WORKSHOP 3:

CONFERENCING MODELS

Chair: Marian LIEBMANN (UK)

1. AN ADULT RESTORATIVE JUSTICE PILOT PROJECT IN SOUTH AUSTRALIA

by Rick SARRE, University of South Australia and the University of Umeå (Netherlands)

Introduction

In March 2004 the Adelaide (South Australia) Magistrates Court announced the commencement of an adult restorative justice conferencing pilot project, initially for six months. The model is based on a victim-focused philosophy, already entrenched in the South Australian juvenile justice system. This paper reports on the circumstances that led to the pilot and the progress of the pilot.

South Australia has been interested and involved in restorative justice processes for more than a decade, the most notable initiative being the family conferencing options available for young offenders.[1] This 2004 pilot project into *adult* conferencing is a new initiative. The intent of the project is to offer consenting victims and offenders the opportunity to meet, after a plea of guilty but prior to sentence, with a view to discussing the harm caused by the offence and exploring possible restorative options. All cases falling within the jurisdiction of the magistrates court are eligible for a conference, except for domestic violence offences and those that are referred to the Mental Impairment Court. A report of the conference (and any agreements reached) is provided to the sentencing magistrate for consideration. Thus, the final decision on sentencing remains with the magistrate, and he or she need not take the conference and its outcomes into account. A conference can be initiated by anyone involved in the case (including victim, offender, prosecutor) but the magistrate has the final say in referring a file to the conference team. A conference will not go ahead without both the victim and the offender attending. After the conference, the facilitator writes a report to the court outlining what happened in the conference, including the remorse (or otherwise) of the offender, the victim's input and feelings, and any agreement reached, for example, apology or compensation.[2]

The 2003 'experiment'

This conferencing pilot arose out of an experimental adult conference that was conducted in South Australia on a purely *ad hoc* basis in 2003. It was not planned by the court, but presented to the court as a *fait accompli*. The circumstances of this 'experiment' were as follows.[3] Whilst working with the State Emergency Service (SES) repairing damage on a series of shops following an arson attack, the defendant, aged 26, stole several items of jewellery from one of the damaged premises. He was arrested and charged with larceny. He had one prior conviction for a similar offence, from which he had received a community service order and a good behaviour bond. The defendant admitted his guilt and cooperated with the police. He was referred to the Centre for Restorative Justice by his Offenders Aid and Rehabilitation Services (OARS) officer as being appropriate for an adult conference. Initially hesitant, the defendant later agreed to participate.

---

[1] Sarre, R. (1999) Restorative Justice, *University of Notre Dame Australia Law Review* 1(1), 11-25.

[2] See Laycock, D. & Garrett, L. (2003) *Preliminary Recommendations and comments in support of the Magistrates Court Adult Restorative Justice Trial*, Adelaide, Centre For Restorative Justice. Western Australia, too, is currently running a pilot project along these lines for adult males, and by press release dated 6 August 2004, the government of the Australian Capital Territory announced the introduction of the *Crimes (Restorative Justice) Bill 2004* that will set up a specialist restorative justice unit which will extend the pilot model to the adult justice system in the second year, following a review. Refer generally Australian Capital Territory (ACT) Government, (2003), *Restorative Justice Options for the ACT: Issues Paper*, Department of Justice and Community Safety.

[3] Sarre, R. & Earle, K. (2004) 'Restorative Justice', in Sarre, R. and Tomaino, J. (eds) *Key Issues in Criminal Justice*, Adelaide: Australian Humanities Press, 144-165, at p 157.

Both prior to and during the conference, the defendant showed great remorse for his actions. He stated that he now realised the damage he had caused not only to the victims of the theft, but also to the SES and to his family and girlfriend. The defendant formally apologised to the area manager of the SES, and discussed how he could repair the harm caused to his family. He identified issues within himself and his personal life which needed addressing. He also undertook to apologise to the shop owners (the property had already been returned to them).

Whilst both of the magistrates involved at different stages of this case stated that they knew nothing of the 'restorative' ideal, they agreed to let the conference proceed, and then to accept the outcome as a 'pre-sentence' report to the court. The prosecution (police) initially did not support the process, and did not have any input into the conference, but once the conference had occurred they had no problems with the court considering the report in this way. The sentencing magistrate made it clear that he had been ready to impose a custodial sentence of 18 months, but stated that he could see the amount of positive advancement work already undertaken by the offender. He suspended the sentence and imposed a good behaviour bond and community service order.

The June – December 2004 Pilot

The formal pilot conferences started in June, and to date there have been three conferences and there are six more planned. There are two facilitators (one male, one female) employed half time.

Case 1 – a 40 year old male charged with false pretences and deception involving $60,000. There were a number of offences involving 18 victims. The offences happened over a long period of time. Ten victims attended the conference. The offender was still sentenced to a term of imprisonment, but the magistrate stated that he gave the offender a discount for the guilty plea, and a further 20% discount for undertaking the conference.

Case 2 – a 28 year old female, charged with assault. She had had an altercation with a security guard at a railway station and spat on him. She had no history of offending. The security guard attended the conference.

Case 3 – a 24 year old male, charged with property damage. He went on a 'rampage' and kicked in a glass window. He had had a history of offending. The victim attended the conference.[4]

The pilot will continue until 50 -60 conferences have been conducted. However, the evaluators are aware that this number may not be reached within a reasonable time, so the pilot may finish at the end of 2004 with fewer than this number.

Evaluation and Conclusion

There is no intention to include recidivism rates in the evaluation of the pilot (nor victim non-attendance), but merely to focus upon varying aspects of victim satisfaction and perceptions of procedural justice, variables that have been used successfully elsewhere.[5] One might hope that the evaluators pay some attention to adult conferencing as another diversionary mechanism from the court process altogether. This is because evidence from the literature tends to suggest[6] that the hopes of planners (in 1994) that juvenile conferencing would lessen the numbers of young people going to court have not been realised. There is no ongoing funding for the adult conferencing pilot programme, and it will be up to the government to decide on its future once the results from the research are in. These results should provide for an interesting debate when the time comes.

---

[4] We are not aware of the results of these other two conferences as the offenders are yet to be sentenced.

[5] Daly, K. (2002) Restorative Justice and Conferencing, in Graycar, Adam and Grabosky, Peter (eds), *The Cambridge Handbook of Australian Criminology*, Melbourne: Cambridge University Press, 294-331, Sherman, L., Strang, H., & Woods, D. (2000) *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments (RISE),* Australian National University, Strang, H., Barnes, G., Braithwaite, J. and Sherman, L. (1999) *Experiments in Restorative Policing: A Progress Report on the Canberra Reintegrative Shaming Experiments (RISE)* Australian National University.

[6] Office of Crime Statistics and Research (OCSAR) (2004) *Crime and Justice in SA 2002 – Juvenile Justice: A Statistical Report*, Attorney-General's Department.

2. CONFERENCING IN THE MAINSTREAM

by Rob van PAGEE, Eigen-kracht Centrale, Center for Restorative Practices (Netherlands)

The development and implementation of Family Group Conferences (FGC) in the Netherlands derives its inspiration from the interesting changes in the child welfare system in New Zealand. There, in 1989, the management of problems with children and families, and the solutions to those problems, were regulated in the Children, Young Persons and Their Families Act. Under the act, before a professional intervenes, the family has the legal right to make a plan and decide for themselves what should happen. This law addresses the government's obligation to protect children when their own family fails to do so, but also the government's limitations in carrying out that obligation. The government is greatly disadvantaged, compared to the system of family and friends, when it comes to real protection of children and creating a better prospect for the long term.

When the principles of family group conferencing were brought to the Netherlands in 2000, two models were introduced: "family group decision making" and "youth justice conference" model. The latter model is generally offered if *two or more families* are involved, usually after a conflict involving members of different families to repair the damage caused by misconduct. Victims and offenders, surrounded by their respective family and social networks, have the opportunity to discuss the current situation, to reach solutions and restore the damage done. When problems or issues arise *within a single-family system*, as, for instance, in cases of domestic violence, family group decision making is used. This provides a framework for the family to solve problems and make decisions when they are at risk of "strangers" or "outsiders" making decisions for them.

Family Group Decision Making is a new model for the Netherlands: Members of the family and social network maintain the responsibility for serious decisions about problems regarding the child or the family. FGC stands for decision making; it is not social work, guidance or assistance. The conference is not an intervention but a means to empower families. Creating action in the family. After professionals provide the family with information, the family group discusses in private what must happen to help the child or the core family in need. No "third parties" are present. The family creates a plan that they think is necessary. This plan is offered to the referrer or case manager and is accepted, unless it is not safe or legal. Afterwards, the family and the referrer cooperate in the implementation of the plan, as described in the plan. The intention is that even after the conference, the family remains the "owner" of the implementation of the plan.

Youth justice conferencing enables citizens to have a constructive dialogue with everyone who has been affected by what has happened. The participants are victims, offenders, members of their families and social network and others directly affected. The core of the restorative meeting involves holding offenders responsible for the offence that they have committed. In the meeting offenders can tell what has happened. Everyone else describes his or her experiences with the impact of this behavior and can ask their questions. The exchange of feelings and ideas reduces the negative emotions that have arisen from the incident, and this makes it possible to develop a restorative plan. All participants can contribute to making this plan. The coordinator is only a facilitator of this process.

In both approaches, the success of the model depends on individuals, as opposed to professionals, taking responsibility for their own circumstances. Individuals derive support from a network of family, friends and acquaintances. Both models use similar questions: "What has happened?" "Who has been affected?" "Whom does it concern and in what manner?" "What outcomes are possible and desired?" "What are the available resources?"

Conferencing turns the system upside down and puts the needs of individuals first.

From the above comes the notion that the principles of family group conferencing demand a new form of citizenship. The development of both FGC and restorative conferencing leads to a change in the relationship between families and professionals. This change in relationship implies a paradigm shift. From international research, we know that this can lead to tension whenever the model is introduced in a field dominated by professionals (Doolan and Nixon in Van Pagée, 2003). In the Netherlands, we are in the midst of this process and very much feel the impact of this struggle. Only 500 conferences are held in four years. This seems is a lot but is nothing in compare with all the decisions that are made in the lives of citizens during that period. This situation raises the following questions: Why is implementation going so slowly? Why doesn't the social response to misbehaviour, crime, neglect and violence in families embrace these models more strongly? In the

search for solutions to social needs, why isn't there more room for elements of restoration and for utilizing the strengths of individuals and families? Hardly any individual (professional, politician or administrator) is against empowering citizens and giving them the responsibility for their lives. Bringing this into the mainstream, however, is extremely difficult. The objections are always on an organizational level. The systems of childcare, education, welfare and justice are not organized to trust families and citizens. The barriers for implementing FGC are within the system. FGC consequently requires system change, and that requires input from much more than just a group of "believers." Analysis of the Dutch implementation of the models highlights the way the welfare state operates: 'the professional authority charged with responding to antisocial or criminal behaviour and its impact on families has not only developed itself into an agent of change in individuals and families but also into a primary decision maker concerning that change'.

A goal of restorative practices is to create a new paradigm for the treatment of problems arising from wrongdoing or misconduct (Goedseels 2002). The paradigm shift here is that citizens, not authorities, should have primary responsibility for and be active in repairing the damage. These processes will only succeed if professionals function solely as facilitators. Thus, the task of coordinators in preparing for restorative conferences and FGC's is to make the circle of participants as inclusive as possible, to ensure the safety of participants and to organize the relationship with professional institutions. They should not offer opinions or solutions. The moment a coordinator gives opinions or introduces sanctions, he no longer functions as a facilitator but instead becomes either an official authority or a participant himself. To ensure broad implementation of the models, it is necessary that professional institutions, either in the criminal justice or the child welfare system, re-evaluate their role and focus on their position as *facilitators* of behaviour change in individuals and families.

The conclusion is that, with the implementation of the models discussed, an important change has been initiated in Western European societies. In many areas, such as education, art and labor, and also in child welfare and criminal justice, we see that the vision of citizenship is changing. This is especially true for the political field. The responsible citizen is ready to choose another value system. The old way of looking at citizenship is interventionist: Society is for many decades seen as moldable; enough and many times very specific interventions create a happy society. See a problem; develop a program; solve the problem. But interventions by professionals in the lives of citizens often do not succeed and in the end many times all the energy is put in resistance. Especially the helping service is based on interventions. See another problem, make another new program. But citizenship is changing. People are more and more educated and have access to information. People no longer accept society's view of how they should behave. More and more citizens are announcing their (political) dissatisfaction. They ask that more attention be paid to the possibility of letting citizens take responsibility for decisions that touch their lives. A recent study in the Netherlands asking child welfare clients what they want taught us that they want three things: control over their lives, information about the available possibilities and cohesion in services *(van Beek)* Professionals delude themselves many times with the notion that they can mold people by means of their interventions. But professional interventions cannot compare to fundamental forms of empowerment, in terms of effectiveness. Thus, the regular use of restorative practices is worthy of closer examination and broader discussion. Not only because the best solution is for the family and their social network to come together in a circle to solve their problems, before professionals intervene, but also because it will give insight into new societal relations between government and citizens.

Literature

Van Beek, F. (2002). Real justice conferences in the Netherlands: The first experiences. WESP-research, Voorhout.

Van Beek, (2003) Deelrapport 2 LPJ: ´Gewoon vragen wat er is en wat ze voor je kunnen doen'.

Goedseel, E. et al. (2002). Deepening of complicating, academic objections at the round table debate concerning (youth) restorative justice. Tijdschrift voor Herstelrecht, 2(2).

Van Pagée, R. (2003). Eigen-kracht: Family Group Conferencing in the Netherlands. Amsterdam: SWP.

3. THE LEGAL SIDE OF MEDIATION, FOR ADULTS

by Monika PLATEK, University of Warsaw (Poland)

A New Look at the Legal Side of Mediation for Adults

Before acquainting you with the provisions on mediation in the new Polish codes, I suggest we think about why the legislator has decided to include mediation in the institutions of law, that is, in criminal, material and procedural law, and consequently (which is what I am trying to convince you of) also criminal executive law.

Perhaps he is trying to keep up with the latest fashion? Or perhaps he found it hard to refuse? Perhaps he did it hastily at the last minute, without giving any particular thought to what he was doing or why? Or maybe mediation is the logical consequence of some basic idea relating to criminal codification? If the answer lies in this last question, it also brings us to a host of new questions about the leading prerequisites of codification and about the foundation on which it is based. There is a type of justice that concentrates on protecting the state's interest, but there is also another type that takes heed of the interests of individuals. Apparently, the latest codification is heading in the second direction. This is confirmed by the position of the subsidiary prosecutor, society's participation in the penitentiary process, as well as the potential and place of mediation in criminal proceedings.

Mediation at the Next Stages of Criminal Legal Proceedings

When is mediation permissible? First, in order to permit it, we have to know about it. This would seem to be a banal truth, but student lawyers in the courts unfortunately have to admit that they never hear this word uttered during their practical studies. This institution, at least for student lawyers, much too frequently remains in the twilight zone. Apparently, the matter is no better, although I hazard to make any sweeping generalizations, in the case of the prosecutors, the culprits, the victims, and even the judges.

There is also the harmful and unjustified conviction that, if it exists at all, mediation is only possible in those cases in which the defendant is threatened with a punishment of no more than five years in prison. This is a terrible mistake, which we will also prove.

Let us also think about how true the statement is that mediation can take place only before the first court hearing. Current laws envisage precise grounds for its use at the first hearing also. It can also be applied during the penitentiary process.

The Court Perceived from the Inside—or Justice, Where Do You Think You Are Going?

At one time, about the 10th century AD., along with the appearance of state borders and the development and increase in the significance of public institutions, the state assumed responsibility for resolving conflicts, removed this responsibility from the parties involved and imposed its role as fair judge. The courts were always a weapon in the hands of the authorities. They could be more or less strict. But in order to preserve the political system, they had to be at least in working order and considered at least relatively fair. Relatively, because the history of legal proceedings is also the history of a shift into the shadows, toward non-existence, toward ignoring the person who has suffered from the violation of the law.

I hope you will not consider what follows from the pages of history a personal insult, and that we can think about how mediation can help to improve legal proceedings.

I have collected the arguments put forward by judges and prosecutors against mediation. I hope that I can counteract them with other arguments ensuing from the work of the court itself perceived from the outside.

For several years now I have been reading lectures and holding seminars on “The Policy of Criminal Punishments in the Countries of the European Union.” One of the assignments I give my students under this topic is to find out how Article 6 of the European Convention, which is also in effect in our country, is implemented in Polish judicial practice. The results of this work are extremely interesting and show very positive changes in the Polish courts. At the same time, they ruthlessly show the discrepancy of the arguments put forward by practicing members of the law against mediation.

The Green Light for Mediation

The results of these research studies unequivocally show that improving the situation in the courts requires not so much an increase in the number of hours judges work, as a change in approach to the cases courts are engaged in. It appears that instead of engaging in the statistics of those cases "marked with a tick," we need to show an interest in the welfare of those people whose cases come to court. And then, without any miracles, these statistics will most likely improve.

It is time to move from the statistics of "finished cases" to the statistics of people who know that human insult and fairness are taken seriously in the courts. As I write this, I am worried that I may be suspected of cheap demagogy and flippant idealism. But I write this because such conclusions clearly follow from the studies conducted by my law students. They point to the source of those painful questions encountered by our current legal proceedings, which cannot be resolved with the help of substitutes and surrogates.

There is no reason deceiving ourselves that if, while making the next changes to the law, and quietly begin to remove the victim from its norms, the "throughput" of the courts will improve and they will become less "clogged." Promoting the axiology of the mechanical "registration" of cases does not withstand the test of court effectiveness.

Taking the Rights of the Victim Seriously

We cannot issue *The Charter of Victims' Rights* under the auspices of the Ministry of Justice and believe that this is all it takes. The *Charter,* apart from other things, sets forth that the victim should enjoy the same rights as the culprit. But it is not enough to put this in writing, the law has to be changed in such a way that the victim is not only not deprived of his say, but has rights at least equal to those enjoyed by the accused. The victim should also be provided with means of mediation, for example, and a real chance to resolve the conflict.

It took three days and three nights for me, along with Kshishtof Pavlovsky, to write *The Charter of Victims' Rights*. Prior to this, many specialists and volunteers worked for almost a year on its contents. Now, I am getting phone calls at the Polish Society of Legal Enlightenment from victims who say that the *Charter* is rubbish and junk. This curt review is not surprising. We are dealing with frightened people who feel helpless and confused and who are deeply convinced that no one is protecting them, that they are scoffed at when they say how things should be, and that no one would even think about taking them seriously.

There is no reason to think that mediation will solve all the problems of the criminal justice system. It will not also suddenly bring about any general improvement. But we should realize that it is one of the tools that, if used correctly, can help to change public opinion about the courts and about the attitude of judges toward the victim. As a result, by increasing the efficiency of the courts, this may help to raise the quality and satisfaction of the work carried out both by you and by me. Last but not least it might really serve well to solve the problems between involved parties and help us to see simply problems where at present we look for crime and hard punishment. Mediation helps us to see the victim and seek remedies that have victim's interest on mind. This is enough to consider the mediation worth to implement within the criminal justice system.