"*IT'S HARDER THAN IT LOOKS*": SPECIALISED INDIGENOUS COURTS & VICTIMS OF CRIME

Michael Dawson & Robyn Holder[1]

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Good afternoon

I am Michael Dawson and on behalf of Robyn Holder and myself I would like to thank Victims of Crime NT and their partners for the invitation to be here. I shall be introducing our topic "Victim Involvement in Indigenous Court Initiatives" and then handing over to Robyn for the guts of the critical perspective.

Before starting we wish to acknowledge the Larrakia people who are the historical owners of this land and thank them for their indulgence in allowing us to meet here. We acknowledge their cultural heritage, their traditions and spiritual connection to this land.

While I am excited by the theme of this conference and the hopeful benefits for Aboriginal and Torres Strait crime victims through our conversations and learnings, I (and I speak for Robyn too) feel somewhat awkward to be a "white man" and a recent arrival in this land, standing here trying to summarise services and issues which are primarily Indigenous focused – we hope we will not appear presumptuous or arrogant in sharing our thoughts with you.

Dr Kate Auty, formerly Magistrate at Shepperton Koori Court (Vic), described that court (commenced in 2002) as a "*sentencing conversation*" (Harris 2006:14). In so doing she highlighted the interactive and reflective nature of these new court initiatives, and the extent to which they have become places where listening and mutual respect is at a premium.

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In presenting today, we wanted to adopt that idea of a "conversation" to explore with you some of our reflections on the issues and challenges to acknowledging victim interests and to attempting victim involvement in Indigenous court initiatives.

Our title "*It's harder than it looks*" comes from a comment by an Indigenous woman who was a victim of violence who participated in a Circle Court with Robyn in Canberra. She was reflecting on how hard the process was for her, but also how hard the process was for everyone.

Victim involvement in specialised courts is harder than it looks.

I will start by providing some context for our part of the conversation. I will also present information gained from our very rudimentary survey of State and Territory Indigenous court initiatives, and will consider some perspectives about them from our interest in victims of crime. Robyn will then move to discuss some of the issues and challenges that we see before us before concluding with some questions for our continuing dialogue.

Our Context

We wanted to start by saying a bit about where we are coming from.

We start from a basic principle that all people have an equal right to access justice and all people have an equal right to the protection of the law. We acknowledge that, for Indigenous people, these rights have been honoured more in the breach than in reality. Both historically and today. We also acknowledge – for both Indigenous and non-Indigenous victims of crime, these "rights" are inconsistently and patchily adhered to in most Australian jurisdictions. Nonetheless we believe the principles to be key to our conversation.

We recognise that many Indigenous people including both victims of crime and offenders, are victims of social injustice, racism, and cultural and language isolation. And, we recognize that dispossession as a cruel continuing legacy. We further recognise the very strong presence of the victim–offender–victim cycle, which – whilst present for much of the wider community - manifests itself in the Indigenous context more strongly than anywhere else in the criminal justice system.

Victim service providers face this challenge frequently and I believe generally exercise flexibility in terms of interpreting who is 'a crime victim' and therefore eligible for services. Nonetheless there remain practical and philosophical issues about whether we can provide services to the victims and offenders in one 'case'. Often it depends on what type of service is sought and/or the location. We may look, for example, at providing a facilitation of a restorative

justice process or chairing a victim–offender mediation, in addition to assisting the primary victim with our usual services. We certainly look to partnering with Indigenous-specific services in these endeavors with Indigenous clients and families.

We also wanted to acknowledge the enormous influence on our thinking of the idea and vision of *reconciliation*, and its promise for more cohesive communities, a restoration of trust and a re-connection between our common humanity. Victim service providers across the country know the truth of research that consistently finds that protective and responsive social support is one of the most crucial factors in assisting victims of crime in restoring damaged lives, re-knitting ruptured relations and in repairing tarnished trust. (Norris et.al)

Professor Mick Dodson, in a recent speech (July 06), expressly acknowledged 'relationship building' as underpinning reconciliation.[2] In thinking about the importance of restoring relations, we recognise that the strength and sense of 'family' in an Indigenous setting is far reaching. Aboriginal families, I understand, have an immense sense of collective pain and victimisation if one of their members is offended against or a greater sense of shame if a member has offended, than is perhaps typical or usual in a western immediate family unit.

Excluding people – be these offenders from our communities, or victims from the criminal justice process, or Indigenous people from wider society – will not serve the ideal of reconciliation as a means of achieving a fairer and more harmonious world.

This understanding of the way in which *reconciliation* has a very real effect on victims of crime is, we think, reflected in the wider goal of *reconciliation* between Indigenous and non-Indigenous Australians. We note the description provided by Reconciliation Australia that:

Reconciliation involves justice, recognition and healing. It's about helping all Australians move forward with a better understanding of the past and how the past affects the lives of Indigenous people today. Reconciliation involves symbolic recognition of the honoured place of the first Australians, as well as

[2] Dodson, M. (July 2006) at *Reconciliation: Taking the Next Step* Luncheon. http://www.reconciliation.org.au/i-cms.isp?file=156/Mick_Dodson_25July.pdf

practical measures to address the disadvantage experienced by Indigenous people in health, employment, education and general opportunity[3]

This combination of justice, healing and practical assistance is shared in our worlds.

I don't want to over stretch the connections between the way in which we understand the meaning of reconciliation and restoration for victims of crime (whoever they are), and the meaning of reconciliation and restoration for Indigenous people. We know that there are many complex levels to understanding each aspect.

One thing I feel we both know, however. And that is that saying sorry is only a first step and not the end.

The Survey

To prepare for this paper we conducted a rudimentary telephone and email survey of colleagues in the States and Territories. I would like to thank everyone for taking the time to respond to us in their busy schedules. Any errors or omissions are our responsibility entirely!

We received information about the wide range of ways in which victim support services across Australia (those for any victim of crime, and those specialist ones such as for family violence and sexual assault and including witness assistance programs) are working to make their services more relevant and accessible to Indigenous people.

We heard about wonderful programs with a crime prevention focus that used a community development and holistic approach that aimed to strengthen family and social ties; and crime prevention programs that wove cultural learning and self-respect through youth and recreational activities.

[3] See www.reconciliation.org.au

We learned about the creative ways in which employment and skills training programs are training people in ways of accessing and distributing self-help information, of utilizing mediation and community education.

We heard a lot about very determined people – Indigenous and non-Indigenous – who were working assiduously in the child protection, family violence and sexual assault fields to heal the deep harm of these offences, help offenders change their ways, and restore people to their communities.

And there was more still we learned about unique combinations of programs for Indigenous offenders where there might be drug and alcohol issues, mental health problems, homelessness and poverty.

Interestingly there seem to be more specific offender-oriented programs with committed funding. But maybe this is no surprise given that there are far more offender programs than ones for victims in the wider community as well– take for example all the court diversion/problem-solving court initiatives which exist focusing on treatment for offenders. I am certainly not criticizing the existence of or need for these. It will not surprise you that I simply think there should be more programs specifically focused on Indigenous victims. This conference may help us bring about more.

More Context: what we found out about Criminal Justice Initiatives

As Elena Marchetti & Kathleen Daly said in their review of Indigenous Courts for the Australian Institute of Criminology (2004:2), the Royal Commission into Black Deaths in Custody "is the moral touchstone for any policy or practice relating to Indigenous people and crime".

Our rudimentary survey affirmed this yardstick. We found a range of criminal justice based initiatives with some stated victim "interest" included:

- Aboriginal Courts
- Drug and alcohol courts – some Aboriginal and Torres Strait Islander participation

- Mental impairment court (SA) – with some Aboriginal and Torres Strait Islander participants
- Youth Court (SA) – aboriginal conveners of family conferences involving Aboriginal and Torres Strait Islanders participants
- Training Aboriginal and Torres Strait Islanders people as mediators
- Night patrols
- CPTED
- Community Development officers – family violence focus
- Family violence intervention programs
- Aboriginal services officers
- Child protection workers
- Victim of crime registers for information about goaled offenders

Our specific interest however was in Indigenous court initiatives. We wanted to identify some key influences, and to generate some perspectives on the directions in which these initiatives were heading and how this might impact on the victims of the offences.

We asked basic questions about whether the initiatives were diversionary or post-conviction; whether they dealt with adult or juvenile offenders or both (and for what type of offences); the make-up and orientation of the initiatives; and the extent to which they involved victims.

There is a lot about these diversion/treatment/problem solving courts which deserve a closer examination from a victim perspective – especially before we look at whether these models of therapeutic jurisprudence are, or can be, used with a primary victim focus; and the extent to which restorative justice approaches can meld with usual court practice.

<u>Aims of Indigenous Courts</u>

There does appear to be a high degree of agreement across the States and Territories about the key influences on Indigenous court developments. [4] These influences include recognition of:

- The vital importance of breaking the cycle of Indigenous offending
- The need to improve relationships between Indigenous communities and the criminal justice system especially the courts
- Provide a more culturally appropriate setting for Indigenous offenders than mainstream courts
- Reduce the number of Aboriginal people in prison and of Aboriginal deaths in custody
- Improve court participation rates of Aboriginal people, and
- Recognise the importance of combining punishment with treatment

Chris Vass, the first magistrate of the Nunga Court in South Australia described the operation of the Court in the following way:

'You gain respect from what you do rather then where you sit or how many wigs and gowns you wear…The first thing I did was get off the bench... What I wanted to introduce was the ability for the accused to be able to speak…I also wanted to include groups that could include alternatives to imprisonment, provide sentencing options…People from government and non-government programs are able to sit in the court and speak and say, 'Well, this is what I can do for this person' (Tomaino, undated, p.5).

Express recognition of the interests of victims of crime appears more limited. The NSW Circle Sentencing Courts state that support is provided to Aboriginal victims of crime in all 8 of their locations.[5] The ACT Ngambra Circle Sentencing Court includes in its aims to "provide support to victims of

[4] Tomaino, J. (undated), *Aboriginal (Nunga) Courts)*, Information Bulletin 39, OSCAR, Adelaide; Marchetti, E. & Daly, K. (May 2004), *Indigenous Courts & Justice Practices in Australia*, AIC, Canberra; Harris, M. (March 2006), *A SentencingCconversation: Evaluation of the Koori Courts Pilot Program, Oct 2002-Oct 2004*, Department of justice, Victoria; Potas, I. et.al. (2003), *Circle Sentencing in NSW: a review and evaluation*, Judicial Commission of NSW, Sydney; and Hennessy, A. (July 2006), "Indigenous Sentencing Practices in Australia", Paper for the Conference of the International Society for the Reform of the Criminal Law, Brisbane, July 2006.

[5] NSW AGD (Nov 2005), "Circle Sentencing" Fact Sheet.

crime and enhance the rights and place of victims in the sentencing process".[6] The SA Nunga courts include involving victims and the community as an objective, along with recognition of the importance of transparency of the process to victims.[7] The Victorian Koori court program does not expressly recognize victims, although at least one area (Shepperton) has a procedure manual that specifies the processes for informing and involving victims.[8] The Community Court here in Darwin appears to be a unique initiative aimed at involving both Indigenous and non-Indigenous victims and communities – though we understand that the majority of offenders before it are Indigenous.[9] Victim-inclusive practice in Indigenous court initiatives in WA and Qld appears to be mixed and localised.[10]

In our survey of people we asked about the actual level of involvement of victims of crime. With some limited exceptions it appears that:

- Victims are rarely invited to comment on any negotiation to divert the charges or to modify (down grade) charges prior to a matter going to an Indigenous court
- Victims often receive limited or no information about the specialized processes, and generally don't receive basic information about court dates.
- Where the 'sentencing' process is delayed to a later date after monitoring a therapeutic intervention, the right and opportunity to submit victim impact statement may be avoided or missed, and elocution where this should be available, is denied.

We went on to ask whether any of the initiatives knew what proportion of the victims were Indigenous. Only the ACT could tell us though Victoria indicated

[6] ACT Magistrates Court (May 2006), NCSC Practice Direction.
[7] Tomaino, *op.cit.*
[8] Victoria Department of Justice, "Koori Courts" at www.justice.vic.gov.au and Shepperton Operations Manual.
[9] Bradley (2005), "Community court Darwin Guidelines"
[10] Email communications from WA on file with the authors. Qld Department of Justice "Murri Courts".

that new data collection templates due to be implemented would collect this information.[11] We will return to this absence later in the paper.

Basic Types of Indigenous Court

In terms of their operational context, it appears that Indigenous Court initiatives fall into three basic types (though with overlaps between them): those which are diversionary, those which are similar to problem-solving sentencing courts, and those which include a restorative approach to sentencing such as in Sentencing Circles. All it appears require a plea or finding of guilt. We did not find Indigenous court initiatives that hear contested matters – though some may exist.

1. Diversionary Courts – an example

An example of a diversionary Court is in Ceduna, SA.[12] The Ceduna Family Violence Prevention Project has developed a visionary new approach for victims of violence, involving principles of restorative justice and community development.

The service provides both counselling and support services and legal assistance. However, the service also has a higher order objective, to bring about social change, through work with schools, teachers, and community, using community development principles.

The project gives Indigenous women the opportunity to discuss the crime with the offender in a poignant and meaningful way, without necessarily proceeding to court.

The process is as follows: [13]

- If a person is charged, the matter will be diverted by the court. The victim and their lawyer will meet with the alleged perpetrator and their

[11] Note that the authors' were unable to make direct contact with the NSW AGD Crime Prevention Division that oversights the Circle courts in that state.
[12] Funded by the Commonwealth Government as part of the Indigenous Family Violence Prevention Initiative.
[13] *Victims' Voice*, Victim Support Service, Adelaide, September 2006 pg 8

legal representative, with a skilled moderator. Community Corrections are also involved, and interpreters used as necessary.

- The victim is encouraged to tell the story, using a narrative framework.
- The perpetrator is then invited to express his feelings about this information, and the factors that have influenced him to choose violent conduct.
- From this point, both victim and perpetrator can explore what it will take to bring about a new life story, one without violence.
- A follow-up plan is then developed, which is provided to Court by Correctional Services. The Court then determines the final sentence, and the way ahead.

2. Problem-solving Courts – an example

The Victorian Koori Court program appears to be the clearest example of this approach. The Murri Courts in Qld and, to an extent, the SA Nunga Courts are also of this mould.

Problem-solving or problem-oriented courts are pretty much as the description implies. The focus is usually therapeutic and problem-solving for the offender. Problem-solving courts involve a more interactive magistrate to the extent that this person acts almost like a 'case manager' of the offender's rehabilitation plan. A magistrate in a problem-solving court is likely to have an offender return to the court for periodic review and discussion about their progress in rehabilitation programs.[14]

Examples of this type include drug courts, youth courts, and – to a certain extent - family violence courts.

[14] For a discussion on the implications for Australia of problem-solving courts, see three articles by Phelan A. "Solving Human Problems or Deciding Cases? Judicial Innovation in New York and its Relevance to Australia: Part I" (2003) 13 JJA 98; Phelan A. "Solving Human Problems or Deciding Cases? Judicial Innovation in New York and its Relevance to Australia: Part II" (2004) 13 JJA 137; and Phelan A. "Solving Human Problems or Deciding Cases? Judicial Innovation in New York and its Relevance to Australia: Part III" (2004) 13 JJA 244. Also see Freiberg A, "Problem-oriented Courts: Innovative Solutions to Intractable Problems?" (2001) 11 JJA 8 at 12; and Freiberg A, "Problem-oriented Courts: An Update" (2005) 14 JJA 196 at 215

The difference with the Koori Court (and most other Indigenous courts) is that the Magistrate is assisted by a panel of Elders or Respected Persons from the local Indigenous community.[15] The SA model usually has the Magistrate assisted by at least one Respected Person from the community.[16] The involvement of people from the community is to better understand the individual and social circumstances of the offending behaviour, and to more effectively tailor a sentence. In some areas/jurisdictions, the Elders or Respected Persons bring a cultural and customary perspective on the offending. And some provide customary law guidance for sentencing and for the 'management' of the rehabilitation plan.

Marchetti and Daly (2004:4) state that the Indigenous community "*is a key influence in correcting and modifying established criminal processes in ways that are less apparent to relevant 'communities' in other specialized courts*". In particular, given that kinship and relationships are prominent elements of Aboriginal culture, undertakings and promises made by Aboriginal defendants in front of their relatives and support group are far more consequential, meaningful and enduring than statements made by their legal representatives in impersonal mainstream courts. Extensive use is made of pre-sentence information, to inform sentencing decisions. These reports can identify defendant's offence-related needs and can include information about the available resources to assist the offender. Magistrates who preside over the courts develop a rapport with Aboriginal communities that in turn builds trust and knowledge of local issues that result in better quality sentencing decisions.[17]

However, in these initiatives there is no role for the victim other than that which is provided for in mainstream courts and by usual prosecution practices. In particular, victims may be told about the charge, the court venue, and about the opportunity to prepare a Victim Impact Statement. As many of us know these are hit and miss procedures at the best of times for

[15] Harris, *op.cit*
[16] Tomaino, *op.cit.*
[17] See for example, Hennessey, A. (2006).

any crime victim in any court. Studies of both the SA and the Victorian Indigenous Courts note the rare or low rate of involvement of victims. This is comparable to the mainstream.

3. Circle Sentencing

A third approach is exemplified in circle sentencing courts. The longest established are in NSW, with the ACT Ngambra Circle Sentencing Court strongly influenced by them.

While very similar in their origins, where they 'sit' in the criminal justice process and how they are structured, circle courts appear to be more conscious of the value of the victim's participation. This is evidenced by the extent to which specific procedure is directed to actively include victims, the extent to which victims are encouraged to be supported and to bring support people, how this is separately resourced, and finally, the extent to which the victim is encouraged to 'tell their story' and to articulate the harm that has been done. The victim's voice can and often does form an active part of the discussion.

In this, these initiatives appear to be influenced by jurisdictions with a strong victims' 'rights' framework, and by the perceived benefits of the restorative dialogue. In the ACT, for example, the Court's Practice Direction allows for victim participation on the basis of informed consent, and allows for a victim representative (in addition to a support person) to be involved in the Circle.

Where they differ from more usual forms of restorative justice is in the absence of a restorative justice facilitator, and the absence of an outcome that is agreed by victim and offender. In Circle Courts, the Magistrate with the Elders is commonly the decision-maker and the sentence may not include some specific redress for the harm done to the victim.

The community court pilot occurring here in Darwin appears to be influenced by circle courts, by restorative justice and by the 'community court movement'

in the USA.[18] While the community court envisages both Indigenous and non-Indigenous community involvement, the majority of offenders involved so far are of Aboriginal and Torres Strait Islander heritage. The court is still in the charge of a magistrate and where a plea or a conviction has been reached.[19]

The Darwin Community Court explicitly provides for victim participation.

- Victims will only participate with their consent
- Victims are entitled to have a support person at proceedings
- Victims will be able to have a representative in the proceedings without having to attend
- Magistrate will ensure the victim has an opportunity to be heard either directly or through their support person
- A victim impact statement if tendered will be kept on the Court file.[20]

Implications & Discussion

It appears to us that Indigenous court initiatives do indeed indicate "*a transformation in our justice system*."[21]

This is most obvious in relation to the extensive recognition of Indigenous community input and expertise, of a greater degree of court and inter-agency interaction with and involvement in deliberations about the offender's circumstances, and of the more tailored sentencing.

What is less obvious is that, in seeking to manipulate usual court processes and to focus on Indigenous offenders, a sharper light is being thrown onto the role of the victim.

[18] A most famous community court is in Red Hook, NYC. A Community Court is also being trialled in Melbourne, Victoria.
[19] Bradley, *op.cit.*
[20] *Ibid.*
[21] Marchetti & Daly, *op.cit*., p.4.

Before getting to the implications of Indigenous court development for victims, we want to discuss three contextual issues we felt were relevant.

Firstly, it is important to state that victims of crime are generally disenfranchised from participating in the criminal justice system. This aspect is not more or less so in Indigenous courts. For very many years, the recognition of victim interests and the participation of that person(s) have posed a profound challenge to all agencies in the contemporary justice system. Therefore, the agitation for acknowledgement is not more for Indigenous courts than for other courts. No one is asking for more than is not already asked of mainstream court processes.

The benchmark for victim advocates is the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power that was unanimously endorsed by the UN in 1985. Australia is 'bound' by this international standard. Most States and Territories have adopted core aspects of the Declaration either in legislation or in administrative code. Neither the UN standard nor the jurisdictional ones limit recognition to this victim of crime above that victim of crime. And the standards are not applicable only to this justice process and not that. Remember that all countries with diverse legal systems incorporating inquisitorial, customary and other frameworks adopted the UN Victims Declaration.

Victim Support Australasia (VSA), the national body, developed – after three years of consultations and using the UN Declaration as a template –a position paper (2003) that sets out in more detail the recommended standards for victim recognition and participation.[22] There is nothing in this Position Paper that could not also apply to any specialized justice process.

A further contextual issue is that the other side of the coin of Indigenous offending is Indigenous victims. Of course, the extent of victimization by

[22] Located at www.victimsupport.org.au

violence and abuse has been known for years[23] – though with fitful responses in many areas.

As mentioned earlier, the RCBDIC is the "moral touchstone" in much Indigenous policy development. But, as the (then) chair of the NSW Aboriginal Justice Advisory Council, Winsome Matthews, has stated, the RCBDIC "failed to really address women's issues either as victims or offenders, and in general, victim of crime issues".[24]

It's not just violence though. Indigenous individuals, families and communities also experience offences like theft, criminal damage, and fraud for example, at least at levels similar to the wider community. Some may fear that to discuss the extent of Indigenous victimization represents a divisive attack on all Indigenous people. But many Indigenous communities & Indigenous leaders such as Prof Dodson are seeing the longer term and corrosive effects that ignoring these issues can result in.

In NSW, for example, the Aboriginal Justice Plan – launched in 2005 – has at Goal 3 that the State will "develop safer communities by recognizing that the majority of victims of offences committed by Aboriginal people are other Aboriginal people and that many offences are not reported through the criminal justice system".[25] The Plan goes on to expressly set out objectives for responding to Aboriginal victims of crime.[26]

In essence this contextualising issue tells us that a significant proportion of the victims of Indigenous offending that may come before an Indigenous court will be Indigenous. There have got to be implications to this. Especially for our interest in restoring both victims and offenders to their communities.

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[23] The National Aboriginal & Torres Strait Islander Social Survey (ABS 2002) show that a quarter of Aboriginal people reported that they had been a victim of physical or threatened violence in the previous 12 months. In NSW, the Bureau of Crime Statistics and Research (BOCSR) reported that 9% of all common assaults and 14% of all AOABH are against Aboriginal victims.
[24] NSW AGD (2001*), Indigenous Victims of Crime*, Sydney, p.4.
[25] NSW Aboriginal Justice Advisory Council (2005), *NSW Aboriginal Justice Plan*, Sydney, p.10.
[26] *Ibid*., p.21.

A third contextual issue relates to the inadequate knowledge-base about victims of crime that appears to us to inform much justice policy and system development. It became apparent, from our surveying of colleagues across the country and from some documentation about Indigenous courts, that the view (however inaccurate) of victims of crime as punitive and retributive has a reasonably strong hold. And this set of assumptions influences people to be cautious of victim involvement at best and restrictive at worst.

Again, this is not an assumption held solely by those developing and working in Indigenous courts. We rather wearily acknowledge its very wide currency. We try not to despair at the dearth of sound Australian research in this area. But can only point to the overseas studies and the few Australian ones that show that victims of crime are not more punitive in their views on sentencing than are non-crime victims.[27] In the ACT, for example, a study that replicated the findings of the ICVS with victims of residential burglary found that victims preferred a non-custodial and community based sentence for a recidivist burglar.[28] In the report (Nov 2004) my Office did for the review of the Ngambra Circle Sentencing Court we noted that the majority of victims surveyed did not want a custodial sentence for the offender and the majority were positive about the social justice intentions of the initiative.

Of course, these research findings sit alongside the experience of many of us here with the fear, pain, anger and anxiety that many victims choose to voice at various stages after victimization. Emotion is nothing to hide from. Indeed, our experience (and the procedural justice research) tends to strongly suggest to that it is the exclusion of people from processes that aggravates and amplifies the negative emotions. Restorative justice practice shows us that the expression of harsh emotion does not preclude empathy with an offender's circumstances; nor does it preclude a shift in any participants' intellectual orientation towards a shared and rehabilitative agreement.

[27] See for example, the *International crime Victim Survey*.
[28] ACT DJACS (2004), *Crime Victims and the Prevention of Residential Burglary*, Canberra.

As victim advocates in the justice system, working through these emotions with victims is part of the preparation we do for Circle Court.

So … when a specialized court or justice process does actually seek to include victim participation, what then? In this final section of the paper, I want to touch on.

- Resourcing victim advocacy
- Transparency
- Victim/witness protection, and
- The sentence.

Resource victim support & advocacy

Here I draw on the experience of my Office in the ACT in conducting the victim liaison and preparation for the Ngambra Circle Court. Firstly – victim involvement does not happen merely because we provide an opportunity to become involved. As the Victorian evaluation of Koori Courts and the Issues Paper on the SA Nunga Courts acknowledge, victim uptake on participation is limited. Why?

In our experience as victim advocates in both the mainstream justice system and the specialized courts, victims respond to measures aimed at active engagement. Put simply, people need (and deserve) active support to enable participation that respects where they are coming from, and works with people to explore and articulate desired outcomes.

In the report my Office did for the review of the ACT Circle Court we described that the majority of victims at first contact did not wish to participate in the process for a range of reasons. After further contact and work with our Office, this reversed and the majority did become involved directly or indirectly whether it was a violence or property offence and whether the victim was Indigenous or non-Indigenous.

Various reports – the evaluation of the NSW Circle Courts and that for the Koori Courts for example – point out the beneficial implications that victim participation may have on offenders. Of course, good outcomes for offenders are a primary consideration for personnel in specialized courts. But it is a secondary (though not more or less important) outcome for us working with victims. While I am not a fan of the concept of 'closure' or indeed of 'healing', we do see victims who are able to resolve for themselves (to a certain extent) - through active and supported engagement with the justice process - the impact of fear of the offender, their broken trust in 'the social contract', and the feeling that no-one cares about victims of crime.

Make no mistake though, the impact on our small Office of the demands of victim engagement in specialized courts is higher than in mainstream courts. Police and independent prosecutors who work in the specialized jurisdictions also know this. In essence, the quality of justice is enhanced through victim participation but this improved quality is <u>not</u> cost neutral – in financial or human terms!

<u>Transparency</u>

Transparency is an issue that is really important to victims trusting court processes enough to be willing to become engaged. Transparency is a critical aspect of how we understand 'due process'. Any person – victim or offender – will make judgments, informed by their own experience, by what they see and by what others tell them – about the legitimacy and fairness of a legal process.

Again, this is nothing new to victims dealing with the mainstream system. However, for Indigenous courts there are particular challenges in overcoming perceptions from Indigenous and non-Indigenous victims that the process may, for example, be biased against them, that it is a soft option, and that there are hidden influences and hidden information kept from the victim.

In particular, as Marchetti and Daly acknowledge in their review of Indigenous courts, "*the role of elder can be tricky ... especially in remote communities, where it may appear that an elder is 'whispering in the magistrate's ear'*".[29] The SA Nunga Courts state one of their aims as being to maintain a transparent process. And the Victorian Koori Court program has developed a Code of Conduct for Elders.[30]

This is not to say that Indigenous courts are somehow inept. Far from it. What it does say is that confidence – of Indigenous and non-Indigenous people – in the fair administration of justice is strongly influenced by what is seen and experienced. That is, what is open. This is the same in mainstream courts as for indigenous courts. I can't imagine a court in the country that is free from bias of some sort. But clear conflicts of interest do need to be actively worked at and openly acknowledged.

Protection issues

A key aspect to transparency that we have found is the way in which protection and safety issues are dealt with in Indigenous courts. All Indigenous court initiatives deal with violence offences, and some with family violence. In this court, as in the main specialist family violence jurisdiction, the usual mechanisms for managing risk and safety include bail provisions, protection orders, supervision arrangements and victim safety planning/management. Most bail laws deal explicitly with witness intimidation.

We have heard at this conference that most Indigenous violence offences are against Indigenous victims. The communal connections and relationships behind this do not necessarily presume that a resolution at court is the end of the dispute. In family violence as in no other offence area there are myriad undercurrents. To an extent, victim exposure is protected in mainstream courts simply by their secondary participation. In specialized courts the exposure of individuals is far heightened. The scope for unwary information disclosure in particular is magnified. Victim support in these matters does not

[29] Marchetti & Daly, *op.cit.,* p.5.
[30] Harris, *op.cit.,* p.45.

presume people will want to separate. Managing risk in these circumstances is an ever present reality for victim advocates.

If we are to avoid the Coroner's forensic eye over our practices and procedures both mainstream and Indigenous courts must be very alert to the possibility of further violence.

The Sentence

As I said earlier, the research and our experience show that, in general, victims do not seek punitive sentences. As Kathleen Daly has written in some of her work, this does not mean that victims do not think that an expression of public disapproval – the punishment – should be ignored. Strange as it may seem at first glance, punishment can and does sit alongside victims' willingness to consider restorative and rehabilitative outcomes.

But, just as Indigenous courts represent departures from usual court practice, so we think the bounds of sentencing norms need to be examined. In particular, the scope for the Magistrate and the Elders to respond to the rich dialogue of the parties and to respond to the extent of the harm that is revealed by using powers for restitution and reparation orders in addition to whatever else is appropriate.

A couple of years ago, a prosecutor (who is of Indigenous origin) from ACT traveled to north America to examine Native American courts. He recalled one where it was almost common practice for the defendant to offer to the victim, at the conclusion of proceedings, some item that had meaning and symbolism to his or her tribal and cultural background.

We think that the power of the "sentencing conversation" that is in danger of being overlooked is that between the offender and the victim. We worry that, in some initiatives, the victim's presence is required almost for the emotional catharsis alone. "Tell us how you feel but then no more." This is a harsh

comment I know but it is also dangerous to our wider goal of reconciliation and restoration.

I recall a recent matter we assisted in our Circle Court where both victim and offender made generous and thoughtful suggestions as to how a specific harm might be addressed. These were completely ignored in the final sentence by Magistrate and Community Panel.

This type of thing makes us, as victim advocates, think (in good conscience) that perhaps a pure restorative justice intervention where a shared agreement is part of the outcome is preferable, rather than a hybrid one where it is still an imposed outcome.

Conclusion

To conclude, we think victim involvement in Indigenous courts, as in mainstream courts, has the potential to improve the quality of justice outcomes. But – victim involvement and participation "is harder than it looks".

Michael and I believe that the fore-mentioned potential weaknesses can be addressed so that "the sentencing conversation" is inclusive of all affected parties. The dialogue, mutual respect and partnership that have been so stressed at this conference are the key. The restoration of people harmed by violence and crime, and reconciliation between peoples is no easy endeavor. But with open hearts and minds much is possible.

Thank you

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