Restorative Justice in Victoria: An Introduction

A Seminar as part of the Victorian Bar Continuing Legal Education Program

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Introduction

Victim offender mediation and conferencing programs have emerged over the past twenty-five years as a dynamic alternative to criminal justice practice. Most commonly referred to as “restorative justice” it is a systematic response to wrongdoing that emphasizes healing the wounds of victims, offenders and communities caused or revealed by criminal behaviour. In the last decade these developments have morphed into processes that can be used in schools and organizations. In the last decade considerable academic interest has been generated in these processes giving rise to a burgeoning number of publications and websites.

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For a range of basic texts see:


Basic texts relating to schools:


Children’s Protection Society (2004) Building Blocks to Safe Schools, Melbourne, Australia


For a range of key websites see:

Victorian Association for Restorative Justice
www.varj.asn.au

Restorative Justice Online
www.restorativejustice.org/

Center for Restorative Justice & Peacemaking
National Restorative Justice Training Institute.
http://ssw.che.umn.edu/rjp/

Restorative Justice in Australia
A number of programs have become associated with restorative justice because of the processes they use to respond to and repair the harm caused by crime. These include:

- Victim-offender reconciliation/mediation programs using trained mediators to bring victims and their offenders together in order to discuss the crime, its aftermath, and the steps needed to make things right.
- Conferencing programs that are similar to victim-offender mediation, but differ in that they involve not only the offender and victim, but also their family members and community representatives.
- Victim-offender panels which bring together groups of unrelated victims and offenders, linked by a common kind of crime but not by the particular crimes that have involved the others.
- Victim assistance programs that provide services to crime victims as they recover from the crime and proceed through the criminal justice process.
- Prison programs that provide services to offenders while they are in prison and on their release.

Like the alternative dispute resolution and other reform movements restorative justice grew out of the informal justice, victim and consumer rights and the restitution/diversion movements. As it has emerged and been put to greater use it has raised a number of legal issues related to its implementation. Among these are jurisprudential concerns, victims' and offenders' rights, and procedural issues. Also, restorative justice has many socio-legal implications related to its implementation.

Victim-Offender Mediation and the Rise of Conferencing

There is no doubt now that restorative justice has become one of the most significant recent responses to the perceived problems in the criminal justice system, especially relating to young people. Under its rubric we have seen the development of a range of processes based upon restorative justice principles.

It “began” in Ontario, Canada in 1974 with the localised implementation of a victim-offender mediation program before spreading across the country. Victim-offender mediation programs have also had a relatively long history in the United States of America and to a lesser extent the United Kingdom.\(^2\) Victim offender mediation programs are now widely dispersed around the world. For example, there are now more than 300 victim-offender reconciliation projects in Europe and North America with 175 programs in the USA and Canada.

In these programs victims and offenders are brought together to negotiate reparation. In Australia victim-offender mediation was first trialled (unsuccessfully) by the ADR Branch of the Department of Justice in Queensland in 1992.\(^3\) More recently a process known as “conferencing” has emerged.

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\(^3\) Department of the Attorney-General (Qld) *Mediation and Reparation Within the Criminal Justice System*, August 1991.
In Australia restorative justice programs based upon the conferencing process have been widely adopted. Unfortunately each State jurisdiction has seemingly followed its own particular needs and predilections. There is consequently little conformity and we are unfortunately left with a confusing jigsaw.

Conferencing has built on the victim offender mediation programs in that it attempts to bring together not just the individuals involved in the particular criminal offence but the wider “communities of care” who may be affected. The conference is essentially a process through which the communities affected by a criminal act can come together to discuss and respond to what has happened. For example, the family of an offender can provide support for an offender but they can also describe their own “secondary victimisation” in a conference. Also, in a conference the focus is not on a dispute but on the offence, its consequences, and upon those affected and what they can do to repair the damage and minimise further harm. Conferencing originally developed in New Zealand. The process finds its roots in traditional Maori practices and is commonly called “family group conferencing”. Family group conferencing was incorporated into New Zealand juvenile justice and child protection legislation in 1989. Similar conferencing programs, modelled on the New Zealand model, were soon introduced into Australia with a number of states introducing legislation and other pilot programs.

The first major experiment with conferencing in Australia was at Wagga Wagga, New South Wales, based on the New Zealand ideas but run by the police. The original Wagga Wagga model has since been abandoned because of concerns about police acting as mediators. In July 1997 the Young Offenders Act 1997 (NSW) passed administration of the program to the Juvenile Justice Department. Sessional Convenors are now employed to assist in intake processes and run the conferences.

Marshall usefully analyses the various programs in terms of the parties involved: see Table below.

The table indicates a wide variety of program types although you will note that most emphasis is given to mediation and conferencing varieties.

The programs apply, generally to a wide range of criminal offences. They are often combined with police warnings, cautions and deferred prosecution. They can also occur parallel with prosecution, prior to sentence, as part of the sentence; or after sentence including pre and post release.

Where used in conjunction with cautioning, the agreements are not enforceable. The emphasis is therefore on the process and particularly the offender’ realisation, understanding and acknowledgment of the impact of his/her actions. Where used in conjunction with a court appearance, the court may impose reparation as part of the sentence.

As with most Australian restorative justice programs many of the US, English and German victim-offender programs deal exclusively with juvenile offenders. Most programs strive to have the victim and offender meet face to face. In other instances, indirect mediation or “shuttle mediation” is conducted, where a facilitator liaises between the victim and the offender, who do not meet face-to-face. Many overseas programs do not have a legislated base but in Australia most now have statutory backing and have moved beyond the local community level to State wide programs. If we looked at crucial elements of the various programs around Australia we can readily see the differences that have

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6. Marshall op. cit., p. 6
developed. These crucial elements are the legislative basis of the programs, target groups, participation, responsibility for the program, monitoring and enforcing agreements and evaluation.

Legislative Basis

TABLE 1: TYPES OF CONFERENCING PROGRAMS

<table>
<thead>
<tr>
<th>Parties</th>
<th>Programs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Victim – Offender</td>
<td>Victim-offender mediation and/or reparation.</td>
</tr>
<tr>
<td>Victim – Community</td>
<td>Community group support for victims.</td>
</tr>
<tr>
<td>Offender – Community</td>
<td>Community programs that support offenders, for example, jobs, retraining, literacy, education, relationship counselling, drug/alcohol counselling, accommodation, support for isolated, activities to release energy and integrate people, family support.</td>
</tr>
<tr>
<td>Victim – Offender – Community</td>
<td>Community involvement in victim-offender mediation.</td>
</tr>
<tr>
<td>Justice Agency – Victim</td>
<td>The justice agency takes a pro-active role with respect to victims.</td>
</tr>
<tr>
<td>Justice Agency – Offender</td>
<td>The justice agency actively tries to reintegrate the offender.</td>
</tr>
<tr>
<td>Justice Agency – Community</td>
<td>The justice agency is integrated into the community. Examples may include probation services and opportunities for volunteering in relation to the criminal justice agencies. For example, in Vermont USA, non-violent offenders are sentenced by the court to a hearing before a community reparative board composed of local citizens.</td>
</tr>
</tbody>
</table>

The program offered in Tasmania is not legislatively based and operate within existing frameworks. This was the case in Victoria until recently. In contrast, the programs conducted in the following jurisdictions are governed by legislation:

- **ACT**: Crimes (Restorative Justice) Act 2004
- **South Australia**: Young Offenders Act 1993
- **Western Australia**: Young Offenders Act 1994
- **Queensland**: Juvenile Justice Amendment Act 1996
- **New South Wales**: Young Offenders Act 1997
Conferencing in Victoria

In 1995 the group conferencing program was adopted in Victoria under the auspices of Anglicare Victoria and initially funded by a philanthropic trust. The Victorian Government took over financial responsibility for the program in 1997. A steering committee was established for the program that included representatives from the Children's Court, the Department of Human Services, the Victoria Police, Victoria Legal Aid, and, in 1998, the Department of Justice.

In the 2001/02 Department of Human Service's (DHS) budget, extra funds were provided to extend the Juvenile Justice Group Conferencing program in the Melbourne metropolitan area and to establish two programs in rural regions. The original steering committee has evolved into an advisory committee with a role to advise and assist DHS with policy issues associated with the development and roll out of the group conferencing program. The group conferencing program has been evaluated on four occasions. 8

The rationale for the program is to provide an effective community rehabilitation intervention to the Children's Court at the pre-sentence stage of the court process and involves the diversion of the young person from supervisory sentences. 9

In November 2005, the Children, Youth and Families Act 2006 was passed by the Victorian Parliament and provided for the first time for specific legislation to allow the Children’s Court to defer sentencing to allow a group conference to take place. 10 It is a program based explicitly on restorative justice principles. It aims to bring together the young person, family, community members and the victim to develop a plan to assist the young person and prevent further offending. It places an emphasis on the relationships within and between these groups to strengthen the young person's supports and identifies ways of repairing the harm associated with the young person's offending. 11

Group conferencing projects have been operating in the Melbourne metropolitan area as well as some regional areas. 12

Principles

The principles of the program, as provided for in DHS document, “Framework for the Delivery of Metropolitan Juvenile Justice Group Conferencing”, outlines the following principles. 13

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9 For further information regarding the program history, please see Department of Human Services, Report of the Steering Committee, May,(1998).
10 See Jesuit Social Services ‘Development of a Young Restorative Justice Conferencing Report for Victoria’ (July 2006). In March 2007 Group Conferencing will be expanded to include all Children’s Courts in Victoria. With the introduction of the new legislation numbers quoted here could change.
Restorative justice is a problem-solving approach to offending that aims to balance the needs of young people, victims and the community. Group conferencing is one of several approaches that can be called restorative, which involves dialogue between people who have offended and their victims and their reintegration into the community. Other relevant initiatives in Victoria include the Department of Justice's Koori Court Program, the Dispute Settlement Program and the youth mentoring program.

The Victorian model of group conferencing is based on the principles of restorative justice and community reintegration that are designed to:

- encourage young people to take responsibility for their offending behaviour in a voluntary setting;
- strengthen family or the family group of the young person or link the young person to a significant other;
- provide the young person with an age and developmentally appropriate intervention and support that may enable him/her to address the causes of his/her offending;
- enhance the rights and place of victims in the juvenile justice process;
- restore the young person and victim to the community;
- provide opportunities for direct or indirect victim reparation;
- establish/enhance the young person's bonds with significant community networks and institutions and facilitate reintegration;
- engage significant others to support the young person;
- contribute to a process of community connectedness; and
- provides a culturally appropriate intervention.

Group conferencing avoids shaming of young people and attempts to balance the needs of all parties in a mutually respectful and supportive environment. Participation in a conference should be voluntary for all parties with mechanisms to ensure their legal rights are maintained throughout the group conferencing process. The young person's consent is a precondition to their involvement in group conferencing.

Aims

The program aims to address the offending behaviour of the young person and divert them from more intensive supervisory court outcomes by raising their understanding of the impact of their offending on the victim and utilising the resources of the immediate and extended family and/or significant others to support the young person. A secondary aim is to involve family members, significant others, community members and victims in the decision making process and thereby enhance their satisfaction with the justice process.

The group conferencing program aims to achieve the following outcomes:

- Effective reintegration of young people into the community following the conference process;
- Reduced frequency and seriousness of re-offending of young people referred to the program as compared to young people on supervisory orders;
- Increased victim satisfaction with the criminal justice process; and
- Reduced costs to the juvenile justice systems as compared to statutory court orders including custody.

Preconditions
The program lays out a number of preconditions that are said to be essential for the delivery of an effective group conference including:

- The young person’s agreement to voluntarily participate in a group conference;
- Timely and efficient court referral procedures;
- Conference convenors with skills in mediation and group facilitation;
- Effective assessment and preparation tools;
- Models that allow for the varying needs of young people and victims;
- Enhanced mechanisms to support young persons and victims post conference;
- Effective program reporting to the courts on the outcomes of group conferencing; and
- Comprehensive practice standards for convening group conferences.

Aboriginal and Torres Strait Islander young people are regarded as particularly vulnerable by these programs because of issues related to discrimination, isolation and problems of family involvement.14

Target Group

The program takes referrals from all metropolitan Children's Courts and selected rural courts. In early 2007 it is expected that all Courts would be able to make referrals. The target group for the group conferencing program are young people who have offended when aged 10 to 16 years presenting at the Children's Court who have:

- pleaded guilty or have been found guilty of offence(s) that do not include homicide, manslaughter, sex offences and generally do not include serious offences of violence; and
- appeared in court on a previous occasion and committed offence(s) serious enough for a supervisory order (primarily a probation order) to be considered by the Court; or
- have committed offences serious enough to warrant a supervisory order on their first appearance; and
- have been referred to the group conference program within nine months of the offence(s) occurring or under exceptional circumstances at the discretion of the Court; and
- assessed as suitable by a DHS juvenile justice officer.

Referral process and sentencing young people

The Victorian model of group conferencing is a pre-sentence diversionary intervention. In cases where a young person has pleaded guilty or has been found guilty of an offence and is within the target group, the court stands the case down for a suitability assessment to be conducted by a DHS juvenile justice officer.

If on the advice of the Juvenile Justice officer the court decides that the case is suitable for a referral to the group conferencing program, it adjourns (under the Children and Young Person's Act S.25 (1)) sentencing for six to eight weeks until a group conference can be facilitated. Following the group conference, the young person returns to court and the Magistrate considers the process and outcomes of the group conference in the form of a report prepared by the convenor (under S. 136 (b)), before deciding upon an appropriate sentence.

Unless the young person fails to participate in the conference or re-offends during the period of the adjournment, the conference is most likely to result in the court diverting the young person from a

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supervisory order. Previous evaluations have shown the most common sentence following a group conference is a Good Behaviour Bond (S.144).

**Court-based suitability assessment**

Court-based suitability assessments will be provided to the court by a juvenile justice officer from the relevant DHS regional office to determine:

- whether the young person is within the target group;
- the young person’s attitude to the offence and motivation to attend;
- the young person's empathy; and/or
- the needs and ability of the young person to understand the voluntary nature of the process.

Given that the adjournment for a court-based suitability assessment may only be for one or two hours, a more thorough assessment of the young person's risks and needs often has to take place at the pre-conference stage. This also allows for more time to make checks with relevant DHS Juvenile Justice Unit (JJU) and Child Protection Units.

**Composition and duration of conferences**

Group conferences normally take the form of a voluntary meeting between the young person and the victim each with support people depending on the circumstances of the young person and victim. Only people who have been directly affected by the offence, support the young person and victim and/or can aid the facilitation of the conference are generally present.

The convenor’s role is to assess the suitability of each member of the conference to attend it by considering whether or not they were affected by the offence(s), together with the wishes of the young person and the victim. If a young person is particularly vulnerable, the conference should generally be kept small in size.

The program framework provides that the length of a conference should normally not exceed 90 minutes. They also stipulate that the total time for the overall conferencing process, from preparation phase to the report writing stage should normally take no more than 30 hours.

The convenor is responsible for choosing a location for the group conference. Venues such as DHS offices and police stations are not suitable and ideally, the venue should where possible be close to or in the young person’s community.

**The Process of Group Conferences**

Pre-conference planning and preparation is considered a key element to ensure success of the conference. Pre-conference preparation includes:

- A thorough assessment of the risks presented by the young person to his/her victim;
- Consultation with relevant JJU and child protection teams to ensure that any previous relevant information by family members is taken into account;
- Consideration of the likely impact on the young person where members of their family/family group are present;
- A thorough consultation with the victim(s);  
- Consultation with the victim and the young person and their supporters regarding the venue and dates for the conference;
• Assessment of the young person's need for support and supervision to implement the Outcome Plan. Negotiation with relevant parties to provide this support and supervision.

After pre-conference planning, the conference itself comprises four stages:

1. Introductions and ground rules
   The convenor invites each participant to introduce himself or herself, and ask how they relate to the young person or victim. The convenor explains the purpose of the group conference and outlines the ground rules.

2. Information sharing
   The main participants are asked their version of the offence(s) and how it has impacted on them. The informant providing an overview of the offence creates a context and a good starting point. The convenor of the conference should consider the needs of each conference participant and determine what process is most suitable for each individual conference.

3. Private time
   In which the young person and their family, family group or significant others are provided with time to develop their own outcome plan to restore the harm to victim and reduce the risks of re-offending.

4. Seeking an agreed outcome
   Where all parties return to hear the outcome plan and further discussion takes place aimed at clarifying and achieving acceptance. During this stage the young person confers privately with their legal representative to ensure they fully understand the implications of the plan and willingly agree to it.

Every effort should be made to ensure all parties agree to the plan but the victim cannot veto or override an outcome plan.

**Outcome Plans and Court Reports**

The outcome plan is written up by the convenor after the conference and included in a court report based on the process and outcomes of the conference. Outcome plans are always unconditional and there is no requirement for formal court based reporting after the young person has been sentenced. Thus the sentencing court is discouraged from imposing any special conditions linked to a Good Behaviour Bond because this would go against the voluntary principle that underpins group conferencing.

Generally young people require assistance in the implementation of the Outcome Plan. Options may include:

- Family member or support person
- Community member or agency
- Group conferencing provider
- Person funded via brokerage funds.
- The Group Conferencing provider organisation is primarily responsible for the preparation and delivery of the group conference.

**The Participants**

The young person's consent must be obtained for them to participate in a group conference. They have the process of a group conference fully explained to them as part of the consent process.
Approximately 50% of young offenders will decline involvement in group conferencing, when mention is made of meeting the victim.\textsuperscript{15}

Participation of the victim in the conference is voluntary. Their role is to:

- Present to the young person a description of the harm s/he has caused;
- Participate in identifying constructive outcomes of the conference including any plans for reparation; and
- Attempt to assist the victim in the process of coming to terms with the offence.

If during the pre-conference preparation, it becomes apparent that the victim does not want to attend a full group conference other alternatives can include:

- Representation at the conference by a victim representative;
- Indirect mediation; or
- Being allowed to take no further part in the conferencing process.

The conference allows the young person's parent(s), guardian(s) and/or significant other(s) to participate in the decision making process in an attempt to involve them in the justice process and promote better relationships between themselves and the young person.

The role of the significant other is important especially where the young person is isolated or there has been family conflict or abuse in the past. The significant other's role may include:

- Supporting the young person in the conference;
- Helping to formulate the outcome plan; and
- Mentoring the young person following the conference by establishing a positive adult relationship with him/her.

The role of the significant other is one of a mentor rather than a quasi-parent or social worker.

### Legal representative

The role of the legal representative is to monitor the conferencing process and to help ensure that the likely outcome of the case is no more onerous than if the young person had not chosen conferencing. It is also to help ensure that if the conference results in an outcome plan, that the young person freely accepts the plan. It is important to note that the role of the legal representative is to provide this input, rather than represent a client in a way that might reduce the active participation of the young person, or involve an adversarial approach.

### Police

Prior to the conference being held the police informant plays a key role in providing details of the victim to the convenor. Discussions with the informant may help inform the convenors decision whether or not it is appropriate for the victim to attend the conference.

The role of the police informant, or delegate at the conference is to clarify any factual matters relating to the offence and if appropriate, contributes towards the outcome plan. For example, the police informant may know of a local youth resource for the young person to be linked to and/or have suggestions regarding suitable community reparation activities.

### Victim agency

Victim agencies may assist the group conference program by providing support and advice to the victim and helping the convenor assess their needs. If the victim chooses not to attend a conference but still wishes some input into the group conference, a victim representative can present their views at a group conference. In addition, the victim representative may provide follow-up support and information to the victim after the conference has been completed where the victim has not been present at the conference.

The Neighbourhood Justice Centre (NJC)

Restorative justice for adult offenders has been incorporated into Victorian legislation for the first time with the Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic). The Act establishes the NJC Court which will hear matters including:

- Magistrates’ Court matters
- Children’s Court Criminal Division matters
- some Victorian Civil and Administrative Tribunal matters, such as civil claims,
- residential tenancies and guardianship matters.  

The NJC Magistrate hears criminal matters where the defendant lives in the City of Yarra. Civil matters are heard in a range of circumstances, including where the subject matter arose in the City of Yarra. The NJC also houses on-site services such as mediation services (provided by the Dispute Settlement Centre Victoria), legal aid, prosecution services, community corrections services, assessment services, victims services, referral to housing, drug and alcohol, employment and mental health services. These services can support and assist in the implementation of restorative justice practices. Normally the Magistrates’ Court has the power to defer sentencing for up to 6 months for a defendant aged 18 years but under 25 years who is found guilty of an offence. Under the Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic), this deferral of sentencing power is extended to defendants appearing in the NJC Court who are aged 25 years or older. Restorative justice conferencing could occur for adult offenders under this provision.

Issues Related to Restorative Justice

For many people the legal system appears to the general community as an indecipherable morass that proclaims high ideals but frustrates and annoys many who have to use it. Over the last twenty years the criticisms of the traditional court system in both its civil and criminal jurisdictions has risen to a continuous chorus of complaint.

It is the perceived shortcomings of the legal system that has added impetus to the interest in the alternative dispute resolution (ADR) movement that promises to provide a more cost effective, more available and more satisfying context for disputants. Most of the attempts to use ADR processes like

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17 Sentencing Act 1991 (Vic) s 83A.
18 Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic) s 4Q(3).
21 The following section is principally based on the article by Peter Condliffe, “The Challenge of Conferencing: Moving the Goal Posts for Offenders, Victims and Litigants”, Australasian Dispute Resolution Journal, No. 2, May 1998
mediation, case appraisal and conciliation have occurred in the civil sphere but in the last several years, in Australia, there have been several attempts to bring in similar innovations into the criminal justice system, particularly for juveniles.

For example a paper, “A Matter of Priority: Children in the Legal Process” produced by the Australian Law Reform Commission (ALRC) and the Human Rights and Equal Opportunities Commission, has found that many laws and legal processes failed to meet the obligations established under the United Nations Convention of the Rights of the Child. It also found that services and assistance for children were inadequate.\(^{20}\) The eighteen month investigation which led to the report found that there had been a national failure, in particular, to look after the most vulnerable children, those in need of care and protection. The research showed that Australians tended to either patronise or demonise young people, rather than adopt an approach designed to encourage self-esteem, individuality and a sense of responsibility.

Despite widespread media reports that there is a juvenile crime wave the research also found that there is absolutely no evidence of this. Nor was there any evidence of a collapse in standards either among young people or in the wider community. The report found that all facets of the legal system failed to accommodate the changing notions of children’s’ evolving maturity. Instead societies’ only interest seemed to be to protect themselves from it’s children. The available statistics certainly portray a grim picture.

Consistently the research shows that the majority of young offenders do not reappear in the juvenile justice system after their first offence. A small number of children who reoffend account for a disproportionately large percentage of Children’s Court appearances.\(^{21}\) Therefore only a small proportion of Australia's five million children have contact with the formal legal process. However, a majority of children have contact with the formal education system.\(^{22}\)

It is for this reason that conferencing and other ADR processes are also being utilised in some school systems. One New South Wales study on children serving control orders in detention centres found that 82.2% of the young people had left school before being incarcerated. Truanting or expulsion from school substantially increases the risk of young people becoming involved with the criminal justice system.\(^{23}\)

Group conferencing is claimed to benefit a range of people associated with this process in different and various ways: see Table below.

The introduction of conferencing programs across Australia has generally met with an enthusiastic response from youth advocacy groups, academics and bureaucrats but it has not been without its critics. Most of these developments in conferencing here and overseas have been pioneered by practitioners attempting to improve on the results that they could obtain within the tight strictures of the criminal justice system within which they worked. In this way they were a rather pragmatic response designed to particularly assist victims of crime and to prevent further crime.\(^{24}\) Academics and theorists have had


\(^{21}\) Ibid, p.10.

\(^{22}\) Australian Law Reform Commission, op. cit., p. 7: 3,109,337 children were attending Australian primary and secondary schools full time as of July 1995.


\(^{24}\) Marshall op. cit., p. 20.
to catch up with these developments both to explain what was and is happening and to better project planning into the future. The most popular theory that has emerged is called “Restorative Justice” or “Reparative Justice”.25

**TABLE 2: THE CLAIMED BENEFITS OF GROUP CONFERENCING**

<table>
<thead>
<tr>
<th>The Claimed Benefits of Group Conferencing</th>
<th>Uses age and developmentally appropriate dynamics to change the young person's thinking and behaviour;</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Focuses on addressing offending behaviour in a pragmatic and respectful manner;</td>
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<td></td>
<td>Models socially appropriate solutions to conflict;</td>
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<tr>
<td></td>
<td>Avoids excessive and longer term criminal justice interventions;</td>
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<tr>
<td></td>
<td>Encourages the family, family group and/or significant others to support their young person;</td>
</tr>
<tr>
<td></td>
<td>Enables the young person to contribute to an outcome plan;</td>
</tr>
<tr>
<td></td>
<td>Allows for reparation to the victim directly or indirectly where appropriate; and</td>
</tr>
<tr>
<td></td>
<td>Facilitates an opportunity for restoration to the family, family group and reintegraiton within the community.</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>The young person's family/family group because it:</th>
<th>Enables effective participation in the decision-making and planning process;</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Shares the responsibility for supporting the young person with other members of his/her support network; and</td>
</tr>
<tr>
<td></td>
<td>Examines the impact of the young person's offending on his/her family/family group.</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Victim/s because it:</th>
<th>Allows for active participation in the justice process;</th>
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<tbody>
<tr>
<td></td>
<td>Reduces the cost of follow-up counselling through facilitating a 'healing' resolution;</td>
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<tr>
<td></td>
<td>Enables victims to benefit from reparation where appropriate; and</td>
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<tr>
<td></td>
<td>Consults victims in a respectful and non-adversarial manner.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>The community because it:</th>
<th>Encourages improved community relationships with young people; and</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Promotes healing and a restoration of harmony in the community.</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>The justice system because it:</th>
<th>Offers an alternative sentencing and diversion option to the courts;</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Promotes improved victim satisfaction with the justice process; and</td>
</tr>
<tr>
<td></td>
<td>Promotes the community's trust in the justice system.</td>
</tr>
</tbody>
</table>

| Cultural Diversity | By encouraging the involvement of family members and/or other persons significant to the young person, these programs aim to better recognise the cultural diversity of a participant and the connections that can be gained from broader family and community involvement.26 |

The restorative model of justice is based on a number of principles outlined in the table below. It is a model often defined in opposition to the traditional or what is called the “retributive model of justice”.


Restorative justice attempts to place the victim with the offender at the centre of the process. So instead of defining crime simply in terms of a violation of the state, it wishes to define crime in terms of the violation of one person by another. The focus is upon providing a forum for the offender to take responsibility and to make amends rather than to establish guilt and exact punishment. The potential benefits are obvious and especially so for victims who, rather than being spectators to a process which they do not fully understand, can participate and speak their feelings directly to the person who has caused the injury. Victims also can attempt to seek answers to questions about why the crime occurred and participate in the process of working out how the injury and damage can be repaired. On the other hand offenders have an opportunity to admit their offence and to understand the consequences of their behaviour on others and also participate in how to make things right. Restorative justice therefore attempts to move the emphasis from guilt and punishment to responsibility and reparation. In this model justice is achieved through the offender taking responsibility for their actions and taking steps to make reparation.
<table>
<thead>
<tr>
<th>Retributive Model of Justice</th>
<th>Restorative Model of Justice</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Crime is a violation of the state.</td>
<td>1. Crime is a violation of one person or community members by another person or community members.</td>
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<tr>
<td>2. The emphasis is on blame or guilt.</td>
<td>2. The emphasis is on problem solving and restoration of harmony.</td>
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<tr>
<td>3. Intent and motive are important elements in defining justice.</td>
<td>3. Restitution and reconciliation through a process of dialogue and negotiation define justice.</td>
</tr>
<tr>
<td>4. The community is secondary.</td>
<td>4. The community is involved as a facilitator.</td>
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<tr>
<td>5. The offender is central to the process and the offender is made accountable through punishment.</td>
<td>5. The offender is made aware of the effects on the community.</td>
</tr>
<tr>
<td>6. Offences are defined in strictly legal rather than moral, social, political or economic considerations. Past behaviour is significant.</td>
<td>6. The context of an offence is important, including moral, social, economic, political and other considerations.</td>
</tr>
<tr>
<td>7. Criminal behaviour carries a heavy social stigma.</td>
<td>7. The stigma of the offence is moderated through a process of reconciliation.</td>
</tr>
<tr>
<td>8. Remorse, restoration and forgiveness are relatively unimportant.</td>
<td>8. Remorse, repentance and forgiveness are important.</td>
</tr>
<tr>
<td>9. Professionals play a central role on behalf of usually passive clients.</td>
<td>9. Participants (offenders and victims) in particular take an active role.</td>
</tr>
</tbody>
</table>

The Australian academic John Braithwaite developed and added to the theory of restorative justice with his theory of "reintegrative shaming". He argues that traditional criminal justice sanctions shame without offering reconciliation and therefore end up as alienating and crime-reinforcing experiences. However, he argues that shaming may be positive in a natural community or family context, and therefore conducive to reform. Within the conferencing process shaming occurs but it does so in a way which is positive for the offender as it occurs within a context of reconciliation. It is often an emotion charged confrontative process where feelings of anger, frustration, remorse and relief can be played out.  

**Implementation Issues**

The Victorian Parliament Law Reform Committee identified net widening and seven other issues relating to the use of restorative justice in the criminal justice system. These were:

- offences to which restorative justice processes apply
- offender participation rates

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• the age of the offender
• referral to restorative justice programs
• mandatory participation in restorative justice programs
• the impact of participation or non-participation in restorative justice programs
• sharing knowledge about ‘what works.’

There are a considerable number of major issues that emerge in the development of restorative justice programs. These include co-existence with the traditional criminal justice system; net widening; community alienation and the over emphasis on individuality. I will deal with each of these briefly in turn.

A recent critique of restorative justice point out that people who would want the wide scale implementation of restorative justice programs have three choices. They may:

- Try to gradually replace traditional correctional practices with restorative justice programs.
- Attempt to allow restorative and traditional programs to co-exist independently of one another.
- Try to integrate restorative practices into the repertoire of the state’s court correctional interventions.29

The first choice is bound to be hindered by resistance from the established political and correctional infrastructures. The central feature of the justice model of western societies is that the state has dominant control over deviants, exercised through well established institutional frameworks. The second choice implies that decisions must be made as to which cases are appropriate for restorative justice programming. Evidence so far indicates that restorative justice is likely to be used in only a fragmented fashion for less serious offences and limited to juveniles. The third choice would mean the attempted implementation of restorative justice practices in agencies which are occupied with bureaucratic needs and interests, which can be antithetical to it. This can lead to corruption of the restorative practices.

My own experience, some years ago on the Attorney-General's Working Party on the Criminal Reparation Scheme (1992), which inter-alia, looked at questions of implementation of victim offender mediation within the Queensland criminal justice system was instructive. It made clear to me the difficulties of implementing a modest victim offender mediation program into a system that was not prepared for or perhaps sympathetic to it. I did not fully understand the structural constraints or opposition that may be encountered. In that case despite a reasonably well thought out report justifying the program, committed staff and the backing of several Ministers the program failed. This is not to say that the individual cases that have gone through the program have not been successful or well managed. The simple fact is that the existing court structures have not seen the merit of referring many cases into it.

Bureaucracy

Traditional criminal justice systems operate within highly bureaucratic frameworks. Emotion is jettisoned from vocational bureaucratic duties as civil servants become specialised and professionalised. Compassion and understanding are desirable outcomes of restorative practice, but these feelings may not be so forthcoming in settings where they are made subservient to bureaucratic priorities. The other concern is that restorative programs could become part of the mentality that cheaper control is better

than no control at all, and the aims of restorative justice will become secondary to fiscal objectives. The work of Foucault has illustrated how correctional systems have moved from being emotionally charged public spectacles to ones which are hidden from public view and administered by bureaucrats striving for rationalised management of punitive processes.\textsuperscript{30} This movement away from the public eye has caused criminal justice processes to be less emotionally charged, but with the result that the community feels alienated from them. This leaves a dilemma for those who would want to implement restorative justice programs. On the one hand, if such programs were tied to the existing criminal justice bureaucracy, the greater the potential for community alienation from them. On the other hand, those that are not tied to criminal justice bureaucracies are likely to experience difficulty in being widely implemented.

**Extending Social Control**

Another point worth some thought is that restorative justice programs can be viewed as another way of extending social control mechanisms. This net widening occurs when a program such as the community conferencing program, which is designed to represent an alternative to more formalised and punitive intervention, takes in people who would have had less or no action taken against them if the program had been unavailable. For example, there may be a danger that cases, which are too hard to prove in court, may be referred by police to conferencing instead. In this way, increasing numbers of people are pulled into the criminal justice system and state control is extended. This is bureaucracy’s justification for allocating more funds and creating new agencies and programs. The process feeds on itself, because once such agencies and programs are created, they must be used. When such a phenomenon occurs, often such programs derive their credibility and power from the threat of greater sanctions being applied against offenders.

**Theft of Crime**

Restorative justice advocates often argue that the criminal justice system represents the theft of crime by the state out of the hands of the victim and the offender. They argue that the real issues lie between these particular individuals (victim and offender) and the state should be kept completely out or, at least in the background. These arguments can be traced back to the seminal article by Nils Christie in 1977.\textsuperscript{31} However, the English theorist Tony Marshall recently argued we would probably regret it if the state did keep out of these matters and in that any case Christie’s argument is basically flawed because the state does have a stake in right behaviour and stable social relationships.\textsuperscript{32} This is because crime is a product of social processes for which we all collectively bear some responsibility. Any of us could be a victim and we are all victims in some way. If we therefore concentrate too much on the relationship between the individual victim and the individual offender we may fail to deal with the greater social issues that arise out of these wider relationships between parties, communities and society and, also with the state.

**Public Sentiment**

Further, even though restorative justice may provide a more constructive basis for crime control, it will need to mesh better with public sentiments about crime, and responses to it, if it is to be widely implemented. Unless the community comes to learn about and appreciate the value of restorative justice programs, there might in fact be a backlash against them. Calls for greater punishment emanating from the community may result in restorative justice programs adding to rather than
reducing levels of punishment. And so it is necessary for reformers to understand the possible connections between these various issues and crime if restorative justice programs are not be reduced to a panacea.

Tom Fisher and Carmel Benjamin in their introduction to a course on victim offender mediation (1998) pointed out that in the latter half of the 20th century, the growth of the victim movement both highlighted and exacerbated problems of the criminal justice system. It did this by raising issues concerning the rights of victims of crime and the difficulties of enforcing those rights. Perhaps not surprisingly, drawing attention to the plight of victims tends to generate myths and feed ideologies in which revenge plays a major role. One of these with disturbing currency and deceptive credibility is that giving rights to victims of crime, such as those who have been assaulted, has some direct correlation to the status of accused persons. This focus on rights and retribution plays into a philosophy of a purely punitive law. In some circles it gives rise to fears that the victim ‘movement’ may be hijacked into ‘radical victimology’, a worldwide phenomenon that is particularly visible during election campaigns to further the law and order concerns of vested interests.

Today, to the outside observer, punishment and retribution as a primary response to crime might seem more securely established than ever, notwithstanding the efforts of concerned criminologists and commentators, who struggle to find satisfactory and viable options within, parallel to, or co-existing with traditional criminal justice processes. A purely punitive law can readily mask the importance to the victim and to the community of an offender’s acceptance of responsibility for wrongdoing, a psychological moment defined by the experience of an offender’s remorse and the victim’s act of forgiving. It is a time when true rehabilitation can begin for both parties. It is a time when victim/offender mediation can provide an appropriate and positive mechanism through which restorative justice can be introduced and lead to creative change for all concerned. As Mace succinctly stated:

Mediation is not a panacea, but it is an encouraging element in the growth towards a more directly responsible and healing community approach to dealing with crime. For the victim, it offers the opportunity to participate actively in the resolution of offending and its consequences, in putting right a wrong that has been done. The offender involved in mediation is directly confronted with the responsibility for what has happened, and is less likely to project blame or fault elsewhere and more likely to do something that will have positive meaning for the victim. For a proportion of offenders, the learning and attitude shift that occurs is profound and brings about real and lasting changes in their lives and outlook.

Conclusion

Victim/offender programs present some of the most difficult philosophical, ethical and practical issues for service providers. These concern the balance of power between the participants; the power of the State (in the combined authority of Parliament, the courts, police and corrections services) as a silent but all-powerful third party in, and to, the ‘dispute’. Added to this are critical principles surrounding ‘voluntariness’, ‘confidentiality’ and ‘plea bargaining’, which give rise to questions of the human rights

and civil liberties of participants and underscore the importance of dedicated, highly skilled and highly trained mediators/convenors as service providers.

It is in the presence of skilled mediators/convenors, and in a ‘safe’ environment, that the offender meets his/her victim and takes concrete steps towards rehabilitation through the acceptance of accountability and responsibility for wrongdoing. A focus on the harm caused acknowledges the needs of the victim, who in turn has the opportunity of addressing the person responsible and dealing with the effects of the crime. It is a time in which forgiveness can play a critical part and healing can commence.

The traditional criminal justice system provides sanctions for criminal behaviour. The use of mediation and conferencing is not intended to undercut these but to supplement them. The key question is can the two approaches readily co-exist and provide a constructive response to crime that addresses the needs both of society in general and the individuals concerned.