

# Restoring the Harmony: piloting victim offender conferencing in South Africa

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## Introduction

### Traditional justice

Restorative justice concepts have long been applied in South Africa in different contexts. It is found in the traditional African concept of '*ubuntu*'. This is a concept which is hard to describe in English, but speaks of the essence of being a human. It is spoken of as a world view of African societies and determining factor in the formation of perceptions which influence social conduct. It has also been described as a philosophy of life, which represents personhood, humanity, humanness and morality (Mokgoro, 1998: 49). When someone is spoken of as having '*ubuntu*', it means that they are generous, hospitable, friendly, caring and compassionate. It is interpreted to mean that the humanity of others is inextricably linked with their own humanity. Key social values of *ubuntu* include group solidarity, conformity, compassion, respect for human dignity, humanistic orientation and collective unity.

This concept has underpinned social systems in Africa for many years, and has been the basis for the resolution of disputes through African customary processes. Reconciliation, restoration and harmony were seen as the basis for adjudication. The central purpose of customary law was to acknowledge the wrong and determine what amends should be made. The victim, offender and community were placed at the heart of the dispute. Customary law was practiced through traditional courts or Makgotla. Presided over by the chief, some of these are still in operation today in the rural areas (Peters, undated).

### Justice in Transformation

The Interim Constitution of 1993 set the tone for social and political transformation in South Africa. The Constitution sought to establish a bridge between the strife and conflict of the past, and a future founded on the

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recognition of peaceful coexistence for all South Africans (Postscript to the Constitution). In order to realise this, the Constitution recognised that there was a need for ‘understanding, not vengeance; a need for reparation, not retaliation’ and a need for *ubuntu*, not victimisation (ibid). *Ubuntu* became an integral part of the establishment of a system that recognised and guaranteed fundamental freedoms and set the tone for reconciliation and peaceful coexistence. Although not explicit in the 1996 Constitution, the principles of *ubuntu* seek expression in the founding values of equality, human dignity, and the promotion of human rights and freedoms.

The Constitution recognises the role of traditional leaders and systems of indigenous law, subject to the Constitution (S 211 of the Constitution, 1996), and thereby seeks to ensure that indigenous law develops alongside modern democratic values.

### **Popular justice**

During the apartheid years, the government tried to co-opt these traditional structures and their legitimacy in the eyes of the community was diminished. During the 1970’s and 1980’s, other forms of justice developed, also in reaction to perceived unfairness of the formal justice system. There was an emergence of community courts in the African townships. This represented a rejection of State authority and an attempt to restore authority to the community in the areas of safety, security and justice. Popular justice became a vehicle for community influence in dispute resolution (Nina, 1995). The problem with these systems is that they were not always associated with legitimate aspects of the judicial system, such as due process, rights culture, legal representation and other mechanism to protect victim and offender. Many of them became retributive ‘kangaroo’ courts, meeting out excessive and brutal punishments, often on scant evidence. Community dispute resolution also became a popular mechanism for dealing with civil and criminal disputes through the use of trained community mediators.

These structures began to diminish as the country moved towards its transition to democracy. The emphasis was moved to improving the delivery of State justice in a way that was acceptable to the people of South Africa.

### **Truth and Reconciliation Commission**

The transitional period was also a crucial one for promoting reconciliation in South Africa, mainly through the establishment of the Truth and Reconciliation Commission. The aim of the TRC was to reconcile different aspects of South Africa through the different processes that allowed for truth telling, for amnesty, and for some degree of victim compensation. In this process, perpetrators could apply for amnesty if they acknowledged the commission of illegal acts with a political motivation. Victims were given the opportunity to tell their stories. Some writers have argued that this was restorative justice on the largest scale (Skelton, 2001), as it created accountability between perpetrator and the society, and

allowed for the creation of a new society. However, it would be misleading to say that all the elements of restorative justice were met. The process did not deal with victims and perpetrators in the same process, and the victim's participation, or even response, was not necessary for the granting of amnesty.

### **Modern Trends towards Restorative Justice**

The growing movement towards restorative justice in New Zealand, Australia and Canada began to impact on South Africa. The period of political transition in the early 1990's created an atmosphere of collaboration between State and civil society in working towards joint solutions. Restorative justice as an alternative to the formal criminal justice system were first promoted as early as 1992, when the National Institute for Crime Prevention and Reintegration of Offenders (NICRO) framed its diversion programme for young offenders in terms of restorative justice. They developed a set of policy proposals for the establishment of a separate juvenile justice system in South Africa. This proposed family group conferences as the centrepiece for dealing with juvenile offending.

These proposals were recognised in the National Crime Prevention Strategy in 1996, which recognised that diversion programmes assist the offender to build personal resources and self-esteem. It was also recognise that they serve to strengthen the restorative component of the criminal justice system (NCPS, 1996, in Skelton, 2001).

The emphasis of the new democratic government was to develop a justice system acceptable and accessible to the larger community. In its *Justice Vision* 2000 paper, the Department of Justice outlined its aim to harmonize the different courts and community structures, and to provide opportunities to enable people to choose appropriate ways of resolving their legal disputes by providing different kinds of courts and dispute resolution mechanisms.

The South African Law commission also proposed a system to allow choice in the manner of resolving disputes with the assistance of a third party as mediator (SALC, 1999).

These approaches opened the way for a number of community based organisations to initiate alternative justice models. Many of these followed the restorative justice model.

### **Restorative justice in practice**

Perhaps the most overt and ambitious restorative justice project is the Child Justice Bill that once passed, will introduce a completely new system for dealing with child offending. The Bill sets out to promote *ubuntu* in child justice by fostering the child's sense of self worth, reinforcing the child's respect for human rights and fundamental freedoms by holding children accountable and safe guarding the interests of victims through a restorative justice response; supporting reconciliation; and involving families, victims and communities.

Diversion from the formal justice system is the core of the new Bill, and offers a range of alternative methods, increasing in level of severity, for dealing with young offenders. The Bill also provides for family group conferences at various stages in the process. It also allows for referral to a victim offender mediation or other restorative justice process. This is to allow for creative of indigenous restorative justice initiatives to emerge.

### **Victim offender conferencing**

Victim offender conferencing is one mechanism for the operation of restorative justice. It is an effort to 'hold offenders personally accountable for their behaviour; emphasize the human impact of crime; provide opportunities for offenders to take responsibility for their actions by facing their victim and making amends; promote active victim and community involvement in the justice process; and enhance the quality of justice experienced by victims and offenders'. (Umbrecht, 1994:5). This is done by bringing victim and offenders together through mediated process.

### **The Victim Offender Conferencing Pilot Project**

The Victim Offender Conferencing project was a pilot project that sought to build on restorative justice experiences described above. It was conceived as a community based restorative justice means for dealing with crime through a face-to-face mediated interaction between offenders and victims, and their families or members of other support networks. It aimed to formulate a restorative model more familiar to African customary values. It also aimed to empower the communities to work in partnership with the formal criminal justice system.

Although the VOC project was conceived of as a community based initiative, it was also intended as a diversionary process to relieve the justice system of some of its load. It therefore sought to work in close cooperation with the police and justice sectors, primarily those officials based at the magistrate's courts.

The project was established in three areas within Gauteng, South Africa: West Rand, and Alexandra township. The project partnered with three community-based organisations operating in each of the three areas, each of which had experience in dealing with the criminal justice system, and some experience of community based mediation or conflict resolution. These organisations were Conquest for Life in Westbury, and West Rand Justice Centre, which had offices in Roodepoort, but had outreach programmes in various areas including Dobsonville in the West Rand. The third organisation was the Alexandra Community Law Clinic. The VOC project was conceptualized by a Steering Committee that also bore overall responsibility for its implementation. The Steering Committee comprised of Wilgerspruit Fellowship Centre (WFC), Community Dispute Resolution Trust (CDRT), and Centre for the Study of Violence and Reconciliation (CSVR) as well as the three partner organisations. A

project manager was appointed to take responsibility for the management of the project.

Cases were referred to the VOC project by the courts, police and community-based organisations over a 12-month period. Rather than targeting young offenders exclusively, the VOC project was open to all age groups and types of offenders.

The VOC project aimed to allow victims to express their needs and feelings, and to create an environment for the offender to begin to understand the consequences of his or her actions. This approach allows for the facts and emotions of the dispute or offence to be dealt with in a safe environment. It aims to encourage the parties to move towards reconciliation, redress and restitution through both parties reaching an agreement.

The principles underpinning VOC were:

- **Acknowledging the injustice** – The offender needs to acknowledge responsibility for the offence. The offender has to confront the consequences of his or her action, and see the victim as a person with real feelings and needs. Without this there can be little progress in resolving or reconciling the hurt and damage that has occurred.
- **Restoring the inequity** – This involves a delicate process of leveling the power imbalances that exist between the offender and victim as a result of the offence or the nature of the relationship between the parties. It provides a forum where victims and their families are given time to speak and be heard by the offender. They are given the opportunity to express their needs and concerns.
- **Addressing the future** – This is the process of developing an appropriate and concrete plan of action accepted by all parties involved. The plan should address symbolic as well as material needs of the victims and must sufficiently spell out the future intentions of the offending parties in order to ensure that revenge or retaliation is not embarked upon (Stauffer, 1999).

Volunteer mediators were appointed at each site, and received training on restorative justice and victim offender conferencing.

## **Research Methodology**

The VOC project had a research component that was intended to provide information to assist in evaluating the success of the VOC pilot project from the perspective of the criminal justice officials, the parties concerned, and the mediators, as well as to analyse the details of cases referred to mediation. The

research was conducted by the Centre for the Study of Violence and Reconciliation.

Semi-structured interviews were held at the outset with selected stakeholders of the project. These included interviews with NGOs and CBOs in each community, the Station Commissioners based at the police station in each area, as well as prosecutors and magistrates. During the course of the project, interviews and a workshop process were held with mediators. Structured telephonic interviews were held with victims and offenders a few months after the conclusion of the conferencing to determine their views and any change of behaviour resulting from the process.

The largest part of the report was compiled after analysing the data which mediators completed in respect of each case referred to the VOC project. This information included biographical details; expectations of victim and offender; details of the offence; details of the conferencing process; the agreements reached; and follow up details to the extent that this occurred.

## **Cases Referred to the VOC Project**

CSVSR analysed two hundred and twenty four (224) cases that were referred to the VOC project from the courts, police and community-based organisations from September 1999 to August 2000. Sixty-two cases were referred to Alexandra, 77 to Westbury, and 85 to West Rand. Of these cases, 46 were not mediated and were referred back to court.

Of the eighty percent of cases that were not mediated there had been some pre-mediation preparation. Mediation failed however, because one or both of the parties could not be found (29%), or one of the parties did not attend the mediation (36%). In 20% of cases, the victim did not want to participate in mediation. In one case the victim threatened the offender, and the offender did not want to continue with mediation.

## **Mediated Cases**

The analysis of cases below refers only to those that did go for mediation. In total 178<sup>2</sup> cases were mediated.

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<sup>2</sup> Several of these cases arose out of the same dispute. This occurred mainly at the West Rand site where 3 disputes resulted in 2 separate charges and separate referrals to VOC. Another dispute resulted in three separate criminal charges and three separate referrals to VOC. This happened because the parties to a dispute were sometimes victim *and* offender. The victim would lay a criminal charge against the offender, and the 'offender' would then also lay a charge against the 'victim'.

There were several cases where dispute between the parties resulted in more than one referral. Sometimes these cases were mediated separately, and sometimes together.

There were several cases that had been referred to mediation by the police, not because a charge had been laid, but because the parties requested assistance in solving their dispute.

## Offences

Of the 178 cases mediated by VOC, there were 189 separate charges made against offenders. In seven cases, two charges had been laid against an offender, and three charges had been made in respect of two offenders. As is apparent from Table 1 above, the offenders were charged with a variety of different offences.

Offences against the person were the most common types of offences, and constituted 73% of the total. The charge of common assault accounted for 42% of the cases, while assault with intent to commit grievous bodily harm (assault GBH) accounted for 31%.

**Table 1: Charges made against offenders**

Charge	Total	Percentages
Assault GBH	58	31%
Common assault	80	42%
Crimen injuria	7	4%
Defamation of character	4	2%
Intimidation	6	3%
Malicious damage to property	20	11%
Pointing a firearm	2	1%
Theft	10	5%
Theft out of car	1	0.50%
Trespassing	1	0.50%
<b>Total number of charges</b>	<b>189</b>	<b>100%</b>

Offences against the dignity of a person were *Crimen injuria* (4%) and defamation of character (2%).<sup>3</sup> In the VOC project, the offenders were usually charged with either *crimen injuria* or defamation of character. There were also

<sup>3</sup> *Crimen injuria* is when a person unlawfully, intentionally and seriously impairs the *dignitas*, or self respect of another. Although criminal defamation of character is also a form of *injuria*, it constitutes harm to the reputation of a person. Defamation of character is the unlawful and intentional publication of matter concerning another that tends to injure his reputation. Publication can occur through written or verbal means (Snyman, 1984, p. 404).

many offences against property. Most of these were charges of malicious damage to property, which accounted for twenty (11%) of the overall number of charges. The majority of the incidents occurred within the context of a domestic dispute between sexual partners, marital partners and family members. Windows were broken in nine of the cases, and doors broken in five instances.

There were ten charges of theft and one of theft out of a car. Again, most of the theft cases occurred within the context of a domestic relationship. There were two instances of pointing a firearm.

## The Offenders

There were 206 offenders in respect of the 178 cases referred to VOC, and in respect of the 189 offences. One hundred and thirty eight (66%) were male offenders, and sixty-eight (33%) were females. As Table 2 indicates most of the offenders were between the ages of thirty and thirty nine, with an average age of 35 years.<sup>4</sup>

**Table 2: Ages of Offenders**

<b>Age</b>	<b>&lt; 20</b>	<b>20 - 29</b>	<b>30 - 39</b>	<b>40 - 49</b>	<b>50 - 59</b>	<b>60 - 69</b>	<b>&lt;70</b>
<b>Number</b>	7	50	67	46	11	5	1

Only seven offenders were younger than twenty years old. The youngest was thirteen years. Unlike other projects based on the victim offender conferencing and restorative justice framework, the courts in this pilot project, did not use the VOC project primarily as a mechanism for dealing with youth crime. The oldest offender was seventy years of age.

In most of the cases, there was only one offender. However, in one case there were four male offenders, and in another, there were four females. There were three female offenders in one case. There were four cases where there were 2 male offenders, and two cases where there were two female offenders.

Thirty one percent of the offenders were unemployed. This is a higher ratio than the overall unemployment figures for South Africa (SSA, 1999).

## The Victims

For the 178 cases mediated by VOC, there were 182 victims. One hundred and thirty one (72%) of the victims were female, and 51 (28%) were male. This contrasts with the offender ratios where 66% were male. Males perpetrated offences on females in 98 (57%) cases. Females perpetrated offences on males

<sup>4</sup> Age was known in respect of 187 of the 206 offenders.

in 17 cases. In the remaining 63 cases, both victims and the offenders were of the same gender.

There were two cases that had two female victims in each, and 1 case where there were two male victims. All the other cases had one victim per case.

**Table 3: Age of Victims**

<b>Age</b>	<b>&lt; 20</b>	<b>20 - 29</b>	<b>30 - 39</b>	<b>40 - 49</b>	<b>50 - 59</b>	<b>60 - 69</b>	<b>&lt; 70</b>
<i>Number</i>	14	40	67	43	12	3	2

On average, victims were 35 years of age, with the majority falling between 30 and 39 years. There were more victims than perpetrators under the age of 20, the youngest being 9 years. He was the unintentional victim of a stone thrown by a 17 year old boy in his street. Another victim was 10 years old. This young boy was assaulted by an adult woman who accused him of scratching her car as she drove past him. The oldest victim was 79 years of age.

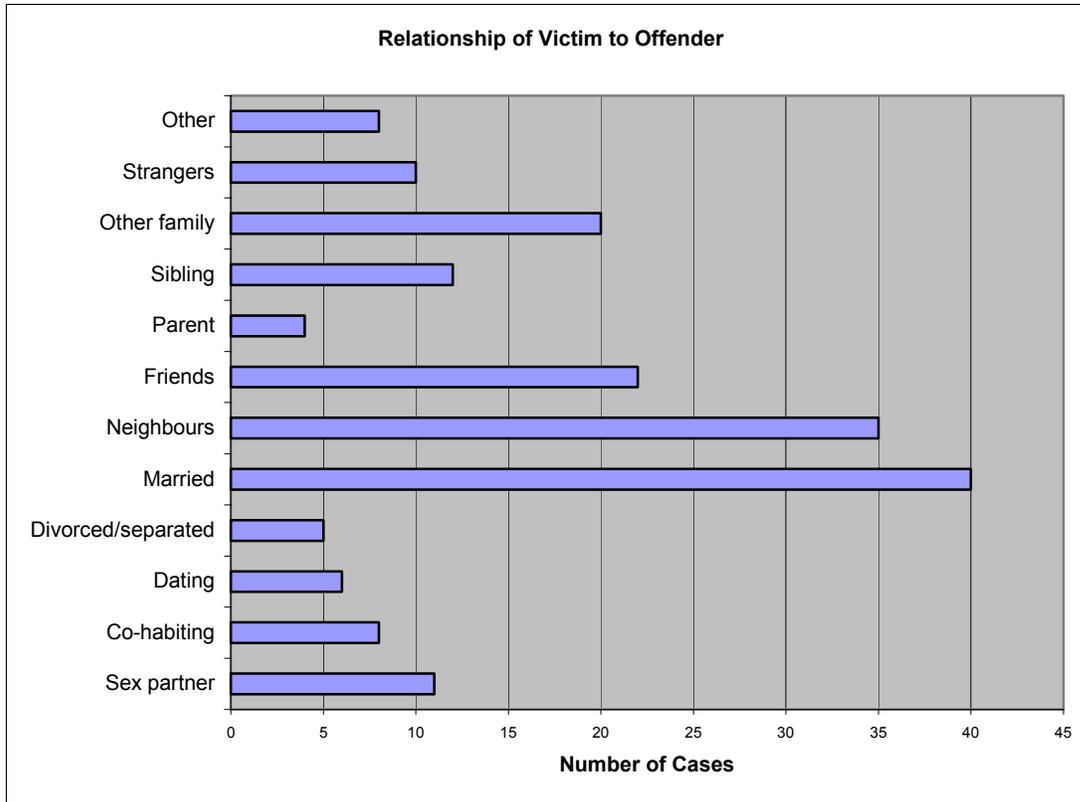
In contrast with the offenders (where 31% were unemployed), a far greater proportion of the victims (46%) were unemployed. This figure is almost as high as the estimates for unemployed African women in South Africa,<sup>5</sup> and it can be attributed to the over-representation of women in this group.

## **Relationships**

Howard Zehr, an influential advocate of restorative justice, says that restorative justice 'defines crime as a conflict between persons, putting the individuals and their relationships at centre stage' (Zehr, 1985, cited in Galway, *et al.*, 1990, p.10). This is particularly apparent when looking at the circumstances of the disputes, or crimes, referred to the VOC project. Understanding these relationships provides a context for understanding the causes and manifestations, as well as the consequences, for the disputes, and helps the mediator to assist the parties in arriving at some resolution. The relationships of the parties were analysed according to the relationship of the victim to the offender. In the majority of cases, there were existing relationships between the victim and offender. Consider Figure 1:

**Figure 1: Relationship between Victims and Offenders**

<sup>5</sup> The SSA survey of 1996 estimates that 48% of African urban women are unemployed. This is the highest figure of unemployment in the country (SSA 1999).



A large proportion of the parties (39%) were involved in some form of intimate or sexual relationship with each other. In forty (24%) of these cases, the parties were married to one another.<sup>6</sup> Others were either dating one another, involved in a sexual relationship, or co-habiting as a married couple. Five cases involved parties who were divorced or separated from their intimate partners.

Thirty-six cases (18%) involved parties who were in some familial relationship to one another, such as parent and child, aunt and nephew, grandparent and child. In other words, 58% (106 cases) of the cases dealt with disputes that had occurred within a domestic relationship.

In our analysis of cases, we have taken note of the broad definition of a 'domestic relationship'<sup>7</sup> when talking of disputes within a domestic context.

<sup>6</sup> There were slight differences in each site regarding the relationships between the parties. Married couples formed the largest percentage (33%) of the parties referred to VOC in Westbury. However, married couples represented 15% of the parties in West Rand, and 20% in Alexandra.

<sup>7</sup> A domestic relationship is defined in the Domestic Violence Act 116 of 1998 as a relationship between a complainant and a respondent in any of the following circumstances: They are married to one another, including any marriage according to any law, custom or religion; They live or lived together in a relationship in the nature of marriage, although they are not, or were not married, or were not able to be married to one another; They are the parents of a child or are persons who have had a parental responsibility for that child; They are family members related by consanguinity, affinity or adoption; They are, or were, in an engagement, dating or customary

Although 58% of the VOC cases occurred within a *domestic relationship*, not all necessarily constitute domestic violence. The Domestic Violence Act defines domestic violence as ‘*any controlling or abusive behavior* that includes physical, sexual, emotional, verbal and psychological abuse, economic abuse, intimidation, harassment, stalking, damage to property, entry into the victim’s residence without consent, or any other controlling or abusive behaviour’ (our emphasis). Clearly this is a very broad definition that could incorporate violent or abusive behaviour occurring within a range of different relationships, and is no longer confined to disputes occurring within a marital, dating or sexual relationship.

Although the VOC cases dealt with one particular incident of abuse or violence, this was often part of an ongoing pattern of abuse which included other forms of abusive behaviour, such as constant criticism, humiliation, enforced social isolation, physical abuse, shouting and swearing, destruction of possessions, rape and other forms of sexual assault, threats, etc.

On the other hand, not all cases of abuse did seem to be part of an ongoing pattern, and appeared rather as isolated incidents. Within the VOC project a large proportion, 74 (43%), of the cases, could be classified as domestic violence cases.

The Domestic Violence Act is perhaps the best indication that the government intends to take the issue of domestic violence seriously, and seeks to ‘afford the victims of domestic violence the maximum protection from domestic violence that the law can provide’. The Act provides for the victim to obtain protection orders against the offender, with the threat of sanction for non-compliance. However, it does not deal with criminal prosecution of offenders. These continue to be dealt with by the existing provisions of criminal law.

Given the high number of domestic violence cases, it is open to question whether victim offender mediation is the most appropriate form of dealing with these cases. Interviews with prosecutors indicated a reluctance to refer domestic violence cases to VOC, particularly in serious cases of abuse, or where there the offender had previously been convicted of an offence in a domestic violence case, or where the behaviour formed part of an ongoing pattern. This however, was clearly not the case for most VOC incidents. Sixteen of the offenders reported having been convicted of a prior offence, ten of which were offenders referred to VOC in terms of a ‘domestic violence’ case. Five had prior convictions for theft; one for drinking and driving; three had convictions for common assault, and one for assault GBH. It is not recorded whether any of these convictions related to offences against the same complainant. More offenders had previously been charged with offences but not convicted. Since

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relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or they share or recently shared the same residence.

this project relied on self-reported data, it is not known how many more of the offenders had prior convictions.

## **Neighbours**

Another large percentage, 35 (20%), of cases referred was those where the parties were neighbours.<sup>8</sup> Although many of the neighbours were indeed living on separate plots adjacent to one another, many of the disputes also arose between parties living on the same plot of land. The high number of neighbourhood disputes is indicative of the conditions under which people in the selected areas live. This is particularly so in Alexandra and Dobsonville where conditions are cramped and people often compete over the same limited resources, such as access to washing lines or water. It is not surprising that 'petty' irritations become enormous issues for confrontation.

Twenty-two (12%) of the disputes referred were between friends. Eight of the cases related to incidents where the parties had some other form of relationship to each other, such as an employment relationship, or where two men, unknown to one another, fought over the same woman. The offenders were strangers to the victim in only ten (6%) of the offences.

## **Mediations**

The main goal of a mediation is to formulate a plan of action on how to deal with the problem of offending. Morris and Maxwell (2000) argue that there are three main components to this process, namely,

- Ascertaining whether or not the offender acknowledges responsibility (in reality the VOC process only went ahead once the offender had accepted responsibility).
- Information sharing among all the parties at the conference about the nature of the offence, the effects of the offence on the victims, the reasons for the offending, and prior offending, etc.
- Deciding on an outcome or making recommendations to court. (p. 209)

The mediations only proceeded in the event of the offender and victim being present at the mediation. In several cases, the mediations had to be postponed as one or more parties did not arrive on the date set, and the mediator had to make an attempt to ensure that the person arrived for another date.

## **Mediation Time**

The mediation times varied significantly from case to case. This depended on the complexity of the case, number of people involved, experience of the mediator,

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<sup>8</sup> Neighbourhood complaints comprised the largest proportion in Alexandra at 29%, followed by 20% in West Rand, and 12% in Westbury.

and other factors. One case took 30 hours to mediate over a number of different sessions. The shortest mediation time was half an hour. The average time for all the mediations was 2 hours 25 minutes. The majority of cases (39%) took between one and two hours to complete.<sup>9</sup>

## **Support persons**

The VOC pilot project was framed in such a way as to recognise that the victim and offender are not necessarily the only parties directly affected by the offence. This model assumes that family members, friends and other people involved in the parties' lives may be able to assist in the resolution of the problem. They play a role in providing a sense of belonging, or forming part of a social grouping which is supportive and caring to either of the parties. In a sense, the family or support group also represents the desirable social norms of the community to which victim and offender belong. They are part of the group that is affected by the offender's behaviour. Unfortunately, the role of support persons was limited in the VOC project. Thirty-one support persons were present during twenty-five of the mediations. Eighteen of the people were known to be supporting the victim, while nine were supporting the offenders.<sup>10</sup>

## **Resolution of disputes**

At the Victim Offender Conference, mediators encouraged parties to arrive at an agreement that was usually reduced to writing and signed by both parties and the mediator. The agreement would then be forwarded to whatever agency had referred the case to VOC, such as the court, police, or welfare agency. In certain sites, the court was asked to postpone the trial for a defined period in order to allow the parties to carry out the terms of the agreement. The sites monitored the agreement, and assisted the victim to withdraw charges against the offender if all the conditions in the agreement had been fulfilled. The offender was required to be present in court when the matter was withdrawn. For instance, in the Newlands Magistrate's court, the Magistrate would read out the agreement and ascertain the offender's commitment to it. She would warn the offender of the consequences of non-compliance, and would also warn him/her that stricter action would be taken against him/her should he/she commit the same offence again. Sometimes the magistrate elaborated on the agreement, for instance by warning the offender to keep away from the victim.<sup>11</sup>

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<sup>9</sup> It should be noted however, that it is not clear from the research data whether the mediation times stipulated by mediators include time spent on pre-mediation as well as the actual mediation, or if they only refer to time spent in the mediation.

<sup>10</sup> The research instruments completed by the mediators do not always indicate who the support person was supporting, or the relationship between the victim/offender and the support person.

<sup>11</sup> Interview with Westbury mediators at Newlands Magistrate Court: 29 February 2000.

An agreement reached through the mediation process was not always a guarantee that the case would be withdrawn from the court role. There were three cases in Alexandra where, although there was an agreement between the parties, the prosecutor refused to withdraw charges. In this regard, the control prosecutor at the Wynberg Court stated,

Generally victim offender conferencing is a good idea. But the problem is that the parties go to VOC, and they settle the problem between themselves. They believe that the criminal case should no longer proceed. The perception I have is that the court is dealing with criminal cases, and the VOC project is dealing with social problems. But it is impacting on the criminal case... I have to assess the facts and make a decision. In many cases, especially the serious ones, I do not withdraw the charges.<sup>12</sup>

Clearly the prosecutor does bear the ultimate decision as to whether the agreement is sufficient, or whether the cases should proceed to trial. However, where the agreement is not accepted, it can undermine the process between the parties when they anticipate that their participation in VOC will result in the charges being withdrawn.

No agreement was reached in seventeen of the cases that went to mediation. In these cases, the matter was referred back to court to be dealt with in the usual way.

### **Analysis of agreements**

According to the restorative justice paradigm, the problem posed by a crime is to be considered through the harm it has caused, and the primary function of the reaction against it is not to punish, nor to rehabilitate, but to repair or compensate for that harm. (Walgrave, 2000, p. 260)

This VOC project was premised on the basis that all kinds of harm should be considered, not only the harm that is reflected in the criminal charge before the court. The harm could include physical injuries, material losses, psychological consequences, and relational troubles.

Restoration can be achieved through diverse means, and could include a wide range of actions, such as restitution, reparation, compensation, apologies, reconciliation. This may be direct, or indirect, or symbolic in nature. The actions can be addressed directly at the victim, or towards a broader community, or even towards society, such as in community service (Walgrave, 2000).

The agreements arrived at through mediation were part of the restorative process. In the VOC project mediations there were complex and creative

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<sup>12</sup> Interview with Control Prosecutor from Wynberg Magistrate Court, 28 August 2000.

responses to the particular disputes that presented themselves. Although some aspects of the agreement were general, such as an apology, other aspects were very specific, such as forbidding a particular *sangoma* from coming to the family home. Parties tended to commit themselves to a range of different things that could include an apology by the offender, an undertaking by the victim to withdraw charges, a commitment by the offender to pay restitution, as well as an undertaking to behave in a civil manner to the victim in future. There were an average of 3.6 different undertakings made in the agreements.

One characteristic of these agreements is that they were often binding on both parties, not only the offender. Both the victim and offender could, and did, make undertakings to one another and to other parties. At times, the victim or offender would also make undertakings that would affect other people, such as family members, friends or children. Table 8 provides a detailed breakdown of the nature of agreements reached.

**Table 4: Agreements between victim and offender**

Nature of Agreement	No. of Agreements	% of cases (out of 160 cases were there was agreement)
Ask forgiveness	18	11%
Apology by offender	103	64%
Apology by victim	10	6%
Victim to drop charges	112	70%
Counselling	17	11%
Restitution/compensation	53	33%
Not abuse victim again	30	19%
Stop alcohol/drug abuse	15	10%
End relationship	26	16%
Improve relationship	19	12%
Respect each other	42	26%
Practical changes in lives	50	31%
Maintenance	13	8%
Alternative ways of solving disputes	17	11%
Change in attitude	26	16%
<b>Total Number of Agreements</b>	<b>551</b>	

Morris and Maxwell (1997) conducted research following Family Group Conferences with young offenders and found that reconviction rates are reduced when some of the potentially restorative aspects of the conferences are achieved. Regression analysis suggested that where offenders had apologised to their victims, they were three times less likely to be reconvicted than those who had not. They were four times less likely to be reconvicted if the victim had attended the conferences (Morris *et al.*, 1997 cited in Morris *et al.*, 2000). In a later study, they found that where the young people had made amends to their victims they were less likely to be reconvicted (Morris *et al.*, 2000).

## Apologies

It is important to examine the agreements reached in these cases to ascertain what restorative objectives were 'achieved'. As appears in *Table 8* above, apologies featured in 113 (70%) of the cases. This indicates an important recognition of wrongdoing on the part of the offender.

Apology and forgiveness bear a special meaning in African culture. Mafani (2000) examines the meaning of these words in South Africa's African languages. In Xhosa and Zulu, the same word is used for forgiveness and apology. 'The relationship is such that the offender asks for forgiveness or for peace, while the offended forgives or grants peace, thus giving both inner peace' (Mafani, 2000, p.5). She writes that in seSotho and Zulu, there is no word for apology, but the process of apologizing is actually asking for forgiveness. She argues that forgiveness can be seen as one of the elements in a long-term relationship of reconciliation between individuals or groups of people. Thus, in certain cultures, apologies can be one of the most important factors leading to the reconciliation of parties.

Archbishop Desmond Tutu explains that the idea of *ubuntu* is linked to that of forgiveness;

To forgive is not just to be altruistic. It is the best form of self-interest. What dehumanizes you, inexorably dehumanizes me. Forgiveness gives people resilience, enabling them to survive and emerge still human despite all efforts to dehumanize them. (Tutu, 1999, in Skelton, 2001)

## Restitution

Restitution appeared to be a less important element in the agreements, and appeared in 33% (53) of cases. The restitutions took the form of direct replacement for goods damaged or stolen. Another form of restitution was to pay for the cost of medical expenses incurred as a result of an assault, or for the loss of earnings as a result of the victim taking time off from work. In one instance the offender agreed to pay the victim's legal costs.

In one case, the victim and offender argued over the right to hang washing on the line in the yard that they shared. The offender assaulted the victim and injured her hand. The victim wanted direct compensation, but the offender was unable to pay. As one component of the agreement, the offender undertook to do the victim's washing while her hand recovered from the injury. As a result of the process and the agreement, the relationship between the parties was also restored.

Although mediators report<sup>13</sup> that there were several cases where the victim had asked for large amounts in compensation, there were no cases where the

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<sup>13</sup> De-briefing meeting with VOC mediators, 2 October 2000.

restitution or compensation agreed upon was in excess of the direct damage or injury sustained. No agreements were made concerning compensation for pain or suffering.

### **Agreements to address the problem of re-offending**

The precipitating factors behind the commission of the offence were varied and numerous. Some of the agreements tried to take this into account when addressing ways to encourage the offender to prevent re-offending.

Drug and alcohol abuse played a substantial role in many of the offences, both on the part of the victim and the offender. Fifteen undertakings were made to stop or to limit alcohol or drug consumption. Without an obligation to attend counselling or obtain additional support, this is potentially a weak agreement, particularly as many of the parties appeared to be addicted to drugs or alcohol.

Offenders agreed to go for counselling in seventeen cases. In thirty cases, the offender undertook not to abuse the victim again, in a physical, emotional or verbal manner.

In seventeen cases the parties agreed to resolve their future disputes in a non-conflictual way.

### **Restoration of relationships**

The VOC process itself was aimed at the restoration of relationships, and mediators felt that the mediations brought people together in order to talk about their grievances<sup>14</sup>. Not all the agreements reflected this process. Indeed, there were twenty six cases where the parties agreed to either terminate or to change the nature of the relationship. However, the VOC project provided them with an important and safe mechanism for arriving at the decision to terminate the relationship. This was also important in cases where one of the parties wished to end the relationship, but the other did not. The VOC process enabled such a person to obtain an agreement from the other party to terminate the relationship. 'VOC is a perfect platform to mend relationships or to dissolve them in a peaceful manner'.<sup>15</sup>

### **Practical changes in the lives of the parties**

There were 50 agreements where parties undertook to make changes in the organisation of their lives that would affect the relationships, and hopefully, prevent further disputes arising, or re-offending. The most common changes reflected in living arrangements, with one party moving out, another party moving into a house, or a particular room, or an undertaking to make the house accessible to all family members. Other practical measures included an undertaking to find a job, to take a particular medication, to request the police to

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<sup>14</sup> Mediator's briefing meeting, 2 October 2000.

<sup>15</sup> Ibid.

return a confiscated gun, or to not leave the gun lying around the house in future. All of these were specific responses required by each situation.

## **Responses from victim and offender**

Fifteen offenders and fourteen victims were randomly selected and interviewed, five from each of the sites. All the respondents were positive about the VOC project. They felt that the most important aspects of the project was to provide or obtain answers to questions they had about the offence; to have an opportunity to tell the offender how they had been affected by the offence; to have the offender apologise for his/her behaviour; and to restore the relationships. Both victims and offenders felt that it was less important to obtain restitution or for punishment.

Most respondents were positive about the mediators, and said they felt comfortable, and that they felt understood and respected. Most respondents were satisfied about the outcome of the mediation, although in some cases they may have been dissatisfied because an agreement was reached which fundamentally changed the nature of their relationship. Most of the offenders (10) felt that the mediation had resulted in a positive change in their behaviour, however, 2 of the victims stated that the offender had subsequently repeated the same behaviour.

All respondents felt that VOC was a good and appropriate form of justice.

## **Conclusion**

The responses from the victims and offenders give some indication of the level of satisfaction from the parties directly involved. The sample size (n=29) is small, and there may be other victims and offenders who were less satisfied, and who did not comply with agreements. But as a start, it does suggest that there is a workable system outside of the courts for dealing with offending.

Offset against this general context, 76% of offenders who were referred to the VOC project acknowledged responsibility for the offence before the cases were referred. While an acknowledgement of responsibility in no way compares with the legal status and moral force of a criminal conviction, it does have meaning to the victim and offender of that particular offence. Thus, the VOC process results in the offender taking responsibility and acknowledging accountability for his or her wrongdoing in a higher percentage of cases. The proportion of this accountability is higher in a mediation process, than in a criminal process. In addition, at the conclusion of most of the mediations, the offenders agreed to

undertake certain steps to restore the harmony of the relationship and make good the damage to the victim.

### **Is victim offender conferencing a solution in South Africa?**

Crime is increasingly a concern in South Africa where levels of serious violent crime have risen to unacceptable highs. The criminal justice system has proven incapable of turning the tide of crime, resulting in ever increasing delays in court, and more awaiting trial prisoners held for long periods of time. The State's ability to investigate and successfully prosecute crimes has not improved and the conviction rate is estimated to be 5,5% of cases reported to the police station. While the problems of the criminal justice system need to be urgently addressed, other systems of justice should also be explored to compliment or divert cases away from it. Systems that are more accessible to members of the public, and that meet their needs and expectations need to be looked at.

The African concept of *ubuntu* is one that is acceptable to most South Africans. It is reflected in indigenous customary systems, and is part of traditional culture. Like restorative justice, these systems emphasized a communal approach to dealing with conflict, and saw the law not as a tool for personal defence, but for the protection of common interests. Justice Mokgoro argues that under this system, the conciliatory character of the adjudication process aims to restore peace and harmony between members, rather than the adversarial approach to litigation. The importance of solidarity requires restoration of peace between litigants, rather than a victor and a loser (Mokgoro, 1998)

However, with increasing development and urbanization, these traditional systems are eroded, and as people move away from the rural areas they loose access to traditional justice processes. Despite this, these traditional values can still be recognised in a modern context. The concepts of *ubuntu* are aligned with those of the Constitution, and with those of restorative justice. We need to look at ways of bringing those concepts together in the development of a justice system that is fair and accessible to all people.

Victim Offender Conferencing offers a system that is flexible enough to incorporate the parties' belief systems. It is highly accommodative of different cultures. Because they are mediated by someone from the community from which the party comes, there is a greater potential that all parties share the same value system. The mediators are able to handle the parties with sensitivity, and to assist them in arriving at a resolution that is appropriate to their situation and culture.

It is clear that any system of community justice must operate within the framework of the Constitution, and principles of human rights and fairness must be acknowledged at all times.

A failure to operate within these boundaries would increase the potential for communities to take law into their own hands in ways that are violent and harmful. There have been numerous incidents in the past few years where members of the community have apprehended a suspect of crime, tortured and sometimes killed them. Clear minimum standards need to guide the operation of community justice by professionals and community groups.

Victim Offender Conferencing operates within these boundaries. It is closely monitored to ensure adherence to basic human rights principles and restorative justice framework. Because it operates alongside the formal justice system, its mandate is limited and monitored by the courts. Agreements are approved of by the court, which means that they must meet a minimum level of agreement. No agreements that are harmful or excessive would be tolerated.

So far, victim offender conferencing has only been attempted in urban areas where it operates alongside the formal justice system. Traditional structures of justice, and community courts are still vehicles that people in more rural areas have access to. There is potential to explore using VOC, and other restorative measures more overtly in more traditional systems. It could help to establish a framework for operation in the Inkundla's where traditional courts still operate.

Although government supports the idea of restorative justice, this needs to be backed up by concrete assistance, through both funding, and creating structural linkages to community justice processes. In an era where voluntarism has almost completely disappeared, it is unrealistic to expect community members to do victim offender conferencing without remuneration.

## **Questions for further VOC work**

- Domestic violence: is VOC an appropriate remedy for serious cases of domestic violence.
- Some of the court officials had different views of VOC, and believed that even though there was a mediated agreement, this did not distract from their legal duty to prosecute, thus frustrating parties who did not understand sufficiently.
- If VOC is a form of diversion, does it adequately deal with the issues leading to offending behaviour? The results of the survey indicate that we are, but perhaps more could be done in this regard.
- How do you balance the competing objectives of VOC – reaching a mediated settlement, restoring relationships, and dealing appropriately with offending behaviour?
- Mediations bring out a number of other issues pertinent to the parties, which are not apparent in the criminal cases.

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