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Victim-offender mediation in Sweden and South Africa

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Summary

The purpose of this thesis is to investigate victim-offender mediation in Sweden and South Africa and then compare the two systems. Victim-offender mediation is a conflict resolution method. The victim and offender take part in a meeting with an impartial third party acting as mediator. The aim of the meeting is for both parties to express their thoughts and feelings towards the offence. The mediator's role is to help the parties communicate with one another. Victim-offender mediation is based on the philosophy of *restorative justice*. 'Making right' is central in the restorative approach and a restorative system wants to involve the concerned parties in the justice process, rather than hand over the justice process to people who represent the judicial system, such as attorneys, lawyers and judges. Victim-offender mediation can be used at various stages in the justice process, both as a complementary and an alternative to the regular criminal justice system.

Victim-offender mediation started to develop in Sweden at the end of the 1980s but the first regulation, *The Mediation Act (Medlingslagen 2002:445)*, only came into effect in 2002. The victim-offender mediation service is a part of the municipalities' social welfare activities. The municipalities are responsible for ensuring that victim-offender mediation are available when a crime has been committed by someone under the age of 21. It is up to each service to decide if a case is suitable for victim-offender mediation or not. There has been a strong opposition towards using victim-offender mediation in serious offences in Sweden, but this attitude has begun to change, it is now believed that victim-offender mediation can be suitable in all types of offences. The fact that a young offender is willing to take part in mediation is a special reason for wavering prosecution and can therefore have an influence on a prosecutor's decision when he or she considers a waiver of prosecution against the offender or not. The fact that victim-offender mediation has taken place may also influence a court's decision on the choice of sanction and the type of punishment. Victim-offender mediation does play a complementary role in the regular justice system in Sweden, which means that it does not constitute a penal sanction, or an alternative to the regular justice system.

Victim-offender mediation started to develop in South Africa in the early 1990s but as a concept it was not foreign, the African traditional justice systems were generally acknowledged to contain elements of restorative justice even before the 90's. The first regulation to mention victim-offender mediation, *The Child Justice Bill*, passed by the parliament in the end of June 2008. The Bill will only come into effect in April 2010 but departments, other State structures and NGOs have already implemented key aspects of the Bill in their work. Service providers are the local Department of Social Development and NGOs. Victim-offender mediation can take place at various stages of the justice system; as diversion options prior to trial or in the middle of a trial or after conviction. Victim-offender mediation in South Africa is therefore used as an alternative, a complement and a sentence. The decision whether or not victim-offender mediation is appropriate is made by the prosecutor or the magistrate. Some cases are seen as more suitable than others but the seriousness of the crime does not automatically excluded a case. Instead the nature of the offence only influences the decision as to how it would be best applied, at pre-trial, pre-sentence or sentence stage, rather than excluding the use of victim-offender mediation altogether.

The main purpose of this thesis was to see how the victim-offender mediation services in both Sweden and South Africa can develop. My conclusion is that South Africa should develop a regulation that states how the service shall proceed and also try to ensure that the service is nationwide. In Sweden on the other hand, I believe that we should take the step to develop victim-offender mediation as a more permanent feature in the criminal justice system.

Writer's preface

I would like to take this opportunity to thank all the people who helped me through this project, both in Sweden and in South Africa. I would especially like to thank SIDA, for their financial support, which made it possible for me to travel to South Africa. Thanks to Bernard Le Roux at Medlingsverksamheten in Gothenburg, for giving me the idea to write about the subject and for helping me understand as to how the mediation practice in Sweden works. I would like to thank Mike Batley, Ansa Verster and Winnie Modiba at the Restorative Justice Centre in Pretoria, for sharing their knowledge with me and enabling me to see how they work and practice in South Africa. I would also like to thank my supervisor, Gösta Westerlund at University of Gothenburg, for helping and advising me, even if I was on the other side of the world. Thanks to Scott Rodwell and his family in Midrand, you have been invaluable to me in so many different ways whilst writing this thesis during my time in South Africa, thank you so much for all your help and love. And lastly, thank you to my family and friends in Sweden, for your everyday support during my years in law-school, which has meant the world to me.

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Abbreviations

ADR	Alternative Dispute Resolution.
BRÅ	National Council for Crime Prevention
NGO	Non-Governmental Organisation
NPA	The National Prosecuting Authority
NICRO	The National Institute for Crime Prevention and Rehabilitation of Offenders
SIDA	Swedish International Development Cooperation Agency
SOU	Swedish Government Official Reports

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1 Introduction

1.1 Background

Victim-offender mediation is in its early stages and in process of further development in Sweden. The first mediation projects in Sweden were initiated at the end of the 1980s, but up until the end of the 1990s, mediation was conducted only on a limited scale. The first regulation came into effect on July 1st 2002. The first time I came in contact with victim-offender mediation was in the spring of 2008 on one of my last courses at the University of Gothenburg on the LL.M. programme that leads to a Master of Law exam (Sw. jur. kand). At the course, we had one lecture about Victim-offender mediation, held by Bernard Le Roux who works for the Swedish mediation service in Gothenburg. He talked about the different systems in different countries and especially about South Africa because he had lived and worked in there. After the lecture, I decided that I wanted to know more about victim-offender mediation and its role in the judicial system. I therefore, decided to write my last paper about this subject.

1.2 Purpose and Questions of Research

The purpose of this thesis is to study and to investigate victim-offender mediation in Sweden and South Africa. The main purpose is to compare the systems and see how the mediation services in both Sweden and South Africa can develop. The objective of this paper is to answer following questions:

1. How is victim-offender mediation used in Sweden and South Africa?
2. How is victim-offender mediation regulated?
3. What is a suitable case for mediation?
4. Where mediation should be placed in the judicial system?
5. What effect should mediation give to the judicial system?

1.3 Delimitations

In both Sweden and South Africa the regulations are focused on children. I have therefore focused mainly on acts committed by young people. In both the countries victim-offender mediation can be used at a post sentence level, after the offender has received his or her sentence. Due to this level not affecting the criminal proceedings of the case, I have not included this type of victim-offender mediation.

In South Africa, there is a difference between victim-offender mediation (also called victim-offender conferencing) and family group conferencing. Whilst Sweden use the victim-offender mediation as a term for all mediation in criminal matters. In literature and articles, terms are used interchangeably, and there can be variations within models. I have therefore used victim-offender mediation as a term consistently in this paper.

1.4 Method

In order to answer the proposed questions, I had to first study the Swedish system. I spent time researching at the Gothenburg University Library. I attended meetings and conducted interviews with people from the mediation service in Gothenburg and I also had the chance to take part in a one day education for new mediators held by the mediation service in Gothenburg.

In March 2008, I was granted a scholarship from the *Swedish International Development Cooperation Agency* (SIDA) to conduct a minor field study in South Africa, which gave me an opportunity to go to South Africa and conduct a minor field study of the South African mediation service. In South Africa, I spent time researching at the University of Pretoria in the Main Library and in the Oliver R Tambo Law Library. I held interviews with people at the Restorative Justice Centre in Pretoria and NICRO in Cape Town. Through the Restorative Justice Centre in Pretoria, I was given the opportunity to attend and observe victim-offender mediation in Atteridgeville, North Pretoria. I also conducted a questionnaire survey¹

¹ Appendix 1.

concerning young people's thoughts and opinions of victim-offender mediation by handing out ten questionnaires to three different schools and one home. The names of the places that took part in the survey were: Midrand High (co-ed high school), King Edward VII (male only high school), Brescia House (girls only convent school), Miriam Makeba Home for Girls (place of refuge for abandoned and abused teenage girls).

2 Victim-offender mediation

2.1 What is victim-offender mediation?

Mediation is one of the most common types of ADR. ADR is the generally accepted term for “alternative dispute resolution”. More simply, ADR denotes all forms of dispute resolution rather than having to proceed through the courts. ADR provides an opportunity to resolve disputes and conflict through a process that is best suited to the particular dispute or conflict. For this reason many ADR practitioners prefer to use the term “appropriate dispute resolution”. ADR involves the selection or design of a process which is best suited to the particular dispute and to the parties involved in the dispute.²

A general description of mediation is as a conflict resolution method where the parties involved, together with an impartial mediator, try to find a solution to the conflict. There are many different types of mediation. At an international level, mediation is used between nations or political parties in disputes, where the United Nations or another impartial body acts as a mediator. At a national level, mediation can be used in the resolution of a number of disputes, for example in schools, communities or the workplace.

Victim-offender mediation is built on the same principals but the difference is that there is no conflict in the controversial meaning. It is not about two people that disagree about something; the reason for the meeting is that one party (offender) has committed a crime upon the other party (victim). The victim can either be a private person, a company or a public authority.³ There is no specific definition of victim-offender mediation. “Victim-offender mediation” is a general term for a variety of programmes involving direct or indirect communication between related or unrelated victims and offenders. Various countries and services have adopted different names for their specific type of programmes dependent on their relevant

² South African Law Commission Issue Paper 8, Project 94 – Alternative Dispute Resolution, p. 3.

³ Wahlin, *Medling vid brott i Sverige på 2000-talet*, p. 11.

organisation's philosophy.⁴ They have all different aims and objectives for their operations. The practitioner and scholar, Mark Umbreit, identifies that the differences in how the mediation is formulated, is dependent upon how much value is given to either the personal meeting or the agreement between the concerned parties. However, the practical subject matter concerned with each mediation practice has many things in common.⁵ Victim-offender mediation is a meeting between a victim and an offender with an impartial third party acting as mediator. The aim of the meeting between the concerned parties is to express their thoughts about the offence, unlike a judge it is the mediator's role to help the parties to communicate with one another. The communication can be either direct or indirect but the most common form of victim-offender mediation is a face-to-face meeting between an offender and his or her victim which is facilitated by the mediator.

Victim-offender mediation is an empowering process that provides those involved with the opportunity to settle the conflict instead of being the subjects of decisions imposed upon them by justice officials. Victim-offender mediation can be used as a complement or an alternative to the criminal justice system at various stages in the criminal justice process.⁶

The first victim-offender mediation programme began as an experiment in Kitchener, Ontario in the early 1970's. A youth probation officer convinced a judge that two youths convicted of vandalism should meet the victims of their crimes. After the meetings, the judge ordered the two youths to pay compensation to those victims as a condition of probation. The programme began as a probation-based/post-conviction sentencing alternative, inspired by a probation officer's belief that victim-offender meetings could be helpful to both parties. The Kitchener experiment evolved into an organized victim-offender reconciliation programme funded by church donations and government grants with the support of various community groups. Following several other Canadian initiatives, the first United States programme was launched in Elkhart, Indiana in 1978. From there it has spread throughout the United States and Europe.

⁴ Muntingh, *The development of a victim-offender mediation programme*, p. 1.

⁵ Nehlin, Lindström, Svanberg, *Medling vid brott, om möten mellan unga gärningsmän och brottsoffer*, p. 12.

⁶ Muntingh, *The development of a victim-offender mediation programme*, p. 1.

2.2 The philosophy of mediation

Mediation is based on the philosophy of restorative justice. Restorative justice looks upon the practice of victim-offender mediation as restoration and compensation, but there is no generally accepted definition of restorative justice. The reason that there is no generally accepted explanation often gives an impression that it is too complex and broad in determining its definition.⁷ Several sources have dealt with the idea of defining restorative justice. One widely-accepted definition of restorative justice was put forward by Tony Marshall in his overview of restorative justice. He described restorative justice as; “a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of an offence and its implications for the future.”⁸ Howard Zehr has refined Marshall’s definition in the following way; “Restorative Justice is a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible.”⁹

The philosophy of restorative justice can be compared to retributive justice which is how the traditional criminal justice system looks upon crime and punishment. Retributive traditions once had survival value. Cultures which were afraid of fighting in recent history were often wiped out by more determinedly violent cultures. In the contemporary world, as opposed to the world of our biological creation, retributive emotions have less survival value. Due to the fact that risk management is institutionalized in this modern world, individuals, groups or nations are more likely to act upon their retributive emotions, which usually creates more trouble for them than not.¹⁰ In a retributive justice system the criminal reaction on a person’s failure to comply with the criminal law is seen as retribution. Retributive justice is punishment and the aim is to prove the offenders guilt and to impose a penalty. Crime is a violation of the state and the offender is therefore in guilt to the state. The justice process is handled by people who represent the judicial system as

⁷ Batley, Skelton, *Charting progress, mapping the future: restorative justice in South Africa*, p. 5.

⁸ Marshall, *The Evolution of Restorative Justice in Britain*, p. 37.

⁹ Zehr, *The Little Book of Restorative Justice*, p. 37.

¹⁰ Braithwaite, *Restorative Justice and a better future*, p. 58.

attorneys, lawyers and judges.¹¹ Operating within the philosophy of retributive justice, one of the most striking developments in criminal justice systems is the fact that the conflict between victim and offender is “stolen” by the state. The whole process appears to be of disempowerment, leaving both victims and offenders unable to resolve the situation in a constructive manner. The retributive justice philosophy gives the parties a secondary role and the offenders rarely have the chance to seek acceptance and forgiveness.¹²

The restorative philosophy defines crime as a violation of people and relationships. A restorative system is making the parties involved the principal persons in the justice process instead of giving them a secondary role.¹³ Making right is central to justice in the restorative approach. Instead of asking the question “what should be done to the offender?” the question in a restorative justice process is “what can be done to make things right?” The primary obligation is on the offender to acknowledge his or her guilt to the victim, to get the opportunity to repair the damage he or she has caused the victim and to take steps to make the wrong right in some way.¹⁴

Restorative justice as we understand it today has been demonstrated for thousands of years in informal, customary traditions. More recently, conferencing and circles have been added to the restorative justice models which have been put into place through a number of ways within and alongside the criminal justice system. Thus each internal justice system have in some way provided powerful new practice tools, the first modern models of restorative justice practice were victim-offender mediation and reconciliation programmes.¹⁵

Different restorative justice practices can be evaluated to be less or more restorative. A victim-offender mediation that includes all who have a stake in a specific offence, addresses harms and causes, is victim-oriented, encourages offenders to take

¹¹ Wahlin *Medling vid brott, en handbok*, p. 8.

¹² Muntingh, *The development of a victim-offender mediation programme*, p. 8.

¹³ Wahlin, *Medling vid brott i Sverige på 2000-talet*, p. 12.

¹⁴ Skelton, *The influence of the theory and practice of restorative justice in South Africa with special reference to child justice*, p. 95-96.

¹⁵ Skelton, *The influence of the theory and practice of restorative justice in South Africa with special reference to child justice*, p. 253.

responsibility, gives an opportunity for a dialogue and participatory decision-making and is respectful to all parties, is a ‘fully restorative’ programme.¹⁶ Restorative justice practice in its “purest” form, is characterised as involving victims and offenders in face-to-face meetings.¹⁷

¹⁶ Batley, Skelton, *Charting progress, mapping the future: restorative justice in South Africa*, p. 7.

¹⁷ Skelton, *The influence of the theory and practice of restorative justice in South Africa with special reference to child justice*, p. 136.

3 Victim-offender mediation in Sweden

There was no special theoretic anchorage in the philosophy of restorative justice in the Swedish victim-offender mediation projects when it was initiated. The ideas and thoughts behind the projects were just “common sense” and the aim was to intervene at an early stage against young offender debutants.¹⁸ Restorative justice is not mentioned in any act or other regulation in Sweden. In the Government Bill for *The Mediation Act*, restorative justice is mentioned as a legal philosophy that victim-offender mediation is based on.¹⁹ In the Swedish mediation services are the theoretic thoughts not so explicit, the service is more pragmatist orientate. The thoughts of restorative justice are behind the system but it has not been given any expression. The National Council for Crime Prevention believe that it is hard to unite the philosophy thoughts of restorative justice with the fundamental judicial principles of the Swedish judicial system.²⁰

3.1 The history of victim-offender mediation in Sweden

Victim-offender mediation in Sweden began to grow spontaneously without any guidance or intervention from the State. The first mediation projects were initiated at the end of the 1980s. The service was conducted only on a limited scale by small private associations in the southern part of Sweden. Their main focus was on children and young people aged from 8 to 18 years old who had committed a crime. Some of the associations were in co-operation with police, school managements and social services. By the beginning of the 1990s a handful of mediation projects had also begun in a number of local municipalities.²¹

In 1994 the government requested the Prosecutor-General to make a survey of the experience gained on carrying out victim-offender mediation. The Prosecutor-General was also asked to create one or more models to carry out mediation with youthful offenders. The resulting report stated that mediation should be developed

¹⁸ Rytterbro, *Medling - möten med möjligheter. En analys av en nygammal reaktion på brott*, p. 8.

¹⁹ Prop 2001/02:126 p. 10.

²⁰ Wahlin, *Medling vid brott i Sverige på 2000-talet*, p. 15.

²¹ Rytterbro, *Medling - möten med möjligheter. En analys av en nygammal reaktion på brott*, p 6.

and implemented as an alternative or supplementary sanction used primarily with youthful offenders.²² A model for such work was put forward, together with a number of proposals for changes in legislation. It was recommended that a nationwide project, which should be the subject of a scientific evaluation, should be implemented and that this should take place before political decisions were taken on the final framework for mediation activities.²³

In April 1998, the Government requested that the National Council for Crime Prevention to initiate, monitor, co-ordinate and evaluate an experiment with victim-offender mediation projects. Thirty-two projects in different parts of the country were selected for the experiment which was to be maintained for one year. The majority of these projects continued after the experimental period ended. According to the final report of the experiment, mediation with young offenders could exert a positive influence on both the offender and the victim. The National Council for Crime Prevention had the opinion that the organization of mediation was best undertaken by the municipalities' social welfare service. Another finding of the evaluation was that the prosecutors and the police needed clear instructions of their responsibilities towards mediation.²⁴

After the project, a Commission was requested to study and analyze the place for victim-offender mediation in the judicial system. The investigation emphasized that the experiments had showed that victim-offender mediation for young offenders could have a positive influence on both the offender and the victim and that the mediation service should be used in more frequent cases. The Commission therefore considered that mediation, with youthful offenders, was a measure that should be used more widely than it was, at that time, and that further clarification of the mediation service in an act would give mediation enhanced legitimacy and vigour.²⁵ It was for this reason that the Commission proposed a bill for a Mediation Act. They considered that victim-offender mediation should not be a penal sanction, but it could be special grounds for the prosecutor, to take in to consideration, when he or

²² Riksåklagaren, *Medlingsverksamhet för unga lagöverträdare. En kartläggning av projekt. Ett förslag till modell för medling*. Åklagarväsendet: Rapport 1996:6.

²³ Proportion 2001/02:126 p. 13.

²⁴ BRÅ-rapport 2000:8 p. 47-49.

²⁵ Swedish Government Official Report (SOU 2000:105).

she continues with legal proceedings against young offenders. They also considered that victim-offender mediation should be organized by the local authority and social services. They proposed that offenders between the ages of 15 to 17 should be the major group considered for mediation, but that no person either older or younger should be excluded from mediation. They further considered that no certain type of crime or offence should be excluded from victim-offender mediation but some crimes like sexual crimes and crimes without victims were unsuitable or even impossible for victim-offender mediation.²⁶ *The Mediation Act (Medlingslagen 2002:445)*, came into effect on July 1st 2002 and was the first regulation in country to deal with victim-offender mediation.

In August 2002, another Commission was instructed to consider, among other things, what position in the judicial process victim-offender mediation should have. The Commission considered the initial findings of victim-offender mediation, up till then, to be good and that it was therefore justified to assume that it would be even more positive if it was put to greater use in the future. The Commission recommended that it should be stated in the provision of a formal caution in section 17 of *Law on Special Provisions concerning Young Offenders* about grants of waivers of prosecution, when the prosecutor makes an assessment of whether such a decision is to be made, special consideration should be given to the willingness of the young person to participate in mediation according to *The Mediation Act*. They also recommended that the period of time for a decision in the issue of prosecution should be extended in the cases when victim-offender mediation comes into question. They found that it was most suitable if mediation took place within the municipal social services, but that there was no sufficient evidence to make mediation mandatory for municipalities.²⁷

In March 2006 the Government handed a bill to Parliament. The bill in many ways corresponded with the Commission from 2002. The government proposed a change in the *Law on Special Provisions concerning Young Offenders*, that the prosecutor, when he or she is considering whether to grant a waiver of prosecution, shall give special consideration to the willingness of the young person to participate in

²⁶ SOU 2000:105 p. 172-173.

²⁷ SOU 2004:122, p. 122.

mediation and that the period of time for a decision in the issue of prosecution should be extended in the cases when mediation comes into question.²⁸ The difference was that the government also considered a change in *The Social Service Act*, that the mediation should be mandatory for the municipalities.²⁹ The new regulations in *Law on Special Provisions concerning Young Offenders* came into effect on January 1st, 2007 and the regulation in *The Social Service Act* came into effect on January 1st, 2008.

3.2 Regulation

3.2.1 The Mediation Act (2002:445)

The main act for victim-offender mediation in Sweden is *The Mediation Act*³⁰. According to section 1, the Act is only valid for victim-offender mediation that is organized by the government or local authorities. The reason for why victim-offender mediation is regulated in an Act, is primarily to provide guarantees of equity and fairness. The regulation will guarantee that the mediation service performs the demands which are required to make the service equal and fair. The regulation will also make the activities more uniform, promote mediation and give it legitimacy. The Act constitutes a general framework legislation to keep the mediation flexible, so that the service can adjust to the special conditions and circumstances in each case.³¹

Section 2 gives a definition of victim-offender mediation according to the Act. Mediation is not described as a method. The definition of victim-offender mediation according to the Act is; a meeting between a victim and an offender, together with an impartial mediator with the aim of talking about the offence and the consequences of it. The Act does not regulate how many victims or offenders can take part at the meeting, it has to be determined in each case.

²⁸ Proposition 2005/06:165 p. 107-109.

²⁹ Proposition 2005/06:165 p. 103-106.

³⁰ Lag 2002:455 om medling med anledning av brott.

³¹ Proposition 2001/02:126 p. 33.

According to Section 3, victim-offender mediation is for the benefit of both parties. The aim is to increase the offenders' level of insight into the consequences of the offence and at the same time give the victim the opportunity to work through his or her experiences. The aim is thus double; to work to prevent the offender to relapse into new criminality and to help the victim to work through his or hers negative experiences. Both the goals weigh just as heavy as the other and victim-offender mediation can not be used just to fulfil one of them.³²

Section 4 concerns the mediator. The only demands the Act stands up are that the mediator has to be competent, honourable and impartial. It is up to each mediation service to decide if the person has the right qualities, education and experience to be a mediator. Thus, it is also up to each service to decide if they want there mediators to be officials or laymen. The demand for the mediator's impartialism is very important in ensuring that his or her role maintains a balance between the parties and that neither party is further harmed.³³

Section 5 is set up for the fundamental demands for a mediation meeting to take place. Firstly, the participation in victim-offender mediation always needs to be voluntary for both parties. The victim, as well as the offender, needs to feel that he or she can refuse to attend the meeting. This is a necessary condition for a successful mediation meeting and it is the mediator's role to make it certain.³⁴ Secondly, the offence must first have been reported to the police, and the offender must have acknowledged his or her guilt before mediation can begin. The offender's guilt has to be clarified to ensure that the meeting is not seen or viewed as a trial, without a discussion concerning the guilt.³⁵ According to the section's second part, the meeting shall only take place when it is, according to all the circumstances, appropriate. The victim and the offender both need to have reached an age and a certain maturity to understand the mediation procedure. However, for offenders under the age of 12, mediation may take place only if there are exceptional grounds.

³² Proposition 2001/02:126 p. 35.

³³ Proposition 2001/02:126 p. 46.

³⁴ Proposition 2001/02:126 p. 36.

³⁵ Proposition 2001/02:126 p. 42.

The Act does not regulate any specific upper age limit for either the victim or the offender.³⁶

Section 6 prescribes that the mediation procedure shall take place quickly and in accordance with other regulations which consider young people. The mediator has to consult with the leader of the preliminary investigation or the prosecutor to clarify if there is any risk that the mediation can be deemed detrimental to the preliminary investigation or an upcoming trial.³⁷

According to section 7, it is important that both parties receive adequate information about the mediation and are well prepared. On account of this, it is in many cases appropriate to have pre-meetings, where the mediator meets the parties separately to prepare them for the victim-offender mediation.³⁸

Section 8 gives other people, besides the parties involved, a chance to attend the meeting. The parties guardians shall have the opportunity to attend if there are not any special reasons that speak against it. Besides the guardians, other people can have the opportunity to attend, but only if it is to unite the aims with the mediation and it is believed to be further appropriate. Defence lawyers and legal representatives should not attend the meeting because the aim of the meeting is not to investigate the offence or to solve complex questions concerning damages.³⁹

Section 9 states the meetings' different parts and aims. The meetings' main aim is to give both parties a chance to talk about what happened. The victim under the meeting shall have a chance to reproduce his or her experience of the offence and the consequences of it. The offender has a chance to explain why the crime was committed and his or her view of what happened. Beyond that, the victim can have a chance to propose a wish for compensation. It does not have to be an economic compensation; it can also be an apology, compensation in the form of work conducted by the offender or to give back an object. Certain mediation cases are concluded with an agreement on how the offender may make amends, but there is

³⁶ Proposition 2001/02:126 p. 37-38.

³⁷ Proposition 2001/02:126 p. 44-45.

³⁸ Proposition 2001/02:126 p. 48.

³⁹ Proposition 2001/02:126 p. 49.

no demand that the meeting has to end with an agreement. How the meeting is organized, what the parties discuss and the result of the meeting is dependant on the special conditions and circumstances in each case.⁴⁰

Section 10 is more about the agreement that can be concluded between the parties. According to section 10, the mediator shall only assist an agreement if it is obvious that the content of the agreement is not unreasonable. The starting-point is that the agreement shall be reasonable in relation to what crime was committed and the damage which has arisen because of the crime.⁴¹ The agreement can affect the victim's right to damages in an upcoming trial. For that reason, is it suitable to regulate the agreement if the agreement has replaced the right to claim damages in an upcoming trial. If the offender does not follow the agreement the mediator shall immediately inform the prosecutor.⁴²

3.2.2 Law on Special Provisions concerning Young Offenders (1964:167)

Law on Special Provisions concerning Young Offenders is a special regulation for young offenders. The following sections affect the victim-offender mediation service in some way.

According to section 4, preliminary investigations of young people under 18 who are suspected of committing an offence, which can lead to an imprisonment, should be dealt with as a matter of urgency. The preliminary investigations shall be concluded and a decision on whether or not to prosecute shall be made as soon as possible and at the latest six weeks from the day of notice of suspicion of crime. In cases where victim-offender mediation is an option, the time limit for the decision on whether or not to prosecute may be exceeded. The regulation means that the prosecutor, more frequently, is able to take the fact that victim-offender mediation has taken place into consideration, in relation to the prosecution. This also means that the status of victim-offender mediation in the penal system is strengthened.⁴³

⁴⁰ Proposition 2001/02:126 p. 36-37.

⁴¹ Proposition 2001/02:126 p. 50-51.

⁴² Proposition 2001/02:126 p. 52.

⁴³ Proposition 2005/06:165 p. 109.

When a person under the age of 18 is suspected of committing an offence which can lead to an imprisonment, the police, according to section 6, shall inform the social service. Within the information that is handed to the social service by the police, it shall be clear whether or not the young person has been asked if he or she would like to take part in victim-offender mediation. The police have no obligation to ask if the offender would like to attend, only to notify if the young person has been asked if they would like to take part in victim-offender mediation or not. If the young person has not been asked about victim-offender mediation the social service shall notify this and offer the young person a chance to take part in victim-offender mediation.⁴⁴

According to section 17, the prosecutor, when he or she is considering whether to grant a waiver of prosecution, shall take special account of the young person's willingness to ensure that victim-offender mediation takes place. It is only the offender's attitude that is relevant and it does not matter if the victim does not consent, or if the mediation for other reasons does not take place. Even before 2008 the prosecutor could take the fact that the offender tried to make amends for his or her actions into consideration in relation to the prosecution. But the Government wanted to, with the change of the Act, give victim-offender mediation a stronger position in the judicial system and enhance the attention of it.⁴⁵

3.2.3 The Social Services Act (2001:453)

According to chapter 5 section 1 c, the municipalities are responsible for the victim-offender mediation service. In order to make mediation available nationwide, as from 1 January 2008 the service became compulsory, in a way that municipalities were to be responsible for ensuring that victim-offender mediation, regulated under *The Mediation Act*, were to be made available when a crime has been committed by someone under the age of 21.⁴⁶

⁴⁴ BRÅ, *Medling vid brott, en handbok*, p. 21.

⁴⁵ Prop 2005/06:165 p. 108.

⁴⁶ Prop 2005/06:165 p. 103.

3.2.4 The Secrecy Act (1980:100)

According to chapter 7 section 44, all information about personal conditions in the mediation service is confidential. The information can only be exposed if it clearly states that the information can be exposed without any harm for any of the parties or someone else close to them. The meaning of the word 'harm' refers to both economic harm and psychological discomfort.

According to chapter 14 section 3, the information can be handed between different authorities if it is clear that the interest, of the information that is handed over, is more important than the interest that the secrecy protects.

3.2.5 The Swedish Penal Code (1962:700)

According to chapter 29 section 5, the court shall give reasonable consideration to the accused, to the best of his or hers ability, whether he or she has attempted to prevent, remedy or limit the harmful consequences of the crime, and the court for this reason can impose a less severe punishment than that prescribed for the crime. The same circumstances can also affect the court in choosing a sanction. According to chapter 30 section 4, the court shall pay special attention to any circumstance or circumstances that argue for the imposition of a less severe punishment than imprisonment. According to the Government Bill is victim-offender mediation one circumstance that is seen by the court to be one of these special considerations to be taken into account, but victim-offender mediation is not mention in the law.⁴⁷

Chapter 32 section 1, concerns the sanction 'handed over to care by the social services' when the offender is under the age of 21. According to the 5th part, the court can, when they hand over the case to the social service prescribe that the offender shall assist the victim with work or in some other way minimize the damage of the crime, but victim-offender mediation is not mention especially.

⁴⁷ Prop 2005/06:165 p. 110.

3.2.6 Recommendation No. R (99) 19 of the Committee of Ministers to members States concerning mediation in penal matters

The Council of European Committee of Ministers has issued a recommendation regarding mediation in penal matters with general principles for mediation. The recommendation begins with recognising the legitimate interest of victims to have a stronger voice in dealing with the consequences of their victimisation, to communicate with the offender and to obtain apology and reparation. Also, the importance of encouraging the offenders' sense of responsibility and offering them practical opportunities to make amends, which may further their re-integration and rehabilitation, is stated in the recommendation.

According to chapter 2, mediation in penal matters shall be available at all stages of the criminal justice process.⁴⁸ The mediation services should be given sufficient autonomy within the criminal justice system.⁴⁹ According to chapter 4, discharges based on mediated agreements shall have the same status as judicial decisions or judgments and shall preclude prosecution in respect of the same facts.⁵⁰

3.2.7 Council framework decision of 15 March 2001 on the standing of victims in criminal proceedings

In 2001, the Council of the European Union made a framework decision concerning the standings of victims in criminal proceedings. According to article 10, each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate, for this sort of measure. Each Member State shall also ensure that any agreement that is reached between the victim and the offender, in the course of such mediation in criminal cases, can be taken into account.

⁴⁸ p. 4.

⁴⁹ p. 5.

⁵⁰ p. 17.

3.3 The mediation process in Sweden

The victim-offender mediation service is a part of the municipalities' social welfare activities in Sweden. A major reason for this, is that mediation would be available throughout the country. Another reason is that victim-offender mediation is fully congruent with other activities undertaken by the social welfare authorities on behalf of young people who have committed offences.⁵¹

Mediation does play a complementary role in the regular justice system in Sweden, which means that it does not constitute a penal sanction, or an alternative to the regular justice system.⁵² Victim-offender mediation can take place during all stages of the judicial process, both during and after the police investigation of the crime. It can also take place both before and after a court trial.⁵³ There is no act in Sweden that regulates how the cases are referred to the mediation service. The mediation service in Gothenburg has therefore, together with the police and the prosecutors, laid down some general outlines for how they shall co-operate.⁵⁴

In connection with an enquiry of a suspect under the age of 21, the leader of the enquiry shall inform the suspect about mediation and ask if he or she would consider participating in a mediation meeting. If the youth expresses an interest, the case shall be forwarded to the mediation service. It is up to the mediator to decide if the case is suitable for mediation. The mediator shall also contact the leader of the preliminary investigations to control, if he or she for some reason thinks that victim-offender mediation is unsuitable in that stage of the preliminary investigations. If the case, according to both the mediator and the leader of the preliminary investigations, is suitable for mediation, the mediator shall hold a pre-meeting with the offender. At the pre-meeting, the mediator shall try to observe and gather if the offender has any real and serious intentions to take part in mediation. After the pre-meeting with the offender, the mediator shall contact the victim to describe what the mediation process involves and asks if he or she would consider participating in a mediation meeting. If the victim has an interest of taking part in victim-offender mediation a

⁵¹ SOU 2000:105 p. 24.

⁵² Wahlin, *Victim-offender mediation in Sweden in the 21st century*, p. 1.

⁵³ Law comment, *The Mediation Act* (2002:445).

⁵⁴ Interview with Bernard Le Roux, The mediation service in Gothenburg, 2008-04-20.

mediation meeting between the parties shall take place. After the meeting the mediator will report the result of the meeting to the leader of the preliminary investigations within five weeks, from the day that the offender got notice of his or her suspicion of the crime. The result of the mediation or the reasons for why the meeting did not take place shall after that be enclosed with the act, when it is accounted for by the prosecutor.⁵⁵

3.3.1 Appropriate cases for victim-offender mediation

Whether victim-offender mediation is a suitable procedure or not, must be decided in each individual case. But both in *The Mediation Act* and in *The Council Framework Decision* the demand of the cases appropriation is essential, but either of them give guidance of what is appropriate or not.

The Government Bill of *The Mediation Act* states that the aims, in Section 3 in the Act; to increase the offenders' level of insight into the consequences of the offence, and at the same time, gives the victim the opportunity to work through his or her experiences of the crime, shall be central in the judgement, but also the parties relationship, the type of offence and the age of the parties involved.

The Government Bill further states that, the regulation shall not exclude any offences' from victim-offender mediation. Victim-offender mediation can be used for both serious and less serious offences and against both physical and legal persons. But according to both the Swedish Government Official Reports and Government Bill, some offences are either suitable or susceptible for victim-offender mediation. It is not possible to use victim-offender mediation in victimless crimes, like drug offence. Unsuitable offences are mainly sexual offences, but also serious acts of violence against close relations. In some cases the opportunity to take part in mediation can only be seen as more detrimental for the victim which may violate them even more. The more serious the offence, the greater are the needs to consider the victim.⁵⁶

⁵⁵ Interview with Bernard Le Roux, The mediation service in Gothenburg, 2008-04-20.

⁵⁶ Proposition 2001/02:126 p. 40-41.

It has been called into question whether sexual offences should be totally excluded from victim-offender mediation in the *The Mediation Act*. BRIS (Children's Rights in Society) has pointed out that mediation not should be used in cases of sexual offences against young victims. The National Council for Crime Prevention thought that, according to the act, it should state clearly that mediation not shall take place in such offences. The Government shared The National Council for Crime Prevention's apprehension, that reasons of carefulness talks against that mediation should be used in sexual offences, but did not agree on, that the Act should totally exclude victim-offender mediation in those cases. The Government felt that extra care should be taken when consideration is to be made before a victim of a sexual offence is asked if he or she would consider participating in victim-offender mediation.⁵⁷

The National Council for Crime Prevention emphasized in a report after the experiment, that the major purpose of victim-offender mediation is to reduce the level of recruitment into criminal lifestyles, and the service should therefore focus on strategic offences, offences which indicate a high risk for a continued criminal career.⁵⁸ According to another report from National Council for Crime Prevention; vehicle theft, robbery and theft, are the three offences which are most likely to indicate a continued criminal career.⁵⁹ The National Council for Crime Prevention also considered that victim-offender mediation should chiefly be available for young offenders who are between 15 and 17 years of age. The likelihood of being able to influence offenders and provide increased insight into the consequences of crime, appears greater within a young age group. In addition, victims are more likely to be willing to meet young perpetrators than older ones.⁶⁰

In both the Swedish Government Official Report and the Government Bill, it states that victim-offender mediation should primarily be undertaken with first-time young offenders, but that victim-offender mediation could even be suitable for young offenders who have relapsed into crime. Whether victim-offender mediation is a suitable procedure or not, must be decided on in each individual case. But further

⁵⁷ Prop 2001/02:126 p. 39-40.

⁵⁸ BRÅ-rapport 2000:8 p. 9.

⁵⁹ BRÅ-rapport 2000:3 p. 51-52.

⁶⁰ SOU 2000:105 p.172.

mediation is in principle excluded if the young offender has previously been the subject of mediation and failed to adhere to the mediation agreement.⁶¹

Bernard le Roux, mediator and co-ordinator at the mediation service in Gothenburg, believes that there has been strong opposition towards using victim-offender mediation in serious offences in Sweden, but that this attitude has begun to change. The mediation service in Gothenburg has recently attended a lecture in Denmark about victim-offender mediation in more serious offences, especially rape. In contrast to what was previously believed, it is now believed that victim-offender mediation can be suitable in all types of offences. In Gothenburg the mediation service has now prioritised expanding their competency to deal with serious crimes.⁶²

3.3.2 The place for victim-offender mediation in the criminal proceedings

According to the Swedish Government Official Report from 2000, it would not be appropriate to introduce victim-offender mediation as a criminal law sanction since mediation, inter alia, builds upon the voluntary participation of victims of a crime. They also concluded that the waiving of prosecution conditional upon mediation was not a suitable measure and should not be introduced into criminal justice procedure. The reason was that a risk could arise in that young offenders might agree to take part in mediation for the "wrong" reasons. If young offenders can avoid prosecution by accepting a condition of mediation, there is an obvious risk that they do so, simply to avoid prosecution. There is also the risk that a victim of a crime might feel obligated to take part in mediation in order to prevent a young offender from being prosecuted.⁶³

In the Government Bill for *The Mediation Act*, the Government expressed that there was a great need for the finding an alternative to traditional reactions to crimes, especially for young offenders and that victim-offender mediation could be that alternative. But a condition to develop victim-offender mediation as an alternative,

⁶¹ SOU 2000:105 p. 26.

⁶² Email from Bernard Le Roux, 2008-10-09.

⁶³ SOU 2000:105 p. 22-23.

was that the service should be operated in a consistent and structured way, so that the effects of the service were seen as a reliable reaction to a crime. According to the government, it was necessary to analyse the information in more detail before any conclusions were to be made, and that it was not the right time to make a final judgement about victim-offender mediations place in the justice process.⁶⁴

In The Swedish Government Official Reports from 2004, the Government considered that a condition to give victim-offender mediation a permanent position in the juridical system is that the victim-offender mediation service can work in a consistent and structured way and that it has an effect that is perceived as a credible reaction in response to the crimes. They therefore concluded that there are no suitable reasons to introduce victim-offender mediation as a sanction in the system of punishment. They neither thought that there were any solid reasons to introduce a system with conditional formal cautions or to have victim-offender mediation as a separate ground for a caution. The Commission however, considered that there is space in the future to develop victim-offender mediation as a more permanent feature of penalties for young offenders. But that there is a need to analyse these issues in more detail, before any final position in question on the regulation of victim-offender mediation, besides what is stated in LUL, is taken.⁶⁵

According to the Government Bill from 2005, victim-offender mediation is not a suitable sentence in the criminal justice system. The reason is that victim-offender mediation can hardly unite with the fundamental values of the criminal justice system like proportionality and anticipation. Another reason why mediation is unsuitable as a sentence is because offenders under the age of 15 would be excluded from mediation due to the fact that they are under the age of criminal responsibility. The government was also of the opinion that the court already, according to chapter 29 section 5 and chapter 30 section 4 in the Swedish Penal Code, has the chance to take into consideration, if victim-offender mediation has taken place and that there is no reason for a change in the Act.⁶⁶

⁶⁴ Prop 2001/02:126 p. 29.

⁶⁵ SOU 2004:122 p. 426.

⁶⁶ Prop 2005/06:165 p. 110.

4 Victim-offender mediation in South Africa

The African justice systems are generally acknowledged to contain elements of restorative justice. What the African traditional justice processes and modern restorative justice processes have in common in their values base, is that both the processes aim for reconciliation, restoration of peace and harmony. They promote a normative system that focuses on both rights and duties and are highly concerned with dignity and respect.⁶⁷

Victim-offender mediation is only one of several different formats to bring restorative justice into the criminal justice process in South Africa. Other formats for example, are community conferences, sentencing circles and community panels. Most restorative justice processes involve a meeting or “conference” between the victim, offender and other members of their immediate and wider community.⁶⁸ Victim-offender conferences and family group conferences are more or less the same thing and the terms are sometimes, still used interchangeably. The difference is that victim-offender mediation tends to involve only the victim, the offender and the mediator, whilst family group conferences include all who have been affected by the incident, like family and friends of the parties.⁶⁹

4.1 The history of victim-offender mediation in South Africa

A popular joke during the 1970s was of a pilot saying “we are approaching South Africa, please turn your watches back twenty years”. When concerning oneself with victim-offender mediation as a recognised adjunct to the formal criminal justice system, this pilot’s words are perfectly suitable. South Africa did not have a formal victim-offender mediation project until eighteen years after the Kitchener experiment⁷⁰. The reasons for this are linked to apartheid and the fact that South Africa was in the grip of a harsh law and order regime. Thousands of people were

⁶⁷ Batley, Skelton, *Charting progress, mapping the future: restorative justice in South Africa*, p. 8-9.

⁶⁸ Batley, Skelton, *Charting progress, mapping the future: restorative justice in South Africa*, p. 148.

⁶⁹ Interview with Ansa Verster, Restorative Justice Centre in Pretoria, 2008-07-30.

⁷⁰ The first Victim-offender project called Victim-Offender Reconciliation Project (VORP) was established in Kitchener, Ontario in 1975, see 1.1.

detained during that period, and many of those who were interested in the humane treatment of victims and offenders were caught up in trying to limit the worst effects of emergency laws, detention without trial, torture and deaths in detention. There were also cultural and academic boycotts against South Africa in the 1980s, which may have had some effect on the free flow of ideas from other countries.⁷¹

Even if victim-offender mediation is a quite new concept to the South African criminal justice system, as a concept it is not foreign to indigenous methods of conflict resolution practised in African township community courts.⁷² The traditional concept of *ubuntu*, provides a foundation for mutual respect that leads to conflict resolution and healing. *Ubuntu* has also been described as a philosophy of life, which represents personhood, humanity, humanness and morality. This concept has highlighted various traditional African ways of resolving conflict through reconciliation, restoration and harmony where it can be seen as the basis for adjudication. The victim, the offender, and the community were placed at the heart of the dispute, and the main purpose of the adjudication was to acknowledge the wrong and to make amends for the harm done. Like restorative justice, these systems emphasised 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. While restorative justice is a specific type of response to crime, *ubuntu* is much more than that, but both focus on restoring an imbalance created by someone's conduct and on building peace within communities and achieves this through co-operative efforts.⁷³ During apartheid, many communities developed their own dispute resolution mechanisms to deal with crime and other conflict in their communities as a response to the lack of justice from the State system.⁷⁴

Nelson Mandela was released in 1990, heralding the fact that the end of apartheid was approaching, but it was not until 1994 that the first democratic elections were held. During those four intervening years of negotiations and planning for a regime

⁷¹ Skelton, *The influence of the theory and practice of restorative justice in South Africa with special reference to child justice*, p. 153.

⁷² Muntingh, Shapiro, *NICRO diversion options*, p. 33.

⁷³ Anderson, *Restorative Justice, the African philosophy of Ubuntu and the Diversion of Criminal Prosecution*, p. 11.

⁷⁴ Dissel, *Piloting victim-offender conferencing in South Africa*, p. 89.

change, things began to normalise. The criminal justice sector began to “catch up” on what had been happening in other parts of the world.⁷⁵ Crime and its control became a pivotal theme in South Africa within the first years of the democratic government coming to power. South African policy and law makers began to embrace a number of “law and order” ideas relating to crime control, primarily borrowed from The United States. It was important to develop a system that was compatible with South African values and its identity. A key issue was that in many respects, victim-offender mediation reflected traditional African values, such as *ubuntu*.⁷⁶ From the Truth and Reconciliation Commission to the creation of alternative justice mechanisms in the transition phase of government, restorative justice became a facet of justice in South Africa.⁷⁷

The first initiatives, to establish and later evaluate South Africa’s first Victim-offender mediation project, were taken by NICRO (The National Institute for Crime Prevention and Rehabilitation of Offenders)⁷⁸ in 1992. Lukas Muntingh was hired by NICRO to oversee this initiative. Muntingh travelled to The United States to observe victim-offender mediation and how it was dealt within their country. On returning to South Africa, Muntingh established NICRO’s first victim-offender mediation project in Cape Town. The project targeted referrals at both the pre-trial and pre-sentence stages. NICRO continued to run victim-offender mediation throughout the country.⁷⁹ The initiative by NICRO was an important milestone in South Africa child justice history. NICRO established a programme aimed at diverting children away from the formal court system. With no enabling legislation in place, the diversion programmes began when NICRO personnel negotiated

⁷⁵ Skelton, *The influence of the theory and practice of restorative justice in South Africa with special reference to child justice*, p. 153.

⁷⁶ Anderson, *Restorative Justice, the African philosophy of Ubuntu and the Diversion of Criminal Prosecution*, p. 11.

⁷⁷ Skelton, *The South African Child Justice Bill: Transition as Opportunity, Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice Systems*, p. 68.

⁷⁸ The organisation originally served prisoners and their families. A number of changes took place in the 1980s and 1990s. In the late 1980's NICRO started to serve victims of crime. In 1992 after a joint campaign with other NGOs "Justice for the Children: no child should be caged" NICRO introduced diversion for young offenders (channeling them away from the criminal justice system into programmes that make them accountable for their actions).

⁷⁹ Batley, Skelton, *Charting progress, mapping the future: restorative justice in South Africa*, p. 20.

directly with public prosecutors to allow cases to be withdrawn, on condition that child offenders complete a programme organised by NICRO.⁸⁰

In 1995 the Inter-Ministerial Committee on Young People at Risk set up a pilot project on Family Group Conferences in Pretoria. The project ran 42 family group conferences, testing the setting-up of conferences, mediation, outcomes, community participation, and victim and offender satisfaction. The report of the project provided a valuable resource indicating the practical implications of making family group conferences part of a future juvenile justice system.⁸¹

The Restorative Justice Centre (RJC) was established in Pretoria in 1998. The organisation delivers different restorative justice programmes and offers victim–offender mediation as an alternative to the criminal justice system.⁸² RJC’s vision is to “see a society in which communities value peace building and the constructive resolution of conflict, and where people care about one another, fostering individual and social well-being.”⁸³

In 1999, a victim–offender mediation project was initiated by a consortium of non-governmental organisations (NGOs). This project operated as a pilot project for one year, after it was extended for two more years. The project sought to build on the growing restorative justice movement that had begun to take hold in Canada, the United States and New Zealand. It was conceived as a community based restorative justice approach for dealing with crime, through a face-to-face meeting between offenders, victims, and their families or members of other support networks. It aimed to formulate a restorative model more familiar to traditional African values, and at the same time empower people to work in partnership with the formal criminal justice system. Although the project was conceived as a community based initiative, it was also intended as a diversionary process to relieve the workload of the justice system. It therefore sought to work in close cooperation with the police and justice sectors, primarily those officials based at the magistrate’s courts. Cases

⁸⁰ Skelton, *The influence of the theory and practice of restorative justice in South Africa with special reference to child justice*, p. 368.

⁸¹ South African Law Commission, *Juvenile Justice*, Discussion paper 79, Project 16, p. 8.

⁸² Batley, Skelton, *Charting progress, mapping the future: restorative justice in South Africa*, p. 20.

⁸³ Interview with Mike Batley, Restorative Justice Centre in Pretoria, 2008-09-16.

were referred to the project by the courts, police and community-based organisations. The project was open to all age groups and types of offenders.⁸⁴

During the apartheid era, South Africa dealt with children who committed offences either by applying adult legislation or by the use of corporal punishment. Children were subject to the same criminal justice system as adults. Due to the being virtually no form of discrete child justice legislation under apartheid, this resulted in a large number of children being subjected to oppressive practices and inhuman treatment, both in prison and by other criminal justice structures.⁸⁵ When Nelson Mandela first made his address to Parliament as the newly elected president of South Africa in 1994, he promised that “the basic principle from which we will proceed from now onwards is that we must rescue the children from the nation and ensure that the system of criminal justice must be the very last resort in the case of juvenile offenders.”⁸⁶

In 1995, South Africa ratified the United Nations Convention on the Rights of the Child (UNCRC), which obliged the new government to develop a separate child justice legislation, and introduced a conception of children’s rights entirely foreign to the old apartheid dispensation. Then, a year later, South Africa adopted a new constitution (Constitution of South Africa Act 108 of 1996), which provided special rights for children.⁸⁷

An official process of a new policy and legislation began towards the end of 1996. In December 1996, the Minister of Justice, Dullah Omar, requested the South African Law Commission (now called the South African Law Reform Commission) to include an investigation into the juvenile justice in its programme. The committee began its work in January 1997 and the first step was to publish an issue paper setting out the general directions which were to be taken. In the final report⁸⁸, which was published almost three years later in 2000, the Commission enumerates various factors that influenced the law reform process, namely the recognition of children’s

⁸⁴ Dissel, *Piloting victim-offender conferencing in South Africa*, p. 89-90.

⁸⁵ Stout, Wood, *Child Justice and Diversion: Will Children’s Rights Outlast the Transition?*, p. 115.

⁸⁶ Skelton, *The South African Child Justice Bill: Transition as Opportunity, Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice Systems*, p. 65-66.

⁸⁷ Stout, Wood, *Child Justice and Diversion: Will Children’s Rights Outlast the Transition?*, p. 115.

⁸⁸ South Africa Law Commission, Project 16, Juvenile justice report.

rights, the theory of restorative justice, fiscal constraints and public concern about crime. The report was handed over to the Minister of Justice in August 2000 and work on its implementation planning, began.⁸⁹ The important and overdue Child Justice Bill was introduced in Parliament in 2002. The Portfolio Committee made various amendments to the Bill, and in 2003, for a variety of reasons, suspended processing the Bill. The Ministry worked on the Bill further and proposed new amendments to Parliament in December 2007. The Portfolio Committee organised public hearings on the Bill in February 2008 because five years had elapsed since the Bill was first introduced in Parliament and the Bill had been significantly changed. The Bill was passed by parliament in the end of June 2008, but will only come into effect in April 2010.⁹⁰

The Child Justice Bill provides a restorative justice approach and is the first piece of legislation to mention victim-offender mediation. Departments, especially the Department of Social Development (DSD), other State structures and NGOs have already implementing key aspects of the Bill, including assessments and diversion.⁹¹

4.2 Regulation

4.2.1 The Probation Services Amendment Act (Act 35 of 2002)

The Probation Services Amendment Act was enacted on 7 November 2002. It was the first piece of South African legislation to specifically mention restorative justice. In Section 1 (d), restorative justice is defined as “the promotion of reconciliation, restitution, and responsibility through the involvement of a child, and the child’s parents, family members, victims and the communities”. The act empowers probation officers to undertake activities and programmes in this regard. The definition of restorative justice in the Act is limited to the context of working with children. The definition of restorative justice in the Act is not entirely congruent with that of current literature. It puts an immediate focus on reconciliation rather

⁸⁹ Skelton, *The South African Child Justice Bill: Transition as Opportunity, Juvenile Law Violators, Human Rights, and the Development of New Juvenile Justice Systems*, p. 69-71.

⁹⁰ Laganparsad, Sunday Times, p. 6.

⁹¹ Justice and Constitutional Development Portfolio Committee, *Report on Child Justice Bill*.

than on attempting to make right the wrongs caused by the criminal incident, which is regarded as the central issue for restorative justice.⁹²

4.2.2 The Child Justice Bill (Bill 49 of 2002)

The notion of restorative justice is a fundamental aspect of *The Child Justice Bill* and has sought to integrate restorative justice approaches into the handling of child offenders at every level. The Bill will be the first piece of legislation in the country's history to deal comprehensively with the management of child offenders.⁹³ The Bill applies to any person under the age of 18 years and, in certain circumstances, a person who is 18 years or older but under the age of 21 years who is alleged to have committed an offence. The definition of restorative justice in the first Bill was the same as in the *The Probation Services Amendment Act*, but after changes, restorative justice is defined as “an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation”.

According to chapter 2 section 6, the offences in order to determine the seriousness of offences in the Act are listed in categories, classified under three different schedules. Schedule *one* covers less serious crimes, such as common assault, possession of drugs in small quantities, petty theft and conspiracy or attempt to commit any of these offences. Crimes such as public violence, housebreaking, robbery with aggravating circumstances, forgery and fraud, fall under schedule *two*. Schedule *three* covers the most serious crimes such as murder, rape, robbery, possession of firearms and ammunition, corruption, extortion, fraud or conspiracy. These offences receive heavier sentences of up to 25 years in prison. All children can be considered for diversion and referral away from formal court procedures to an alternative form of sentencing, but those charged with more serious, schedule three crimes will only be diverted in exceptional circumstances.⁹⁴

⁹² Batley, *Beyond Restitution – Prospects for Restorative Justice in South Africa*, p. 120-121.

⁹³ Stout, Wood, *Child Justice and Diversion: Will Children's Rights Outlast the Transition?*, p. 115.

⁹⁴ Laganparsad, *New justice for child criminal*, Sunday Times, p. 6.

4.2.2.1 Pre-trial

According to chapter 5 section 34, the probation officer has a duty to assess an arrested child. A probation officer, who receives a notification from a police official that a child has been arrested, served with a summons or issued with a written notice, must assess the child before the child appears at the preliminary inquiry. The purpose of the assessment is, among other things, to establish the prospects for diversion of the matter. According to section 40, the probation officer must complete an assessment report in the prescribed manner with recommendations as, for example, the prospects of diversion. The report shall include the appropriateness of diversion, a particular diversion service provider and a particular diversion option. The report must be submitted to the prosecutor before the commencement of the preliminary inquiry.

According to chapter 6 section 41, the prosecutor can divert a matter involving a child who is alleged to have committed an offence referred to in Schedule 1 (minor offences) before preliminary inquiry. In order to decide whether to divert the matter or not, the prosecutor must take into account whether the child has a record of previous diversions. If a matter is diverted in terms of this section the child and, where possible, his or her parent or appropriate adult must, according to section 42, appear to a magistrate in chambers, for purposes of having the diversion option that has been selected by the prosecutor, made an order of court.

According to chapter 7, a preliminary inquiry must be held in respect of every child who is alleged to have committed an offence, except where, the matter has been diverted by a prosecutor in terms of chapter 6, the child is under the age of 10 years, or the matter has been withdrawn, before the child is asked to plead to any charge. The preliminary inquiry, although regarded as the child's "first appearance" in court, is an informal pre-trial procedure which is inquisitorial in nature. One of the main objectives of the preliminary inquiry is to establish whether the matter can be diverted before plea and if it can, also to identify a suitable diversion option for the child. At the preliminary inquiry, the inquiry magistrate must ensure that the child, the child's legal representative, the child's parent or an appropriate adult knows of the recommendations in the probation officer's assessment report. They also need to

be informed of any diversion option available in the district or area of his or and her jurisdiction and the aims and content of such option. According to section 49, an inquiry magistrate may make an order that the matter should be diverted if the prosecutor indicates that the matter can be diverted.

According to chapter 8 section 52 (1), a matter may only be considered for diversion if, the child acknowledges responsibility for the offence, the child has not been unduly influenced to acknowledge responsibility, there is a prima facie case against the child, the child and, if available, his or her parent or an appropriate adult, consent to diversion and the prosecutor (offence referred to in Schedule 1 and 2) or the Director of Public Prosecutions (offences referred to in Schedule 3) indicates that the matter may be diverted.

According to chapter 8 section 52 (2), in the case of an offence referred to in schedule 1 or 2, the prosecutor needs to consider the views of the victim, or any person who has a direct interest in the affairs of the victim, whether the matter should be diverted or not, unless it is not reasonably possible to do so. The prosecutor also needs to consult with the police official responsible for the investigation of the matter before indicating that the matter may be diverted. In the case of an offence referred to in Schedule 3, only the Director of Public Prosecutions has jurisdiction to indicate that the matter should be diverted. The matter can only be diverted if exceptional circumstances exist. The Director of Public Prosecutions may only indicate that a matter may be diverted after he or she has; afforded the victim or any person who has a direct interest in the affairs of the victim, where it is reasonable to do so, an opportunity to express a view on whether or not the matter should be diverted, and if so, on the nature and content of the diversion option being considered and the possibility of including in the diversion option, a condition relating to compensation or the rendering of a specific benefit or service, and has considered the views expressed and consulted with the police official responsible for the investigation of the matter.

When the matter is not diverted, it will proceed to the child justice court for trial. A child justice court deals with the bail application, plea, trial or sentencing of a child. The ideal Child Justice Court is not a completely specialised or separate court, but a

court where a child appears in terms of this Act. According to chapter 9 section 67, a child justice court may, at any time before the conclusion of the case for the prosecution, make an order for diversion. A child justice court that makes a diversion order must postpone those proceedings, pending the child's compliance with the diversion order and warn the child that any failure to comply with the diversion order may result in any acknowledgment of responsibility being recorded as an admission in the event of the trial being continued. The child justice court must, on receipt of a report from the probation officer that a child has successfully complied with the diversion order, and if the child justice court is satisfied that the child has complied, make an order to stop the proceedings.

The options available once a decision to divert has been taken operate on three levels, depending on the seriousness of the offence. Chapter 8 section 53, sets out the diversion options. The diversion options are set out in two levels, with level one applying to offences referred to in schedule 1 and level two applying to all other offences as referred to in Schedules 2 and 3. According to 53 (7), a magistrate, an inquiry magistrate or child justice court, may order a child to appear at a family group conference or a victim-offender mediation on a specified date and at a specified time and place in appropriate cases, in the place or in combination with any of the diversion options.

According to chapter 8 section 62, victim-offender mediation is an informal procedure which is intended to bring a child who is alleged to have committed an offence and the victim together, at which a plan is developed on how the child will redress the effects of the offence. A victim-offender mediation may only take place if both the victim and the child consent. A probation officer appointed by a magistrate, inquiry magistrate or child justice court must convene the victim-offender mediation or cause the mediation to be convened. The victim-offender mediation must be mediated by a probation officer or a diversion service provider who has a valid certificate of accreditation issued by the cabinet member responsible for social development, who or which may regulate the procedure to be followed at the mediation.

Section 61, regulates family group conference and according to Section 61 (2) shall section 61(2), (4), (5), (6), (7), (8) and (9) apply with the changes that the context requires if a child has been referred to appears at a victim-offender mediation.

According to Section 61 (2), if a child has been referred to victim-offender mediation the probation officer or an accredited diversion service provider, appointed a magistrate, inquiry magistrate or child justice court, shall within 21 days after a child has been referred convene the conference or cause the conference to be convened by setting the date, time and place of the conference and taking steps to ensure that all persons who may attend the conference are timorously notified of the date, time and place of the conference.

According to Section 61 (4), the probation officer, if a victim-offender mediation fails to take place at the time and place set for the conference, must convene another conference or cause that conference to be convened as provided within 21 days from the date on which it was to take place.

According to Section 61 (5 and 6), participants in a victim-offender mediation must follow the procedure agreed on by them and may agree to a plan in respect of the child. The plan may include the application of any level one diversion options or any other action appropriate to the child, his or her family and local circumstances, which is consistent with the principles contained in the act. The plan must specify the objectives for the child and the period within which they are to be achieved, contain details of the services and assistance to be provided to the child and a parent or an appropriate adult, specify the persons or organisations to provide the required services and assistance. The plan also needs to state the responsibilities of the child and of the child's parent or an appropriate adult, state personal objectives for the child and for the child's parent or an appropriate adult, include any other matters relating to the education, employment, recreation and welfare of the child as are relevant and include a mechanism to monitor the plan.

According to 61 (7), the facilitator must record the details of, and reasons for, any plan agreed to at the victim-offender mediation and must furnish a copy of the record to the child and to the probation officer or another person who is identified

to monitor the child's compliance with the diversion order. If the victim-offender mediation does not take place or the child fails to comply with the agreed plan, the probation officer or other person must notify the magistrate, inquiry magistrate or child justice court in writing of the failure.

Section 61 (8) states that, if the participants in victim-offender mediation cannot agree on a plan, the mediation must be closed and the probation officer must refer the matter back to the magistrate, inquiry magistrate or child justice court for consideration of another diversion option.

According to Section 61 (8), no information furnished by the child at a victim-offender mediation may be used in any subsequent criminal proceedings arising from the same facts.

Section 59 states the legal consequences of diversion. If a matter has been diverted by a prosecutor in terms of chapter 6, at a preliminary inquiry in terms of chapter 7 or by a child justice court in terms of chapter 9, and the diversion order has been successfully complied with, a prosecution on the same facts may not be instituted. Therefore, a diversion order made in terms of the Act does not constitute a previous conviction referred to in the Criminal Procedure Act and a private prosecution may not be instituted against a child in respect of whom the matter has been diverted in terms of the Act.

4.2.2.2 Pre-sentence

According to Section 73, a child justice court that convicts a child of an offence may refer the matter to a family group conference, victim-offender mediation or to any other restorative justice process which is in accordance with the definition of restorative justice. On receipt of the written report from a victim-offender mediation the child justice court may impose a sentence by confirming, amending or substituting the recommendations. If the child justice court does not agree with the terms of the plan made at the victim-offender mediation, the court may impose any other sentence and enter the reasons for substituting the plan with that sentence on the record of the proceedings. A child justice court that has imposed a sentence in

terms of the recommendations from the victim-offender mediation must request the probation officer concerned to monitor the child's compliance with the sentence and to provide the court with progress reports, in the prescribed manner, indicating compliance. The court must also warn the child that any failure to comply with the sentence will result in the child being brought back before the child justice court for an inquiry.

Section 79 states that if a probation officer reports to a child justice court that a child has failed to comply with a restorative justice sentence, the child may in the prescribed manner be brought to the child justice court which imposed the original sentence for the holding of an inquiry into the failure of the child to comply. If, upon the conclusion of the inquiry, it is found that the child has failed to comply with the sentence, the child justice court may confirm, amend or substitute the sentence.

4.2.3 Case law

4.2.3.1 The state vs. Joyce Malileke and others⁹⁵

In this case from the High Court of South Africa the principles of restorative justice got introduced into the sentencing process. The accused was convicted in the High Court of the Northern Circuit of the Transvaal Provincial Division, of murder. The victim was a young person who broke into her house. The sentencing of the accused presented particular problems because the accused had four minor children who were dependent on her, she was unemployed, and her only income was a child grant. She was a widow and did not receive a pension because her husband was under suspension from the police at the time of his demise. On the one hand, she was guilty of a very serious offence, the result of a sustained and brutal attack upon a youthful transgressor who was tied up before the assault and could neither defend nor protect himself.

The accused was a first offender and there was no suggestion that there existed any danger of the crime being repeated. There was evidence that she regretted the death

⁹⁵ Case no. CC 83/04, 13/06/06.

of the victim. According to the court she was therefore, clearly not a person against whom society needs to be protected.

During the production of evidence, the defence investigated the question whether the accused had, prior to the trial, complied with the traditional custom of her community of apologizing for the taking of the victim's life by sending an elder member or members of her family to the family of the victim. No expert evidence was given in regard to this traditional custom, but the fact of its existence was not challenged by the prosecution. On the contrary, it was accepted that the traditional custom prevailing in the accused's community demanded that, in the event of an unlawful killing of a member of the community, the family of the offender send a senior representative to the family of the deceased to apologize and to attempt to mend the relationship between the families disturbed by the death of the deceased.

When the accused was asked whether she had complied with this custom, she answered in the negative. A failure to comply with this custom normally is regarded as adding insult to injury by the family of the victim. The state and the defence approached the issue on the same basis during the trial.

The state called the victim's mother to inform the court of the hurt and loss that the victim's family had suffered. In cross-examination, counsel for the defence enquired her whether she would be prepared to receive a senior representative from the accused's family in order to attempt to restore the broken relationship between the families. The victim's mother answered in the affirmative, adding "But she must tell me why she killed my child."

The answer enabled the court to involve the community in the sentencing and rehabilitation process. The court sentenced the accused to 8 years imprisonment, all of which was suspended for a period of 3 years on condition that, inter alia, the accused apologized, according to custom, to the mother of the victim and her family, within a month after the sentence having been imposed.

4.3 The mediation process in South Africa

Typical service providers are the local Department of Social Development (probation officer/social worker), NICRO and Restorative Justice Centre or other NGOs.⁹⁶ NGOs are often adept at revealing problems of weaknesses in a system from the perspective of people at the receiving end. They are contracted to the state to do work for them and they pay the organisation for their work. But the money the organisations get is not a full amount, NGOs are also often funded by donors. This often helps them to maintain some independence from the state and allows them to be critical of the system if need be. In South Africa, the Department of Social Services outsources many of its diversion programmes. This means that the Department pays or financially subsidises NGOs doing this kind of work. This is done through public private partnership or service level agreements.⁹⁷ The service is not available throughout the country, the NGOs or functioning Department of Social Development/Services/Welfare are not spread nationwide.⁹⁸

Diversions practices have grown considerably in the period 1992 to date, and diversion has now received legislative recognition in the Child Justice Bill.⁹⁹ To divert children in conflict with the law, away from the formal criminal court procedures, is a key aspect in the Bill. The Bill allows for the referral of a child away from the formal court system to some form of diversion option or programme which represents an alternative to the formal criminal justice system. A child who is diverted is instead held accountable for his or her actions through an alternative process. The benefits are that the child receives an intervention based on his or her individual circumstances aimed at preventing him or her from re-offending and producing the best outcome for the child. In addition, the child does not receive a conviction, thereby allowing him or she to become a productive member of society without the stigma attached with that of a criminal record.¹⁰⁰

⁹⁶ Interview with Mike Batley, Restorative Justice Centre in Pretoria, 2008-09-16.

⁹⁷ Sloth-Nielsen, Gallinetti, *Child justice in Africa*, p. 163-164.

⁹⁸ Interview with Mike Batley, Restorative Justice Centre in Pretoria, 2008-09-16.

⁹⁹ Sloth-Nielsen, Mayer, *Children and Criminal Accountability*, p. 90.

¹⁰⁰ Justice and Constitutional Development Portfolio Committee, *Report on Child Justice Bill*, p. 4.

Victim-offender mediation is linked to and inter-dependent of the formal criminal justice system and referrals to a victim-offender mediation can be made at different points in the criminal justice process. According to the Child Justice Bill, victim-offender mediation can at first, take place as diversion options prior to trial. The decision about whether or not to divert is made by the prosecutor, and a child who does not successfully complete the programme linked to the diversion is brought back for an investigation into the circumstances surrounding that failure. If it appears to be due to wilfulness or negligence on the part of the child, the charges may be reinstated.

If an offender is not diverted to a restorative justice alternative at the pre-trial stage, the offender (and the victim) has not lost the chance of a restorative justice solution, as these are available at various stages of the system. A magistrate can stop the proceedings in the middle of a trial and refer the matter to a victim-offender. A magistrate can also, after conviction, send the matter to a victim-offender mediation to determine a suitable plan, which the magistrate can then make into a court order for the purposes of sentencing.

The organisations are empowered to regulate their own procedures and to make such plans as they see fit, provided that these are appropriate for the child and family and consistent with the principles contained in the Bill.¹⁰¹ When the case is referred to the service providers, they initially speak with both the victim and the offender individually. They ask them if they are willing to face each other in a victim-offender mediation and if they are, they prepare them both for the procedure ahead. If the offender for example has an alcohol problem, it is necessary for service providers to send him or her to a rehabilitation clinic first, before the victim-offender mediation can take place.

After a victim-offender mediation, the mediator sends a report to the prosecutor or magistrate to tell them what has happened during the meeting. The report includes the agreement between the parties and explains how the parties felt after the meeting, if the offender was remorseful, if he asked for forgiveness and if the victim was

¹⁰¹ Skelton, *The child justice bill from a restorative justice perspective*, p. 132-134.

satisfied. If it is in a pre-trial stage, the mediator, most of the times suggest that the court should withdraw the case because the victim is satisfied and the offender has asked for forgiveness, showed remorse and took responsibility.¹⁰²

4.3.1 Appropriate cases for victim-offender mediation

According to both the Child Justice Bill and the people at the Restorative Justice Centre, it is the prosecutor or the magistrate who takes the decision if a child shall be referred to a victim-offender mediation or not.¹⁰³ Even if the case is referred to a service provider from the prosecutor or the magistrate, should this, according to Vanessa Padayachee, only be seen as a recommendation. According to her, shall it be up to the service provider to decide if the case is suitable for a specific option, like victim-offender mediation or not. She is under the impression that there are two different types of decisions. The first decision, if the case is suitable according to the law, should be taken by the magistrate or prosecutor. And the second decision, if the case is suitable according to human behavior, should be taken by the service provider.¹⁰⁴

According to The Child Justice Bill, diversion can only be considered as a possibility if the child acknowledges responsibility for the offence, and if he or she has not been unduly influenced, to make an acknowledgement to this effect. A victim-offender mediation can only take place if both the victim and the offender consent.¹⁰⁵

A discussion paper on Juvenile Justice considered that diversion would not be possible in a number of circumstances. One circumstance was that when the child does not admit responsibility for the offence or where the child is not a suitable candidate for diversion as he or she has previously been in conflict with the law and the case was diverted. Further, diversion options may not be appropriate, given the history of the child and the availability of more intensive programmes. But this does

¹⁰² Interview with Ansa Verster, Restorative Justice Centre in Pretoria, 2008-07-30.

¹⁰³ Interview with Mike Batley, Restorative Justice Centre in Pretoria, 2008-09-16.

¹⁰⁴ Interview with Vanessa Padayachee, NICRO National Head Office in Cape Town, 2008-09-23.

¹⁰⁵ Justice and Constitutional Development Portfolio Committee, *Report on Child Justice Bill*, p. 5.

not mean that once a child has been diverted once, no further diversion is possible, the availability of diversion programmes and options with different levels of intensity implies that a child may nevertheless be diverted more than once, albeit to an option at a higher level of intensity.¹⁰⁶

The discussion paper on Juvenile Justice also raised the question as to whether the diversion of certain cases should be made compulsory, and whether certain (possibly more serious) cases should be excluded from consideration for diversion. An alternative approach would be to leave this in the discretion of those making diversion decisions. The Commission concluded, after some discussion and comparative analysis, that the latter approach should be supported, rather than the approach which excludes the consideration of diversion altogether in some instances.¹⁰⁷ This was further supported by the policy initiatives and responses supporting an individualised approach to each child who is in conflict with the law, to excluding a child from diversion opportunities on the basis of the seriousness of the offence would go against the individualised approach that has been proposed in the Bill. The Bill therefore does not exclude any offences from victim-offender mediation and leaves the question as to whether diversion is a possibility in the discretion of a judicial officer. In more serious offences like murder and rape, the case can only be diverted if exceptional circumstances exist and the Director of Public Prosecution, in consultation with the police official responsible for the investigation of the matter, must take the decision.¹⁰⁸

In 2007, The National Prosecuting Authority (NPA) designed and developed restorative justice guidelines for prosecutors. The guidelines state that the role of the prosecutor is to identify cases by deciding if the offence is suitable, determining if the offender is eligible, and identifying the service providers.¹⁰⁹ The guidelines are intended to provide a guide for prosecutors utilising restorative justice processes at the pre-trial period and should be seen as a supporting reference tool which is meant to guide prosecutors.

¹⁰⁶ South African Law Commission, Juvenile Justice, Discussion paper 79, Project 16, p. 169.

¹⁰⁷ South African Law Commission, Juvenile Justice, Discussion paper 79, Project 16, p. 100.

¹⁰⁸ South African Law Commission, Juvenile Justice, Discussion paper 79, Project 16, p. 163.

¹⁰⁹ The National Prosecuting Authority Restorative, *Justice Explorative Evaluation Report*, p. 27.

According to the guideline, the first instance is in the identification of suitable cases to establish that offenders acknowledge responsibility, but that there are different levels of responsibility, and that this factor should not be subjected to the same scrutiny as a plea of guilt. As long as an offender is acknowledging some responsibility the matter can usually be engaged with. The guidelines further state that, the referral of a matter should not be based on the nature of the offence alone. The emphasis should be on the willingness of the participants, rather than the crime itself. Situations where parties know each other are particularly suitable, as these cases often involve underlying factors that need to be addressed, but both the victim and the offender must be willing to participate. However, some cases are more suitable than others, the seriousness of the crime should not automatically cause a case to be excluded. At the outset, the focus should primarily apply to less serious offences. The nature of the offence should influence the decision as to whether it would best be applied, at pre-trial, sentence or post-sentence stage, rather than excluding the use of restorative justice altogether. The cases at the pre-trial stage, are by their very nature, tended to be less serious offences and can, in the opinion of the prosecutor, be appropriately resolved, without the need for a trial and court time. When pre-trial diversion is not appropriate, as in the case of more serious offences or with repeat offenders, victim-offender mediation can be part of an appropriate sentence. A matter can be referred to a victim-offender mediation and the agreement that is reached can be presented to the court with a set of recommendations listed as conditions.¹¹⁰

In a book published by Ann Skelton¹¹¹ and Mike Batley¹¹² it was considered that the fact that victim-offender mediation can be available across the system it is an important factor in understanding that it can be applied even in serious cases. Cases involving a significant level of violence will, in many instances, obviously be considered too serious to divert to a mediation process at the pre-trial stage. But this does not mean that victim-offender mediation cannot be used at all, it can be a relevant consideration at the sentencing stage. Even in very serious matters, when the offender is sentenced to prison, mediation can still be part of the resolution. The

¹¹⁰ Guidelines for prosecutors on restorative justice, p. 9-12.

¹¹¹ Ann Skelton is a human right lawyer and national co-ordinator of the Child Justice Project

¹¹² Mike Batley is the executive director for the Restorative Justice Centre in Pretoria

key to understanding that mediation is not aimed primarily to the offender, but at dealing with the needs of the victim. In crimes that have impacted heavily on the victim, he or she may have questions that remain unanswered, even after a trial or where there has been a guilt plea. The victim may feel the need to confront the offender with the facts about the impact of the crime on him or her, a need not generally catered for by the criminal justice system. The other strand of the argument about victim-offender mediation being inappropriate at times, involves cases in which the victims are especially vulnerable or there are power differences that will make the process unfair. Obvious examples are cases involving sexual offences or incidents of child abuse or domestic violence. It is feared that victim-offender mediation in such cases might result in the victim's is exposed to renewed trauma. In South Africa, some of the cases being referred to victim-offender mediation involve these kinds of offences, and the results show that, if carefully selected, properly managed and professionally facilitated, these cases may also be successful. An examples of where such cases have been dealt with, is the Restorative Justice Centre in Pretoria.¹¹³

Winnie Modiba¹¹⁴ has been a mediator in many serious offences like rape and murder. According to her, victim-offender mediation is appropriate in both those types of offences, but in offences like murder it can take a number of years before the victim and offender are ready to face one another and victim-offender mediation is only then suitable at a post sentence level. In rape offences, especially when the offender is a child, she believes that it is important and necessary for the parties to take part in a victim-offender mediation. The reason is that the many children do not receive any sex education at school or from their parents. The offenders do not understand what they have done wrong and how they have affected the victim. It can also help the victim to understand why it happened, rather than causing them to blame all boys and men.¹¹⁵

¹¹³ Batley, Skelton, *Charting progress, mapping the future: restorative justice in South Africa*, p. 12-14.

¹¹⁴ Coordinator Victim-Offender Conference program at Restorative of Justice centre in Pretoria.

¹¹⁵ Interview with Winnie Modiba, at Restorative of Justice centre in Pretoria, 2008-09-16.

4.3.2 The place for victim-offender mediation in the criminal proceedings

According to the court in *The state vs. Joyce Malileke and others*¹¹⁶, incorporation of the principles of traditional justice into the South African criminal justice system, must be approached with circumspection. The introduction of traditional, indigenous legal systems into at least part of the criminal justice system may increase the existing alternatives to imprisonment, particularly where there is a need to involve the community in the healing of the victim's pain, the rehabilitation of offenders and their reconciliation with those they wronged and with society at large. Legislative intervention may be required to recognise aspects of customary law, but this should not deter courts from investigating the possibility of introducing exciting and vibrant potential alternative sentences into the criminal justice system.¹¹⁷

According to chapter 1 section 2 in the Child Justice Bill, one of the objects of the Act is to promote the spirit of *ubuntu* in the child justice system through; supporting reconciliation by means of a restorative justice response and involving parents, families, victims and, where appropriate, other members of the community affected by the crime in procedure, in terms of the Act, in order to encourage the reintegration of children.

The propose of the Child Justice Bill is to place great emphasis on early intervention measures. This means that once children have come to the attention of the authorities, they will be dealt with in a way which prevents them from going deeper into the system, and which will prevent them from committing crimes again. Diversion is an early intervention measure, and the Bill has several mechanisms built in to ensure that diversion is a measure of first resort.¹¹⁸ Referral mechanisms are built into the system from arrest right through the trial, up to the finding of guilt and after conviction.¹¹⁹

The referral of an offender away from the formal court system to victim-offender mediation represents an alternative to the formal criminal justice system, and instead

¹¹⁶ Case no. CC 83/04, Date 13/06/06.

¹¹⁷ Case no. CC 83/04, p. 7.

¹¹⁸ South African Law Commission, Juvenile Justice, Discussion paper 79, Project 16, p. 6.

¹¹⁹ South African Law Commission, Juvenile Justice, Discussion paper 79, Project 16, p. 149.

the child is held accountable for his or her actions through this process. The benefits of this include ensuring that the offender receives an intervention based on his or her individual circumstances aimed at preventing him or her from re-offending, and producing the best outcome for the child, as well as promoting public safety. The offender does not incur a previous conviction, thereby allowing him or her to become a productive member of society without the stigma attached of a criminal record. In a report from the Committee of the Bill, the Committee expressed that, because victim-offender mediation is an alternative to the formal criminal justice system, it was important that the Bill carefully regulated the issue and ensure that victim-offender mediation is not a 'soft option' for children who commit crime. According to the Committee, checks and balances will ensure that victim-offender mediation only is allowed in exceptional circumstances of serious offences. The Director of Public Prosecutions decides on whether children charged with more serious offences can be diverted or not. Other measures include the adoption of minimum norms and standards for the content of diversion programmes. There are also mechanisms to bring the child back into the criminal justice system if he or she fails to comply with a diversion order. South Africa has created a carefully balanced system of diversions in order to ensure that children are diverted from the formal criminal justice system, while also ensuring that such diversion is not only in the interest of the child, but also society.¹²⁰

The cases that are referred to victim-offender mediation at a sentence-stage (typically the more serious cases), is more a complement to the formal court system, rather than a method of diversion away from the system. A major benefit of using victim-offender mediation at this stage is that all the parties concerned, participate in generating outcomes to the incident. If these are accepted and endorsed by the court this is likely to raise the credibility of the system in the eyes of the participants. It is also more likely to be regarded as a satisfactory outcome than a sentence simply imposed by the court without the participation of any of the parties.¹²¹

¹²⁰ Justice and Constitutional Development Portfolio Committee, *Report on Child Justice Bill*, p 4-5.

¹²¹ Batley, *Existing Sections in the CPA that are not being utilized effectively and gaps in the CPA*, p. 10.

4.3.3 Public opinion and perceptions of victim-offender mediation

In my interview at the Restorative Justice Centre in Pretoria, Ansa Verster expressed in her opinion that the black people in South Africa, in general, are more open to victim-offender mediation, whilst white people prefer to conduct the case through the court. She also believed that a larger percentage of black people are willing to participate in victim-offender mediation in more serious offences like rape and other sexual offences.¹²²

4.3.3.1 Questionnaire

After the interview, I thought it would be best to conduct a questionnaire to gauge young people's opinion of the general public.¹²³ According to the questionnaire, 58% of the black people and 33% of the white people would like to attend a victim-offender mediation if they were a victim of a crime. When asked the same question, but if their answer would be different if it was a serious crime like murder or a sexual offence, 63% of the black people and 28% of the white people answered 'yes.' Of those that answered 'yes' to the first question, 83% of the white respondents answered 'yes' and 17% 'not sure', whereas with the black respondents 36% answered 'yes', 28% 'no' and 36% 'not sure', regarding the question whether their answer would be different, if the victim-offender mediation could effect the criminal proceedings and give the offender a softer sentence, or not. When faced with the question regarding whether they would like to attend a victim-offender mediation as an offender, 58% of the black respondents and 39% of the white respondents answered 'yes.'¹²⁴

There was an optional section in the questionnaire for the respondents to voice or add any personal concerns and opinions concerning victim-offender mediation. Listed below are a few of the comments.

Black male: *"This is very good because it brings peace after a tragedy. It also helps offenders to learn from their mistakes, while making peace with themselves."*

¹²² Interview with Ansa Verster, Restorative Justice centre in Pretoria, 2008-07-30.

¹²³ See Method.

¹²⁴ Appendix 2 and 3.

White female: *“I think it would be a good idea but for many (victims especially) it could make the crime even more traumatic.”*

Black female: *“I think doing this is very good because it can bring peace in our country.”*

White male: *“Victim-offender mediation would be a return to the system used after apartheid (Truth and Reconciliation commission). This system allowed many white murderers to get off lightly by just admitting to wrong-doings, society was not happy with majority of the out-comes and this led to further defiance campaiyns. Victim-offender mediation would probably lead to criminals acquiring a lighter sentence.”*

Black male: *“I think it is very important that victim-offender mediation takes place. Very often the victim and his/her family need closure when they are victims of crime. Talking to the offender will help with that. However, I do not agree whit it being an alternative to the justice system. Offenders need to be held accountable and therefore punished for their crimes, whether or not the victim forgives them.”*

White male: *“Can help in todays society. Good idea. But do not think people who have become victims to crimes can forgive their offenders for what they have done to them.”*

Black male: *“As a victim I would have reservations against victim-offender mediation if it was possible to give the offender a shorter sentence. The offender should face the full force of the Law”.*

4.3.3.2 Observations during a victim-offender mediation meeting

I was able to attend and observe a victim-offender mediation in an assault case between two black people. After the meeting I asked the victim and the offender about their feelings and opinions towards victim-offender mediation. Both of them were happy that they were given the opportunity to take part in a victim-offender mediation because they believed that proceeding through the court would not sort out the real issues they were concerned with. Mediation is also their traditional way of sorting out issues in their relative communities. The families sit together in a ring and try to resolve the issue between them in an informal way of justice. They

believed that the most important thing was to build peace between the parties and that the court proceedings do not fulfil that purpose.¹²⁵

¹²⁵ Victim-offender mediation in Attrigeville, 2008-09-16.

5 Conclusion

Sweden and South Africa took the step to develop and involve victim-offender mediation in the criminal justice process at approximately the same time, but they chose to do it in two different ways.

Sweden has developed a special mediation act. The act is a general framework for how the service should be practised. It describes what victim-offender mediation is and its aims and demands, but does not mention how the cases may be referred, where the service should be placed in the judicial system or what effect it should have on the criminal justice process. *The Law on Special Provisions concerning Young Offenders* obliges the police to ask an offender if he or she has been asked about victim-offender mediation and to report this to the social services. From there it is up to the social services in each municipality to take procedures in order to make victim-offender mediation an option in each case. The only effect that victim-offender mediation has on the criminal justice system according to any regulation is that, if an offender is willing to ensure that victim-offender mediation takes place, it can have an influence on a prosecutor's decision when he or she considers a waiver of prosecution against the offender or not. The fact that the offender is willing to take part in victim-offender mediation may also influence a court's decision on the choice of sanction and the type of punishment. It must be noted that victim-offender mediation is separate from the court proceedings and that the court is not involved in the proceeding. Victim-offender mediation is therefore only a complement to the criminal proceedings in Sweden. According to the *The Social Services Act* it is compulsory for the local municipalities to ensure that victim-offender mediation is available when a crime has been committed by someone under the age of 21. This gives everyone the same right and guarantees equity and fairness through the system.

South Africa on the other hand has, through *The Child Justice Bill*, involved victim-offender mediation in the criminal justice system. The mediation service is linked to and inter-dependent on the system. According to the Bill, victim-offender mediation can be used both as, an alternative as a diversion option at the pre-trial stage, and as a part of the sentence at a pre-sentence stage. The prosecutors and the magistrate

have been given the opportunity to empower the parties and given them a chance to affect how the criminal proceeding shall continue. How the cases are referred to the mediation service and what effect it gives to the criminal proceedings, is all regulated in the Bill. Whereas in South Africa there are no rules concerning the practise of the service like *The Mediation Act* in Sweden. The service is provided by different social services and organisations. The services are not nationwide and the practise of the service can be different in every case.

South Africa has made victim-offender mediation a part of the criminal justice system without regulating the service, whilst Sweden has done it differently and first begun regulating the service without taking it into the justice process. One explanation for the different developments, can be that South Africa developed a greater need to find an alternative to the criminal justice system because of the massive increase in their crime rate and the continuous overcrowding in prisons.¹²⁶ Another explanation can be the history of 'ubuntu' and other African traditional justice processes that exist in South Africa and not in Sweden, maybe the people in South Africa, have a greater deal of faith in restorative justice. As I heard in both my interviews and found in my survey, the black people are more open to victim-offender mediation which proves the theory that history and tradition is one explanation to describe the difference between victim-offender mediation in South Africa and in Sweden.

When it comes to the question, what is a suitable case for victim-offender mediation, the views in the countries are now quite similar. There used to be a strong opposition towards using victim-offender mediation in serious offences in Sweden, but these attitudes have begun to change. In both the countries no offences are totally excluded from victim-offender mediation and the emphasis is on the willingness of the participants, rather than the crime itself. The only difference I can see is that South Africa believes that victim-offender mediation is particularly suitable in situations where parties know each other, as these cases often involve underlying factors that need to be addressed. Sweden believes it is unsuitable to use

¹²⁶ There are 163000 prisoners held in 237 correctional centres throughout South Africa. 49000 are awaiting-trial detainees, many of whom can not afford bail. Three-quarters of these facilities are overcrowded by an average of 143 % and some are much worse. *The Citizen*, 14 August 2008.

victim-offender mediation in acts of violence against close relations. Another notable difference between the two countries is the question of who decides if a case is suitable or not. In Sweden it is up to each mediation service to decide if a case is suitable for victim-offender mediation or not. The service provider only needs to consult with the leader of the preliminary investigation or the prosecutor to clarify if there is any risk that the mediation can be deemed detrimental to the preliminary investigation or an upcoming trial. In South Africa the cases are referred to the service providers from, depending on what stage of the process the case is at, the prosecutor or the magistrate. The decision is therefore taken by the prosecutor or the magistrate in the first place. It is possible that the service providers can reject the case if they have another option, but I am not sure as to how often this has happened. According to NICRO, the decision shall be taken by the service provider but I believe that many service providers follow the decision that the prosecutor/magistrate has taken.

The regulation in Sweden is new and even if the organisations in South Africa have been working according to the rules in the Child Justice Bill for such a long time, the Bill will only come into effect in April 2010. It will therefore take some time before we can tell how the regulations will work in actual practice in both the countries.

I believe that Sweden and South Africa both have good regulations and we can learn a lot from each other. I believe that South Africa should develop a regulation that states how the service shall proceed so as to ensure that all the organisations operate within the same framework and ensures that everyone fulfils the same high standards of services provided. My opinion is that the organisations in some fundamental issues work different, for example in the question of what is a suitable case for victim-offender mediation and who should take that decision. They should also try to ensure that the service is nationwide so that everyone has the same opportunity to take part in a victim-offender mediation and other diversion options. The rights for the children in the Child Justice Bill mean nothing without an available service that work correctly. A regulation would help the different services to operate in a consistent and structured way and guarantee equity and fairness. In Sweden on the other hand, I believe that we should take the step and develop victim-

offender mediation as a more permanent feature in the criminal justice process and give the parties the power to effect the proceeding of their case. Like in *The Child Justice Bill*, the prosecutors and the magistrates should be involved in the process and have the opportunity to refer the matter to victim-offender mediation. I believe that by involving justice officials in the mediation process, mediation will enhance legitimacy and vigour in Sweden. As The Committee of Ministers recommend, we should also, like in section 59 in *The Child Justice Bill*, give the mediation services sufficient autonomy within the criminal justice system. Discharges based on victim-offender mediation should be given the same status as judicial decisions or judgments and should preclude prosecution in respect of the same facts.

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Questionnaire concerning Victim-offender mediation

What is Victim-offender mediation?

Victim-offender mediation, also called victim-offender conferencing, is a meeting in the presence of a trained mediator, between the victim of a crime and the person who committed that crime. In some practices, the victim and the offender are joined by their family. In the meeting, the offender and the victim can talk to each other about what happened, the effects of the crime on their lives, and their feelings about it. They may choose to create a mutually agreeable plan to repair any damages that occurred as a result of the crime. Victim-offender mediation can be used as a complement or an alternative to the criminal justice system at various stages in the criminal justice process.

My name is Frida Eriksson and I am from Sweden. I am here in South Africa to write my last paper on Victim-offender mediation for my law degree. The purpose of this questionnaire is to try to investigate young peoples attitudes and opinions towards Victim-offender mediation.

Please note: All your answers will remain confidential and evaluated anonymously.

Thank you for your time and co-operation!

Frida Eriksson

Race: Black White Sex: Male Female

1. If you were a **victim** of a crime. Would you like to talk to the offender about what happened?

yes no not sure

2. Would your answer be different if victim-offender mediation could effect the criminal process and give the offender a softer sentence?

yes no not sure

3. Would your answers be different if it was a serious crime like murder or a sexual offence?

yes no not sure

4. If you were an **offender** in a crime. Would you like to meet the victim and talk about the offence?

yes no not sure

5. Would your answer be different if victim-offender mediation could effect the criminal process and give you a softer sentence?

yes no not sure

6. Would your answers be different if it was a serious crime like murder or a sexual offence?

yes no not sure

7. Do you think your parents have the same opinion as you?

yes no not sure

Personal concerns or opinions concerning victim-offender mediation:

Race: Black

1. If you were a **victim** of a crime. Would you like to talk to the offender about what happened?

yes	no	not sure
58 %	21 %	21 %

2. Would your answer be different if victim-offender mediation could effect the criminal process and give the offender a softer sentence?

yes	no	not sure
32 %	36 %	32 %

3. Would your answers be different if it was a serious crime like murder or a sexual offence?

yes	no	not sure
63 %	37 %	

4. If you were an **offender** in a crime. Would you like to meet the victim and talk about the offence?

yes	no	not sure
58 %	10 %	32 %

5. Would your answer be different if victim-offender mediation could effect the criminal process and give you a softer sentence?

yes	no	not sure
42 %	26 %	32 %

6. Would your answers be different if it was a serious crime like murder or a sexual offence?

yes	no	not sure
42 %	37 %	21 %

7. Do you think your parents have the same opinion as you?

yes	no	not sure
16 %	37 %	47 %

Race: White

1. If you were a **victim** of a crime. Would you like to talk to the offender about what happened?

yes	no	not sure
33 %	50 %	17 %

2. Would your answer be different if victim-offender mediation could effect the criminal process and give the offender a softer sentence?

yes	no	not sure
33 %	50 %	17 %

3. Would your answers be different if it was a serious crime like murder or a sexual offence?

yes	no	not sure
28 %	61 %	11 %

4. If you were an **offender** in a crime. Would you like to meet the victim and talk about the offence?

yes	no	not sure
39 %	39 %	22 %

5. Would your answer be different if victim-offender mediation could effect the criminal process and give you a softer sentence?

yes	no	not sure
61 %	27 %	11 %

6. Would your answers be different if it was a serious crime like murder or a sexual offence?

yes	no	not sure
50 %	44 %	6 %

7. Do you think your parents have the same opinion as you?

yes	no	not sure
50 %	22 %	28 %