

STATEMENT ON THE POSITION OF THE VICTIM WITHIN THE PROCESS OF MEDIATION

Victim Support Europe

In formulating this statement, Victim Support Europe recognises and values existing international statements on basic human rights and also on the rights of the offender. It acknowledges the importance of the United Nations Declaration of Basic Principles on the use of Restorative Justice programmes in criminal matters and the Council of Europe Recommendation (99)19 Concerning Mediation in Penal Matters.

It also acknowledges the importance of the work of those involved in restorative justice programmes, including those who work with offenders.

The specific expertise of Victim Support Europe is derived from our extensive experience in working with victims in the aftermath of crime. The purpose of this document is not, therefore, to repeat the provisions for good practice which have been documented elsewhere, but to draw attention to the issues which we believe have not been adequately dealt with from a victim perspective in the previous protocols.

Principles for the establishment of recommendations on the position of the victim in the mediation process

In this paper, the term “mediation” is used to describe any process which involves contact between the victim and the offender, either directly or through the mediator. The process of mediation is generally regarded as part of the broader issue of restorative justice. However, the existing protocols for restorative justice, including those aspects which deal with mediation, rarely recognise the principle that no programme should be described as “restorative justice” if it does not, as a priority, seek to restore the victim. By contrast, all programmes aimed at the direct support of the victim can be described as an essential element of restorative justice.

Victim Support Europe, as the body representing national victims’ organisations throughout Europe, therefore supports the principle of restorative justice and would like our work to be recognised as making an important contribution.

This document concentrates on the process of mediation in criminal cases. By definition, this process requires the direct involvement of the victim and it is therefore important that their interests are considered fully. We would like our experience and knowledge to contribute to the development of both policy and practice in this field.

Mediation in criminal cases has been described as a process in which victims and offenders communicate, with the help of an impartial third party, either directly face to face or indirectly via the mediator, enabling victims to express

their needs and feelings and offenders to accept, and act on, their responsibilities. We are taking this as a starting point, but wish to make several observations about the process of mediation where a crime has been involved.

First of all, it has to be recognised that victim/offender mediation in criminal cases is different from similar processes of mediation in other areas of life. One of the conspicuous differences is that, when a crime has occurred, the offender has not only violated the individual rights of the victim but has also broken the legal order designed to protect society at large. As a consequence, part of the mediation process must include the offender accepting responsibility for his act and the acknowledgement of the adverse consequences of the crime for the victim. The importance of public accountability cannot be ignored. Similarly, the victim has a right to have their status as a victim of crime recognised by society and their position protected.

The potential impact of the mediation process

We recognise that mediation is a very powerful process, with the potential to deliver great benefits to all parties concerned. However, it also has the potential to do harm, particularly in programmes in which the mediator has not received sufficient training. Most of the existing literature tends to focus more on the benefits than on the potential risks.

The potential benefits include the recovery of autonomy and dignity for the victim. Participation and involvement of the victim can avoid feelings of alienation which are so prevalent in the process of traditional criminal justice. The victim may obtain an opportunity to seek information from the offender which would not otherwise be available and also the opportunity to seek redress. In addition, many victims will value an opportunity to communicate their experiences of the crime and to help achieve a constructive outcome from their negative experience. Helping the offender to avoid future crimes can help to restore the victim's autonomy.

The potential risks involved include the possibility of secondary victimisation occurring before, during or after the mediation process. It should be recognised that most of the current programmes of mediation were not initiated either by victims or by victim services. Victims have many needs in the aftermath of crime but the desire to meet the offender is rarely a priority for most victims of crime. The invitation to meet the offender is a powerful intervention which could impose unwanted responsibilities on the victim. Victims who decline the invitation may be left with feelings of guilt or inadequacy and may even fear reprisals from the offender. An agreement to enter into mediation may also raise expectations which can be damaging if the desired results are not achieved. For this reason, the assessment of the suitability of the offender should be carried out with the victim's interests in mind.

In each case where mediation is being considered, the potential benefits need to be balanced against the potential risks. There are many variables which need to be considered:

The timing of the offer of mediation and the point at which it occurs in the process of the victim's recovery will make a significant impact on the ability of the victim to respond. Therefore, mediation as a diversion process may be more appropriate in cases of minor assaults or property crime than in cases of serious violent crime. The most serious crimes are likely to result in a prison sentence but mediation may still be appropriate, for example for the purpose of agreeing measures to protect the victim following release. Mediation in these cases would be more appropriate post sentence. In cases which are required to go to court mediation may also be of value during the criminal justice process.

Any prior relationship between the victim and the offender will also affect the process. Where there is a close personal relationship between the victim and the offender, special care must be taken to ensure the selection of suitable cases and the adequate preparation of each of the parties to the mediation. Special provisions will need to be in place to take account of the wider implications in such cases, for example the impact on other relationships within the workplace, school, family or neighbourhood. Mediators dealing with these cases should have received specialist training.

The process will also be affected by the personal characteristics of the victim, including their previous experience of crime, any other factors affecting their personal well being and their success or otherwise in coping with previous crises. The availability of support and close relationships will also be an influencing factor. It is likely that none of these factors will be known or provided for prior to the offer of mediation.

Victim/offender mediation depends on having some common ground in terms of basic needs and values. Disparities between victims and offenders in terms of wealth, age or ethnicity should always be recognised. This should already occur when mediators have been properly trained. The objective in each case should be to maximise the potential for the benefits of all parties and to minimise any risks involved, particularly for the victim.

Issues in existing protocols from a victim perspective

The definition of free and informed consent

According to the United Nations Declaration of Basic Principles on the use of restorative justice programmes, restorative processes should be used only with the free and voluntary consent of the parties. The parties should be able

to withdraw consent at any time during the process, including during the mediation session.

The mere opportunity to refuse to take part in the mediation process is not, in our view, sufficient to constitute free consent. A full policy of free consent must require that the offer of mediation should only be made by a person who has been fully trained to recognise the variable impact of the offer on each victim of crime and the potential for adverse consequences.

Victims should always be given not only full information about the process and the potential outcomes, but also information about where they can obtain independent support and advice. Procedures should be in place to refer victims to other organisations who can provide this assistance whenever it is requested.

In our view, consent can never be free of pressure if the alternative consequences for the offender are substantially greater if the victim feels unable to take part in mediation. Where the diversion of the offender from the criminal justice process is being considered, an alternative diversionary remedy should be available – for example, community service. Where a case has been referred for mediation by a court, there should be an understanding that any sentence discount which would be available following a successful mediation will also be available if the offender had been motivated but the offer was declined.

In all cases, the victim must be given sufficient time to consider their decision and to take independent advice if required. We suggest that victims should be given a minimum of three weeks to make this decision.

Support and representation

The Council of Europe recommendation states that the parties should have the right to legal assistance. In the United Nations Declaration, this is limited to the right to legal advice before and after the restorative process. In our view, victims should be entitled to assistance from a supporter of their choice, before, during and after the process. This may involve a dedicated Victim Support organisation. We would, however, be concerned about a high degree of legal representation in the process, as this may not be conducive to good communication between the parties. The culture of mediation has, of necessity, an informal nature. We do, however, consider that victims may benefit from legal advice prior to the decision to mediate, and possibly after the process has been conducted. Where this is the case, legal advice should be available equally to all victims of crime and this should be included within the provisions of free legal aid.

In all cases in which a victim is approached they should be informed about the availability of an independent victim service and a referral should be made if this is requested.

Training and preparation

According to the UN Declaration on mediation, facilitators should receive initial training before taking up mediation duties, and should also receive in-service training. The training should aim to provide skills in conflict resolution, taking into account the particular needs of victims and offenders, and to provide basic knowledge of the criminal justice system, and to provide a thorough knowledge of the operation of the restorative programme in which the mediators will work.

We support this provision, but consider it is important that the training on victim awareness is provided by independent experts who have experience of working with victims of crime and who have no vested interests in the outcomes of the mediation programme. Victim Support organisations are well placed to provide this type of expertise.

As we have previously noted, specialist training should be provided for mediators who are expected to work with cases involving intimate personal relationships.

Confidentiality

All international protocols require that the process of mediation should be confidential to all parties concerned and should not be disclosed subsequently except with the agreement of the parties. No explanation is given as to why such a high level of confidentiality should be required, particularly in criminal cases where the element of public accountability is also at stake.

We believe that victims and offenders should be free to discuss the process they have been involved in with friends, relatives and other supporters. They should not feel isolated by being unable to share such a significant experience. We accept that it would not be helpful for information to be placed in the public domain during the process of mediation. The level of confidentiality required may therefore be different between the parties and the mediator. If issues of a particularly sensitive nature arise during the course of mediation the level of confidentiality to apply to those issues can be negotiated between the parties.

Admission of guilt by the offender

According to the Council of Europe recommendation, it suffices that the accused admits some responsibility for what has happened. Furthermore, it is emphasised by the Council of Europe recommendation that participation in mediation should not be used against the accused if the case is referred back to the criminal justice authorities after mediation. Moreover, the document states that an acceptance of facts, or even confession of guilt by the accused, in the context of mediation, should not be used as evidence in subsequent criminal proceedings on the same matter.

We favour a different approach. As stated before, it is an essential feature of any mediation scheme that it enables the victim to express his needs and feelings and the offender accepts and acts on his responsibilities. It follows that there is no logic in precluding this evidence from being used in any subsequent prosecution. Victims cannot be prohibited from offering evidence of confession if they believe it is appropriate to do so. Equally, the prosecution could call upon a victim to give such evidence as the confidentiality in the mediation process is not protected by law.

Other issues which may be subject to disclosure

Other aspects of mediation which cannot be protected by confidentiality must include any further crime, for example any threat of further violence which occurs during the mediation process. It is questionable, therefore, if it is appropriate to preclude the behaviour of the offender during mediation as a factor to be taken into account in subsequent sentencing decisions.

According to the UN Declaration of Basic Principles, failure to implement an agreement reached in mediation may not be used as justification for a more severe sentence in any subsequent criminal justice proceedings (which may be possible in certain jurisdictions). While recognising the validity of this proposition in many cases, we feel that a intentional violation of the mediated agreement can lead to re-victimisation of the victim and can then lead to circumstances which should be taken into account in subsequent sentencing decisions.

Issues not included in international protocols

Indirect mediation

As well as being given a choice to accept or decline face to face mediation, victims who would prefer not to meet the offender should be given a clear and free choice to mediate through the mediator.

Preparation for direct mediation

Once a victim has decided to accept an invitation to meet the offender adequate time must be allowed for preparation before the meeting. There should be provision for full information to be given about the procedure which is planned, for all questions to be answered and for all concerns to be addressed. More than one meeting should be offered to allow the victim time to reflect on the information which they have been given.

Supervision of the agreement

Victims who have taken part in mediation should always be kept informed of the offender's performance in meeting the terms of the agreement. They should be given clear information about the procedures for supervising the

implementation of any agreement reached during mediation. In particular, they should know how any breaches of the agreement will be dealt with and the possible results of such a breach, including any further action which may be taken.

Monitoring and evaluation of mediation programmes

The monitoring of all mediation programmes should give as much attention to the victims involved as they do to the offenders. Data should be collected for example on the age, sex, race and other characteristics of victims as well as any significant differences between the parties in each case e.g. a very young victim and an older offender. Monitoring should be designed to provide information on which cases are most likely to be beneficial to both parties and circumstances in which special provisions for preparation or support should be made.

All programmes aimed at monitoring the success or otherwise of the process should include the level of satisfaction and any other outcome for those victims who chose not to accept mediation.

The role of victim services

Victim services share with other agencies involved the desire to maximise the benefits of mediation and to minimise the risks. Through their knowledge and experience of working with victims they have specific expertise to contribute to the development of both policy and practice in mediation. Their contribution should include:

The provision of consultation during the development of Government policies in relation to mediation;

Active contribution to the monitoring or management of programmes and in the design of new programmes;

Taking part in the training of both professional and voluntary mediators and other personnel who are required to have direct contact with victims;

Ensuring that all programmes are fully aware of the availability of dedicated victim services and that adequate referral procedures are in place;

Being available to provide independent support to victims before, during and after the mediation process including support in reaching a decision whether or not to take part in mediation.

In some jurisdictions it may also be appropriate for victim services to be involved in making the initial approach to the victim. In jurisdictions where this is not appropriate victim services should raise awareness of the availability of programmes and assist victims in accessing the services when they wish to do so.

The role of victim services in mediation should be recognised and appropriately funded.

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