

Relate, Resolve, Restore

Mediation and resolution in the justice system

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[New Zealand Government](#)

The Ministry of Justice is focused on delivering people-centred justice services that result in better outcomes for New Zealanders. This work contributes to safer communities and a fairer, more responsive justice system.

People come into contact with the justice system for a variety of reasons. It's usually when they're at their most vulnerable and want a grievance or dispute settled, or are involved in criminal proceedings. The civil and criminal courts, tribunals and authorities exist to allow their case to be heard and resolution reached. Importantly however, we also provide a wide range of mediation and resolution services that are an alternative to or compliment formal proceedings.

Empowerment, informality and agreement

Mediation and resolution gives people an opportunity to 'relate, resolve and restore' by:

- enabling people to have a voice. Everyone involved in the dispute meets in a safe environment and has the chance to actively participate in the justice process. This can be empowering, giving them control over the process and greater ability to decide the outcome for themselves, and to be comfortable with the outcome.
- providing a way to resolve disputes in a variety of informal settings, reducing or avoiding the need to go to court.
- restoring and promoting healthy relationships between people, whānau and communities.

This is a vibrant space to work in. For our justice services to be accessible, responsive and focused on the people who use them, we need to be flexible and adaptable. We need to be innovative as we continue to look for new ways to support New Zealanders to resolve their disputes. It takes time to develop and refine new and evolving services, and to work through the many challenges along the way. We need to actively encourage continuous learning and the improvement of our services. We can't do this on our own; it's important we work closely with our community providers, suppliers and practitioners if we're to make a meaningful impact on the lives of New Zealanders.

Mediation and resolution in a modern justice system

There are many examples of mediation and resolution services within the justice system. Mediation and resolution have been part of the Treaty settlements process for many years. Settlements have a clear focus on resolution and resetting relationships between Māori and the Crown. The Crown apology and historical redress that are a part of each settlement acknowledges the impact of historical Crown actions or inactions on Māori. In this way, the focus is on healing the past and building the future.

Family Group Conferencing addresses youth offending by involving family, victims and others such as police, social workers and youth advocates in the youth justice process. Similarly, the Rangatahi and Pasifika Courts address offending by young Māori and Pasifika by involving communities in the youth justice process and encouraging strong cultural links. Family Dispute Resolution gives parents options other than court to resolve care arrangements for their children.

Environment Court, restorative justice, and Netsafe

This paper explores in more detail 3 examples of mediation and resolution services in the justice system. These are the long-established Environment Court, the continually evolving restorative justice service and the new service for resolving harm caused online, to be delivered by Netsafe. These examples illustrate the diversity of mediation and resolution services in the justice system, both in different stages of development and the issues they aim to resolve. We look at their impact (or potential impact) on the lives of New Zealanders.

Mediation in the Environment Court

The long-established Environment Court is a specialist court for plans, resource consents and environmental issues. Most of the court's work involves the Resource Management Act 1991. The Act is designed to ensure activities like building houses, clearing bush, moving earth, taking water from streams or burning rubbish won't harm our neighbours and communities, or threaten the air, water, soil and ecosystems that we and future generations need to survive.

The court largely deals with appeals about the contents of regional and district plans and appeals arising from applications for resource consents. Consents may be for land use, a subdivision, coastal permit, water permit, discharge permit or a combination of these.

For many years, the court has offered a mediation service to help people clarify issues, resolve conflicts and reach agreement out of court. It's an opportunity for people to 'relate, resolve and restore' by talking about what's important to them and to reach agreement from newly developed understanding. Mediation contributes to a people-centred justice system by bringing people together to reach an agreement everyone can live with, rather than having a decision imposed on them by a formal body such as a court. While the court is a small jurisdiction in terms of caseload, its decisions have the power to affect the lives of all New Zealanders.

Mediation helps move people forward

Mediation in the Environment Court can help parties 'get unstuck' from the stalemate of their dispute. It allows people to explain how they see the problem and how they feel about it. Initial discussion at mediated meetings focuses on what people value and need, rather than their positions or demands. By taking a step back, parties can share and gain an understanding of each others' opinions and the values that underlie their attitudes to disputes. In this way, disputes can be looked at afresh.

Some examples of resource management disputes where mediation may be appropriate are:

- questions about the extent and integrity of consultation by applicants with iwi,
- how sites of value such as heritage places, wāhi tapu and stands of indigenous vegetation, should be managed in district plans,
- the allocation of water rights in catchments with a small or heavily used resource,
- the granting of resource consents for infill housing close to neighbouring properties in residential areas, or
- the granting of resource consents for major projects such as landfills, lifestyle block subdivisions and sawmills, in rural areas.

Mediation is a core process of the Environment Court

Mediation in the Environment Court is facilitated by one of the Environment Commissioners. Environment Commissioners are experienced in mediation and trained in alternative dispute resolution (ADR); in fact, experience in ADR is one of the criteria for eligibility for appointment as an Environment Commissioner.

The Commissioner helps identify points of agreement and dispute. They lead a robust discussion to ensure everyone understands each other's views on the issues before

inviting suggestions for resolution. They help people agree (if possible) on solutions and draft a document (consent order) outlining what was agreed. Agreements are usually drawn up and signed on the spot so people leave the mediation confident their dispute has been resolved. The agreement is also reviewed and endorsed by the court to ensure agreements are aligned with the appeal, and the purpose and principles of the Resource Management Act. This helps ensure the integrity of the mediation process.

Mediation is effective at resolving disputes

Mediation is well-suited to resolving many environmental disputes, as it provides an opportunity to balance the views of the multiple parties involved. Benefits include:

- people are in control of resolving their own disputes, and they have a sense of ownership of the outcome,
- the process is confidential and avoids undesirable publicity and attention,
- outcomes can be reached beyond the jurisdiction of the court by way of a side agreement, for example, a formal apology or public acknowledgement,
- it's often more cost-effective for people compared to court appearances, as disputes can be resolved sooner, and
- it can be more conducive to preserving ongoing relationships between people.

The Resource Management Act was amended in April 2017 to require parties to participate in the mediation process, unless the court considers it would not be appropriate. Environment Judge Smith has reported that more than 90% of environment court cases proceed to mediation on a voluntary basis, and around 75-80% of cases are resolved at mediation or as a result of a subsequent agreement. This represents many people reaching some form of resolution, as well as a large reduction in the court's potential hearing schedule for those who cannot reach agreement themselves.

In some jurisdictions mediation is considered successful if people agree to end their dispute. In the Environment Court, even if mediation doesn't produce a complete settlement, it may define and settle issues, thereby shortening and simplifying any future hearing. Even in cases where ADR doesn't result in agreement, the process of isolating issues and agreeing facts can be helpful and reduce the time and cost of a hearing.

Case study: appeals against the proposed Rotorua District Plan

Following the publication of the proposed Rotorua District Plan in 2015, 37 appeals were filed in the Environment Court from the proposed Rotorua District Plan. From these 37, 279 appeals points were classified by topics and sub-topics. At the outset, the presiding Judge set a target that the appeals would be resolved within a 2-year time frame, with an expectation that over 90% would be resolved within a year. A series of working groups and mediations commenced, facilitated by an Environment Commissioner. 10 months later, all but 2 appeal points had been agreed without need for a hearing.

Resolution with restorative justice

This section of the paper looks at how restorative justice has grown since its introduction in 1995, some of the challenges it faces and the opportunities that exist to deal with them.

Restorative justice brings victims and offenders together to reach resolution

We're committed to making justice services people-centred by adopting more tailored responses to victims of crime. Restorative justice is a key part of this.

Restorative justice is a community-based approach to responding to crime that aims to hold offenders to account for their offending and, to the extent possible, repair the harm caused to the victims and community. It aims to give victims a stronger voice in the criminal justice system and may enable them to get answers, apologies and reparation. When the offender is confronted with the consequences of their actions through meeting the victim and hearing their story, our research shows they're less likely to reoffend.¹

In New Zealand, restorative justice is offered after a guilty plea is entered but before sentencing. It may be offered in cases where:

- the offender appears before a District Court,
- the offender has pleaded guilty,
- there's one or more victims,
- no restorative justice process has previously occurred in relation to the offending,
- and

¹ Ministry of Justice (2016) Reoffending analysis for restorative justice cases 2008-2013.

- the Court Registrar has informed the court that there's an appropriate restorative justice process available.

The use of restorative justice in all cases, particularly family violence and sexual violence, must be carefully considered. Safeguards including best practice standards, risk assessments and safety planning must be in place to ensure the safety of all participants. In cases of family and sexual violence, we require experienced specialist facilitators to deliver restorative justice.

We contract 26 organisations – iwi, restorative justice trusts, marae trusts, and district councils - to provide restorative justice services across 57 district courts in New Zealand.

Meeting to reach resolution

Restorative justice typically begins with a court referral to a restorative justice provider. A facilitator will then contact the victim and offender to ask if they want to participate in a restorative justice conference. Participation is voluntary and only takes place with the consent of both the victim and offender. When deciding if a conference is appropriate, the facilitator considers if:

- all participants will be safe and feel safe,
- the offender shows genuine remorse, and
- the offender shows a desire to put things right or repair the harm caused.

If appropriate, a conference is arranged between the facilitator, victim and offender. The facilitator may also approve other people such as interpreters or support people to participate. The conference usually includes a discussion of what happened, the impact of the offence, and what can be done to put things right and prevent further offending. Facilitators manage the interaction between the victim and the offender, and the development of any agreement or plan.

There are no outcomes that must always result from a restorative justice conference. Instead, outcomes aim to reflect what participants think can be done to put right the harm caused. After the conference, the facilitator reports to the judge about what occurred and any agreements made. The judge can then take this into account when sentencing the offender.

Evidence shows restorative justice reduces reoffending and satisfies victims

Our research shows that pre-sentence restorative justice conferences are effective at reducing reoffending. On average, offenders who took part in a conference between 2008 and 2013 had a 15% lower rate of reoffending over the following year.² Offenders who took part in a conference committed, on average, 26% fewer offences over the following year than comparable offenders who didn't participate in restorative justice. Restorative justice appears to help reduce reoffending across many offence types including violence, property abuse and damage, and dishonesty.

Restorative justice is particularly effective for stopping the youngest offenders (aged 17 to 19) reoffending. Offenders aged 17 to 19 who participated in a restorative justice conference had a 17% lower rate of reoffending than comparable offenders from the same age group over the following 12-month period.

Based on these findings, we estimate the 1,638 restorative justice conferences across all age groups held in the 2013/14 financial year led to 620 fewer offences being committed and 359 fewer offences being prosecuted over the following year.³

As well as reducing reoffending, victims of crime have consistently reported high levels of satisfaction with restorative justice.⁴

In 2011 and 2016, restorative justice victim satisfaction surveys were undertaken with victims who had attended a restorative justice conference. The surveys measured the experience of, and satisfaction with, Ministry of Justice-funded pre-sentence restorative justice processes. Results were very positive. The three topline results from the 2016 survey were that:

1. a large majority (84%) were satisfied with the conference they attended,
2. the majority (80%) said they were satisfied with their overall experience of restorative justice, and
3. the majority (81%) said they would be likely to recommend restorative justice to others.

² Ministry of Justice (2016) Reoffending analysis for restorative justice cases 2008-2013.

³ *ibid.*

⁴ Ministry of Justice (2011) Victim satisfaction with restorative justice: a summary of findings.

Of interest, 86% of family violence victims were satisfied with the restorative justice process compared to 77% of victims in non-family violence cases.

Case study: restorative justice

An 80-year-old woman was tackled to the ground and mugged by a powerfully built 17-year-old rugby league player. He took her handbag as well as her confidence. Mrs Martyn said the attack was vicious and left a lasting impression on her. She said for 3 months she woke up every morning shaking. When invited to participate in restorative justice, Mrs Martyn accepted immediately. She wanted to face her attacker, she wanted to tell him how mad she was, and she wanted to reclaim some of her confidence and dignity.

At the restorative justice conference, Mrs Martyn told her attacker what he did to her was the worst thing that had ever happened to her in her life. She asked him how he'd feel if someone had done that to his grandmother. He said he'd be upset. She told him how affected she was from what he had done. As a result of facing her attacker, Mrs Martyn was empowered. She was able to reclaim her dignity and confidence and could face the world again. She was very thankful for the opportunity to participate in the restorative justice process.

Access to restorative justice has increased since the Sentencing Act Amendment

Under an amendment to the Sentencing Act, which took effect in December 2014, it became mandatory for the court to adjourn criminal proceedings to consider restorative justice if certain criteria were met. In the 3 months before the amendment came into force, courts made over 1,300 referrals to restorative justice. In the 3 months after the amendment came into force, courts made over 3,500 referrals: an increase of 322%. In 2015, around 18% of all people convicted in the District Court were referred to an assessment for restorative justice. Across the country in the 2015/16 financial year, 2,981 restorative justice conferences were delivered.

Conferences haven't increased at the same rate as referrals, but this isn't surprising as there are many reasons conferences don't go ahead. The offender or the victim may not want to participate or the provider might consider there are significant safety risks.

Restorative justice will continue to evolve

To fine-tune the restorative justice service, one of our challenges is to reduce the number of referrals to restorative justice in cases that are unlikely to proceed to a conference. One of the ways we are doing this is by improving the quality of information given to providers at the time of the referral, so that better assessment can be made earlier, and better contact information is provided.

Our second challenge is maintaining a safe, credible and effective restorative justice service. We're working with providers, Restorative Practices Aotearoa, Resolution Institute and the Diana Unwin Chair in Restorative Justice, Professor Chris Marshall, to update our best practice documentation, originally developed in 2004. This August, we published our updated best practice framework and standards to be used in all cases, and now, we're shifting our focus to reviewing and updating standards in family violence cases. We're also working with the judiciary and family violence professionals on processes that encourage collaboration between the family violence sector and restorative justice services when working with victims and offenders. This will result in safer, more connected restorative justice services.

Innovative solutions in addressing harmful digital communications

Our final example of a resolution service is one which addresses the devastating harm that can be caused through digital communications. Netsafe is the approved agency under the Harmful Digital Communications Act 2015 (the Act). Netsafe's role is to investigate and resolve complaints about online bullying, harassment and abuse and provide people with education and advice about online safety and conduct. Netsafe began delivering these services on 21 November 2016.

Addressing harmful digital communications through legislation

Harmful digital communications can include text messages, written text, photographs, pictures, video, or audio recordings that are communicated or published electronically using the internet, email, apps, social media or mobile phones. They might include:

- threatening or offensive material or messages,
- damaging or degrading rumours about someone, or
- invasive or distressing content about someone.

The Act was introduced as part of a national response to bullying and to do more for people harmed by digital communications, particularly those who have suffered serious emotional harm.

Over time, we expect it will result in more New Zealanders being kept safe from digital harm, more people will become aware of the harm and consequences of harmful digital communications and will know where to go for help, and this harm will be increasingly deterred, prevented or mitigated. Increasingly, we expect to see people change their digital behaviour to protect themselves or others from such harm.

Assessing harm

Harm refers to serious emotional distress, which means different things to different people. The definition of harm will evolve as harmful digital communications cases go to Netsafe and the courts. The Act sets out 10 communication principles NetSafe and the courts should consider when assessing whether a digital communication has caused or is likely to cause harm. Netsafe reviews the harm criteria regularly, particularly informed by Court outcomes. If the communication is assessed as having caused, or likely to cause, harm and has breached one of the principles, the complaint will be investigated and a resolution plan developed. Since NetSafe began they have received over 1100 requests for help from people affected by harmful online content. Some 110 of these requests have been assessed as reaching the threshold of serious emotional distress, but in all cases Netsafe has sought to provide some form of resolution. The speed at which most complaints are resolved is dependent on factors such as the complexity of the complaint, and the willingness of the parties to engage in the process. In 50% of cases, resolution can be reached within 72 hours.

Steps towards resolution

Resolution is a key way to provide a quick and efficient means of redress for victims. NetSafe receives complaints, assess them and establish the facts of the case. If appropriate, and with the agreement of the person harmed, they put a resolution plan in place which outlines the actions NetSafe and the people involved will take to resolve the issue.

Actions could include NetSafe contacting the website administrator or online content host to ask for the offensive material to be taken down from the site, contacting the person who published the material to request they retract, remove or delete the material, or issue an

apology. NetSafe may also refer the victim or publisher to a service such as family or youth counselling services.

Resolving complaints

Netsafe's contact centre is open 7 days a week to provide an easy point of access for people wanting advice or information, or to make a complaint. People can also go to their website. There is a 'no wrong doors' approach, where complainants are quickly referred to the best source of help, including referrals to other agencies (such as Youthline).

Netsafe receives up to 10,000 enquiries a year by phone, email and their website. These range in severity, from complaints about posts on Facebook that someone else likes your boyfriend, to complaints about constant bullying messages via multiple apps or online scams. Enquiries also include requests for information and advice.

Netsafe resolves complaints using advice, negotiation and persuasion with key stakeholders, such as website administrators and telecommunication providers, to help achieve a successful resolution (such as removing the harmful content). This is critical as Netsafe doesn't have any formal power to make decisions about a case or enforce the action of any party.

If a complainant (such as the victim or their parent) isn't satisfied with the outcome, they can apply for a district court order to, for example, take down the material or publish an apology. court orders are legally binding and failure to comply can be a criminal offence. Since November 2016, the courts have received 14 civil cases requesting Harmful Digital Communications orders, 9 of which have been completed.

Case study: Anna and her ex-boyfriend Andrew

Anna makes a complaint to Netsafe about a nude photo Andrew, her ex-boyfriend, has published of her on a blog. Anna has been bullied about the photo at school and is struggling to cope.

Netsafe:

- 1) determines that this incident has breached the communication principles and has caused Anna serious emotional harm;*
- 2) investigates the facts of the case, including confirming that the accused, Andrew, is in fact the publisher.*
- 3) investigates, in agreement with Anna, the best ways to minimise the harm caused which it records in a resolution plan. Actions that Netsafe discuss with the parties include:*
 - a. requesting that the blog administrator remove the photo;*
 - b. contacting Andrew directly to explain why his actions were harmful, the reasons not to do it, the action he can take to address the harm (including the consequences if he doesn't take action), and lets him know that what action Netsafe has taken in requesting the blog administrator remove the photo;*
 - c. providing Anna and Andrew with education resources and advice about the harm that can be caused by digital communications and how to keep themselves and others safe from future harm.*
- 4) Andrew agrees to remove the content. If he does not, Netsafe will provide Anna with a complaint summary which will enable her to make an application to the district court.*

As well as resolving complaints, Netsafe has a leadership role in educating New Zealanders about the harm and consequences that can be caused by digital communications. They provide education about the behavioural changes that people can make to be safe from harm. Netsafe specifically focus on working with schools, and since the Harmful Digital Communications Act came into force requests for their services, including presentations in classrooms and providing resources to support schools, have increased in this area. NetSafe also has a role in shaping standards for website administrators to use when managing their content. They support administrators who need assistance to implement these, and engage with those that demonstrate a pattern of concerning digital behaviour.

Delivering the best services for New Zealanders

It is an evolving process as we understand and learn more about what makes this resolution service for harmful digital communications most effective. It's difficult to accurately predict future demand but since starting as the approved agency demand for

services have not exceeded our expectations, and NetSafe is adaptable and able to meet changing demand at short notice.

A key challenge will be how we collectively lead behavioural change in the long term to create a safer digital community. We're also keen to learn how we might shape future developments in alternative dispute resolution.

Future focus

There are a wide range of mediation and resolution services within the justice system, each contributing to a people-centred justice system, with a focus on helping people to 'relate, resolve and restore'. These services can have a very positive and meaningful impact on people. They give people a chance to have their voice heard, to actively participate in the justice process, restore and promote healthy relationships. They provide opportunities for victims to find meaningful redress and reparation for harm done, and for offenders to take ownership of their offending, face the consequences of their actions and to rehabilitate. Mediation and resolution services also provide opportunities to reduce or eliminate the need to go to the more adversarial court system for resolution.

This paper has focused on 3 examples, each at different stages in their establishment and in different streams of the justice system.

Mediation through the Environment Court helps people reach their own resolutions, while also supporting the administration of the court. Restorative justice can help bring victims of crime closure following an offence and reduce reoffending by helping offenders understand the impact of their crime. Netsafe's resolution process provides an easy, accessible alternative for people seeking to resolve disputes about harmful digital communications.

All of these services face some unique challenges as they evolve. We need to ensure the many benefits of mediation and resolution are well understood by the wider community. This reduces the likelihood that these types of services are side-lined as a 'nice to have' extra, or seen as a 'soft option' for offenders. They're a core part of people-centred justice services.

For these services to be people-centred, we need to be flexible, adaptable and innovative, actively encouraging continuous learning and improvement of our services. We can't do this on our own; it's important we continue to work closely with our providers, suppliers and practitioners in our local communities if we're to continue to make a meaningful impact in our communities.

To this end, we'd like to thank and acknowledge all of the facilitators, practitioners, coordinators, managers and provider organisations that we partner with to do this important work.

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