Northern Territory Law Reform Committee

Final Report

Mediation and the Criminal Justice System

February 1996

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2. The offender must acknowledge responsibility for the offence.

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Mediation should be available at any stage of the criminal justice process, including before the offender is charged.

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Victim-offender mediation should be available in all criminal cases, including serious offences. Whilst Victim-Offender mediation is not generally suitable for serious offences against the person, there will be exceptional cases.

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Applications to keep the peace (s.99 of the Justices Act) which involve alleged criminal offences should be available to be mediated as part of the victim-offender mediation. Those matters that involve non-criminal complaints should be mediated in mainstream services.

Recommendation 6.

Victim-Offender mediation should be available for domestic violence matters including where there is no complaint of a criminal offence.

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The Committee recommends that there be no legal restriction on the class of offender for whom mediation is available as an alternative method of dealing with criminal behaviour. The Committee recognises that the individual circumstances of the victim and offender are but one factor that should be taken into account in deciding whether a particular dispute is appropriate for victim-offender mediation.

Recommendation 8.

The Committee recommends that legislation be enacted:

- providing that an agreement to mediate suspends the running of the limitation period until any mediated agreement is fully complied with;
- providing that a court may refer a dispute to mediation at any stage.

Recommendation 9.

The Committee recommends that, once victim-offender mediation programs are in existence, the Police General Orders be amended to provide for suitable cases to be referred to victim-offender mediation by police officers.

Recommendation 10.

The Committee recommends that, for matters instituted under section 99 of the Justices Act, practice directions be developed to divert suitable cases to mediation at the first mention date.

Recommendation 11.

The Committee recommends that funding be from consolidated revenue.

Recommendation 12.

There should be an independent monitoring and evaluation process involving the legal aid service, police, correctional services and other relevant community groups. The Law Reform Committee should also be provided with a copy of the evaluation.

Introduction

On 24 June 1991, the Attorney General referred the issue of alternative dispute resolution [ADR] to the Northern Territory Law Reform Committee for examination and report. The Terms of Reference are set out in Appendix "A".

The Committee advertised in the Northern Territory News and the Centralian Advocate asking members of the public interested in participating in subcommittees, or in making submissions on the reference or any aspect of it, to contact the Committee. Following this, the Committee established four subcommittees comprising Committee members and members of the public to deal with this reference. The subcommittees variously deal with:

- civil disputes (including commercial disputes and disputes relating to human rights);
- disputes involving the criminal law;
- family and other domestic disputes;
- disputes occurring in Aboriginal communities.

The Committee established a Subcommittee on Alternative Dispute Resolution and the Criminal Justice System to examine ADR in this area.

The Subcommittee released an Issues Paper in June 1992 which was circulated by the Subcommittee to those it identified as interested in this area.

The Subcommittee released a Discussion Paper in February 1994. The Committee advertised the release of the paper in the Northern Territory News and the Centralian Advocate. The paper examined current literature regarding alternative dispute resolution in the criminal justice process and focussed on the use of mediation.

Public response to the Discussion Paper was minimal and it was considered that a smaller issues paper might encourage greater comment. To that end an Issues Paper on Mediation and the Criminal Justice System was released in November 1994 and comments were requested by 31 January 1995. The Committee advertised the release of the paper in the Northern Territory News and the Centralian Advocate. There were twelve requests for copies of the Paper and one comment was received, that being from the Commissioner of Police.

The Subcommittee submitted a draft report to the Committee for consideration at its meeting in March 1995. Subject to a number of

amendments the Committee adopted the draft as its final report in August 1995. The report was resubmitted to the Committee at the October 1995 meeting where a number of other changes were made and it was finally adopted at the February 1996 meeting of the Committee.

The Report concludes that victim - offender mediation is the only suitable form of alternative dispute resolution appropriate for the criminal justice process.

Such programs have several goals. The primary goal is seen as compensating the victim for the loss suffered as a result of the crime by making the offender take personal responsibility for making good this loss. The traditional legal system does not have this personal focus in that the offender is made accountable by paying a fine or promising to be of good behaviour. These punishments do not relate to the personal loss of the victim.

The programs attempt to focus on the concept of reparation. It follows the successful operation of similar schemes in countries such as New Zealand, Canada, the United States, the United Kingdom, Western Europe and China. These programs give a victim the opportunity to tell the offender how the crime affected him or her. The offender has the opportunity to apologise, explain his or her behaviour, and make some reparation.

Part 1 of the Report considers whether there is a need for ADR in the criminal justice system.

Part 2 provides information on victim - offender schemes presently operating in Australia and elsewhere.

Part 3 makes recommendations about how such a scheme might operate in the Northern Territory.

The Committee notes that the Attorney General, in the original reference, asked the Committee to bear in mind the role of Alternative Dispute Resolution in Aboriginal communities in the Northern Territory. The Committee in this report, does not address the specific issues relating to Aboriginal communities as these are to be addressed in a separate report of the Committee.

PART 1 - IS THERE A NEED FOR ADR IN CRIMINAL MATTERS?

Why do some perceive the present criminal justice system as not being the best available method of dealing with all disputes that may involve criminal behaviour?

With respect to the accused person

Lawyers undertake the deliberation with a final pronouncement of guilt passed by a third party. The accused person is sometimes left not only ignorant of the purpose and reasons of the formalised procedures but in the end is left feeling morally indifferent to the situation at large. An end to recidivism is unlikely if the accused cannot morally accept his/her culpability.

With respect to the victim

The state represents the victim so completely that he/she is almost ignored. The victim is given almost no opportunity to voice his/her own anger and frustration, and is often left with a sense of resentment that justice was not done.

> *Victims express feelings of powerlessness and loss of control. It has been frequently reported that they have little information about their case, they do not know if, or when, their case goes to court, or if charges have been altered or dropped. They often are not consulted and do not know or understand the mechanisms to attempt redress for their suffering, such as access to counselling, compensation for damage, or the outcome of the case.*[1]

Victim/Offender Mediation

Alternatives to traditional adjudication which have been proposed include:

- arbitration: like adjudication it involves a neutral third party consensually agreed to by both parties to the dispute to resolve the issue;

[1]Murray G, *Mediation and Reparation within the Criminal Justice System*, Dept of Attorney General Qld, (1991), page 9.

- conciliation: the disputants do not necessarily come together face to face, however a third party is engaged to negotiate between the disputants;

- mediation: a voluntary process whereby a neutral third party encourages the disputants to find their own solution to the dispute.

Arbitration is not recommended by the Committee because it involves a third party intervener imposing a solution to the dispute upon the disputants with the disputants' consent. This does not encourage the disputants to accept responsibility for their own dispute and its resolution.

Conciliation is not advocated because it may not deal with the underlying causes of the dispute, nor does it necessarily enable the disputants to perceive each other's point of view, or involve regulation of their future conduct.

Mediation is regarded as the more suitable alternative.

> *Unlike adjudication, mediation is believed to address the causes of disputes, reduce the alienation of litigants, inspire consensual agreements that are complied with and are durable over time and help disputants resume workable relationships. Mediation is also believed to be more expeditious and inexpensive than adjudication.*[2]

Mediation in the criminal justice context however is not the same as mediation in civil disputes. There are four major differences between mediation in the criminal justice context and mediation in the civil context.

1. The offence has already occurred and consequently there is no ongoing dispute;

2. The parties are not equal in that the offender committed the offence totally on his/her terms without regard to the victim;

3. Mediation in the criminal justice context represents a shift towards "restorative" justice, which views crime as the violation of one person's rights by another.

4. Mediation in the criminal context contains an aspect of reparation that is not a component of mediation in the civil context.

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2 Pearson J, *"An Evaluation of Alternatives to Court Adjudication"* 7 Justice Systems Journal (1982), page 422.

Reparation refers to an act on the part of the offender to do something positive on behalf of the victim and may involve:

- compensation;
- work for a community cause selected by the victim;
- a promise to do something;
- the effort of owning up;
- facing the victim and apologising.

5. Mediation in the criminal context especially when it forms part of the sentencing process involves the final agreement being publicly aired in court. This would never occur in civil mediation where the outcome is confidential and remains simply a matter between the parties.

Terminology: Victim-Offender Mediation

Because of the essential differences between civil mediation and mediation in the criminal justice context, as outlined above, this paper refers to mediation in the criminal justice context as victim-offender mediation.

What are the benefits of victim - offender mediation?

Below are some of the benefits that research has identified in victim - offender mediation schemes. Some of the benefits have empirical data to substantiate the claims, however others are more subjective and are unable to be quantified.

Victim Satisfaction with outcome:

This can be the result of :

- improving the quality of service for both the victim and the offender. That is, the victim participates and has a voice in the process and the offender is no longer a passive spectator in the adversarial process;

- providing the opportunity for the victim to confront the offender and explain the effect of the crime; and

- the potential for speedier processing of cases.

An evaluation of the Wagga Wagga model in New South Wales revealed that over 90% of participants were satisfied with the outcome of the mediation. An evaluation of the New Zealand Model by the Police

Association stated that 90% of the family conferences achieved satisfactory results for the victim. In Western Australia, an evaluation of the Victim Offender Mediation Unit showed that 91% of mediated cases ended in a mutually satisfactory agreement.[3]

A full evaluation of the Alice Springs Community Justice Program involving diversionary conferencing is yet to be completed. However an interim report submitted in January 1996 establish that all the victims who participated in the program were satisfied with the outcome.

Compliance with Agreements:

There should be an increased likelihood of the offender complying with the agreement and therefore increasing the likelihood of reparation because the offender is happier with the process because he/she is actively involved and listened to.

North American studies have shown that the rate of compliance with agreements were over 80% [4] Although the pre-existing character of mediation clients may explain part of the phenomenon, there is general consensus that mediated agreements result in better compliance.[5]

Recidivism

There is a potential for reducing repeat offending because the offender has had to confront the consequences of his/her actions.

Figures from the UK and the United States concerning recidivism are not conclusive, though there are indications that juvenile offenders participating in mediation programs committed considerably fewer crimes than a matched sample of similar offenders who did not take part in mediation. This finding of lower recidivism cannot be seen to be statistically significant because there are many other factors that contribute to recidivism that have much more influence than participation in a short term mediation process. [6]

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[3] Brown, Judge MJA "Empowering the Victim in the New Zealand Youth Justice Process - a Strategy for Healing, 8th International Symposium on Victimology 23 August (1994).
[4] Umbreit, M and Coates, R, "*Victim Offender Mediation: an Analysis of Programs in Four States of the U.S.*" Minneapolis : Minnesota Citizens Council on Crime and Justice (1992) p 1.
[5] Pearson J, "*An Evaluation of Alternatives to Court Adjudication* " 7 Justice Systems Journal 720(1982) p 433.

[6] Marshall,T and Merry, S. *Crime and Accountability: Victim/Offender Meidaiton in Practice*, London: HMSO, (1990) p. 197.

The Alice Springs Community Justice Program interim evaluation states that because most of the offences that are involved in the program come within the category where it is unlikely that the offender will re-offend after a normal Officer's Caution, it is difficult to assess the level of re-offending that could be attributed to involvement in the program.

It is clear however that recidivism rates are no higher than similar offenders in other programs or court interventions. It has been shown that there are numerous other benefits of the process, for both parties. "If these benefits occur, with no additional risk of higher rates of criminal behaviour, it should be argued that on balance the victim offender programs are quite effective".[7]

What are the disadvantages of victim-offender mediation?

The disadvantages identified in using a victim-offender mediation scheme are:

- the offender may not fulfil the terms of an agreement;
- there may be a risk of undermining legal rights (eg. pressure on the offender to plead guilty, as mediation can only occur where the offender makes an admission of guilt);
- the terms of an agreement may be more punitive than the penalties imposed by a court;
- the victim may be re-victimised by being pressured into a process that, if successful, is used to mitigate the offender's sentence without fully addressing the problem for the victim;
- The use of alternative dispute resolution technique in the criminal justice system may work to undermine the principles of that system. It moves away from the concept of societal responsibility and could be seen as individualising the offence;
- There is a potential for inconsistency in punishment, especially when seen in the context of the pre-charging process.

[7] Marshall, T and Merry, S. ibid , page 137.

PART 2 - REFORMS ELSEWHERE

There are some 300 victim-offender mediation programs in Australia and overseas.

Overseas schemes have been run by different groups, both inside and outside the justice system. Some have been focused on restitution, some are more broadly focused on reconciliation. Some have tried to enable victims, in suitable cases, to have a voice in the criminal justice process.

How Victim - Offender Mediation Works In Victoria

The Victorian program is limited to cases where adults plead guilty to property offences and some crimes of violence - sex offences and domestic violence offences are excluded - and both the offender and the victim agree to take part.

The program is not an alternative to court proceedings; rather, it is a pre-sentencing option. Ultimately, it is hoped the program will reduce the number of people committing offences a second time, reduce fear of crime and improve respect for the criminal justice system.

In an interview, Daryl Kidd of the Coburg Community Corrections Centre said:

> *Our research shows that it is very difficult for the offender to face the victim. The community tends to see it round the other way, but most offenders recognise that they don't have a satisfactory explanation for what they have done. They tend to rationalise it, not acknowledge property as belonging to anyone. This becomes much more difficult when they meet the owner.*
>
> *It is the non-tangible benefits which are most important. Victims are mostly interested in finding out why a crime happened to them: 'Why was it my house?' They also want to know what the offender looks like, and let off a bit of steam, tell the offender how they were affected by the crime.*
>
> *A lot of the time the offender turns around and apologises, and that apology is accepted as sincere.*

By involving victims in the justice process, it is possible to create a situation where victims are much more satisfied with the sentence that 'their' offender received. Therefore, making programs like this work is an important way to help protect those rights.

A mediated agreement between the victim and the offender is something the court will then take into account in sentencing the offender. For example, if the court considers that the offender is sincere in making amends to the victim for the wrong done, and the reparation made is something of benefit to the victim, it may result in a lesser penalty, such as a fine, being imposed.

How Victim - Offender Mediation Works In Queensland

The Queensland victim-offender mediation program is available at two stages:

- firstly, as an option before the offender is charged; and
- secondly, as an option in the sentencing process,

in both cases with the consent of the victim.

Victim-Offender Mediation as a part of the sentencing process

The Queensland program began in February 1992. Between July 1993 and January 1994, 22 offenders were referred to victim-offender mediation and 12 have reached successful agreement with the victim.

Having a victim and offender sit down together to talk about the crime from their individual perspective's and discuss reparation is the thrust of the Queensland program.

The program is about empowering victims in the criminal justice process. It is an opportunity for victims to have their say, describe how they were affected by the crime and negotiate reparation. It gives offenders the chance to be directly accountable to the people they have harmed. It is similar to the Victorian program.

Pre-Sentence Mediation

In conjunction with the Queensland Police Service, there is also a pre-court model of victim-offender mediation, which involves referral for mediation instead of charging. This scheme began on 5 April 1994.

The goal of the program is to provide the opportunity for offenders to accept responsibility and be accountable for their actions, and to allow victims to have a voice in determining reparation. Additionally, the mediation process also provides an opportunity for the victim to heal and perhaps to divert offenders from further involvement in the criminal justice process.

Key aspects of the program include:

1. Adult offenders who intend to plead guilty in a Magistrates Court to certain offences including break and enter, stealing, fraud and minor assault can request mediation with their victim. The offender must be the first to indicate interest in the mediation process. Lawyers discuss the option of mediation with their client, and if she/he is willing, a month adjournment can be requested. No paperwork is required.

2. The court then refers the offender to the Community Justice Program, which contacts the victim/s to offer mediation with the offender. Mediation must be voluntary - if a victim declines mediation, the offender returns to court for sentencing as usual.

3. When mediation takes place and a reparation agreement is reached between the victim and offender, the agreement is forwarded to the Magistrate with their consent. The Magistrate may take this agreement into account when sentencing.

4. The Community Justice Program uses a co-mediation model. It employs two of its accredited mediators and matches participants for age and gender. Mediations are held in a neutral setting, after hours if required. Victim-offender mediations last an average of three hours.

5. The process is structured but informal and allows all participants to have their say. The mediators are impartial and do not make suggestions. However, parties are always encouraged to seek legal advice prior to mediation. Agreements reached in mediation are not legally binding.

6. Mediators are bound by confidentiality provisions, and mediation proceedings are not admissible in any court, tribunal or body.

An evaluation of the merit of the scheme in Queensland will be conducted after 100 mediations.

Advantages:

The greatest benefit of the mediation process is the opportunity for reconciliation. The victim gets to see the offender as a person, often with problems, and the offender is forced to confront the pain they have caused and acknowledge the humanity of their victim.

Agreements may include an apology, offers of financial restitution, repair of damage or performance of some service.

How Victim - Offender Mediation Works In Western Australia

The Victim-Offender Mediation Unit ("VMU") in Western Australia is part of the Ministry for Justice. The VMU offers services that help both the victim and offender come to voluntary agreement about issues between them.

The Service deals with both violent and non-violent crimes. In the case of non-violent crimes, the agreement is reparative, for example an agreement to repair property damage or offering an explanation for the crime. In the case of violent crimes the agreement is essentially different and focuses on protecting the victim. An agreement can place limits on any contact between the parties once the offender is released and is built into parole conditions. In these cases, the VMU contacts the victim when the offender is due for release and offers its services.

The process involved in non-violent crimes is set out below.

STEP 1

When a person is convicted of an offence the Magistrate or Judge may decide mediation is appropriate and advise the Victim-Offender Mediation Unit.

Alternatively the Magistrate or Judge may call for a pre-sentence report and in this case the community corrections officer will refer the matter to the VMU.

STEP 2

Once a referral is received the VMU will contact the offender to confirm his/her wish for mediation. Once this is confirmed the victim will be asked if he/she wishes to be involved in mediation.

STEP 3

If both parties agree to mediation the VMU will arrange an initial interview with each separately and then

EITHER

organise a victim-offender mediation session with both at a mutually convenient time -

OR -

begin to act as a go-between with the parties to see if an agreement can be reached.

STEP 4

If a face-to-face mediation session is arranged, a trained mediator will assist in talking about the offence and ways amends can be made to see if an agreement can be reached.

STEP 5

The outcome of the victim-offender mediation will be reported to the Magistrate or Judge prior to the sentencing of the offender.

Once a reparative agreement has been made the VMU monitors the agreement to determine if it has been complied with. If it is broken, the VMU can refer the case back to Court via the Community Corrections Officers who are usually supervising the offender as part of the court sentence. If the protective agreement is breached, there is also a breach of parole as the conditions of the agreement are usually contained in parole conditions.

The average mediation takes about eight hours and most of the victims and offenders are referred by either Community Corrections, Prison Officers or the Parole Board. According to a report released in 1994 by the VMU, approximately 50% of victims/offenders referred proceed to mediation and of those referred 90% reach agreements.

The Katherine Community Aid Panel

A Community Aid Panel was established in Katherine in 1990. The scheme is informal and is only available to juveniles and young adults.

The young offender appears in court and, if he or she pleads guilty, the Magistrate has the option of delaying sentencing the offender by adjourning the matter for approximately three months and referring the case to a Community Aid Panel.

Generally, victims are not involved however the panel is investigating how to encourage victims to become more involved.

Key aspects of the program include:

1. After the adjournment, a youth worker consults with the young person and arranges for a panel to meet within a week to identify an appropriate process of counselling. The panel continues to meet on an "as required" basis;

2. The outcome of the panel is reported to the court and is taken into account in the sentencing process;

3. Panel members participate on a voluntary basis, although they are people who are professionally involved with young people and tend to have an understanding of the issues involved with offending;

4. The process is time consuming, particularly in establishing a good relationship with the young person.

Community Justice Program in Alice Springs and Yuendumu

There is pilot project being conducted from 1 October 1995 to 1 March 1996 by the Northern Territory Police in Alice Springs and Yuendumu. The system was proposed by Senior Sergeant Don Fry of the Alice Springs Police. The following information was extracted from his report prepared for the Commissioner of Police.

The Community Justice Program ("CJP") is a process whereby offenders are diverted away from the Court system or Judicial process in the first instance. By agreement, the offenders and victims meet to discuss what has happened and negotiate measures for repairing the damage caused by the offence. The meeting takes place in a conference forum chaired by a facilitator, who for the trial period, will be one of a number of police officers, who will perform this role on a rotational basis. Family and support persons of both the victim and offender are invited to attend and be involved in the discussion and outcome.

The aim of the meeting is to come to an agreement which is satisfactory to both parties. The agreement may include an apology, restitution, enrolment in rehabilitation programs or involve work being undertaken by the offender.

Conferencing of offenders in both arrest and summons matters is proposed provided that in each case they meet the CJP criteria.

The criteria involves the offender first admitting the offence and viewing the CJP as an opportunity to redeem himself/herself with the community.

The CJP is primarily aimed at young and experimental offender categories. However the trial will look at involving some categories of adult offenders as well.

Proposed Children's Panels, NSW

The report of the NSW Parliamentary Standing Committee on Social Issues recommended the establishment of Children's Panels. The following process was proposed:

1. The young person is referred to the panel provided that the offence is not denied and the young person has been made fully aware of what participation would entail. It was not clear, however, who would make the referral, although probably police would do so.

2. The person and appropriate members of his or her family attend the panel, which comprises a juvenile justice officer, a police officer and a community representative. It was recommended that at least one member of the panel be a woman, and one member should be of the same cultural group as the offender.

3. The victim and a support person should be encouraged to attend.

4. Focus is on reparation; that is, the process of making amends. This can be in the form of a verbal or written apology to the victim and/or participation in a relevant program.

5. It was emphasised that panels should operate under clear and specific guidelines and that panel members should be trained in mediation, knowledge of sentencing options and availability of services.

Family Group Conferences, New Zealand

A young person can be referred to a Family Group Conference (FGC) as an alternative to court or on referral from the court. Common outcomes include reparation, apologies to the victim, community work, work for the victim, donations to charity, and "groundings" or other restrictions to liberty.

Participants include the young person, members of his or her culturally defined family group, any social worker who has a statutory role in relation to custody and guardianship, representatives of the enforcement agency, victim and supporter, a Youth Justice Co-ordinator and anyone else the young person's family wishes to invite.

The process is convened in the wake of an offence where guilt by the offender is not denied. It begins with an introduction from the co-ordinator and then an initial version of the events of the offence is provided by the offender. The victim and then the victim's family and offender's family are then invited to give their version of events. The version of events involves not just what happened at the time but what has happened in their lives after the incident so the lasting effects of the single offence are stressed to the offender. The parties then begin to work towards a collective agreement to repair the material damage, and the process of symbolic reparation involving the acceptance of responsibility by the offender is begun.

PART 3 - ISSUES AND RECOMMENDATIONS

Principles for Victim Offender Mediation

The Committee has concluded that the principles that should guide reform in this area are that:

- The concept of a "restorative" justice mediation program, which views crime as the violation of one person's rights by another, is compatible with the traditional legal system.
- The focus of such a program should be to:
  (a) Enable victims, in suitable cases, to have a voice in the criminal justice process;
  (b) Encourage the offender to assume responsibility for the act;
  (c) Encourage reparation by the offender to the victim; and
  (d) Highlight the offence and not the offender so that what is essentially an anti-social act is not permitted to be justified, excused or condoned by the mediation process.
- While any person may initiate use of the program, it will always be up to the victim to agree before any victim-offender mediation takes place.
- Upon consent of both parties, a binding agreement will take place and can be used by the Court in sentencing matters or in community service/probation orders.

Specific Recommendations relating to the details of a victim - offender mediation scheme

In accordance with the principles outlined above, the Committee recommends the establishment of a victim offender mediation program in the Northern Territory.

Recommendation 1.

A victim offender mediation program should be established in the Northern Territory.

What are the pre - conditions to mediation?

Mediation assumes the voluntary participation of both disputants.

This "voluntariness" of the participants should be based on a clear understanding of the mediation process, the role and objectives of the process, and the other options that are available to both parties.

Victims should never be coerced to participate in a program no matter what their reasons are for not wanting to take part in mediation.

It is a necessary precondition that a criminal offence has occurred and there is an identifiable victim and offender. If no offence has occurred, the mediation model proposed is irrelevant to the parties. If there is no victim/offender neither party will be interested in the offender taking responsibility for his/her actions which is a fundamental part of the reparation model of mediation proposed. Where there is an ongoing dispute but where a criminal offence has not occurred, the parties should be referred to a civil mediation service.

It is also a precondition to the Victim-Offender mediation occurring that the offender acknowledges responsibility for the offence. This is necessary in order for the mediation to work properly. It should not become a process whereby the offender can prove why he or she is not responsible for the offence. The reparation between the parties will not occur when there has not first been an acknowledgment of guilt by the offender.

It is not a precondition to this mediation process for police to have been contacted by the victim. The model would be applicable for those matters where a criminal offence has occurred and yet the victim prefers not to contact the police, for whatever reason. The Victim Liaison Officer ("VLO") in these cases should be the point of first contact (refer pages 20 and 28 *infra*).

Recommendation 2.

The two necessary preconditions to mediation taking place are:

1. **The victim must freely consent to taking part in the mediation process; and**

2. **The offender must acknowledge responsibility for the offence.**

At what stage of the criminal justice process should the option of Victim Offender Mediation be available?

It is possible for victim-offender mediation to take place at any part of the criminal justice process. For example:

- preliminary to, or opposed to, charging;
- after charging but before any plea is entered;
- during a pre-sentencing adjournment;
- as a sentencing option;
- as part of a probation order.

The Committee believes that victim-offender mediation should be available at any stage of the criminal justice process, including before the offender is charged.

Before the offender is charged

- Before a person is charged with an offence the police may decide mediation is appropriate and advise the Victim Liaison Officer ("VLO"). Alternatively, police may not have become involved because the victim chooses not to make a complaint in which case the victim or offender may choose to contact the VLO directly themselves. The Committee recognises however that the majority of the cases will be referred by the police and will result after the victim has contacted the police.

- The function of the VLO is to make both the victim and the offender aware of the purpose of the victim-offender mediation process and their roles in it, in an attempt to enlist both party's support in the process.

- The decision to refer the matter to victim-offender mediation should be made in accordance with guidelines. It may be desirable to locate the guidelines in Police General Orders. The guidelines should contain a time frame in accordance with which the mediation should proceed.

- Once a referral is received the VLO will contact the offender to confirm his/her wish to take part in victim-offender mediation. Once this is confirmed the victim will be asked if he/she wishes to be involved in the victim-offender mediation process.

- If both parties agree the VLO will arrange an initial interview with each separately. The VLO will then either organise a mediation session at a mutually convenient time where both parties attend in person, or begin to act as a go-between with the parties, if a face to face mediation is not to be arranged.

- The VLO may utilise video conferencing equipment for the mediations in the event of the parties not being located in the same town. One way video conferencing may be used if the victim does not wish to be seen by the offender. The VLO may also utilise an interpreter to assist in the process with people from non-English speaking backgrounds.

- If a face-to-face mediation session is arranged, a trained mediator will assist in talking about the offence and ways amends can be made to see if an agreement can be reached.

- The outcome of the mediation will be reported to Police who may then decide whether a charge should be laid.

- Participation in Victim-Offender mediation will not limit the discretion to charge an offender.

As an option after the offender is charged but before entering any plea

- This would occur before the offender enters a plea to the charges and could take place as early as the first mention date for the matter. If the parties consent to taking part in the victim-offender mediation, the matter would then be referred to mediation.

- It is important that prior to the matter being referred, the offender indicate in some way his/her intention to take responsibility for the offence. As mentioned in Recommendation 2, the victim-offender mediation will not be successful if the offender has not first taken responsibility for the offence.

As an option in the sentencing process

- When a person is found guilty after a trial, or has entered a plea of guilty, the Magistrate or Judge may decide that victim-offender mediation is appropriate, adjourn the matter to a fixed date and advise the VLO.

- The Committee believes that the opportunity to take part in mediation should still be available after a finding of guilt at trial when the offender is found guilty of a lesser charge to which he has always been prepared to plead guilty as evidenced by him/her entering or indicating a plea of guilty to a lesser charge. The committee believes that in those circumstances the offender should not be denied the benefit of taking part in the mediation process.

- Once a referral is received the VLO will contact the offender to confirm his/her wish to take part in the victim-offender mediation process. Once this is confirmed the victim will be asked if he/she also wishes to be involved.

- If both parties agree to take part the VLO will arrange an initial interview with each separately. The VLO will then either organise a victim-offender mediation session at a mutually convenient time where both parties attend in person, or begin to act as a go-between with the parties, if a face to face session is not to be arranged. Again, video conferencing facilities can be used.

- If a face-to-face session is arranged, a trained mediator will assist in talking about the offence and ways amends can be made to see if an agreement can be reached.

- The outcome of the victim-offender mediation process will be reported to the Magistrate or Judge prior to the sentencing of the offender. If mediation is undertaken and an agreement reached and fulfilled, the court can take this into favourable consideration.

- If mediation has broken down and the agreement has not been fulfilled prior to sentencing, then the offender is to be returned to the ordinary adjudication process and the usual method of sentencing. In the event that the mediation is unsuccessful, no adverse inference should be taken against either the victim or the offender in the sentencing of the offender.

- The victim-offender mediation process should be confidential. The meeting should not be recorded or minuted other than for any agreement that results from the process.

Recommendation 3.

Whilst it is not recommended that there be any limitation of prosecutorial discretion in any case, mediation should be available at any stage of the criminal justice process, including before the offender is charged.

For what matters should victim-offender mediation be available?

The Committee believes that Victim-Offender mediation should not be limited to only certain categories of offences.

The Committee understands through previous schemes that Victim-Offender Mediation is generally suitable for property offences like criminal damage, unlawful use, stealing and fraud. Similarly, Victim-Offender mediation has been seen to be not generally suitable for serious offences against the person such as sexual assaults, domestic violence matters, robberies and other serious assaults.

However, the Committee believes that the choice must be the victims as to whether the mediation takes place (see pre-conditions above) and therefore the committee believes there should be no legislative restriction on the category of offences that can be mediated.

Domestic Violence Matters

Most writers, while acknowledging the recognised advantages of victim-offender mediation, do not extend its appropriateness to disputes where domestic violence is involved.

One of the fundamental aspects of mediation in general, and even victim-offender mediation, is that it is a consensual process rather than co-ercive. A successful mediation therefore is predicated on the parties being able to negotiate as equals to seek solutions that are mutually beneficial. A relationship involving domestic violence is not characterised by negotiation as equals, but by the offender exerting control over the victim through violence that is can be both physical and psychological. The party who has the ability to inflict harm or to harass the other party, will be able to use their power to negotiate a more favourable outcome in mediation. Mediation requires the victim to be able to negotiate effectively on her own behalf when her previous attempts to do these things may be exactly what resulted in her being abused. [8]

However some authors on domestic violence cases do see merit in mediation as part of a deferred prosecution program in situations of domestic violence. Normal litigation including the prosecution process is not a hospitable environment for women who have been victims of domestic violence. If mediation were unavailable to women who had been subjected to violence and some women, who might make a free and informed choice to use a convenient and inexpensive service such as the

[8]National Committee on Violence Against Women, *Position Paper on Mediation*, 1991, Commonwealth of Australia

victim-offender mediation process, would be deprived of that choice. Some authors assert that mediation can deal with the imbalance of power that exists in domestic violence matters by insisting on strict procedural fairness, full participation of the less powerful party, addressing attempts at control made by the perpetrator and providing the less powerful party with support outside the mediation process. Mediation is seen as a process to empower the powerless by enabling the victim to assert her own interests for the first time. [9]

An example of how mediation could work in domestic violence cases could be when charges are laid, but prosecution is deferred pending the undertaking of mediation with specially trained mediators. All authors on this subject, both for and against mediation of domestic violence make it clear that mediation is only appropriate where criminal charges are available and not when the recourse is a protection order, as the safety of the victim is paramount.

The Committee believes there will be very few cases where a victim of domestic violence will be prepared to be involved in a mediation environment. However the Committee also believes that the system must allow for those who do wish to be involved in the process. No legislative restriction will therefore be placed on domestic violence matters being referred to victim-offender mediation. The Committee believes that in most cases involving domestic violence or sexual assault mediation will be inappropriate.

Those cases that do proceed to mediation that involve domestic violence should only do so with the victim's clear consent after all the options have been canvassed with the victim and it is quite clear to the victim that she/he does not have to take part in the mediation process if she/he does not want to.

Matters under section 99 of the Justices Act: Orders to Keep the Peace

The distinction must be made between applications for orders to keep the peace that involve offences being committed by one party against another and those that are simply ongoing disputes between neighbours or acquaintances involving continuous aggravating behaviour by both parties where there is no identifiable "victim" or "offender".

Those disputes that involve the commission of an offence by one party against another are clearly suitable for victim-offender mediation.

[9] ibid

The other category of dispute is more suited to mainstream mediation where there is a negotiation between two "equal" parties who are involved in an ongoing dispute.

It is important to maintain the distinction between the two kinds of disputes and the two kinds of mediation processes as the process used will affect the success of the outcome. It is possible that the VLO can refer the parties to the other mainstream mediation services, or that the victim-offender mediation process can be amended to take into account the different nature of the dispute.

Recommendation 4.

Victim-offender mediation should be available in all criminal cases, including serious offences. Whilst Victim-Offender mediation is not generally suitable for serious offences against the person, there will be exceptional cases.

Recommendation 5.

Applications to keep the peace (s.99 of the Justices Act) which involve alleged criminal offences should be available to be mediated as part of the victim-offender mediation. Those matters that involve non-criminal complaints should be mediated in mainstream services.

Recommendation 6.

Victim-Offender mediation should not be precluded for domestic violence matters including where there is no complaint of a criminal offence.

Who should, and who should not, be considered suitable for Victim-Offender Mediation ?

Those types of offenders who may be dealt with by way of victim-offender mediation include: juvenile offenders, first offenders, neighbours and stranger disputants.

Juveniles

Punishment of juveniles has been shown to be counterproductive. Alternatives aimed at providing a setting which encourages young people and their families to assume the major responsibility for avoiding further offences and which promote community and/or family involvement are considered more appropriate.

First Offenders

Mediation is believed to be a viable alternative for first offenders for similar reasons:

> *To enable first offenders to fully appreciate the effect of their criminal act upon their victim and the victim's response to that act may enable the offender to learn from the event. If the alternative is merely to punish them and leave them free to resent the adjudication system, and the victim, surely mediation is worth trying.*
> *(David J, Mediation: A Viable Alternative (1985) 9 Crim L J 86 page 96)*

Neighbours

Mediation is regarded as effective between disputants in an ongoing relationship; for example, between neighbours or acquaintances. The aim is to promote the restoration and maintenance of the relationship, and to seek a mutually convenient resolution rather than leaving the anger unresolved, which may have the potential to result in a serious crime. As mentioned above, neighbour disputes should only be referred to victim-offender mediation where there has been a criminal offence committed against one party by another and there is an identifiable victim and offender. Those neighbour disputes that involve continuous aggravating behaviour that does not constitute an offence or the identification of one party as a victim and the other as an offender should be referred to civil mediation services.

Stranger Disputes

"Stranger disputes" involve parties who do not have an ongoing

relationship but for whom victim-offender mediation may be a successful mechanism. For example, criminal damage caused to a vehicle by an offender who was drunk at the time.

The Committee believes that only in rare cases would it be appropriate to deal with the matter by way of victim offender mediation when:

- the offender is a repeat offender; and/or
- the offender is one who commits an offence involving domestic violence.

Recommendation 7.

The Committee recommends that there be no legal restriction on the class of offender for whom mediation is available as an alternative method of dealing with criminal behaviour. The Committee recognises that the individual circumstances of the victim and offender are but one factor that should be taken into account in deciding whether a particular dispute is appropriate for victim-offender mediation.

What is the role of the mediator?

Traditionally in such programs the role of the mediator is seen to encompass the following:

- identify the issues;
- allow venting of emotions;
- clarify priorities;
- find points of agreement;
- facilitate reparation between the victim and offender.

Most models of mediation involve a degree of active facilitation. Here the mediator provides, at the very least, space, time and the mere presence of a neutral third party to achieve a controlling factor on the venting of emotions and in assisting in the formulation of agreements.

However in matters of a criminal nature, a more formal approach may be warranted.

There is concern that mediation should not be seen as a soft option by offenders. The mediator should actively ensure that the focus of mediation is the offence and not the offender. This will result in a process that does not allow the offender's version of events to be justified, excused or condoned in terms of the offender's character defects or social situation. "The mediator's response should strongly moralise against the anti-social act, allow the offender to assume responsibility for the act and encourage the social re-integration of both the victim and the offender." [10]

What is the role of the Victims Liaison Officer?

The VLO will become the first point of contact in the victim-offender mediation process. The VLO will provide information about the victim-offender mediation process and will be able to identify inappropriate referrals, especially in relation to s.99 matters as noted above.

The role of the VLO is vital to ensure that pressure directly or indirectly is not brought to bear on either party to take part in the mediation process. This is because successful mediation is dependent on both parties having an equal position of power and if one party perceives that they are "forced" into mediation, the process will fail and can "re-victimise" the victim. This is particularly true in domestic violence cases where the pressure on the victim is far greater to "do what the offender wants". The role of the VLO is particularly important in these cases to ensure that the victim realises

[10]David Moore, *"Diversion? Reconciliation? Mediation? Confusion"* page 39.

there are other options available and to outline the real advantages and disadvantages of the mediation process.

Detailed guidelines should be developed for the VLO relating to intake procedures generally. Guidelines should be specially developed that deal with the intake of matters involving domestic violence. The VLO should be trained on issues relevant to domestic violence, particularly the power imbalance that exists in those relationships.

Is a legislative base required?

Many mediation programs operate on the basis of administrative practice by the courts or police. Legislation is not necessary for the program to function.

Evaluations of existing victim-offender mediation services have shown that where there is no clear referral practice/guidelines established, few cases get referred.

Practice directions from Magistrates/Judges would ensure that the appropriate cases are referred to victim-offender mediation. Similarly, guidelines contained in Police General Orders would ensure appropriate referrals from Police.

In the event that completion of a mediated agreement is contained in the sentence handed down by the court, it may again not be necessary to provide a statutory regime for such mediators.

If the mediation agreement involves a summary offence and the carrying out of work by the offender that will not be completed within 6 months of the commission of the offence, it will be necessary to provide for the suspension of the limitation period for prosecution of the offence otherwise the time for prosecution may expire before the offender has completely discharged his obligations to the victim.

Recommendation 8.

The Committee recommends that legislation be enacted:

- **providing that an agreement to mediate suspends the running of the limitation period until any mediated agreement is fully complied with;**
- **providing that a court may refer a dispute to mediation at any stage.**

Recommendation 9.

The Committee recommends that, once victim-offender mediation programs are in existence, the Police General Orders be amended to provide for suitable cases to be referred to victim-offender mediation by police officers.

Recommendation 10.

The Committee recommends that, for matters instituted under section 99 of the Justices Act, practice directions be developed to divert suitable cases to mediation at the first mention date.

What will be the estimated costs of this reform?

It is difficult to estimate the costs of reform. The proposals will involve either the creation of a new position of victim's liaison officer or the combining of the duties of this position with an existing officer.

The only position that currently exists that could be considered is the Victim Support Co-ordinator employed by the Director of Public Prosecutions ("DPP").

The Victim Support Co-ordinator provides information on request to victims of the progress of a prosecution including the nature of the charges, bail status, reasons for acceptance of a plea of guilty to a lesser or different charge, and information about the trial process generally. The Victims Support Co-ordinator also refers victims to other appropriate support services. This position deals only with charges that are dealt with in the Supreme Court or in the Magistrates Court by way of committal.

The Committee notes that, in its recent report on services to victims of crime, the Crime Victims Advisory Committee dealt with this issue in some detail and made certain recommendations. We note and support its recommendation that the Attorney General, in consultation with the Director of Public Prosecutions and the Officer in Charge of Police Prosecutions, create positions for both female and male victim/witness support officers, to provide information to victims and witnesses about cases they are involved in and the prosecution process as it affects them and to be the contact point for victims who request information (Recommendation 11 of that report).

A further examination of the possibility of combining the new position with the existing Victim Support Co-ordinator would have to be undertaken in the light of possible work load implications and the fact that the existing officer deals only with the more serious matters that would not usually come within the scope of mediation.

The Committee believes that the most appropriate place to locate the VLO in Darwin would be in Police Prosecutions as they are responsible for over 90% of all NT prosecutions in the NT and deal with almost all of the offences that are likely to be suitable for mediation.

Several writers on this issue stress the importance of establishing strong links with the police so that the service is given credibility and will be trusted by the community. It will also ensure referrals. Locating the VLO within the Police Prosecutions Unit and combining it with the existing Victim Support Co-ordinator would be more cost effective as well as providing that link with the criminal justice system. The Committee notes however that at present it would be physically impossible to locate the officer there due to constraints in office space.

In the event that it is not possible to combine the two positions, the cost of a separate officer should be determined in the light of the recommendations made in the Law Reform Committee's report on ADR in the Civil context. It is not possible to estimate the costs of a separate service without the benefit of reviewing the report on ADR in the civil context because of the possibility of combining the two services to a certain extent.

Cost Effectiveness of the service

It is difficult to assess the cost effectiveness of victim offender mediation. Simple financial measures do not provide much more than a starting point for comparisons with other interventions. More importantly the social costs and benefits must be taken into account which are extremely difficult to quantify. Listed below are some of the reasons why the system proposed may save money for the individual, the community or the government.

1. The aim of the victim offender mediation is ultimately to prevent further offending by that individual. This will potentially save considerable amounts in terms of police time, legal aid expenditure and court costs.

2. A victim offender mediation service could be expected to save court and legal costs and play a part in preventing certain minor offences from developing into major social problems in terms of ongoing criminal activity which could otherwise in due course make considerably larger demands on Territory resources.

3. Adversarial processes of the Court system tend to cause trauma and emotional upheaval and leave one or both parties dissatisfied with the outcome. A process that aims at empowering the victim and ensuring that the offender takes full responsibility for his or her actions will lessen the adverse effects of the Court process.

4. The statistics that show that agreements reached by way of victim offender mediation have a high rate of compliance means that society has a greater chance of recouping losses than if the traditional system of restitution orders or fines was used.

What are the possible sources of funding?

Traditionally cost associated with the conduct of the criminal justice system have been funded from consolidated revenue.

Recommendation 11.

The Committee recommends that funding be from consolidated revenue.

Implementation of this report

The implementation of this report should take into account the recommendations of the Aboriginal disputes report and the Civil disputes report. This is because of the issues discussed above regarding the cultural appropriateness of the process with Aboriginal people and the possibility of combining the resources of the mediators in civil mediation with those of the victim-offender mediation scheme.

It is intended that the recommendations of this report should have Territory wide application. The Committee notes however that there are two areas in the Northern Territory that already have some form of victim-offender mediation programs running: the trial program with the police in Alice Springs and the Community Aid Panel in Katherine. The Committee recommends that while the program has Territory wide application, any implementation of this report should begin in those areas that already have some informal scheme that is operating according to the principles of this report.

There should also be an independent monitoring and evaluation process involving the legal aid services, police, correctional services and other relevant community groups. The Law Reform Committee should also be provided with a copy of the evaluation.

Recommendation 12.

There should be an independent monitoring and evaluation process involving the legal aid services, police, correctional services and other relevant community groups. The Law Reform Committee should also be provided with a copy of the evaluation.

Appendix A

1. Is there a need to introduce reforms providing for the use of alternative dispute resolution in the Northern Territory:

   - in relation to civil issues;
   - in relation to criminal issues;
   - both?

2. If so, what are the reforms?

3. If so, what will the reforms require as regards -

   - infrastructure;
   - personnel;
   - training?

4. If so, what will be the estimated cost of these reforms?

5. If so, what are possible sources of funding for these reforms having regard to the sections of the community who will have the benefit of the reforms?

In considering these Terms of Reference, and when making its recommendations, the Committee was asked to bear in mind the role of these reforms in Aboriginal communities in the Northern Territory and also the Territory's isolation and distance problems.

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