

# JUSTICE RESTORED?

Victim-offender conferencing in the Northern Territory by Tony Fitzgerald

Restorative justice looks at our system of criminal justice in a completely different way and recognises that:

- our present system determines blame and administers punishment in a contest between the offender and the state;
- in the contest victims and offenders are assigned passive roles;
- our present system is preoccupied with offenders and seeking retribution from them; and
- the adversarial process deals poorly with victims and may victimise them further.

Restorative justice:

- redefines crime so that rather than the state being viewed as the primary victim, crime is seen as causing multiple harms to the victim, the offender and the community;
- removes the real victims from their passive roles and gives them a chance to become actively involved in the contest;
- is concerned more about restoration of the victim and victimised community than costly punishment of the offender;
- requires that offenders be held directly accountable to the victim and/or community;
- encourages community involvement in holding the offender accountable and in the restoration of victims and offenders;
- emphasises acceptance of responsibility and making amends by the offender rather than severity of punishment; and
- recognises community responsibility for criminal justice through recognition of community responsibility for social conditions which contribute to offender behaviour

## Victim-offender conferencing

The Victim-Offender Conference (VOC) is a mechanism for invoking restorative justice. After a formal finding of guilt, victim and offender are brought together in a conference environment and encouraged to be directly involved — through their own dialogue — in discussing the issues surrounding the crime.

The 'conference', so-called, comprises not only victims and offenders, but also their families and supporters and the arresting police officer — in other words, a sample of the community. Attendance is voluntary.

The process commences when a trained facilitator is provided with a precis of the facts and a list of likely conference participants. The facilitator brings all the parties together at the conference and this often involves "selling" the conference concept to them. Conference facilitation is similar to mediation in that participants identify their needs and interests and negotiate an agreement (that is, an agreement on the offender's penalty).

The dialogue at this 'community' conference is moderated by the facilitator and may cover such issues as:

- from a victim's viewpoint — the damage caused; emotional/physical effect of the crime; ongoing fears; what they want done about it; and
- from an offender's viewpoint — an explanation of what happened; why they did it; what they felt about it at the time; what they feel after hearing from the victim; whether they thought about who might be inconvenienced; what can be done to make amends (for example, apology, restitution, community work).

There is no conference script and no predetermined outcome. The outcome depends on the dialogue and all the participants are encouraged to provide input.

Participants progress through two phases at the VOC — exploration and negotiation. During the former there might be denunciation of criminal behaviour, empowerment of victims, permission for offenders to acknowledge and take responsibility for the crime, and a closure of the incident that people can move on. The latter might involve talk of restitution, an invitation for the offender to account to the victim and the community, and a restoration of the offender to the community.

## The NT experience

As at 30 September 2000, only five VOCs have proceeded in the NT since mandatory sentencing commenced in March 1997. All have been conducted at government expense — three in remote Aboriginal communities and one in Darwin — but the take-up rate has been low in both remote and urban areas. This suggests that the whole community may need educating in the underlying philosophy and aim of the process. Interestingly the 'community' style of conference appears well suited to Aboriginal communities because of their familiarity with 'community-based' decision making processes.

At three VOCs facilitated by the writer the offender had damaged community property. In one conference the offender's father offered to pay for the damage, but the conference (read 'community') said, 'No, we want the boy [offender] to pay — not his dad'. After negotiation the boy agreed to perform unpaid work for the community to the value of the damaged property. In another case the offender's efforts rendered unserviceable a community vehicle used for transporting the elderly to and from the store. At conference the offender agreed through negotiation to hunt and fish for a stipulated period for the old people and personally deliver to them the fruits of his labours.

At the conclusion of both VOCs all the participants, including police, were delighted with the outcome and there was back-slapping and handshaking all round. The jubilation was no doubt tinged with relief because conferencing is no a soft option — it is hard work. The conferences lasted over an hour, and were punctuated with outpourings of anger and lengthy periods of silence as the participants grappled with the issues. It is not easy for victims to face their tormentor, and/or for offenders to face their community.

Of course, not all VOCs will deliver such a neat outcome. It may be that the conference is unable to reach agreement on penalty because the victim sets the bar too high or the offender is

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uncooperative. In the NT a juvenile receives the mandatory term if there is no agreement, so the NT facilitator must reality check agreements to ensure they are genuine and not just a means to avoid detention.

It may be possible to gain an insight into the value of the conferencing process by calling on our experience of victims and offenders. We know that many victims get no real satisfaction from seeing the system bundle the offender off to gaol, or pay a fine to the state, and we know that victims want to be restored and they want offenders to take responsibility for their misdeeds. Equally, we know that many offenders are not fundamentally evil — they have done something they are not particularly proud of, and they want a chance to express contrition to the victim — the current system does not give them that opportunity. VOCs at least cater to these needs.

### VOCs and mandatory sentencing

The VOC is one of a number of 'diversionary programs' available to the court under the mandatory sentencing regime. Offenders avoid the mandatory sentence through diversion into a program.

Mandatory sentencing is targeted at repeat property offenders. The most lively debate has centred on the plight of juveniles, but the laws prescribe compulsory minimum terms of imprisonment of 14 days, three months and one year for respectively first, second, and third property offenders (18 years and over). That is, for adults it's one strike and you're in!

Juvenile property offenders aged over 15 are diverted or (if unsuited) detained for a minimum of 28 days for a second offence. Mandatory detention for at least 28 days applies to findings of guilty on a third or subsequent occasion.

The diversionary option is available only to second offending juveniles who are both 15 and over and deemed suitable by the court. If an offender fails to satisfactorily complete the diversionary program, detention is the next step.

The initial justification for the introduction of mandatory sentencing was its deterrent value. However, after

three years of operation the anecdotal evidence suggests that property crime has increased. No official statistics have been produced by government to demonstrate otherwise.

The present position of government is that mandatory sentencing is but one facet of an overall crime prevention strategy. Privately the government admits it does not support the incarceration of juveniles for trivial offences. However, the government will not back down now because its political imperative is to 'hold the line' on 'State's rights'.

Progress towards repeal of mandatory sentencing laws may depend on the success of juvenile diversionary schemes (especially VOCs). The NT government has demonstrated its genuine interest in VOCs by funding facilitator training and meeting the cost of all VOCs to date. If VOCs receive *community* support, government may be persuaded to extend them to adults. It is conceivable that continued public support for conferencing would convince government to securely entrench the initiative and thereby enable an honourable government retreat from mandatory sentencing.

So far, in response to public disquiet, the government has shown a willingness to at least tinker with the legislation, for example, by exempting adult offenders in very limited 'exceptional circumstances', and by excluding juvenile offences involving property valued under \$1000 — provided there was no unlawful entry.

Certainly an opportunity to advance victim-offender conferencing exists in the Territory. Whether we grasp that opportunity remains to be seen.

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## WHO CARES ABOUT HUMAN RIGHTS?

**Given the recent controversy about Australia's participation in international human rights and the focus on Australia since the Olympics, the latest provocative edition of the *Alternative Law Journal* covers a timely theme.**

Among the many compelling articles, the edition once again has excellent representation on Territory issues by Territory authors, including former Senior Crown Counsel to the Northern Territory, Graham Nicholson, Ken Brown, Legal Aid's Jonathon Hunyor, Helena Blundell from NAALAS and NTU lecturer Stephen Gray.

The NT Editorial Committee would like to thank St John's College for their involvement in the edition. Legal Studies teacher Marita Fitzpatrick managed to persuade two students to be involved in the project. Nikki Howden provided the artwork *The Human Condition* for the cover and Lauren Townsend interviewed Sir Gustav Nossal for the *Sticky Beak* column.

The next NT edition will be published in June 2001 and will be 'themeless'. This means that contributions can be submitted on any topic. The NT editions are edited by the small and hardworking NT Editorial Committee and they are currently calling for contributions for the June 2001 edition. If there is an issue which you are researching or which needs ventilating, you should consider submitting it for publication.

Abstracts should be submitted by early March 2001 with the final drafts being sent to the Committee by early April. Guidelines for authors and editors are available from the committee or on the internet at <http://www.altlj.org/>

If you are interested in joining the committee or subscribing or contributing to the Journal, contact either Fiona Hussin in the Top End on (08) 89466963 or email: [Fiona.Hussin@ntu.edu.au](mailto:Fiona.Hussin@ntu.edu.au) or Russell Goldflam in the Centre on (08) 89515377 or e-mail: [russell.goldflam@ntlac.nt.gov](mailto:russell.goldflam@ntlac.nt.gov)