyone a chance to forge a safer, fairer and more inclusive society. Led by its founder and Director, Professor Dr. Theo Gavrielides, and staffed with an expert and dedicated team of researchers, interns and volunteers, IARS achieves its charitable aims by producing evidence-based solutions to current social problems, sharing best practice and by supporting young people and the community to shape decision making. IARS is an international expert in user-led research, evaluation, human rights and inclusion, citizenship, criminal justice and restorative justice. We deliver our charitable mission:

- By carrying out action research and evaluation that is independent, credible, focused and current
- By acting as a network that brings people and ideas together, communicates best practice and encourages debates on current social problems
- By supporting the individual (with an emphasis on young people) to carry out their own initiatives to shape decision-making
- By being an authoritative, independent and evidence-based voice on current social policy matters
- By thorough, high quality user-led (youth-led) evaluations, increasing the effectiveness of how organisations work and deliver

IARS was set up by volunteers as a user-led and user-focused think tank with an emphasis on changing society from the bottom up through evidence. IARS' stated vision is "a society in which everyone is given a chance to actively participate in social problem solving". Our Mission is "to give everyone a chance to forge a safer, fairer and more inclusive society". We do this by producing evidence-based solutions to current social problems, sharing best practice, and by supporting young people and the community to shape decision-making from the bottom-up. We believe that the best solutions to social problems are found in those who are directly affected by them. We were founded upon the principles of user & civic participation; restorative justice and dialogue; individual empowerment and responsibility.

## Overview

BAME communities are overrepresented at all stages of the criminal justice process from stop and search to imprisonment. There has not been significant change in these patterns for over 30 years, and they are as evident among young people as they are among the adult population.

There are no significant differences in offending patterns in most contexts, which leads us to believe that the case can be made that there is different or discriminatory treatment of BAME groups by the police and criminal justice system.

While there will be many submissions from relevant expert groups covering a wide range of issues, it is IARS view that rather than seeking to cover the full catalogue of the issues at hand, we can best add value by limiting our response to several areas in which we have specific expertise.

In order to also avoid repeating the comments we have already made at an earlier roundtable, this submission will focus on:

1. Our work on restorative justice<sup>5</sup>
2. Our programme with the (former) London Probation Trust (LPT) on the project entitled *Embedding Race Equality in Probation*. The full detail of the results of this project are published in 'Race in probation: Achieving better outcomes for black and minority ethnic users of probation services' by Theo Gavrielides and Sophia Blake, available at <http://www.iars.org.uk/node/1426>. Also accompanying this publication is a Toolkit developed following consultation with probation service users, available at <http://www.iars.org.uk/node/1425>. The Toolkit contains practical recommendations for the direct involvement of the users in the planning and delivery of the services. It also includes additional resources and guides that can further support service providers to understand and respond effectively to specific needs of the BAME offenders.

Relations between BAME communities and the criminal justice system are fractured with distrust and animosity a common feature. In addition to the above, this submission will also explore the utility of restorative approaches to repairing these relationships. Firstly, however, the usefulness of the parameters of the review in developing solutions to the problem must be addressed.

### **Parameters of the Review: Our concerns and recommendation**

While we recognise that this review requires a significant body of work to be completed and that as such, placing parameters on the project to ensure it does not become unwieldy is necessary, we do question the decision to only consider evidence from the point of the involvement of the Crown Prosecution Service. This means that there will be no consideration of critical factors which determine the disproportionate flow of BAME individuals into the criminal justice system such as underlying socio-economic factors and policing activities. Without considering such realities, the review cannot accurately define the nature of the problem which in turn makes matching effective solutions very difficult. The significant extent to which these factors, in particular police stop and search powers, contribute to the over-representation of BAME individuals in the criminal justice system should not be overlooked, and IARS is disappointed to see that they have been excluded.

### **Let's talk about race when we talk about race**

As noted in the Open Letter by Dr Gavrielides above, IARS is concerned with how the term 'race' is being interpreted and the underestimation of the significance of reaching an agreement and achieving clarity around this matter.

A biologist would probably say that race refers to a person's physical appearance such as skin colour, hair, eye colour, bone structure etc. It is said that these are characteristics that are passed from generation to generation and are part of a fixed biological category. For instance, in 1885, Meyers Konversationslexikon spoke about ethnographic division into three principal races: "Caucasian, Mongolian and Negroid". In 1962, Carleton S. Coon, presented four major races: "White/Caucasian,

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<sup>5</sup> <http://www.theogavrielides.com/#!rj/ccb3>

Mongoloid/ Asian, Negroid/Black and Australoid". However, in 1950 the UN opted to drop the term race altogether and speak of 'ethnicity'. Consequently, a number of scholars have asked for the replacement of race with ethnicity (Patel and Tyler, 2011). They believe that ethnicity can be tracked down depending on where one's ancestors came from. Ethnicity also relates to cultural factors such as language, beliefs, nationality and religion.

However, the term 'culture' is not without its own challenges. In 1963, anthropologists Kroeber and Kluckhohn (1963) identified 163 definitions for the term, and more have appeared since. Again, there have been views that the term is abandoned all together (e.g. Abu-Lughod, 1991). This is principally because the term is no longer used within a specialised anthropological context. The effects of culture may also vary at an individual level (Davidson, 2001). Individuals also have "multiple cultures linked to social groups memberships and experiences" (Charkoudian and Wayne, 2010: 30).

From a sociological perspective, race is seen as the trigger for understanding society's reaction to diversity and cultural difference (see for instance Lindhorst Everhardt, 2010). Functionalists would say that race differences exist because they serve important functions for society including the creation of 'scapegoats' and the justification for things that tend to go wrong (Crenshaw et al, 1995). The conflict perspective argues that those in power use race and cultural difference to create conflict that will work to their advantage. This strand is very much influenced by economics and goes as far back as the time of slavery and the labour disputes during the industrial revolution (Zuberi, 2011). For instance, it has been argued that race divisions were used as a managerial strategy to prevent a unitary labour force against those in control of power structures. Finally, interactionism looks at issues like labelling and stereotypes. So, when people define themselves using racial terms, it is because of their difference with other racial groups. It has been argued that if we all experienced the world in the same way, and if we all were given the same choices and opportunities in society, then no group could claim that they are more oppressed than others and racial differences and racism would be terms of the past.

Therefore, to be clear, IARS rejects the biological discourse and thus when race is talked about in this submission, it in its **analytical, sociological context** to refer to **the process of power that 'racialises' groups and identities** - the power structures that the term is infused with as well as the interactionism meaning it gains through the existence of 'the other'. These power structures exist not only within the criminal justice system but in our society. It is the trigger for the misuse of stop and search powers, wrongful convictions, the over-representation of BAME groups in prisons, probation and the entire criminal justice system as well as our own inability to accept that we ourselves are to some extent discriminatory.

## **Focusing on Race Equality in Probation**

At the time of IARS project with LPT, over 50 per cent of LPT service users came from BAME communities. This particular piece of work focused on how probation services could be improved for these communities. In particular, issues around community engagement, mental health, substance abuse, foreign nationals, victims and resettlement were analysed, and recommendations posited.

A snapshot of the situation which the research reflected includes the following realities:



- Population in England & Wales of 54,809,100 of which BAME groups account for 6,620,200 i.e.12.07 per cent (ONS 2009).
- Prison population in England & Wales: 85,002 of which BAME groups account for 23,801 i.e. 28 per cent (MoJ, 2012). (36 percent of young people in custody were BAME).
- London’s population: 7,753,600 of which BAME groups account for 2,347,600 i.e. 30.28 per cent (Office for national statistics, mid 2009).
- In London, 49.1 per cent of prisoners were BAME (MoJ, 2012).
- In London Probation, 43 per cent were BAME users (MoJ, 2012).
- 90 per cent of prisoners had one or more mental health issues (Bradley Report, 2009). The 2007 ‘Count me in’ survey showed 40% of BAME groups accessed mental healthcare through CJS.

The findings of the project can be summarised as the following:

1. There is a need for individualised and culturally specific services. In particular, small, locally-based specialist services are required to take account of the multiple ways in which people identify themselves, language barriers, cultural differences in issue framing and approaches to therapy. BAME communities have a lack of confidence in the system and a more tailored approach would significantly help effective engagement.
2. There is an important role played by communities and local voluntary and community organisations in delivering informal support services. However, there is a challenge with reconciling this with standardised commissioning processes.
3. There is a critical role played by the BAME and faith sectors in participating in a cross-sector approach to supporting resettlement.
4. That user focused services that empower individuals to deal with feelings of community isolation and encourage responsibility-taking are important.
5. That restorative justice can play an important role as a community-led response to harm and the restoration of victims and communities which can facilitate the resettlement of offenders.
6. There is value in diversity and the representation of BAME communities within the probation workforce.
7. Offenders and victims’ families and friends are important to successful resettlement via the provision of assistance with housing and support and family engagement. However, the variety of family structures within BAME communities means that a one size fits all approach is not appropriate and assumptions by probation staff that all families of a certain community will provide support in the same way must be avoided.
8. There is a need for culturally informed approaches to mental health that take into account issues of bias, cultural differences in understanding, issue framing and approaches to therapy.
9. Consideration needs to be given to matters of compliance and legal action in regards to the Equality Act 2010, the Offender Management Act 2007, the Human Rights Act 1998 and relevant Business Plans, Vision & Mission statements and codes of practice.
10. That human rights frameworks can assist in building the right culture within probation – one that moves away from a “compensation culture” and towards a culture based on the fact that tailored treatment in response to different needs is warranted based on human rights principles.

## Considering Restorative Justice

Over the last thirty years, restorative justice spread fast across the world occupying scholarly and policy debates principally within the criminal justice arena. Definitions can be artificial and run the risk of becoming obsolete very quickly, particularly if they refer to continuously evolving concepts such as restorative justice. While bearing this in mind, a glance at the extant literature will render a number of definitions for restorative justice as if it has always been a unified concept (e.g. see Marshall, 1999; Braithwaite, 2002; Gavrielides, 2008; Johnstone & Ness, 2011). Morrison (2006) argues that restorative justice has been conceived in two broad ways. One is a *process conception*; the other is a *values conception*. The process conception is characterized by a process that brings together all parties affected by harm or wrongdoing. The values conception, on the other hand, is characterised by a set of values, or principles, that distinguish restorative justice from traditional punitive state justice.

For the purposes of this submission, we accept that restorative justice is “an ethos with practical goals, among which is to restore harm by including affected parties in a (direct or indirect) encounter and a process of understanding through voluntary and honest dialogue” (Gavrielides, 2007: 139). Gavrielides argues that restorative justice “adopts a fresh approach to conflicts and their control, retaining at the same time certain rehabilitative goals” (139). For Braithwaite (2002) and McCold (1999), the principles underlying this “ethos” are victim reparation, offender responsibility and communities of care. McCold argues that if attention is not paid to all three concerns, then the result will only be partially restorative.

Restorative justice proponents see it as a ‘reincarnation’ of an old justice notion that puts conflicts into the hands of their parties (Gavrielides, 2011b). In its modern version, restorative justice appears principally in the form of (direct or indirect) mediation, family group conferencing, circles and restorative boards (Johnstone and van Ness 2011; Bazemore & Walgrave 1998; Crawford & Newburn, 2003; Gavrielides, 2007).

In 2005, Van Ness recorded approximately 100 countries that utilise restorative justice (van Ness, 2005), while in 2011 Gavrielides identified 23 prison-based restorative justice programmes in at least 84 countries (2011a: 35-37). Umbreit (2008) estimated that there are over 300 victim-offender mediation programmes in the US and over 700 in Europe. The Council of Europe and the European Union have shown their keen interest by issuing Recommendations and Directives encouraging member states to promote and implement restorative justice<sup>6</sup>. At the international level, as early as 2002, the United Nations (UN) issued UN Resolution E/CN.15/2002/L.2/Rev.1 ‘Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters’.

The scarce extant literature on the interaction of restorative justice with race argues that one factor that makes restorative practices appealing is their potential to create an understanding of the perspective of ‘the other’ (Charkoudian and Wayne, 2010; Gavrielides, 2012b; Walters, 2012). Unlike with what takes place in a courtroom, restorative practices require communication processes between the conflict parties. According to Albrecht, “This process can be expected to be

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<sup>6</sup> See for instance “Mediation in Penal Matters” – Council of Europe 1999 Recommendation No R(99) and “Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime”, EU Directive 2011/0129.

exacerbated when participants from different language groups and cultures, with their distinct sets of behaviour, rituals, and values meet in mediation” (2010: 4).

A number of restorative justice advocates would agree with this claim. For instance, Johnston and van Ness argue “The ultimate goal of restorative justice should be to transform the way in which we understand ourselves and relate to others in our daily lives” (quoted in Vlaemynck, 2008: 3). Vlaemynck (2008) would add that this way, restorative justice has the potential to enhance social integration, understood as the ability of different groups in society to live together in productive and cooperative harmony built on mutual trust.

Similarly, Zehr (1990) spoke about the transformative potential of restorative justice and its changing lenses of how we view crime. He saw crime as a wound in human relationships, and as an action that “creates an obligation to restore and repair” (Zehr, 1990: 187). He contrasted restorative justice with the retributive way of defining crime. He argued that retributive justice understands crime as “a violation of the state, defined by law-breaking and guilt. Justice determines blame and administers pain in a contest between the offender and the state directed by systematic rules” (Zehr, 1999: 181). According to Zehr, restorative justice sees crime as a conflict not between the individual and the state, but between individuals. Accordingly, this understanding encourages the victim and the offender to see one another as persons. In a similar vein, Gavrielides argues (2005; 2013) that the focus of the restorative justice process is on the restoration of human bonds, and the reunion of the two individuals that have been affected by harm or of the individual with their community. Zehr agrees as he points out that our current understanding of crime “creates an obligation to make things right”, and while “retributive justice focuses on the violation of statelaw... restorative justice focuses on the violation of people and relationships” (Zehr, 1999: 199).

Restorative justice assumes the existence of, what Gavrielides calls a “social liaison” that bonds individuals into a relationship of respect for each other’s’ rights and freedoms (Gavrielides, 2005). This also includes their race and cultural differences. Restorative justice assumes that this liaison has always been with us independently of our ethnic background, because it is innate in our nature as human beings. We cannot see it, but we can feel it in moments of danger, or of extreme happiness. Individuals are not really strangers, and that is why victim and offender are not enemies (Gavrielides, 2013).

Interestingly, critical race theorists agree with Gavrielides’ justification of what a restorative justice process aims to restore. Jenkins argues that restorative justice is based on the Afrocentric understanding of justice (2006). This is very much dependant on the existence of others putting an emphasis on community and values as opposed to individualism and control. The latter, he argues, are the central features of the Eurocentric understanding of justice. Schoeman reminds us of the African concept of Ubuntu which she claims to be the foundation of restorative justice (2013). “Modern restorative justice and indigenious justice practices share many similarities. The same values and principles that underpin the African philosophy of *ubuntu* are also embodied in restorative justice. This intersection of restorative justice and *ubuntu* philosophies is of broader relevance as it demonstrates how global and African philosophies have the potential to contribute to restoration and conflict resolution in diverse societies (Schoeman , 2013).

## Building confidence among BAME communities

The disproportionality that exists in the representation of BAME communities in the criminal justice system has a disastrous effect on the level of confidence that members of these communities then have for criminal justice agencies.<sup>7</sup> These figures contribute to perceptions of unfair treatment and to suspicion and mistrust of criminal justice agencies. Such perceptions in turn impact upon engagement and act as a barrier to improving outcomes. The lack of representation of BAME groups in agency staff also produces a similar effect. Lack of confidence in the criminal justice system may also mean that some young BAME people take the law into their own hands or carry weapons in an attempt to distribute justice and ensure their own personal safety.

Poor relations with criminal justice agencies, over-representation and a history of discrimination and racial prejudice all play part in distancing BAME communities from such agencies and impact upon the achievement of increasingly positive engagement and better outcomes.<sup>8</sup> Such fractured relationships also present challenges to criminal justice agencies in securing better engagement with local BAME communities so as to inform improved service delivery.

At the community level, restorative justice could be used to as a means to bridge this divide and repair relationships. The equal footing on which participants are placed and with which their voices are heard, the focus on repairing harm rather than assigning blame and the central part played by participants in identifying their own solutions, makes a community led restorative approach uniquely well placed to deal with this type of deep rooted conflict.

In this context we are looking at criminal justice agencies in a different light - as transitional structures for promoting restoration with communities with which they have a history of conflict. Such an approach highlights the importance of criminal justice agencies knowing the communities they serve, not just in order to solve crimes but also to actively prevent crime and to solve social problems that are associated with crime.

In many respects, the role of criminal justice agencies is to achieve goals that can also be considered restorative.<sup>9</sup> For example, there is a clearly articulated goal to restore community, to build peace, to protect human rights, and to ensure the security of all persons in the community.

However, to be successful there must be recognition of the fact that there is a legacy of exclusion, marginalisation, violence, and pain that must be overcome.<sup>10</sup> There must be a visible attempt to address the fears of abuse of power imbedded in BAME communities and protect communities from police misconduct. There must also be a willingness of communities to accept the impact of community relations over the last 30 years and be prepared to engage in a repairing process.

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<sup>7</sup> Theo Gavrielides and Sophia Blake (2013) *Race in probation: Achieving better outcomes for black and minority ethnic users of probation services*, 37.

<sup>8</sup> Theo Gavrielides and Sophia Blake (2013) *Race in probation: Achieving better outcomes for black and minority ethnic users of probation services*, 38.

<sup>9</sup> Margaret E. Martin (2006) *Restoring Justice Through Community Policing The Northern Ireland Case*, Criminal Justice Policy Review, Volume 17 Number 3, 314-329, 322.

<sup>10</sup> Margaret E. Martin (2006) *Restoring Justice Through Community Policing The Northern Ireland Case*, Criminal Justice Policy Review, Volume 17 Number 3, 314-329, 327.

As a specific example, we can look at how a restorative approach such as this aligns with the model of community policing. This is particularly of interest given that relationships between BAME communities and criminal justice agencies are perhaps at their most damaged when it comes to police. Community policing requires an orientation to understanding and valuing community needs. Empathy, community organisation, problem solving, mediation, empowerment practice, and other attitudes and skills are necessary.<sup>11</sup>

The cross overs between community policing and restorative justice have been described in the following way:

“In each domain, human rights, equality and equity, power sharing, respect for diversity, culturally competent and inclusive practice, and accountability to the community are core values. The practices of community policing appear to be similar to central restorative justice practices, such as victim-offender mediation and conflict management. Problem solving, collaborative, democratic, action-oriented, and empowerment-based practices are identified in community policing as important to best practice. In both restorative justice and community policing, the work is local, decentralized, and based on intimate knowledge of the community and fosters respect for the felt needs and unique meanings of the experiences of persons in the community. Restorative justice practice gives voice to persons silenced in retributive justice systems”.<sup>12</sup>

There is great potential for criminal justice agencies to utilise a restorative justice approach to improve relationships with BAME communities. Firstly, this would result in communities having increased trust and confidence in the system which would facilitate greater engagement and improved outcomes. Secondly, it would also lead to better understanding of communities and communities’ needs by criminal justice agencies that could better inform service design and improve delivery. And thirdly, better relationships and understanding would help to prevent discriminatory treatment, whether intentional or otherwise, of BAME communities in contact with the criminal justice system. Ultimately, these outcomes would serve to reduce BAME representation in the criminal justice system.

## Examples of good practice

Turning our focus on what little empirical evidence exists on the intersection between restorative justice and race, Albrecht, in a research project that she carried out in Norway and Finland looking at restorative justice with cases that involved migrant minorities she concluded, “Restorative justice is an appropriate tool of conflict resolution for migrant minorities” (2010: 14). She gives two reasons for this. Firstly, she claims that restorative justice offers a less complex justice system that is easier to grasp by migrants and refugees who lack the knowledge and often the language skills to engage with the formal criminal justice system. The restorative justice system is also more flexible, she argues, and has the potential to respond to the needs of the participants. Secondly, restorative

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<sup>11</sup>Margaret E. Martin (2006) *Restoring Justice Through Community Policing The Northern Ireland Case*, Criminal Justice Policy Review, Volume 17 Number 3, 314-329, 326.

<sup>12</sup> Margaret E. Martin (2006) *Restoring Justice Through Community Policing The Northern Ireland Case*, Criminal Justice Policy Review, Volume 17 Number 3, 314-329, 319.

justice offers an alternative that is free of costs as opposed to the expensive criminal justice procedures, which entail paying for a legal representative and various associate court fees. While financial aspects can create power imbalances in court procedures, concerning for example the quality of the juridical representation or possibility to appeal against a judgement, differences in social status do not affect mediation processes. Albrecht arguments are backed up with findings from a small qualitative study that she carried out through observation of four cases where restorative justice was used with migrant and refugee people. These were followed up with 31 qualitative interviews with mediators, administrative mediation staff and project leaders in Finland and Norway (2010).

Jenkins' research with the black communities of the Gullah Island also agrees with Condon (2006). Using the method of folkography (Jarett and Lucas, 2002) and through interviews with key informants and focus groups he concludes that on the Gullah Islands, black communities have two forms of justice: 'just law' and 'unjust law'. "The just law is an approach that is restorative in nature" (Jenkins, 2006: 309). "Unjust law is the formal law of the state that is grounded in Eurocentric principles" (Jenkins, 2006: 310). He claims that the Eurocentric approach to justice has caused mistrust of the criminal justice system by many blacks and that "the use of a restorative process, grounded in Afrocentric principles, could reduce not only crime and delinquency but also the apprehension many Blacks have about the political and legal systems" (304).

Simson's (2012) US-based research in restorative justice and its effect on racially disparate punitive school practices seems to agree with the above arguments. He presents data to claim that the punitive practices in American schools (e.g. out-of-school suspension) "Not only has racial disproportionality in school discipline been consistent, it also seems to have increased in severity over time" (2012: 7)<sup>13</sup>. Schiff agrees with Simson. She claims, "In an adversarial legalistic power structure, winners and losers are too often dictated by skin colour, socioeconomic status and access to resources of power" (Schiff, 2013). Payne and Welch (2010) are also in agreement with this conclusion.

The system's differentially unjust treatment of minorities is reflected in the concept of "disproportionate minority contact ("DMC")" which documents the extent to which minorities, and especially African Americans, are disproportionately represented at all levels of the criminal and juvenile justice systems (Cabanis et al, 2006). For example, national data in the U.S. showed that in 2000, Black students represented only 17% of public school enrolment but accounted for 34% of suspensions (Advancement Project, 2005). Other data show that nearly 1 out of every 6 African American students is suspended, as compared with 1 out of 20 for White students (1 in 12 Native American and 1 in 14 for Latinos). The number increases to 1 in every 4 for African American students with learning disabilities – a full 16% points higher than for White students with comparable disabilities (Losen and Gillespie, 2012). Similarly, Platt (1977) argued that the juvenile justice system is primarily a middle-class mechanism invented for the purpose of controlling lower-class immigrant youths. Bortner (1988) later contended that the juvenile justice system was created

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<sup>13</sup> For example the number of primary and secondary school students that were suspended from school at least once during a particular school year has risen from an estimated 1.7 million in 1974 to approximately 3.1 million in 1998 and 3.3. million in 2006 (Wald and Losen, 2001).

to imbue youths with middle-class societal values and behaviours that essentially extended state control and oppression by those with power and privilege.

Simson, argues that restorative justice “might be an attractive alternative to zero tolerance policies because it is a practice that can provide a forum for the voice of minorities to show that systematic inequalities are still a reality in society: (Simson, 2012: 16). To test his hypothesis he conducted quantitative research with 30 schools that used restorative justice in their disciplinary practices (2006-10) compared against 113 schools that were non-restorative justice. He argues that restorative justice can bridge the gap of understanding created in part by perceptual segregation. “Restorative justice helps in reducing school suspensions and allows schools to move away from being punitive in their resolution of disputes, keeping students in school instead” (2012: 34). According to his research, the focus of restorative justice on dialogue and on giving everyone a chance to interact can lead to discovery of misunderstanding and different perceptions of the interactions between members of a school community. Restorative justice, he says, can bring to the surface the causes of instances of ‘behaviour leakage’ by encouraging both students and disciplinary decision-makers to be honest about how they perceived the other person’s behaviour in the interaction that might lead to a suspension. “The 13 restorative justice schools reduced their black suspension percentage disparity by 4.5% while non-restorative justice schools increased their disparity by slight less than 1% ... Consequently, there is strong evidence that at least in the two school districts under investigation, restorative justice is helpful in addressing what has been a decade long problem of African American disproportionality in school discipline” (2012: 35)<sup>14</sup>.

Lyubansky and Barter also agree that restorative practices “support individuals and communities during racial conflicts by creating conditions for mutual understanding and collaborative action rather than seeking to exclude or punish any of the parties in the conflict” (2011: 38). They argue that when communities begin to see themselves and others through labels and structural power relationships, a quality of truth is lost without which dialogue declines. “Restorative practices create the space for this quality of truth, and the forms of expression privileged by truth to reassert their force and authority” (2011: 40). In their study of dealing with interracial conflicts in Brazilian society through restorative circles, Lyubansky and Barter found that dialogue helped make domination of the proceedings by and one person or group difficult to achieve as it passes the discourse back and forth until mutual comprehension is reached.

IARS would like to conclude this submission with the following quote:

“Seeing Brazilian court workers or others invested with conflict-resolution authority travelling to favelas to sit in spaces chosen and legitimised by members of those communities is to see a concrete shift in how justice is also racially done. To see US police officers responding hesitantly but sincerely to the codes and signs of a restorative system set up by First Nation peoples is to see both a more effective and inclusive approach to community healing and a symbolic recognition of the deeper complexities and interrelationships behind daily choices” (Lyubansky and Barter: 2011: 43).

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<sup>14</sup> According to the National Centre for Education Statistics, approximately 40% of US states have seen restorative practices in schools including California, Florida, Colorado, Minnesota, New York and Virginia (2010).

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