

*Victims of Crime: Working Together to Improve Services Conference*

**Victim Support Service, Adelaide**

**“Diversionsary Programs in the Criminal Justice System and  
Their Effects on Victims:  
a victimological perspective”**

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***Abstract***

*The introduction of specialist courts in South Australia has changed the current administration of criminal justice in this State to a significant degree. Their presence has added to the diversionary options available to sentencers. Moreover, specialist courts have embraced anew the view that focusing on offenders' needs and treatment will aid crime prevention efforts. At the same time South Australia is a jurisdiction that takes pride in its history and enlightened attitude on the subject of victim concerns. Now that some aspects of the criminal justice system, into which the victims' movement has carefully positioned itself, have shifted the focus to offenders, what may be the effects on victims? This paper reviews first some historical reflections on victims' rights in South Australia, then describes briefly some of the specialist programs that have been implemented or are in the process of being implemented. Finally, the paper offers some common ground with victim issues and makes suggestions for the future. It maintains that diversionary justice practitioners need not lose sight of victim concerns. It is not a foregone conclusion that victims and their needs will be forgotten in the rush to individualised justice, especially if policy-makers and administrators explore the principles of 'restorative justice'.*

## Discussion

### ***Proposition 1: Victim considerations have been playing an important role in South Australian criminal justice administration for at least the last twenty years***

Detailed research into the needs of victims and the offender-victim relationship only began, worldwide, as recently as the 1940s. Even then, research was conducted merely as part of an effort to gain a better understanding of the causes of crime. Prior to the 1970s, in our common law tradition, the Crown's decisions concerning proceeding with a prosecution, negotiating with defence counsel, protecting the community at large and rehabilitating the offender occurred, for the most part, outside of considerations of victims' interests. The Crown could not have been seen to be representing the victim, it was determined, lest there be allegations by defendants that their rights had been compromised unfairly (see generally Grabosky, 1987, Whitrod, 1986).

Specific victim-centred initiatives in South Australia had their origins in August 1979. In that year, the government established a Committee of Inquiry on Victims of Crime. The Tonkin Liberal government report (South Australia, 1981) made a number of recommendations that laid the foundation for legal and administrative reforms over the ensuing years. In 1985 South Australia became one of the first jurisdictions in the world to endorse the *United Nations Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power* by promulgating a specific Declaration of Rights for Victims of Crime. This document was designed to state a range of principles relevant to victims at a number of key stages in the justice process, essentially in relation to access to the courts, fair treatment, restitution, compensation and assistance (Erez *et al*, 1996, p 206, Cook *et al*, 1999, p 84; Zdenkowski, 2000, p 168). The then SA Labor government Attorney-General, Chris Sumner, in his second reading speech for the *Statutes Amendment (Victims of Crime) Bill* in that year, listed the seventeen 'rights' that had been endorsed at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan, Italy, during August 1985 (Sumner, 1987, Sumner and Sutton, 1990). Governments were encouraged to incorporate the rights into policy and practice as far as possible, and the South Australian government was quick to do so.

The seventeen rights are as follows, in an abridged form. (see also Findlay *et al*, 1999, pp. 344-5; Hansard, 1985).

The victims of a crime shall have the right to:

1. be dealt with at all times in a sympathetic, constructive, dignified and reassuring manner;
2. be informed about the progress of investigations;
3. be advised of the charges against the accused;
4. have a comprehensive statement taken at the time of the initial investigation of the harm done and the losses incurred;
5. be advised of justifications for accepting a plea of guilty to a lesser charge;
6. be advised, with sensitivity and tact, of any justifications for the withdrawal of charges;

7. have property held by the Crown as evidence returned as soon as possible;
8. be informed about the trial process and the rights and responsibilities of witnesses;
9. be protected from unnecessary contact with the accused and defence witnesses during the course of the trial;
10. not have their address disclosed unless it is deemed material to the defence;
11. not be required to appear at any preliminary hearings unless it is deemed material to the defence;
12. be entitled, during a bail application, to have their need for physical protection put before a bail authority by the prosecutor – as enacted in the *Bail Act (SA) 1985*, section 10;
13. be advised of the outcome of all bail applications and be informed of any conditions of bail;
14. be entitled to have the full effects of the crime upon them made known to the sentencer – the ‘victim impact statement’ – as enacted in the *Criminal Law (Sentencing) Act (SA) 1988*, section 7<sup>1</sup>;
15. be advised of the outcome of any criminal proceedings and the sentence;
16. be advised of the outcome of any parole deliberations;
17. be notified of an offender’s impending release from custody.

Have victims reason to feel that these rights have been compromised, or potentially compromised, by the newly emerging diversionary practices and justice initiatives, such as specialist courts, being introduced in South Australia currently? At this stage, evaluations have not been undertaken, and thus answers informed by empirical evidence are not yet available. What follows is simply a discussion that explores how these shifts in criminal justice choices may affect victim issues. The task of assessing whether diversionary options have had a beneficial or deleterious effect upon victims generally is made difficult, however, by the inconclusive and often contradictory benchmark of victims’ interests in the traditional criminal justice setting, a setting that has struggled for decades to reconcile victims’ concerns with concerns for offenders’ rights (Sarre, 1999a). It is also hampered by the fact that many offenders are victims as well. It is simply not appropriate to adopt a theoretical position that cannot accommodate some overlap between those who cause harm and those who are on the receiving end of it.

***Proposition 2: Victims’ interests do not square easily with the new-found focus on offenders in specialist courts and other diversionary options***

There are pragmatic and philosophical difficulties facing any jurisdiction attempting to develop consistent and plausible diversionary strategies for offenders, while remaining cognisant of victims’ interests. When designing specialist courts and other diversionary programs and practices, policy-makers are likely to have, in the forefront of their minds, offenders’ interests, not the interests of their victims. Indeed, not one of the traditional justifications for punishment, let alone those inspiring the ‘new’ diversionary themes, makes victims’ interests a principal focus. If the purpose of punishment is to rehabilitate the offender, rehabilitation reviews the

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<sup>1</sup> South Australia was the first Australian jurisdiction to introduce a VIS by legislation. It came into effect 1 January 1989 and its mechanics are explained in Erez *et al*, 1996, p 207ff.

offender's future prospects, not those of the victim. If the purpose of punishment is deterrence or denunciation, then the sentence is to be certain and predictable, not subject to the evidence of any specific impact of the offence upon victims. If the purpose of punishment is public retribution, then the punishment must, as far as possible, fit the crime as prescribed by the state, and not be subject to the whim (forgiveness or vengeance) of the victim. Although restitution and incapacitation are sentencing considerations that may have a bearing on some victims, these are not factors that dominate the sentencing process in the same manner as rehabilitation, deterrence and retribution (Tomaino, 1999, p 165, Sarre, 2000).

Offender-based, diversionary practices are designed to remove defendants from the intimidation of formal court settings, if that is at all possible. The impetus for such 'de-structuring', White and Perrone (1996, p 177) suggest, came from a combination of factors, including high remand numbers, high recidivism rates, high costs, and the negative impacts of conventional methods of punishment – if not the system itself (Feeley, 1979) – on rehabilitation and reintegration of offenders into wider society. Keeping people out of the system at the 'front end' became the catch-cry of diversionary policy-making. These themes have been heightened under the current moves towards specialist courts and other diversionary practices.

It is now worth reviewing some of these models. While the evaluations have tended to suggest that the reforms have not always achieved their sometimes lofty aims – sometimes people are merely diverted into a less formal, bureaucratic apparatus rather than away from the system entirely (Cohen, 1985) – nevertheless it has generally been agreed that diversionary programs can bring about lower recidivism rates than the employment of other more formal options (Sarre, 1999b). One can draw from the examples that follow a consistent theme: that offender-based, less formal programs of diversion or specialisation have the potential for preventing some criminal activity. Of course, many of these schemes are still in their 'pilot' stages and one needs to question, of course, their long-term viability, especially in relation to persistent and habitual offenders. Be that as it may, the various projects are presented here and opened for scrutiny.

### ***Aboriginal Court Day***

The Aus\$40 million Royal Commission into Aboriginal Deaths in Custody (Royal Commission, 1991) was a milestone down the continuing road of justice reform in this country. The key conclusion to come out of this report was that too many Indigenous Australians are coming into the formal justice setting. Its key recommendation, therefore, was to encourage jurisdictions to consider ways to reduce Aboriginal rates of imprisonment (Cunneen and McDonald, 1997). The notion of an Aboriginal Court Day, while not being mooted in the 1991 report specifically, is an example of a contemporary idea that would have received acclaim from the Commissioners as involving a significant degree of Indigenous input in its planning and execution (South Australia, 1999a, 1999b). Similarly, one could cite the memorandum of understanding, signed in September 1999 between the South Australian State government and the elders of the Anangu Pitjantjatjara Lands, to enable the Umuwa community to self-supervise offenders on community service orders, parole and probation, as an example of a less formal justice setting designed to reduce re-offending.

### ***Family conferencing***

The well-researched ‘family group conference’ juvenile justice model provides another example of a justice forum separate and apart from the formal system that has shown encouraging evidence of success (eg. Strang 2000, p 24). The offender(s), their extended families and advocates (if appropriate), the victim(s) and their supporters, and the police are brought together with an independent facilitator. In South Australia the independent facilitator is a trained justice coordinator. Offenders are urged to confront their wrongdoing (for the most part, in South Australia at least, the less serious offences) while being allowed to develop their own negotiated outcome. The aim of the process is to bring about reconciliation and reparation, not to exact punishment. Offenders, it has been found in evaluative studies, are more likely to respond to their justice experience positively when they perceive it to be fair, and the evidence is clear that conferencing programs do give rise to favourable perceptions (Strang 2000, p 27).

### ***Drug courts***

Drug courts provide another example of the trend towards diversionary justice structures referred to by one commentator as “new rehabilitationism” (Zdenkowski, 2000, p 162). The court’s attention is focused on treatment and rehabilitation of the offender who appears before it. Prosecution and defence teams work cooperatively rather than in an adversarial fashion. The judge, in the American experience at least, is not an independent arbitrator, but becomes actively involved as a “confessor, taskmaster, cheerleader and mentor” (Inciardi *et al*, 1996, p 71, cited in Makkai, 2000, p 81). There are still a range of implementation problems to overcome before the effects of such courts on crime rates and victimisation rates can be assessed accurately in Australia (Makkai, 1999). But American evaluations show good success rates in terms of less drug use and lower recidivism rates (Makkai, 2000, p 81).

### ***Drug Assessment and Aid Panels***

The South Australian Drug Assessment and Aid Panel, established in 1985 under the auspices of the *Controlled Substances Act (SA) 1984*, is a pre-court diversionary program designed to divert people caught with possession of illicit drugs for personal use away from the courts and to the Panel, placing pre-eminence upon the medical, rather than criminal, nature of the problem. There has been, in this context, specific attention given to Aboriginal offenders (ADCA, 1996a, p 8). Unless offenders wish to defend the matter in court, fail to adhere to the requirements of the Panel or are found unsuitable by the Panel, their matters are not referred to the courts and no conviction is recorded (ADCA, 1996b, p 14). The continued operation of the Panel bears testimony to its practitioners’ perceptions of its ability to reduce criminality through an offender-focused treatment regime.

### ***Proposition 3: Victims’ interests can, however, find some common ground with offender-based initiatives***

#### ***Common ground in a less formal justice setting***

While it is possible that a focus on the offender may diminish official sensitivity to their victims, there is nothing *mutually exclusive* about the reform associated with

diversionary programs and the development of specialist courts. In other words, just because one element of the criminal justice process receives pre-eminent attention, it is not axiomatic that, thereby, other aspects of the process are ignored. It is worth remembering that victims, too, are likely to find that a formal court environment often robs them of the outcomes they may be seeking. It was incontrovertible a decade ago that many victims were dissatisfied, unhappy with or upset by what happened to them in and around court, and, although significant reforms have occurred since, the fact remains that courts can be highly inhospitable places for victims.

“Julie Gardner’s survey of 52 South Australian victims who had appeared as crown witnesses in 1990 ... found that victims were very unhappy. They resented the amount of time that they had to spend waiting in court as well as the facilities offered to them while they were there. In addition, many were distressed by having to encounter the offender or the offender’s family and friends in waiting rooms, corridors, toilets or at the entrance to the court” (Israel, 1999, p 235).

Thus, reforms that endeavour to destructure the formal justice process may hold something for victims, too, in removing the potential for injustice that is likely in a ‘one size fits all’ approach. Just as specialist courts, for example, allow significant interplay between judges and the parties that appear before them, so greater levels of informality may be more accommodating to victims who feel that formality has denied them a voice and frustrated their comprehension of the process in the past. In other words, there is no fundamental incompatibility between the rights of victims and the rights of an accused person to participate in the proceedings and to understand what is happening (Grabosky, 1987, Sarre, 1994, p 204; Brown *et al*, 1996, pp 1366-68, Zdenkowski, 2000, p 169).

### ***Common ground in ‘restorative’ theories and practices***

There is great value also in seeking out the principles of *restorative justice* in order to find other common ground. These principles are often expressed in different ways, but some clear themes emerge. In models of restorative justice, there is

1. shared responsibility for resolving crime and for one another,
2. the use of informal community mechanisms in addition to the involvement of criminal justice professionals,
3. the inclusion of victims as parties in their own right,
4. an understanding of crime as injury, not just law breaking,
5. an understanding that a state monopoly over the response to crime is inappropriate (Sarre, 1997, 1999c).

In a traditional model of criminal justice, crime is defined as a violation of the state, the focus is on blame, deterrence and punishment, and the offence is defined in purely legal terms, devoid of moral, social and political dimensions. In a restorative model, crime is defined as a violation of one person by another, the focus is upon problem-solving, dialogue and restitution (where possible), mutuality, the repair of social injury and the possibilities of repentance and forgiveness. The offence is understood in a range of dimensions, including moral, social and political.

Immediately, some parallels between offender-based practices and victim-sensitive practices become apparent. A judge, specialist magistrate or trained justice coordinator is not unlikely to seek a victim impact statement, or to divert the offender to a restorative option that may involve victim-offender mediation. He or she may be more ready to choose a family conference setting (if available) since that setting is likely to involve a victim, an apology, and a commitment to restitution. Evaluations of victims' reactions to 'restorative' models of justice in New Zealand, the United States, Canada and the United Kingdom indicate that there are high levels of victim satisfaction where restorative, rather than retributive, models of justice are used (Lederach, 1999; Wilson, 1999, Strang 2000, p 26). Hence, it is possible to argue that victims' rights need not be compromised, indeed may be strengthened, in a system committed to restorative principles.

This is not to say that the trend towards individualisation is immune from criticism from those who seek to champion victims' interests. Laster and Erez (2000, p 252) are of the view that diversionary practices that pursue 'neo-liberal' notions of individual responsibility, especially through the negotiated (and often private) outcomes of restorative models, co-opt victims into participating in a ritual that cannot deal with the causes of crime. That is too pessimistic a conclusion, however, since it assumes that traditional models of criminal justice administration are assisting to a significant degree the criminological quest, which is simply not the case. It is possible, indeed, to assert that individualised, offender-based justice initiatives not only confront the causes of crime, but do so in a way that allows victims to play a role in the process. For example, a family conference arising out of a case of vandalism may uncover deep-seated frustrations that have marred the relationship between offender and target. This diversionary scheme may now be in a better position than a traditional court to pose solutions that are acceptable to offender and victim alike. Perhaps the appropriate way to proceed in light of Laster and Erez's caveat is to ensure that any evaluations of diversionary programs or practices, and especially specialist courts, insist upon the use of criteria that seek to determine the impact of any initiative on victims' rights and victims' interests generally. That may include a consideration of whether involvement of victims frustrates or enhances the rehabilitation prospects of offenders, and whether such involvement enhances an examination of the causes of the offending behaviour. In other words, it is not axiomatic that restorative models make victims into stooges. If that is happening, then a evaluation should seek to find out why, and to make suggestions for change.

## **Conclusion**

Will any of the legislative initiatives to give offenders more individualised, specialised and diversionary justice make any difference to, or have any adverse impact upon, victim concerns? A victimological commentator may have good reason, initially, to be pessimistic. Victims' interests in the criminal justice system have been high on the political agenda in South Australia for twenty years, but their niche was carved out before the latter-day diversionary emphases came into being, initiatives that pursue very individualised processes that focus primarily upon offenders. Furthermore, although the official goal of the criminal justice system is to serve the public and thus the victim, the unofficial goal is to operate expeditiously to

deal with offenders, and there may be a temptation in an individualised justice setting to down-play or omit extraneous factors (such as victims' interests, victim impact statements and so forth) from the process altogether.

There are signs of hope, however. It is not unlikely that a justice setting involving an activist facilitator, a specialist court or a more informal setting may be quite conducive to victims' concerns, especially if the process remains open and if the victim is kept informed of the process and invited to participate at strategic points. In other words, the moves towards greater informality are not exclusively beneficial to offenders. Moreover, in a world of 'restorative' justice, where offenders and victims are brought together in a setting where crime is seen as injury, not just law breaking, and where administrators are committed to outcomes that lead to reduced offending overall, there can be much common ground.

The final picture, in the absence of specific evaluative data, however, is not entirely clear. The fact remains that lawyers, judges, courts and the public at large are still unsure about how best to accommodate both the rights of the victim and the rights of an accused or convicted offender. Diversionary scheme practitioners are still coming to grips with the difficulties that are presented in theory and practice by the processes of deconstructing. The time is ripe, however, for more diversionary initiatives to be explored, implemented and evaluated in order to discover the sorts of solutions that will deliver the outcomes desired and required by offenders and victims alike.

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