

Alternative Dispute Resolution Inquiry
Victorian Parliament Law Reform Committee

Youthlaw's response to Discussion Paper
March 2008

Introduction

Youthlaw is Victoria's state-wide community legal centre for young people under the age of 25 years. Youthlaw works to achieve systemic responses to the legal issues facing young people, through casework, policy development, advocacy and preventative education programs, within a human rights and social justice framework.

Youthlaw is co-located with seven other youth services as part of Frontyard Youth Services at 19 King St, Melbourne. In the 2006/7 financial year, Frontyard Services assisted 1832 young people and had 11,000 contacts with young people. Young people accessing Frontyard Services are mostly aged between 18 and 25 and are either homeless, experiencing significant family breakdown or deemed to be 'at risk'.

We welcome the opportunity to respond to the Victorian Parliament Law Reform Committee's Inquiry into Alternative Dispute Resolution, and thank you for the extension of time for the Federation of Community Legal Centres to do so. We are committed to supporting the expanded employment of alternative dispute resolution mechanisms and thereby improving the access to justice and outcomes in civil and criminal court, particularly for marginalised young people.

Our comments however will focus on the criminal court jurisdiction as this best reflects our casework experience.

Alternative Dispute Resolution in criminal matters

In general terms Youthlaw maintains that there should be a broad range of sentencing orders to allow the Magistrate or Judge a range of options which take into account the individual factors for young, mentally impaired and intellectually disabled offenders etc. For young offenders up to 25 years, the guiding principle should be rehabilitation. Currently it is especially used as a pre-sentencing option for youth. Pre-sentence court diversion, under *Magistrates Court Act 1989 (Vic)* could be extended to include restorative justice programs, such as the Neighbourhood Justice Centre.

Youthlaw is a member of the Steering Committee of the Neighbourhood Justice Centre. We believe this model will assist to:

- address the underlying causes of offending
- provide opportunity, education and support for victims, witnesses, defendants & local residents
- assist in preventing crime
- stop the 'revolving door' of crime and punishment
- increase the community's involvement in the administration of justice, and
- increase access to justice.

Youthlaw supports the ongoing and expanded implementation of restorative justice systems which encourage meetings between victims and offenders to help resolve issues related to the offence. Given the significant number of young people in our prison system with mental health issues and drug and alcohol issues, we support an expanded range of sentencing options that divert these offenders from the prison system into therapeutic options.

We now turn to some specific responses to the questions posed by the Inquiry.

4.2 Mediation in criminal court jurisdiction

Question 19: Criminal case conferencing

a) *Should criminal case conferencing be introduced into the Victorian court system?*

In principle we support the introduction of criminal case conferencing into the Victorian court system, as long as all parties consent and have an informed understanding of the processes involved. We would not support compulsory participation by the accused. This disposition is particularly sensitive to victims, and is consistent with the principles of restorative justice.

Group conferencing has been available as a sentencing option in the Children's Court for some years now, and is specifically included in *Children Youth and Families Act 2005* and *Courts Legislation (Neighbourhood Justice Centre) Act 2006*.

In our experience group conferencing works well for all parties involved. This pre-sentencing option provides an opportunity for victims of crime to meet the offender and for offenders to offer a personal apology to the victim. The process provides an opportunity for the offender to make amends to society as a whole, and has considerable therapeutic value for offender and victim alike.

The primary goal of a group conference is to address the offending behaviour of young people and help them avoid further or more serious offending by:

- strengthening the young person's family and community supports;
- making amends to the victim(s) where appropriate which can be constructive for both victim and offender; and
- holding the young person accountable for the impact of his or her offending.

An 'Outcome Plan' is then developed and prepared, explaining the agreement/s that have been made during the conference. Following preparation of the 'Outcome Plan', it is discussed among the group and input from all participants is encouraged.

4.3 Restorative justice and access to justice

Question 20: Access to justice for victims

To what extent do restorative justice processes increase or decrease access to justice for victims?

Restorative justice recognises the vital role of conciliation and mediation play as important processes in healing the damage to the community, victims and offenders after crime. It requires offenders to be accountable for their crimes by personalising the situation, the problem and the solution.

The pre-sentence diversion program for example offers the offender an opportunity to make reparations to the victim specifically and society in general while avoiding a criminal record. Hence we believe restorative justice processes significantly increase access to justice for victims who otherwise have very limited access to justice.

Question 21: Net-widening

Is there a danger that restorative justice programs will net-widen, bringing more offenders into the criminal justice systems? If so, how can this be overcome?

No. Even though it may be perceived as a soft option by the media, it is not a soft option. This is reflected in the significant number of offenders who elect not to take up the option of group conferencing as they find it very confronting and challenging.

It is critical that the use of restorative justice principles and practises in the criminal process not be seen as or promoted as a "soft option" for offenders.

Question 22: Offender participation rates

Should efforts be made to increase the current offender participation rate in Victorian restorative justice programs? If so, how?

Yes, efforts should be made to increase current offender participation rate in Victoria.

One way would be to expand the use of the programs across all matters in the Magistrate's Court. Currently the programs are limited to Children's Court and the Neighbourhood Justice Centre. Magistrates should consider restorative justice programs as a potential sentencing option in every case. If they decide to discount it as an option they should be required to provide their reasons why.

Youthlaw is strongly of the view that the current diversion system needs to be reviewed and legislation amended to ensure consistency of approach by police and magistrates in recommending and accepting diversions. Our experience is that the current legislative provisions are inadequate in providing an effective system to divert adult offenders from the criminal justice system, as police often refuse diversion where they have formed a negative opinion of the defendant. Similarly in our observations magistrates sometimes will only offer diversion with respect to certain offences e.g. driving offences.

Question 23: Offences to which restorative justice processes apply

- a) ***Is there the potential to use restorative justice programs in relation to a greater range of offences? If so, which offences should restorative justice initiatives be used for?***

Given its therapeutic value, restorative justice should be made available to potentially all offences, where both parties consent. However caution needs to be exercised in relation the use of restorative justice in family violence and sexual offences. (See below Question 42)

We have observed first hand the educative and emotional effect on young offenders to meet and hear from the victim of a personal property or violence offence they have committed. At the time of the offence they had limited or no understanding of the impact of their crime on the victim. To hear of the trauma and debilitating impact of the crime on the victim has left them remorseful, and given them some insight into the impact of the offending on the victim.

- b) ***Should there be restrictions on repeat offenders accessing restorative justice programs?***

No there should not be any restrictions imposed. Given that rehabilitation is the guiding sentencing principle, restorative justice programs should be offered to repeat offenders. The circumstances of each individual case are different, and young peoples' circumstances can change quite dramatically even over short periods. Courts should be adaptable in their approaches to sentencing, especially young people who should be given a realistic opportunity to "make it on the outside". We need to persist in assisting young offenders to try address the underlying causes of their offending such as family dysfunction, homelessness, drug and alcohol, and mental health issues.

Question 24: The age of the offender

Should the use of restorative justice programs in Victoria be extended to adults?

Yes

If so, should any age restrictions apply to accessing restorative justice programs?

No.

In earlier submissions to the Sentencing Advisory Committee, Youthlaw supported the extension of the power to defer sentencing to all offenders.

Question 25: Referral to restorative justice programs

At which stage is it appropriate to refer offenders to restorative justice programs: pre-sentence, post-sentence, parole?

Given the aim of restorative justice is to help offenders reintegrate into the community and help with their rehabilitation, Youthlaw is supportive of expanding restorative justice

programs to post-sentence as well as pre-sentence, these being in addition to other sentencing options. Given the significant number of young people in our prison system with mental health issues and drug and alcohol issues, we support an expanded range of sentencing options that divert these offenders from the prison system into therapeutic options.

Question 26: Mandatory referral to restorative justice programs

a) ***Should there be mandatory referral to restorative justice programs?***

No

b) ***What are the issues associated with mandatory referral to restorative justice programs? How can these be addressed?***

It is Youthlaw's view that there should not be mandatory referral to restorative justice programs, as they may not be suitable in particular cases and this would jeopardise the active and genuine participation of the accused.

Question 27: Impact of participation or non participation in restorative justice programs

Should there be any sanctions associated with refusal to participate in a restorative justice process?

No, these programs are not necessarily suitable for all offenders.

Should there be any rewards for participation in restorative justice processes?

Yes, such as diversion from the criminal justice system, or no conviction, or not being placed on fixed supervisory order.

6.4 Marginalised communities and restorative justice

Question 41(a): What advantages do restorative justice processes offer for marginalised individuals and communities? What are the disadvantages associated with the use of restorative justice initiatives for these groups?

The advantages of restorative justice processes are that the programs focus on the offender and try to address the underlying causes of their criminal behaviour. The primary goal of a Group Conference for example is to address the offending behaviour of young people and help them avoid further or more serious offending by strengthening the young person's family and community supports. In this way they may receive support and assistance around a range of issues including drug and alcohol abuse, homelessness, and mental health etc. without them being involved in the criminal (youth) justice system and thereby avoiding possible contamination.

It is our experience that sentencing options such as community based orders have failed many young offenders. In part, this is reflected by a high breach rate. This is mostly due

to different approaches of Youth Justice (work intensively with young offenders) and CORE case-management and referral. We fully support the provision of intensive support to young offenders in the adult system that Youth Justice provides in the Children's Court. This support may arrest the potential of young offenders re-offending and possibly incur a term of imprisonment.

Question 41(b): Is there a need for restorative justice programs to be utilised further in relation to marginalised communities and group? (for example, is there merit in the Koori Court having a restorative justice diversion component?)

Yes. Initiatives such as the Koori Children's Court reflect an accepted view that mainstream methods of dealing with and punishing offenders are not effective in the rehabilitation of Indigenous offenders or as a deterrent to others from committing offences. It is argued that methods which involve offender, family and community participation, particularly that of respected Elders are more culturally appropriate.

We would support a restorative justice initiative with a focus for newly arrived CALD communities.

Question 42: Restorative justice responses to family violence

Are restorative justice responses to family violence matters appropriate? If so, in what circumstances? What safeguards, if any, would need to be in place?

Youthlaw would be supportive of piloting a restorative justice response to family violence offences that is premised on consent of the victim and mindful of the inherent power imbalances these matters involve. The Federation of Community Legal Centres welcomed further exploration of restorative justice practises and acknowledged that the use of restorative justice practices as applied to family violence issues have tended to suit indigenous women but have not been favoured by non-indigenous cultures.¹

Possible safeguards would include the development and introduction of practice standards and training of practitioners, and monitoring and evaluation of programs.

The civil and criminal justice system responses must be further developed for situations where restorative justice is not appropriate, not favoured by the relevant parties or is unsuccessful.

¹ Federation of Community Legal Centres Response to the VLRC's Review of Family Violence Laws (March 2006) p 5.