

# **NATIONAL VICTIMS OF CRIME CONFERENCE 2008**

## **Reform, Participation and Accountability, Response**

### **Exploring New Pathways Forward**

## **Victim-offender Mediation: Reparative Mediation**

In a world that embraces technology, our global society undergoes transformation and change in all facets of human experience and interaction with unprecedented velocity. The fixed and often rigid social, political, and legal infrastructures struggle to keep abreast of a dynamic and complex populous. In an increasingly consumerist and individualistic society, with subsequent changing ideologies, the challenge is for our organisational structure to maintain a presence and an accountability in order to best guide and manage a divergent society. With rapid change comes increased responsibility and hence the need for greater awareness, consideration and accountability from our governing establishments. In such an environment, the judiciary and binding legislative framework seem almost archaic with an incapacity for immediate response to social change and a pretentious, often impenetrable sanctuary through its detachment from everyday society. The focus on what constitutes a criminal act and determining an appropriate punishment has seen the law dissociate from the crime itself and by association the traumatic consequence on the victim. Social and moral responsibility demands the law be more responsive and considerate to humanistic needs.

Support for the restorative justice movement has gained increasing momentum nationally and internationally over the past decade, and this can be evidenced by the growing numbers of practitioners who welcome principles of therapeutic jurisprudence and embrace alternative sentencing regimes. The term 'problem solving courts' has even been introduced to account for the growing number of specialist courts that attempt to focus on the underlying criminogenic needs of the offender, rather than just the offence. In order to achieve this a cohesive team of professionals provide information to the court in an on-going and often lengthy process which

attempts to best decide a course of action for the offender that sees offending dealt with in a manner which is rehabilitative, therapeutic, inclusive and appropriate from a holistic perspective rather than simply a legal one. It crosses the adversarial divide between the judiciary, prosecution, defence and incorporates advice and guidance from professionals of the social science sphere of influence. It requires an inherent transparency with regard to information dissemination and recognition that what is legally the best outcome for an offender may not necessarily equate with what is morally, emotionally, psychologically or socially the most beneficial course of action. In court environments such as these, the right conditions exist for the principles of restorative justice to flourish and develop.

Although the focus of this paper thus far seems very much restricted to offender needs, it was important to highlight the enormous reframing required of many practitioners and members of the judiciary to approach the law with a humanistic framework rather than being purely adversarial. For the shift to now become a focus on engaging victims of crime with a real commitment to incorporate their views and opinions, and to do so with a legal infrastructure systemically flawed by its lack of inclusivity, you may now begin to understand the enormity of the task as it currently stands. By utilising principles of restorative justice and therapeutic jurisprudence, it is an opportunity for those committed to treating victims with a recognition and acknowledgement they deserve, to neatly circumvent the more traditional, conservative and entirely exclusive legal system.

The fundamental principles of restorative justice lie in focusing on the harm inflicted and experienced by individuals in the wake of crime, and by providing those directly impacted upon with an opportunity to address the harm, often through dialogue. It is increasingly seen as presenting an answer to the obvious failings of the conventional criminal justice system, by necessitating a re-conceptualisation of criminal justice in terms of a new paradigm, namely the engagement and empowerment of the victim. Victim-offender mediation is an integral component of restorative justice theories as it is built on a foundation of allowing those most impacted by a crime to be directly responsible for holding the offender accountable. This is achieved by providing information and support to those who have been victimised, by engaging and encouraging the involvement of victims in the justice process (and by association the

wider community), as well as restoring harm caused by the offence to the greatest degree and in the most meaningful way possible.

The Victim-offender Mediation Unit (VMU) is funded by the Western Australian government and based in Perth. It has been in existence since 1992 when it originated as a forward thinking and very progressive service provider of Reparative Mediation. In the intervening years it has branched out to specialise in a number of services including the Protective Conditions Process and Victim-offender Dialogue. The focus of the following discussion however is on the Reparative Mediation service and will provide a brief overview of the state wide expansion and service provision refinement initiated in 2003. Continuing from that, attention will be brought to the positive direction the Unit has taken in providing a service to the courts and community that engages and empowers victims of crime whilst instilling an awareness in offenders and encouraging an acceptance of responsibility and accountability.

In direct response to the Attorney General's reform agenda of 2003 which included increasing victim and community involvement in the criminal justice system, the reparative mediation service underwent a modification in service provision that saw it acquire a heightened standing within the Western Australian court system. With the placement of a dedicated mediation officer in court, the profile and accessibility of our service was immediately increased. This also afforded the mediation officer an opportunity to liaise with various stakeholders and educate them as to what can be achieved in terms of outcomes for their clients, as well as being a constant visual reminder to the magistrate regarding the availability of the service and a gentle prompt to consider referring matters before them. The initial roll out of the revived service was undertaken in the Chief Magistrates Court in the Central Law Courts (Perth) in May of 2003. This proved highly successful and to date similar systems have been set up in each of the six metropolitan magistrates courts and nine major regional centres (and where required circuit courts within these jurisdictions) and most recently, by introducing a dedicated mediation officer to the Perth Children's Court. In addition mediation officers are also utilised to provide an intervention with appropriate clients engaged in problem solving courts such as the Drug Court and the Kalgoorlie Community Court which offers a culturally sensitive experience of the

criminal justice system for Indigenous clients who choose this option over the traditional version.

The problem of offering a clear inventory of the goals and objectives with respect to the reparative mediation service lies in the variation and complexity of desired outcomes. Due to the nature of the work undertaken by VMU and the specific context in which it is positioned, achieving dual objectives in each case by meeting the requirements of diametrically opposed parties, (namely the victim and the offender) requires clear boundaries in respect of the mediation officers role. The apparently incongruous objectives need to be acknowledged and out of necessity reframed, to ensure the service in each case is tailored to individual needs rather than specific objectives. This approach has broadened the scope for what can be achieved, and as a consequence significant strength has been found in the capacity to be flexible and adaptable, rather than bound by strict and rigorous procedural guidelines.

In a broad sense the VMU attempts to encourage the participation of the people most directly impacted by the crime in working towards a resolution for the crime, and in doing so, provide a restorative conflict resolution process that is perceived as inherently fair to participants, namely the victim and the offender. In focussing on victim orientated goals, the strive is to attain the direct involvement of the victim in the criminal justice process by enabling them to describe the harm they have suffered, to receive answers to questions and to directly influence the accountability of the offenders. Offenders are positioned to be held directly accountable for their behaviour and actions, by giving them a chance to repair the damage they have caused, to accept responsibility for their actions, to display a more human element or dimension of their character and in achieving this, to have mitigation considered in sentencing. In looking further afield and with broader parameters, we also consider that there are secondary goals that can be achieved via the reparative service such as crime prevention, offender rehabilitation, victim assistance, victim empowerment and to raise the profile of victims in the court process and agenda.

In concentrating on the outcomes of the reparative mediation service, the intangible benefits will often far outweigh (and be more reliable than) the tangible recompense offered by the court. Such themes as forgiveness, closure and restoration are reflective

of the potentially enormous philosophical movement victims and offenders need to achieve in order to find meaning and resolution for the offence and reach an acceptance (albeit sometimes stoical) for its occurrence and construct a rationalisation regarding their involvement in it. A significant and powerful component of restorative justice outcomes is in the fact that they require an engagement far beyond what would be expected and anticipated in the criminal justice system, as they focus on the humanistic and emotional needs rather than pragmatic property concerns. In doing so they become a far more versatile, accommodating and provocative option for sentencing courts. In respect of the offender it has the capacity to be confronting, challenging and a catalyst for self-awareness, insight and a genuine acceptance of responsibility for the consequence of their actions. This is no more apparent than through the fact they are directly accountable to the individual(s) they harmed, rather than simply offering a passive, mundane, detached explanation to the court often via their legal representation. Utilising this approach however, they do not have anywhere to hide and will offer their expressions of remorse and apology to an uncompromising critic.

In terms of victim engagement, firstly they are provided the opportunity to actively participate in the criminal justice system which systemically and historically has restricted the capacity for an active victim role and voice in proceedings. It is a concept which one struggles to comprehend, due to the fact that a majority of offences as outlined in the Criminal Code and various legislative appendices would not be committed if not for the existence of a victim. So given they are such an integral part of offending behaviour, it is incongruent that they not also be a fundamental consideration in criminal justice proceedings, particularly when sentences are deliberated and appropriate courses of action determined. Through the invitation to engage in mediation, there is an inherent recognition of their existence and victims are acknowledged with the dignity and respect they deserve as their views, concerns and experiences are given an importance and afforded a position in sentencing considerations. They also assist in determining and developing a unique and meaningful consequence for the offender. Not only are victims given the option of engaging in a process on their own terms, with their own intent, rationale and to achieve their own outcomes, but they are given the space to tell their story and be heard, the validation and recognition of which can be very powerful and should not be

underestimated. This process allows a freedom of discourse and (almost) unlimited context for dialogue which is a balance to the traditional modes of engagement for a victim. For example the giving of evidence as a witness during trial or hearings which can be frustrating and condescending as the focus is on content as directed by the strict and uncompromising questioning by lawyers. Secondly with regard to the often limiting contextual framework of a Victim Impact Statement which again disempowers and inhibits a victim's complete and honest representation in the criminal justice system. The exasperation does not lie in the fact that a victim is given an opportunity to be involved, but rather the restrictive manner in which involvement is controlled and manipulated.

When contemplating a theme that is representative of the nature of the possible outcomes for victims through reparative mediation, a key term invoked is the word meaningful. Not only is the victim afforded an explanation of the processes of the criminal justice system and an understanding of where they fit, but the actual offence itself is given some meaning through the offender's capacity to provide some contextual framing. But mostly it is meaningful in the sense that any outcome suggested or accepted by the victim is one which they desired, not simply something offered by the court in accordance with the legislative framework provided by the various sentencing acts. The victim is given the opportunity to obtain some form of reparation which makes sense, has meaning and is directly restorative, healing and remedial in a way that is uniquely personal to them. In doing so, it also allows for a much greater scope for understanding from the offender's perspective, as the repercussion and consequence of actions has an emotive, intimate and humanistic context that allows for some expression of benevolence from both parties.

The time at which the reparative mediation intervention occurs, namely post-conviction and pre-sentence, ensures an inbuilt quality assurance and credibility of service as it does not rely purely on language, and requires some level of action before an offender appears before the court for sentence. The service can subtly manipulate an offender's desire and strong motivation to appear in a positive light before the court to ensure that a victim's needs are met in a timely and complete manner. This is assessed on a case by case basis to ensure that an offender is genuine in their expression of remorse or reparation and the potential for further re-victimisation

through unrealistic expectations from the victim is minimised. Both parties are also provided with ample information regarding the process and what can be expected, as well as various options available to them and are also given the opportunity to make informed choices to ensure integrity in service provision is maintained. It is an accepted finding that by having an offender's active and voluntary participation in a process which involves decisions regarding sentence requirements, that they are far more likely to take an ownership of the outcome and abide by all requirements than those imparted or mandated by the court.

It is considered that the reparative mediation service attempts to rehabilitate offenders by educating them regarding the impact of their actions, and increasing their awareness of the consequences of their behaviours for other people. It is hoped that an understanding of the negative impact of their actions is enough to give them incentive and motivation to change their behaviours, as well as instilling some level of insight and self awareness. Offenders by their very nature can be ego-centric and self-centred so by working to create a greater level of consideration and even provoking thought before action, it is hoped that the service works towards reducing re-offending and an eventual lack of recidivism. It is also recognised that there is an important distinction between acknowledgement of the harm their actions cause, and an acceptance of the responsibility for it. As without a meaningful acceptance of responsibility, this type of approach is not likely to be conducive to a positive change in the offender's behaviour.

In those instances where the offence does not involve an individual victim, the opportunity to broadly educate offenders about the impact of their actions was considered a good one. In circumstances involving offences committed against corporate victims, we found from experience that these large corporations will not engage in person for what they regard as relatively trivial offences and so it is often the case that no direct mediation occurs between them and the offender. As such we developed a process by which an offender is still given the opportunity to contemplate and understand their motivations, how their life circumstances contributed to their offending and also to offer an expression of remorse or apology for their actions, despite the individual victim not being involved. It brings to the offender the understanding that there is no such thing as a faceless victim and that even the most

detached and de-personalised offence actually has flow-on effects that impact on society more broadly. It is hoped that an offender is able to then transfer this learning to other situations where their actions may impact on others and apply the same principles of consideration and respect.

As outlined above, this adaptable approach and the focus on qualitative intervention allows for a greater information provision to victims. In Western Australia currently there is no inbuilt, automatic mechanism that informs victims of crime of the progress of their complaint and whether or not an investigation was forthcoming by the police or even a charge preferred. If the matter progresses this far, the victim still remains uninformed as to whether the offender is arrested, pleads guilty or not guilty, and what the subsequent sentence may be. So although in theory it is recognised that victims have the option of providing a Victim Impact Statement to the court, this is not a functionally effective practice as the victim first needs to be aware that an offender is appearing in court, then informed of the capacity to provide a Victim Impact Statement before such a document can be created. There is no universal or even common awareness in the general population that this is an option available to them. It should be noted that these comments in no way negate or undermine the exceptional work undertaken by the Victim Support Service but rather, it highlights the massive inequalities in service provision to victims, the criteria for which is linked purely to the charge preferred by the police, not necessarily the nature or severity of the crime and certainly not the individual impact on the victim. It is yet another facet of the criminal justice system that only recognises and understands victims in context to an offender or an offence, not as an individual or entity in their own right deserving of respect, dignity and attention.

The Victim Support Service in Western Australia will proactively offer their service to victims of offences of Assault Occasioning Bodily Harm and above. Due to restrictions in funding allocations and staff resources they have had to set a criterion to restrict and refine the service they provide. As the reparative mediation service is primarily provided in the Magistrates Court jurisdiction, and the offence of Assault Occasioning Bodily Harm is at the more serious end of the spectrum this court is able to deal with, a majority of victims linked to offences coming through this court would not be receiving attention from the Victim Support Service. As such it is apparent

there is a very big gap in service provision to victims of lesser interpersonal and property offences. As the clientele of the magistrates court is the focus of the reparative service, there is a capacity to bridge some of those gaps by extending the service to offer broad victim resources and information to those we send correspondence to. Along with pamphlets outlining the reparative mediation service, victims are also provided with information pertaining to the Victim Support Service, Criminal Injuries Compensation and the capacity to provide the court with a Victim Impact Statement. So even though they may decline involvement in reparative mediation, they are still informed of other services available to them. International research suggests that reported levels of victim satisfaction in restorative justice interventions is directly linked to the fact that they are kept informed of proceedings and that this fundamental recognition and acknowledgement can have more meaning than any restorative outcomes. Once a matter has been settled, this Unit will also provide information regarding sentence outcomes, whether a compensation order has been made by the court in their favour (and if so, information regarding how to proceed with civil action should the money not be forthcoming) and a questionnaire designed to give them the opportunity to provide constructive feedback about the service and their involvement with it.

The benefits to victims as outlined above are peripheral to that of the actual reparative service, and the secondary benefits regarding information provision and raising awareness do not stop with that. By having a mediation officer present in court to raise the profile of the service, this by association raises the profile of victims in general. To the extent that the mediation officer liaises closely with stakeholders such as lawyers, prosecution, community corrections officers and general court staff, they are able to educate others about the impact of crime on victims and increase the awareness of victim issues and experiences. Another method of raising the profile of victim issues is through reports to the court outlining the mediation process, where it is possible to offer an intimate account of the offence in the context of a formal document and with appropriate language which positions the harm and the impact on the victim in a professionally detached manner that makes it less confronting to comprehend. The power of the content lies in its simplicity, sincerity and unguarded style which when teamed with lack of emotive or descriptive language, it is formulated in a way the court is familiar with and can easily digest. So not only are

specific victim issues presented to the court and taken into account via mediation reports, but through information dissemination and education of stakeholders there is an inherent and steady increase in general victim awareness. This will hopefully build a foundation of respect and recognition for victims in the criminal justice system that will eventually see their participation held in high esteem for the unique value and worth it contributes.

As our social order and culture undergoes rapid and constant change, the dynamics of offending are also affected and with an influx of random incidents, crime has insidiously become a reality for a much wider scope of the populace. It no longer remains categorised to specific sections of society. With a prevalence of crime has also sadly come a de-sensitisation to the intangible impact on victims. Where the financial cost of anti-social offending such as graffiti and damage is an acceptable issue to confront and attempt to alleviate, it is one of the only paramount concerns government and legislative bodies have with regard to the impact of crime. There is close to no recognition for the ongoing detrimental harm caused by crime, particularly on an emotional and psychological level. Nor is there any recognition for the devastating impact on one's psyche, sense of independence, security or faith in others. There is also no comprehension of the residual affects of crime, which advance stealthily through all facets of a victim's life leaving barely a region unscathed. It is hoped that through incentives such as the reparative mediation service and more generally with an embracing of principles of restorative justice and therapeutic jurisprudence, it will instil a victim focussed ideology and framework for all future legal professionals, practitioners and members of the judiciary. The objectives being to re-conceptualise how we approach crime and offending behaviours so they are less about utilising punitive approaches and more about attending to the holistic needs of victims and offenders. This will lead to an eventual change in the nature of offending as our populace as whole becomes less self focussed and more humane.