

MAKING THE BALANCED APPROACH BETWEEN VICTIM AND OFFENDER A REALITY: INTEGRATING A PROACTIVE APPROACH TOWARDS THE VICTIM

ABSTRACT

The Mediation and Reparation Program (MRP) was from the outset set up with the mission of serving both victims' and offenders' needs alike, that is to say, informed by a balanced approach between victim and offender in accordance with the restorative justice (RJ) principles.

Concerned with the risk of secondary victimisation, the scheme has traditionally observed the protective

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approach; therefore as a general rule, with serious crimes we have followed the offender-initiated model. However, the experience gathered has shown that such practice was not fully in line with our stated mission as victims were having more limited access to the scheme compared to offenders.

The aim of this paper is to share the process that has led a team of practitioners to reflect on our practice and review the protective approach in place. To that end, the combination of factors we have identified to be at the root of this transformation will be analysed, and the key changes introduced in order to improve victims' access will also be outlined.

INTRODUCTION

The mission of the Mediation and Restoration Program (MRP), since its inception has been to serve as a public service available to all citizens who, either as victim or offender, wish to take part in a communication process in order to address the consequences deriving from an offence, and when existing, also the conflict that might have led to it. In other words, the programme did not emerge to become another sanctioning or diversionary measure to help the criminal justice system mission, but deliberately as a restorative justice practice, namely, as an offer aimed at serving both, victims' and offenders' needs alike in line with the restorative justice principles, (Aertsen, 2006:83)¹.

Nevertheless, over the years, several factors have revealed that maybe we have not been fully consistent with such values, in particular, we are faced with the reality that victims tend to have less access to our scheme than offenders do. In light of this, in a joint effort through meetings and discussion mediators, coordinators and managers have been examining what is preventing our scheme from actually providing equal opportunities for victims and offenders.

While some of the reasons for that relate to the institutional framework and the way the criminal justice system is organised providing offenders with more opportunities to receive advice and information than victims, other reasons relate to our practice and protocols such as the choice of whom to contact first.

With regard to referrals of serious crimes it has been general practice of the MRP to contact the offender first except for those cases in which the victim has actively sought to reach out to our scheme². Such an approach is based on the as-

¹ See also Van Garsse (2007.)

² Other than serious crimes, an important share of our referrals emerge from long-term conflicts, frequently in the framework of a relationship between ex-partners, neighbours or acquaintances. In such cases what started as a low intensity confrontation, has escalated causing and eventually resulting in behaviours relevant to criminal law usually as petty crimes or misdemeanours. The story told by the parties reveals that over the numerous incidents, there have been several occasions in which both parties feel they have been victimised by

sumption that being informed about restorative justice can be a source of secondary victimisation unless it has already been asserted that the offender is prepared to apologise and make amends. In the words of Wemmers and Van Camp (2011), this responds to the protective approach. While the priority is to protect the victim from any risk of secondary victimisation, it excludes the vast majority of victims from accessing such schemes. By contrast to the proactive approach, which prioritises the need for information, recognition and reparation of the victim. It implies that the victim is entitled to systematically receive comprehensive information about the programmes and services that may help to meet the needs arising from the offence. Therefore, when the proactive approach is in place, the offer of restorative justice reaches out to all of the victims regardless of the crime or stage of the criminal proceedings.

With this paper we wish to share this process of self-evaluation, and the changes introduced to improve victim access. To that end, we will first start by introducing the origins of the scheme and providing basic information on the organisational and legal frameworks as to how these aspects have played a role in shaping our practice in accordance with the victim's protective approach and the position given to the victim in our scheme, which reflects/mirrors the protective approach. Next, we will describe the factors that we consider to be at the root of the gradual move away from the offender-initiated model. These include the study of real cases³ with a special focus on the victim's response, the outcomes of prison protocols, international exchange and research findings. We will then move on to outlining the improvements we are piloting, and finally we will draft some final remarks⁴.

LEGAL BASE AND INSTITUTIONAL FRAMEWORK⁵

The MRP is run by the AGI Foundation and it is being funded and monitored by the Justice Department of the Autonomous Catalan Government, particularly

the other person. When both parties report grievances and losses caused by the other party, the line between victim and offender becomes blurred. As a result, regardless of the position they hold in the judicial process, both of them are actually experiencing a comparable degree of emotional distress. When facing these types of cases, as opposed to our practice with serious crimes, the offender initiated model is not followed but we decide who to contact first based on what can be more helpful for conflict management on a case by case basis. It is also possible that in these petty crime cases, we arrange a first informative meeting with both parties at the same time, especially when the complaint is related to a family conflict between ex-partners.

³ The names used in the case studies do not correspond to the real names of the people involved.

⁴ This paper draws on the experience and information available to the authors until the date of submission June 2014. New developments concerning new pilot projects or protocols, evaluation results or legal instruments subsequent to that date could not be reflected.

⁵ This section is based on information obtained from the European Forum for Restorative Justice (2008), Vall Rius (2012) and Martin, Cano i Dapena (2010).

under the auspices of the Directorate General of Probation and Juvenile Justice. It emerged in 1998 as a pilot project led by a group of practitioners that had extensive experience as mediators with juvenile offenders. They were driven by the goal of extending the positive outcomes achieved with minors to the adult justice system. Two years later, in 2000, the pilot project with adults evolved into an established scheme.

The different legal frameworks governing the juvenile justice system and that of adults in addition to the institutional context of both schemes are two relevant factors to understand why the protective approach has been traditionally implemented.

Restorative justice practices in the juvenile justice system were first authorised by Law 4/92 regulating juvenile courts (*Ley 4/1992, de 5 de junio, Reguladora de las competencias y el procedimiento de los Juzgados de menores*) which was later replaced by Organic Law 5/2000 regulating the criminal responsibility of juveniles (*Ley Orgánica 5/2000, de 12 de enero, reguladora de la responsabilidad penal de los menores*). This law also set the age for criminal responsibility from 14 to 18 years old.

Organic Law 5/2000 establishes that the measures imposed to those having committed an offence should be informed by an educative ethos in the best interest of the young person. In any given case, such underlying principles will be defined in any given case according to the personal, family and psychosocial needs of the young person. Moreover, although the needs of the victims should be taken care of, according to Organic Law 5/2000, complying with the best interest of the young person is a paramount principle informing all legal proceedings and the juvenile justice system in general and as a consequence, the role of specialised practitioners in assessing the needs of the young person becomes pivotal. In the Catalan Autonomous Community, this task is being carried out by the Advisory Unit within the so called Mediation and Advisory Service (*SMAT – Servei de Mediació i Assessorament Tècnic*), belonging to the Directorate General of Probation and Juvenile Justice.

In the juvenile justice system, the prosecutor will decide whether to dismiss a case, impose a measure or continue with the proceedings, based on the report drafted by the Advisory Unit and their recommendations. Participating in a mediation process with the victim to repair the harm caused is one of the several measures foreseen by Organic Law 5/2000. Such measures can be recommended provided that the young person is ready to take responsibility and make amends. In such cases, after the approval by the prosecutor, the Mediation Unit within the SMAT will conduct the mediation process⁶.

⁶ The law provides that for certain offences the prosecutor can conclude all proceedings if the young person has successfully repaired the harm to the victim, thus If the mediation process is successfully completed, the SMAT

It could be that the needs of the victim have been decisive when deciding to refer a given case, but that is uncommon. The general rule is that the eligibility criteria for referrals are based on the young person's best interest, thus a mediation process might be seen as a *measure*⁷ with the primary goal of serving an educative purpose. In order to avoid the risk of secondary victimisation, the SMAT integrated the protective approach also inspired by the practice followed in other countries at that time. In practice, as mentioned above, that entails the victim only being offered mediation if two conditions concur: first, that the case is considered eligible based on the best interest of the young person, and second, that the offender is deemed suitable⁸.

In the field of adults however, unlike in juvenile justice, mediation doesn't count on an explicit legal base and there is not a particular paramount principle that could determine the eligibility of the cases. A mediation agreement may have an impact on the criminal proceedings through the legal concept of the reparation of the harm to the victim. The Penal Code and the Criminal Procedural Law (*Ley de Enjuiciamiento Criminal*) foresee a number of possibilities to award legal benefits to the offender that make the effort of compensating the harm to the victim. The type of legal benefit will depend on the stage of the process and the type of the crime, e.g. mitigation of the sentence, suspension of a custodial sentence or its replacement by an alternative sanction, benefits or licences when the offender is serving a prison sentence amongst others. Hence *de facto* a restorative process, although not being explicitly foreseen by law, is possible at any stage of the criminal process, also after sentence, for any type of crime, as far as there is a personal victim or a legal entity that has suffered loss or damage. Mediation is only excluded explicitly for gender violence offences when the case is at the pre-trial stage⁹.

For the same reasons, the lack of legal provision for restorative justice allows a wider range of referral sources, besides judges, prosecutors, prison staff and other offender-related services, victim-related services and self-referrals are equally possible¹⁰.

refers the case back to the prosecutor together with the agreement and a report informing about the young person's attitude along the process. If the harm has been repaired, the prosecutor will conclude the file on the proceedings. It is also possible to refer a case to mediation at the trial stage. The judge may adjourn sentencing until the mediation process is completed and then pass sentence in accordance with the outcome of the mediation process. Moreover, restorative practices at the post-sentence stage are also possible, although this option remains underused because it is not being explicitly foreseen by law.

⁷ See Aertsen (2006) and Van Grasse (2007)

⁸ At the time this paper was being written, we learned that the SMAT was developing a new protocol to introduce a victim support team specific for the victims of young offenders so that for every referral of a young offender, the victim would receive a phone call by a youth worker informing about the case and offering support.

⁹ Art. 44.5 of Organic Law 1/2004 on Comprehensive Protective Measures against Gender Violence (*Ley Orgánica 1/2004 de Medidas de Protección Integral contra la Violencia de Género*).

¹⁰ Although it is not the purpose of this paper to go into detail about the source of referrals, it might be relevant to note that even though any agency or individual could refer a case, in practice the vast majority come from

On a different note, it can be said that the institutional context in which the MRP is immersed, has also been favourable to a victim protective approach. Directorate General of Probation and Juvenile Justice is related to the Directorate General of Penitentiary Services. In this framework, mainly focused on offenders' assistance and rehabilitation, there is an extreme caution when defining the type of work to be carried out with the victim in order to avoid any potential source of secondary victimisation.

Following from all of the above, the adults' scheme inherited the protective approach particularly with serious crimes. In the coming sections we will provide an outlook of the most relevant lessons learned over the years which have challenged this model and have brought about key changes.

VICTIMS TAKING THE INITIATIVE

As mentioned above, self-referrals are one of the pathways foreseen in our protocols to access the program, thus it is possible for any citizen to reach out to our scheme without being referred by any agency or related service. As mentioned before, victims' self-referrals represent a rather limited number of the total of the referrals, however, the cases in which the victim reaches out to the program purely on their own initiative are a reality as we illustrate with the two following cases.

The first case was initiated by Carmen, a woman who called a prison centre asking for information about the situation of an inmate, her ex-husband, Daniel. He had been convicted to a long prison sentence for having sexually abused their 3 year old son. The prison staff could not provide Carmen with any details about the inmate as it was confidential, but they referred her to the MRP. As a victim self-referral there was no doubt we had to meet Carmen. The crime had happened 10 years earlier and over the course of the criminal proceedings, her ex-husband had always denied any responsibility for the offence. Now, common acquaintances had informed Carmen that Daniel was being released on licence and this news made her extremely worried. She needed to know whether his ex-husband intended to meet their son, 13 years old at the time of the mediation, so that she could prepare him for that. When approached by the mediator, Daniel was willing to participate

judges and prosecutors. A rather limited share of cases is referred by the parties themselves or victim related agencies. As a way of example, in 2013 there were in total 1431 referrals of which 86% (1236) came from judicial authorities, 5.6% (80) were referred by prison centres and 6.7% (97) were self-referrals by individual victims or offenders on their own initiative, of which 75.2% (73) came from the offender, 15.44% (15) from the victim and 9.2% from victim and offender together. Only 1.25% (18) of the total of the referrals came from other services such as community or family mediation, alternative measures officers (diversion) or victim support. The figures from previous years show very similar trends (Direcció General d'Execució Penal a la Comunitat i Justícia Juvenil (2013)).

and the mediation process took place indirectly thus several individual meetings with mother and father were held. As a result of the exchange through the mediator, mother and father agreed that whenever the father would decide to get in touch with their son, he would not do it directly, but he would first look for an intermediate institution that could establish contact with the mother and their son. Another outcome of the process was that it allowed for Daniel to admit for the first time to Carmen that he had actually committed the crime, something that he had always denied also after being sentenced. He also let her know that he was able to understand her pain and her extreme concern. This had a positive impact on Carmen who felt a sense of relief as his ex-husband had finally acknowledged his responsibility.

Carmen had been attended by the Victim Support Office (*Oficina d'Atenció a la Víctima*) when the judicial proceedings were taking place, and she received legal advice and guidance as to the appropriate services and programmes she could address. However, at that time there were not established protocols between the Victim Support Office and the MRP. Actually, an additional challenge hindering referrals from the Victim Support Office is the fact that this agency is overloaded with domestic violence cases and it is left with limited resources to provide support to victims of other crimes¹¹. Therefore, should the need for mediation arise for the victim, there are scarce chances for him/her to learn about the possibility of accessing a restorative justice scheme¹².

One of the few referrals from the Victim Support Office is the second case we want to introduce, that of Núria, a woman who had been a victim of a burglary. She had been robbed and brutally attacked by a man in his twenties, Alan, who had broken in and entered her flat on a summer night and during the attack Carmen was beaten and humiliated by him. The trial took place in 2006 and Alan was convicted to a long sentence for that and for other burglaries he had committed over the same period of time. Seven years later, due to procedural requirements related to the court file, the Victim Support Office had been asked to contact the victims. Over the first call to Núria, the victim support worker identified that she needed support to cope with some unresolved aspects ensuing from the offence and s/he offered to arrange a meeting.

¹¹ This situation derives from Organic Law 1/2004 of 28 December, on the Comprehensive Protection Measures against Gender-based Violence. See Tamarit et al (2008).

¹² This situation could change with the enactment of a Law on the Crime Victim's Chart (*Ley del Estatuto de la víctima del delito*). The art. 5 of the current draft establishes that victims need to be informed about their rights and also about any aid, medical and support schemes available, amongst which the access to restorative justice services is explicitly mentioned (art. 5. 1. k). The same article 5 goes on by specifying that such information must be updated at every stage of the criminal proceedings in order to remove any possible obstacles/barriers for the victim to exert her rights (*Proyecto de Ley del Estatuto de la víctima del delito*)

In the course of the follow-up meetings with victim support, Núria expressed that she needed to face the offender and tell him she was no longer afraid of him, thus the case was referred to the MRP. In the first meeting with the mediators, Núria made it clear that she did not want him to understand her nor to apologise, but her only expectation was to be heard and let him know that she was strong and had overcome the harm he had caused her years earlier. We also learned there was a restraining order in place, thus we discussed with Núria that even if the offender accepted to participate, we could not proceed with any communication process unless we were granted a suspension of the order. This entails a complex process of paper work which would require Núria to draft a letter explaining her reasons to the court for a meeting and eventually the sentencing court decided on a case by case basis whether to allow communication between the parties involved or not. Our experience is quite variable so we were honest with Núria about the fact that there was no certainty about the outcome, however, at that time, Núria decided to go ahead anyway.

We then met the offender in prison and as he was open to participate, we started to prepare the petition of suspension of the restraining order. Nevertheless, when the time came for Núria to draft the letter for the court, she expressed that she had moved on in that time-span. The very fact of having talked about the facts and realised she was not afraid of Alan anymore, brought her closure and she no longer needed to face the offender nor to have any further communication with him

In our view, these cases put forward that the victim's need for restorative justice is not necessarily dependant on the offender's interest but can very well be on the victim's own interest, hence the importance of implementing strategies that enable a victim-initiated model.

OUTCOMES FROM THE PRISON PROTOCOLS

Since 2007-2008 we have been running a special referral protocol in two penitentiary centres, the CP Ponent (regular prison centre in the province of Lleida), and the CP Joves (for young adults from 18 to 25 years of age). The cases referred in the framework of these protocols are requests from offenders who are remanded in custody waiting for trial for serious cases. At that stage they receive information on several programmes and services available including the MRP.

In 2012 only 1 of the 106 referrals resulted in being suitable, that is to say, both offender and victim were willing to participate and mediation took place with a positive outcome. In 2013 also only 1 of the 79 cases referred resulted in a mediation process. The reasons for non-suitability are illustrated as follows:

Table 1. Reasons for non-suitability for mediation

	Reasons on the offender side	Reasons on the victim side	Victim not showing-up	Total referrals
2012	52	26	13	106
2013	37	25	8	79

Although no scientific evaluation has been conducted with the parties, we have brought together our impressions about the reasons for such results. We have come to the conclusion that the offer of mediation at pre-trial stage may very well find victim and offender at a very complex moment. It is a time when key aspects are yet to be decided, and both, victim and offender, have a lot at stake.

On the one hand, the emotional state of an offender who is being held in custody while waiting for trial, especially first time offenders, is not a minor issue. The fact that prosecution proceedings are still ongoing may create a lot of uncertainty about the charges and the sentence the prosecutor will be asking for. He may also be coming to terms with the idea of spending some time in prison. Not to mention their worries about all the personal and family related issues that may arise from the fact of being in prison. It can be the case that under such stress the offender is not fully prepared to focus on others' harm and needs, but rather only ready to pay attention to his/her own situation.

On the other hand, in these cases in which the offender is prepared to participate in a restorative process with the victim, and we approach the victim, we may find them also in a stressful situation albeit for different reasons. They may be still coping with the aftermath of the crime and in the midst of complying with all the judicial requirements such as showing up at imposed times and dates in order to give a statement, take part in an identity parade or prepare the evidence of the harm or injuries suffered, to name some of the formalities. As a consequence, most of the victims decline to participate in mediation because they are tired and need to leave the offence behind and move on without having to invest more time.

We should not lose sight of the fact, however, that even when the victim refuses to participate, the vast majority of them appreciate having been contacted. They often have the urgent need to receive information about the judicial proceedings, what is going to happen as well as the current situation of the offender. They often express gratefulness that someone takes the time to listen to them and provides some guidance on how to address personal issues derived from the offence. Sometimes they are even surprised at the possibility of arranging an appointment at a date and time of their convenience.

As time goes by, things settle down for both the victim and offender therefore their needs may change. Such is the case of attempted homicide between two

young men, belonging to rival gangs. Mediation started at the request of the offender, Freddy who was remanded in custody. Luis, the victim, received the offer of mediation when the trial was about to take place and he decided to postpone the decision on whether to participate. He agreed with the mediator to be contacted again after the trial. When that moment arrived, Luis explicitly declined once again, however, a year later, he took the initiative to address the MRP. The mediation process was reopened and the meeting between the two young men took place with a positive outcome.

Another related case was that of an attempted homicide between ex-partners, Jordi and Toni. The relationship between them had ended in a way that Jordi felt betrayed and hurt by Toni. After having blackmailed Toni with text messages and e-mails, one day Jordi carried out his threats and waited for Toni inside the entrance hall where he lived with a big knife. When Toni arrived Jordi tried to stab him but Toni managed to get away from him and eventually only got his hand injured. As a result, Jordi was convicted to 8 years of prison and to pay 3.000-€ of economic compensation to Toni.

Two years after the facts, while serving the sentence in prison, Jordi applied for mediation. He had undergone a treatment programme specific for inmates of violent crimes. After having met with the mediator, Jordi wrote a letter of apology taking responsibility for his behaviour and all the emotional harm he had caused Toni. The mediator offered Toni to meet Jordi. Toni was glad to learn about this initiative of Jordi but he preferred to read the letter at home to have more privacy. When the mediator contacted Toni again, he expressed the letter had brought him relief and closure. In Jordi's words he had sensed a reflection and the acknowledgment of all the emotional and psychological harm he had caused him. Toni wanted to write a reply for Jordi as a way of giving closure to the process but asked the mediator to contact him in two months time. The mediator contacted Toni as agreed but he asked for an extension as he had realised that writing back was harder than he had expected. Later on, the mediator contacted Toni again. He had not been able to find the right moment to write the letter and decided instead to give Jordi his feedback verbally through the mediator. Toni wanted Jordi to know that he really appreciated him sharing his insights on his own behaviour and the effort to apologise through a letter. Finally, the mediator passed these messages on to Jordi and the mediation process was concluded.

Following from the experience with these and other similar cases, it comes to the fore that even if the offer of mediation may not come at the right time for the victim, receiving the information enables them to make a choice and access the scheme should the need arise. Not setting time limits and offering different options for participation is also key in order to improve a victim's access.

INTERNATIONAL EXCHANGE

Attending international conferences, as well as participating in international projects or study visits, has given us excellent opportunities to both meeting practitioners from other countries and learning from the latest research findings. We have gained valuable insights about restorative justice theory and implementation models allowing us to reflect on our strengths and on how to improve our practice.

In the framework of international conferences and summer schools we have established informal exchange with practitioners experienced in serious crimes about numerous practice related topics such as the pros and cons of contacting the victim or the offender first. Mediators from diverse countries who work on different settings, have shared their experience and very practical explanations on how they first approach the victim¹³.

Research findings on the victim's perspective about mediation or restorative justice have equally had a critical role for us to question our victim protective approach. There is a substantial body of research studying the impact of a restorative justice process on victims and offenders. In particular, we found that the studies that evaluate victim's satisfaction and the effect of restorative justice on victim's restoration, shed some light on whether *a priori* it is possible to identify any indicators that could help to discern whether it could be more appropriate to contact the victim or the offender first. Here we will mainly focus on three studies we have happened to get to know more closely.

Firstly we want to point out the study conducted by Bolivar (2012) with victims of serious crimes who had been offered mediation by Catalan, Basque and Belgian schemes. This study addressed two general research questions: how victims describe and evaluate their experience in victim-offender mediation and, what the role of mediation is in the victim process of restoration. The research assessed victims' experiences at two different stages: before and after the encounter with the offender. Amongst the wide range of issues analysed, particularly relevant to the aim of this paper are the findings concerning the stage prior to mediation and the aspects could be conducive to a victim's participation in restorative justice.

The results suggest key insights concerning the comparison amongst three groups of respondents: victims accepting direct mediation, victims accepting indirect mediation, and victims refusing mediation. For the sake of this paper we will

¹³ We would like to take the opportunity to thank the generosity of all the practitioners from around the world we have encountered in sharing useful tips and insights for practice and in particular, we are grateful for to the Belgian mediators from *Suggnomé* and *Médiate*, who lend us invaluable support concerning restorative justice work in serious crimes.

focus on the distinctive characteristics that victims who prefer to participate in direct mediation share, and which are not found in those victims who prefer indirect mediation or decide not to participate at all. Victims willing to participate in mediation are prone to have a more positive concept of the offender than the other respondents do. Moreover, they were inclined to offer explanations for the crime that were not only related to offender's characteristics but also included more contextual factors. It is also relevant that, as Bolivar remarks, »Some of these respondents, moreover, were involved in social movements or played social leadership roles that somehow helped them to consider mediation as something good and positive for society and not only for themselves« (Bolivar 2013: 206, our translation). Besides, an interest in understanding 'why' the offence happened and in getting to know the offender, were aspects that were found to favour the decision of the victim to take part in restorative justice (RJ). Bolivar elaborates further on the additional factors that seemed to foster victim participation such as the lack of a punitive desire, the victim's ideology, having received psychological help, the victims' previous experience with the criminal justice system and the reactions of significant others (Bolivar, 2013: 208).

As the author concludes, »the voluntary nature of victim participation in RJ seems to act as a natural filter that prevents from experiencing secondary victimisation« (Bolivar, 2013: 210).

In fact, the research conducted by Wemmers and Van Camp (2011) supports this view. It aimed at understanding whether victims of violent crimes preferred a protective or a proactive approach when being offered restorative justice. The respondents were victims of violent crimes who had taken part in different restorative justice programmes in Canada where the protective approach prevails, and Belgium where the proactive approach is more common¹⁴.

According to the victims interviewed, when a serious crime is involved they prefer the proactive to the protective approach. The latter is seen by the respondents as a reflection that in general in the justice system, offenders receive more support than victims, who *de facto*, are denied access to restorative justice unless they actively search for it. In contrast, the proactive approach provides them with information and allows them to make informed choices, which in its turn, gives them a sense of control and empowerment. Being reached out to, was not seen as upsetting by the victims rather the opposite, it was appreciated. Another crucial finding is that respondents do not see the seriousness of the crime or the possible existence of trauma as counter indicators for the proactive offer of mediation.

¹⁴ See also Van Camp (2013).

As the victims express in the Wemmers and Van Camp (2011) study, such a proactive and generalised offer to all of the victims should meet certain conditions. In particular, the respondents highlighted that their participation should be fully voluntary and flexible. Victims want to be given all the time they need in order to make a decision about participating without any pressure, and be able to leave the restorative justice process at any time.

Finally, a recent evaluation carried out in the MRP by Tamarit and Josep (2013) has also had an influence on our change of approach. The main objectives of the research were on the one hand, to assess the degree of victims' satisfaction with the scheme and with the outcome of the mediation process, and, on the other, to gauge the impact of mediation on the emotional wellbeing of the victim. Tamarit's and Josep's (2013) study was addressed to victims that had participated in a mediation process, regardless of whether an agreement was eventually reached or not. The survey was carried out by phone in a time-span of one to three months after the mediation process had finished.

In a scale from 1 to 5, satisfaction with the mediator's performance scored 4.67, and satisfaction with the scheme in general scored 4.49. Also, 75% of the victims would recommend others to participate in a mediation process. The aspects of mediation that were most valued by the respondents were being heard, being able to have a say in a matter of their interest, as well as having the possibility to explain to the offender how they experienced the offence.

Although a vast majority of the respondents had been victims of a misdemeanour (96,6%) and only 3.4% had been victims of a crime, 83.3% of all of the respondents considered that the offence was serious or very serious. Moreover, 66.7% of them reported having experienced psychological harm. Seemingly, the closer the relationship between victim and offender, the more likelihood there is for the victim to experience psychological harm. Interestingly, in those cases where there was a family or close relationship between the participants, victims expressed a lesser degree of satisfaction with the attitude of the offender and the outcome of the mediation process, compared to those cases where there was no previous relationship.

A possible reason for that, as Tamarit and Josep (2013) points out, is precisely the fact that the existence of a previous relationship might be connected to an enduring conflict thus the emotional impact goes beyond that of the specific offence.

With regard to the impact of mediation on the emotional wellbeing of the victims, the results of Tamarit's and Josep's survey revealed that the degree of anger, frustration, anxiety, fear, sadness and helplessness that victims experienced as a re-

sult of the offence, had diminished significantly after the mediation process, anger and frustration being the feelings that had diminished the most¹⁵.

Linked to this, Tamarit and Josep (2013) remarks that the improvement in emotional wellbeing was observed regardless of the type of crime and the relation between victim and offender, in spite of the fact that in these cases, as mentioned above, the satisfaction with the outcome of the mediation process tended to be low. This leads to consider that the participation in mediation succeeds in meeting to a different degree, the victim's needs connected to emotional restoration. This also holds true for those cases where the conflict cannot be settled with an agreement or the offender's attitude does not fully meet the expectations of the victim.

In light of this, Tamarit concludes that mediation as implemented in the MRP has a great potential as a restorative process, regardless of the type of offence and the outcome of the process concerning the conflict as it contributes to the emotional restoration of the victims and helps to improve their sense of empowerment.

Such results are in line with other studies conducted in the UK and Australia. According to Strang (2013) victims who have participated in a restorative justice process, experience emotional restoration as they express feeling less anger towards the offender, less anxiety and less fear, than before the restorative justice process. They also report the harm repaired and a sense of closure as a result of the restorative justice process¹⁶.

INTRODUCING CHANGES

Drawing on the experience gathered and inspired by the research findings, two new protocols are now being piloted in order to test different pathways to improve victim access.

On the one hand, there is the protocol applicable to post-sentence cases referred by the prison. The case will be dealt with by two co-mediators, one practitioner will be contacting the offender first and a different one will be contacting the victim at the same time.

On the other hand, the pilot protocol with Criminal Court No. 21 (*Jutjat Penal núm. 21*) one of the courts devoted to enforce sentences, has also been modified so that it follows a victim-initiated model. The cases eligible are those where there is an individual victim, and the offender is reachable at the contact details provided by the court file. The court sends a letter to the offender inviting him to show

¹⁵ A very similar evaluation conducted in 2010 with victims of juvenile offenders, threw comparable results, the degree of negative emotions experienced as a result of the offence had considerably decreased after the mediation process (*Comunitat Mediació penal juvenil (2010: 52-54)*)

¹⁶ See also Sherman and Strang (2007).

up at a given date and time. In that time-span (usually a month), the victim will be contacted to be given the possibility to meet a mediator and receive information about the MRP prior to the date the offender has been invited. Should the victim be willing to start a restorative process, the mediator will also meet the offender at the date set by the court and provided that the case is suitable, mediation can start. At the beginning of 2015 the results of these two protocols, with a focus on the reasons for non-suitability and the outcomes of the suitable processes, will be analysed so that we can fine tune our practice to better meet the needs of victims.

FINAL REMARKS

Our own experience and the input received from research and international exchange has led us to reconsider the protective approach as it has become clear that, compared to offenders, it reduces the possibilities for the victim to have a say and make an informed choice about whether to access the MRP or not.

Due to how the criminal justice system is organised and the particular organisational framework in which the MRP is set, while there are several instances through which an offender can be informed about the MRP, the victim will have few opportunities if any, to learn about it. In addition to the difficult access to information for victims, offenders can be granted legal benefits for participating in mediation. It should not come as a surprise that in the eyes of many victims, mediation is perceived not as a neutral *offer* but rather an offender-oriented service or *measure* (Bolívar, 2012: 380). As this author points out, "(...) *Mediation makes sense when it works fully for the interest of those affected by the crime, and not mainly for the interest of the criminal justice system.*" (Bolívar, 2012: 381).

Against this background, we see it is our responsibility to remove all the obstacles within our reach for contacting the victims and making sure they are given the choice of participating in a restorative justice process. To that end, not only have we changed our practice, but also the referral protocols ought to be reviewed in accordance so that we can ensure an effective balanced approach between victim and offender.

This transformation is already underway. At present, in serious crimes the proactive approach is followed as a general rule in order to increase the opportunities for the victim to be informed about restorative justice options and be given the room for being heard. In addition, as explained above, two new protocols concerning post-sentence cases which follow the proactive model are being piloted. Finally, a fundamental revision of the scheme's framework documents has been undertaken so that there can be a consistency between our practice, our protocols and the mission and objectives of the scheme.

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OSTVARENJE URAVNOTEŽENOG PRISTUPA IZMEĐU ŽRTVE I PRIJESTUPNIKA: INTEGRIRANJE PROAKTIVNOG PRISTUPA PREMA ŽRTVI

SAŽETAK

Program posredovanja (medijacije) i reparativne pravde od samoga je početka pokrenut s misijom jednakomjernog služenja potrebama žrtava i počinitelja, odnosno, utemeljen je na uravnoteženom pristupu između žrtve i počinitelja, u skladu s načelima restorativne pravde. Zaokupljen rizikom od sekundarne viktimizacije, program slijedi načela zaštitničkog pristupa; stoga se, kao opće pravilo, kod teških zločina slijedi model koji se pokreće na zahtjev počinitelja. Iskustvo je pokazalo da takva praksa nije sasvim u skladu s našom misijom jer su žrtve, u usporedbi s počiniteljima, imale ograničeniji pristup programu. Cilj ovoga rada je predstavljanje rada i refleksije skupine praktičara o praksi i pregled uspostavljenog zaštitničkog pristupa. U tu svrhu je analizirana kombinacija čimbenika identificiranih u korijenu takve transformacije, te se navode ključne promjene koje su uvedene kako bi se žrtvama olakšao pristup programu.

Ključne riječi: *posredovanje (medijacija) između žrtve i počinitelja, restorativna pravda, zaštitnički pristup, proaktivni pristup.*