

Victim Offender Mediation Programmes  
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Thank you. I am honoured to be with you at this important conference. Restorative justice is changing the way criminal justice is administered in every region of the world. May I extend congratulations to the Ecole Nationale de la Magistrature for their achievement in organising this event.

On 28 May 1974, two young men pleaded guilty to twenty-two charges of wilful damage stemming from a night of intoxication and vandalism. They were 18 and 19 years old at the time, living in the city of Kitchener, Ontario. The probation officer assigned to prepare the pre-sentence recommendation enclosed a letter to the judge proposing that as a condition of probation the two offenders be required to visit each of their victims to ask about the victims' tangible losses.

Canada is a common law country and allows the exercise of considerable discretion by decision makers in the criminal justice system. After reflection, the judge decided to continue the case for one month so that the two young men, accompanied by the probation officer and a Mennonite Central Committee community worker, could do what the probation officer had proposed.

In all, they spoke to 21 victims (one had moved and could not be located). In each instance the young men went to the victims' homes, introduced themselves and explained why they were there. The victims reported losses of \$2200; after deducting insurance reimbursements, around \$1100 of those losses remained unpaid.

When the young men returned to court, the judge placed them on 18 months probation, and ordered them to pay a fine and restitution amounting to \$550 per person during the first three months. At the end of the third month, the young men returned to the homes and paid each victim what was due them. Many of the victims were pleased with how this had worked out; others were still angry. But the results were impressive enough that it led to the creation of what was called the Victim Offender Reconciliation Programme. (Peachy, 2003, pp. 178-80)

This programme is often credited with being the first modern example of restorative justice<sup>1</sup>. Restorative *approaches* to crime and conflict have been in use from ancient times in the Middle East to the present in aboriginal people's customs. But the term "restorative justice" was used by people who worked in this programme and several of its early replications in the US, in an attempt to explain how it was different from the justice

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<sup>1</sup> The other candidate for this distinction is a programme started by the prosecutor of Columbus, Ohio in 1972 with the help of a law professor. Law students served as mediators of a number of relatively minor criminal matters that were diverted from the court process into the programme (Wright, 2002, p. 91).

found in courts. The first replication, in Elkhart, Indiana, was administered by Howard Zehr, and the rest, as they say, was history.

Initially these programmes were called *reconciliation* programmes, but over time the name was changed to Victim Offender *Mediation* Programmes. Some victims and offenders who meet together have a profound experience that can only be described as reconciliation. For others, the hostility is decreased and understanding increased. For still others, there is merely an agreement about what to do in the aftermath of the crime. Sometimes not even an agreement emerges. Where many of the early practitioners were Mennonites and comfortable with emphasizing the potential for reconciliation, as the movement expanded others joined who preferred to refer to the process rather than to a hoped-for outcome. Hence the name 'victim offender mediation' or 'victim offender mediation/dialogue'.

### Victim offender mediation and other restorative processes

Other restorative justice programmes have arisen in the past 30 years. The two major alternatives are being discussed at this conference: conferencing and circles. At the end of the seminar I believe that you will understand the differences between these three kinds of programs in both operation and, to a certain extent, operating values. But far more unites these programmes than divides them.

All of them reflect a dramatic departure from criminal justice as it is usually practiced. All focus on the needs and responsibilities of the offender and victim more than on how to punish the offender. All emphasize the importance of communication and participation by the parties as well as inclusion of the parties in deciding which of the programmes to use or modify. This is, of course, quite different from traditional criminal justice processes in which victims have a minimal role, if any at all, and defendants watch lawyers and judges argue using vocabularies that have specific and specialized meaning. A courtroom is very different from restorative processes, which the UN Declaration of Basic Principles on the Use of Restorative Justice refers to as processes, "in which the victim and the offender, and where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator." (Council Res. 2002/12, 2002) The Basic Principles give as examples, mediation, conciliation, conferencing and circles.

So one common characteristic of these restorative programmes is that they were designed to be voluntary, cooperative, consensual alternatives to criminal justice. A second characteristic is that each creates an environment in which the parties may engage in restorative dialogue to resolve the matter between them. Third, while the prototypical programmes have different features, in practice they often adjust to particular circumstances and the needs of the parties, and may include features one would expect to find in one of the other restorative processes. Finally, there are likely to be new forms of restorative dialogue in the future. At one time it was believed that victim offender mediation was the only restorative process. After conferencing emerged from New Zealand, there were two kinds of restorative processes. Then came circles and we now

discuss three major programmes for restorative dialogue. Based on this history it should not surprise us if eventually a fourth, fifth, or even sixth option appears.

What is victim offender mediation?

Victim offender mediation is a process that gives victims the opportunity to meet with their offenders in a safe and structured setting, with the assistance of a neutral facilitator. During the meeting, the parties talk about the crime and its consequences, ask and answer questions of each other, and consider together what should be done to resolve the matter. Often that resolution includes some form of amends by the offender.

There are over 1300 victim offender mediation programmes in the world, primarily in North America and Europe (Umbreit, 2001, p. xliii). For the most part these programmes use similar processes. Once a case has been referred for mediation and a mediator is assigned, that person will contact the victim and offender to explain in general terms the process. Particularly in serious crimes, the mediator will arrange for individual meetings to discuss the process in detail, listen to the party's story and help them decide whether or not to pursue mediation. The mediator arranges for the mediation session and serves as a facilitator whose role is to allow the parties to speak freely, listen carefully and eventually work toward agreement. After the meeting, copies of that agreement are prepared and delivered to the parties and to the referral agency. In many programmes, the mediator will also monitor progress to ensure that the agreement is being kept.

The parties decide whether to attend; they are not compelled to do so. However, the reality of conducting victim offender mediation or any restorative process in the context of a criminal matter is that the defendant may elect to participate not because of the intrinsic worth of meeting the victim, but to avoid more onerous punishment. This is not considered coercion of the sort that will diminish the value of the meeting.

Victim offender mediation is different from civil mediation. In civil mediation, the parties are assumed to have each contributed to the dispute, and the goal is largely to find an acceptable agreement. The mediator may play a very active and sometimes directive role in negotiating that agreement. In victim offender mediation, on the other hand, it is understood that one person has harmed another. In some instances there has been a prior relationship out of which the offender was provoked to act. But in others the victim is innocent of wrongdoing. Victim offender mediation recognizes that there may be a moral imbalance among the parties. Furthermore, restorative dialogue is at least as important as an agreement, because it is during conversation that the victim can find answers, express emotion and explain how the crime affected her life. Similarly, the offender can answer questions, express remorse and explain motivation for and consequences of the crime to himself.

Direct and indirect mediation

In some parts of Europe it is more common to have mediation take place indirectly than in person. The mediator becomes a conveyor of information and communication between the parties. There are several reasons why indirect mediation may be selected.

One is that the parties themselves prefer to “meet” in this way. This could be because of fear or convenience. Using the mediator to help them communicate with the other allows them a level of participation and dialogue, and can produce an agreement about what should happen in the aftermath of the crime.

A second reason is that it is easier for the mediator to handle larger numbers of cases if the mediation is indirect. An exchange of telephone calls may be all that is needed to reach an agreement about what should happen in a case. The problem with this reason is that it is not responding to the needs of the parties but to the needs of those who provide the mediation services. The per-case costs can be much lower for indirect mediation, but its value to the parties is also lower. According to Umbreit (2002, pp. 246-48), a study in England found that victim and offender satisfaction with the outcome of mediation, victim and offender perception of fairness, and victim fear of revictimization were significantly improved for those who had experienced direct mediation compared to those whose mediation was indirect.

#### Relationship of victim offender mediation to the criminal justice system

There are a number of ways to explore the relationship between victim offender mediation and the criminal justice system. For example, Marc Groenhuijsen (2000, p. 71) has proposed three models of victim offender mediation, based on their relationships to the criminal justice system. The first is an *integrated* programme, which means that it is actually part of the criminal justice system. The agreements reached during the mediation are certain to have an impact on the disposition of the case in the criminal justice system. An example would be when a judge refers a matter to mediation before sentencing, with the expectation that the agreement will affect that sentence.

The second model is an *alternative* programme, which is used instead of the criminal justice system. For example, a case may be diverted from the criminal justice system and sent to victim offender mediation. Mediation is used instead of criminal justice.

The third model is the *additional* programme, which complements what takes place in the criminal justice system. In the state of Texas, for example, there is a long waiting list of victims who wish to meet with their prisoners, some of them on death row, to discuss what happened during the crime. These meetings serve a useful purpose for the victims and offenders emotionally, psychologically and spiritually, but they do not have any influence on the sentence that has been imposed by the courts.

A second way to consider the relationship between victim offender mediation and criminal justice is to explore the source of mediators. The mediator may be an employee of a government agency, such as the probation department, social welfare department or judicial support staff. In other programmes the mediators are volunteers recruited from

the community and given training. In still others, the mediator may be an employee of an NGO that has gotten permission – if not a contract – to conduct victim offender mediation.

A third consideration is who makes the referral to mediation. This can be the police, prosecutors, judges, and prison or parole officials. According to Knut Petterson (2002, p. 38), a district judge from Norway, referrals that come from the prosecutor are more likely to be offender focused than those coming from a judge. Presumably we could add the names of several other agencies to the prosecutor's, such as police and the prison or parole board. In each of those instances the focus is already on the offender, and the agencies mentioned are tasked with determining or carrying out processes that control what happens to the offender. Some might question whether judges really belong in the separate category of those with a more balanced concern between the offender and the victim, since the court process itself is highly offender oriented. However, there are undoubtedly differences from jurisdiction to jurisdiction.

There are also differences based on the existence of and adherence to the legality principle. For example, according to Pelikan (2002, p. 29), Austria's victim offender mediation models are predominantly prosecutor based, whereas Rius (2002, p. 32) reports that Spain's prosecutors still strongly adhere to the legality principle with the result being that most victim offender mediation is initiated by judges.

A fourth consideration has to do with the kind of case. Victim offender mediation, as with conferencing, has had a tendency to be used first with juveniles, then with adults charged with minor property crimes, and finally in cases of serious, violent crime. Because the victim and offender in a serious, violent crime may not be ready for such a meeting for years, the criminal justice system will often have completed its work by the time they choose to meet. This is why these kinds of cases are typically handled in complementary programmes rather than integrated or alternative victim offender mediation programmes.

Is victim offender mediation inherently restorative?

Increasingly there seems to be agreement that it is the presence or absence of restorative values that makes something more or less restorative. These are more important than the name of the programme or even of the presence of restorative principles. Values must express themselves in principles and programmes of course, but the presence of the values is more critical to restorative justice than is the "correctness" of the articulated values or programme design.

Just as there is lack of agreement on a definition of restorative justice, so there are many formulations of restorative justice values. Here is one for your consideration:

First, restorative justice values *peaceful social life*. This means more than the absence of open conflict. It includes concepts of harmony, contentment, security, and wellbeing that exist in a community at peace with itself and with its members. Furthermore, it means

that when conflict occurs it is addressed in such a way that peaceful social life is restored and strengthened. This is expressed in at least two ways in the aftermath of conflict:

- a. *Resolution*: the issues and people surrounding the offense and its aftermath are addressed as completely as possible
- b. *Protection*: the physical and emotional safety of affected parties is a primary consideration in all phases

Second, restorative justice values *respect*. This means that all people are regarded as worthy of consideration, recognition, care and attention simply because they are people. This is expressed by offering the parties the opportunity for:

- a. *Encounter*: affected parties are invited, but not compelled, to participate in person or indirectly in making decisions that affect them in the response to the offense
- b. *Empowerment*: affected parties are given a genuine opportunity to effectively influence and participate in the response to the offense

A third restorative value is *solidarity*. This means a feeling of agreement, support, and connectedness among members of a group or community. It grows out of shared interests, purposes, sympathies, and responsibilities. This is expressed through:

- a. *Inclusion*: affected parties are invited to directly shape and engage in restorative processes
- b. *Assistance*: affected parties are helped as needed in becoming contributing members of their communities in the aftermath of the offense
- c. *Moral education*: community standards are reinforced as the values and norms of the parties, their communities, and their societies are considered in determining how to respond to particular offenses

Finally, restorative justice values *active responsibility*. This means taking responsibility for one's behavior. It can be contrasted with passive responsibility, which means being held accountable by others for that behavior. Active responsibility arises from within a person; passive responsibility is imposed from outside the person. This value is demonstrated through:

- a. *Collaboration*: affected parties are invited, but not compelled, to find solutions through mutual, consensual decision-making in the aftermath of the offense
- b. *Reparation*: those responsible for the harm resulting from the offense are also responsible for repairing it to the extent possible.

Victim offender mediation programmes can become less effective as they cease to reflect these values. This can happen because of a loss of vision by those who manage, fund, or refer cases to the mediation programme. It can result from a change in focus from helping parties dialogue together to hammering out an agreement. It can be caused by a focus on the offender that increases to the point that the programme loses its sensitivity (or fails to acquire it in the first place) to crime victims.

However, as reflection on restorative justice values leads to renewed commitment, changed behaviour, and reoriented goals, programmes that were once only marginally restorative can become places that restore victims, offenders and their communities.

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