The Case for Restorative Justice (RJ) in Post-Secondary Institutions as

a Viable Response to Incidences of Sexual Violence and Misconduct (SVM)

Literature Review

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Restorative Justice (RJ) in Post-Secondary Institutions as

a Viable Response to Incidences of Sexual Violence and Misconduct (SVM)

List of Acronyms:

ADR – Alternative Dispute Resolution

EVA-BC – Ending Violence Association of BC

KPU – Kwantlen Polytechnic University

MAEST – Ministry of Advanced Education Skills and Training

PSIs – post-secondary institutions

RJ – restorative justice

SVM – sexual violence and misconduct

On May 19, 2016, the Government of British Columbia passed the Sexual Violence and Misconduct Policy Act in an effort to make campuses safer and more responsive to the needs of victims/survivors of sexualized violence and sexual misconduct. The *Act* requires BC PSIs to establish, implement and make publicly available a policy, with associated procedures, that addresses its prevention, and responses to sexual misconduct (Government of British Columbia, 2016).

Post-secondary institutions (PSI)s were tasked with developing and implementing a stand-alone policy and associated procedures to address Sexual Violence and Misconduct (SVM). Although institutional autonomy was respected, both MAEST and EVA-BC developed guidelines for Institutions to follow. The Ministry guidelines were more prescriptive, indicating what needed to be addressed in such a policy and provided sample definitions and elements to consider for inclusion. In discussing institutional response to SVM, RJ is not mentioned (Ministry of Advanced Education, 2017). On the other hand, EVA-BC actively discouraged the use of RJ in their guidelines:

> "We strongly discourage the use of restorative justice processes, including mediation, in lieu of sanctions in cases of sexual violence, as sexual assault is a power-based crime (that is, a crime where there is an imbalance of power, or an abuse of power by the perpetrator, and the victim/survivor feels powerless to stop it and/or come forward). In these cases, it has been argued that restorative justice processes may be used by perpetrators to manipulate and maintain their power over victims/survivors, and thus the application of these processes to gender-based violence remains controversial

(Randall, 2013). If the victim/survivor specifically requests a restorative justice process,

great care should be taken to identify community-based sexual assault experts and

restorative justice experts who deal with sexual assault cases, as expertise in both

restorative justice *and* sexual assault will be critical for this process to be empowering

for the victim/survivor. Managing restorative justice processes in cases of sexual

violence should *not* be promoted or taken on by the institution alone but in partnership

with community-based anti-violence workers" (Ending Violence Association of BC,

2016, p.37).

As such, the author speculated whether PSIs SVM policies and related procedures mentioned RJ

as an option and if not, the lack of mention from MAEST and the discouragement by EVA-BC

may have contributed to this outcome.

Despite this admonishment by EVA-BC, there is growing interest in whether RJ may be

an effective response to complaints of SVM, driven in part by victims / survivors themselves

asking for this to be an option. There is a prominent Canadian example of RJ being used to

address a case of sexual misconduct at Dalhousie in 2014 and despite intense public scrutiny and

pressure, it was the victims that held firm in their desire for RJ to be employed to address the

situation (Llewellyn, Mackay & MacIsaac, 2015).

The Campus PRISM Project which stands for Promoting Restorative Initiatives for

Sexual Misconduct is a report and ongoing project to make space for exploring RJ as a viable

response to sexual violence and misconduct on post-secondary campuses. The authors Karp,

Shackford-Bradley, Wilson and Williamsen (2016) stated that "the goals of a campus

adjudication process—utilizing fundamentally fair and unbiased approaches to determine what happened, whether what happened entailed a policy violation, and if so, what outcome should be assigned—can be incompatible with the needs of survivors" (p. 8). Additionally, proponents of RJ are not advocating that RJ be the only response; rather, that it is an option that makes up a suite of potential ways to respond to SVM (Karp, 2015; Karp et al., 2016). Finally, there is a small but growing body of research recommending RJ as a viable option (Barone, 2018; Boutilier & Wells, 2018; Karp et al., 2016; Llewellyn, Mackay & MacIsaac, 2015; Martin, 2018; Zinsstag, Keenan, Mercer & Madsen, 2018).

A literature review was conducted to explore the hypothesis that principles of RJ can serve as effective tools in responding to incidences of sexual misconduct in post-secondary institutions. This review starts with a theoretical overview of RJ and its role in PSIs. Next, the limitations of RJ are discussed and the results of the author's scan of 23 PSIs are outlined to determine how explicit PSIs are in mentioning RJ as an option. Finally, a case is made for employing RJ in PSIs as an option for addressing incidences of SVM. My research informed two broad recommendations:

1. That PSIs include language about RJ in their SVM policies and procedures in order to be explicit that this is an option victims-survivors can choose.

2. That PSIs be prepared to provide RJ processes that indirectly involve or not even involve the person responsible. RJ options such as indirect dialogue, exchange of letters / videos, or employing a surrogate stand-in for a direct dialogue approach may widen the range of methods available to allow PSIs to be more responsive to the needs of victims-survivors.

Methodology

A scan was conducted of the SVM policies and procedures of 23 PSIs in BC to discover the following:

1. Is the PSI's SVM policy and related procedures in one document?

2. Does the PSI have a separate policy and a separate procedures document?

3. Are complaints about students addressed under the SVM policy and related procedures or under another policy or policies and their related procedures?

4. Is there language incorporating the word "restorative" or mention of alternative dispute resolution used in the SVM policy?

5. Is there language incorporating the word "restorative" or mention of alternative dispute resolution used in the SVM procedures?

The 25 PSIs available to be scanned are listed in Appendix A. Two institutions (indicated in both appendices A&B) were excluded from the scan; one because it is not commonly associated with the other public PSIs listed and the other because their SVM policy and procedures were not readily accessible online. The answers to the five questions are noted in Appendix B. Further research should include a policy and procedures scan of the intersecting policies for handling a complaint to see if, at a minimum, alternative dispute resolution is mentioned and/or if language using the word "restorative" is used as an option for resolving the complaint.

The purpose of the proposed study is to conduct an exploratory survey to ascertain if any PSIs have used RJ to address incidents of SVM since the implementation of their SVM policies and procedures, regardless of whether their policies have RJ (or "restorative" or alternative dispute resolution) explicitly mentioned. These open-ended survey questions (see Appendix C) will be emailed to the Administrator responsible for handling complaints under their Institution's SVM policy. A qualitative research method was chosen to elicit more comprehensive data on

whether any RJ practices have been employed since these policies have been implemented, in what types of scenarios and to what effect. It is expected that further research questions could be developed after this initial survey.

Literature Review

The Role of RJ in PSIs

In exploring whether RJ principles would be effective in addressing incidents of SVM, a working definition of RJ is needed. Zehr (2015) stated that RJ is "an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific offence or harm to collectively identify and address harms, needs, and obligations in order to heal and put things as right as possible" (p. 48). Zehr proposed the three pillars of RJ to be:

1. About the harm caused and the needs of the victim – a victim-oriented approach,

2. The harm(s) caused result in obligations by the person responsible; and,

3. It encouragers stakeholder engagement – the stakeholders being the victim, the person responsible and community members.

From these three pillars stem five principles of RJ, practiced with an attitude of respect for all: "1. Putting right wrongs and harms; 2. Focusing on harms and needs; 3. Addressing obligations; 4. Involving stakeholders; and, 5. Using collaborative processes" (Zehr, 2015, p. 44). Outside of the criminal justice system, schools have been adopters of restorative approaches to misconduct. Zehr stated that "schools have become an important area of restorative practices" (p. 54). Goldblum stated that she "enjoyed codeveloping one of the first university RJ programs in the late 1990s at the University of Colorado at Boulder" (p. 141); which indicates RJ has been employed to various degrees in PSIs since then.

RJ is not new to PSIs; however, using it to address SVM is. The principles of RJ theoretically should make this a viable option. At its heart, RJ is about relationships and because many incidents of SVM have a relational aspect to them, this may be a more satisfying alternative to offer victim-survivors.   Furthermore, SVM policies are grounded in a victim-centered, trauma-informed approach (Ending Violence Association of BC, 2016, pp. 23-23). This approach aligns nicely with the pillars and principles of RJ. Finally, the RJ pillar of engagement promotes involvement of the community and ultimately PSI's are a community. As posited by Llewellyn, Mackay and MacIsaac "punitive measures such as expulsion do not change attitudes or positively influence future behaviour, nor do they address underlying systemic problems" (p. 13). Karp (2015) stated that "college campuses are using restorative practices to respond to larger social justice issues such as sexual misconduct, abuses of power and privilege, and bias incidents" (p. 52). Therefore, the very nature of SVM may make it more conducive to be effectively addressed using RJ principles.

Limitations of RJ

There are limits to an RJ approach. According to Karp (2015), RJ doesn't always work and that is why it is recommended to compliment, not replace, other approaches. Also, RJ may not be appropriate for very serious SVM cases and conversely, RJ is very time-intensive and may not be the best use of resources for minor SVM cases (Goldblum, 2009, p. 149). Further, it is commonly agreed that in order for RJ to be successful, the person responsible must accept responsibility (Busby & Birenbaum, 2020, p. 106; Goldblum, 2009, p. 142; Karp, 2015, p. 11). Another limitation to RJ then, according to Busby and Birenbaum (2020), is that there is "a serious disincentive to respondent participation… they cannot be promised that admissions made in the course of an alternative process will never be used against the in any other legal process,

and in particular, will not be ordered produced to the Crown in any parallel or subsequent criminal proceeding" (p. 104). As such the person responsible may be willing to take responsibility and even participate in an RJ process but choose not to as a defensive measure in any current or potential future litigation. When might RJ be most applicable? Goldblum (2009) posited that RJ in post-secondary may more effectively address "normative violations", when community standards or social justice norms have been violated and there has been an impact to the community (p. 149).

The guideline to be "cautious about the use of restorative justice processes, including mediation" (Ending Violence Association of BC, 2016, p. 8) may be addressed by PSIs being more explicit about the difference between mediation and RJ. Criticism of using mediation in particular in response to SVM include concerns of leniency for the offenders, perceptions that this is condoning and perpetuating systemic violence, and because sexual violence often is about power, such processes can be manipulated by the perpetrator to further victimize the individual that has come forward. There is a growing understanding that RJ is different than mediation. Although RJ and mediation share some features, there are also important distinctions that may overrule the concerns expressed about mediation (Karp et al., 2016, p. 29). Barone (2018) explained "mediation and restorative justice can often be confused as being the same approach. They both require trained facilitator(s) and share similar terminology. However, there are key differences. RJ requires the responsible person (RP) to take ownership of their harm causing actions ahead of the process, while mediation does not" (p. 6). To help foster this change in perception, PSIs should be explicit about what RJ is and what it is not.

Are PSIs Explicit that RJ is an Option?

In conducting a scan of 23 PSIs SVM policy and procedures (see Appendix B), 9 linked to student conduct or other policies for the handling of formal complaints about students. As such, further research is required to review those institutions' other policies to see if RJ or at least ADR is an option in those policies. Looking specifically at KPU as an example, the formal adjudication of an SVM complaint when a student is the Respondent is handled under the Student Conduct (Non-Academic) policy ST7 which has a section that talks about ADR. This allows for the flexibility to offer RJ options as part of the institutional response to SVM even though RJ is not specifically mentioned in either policy. Of the 9 institutions that linked to other policies, two of them (Langara and NVIT) mentioned "alternative resolution" and "restorative processes" in their SVM policy/procedures. For those 14 institutions where their sexual violence and misconduct policies do address how formal complaints about students will be addressed, 5 mentioned "alternative resolution" or "restorative justice". That is a total of 7 institutions who explicitly state some form of restorative option in their SVM policy and/or procedures.

Interestingly, Busby & Birenbaum (2018) asserted that "most if not all sexual violence policies already have provisions that allow alternative processes to be used to resolve sexual violence complaints outside of an investigation stream, that is, before a formal complaint has been filed or as a side process following a formal complaint" (p. 105). The few examples they cited were institutions from provinces other than British Columbia. An alternative explanation for their assertion that appears to contradict this literature review is my use of a narrower search category; i.e., expecting RJ to be mentioned explicitly in the SVM policy. It is important to note that SVM reports are often handled without conducting a formal investigation and RJ may be employed at this informal stage. Alternatively, or perhaps concurrently, as in the KPU example,

RJ may be an option under another policy. Therefore, it is unclear how many BC PSIs are using restorative measures to handle incidences of misconduct, regardless of whether their policies/procedures allow for it, which is why the qualitative exploratory survey proposed is needed. Based on the results of that survey, if it is found that restorative options are being employed, I would argue that PSIs could address some of the limitations of RJ and be more transparent about whether this is a viable option for victim-survivors by explicitly mentioning RJ in their SVM policies and procedures.

The Case for RJ

Proponents of RJ stress the opportunity it may provide to address relational dilemmas, allow victim-survivors to reclaim their voice and transform their experience of shame (Zinsstag et al., 2018). There are books, guides and reports detailing various RJ options, including template curriculum and scripts for processes such as: restorative conferences, circles (of varying types), CoSAs (Circles of Support and Accountability) and accountability boards (Goldblum, 2009; Karp, 2015; Karp et al., 2016; Zehr, 2015). Busby and Birenbaum (2020) provide wording examples of alternative processes for inclusion in sexual violence and misconduct policies. Case study examples can be found in the Campus PRISM Project Report and the Report from the Restorative Justice Process at the Dalhousie University Faculty of Dentistry (Karp et al., 2016; Llewellyn et al., 2015). The Campus PRISM Report also provides recommended next steps for institutions interested in incorporating a restorative approach (Karp et al., 2016). Zinstaag et al. (2018) created a Guide "on how to engage with the parties to RJ in SV cases safely and in a manner that meets the psychological and emotional needs of all, most especially of the victims and offenders" (p. 12). This recent and relevant information of RJ specific to SVM is laying the foundation for more to come. Recent research has proposed recommendations such as:

1. PSIs offer an alternative dispute resolution process for SVM in the form of RJ by partnering with a community restorative justice centre (Barone, 2018). This recommendation aligns with EVA-BC where they urged PSIs not to undertake restorative justice processes in cases of SVM alone; but rather in partnership with community-based anti-violence workers" (Ending Violence Association of BC, 2016, p.37).

2. Build interest and acceptance of RJ in PSIs for handling incidences of SVM by engaging with community partners and involving them in training facilitators and creating opportunities for their participation in RJ processes. PSIs to develop context specific RJ options (Martin, 2018).

3. Boutilier and Wells (2018) go even further, using language of "reparative and transformative justice" and calling for government funding to develop, in part, a reparative and transformative justice response to sexual violence in the post-secondary context.

Current academic literature outlines several potential benefits of restorative practices for victim-survivors of sexualized violence namely their capacity to provide opportunities for choice and empowerment, to provide victim-survivors the opportunity to share what happened in their own voices, to flexibly respond to their self-determined needs and finally to have their experiences recognized without dispute of fact (Martin, 2018, p. 39). These findings and recommendations support my hypothesis that principles of RJ may serve as effective tools in responding to incidences of sexual misconduct in post-secondary institutions.

Recommendations

Building on this, the study's fundings propose that:

1. PSIs include language about RJ in their SVM policies and procedures in order to be explicit that this is an option victims-survivors can choose.

2. PSIs be prepared to provide RJ processes that indirectly involve or not even involve the person responsible. RJ options such as indirect dialogue, exchange of letters / videos, or employing a surrogate stand-in for a direct dialogue approach may widen the range of methods available to allow PSIs to be more responsive to the needs of victims-survivors.

Language is important. Informal resolution is not equivalent terminology to ADR as there is no formal accountability tied to informal resolution. With ADR, should the Respondent not uphold their obligations, disciplinary measures may then be applied. Even if ADR is mentioned, I propose it is important to provide specific examples of what falls under this overarching category and whether this includes RJ or restorative options. The reason being that mediation is a form of ADR and criticisms indicate that mediation is not considered an effective response whereas the accountability tied to RJ may make it effective. Using specific terminology that more accurately reflects there is accountability within an ADR process not only aids in legitimizing such an approach; being explicit is transparent about providing more options which may be empowering for victims-survivors.

Another consideration that informs the second recommendation is that according to Martin (2018):

"In some cases, processes that involve both the victim and offender are not possible; for

example, if the offender will not accept responsibility, there are safety concerns that

cannot be sufficiently addressed, or if one party is no longer living. However, the absence

of a direct encounter does not preclude a restorative response. Restorative processes are

possible and even beneficial in cases where only one party is able to participate [Walker,

2013, p. 35]. Walker (2013) refers to these as "partially restorative processes", (p. 36),

which is aligned with Zehr's (2002) continuum of restorative responses [p. 55] (Martin,

2018, p. 34)."

In PSIs there are instances where a student may make a complaint about SVM but the person

responsible is not a community member of that institution so there is no jurisdiction in which to

hold that person accountable. According to policy, the institution still has a duty to support the

Complainant and it is very forward-thinking to consider how RJ may still be an option in such

cases.

Conclusion

SVM is a serious societal issue and PSIs are not immune. Results from the 2014 General

Social Survey on Canadians' Safety show that students, and especially women who were

students, reported relatively high rates of sexual assault. Overall, approximately 261,000

incidents of sexual assault—41% of all incidents—were reported by students. This represented a

rate of 73 incidents of sexual assault per 1,000 population" (Statistics Canada, 2014). The

seriousness of this issue led to legislation being enacted in BC, and according to the Guide that

accompanied the legislation, "with the aim of making campuses safer and more responsive to the

needs of victims/survivors" (Ministry of Advanced Education, 2017, p. 4). The Ending Violence

Association of BC (2016) stated "the challenge for institutions, in developing and implementing

sexual violence policies and protocols, is in balancing the rights of victims/survivors, the rights

of the accused to due process and privacy, and the safety of the campus community as a whole"

(p. 13).

The question my research poses is whether PSIs could be doing more to be responsive to

the needs of victims-survivors and to the campus community as a whole. I would suggest that

this is the case and propose that by explicitly incorporating RJ as an option for handling

incidences of SVM in the SVM policy and procedures, PSIs would be signaling an important

message to victims-survivors and the campus community that RJ is a viable option. Further

research should be conducted to determine if RJ is an option in PSIs that link to another policy to

handle complaints about students where a student is the Respondent. My proposed study will

provide clarity around whether RJ is being practiced even if not explicitly named as an option in

policy and to what effect. Finally, a bold, new direction would be to conduct research into if,

where and how, restorative practices are being carried out that only involve the victim-survivor's

participation and to what effect the victim-survivor finds this a satisfying process to engage in.

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Appendix A

"The *Sexual Violence and Misconduct Policy Act* requires all B.C. public post-secondary institutions in B.C. to have a sexual violence and misconduct policy." The Ministry of Advanced Education, Skills and Training (MAEST) created a website where all the SVM policies would be located in one place to make them more accessible, available at: https://www2.gov.bc.ca/gov/content/safe-campuses-bc/get-informed.

British Columbia Institute of Technology
Capilano University
Camosun College
Coast Mountain College – excluded from review
College of New Caledonia
College of the Rockies
Douglas College – excluded from review
Emily Carr University of Art and Design
Justice Institute of British Columbia
Kwantlen Polytechnic University
Langara College
North Island College
Northern Lights College
Nicola Valley Institute of Technology
Okanagan College
Royal Roads University
Selkirk College
Simon Fraser University
Thompson Rivers University
University of British Columbia
University of the Fraser Valley
University of Northern British Columbia
University of Victoria
Vancouver Community College
Vancouver Island University

Appendix B

Chart 1

Post-Secondary Institution SVM Policy and Procedures Scan: Review whether language such as

restorative justice (RJ) or restorative principles/options/approaches/engagement or alternative

dispute resolution is used specifically in either the policy or procedures.

Institution	SVM Policy and Procedures in one document?	Is there a separate SVM Policy Document and a separate SVM Procedures document?	Complaints about students handled under another policy and related procedures?	Language incorporating the word "restorative" or mention of alternative dispute resolution used in SVM Policy?	Language incorporating the word "restorative" or mention of alternative dispute resolution used in SVM Procedures?
British Columbia Institute of Technology (BCIT)	No	Yes	Yes – to 3 other policies	No	No
Capilano University	No	Yes	No – the SVM procedures handle complaints	No	No
Camosun College	Yes	No	No – the SVM policy & procedures handle complaints	No	N/A (as policy and procedures are 1 document)
Coast Mountain College – excluded from review					
College of New Caledonia (CNC)	No	Yes	No – the SVM procedures handle complaints	No	No
College of the Rockies	Yes	No	No – the SVM policy & procedures handle complaints	No	N/A (as policy and procedures are 1 document)
Douglas College – excluded from review as SVM policy not readily available					

Emily Carr University of Art and Design	No	Yes *Note there is one overarching policy and then separate procedures documents for students and for employees and non-students.	No – the SVM procedures handle complaints	No	No
Justice Institute of BC (JIBC)	No	Yes	No – the SVM procedures handle complaints	No	No *Note, the procedures identify informal resolution but this is not an equivalent term to alternative dispute resolution.
Kwantlen Polytechnic University (KPU)	No	Yes	Yes – to the Student (Non-Academic) Misconduct policy	No	No
Langara College	No	Yes *Note there is one overarching policy and then separate procedures documents for students and for employees and non-students.	Yes – to the Student Conduct policy	No	Yes – an option of "alternate resolution process" is noted in the procedures.

Nicola Valley Institute of Technology (NVIT)	Yes	No	Yes – to the Human Rights policy	Yes. Students have the option of "seeking restorative processes".	N/A (as policy and procedures are 1 document)
North Island College (NIC)	Yes	No	No – the SVM policy & procedures handle complaints	Yes. Students have the option of "alternate resolution".	N/A (as policy and procedures are 1 document)
Northern Lights College (NLC)	Yes	No	No – the SVM policy & procedures handle complaints	No	N/A (as policy and procedures are 1 document)
Okanagan College	Yes	No	Yes – to the discrimination, bullying and harassment policy.	No	N/A (as policy and procedures are 1 document)
Royal Roads University (RRU)	No	Yes *Note there is one overarching policy and then separate procedures documents for students and for employees and non-students.	No – the SVM procedures handle complaints	No	Yes - alternative resolution as opposed to the completion of an investigation and decision-making process is an option.
Selkirk College	Yes	No	Yes – to the Student Conduct policy	No	N/A (as policy and procedures are 1 document)
Simon Fraser University (SFU)	Yes	No	Yes – to the Student Conduct policy	No	N/A (as policy and procedures are 1 document)

Thompson Rivers University (TRU)	Yes	No	No – the SVM policy & procedures handle complaints	No	N/A (as policy and procedures are 1 document)
University of British Columbia (UBC)	Yes	No	No – the SVM policy & procedures handle complaints	Yes – an alternative resolution process is an option	N/A (as policy and procedures are 1 document)
University of the Fraser Valley (UFV)	Yes	No	Yes – to the Safe Student Learning Community Policy	No	N/A (as policy and procedures are 1 document)
University of Northern British Columbia (UNBC)	No	Yes	No – the SVM procedures handle complaints	No	No
University of Victoria (UVIC)	No	Yes – 3 separate procedures documents	No – SVM procedures documents handle complaints	No	Yes, in the procedures document called "Sexualized Violence – Investigation, Adjudication, and Appeal Procedures for Students". It's called a "community accountability agreement process" "A community accountability agreement process may include but is not limited to: restorative justice, etc.

Vancouver Community College (VCC)	No	Yes	No – the SVM procedures handle complaints	No	No
Vancouver Island University (VIU)	No	Yes	Yes – to the Student Conduct Code	No	Yes – the Investigation Manager may, on their own initiative or at the request of the Complainant or the Respondent, explore resolution through alternate dispute resolution. This process may occur before, during, or after an Investigation

Appendix C

Proposed Exploratory Survey Questions

To be emailed to all the institutions listed in Appendix A with a cover sheet providing the

Definitions outlined in Appendix C.

Q.1

Based on the definitions provided, has your institution utilized one of those methods to address

an incident of sexual violence and misconduct perpetrated by a student? Please answer Yes or

No.

Follow-up questions if answered "no" or "yes":

Q.2 a

If the answer to Q.1 was "no", would your institution consider doing this in future?

Please answer Yes or No and in the space provided indicate why or why not.

Q.2b

If the answer to Q.1 was "yes", by the definitions provided, what approach(es) did you take?

Further follow-up questions if answered "yes":

Q.3

If the answer to Q.1 was "yes", please indicate what types of incidents were handled this way.

Q.4

Who facilitated the process?

Q.5

Did you conduct an evaluation of the process afterwards? Please answer Yes or No,

Q.6

If the answer to Q.5 was "yes", by what means did you evaluate? Please explain.

Q.7 Based on your experience, would your institution continue utilizing these methods where appropriate?

Please answer Yes or No and in the space provided indicate why or why not.