



Submission to the Victorian Law Reform Commission's Inquiry into Improving the Response of the Justice System to Sexual Offences

January 2021

Introduction

This submission responds to *Issues Paper G Sexual Offences: Restorative and Alternative Justice Models*. The submission is structured in three parts. Part 1 responds to the questions raised about the use of restorative justice processes to respond to sexual offending in Issues Paper G. Part 1A describes the CIJ's views on why restorative justice processes should be used in response to sexual offences. Part 1B then outlines what a restorative justice response to sexual offending might look like. Part 2 responds to the issues raised under the heading 'Speaking and being heard' in *Issues Paper G*. Part 3 responds to the issues raised under the heading 'Aboriginal justice models' in *Issues Paper G*.

Who we are: The Centre for Innovative Justice and Open Circle

About the Centre for Innovative Justice

The Centre for Innovative Justice (CIJ)'s objective is to develop, drive and expand the capacity of the justice system to meet and adapt to the needs of its diverse users. The CIJ meets this objective by conducting rigorous research



which focuses on having impact— taking our research findings, most of which involve direct engagement with service users, and using them to develop innovative and workable solutions.

About Open Circle

Open Circle is a restorative justice service within the Centre for Innovative Justice (CIJ) at RMIT University. Open Circle conducts restorative justice processes in a wide range of contexts to support people who have experienced harm address some of the unmet needs which have not been addressed by conventional justice system mechanisms. Open Circle works with individuals and institutions to address harms caused by crime and other wrongdoing.

Open Circle consists of a highly skilled team of restorative justice practitioners and justice system experts who work closely with their colleagues at the CIJ.

Our expertise in restorative justice, including restorative justice in the context of sexual harm

The CIJ's Open Circle is a direct provider of restorative justice processes. In this submission, references to the CIJ include both its general research arm and its restorative justice practice arm, Open Circle. As noted by the Victorian Law Reform Commission ('the Commission') in *Issues Paper G, Sexual Offences: Restorative and Alternative Justice Models*,¹ the CIJ has trialled restorative justice practices in relation to a broad range of offences or harms, in addition to sexual harms. From 2015 -2018 the CIJ piloted a restorative justice conferencing program that offered restorative processes in response to motor vehicle collision offences where someone died/and or was seriously injured.

The CIJ has experience designing restorative justice programs, including those that have responded specifically to sexual harm. At the request of RMIT University, the CIJ created a restorative engagement program available to people who had experienced sexual harassment on campus. The CIJ has also

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designed restorative justice programs that respond to a broader range of harms, in its work with organisations including the Transport Accident Commission, WorkSafe Victoria and the Coroners Court.

The use of restorative justice to respond to sexual harm is an ongoing research focus of the CIJ. Our 2014 report, commissioned by the Attorney General's Department (Cth), involved a detailed consideration of the systemic responses to sexual offences. This piece of work included a best practice restorative justice conferencing approach designed to respond to sexual offences.² Open Circle's practice and this submission draws heavily on the approaches recommended in that report and we have continued to advocate for restorative processes to be made available in response to sexual harm. The CIJ has also published research on restorative justice practices that respond to broader categories of harm, on victims' (many of whom were victims of sexual harm) experiences of criminal justice system processes, and legal system responses to family violence, a form of harm where, as is the case with sexual violence, gender dynamics are central.³

In making this submission, the CIJ draws on our restorative justice practice experience, our experience in the design and implementation of restorative justice programs, and our research experience.

² Centre for Innovative Justice *Innovative justice responses to sexual offending – pathways to better outcomes for victims, offenders and the community* (2014).

³ It should also be acknowledged that sexual violence is often a feature of family violence; these two categories of harm are not exclusive.

Part 1A: Why the CIJ supports the use of restorative justice processes that respond to sexual offences

Defining restorative justice

Restorative justice has been defined as, ‘a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.’⁴

Restorative justice focuses on the personal harm caused by a crime or other wrong rather than on the violation of a law committed against the state, or on the technical elements of a legal duty owed to another party. It is concerned with acknowledging and addressing the harm caused to individuals and their broader communities. The focus is on healing, meeting needs, accountability, community restoration, and righting damaged relationships (where appropriate).

Among the core principles underpinning restorative justice processes are those relating to the importance of involving all people affected by a crime or other form of harm in addressing its effects and its implications for the future, and of not causing any further harm to the participants in circumstances where they are already feeling the impact of the original harm. Restorative justice processes can have benefits and outcomes that are not generally available through adversarial legal processes, which tend to entrench oppositional and defensive positions and states of conflict. Restorative justice processes, by contrast, encourage participants to speak with and listen to each other, thereby promoting mutual understanding. Restorative justice processes offer benefits to all who participate in them.

Restorative justice processes

The most common restorative justice process is restorative justice conferencing, where those affected by a crime, other harm or situation of conflict collectively discuss how to respond to the aftermath of what has happened and its implications for the future. Participation in a restorative justice conference is

⁴ Tony Marshall, ‘The evolution of restorative justice in Britain’ (1996) 4 *European Journal on Criminal Policy and Research* 31, 37.

voluntary for all participants. The convener of the conference is a skilled professional whose focus is guiding the process according to restorative principles, with the aim that the process is respectful and fair for everyone involved. A restorative justice conference generally proceeds in three phases, with all parties discussing: what happened; how people were affected; and what needs to happen to address the harm. Restorative justice processes can also be used in ways other than conferencing or face-to-face meetings between parties, including through indirect communication and the exchange of correspondence. Throughout this submission we advocate for the wider availability of 'restorative justice processes.' In doing so we are referring to restorative justice conferencing and also a broader range of processes that are restorative in nature, including those involving indirect communication. We take the view that a key benefit of restorative justice processes is their capacity to be flexible and responsive to the needs of individual participants. The structure of restorative justice conferencing may be an appropriate response to sexual harm in some contexts, however other restorative processes that might be a better fit in other cases should also be considered.

The CIJ is already offering restorative justice processes in response to sexual offences in some contexts. We take the view that restorative justice processes should be options that are made widely available to victim/survivors of sexual offences. As we will outline below, many victim/survivors have justice needs that are not all able to be met via the formal criminal justice system. Restorative justice processes have the capacity to meet needs that the criminal justice system cannot. There can be some reluctance to introduce restorative justice processes that respond to sexual offences, due to the serious and complex nature of these crimes. The fear is that victim/survivors may be retraumatised if they participate. However, processes of this nature have been operating for some time in other jurisdictions.⁵ While some reviews of these programs are

⁵ Jane Bolitho and Karen Freeman *The use and effectiveness of restorative justice in criminal justice systems following child sexual abuse or comparable harms* Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney (2016).

available,⁶ these are insufficient to definitively assess whether they are effective.⁷ Nonetheless, the available evidence does indicate that restorative justice responses to sexual offending can be successful, and can deliver benefits to the victim/survivors who participate.⁸ Importantly, in response to the concern that victim/survivors may be retraumatised by participating in restorative justice processes, the existing research has not found any evidence of victim/survivors feeling harmed through taking part.⁹

Our direct experience is that restorative justice processes can be delivered effectively in the context of serious harms including sexual offending and can result in significant benefits to those who take part.

Victims' justice needs

It is often said that, after experiencing a crime, victims seek 'justice.' But what does 'justice' mean for victims? Recognising that victims of crime are not a homogenous group and their distinct characteristics and experiences shape how the crime affects them and their interests and needs following the crime, there are common themes in what victims want to happen in order for them to feel that justice has been done. The CIJ refers to these themes collectively as 'victims' justice needs.'¹⁰ Based on the research and the CIJ's experience of working directly with victims of crime, the CIJ uses the following categories of victims'

⁶ Ibid.

⁷ Daye Gang, Bebe Loff, Bronwyn Naylor, and Maggie Kirkman, 'A Call for Evaluation of Restorative Justice Programs' (2021) 22 *Trauma, Violence and Abuse* 186-190.

⁸ Bolitho and Freeman, above n 5.

⁹ Bolitho and Freeman, above n 5, 31. In their review of the available evidence, the authors found that there was only one case where concerns about a victim/survivor being harmed became pressing, and in that case the process was halted as a result.

¹⁰ Some scholars refer to these themes collectively as 'victims' justice interests,' e.g. Kathleen Daly, 'Reconceptualising Sexual Victimization and Justice' in Inge Vanfraechem, Antony Pemberton & Felix Mukwiza (eds) *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Taylor & Francis, 2014) 387. However, other researchers (e.g. Jane Bolitho, 'Putting justice needs first: A case study of best practice in restorative justice' (2015) 3(2) *Restorative Justice* 256, 267) have found the term 'justice needs' to be a closer fit with victims' own narratives, which is also the experience of the CIJ, and therefore we use the term 'justice needs.'

justice needs: voice; validation; information; accountability; relationships; prevention; and resolution.

Victims of all types of offences, including sexual offences, have justice needs. However, victim/survivors of sexual offences may have even more acute justice needs than those of victims of other types of offences. Myths about sexual violence, including that victim/survivors lie about their abuse and that victim/survivors are responsible for the abuse they experienced (victim-blaming) are prevalent. Patriarchal social structures discourage victim/survivors from speaking about their abuse and from reporting it. Victim/survivors who do reveal their abuse may be disbelieved by those they disclose to, including family members. Therefore, it may be particularly important to victim/survivors to experience a justice process that is designed to allow them to feel heard and believed and to accord recognition to the harm they have suffered.

Some justice needs may be met by criminal justice system processes. For example, giving evidence in a trial may meet a victim's need for voice. Some victims may experience a sense of validation and offender accountability in cases where offenders plead guilty or are found guilty. In those circumstances a victim may feel that the criminal justice system has believed them, that it has called out the behaviour as wrong, and has attributed the wrong to the offender and imposed a punishment on them.

However, as we know there is a high attrition rate in the prosecution of sexual offences. Indeed, some have estimated that there is as low as a one in one hundred chance of a conviction following a sexual offence.¹¹ The vast majority of victim/survivors who report these offences do not get the opportunity to give evidence as their matters do not proceed this far.

Even in cases where victim/survivors do give evidence, doing so may not always meet their need for voice. The legal structures governing this process are not

¹¹ Rape Crisis Auckland, 'One in One Hundred Sexual Assaults Result in a Conviction' (13 August 2013) Media Release. At <http://www.scoop.co.nz/stories/PO1308/S00173/one-in-one-hundred-sexual-assaults-result-in-a-conviction.htm>.

designed to facilitate victim/survivors feeling able to tell their stories in the ways they want to tell them. Indeed, victim/survivors of sexual offences often feel retraumatised rather than empowered by the process of giving evidence, particularly by the experience of being cross-examined.

Prosecutions of sexual offences are less likely to result in a guilty plea by an accused person, and more likely to result in the acquittal of the accused compared to other offence types.¹² Therefore many victim/survivors do not experience the sense of validation or offender accountability that guilty outcomes may bring.

Some victim/survivors of sexual offences may seek validation in the form of their own family members acknowledging the harm they have experienced. This is not a process the criminal justice system can deliver.

For some victim/survivors it is crucially important to know whether an offender is genuinely remorseful, beyond any formal acknowledgment of responsibility that might be indicated on the offender's behalf via their lawyer in a plea of guilty. These victim/survivors may seek an opportunity to speak directly with the offender in order to gauge whether the offender truly understands the consequences of the offending. Others may want to directly tell the offender about the effects that the offending has had on them. Again, the criminal justice system does not facilitate such interactions.

In summary, the criminal justice system as currently constituted cannot meet all victims' justice needs. Its capacity to meet the justice needs of victim/survivors of sexual violence is particularly limited. This is not to say that the criminal justice system is failing to fulfil its purpose. The core function of a criminal prosecution is to determine questions such as whether a crime has been committed, whether an accused person is guilty, and if so, what sentence is appropriate to impose in the circumstances. Criminal justice system processes are not primarily intended to address victims' needs, and perhaps could never fully meet all victims' justice

¹² Karen Gelb, *Recidivism of Sex Offenders* (Sentencing Advisory Council, Research Paper, 2007), 3.

needs without compromising their other functions. Instead of expecting the criminal justice system to deliver everything that victims need, other processes that are better suited to meeting these needs must be offered in addition to the existing criminal justice processes. Restorative justice processes have much potential in this regard.

Restorative justice processes have the capacity to meet victims' justice needs

Unlike a criminal prosecution where the victim is not a party to proceedings and where their needs are not the main focus, restorative justice processes have the potential to offer victims an opportunity to participate in a process specifically designed to address the harm they have experienced.

In the context of sexual harm, restorative justice processes have the potential to meet victim/survivors' justice needs in the following ways:

Justice Need	The capacity of restorative justice processes to meet victims/survivors' justice needs
Voice	<ul style="list-style-type: none"> • Victim/survivors commonly experience feeling silenced; they encounter pressure that hinders them from speaking out about what happened. A restorative justice process can provide a forum within which victim/survivors can be supported to talk about what happened and how this has affected them. • The victim/survivor can tell their story in their own way, unlike what happens when victim/survivors give evidence in criminal justice processes, where legal rules shape what can be said.
Validation	<ul style="list-style-type: none"> • Within a restorative justice process, the victim/survivor is believed. • The victim/survivor's experience is recognised and treated as meaningful within the process. It is not challenged or subject to attack via cross-examination.
Information	<ul style="list-style-type: none"> • The victim/survivor can directly ask the offender questions. Even if there has been a criminal justice system process, the victim/survivor may have

	<p>unresolved questions for the offender, for example, 'why did you do this to me?'</p> <ul style="list-style-type: none"> In the case of restorative justice processes that involve meetings between the victim/survivor and their family members, the victim/survivor may want to ask family members questions such as why they did not support them, or whether they were aware of the offending at the time.
Accountability	<ul style="list-style-type: none"> Given the low numbers of cases of sexual harm that result in a conviction, most victim/survivors will not have experienced the offender being subject to any formal kind of accountability. In this context, a restorative justice process can offer the opportunity for a victim to witness the offender acknowledge the wrongfulness of their actions and the harm they have caused. Even in cases where the offender has been found guilty via the criminal justice system, victim/survivors may benefit from experiencing the offender offer a personal acknowledgement of wrongdoing and having caused harm. This is very different from what occurs in criminal justice processes via mechanisms such as a plea of guilty, which is made on the offender's behalf via their lawyer.
Relationships	<ul style="list-style-type: none"> The victim/survivor may not want to have future contact with the offender, however they have the opportunity to address any outstanding issues, such as what to do if by chance they encounter each other in the community. Instead of, or as well as meeting with the offender, some victim/survivors seek a restorative process with their own family members. This provides the opportunity for victim/survivors to address issues such as family members' failure to believe and support the victim/survivor when they disclosed the sexual harm.
Prevention	<ul style="list-style-type: none"> The victim/survivor has the opportunity to encourage the offender to take steps towards addressing the offending behaviour and preventing it from happening again. This may include the offender agreeing to participate in a sex offender behaviour change program.
Resolution	<ul style="list-style-type: none"> Given the low reporting rates for sexual offences, and the high attrition rates in cases that are reported, many

	<p>victim/survivors may feel that there has not been a response to what happened. Taking part in a restorative justice process may allow victim/survivors to feel that they have done what the needed to do in order to address the crime.</p> <ul style="list-style-type: none"> • Note: it is not expected that participating in restorative justice processes will necessarily mean that the victim/survivor no longer feels the effects of the crime. Resolution does not necessarily mean ‘closure.’
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Research findings

The CIJ sometimes encounters the view that restorative justice processes are ‘too risky’ to be used in response to very serious offences. However, evidence suggests that in fact restorative justice processes are most effective in the context of serious harm.¹³ Sexual offending is not only serious in terms of the harm that results from it, it is also characterised by complex dynamics. However, restorative justice processes that respond to sexual offences exist in Australia and internationally.¹⁴ It is difficult to conclusively determine the effectiveness of such processes, given the shortage of peer-reviewed studies in this area.¹⁵ However, there is evidence that restorative justice processes can be effective in this context. A survey published in 2016 examined restorative justice processes operating in Australia and internationally that offer restorative justice processes in response to sexual offences. It noted that the majority of these processes were designed to positively benefit victim/survivors’ wellbeing, and that the evidence suggests that participating in them was satisfying for victim/survivors. Ultimately, the report concluded that restorative justice processes can be used successfully following sexual harm, if processes satisfied certain conditions.¹⁶

¹³ Lawrence Sherman, Heather Strang and Daniel Woods, *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments (RISE)* (Australian National University Press, 2000); Mary Koss, ‘The RESTORE program of restorative justice for sex crimes: vision, process and outcomes’ (2013), *Journal of Interpersonal Violence*, 29(9), 1623-1660.

¹⁴ See Bolitho and Freeman, above n 5.

¹⁵ Daye Gang et al, above n 7.

¹⁶ Bolitho and Freeman, above n 5.

Our experience

Through Open Circle, the CIJ provides restorative justice services in response to a diverse range of harms, including sexual harm. We are a relatively new service, however since our inception we have received a high volume of inquiries and referrals that relate to sexual harm. This contact with people interested in participating in our processes, and consultations we have undertaken with organisations that support victim/survivors of sexual harm, indicate that there is a great demand for restorative justice processes that respond to this type of harm. What we are told, both by victim/survivors directly, and by those who work with them, is consistent with the above discussion of victims' justice needs: victim/survivors of sexual harm have a range of unmet justice needs, and many feel that participating in restorative justice processes could address these needs. Some victim/survivors we have spoken to have sought direct engagement with the offender, while others have wanted to engage with their parents or members of their extended family to explain how the harm affected them and their disappointment with how the family responded. There are few existing avenues¹⁷ in Victoria for victim/survivors to pursue these objectives. Victim/survivors and those who work with them commonly tell us that even if a victim/survivor has engaged in psychological or other therapeutic treatment in response to the harm they have experienced, many feel that engaging in a restorative justice process would be a meaningful step in their healing process.

Challenges/concerns

The dynamics of the original harm may be repeated

The most common concern raised in relation to the use of restorative justice processes in response to sexual offences is that doing so risks causing further harm and trauma to the victim/survivor. The following points are often raised in the context of this concern: by their nature, sexual offences involve an abuse of

¹⁷ South Eastern Centre Against Sexual Assault and Family Violence provides its clients with access to restorative justice processes; victim/survivors of family violence, which may include sexual violence, can access restorative justice processes through the Department of Justice and Community Safety, Victoria, Family Violence Restorative Justice Service.

power. Victim/survivors of sexual offences have by definition been disempowered by the actions of the offender. Restorative justice processes do not have the formal structures of the criminal justice system, some of which are designed to shield victim/survivors from secondary trauma. Therefore, the concern is raised that within the context of a restorative justice process the victim/survivor, who is *prima facie* in a more vulnerable position than the offender, will be too vulnerable. Given that perpetrators of sexual offences have often manipulated victim/survivors and abused their trust, there is a risk that offenders will take advantage of their relative power in a restorative justice process and subvert it to their own ends while inflicting further harm on the victim/survivor. The victim/survivor, therefore, may experience the restorative justice process as a further event where the offender is able to exert power over them and curtail their agency.

This concern is valid. Any restorative justice process that is offered in response to sexual offences must satisfactorily address it. A criticism of less formal dispute resolution processes, such as mediation, is that these processes can be structured with the assumption that participants are on an equal footing. If the process facilitator plays a narrowly interpreted neutral role in this context, the process will recreate existing power imbalances between participants. Therefore, restorative justice processes that respond to sexual offending must be structured in ways that explicitly acknowledge the power dynamics that characterise these types of offences¹⁸. Specialist knowledge of the effects of sexual violence on victim/survivors and of perpetrator characteristics, must be features of these processes. Those who deliver the processes, including conveners and other staff, must have a thorough understanding of the dynamics of sexual violence, including the gendered nature of this form of harm. Processes must offer

¹⁸ For example, in New Zealand, the Ministry of Justice develops Restorative Justice Standards for Sexual Offending Cases recognise the additional safeguards and principles required for restorative justice processes that respond to sexual harm, including addressing power dynamics and the need for specialist skills: Ministry of Justice, *Restorative justice standards for sexual offending cases* (Wellington, New Zealand: 2013) <https://www.justice.govt.nz/assets/Documents/Publications/Restorative-justice-standards-for-sexual-offending-cases.pdf>

thorough support to victim/survivors and be responsive to their needs. Processes should also have the capacity to access secondary supports for perpetrators. Careful screening and thorough preparation of participants must occur.

Restorative justice processes risk re-privatising and decriminalising sexual violence

For too long, many forms of sexual violence were seen as private matters, not deserving of public condemnation. Reforms that have reframed acts of sexual violence, whether they are perpetrated by a victim/survivor's partner, family member, acquaintance, or by a stranger, as harms that require criminal justice responses have been hard-won. It is argued that the prosecutions of sexual offences that we now have are essential in ensuring sexual offences and the harm they caused are acknowledged by the community, and the criminal sanctions imposed are necessary in signifying the community's denunciation of the offender's actions. It is argued that using restorative justice processes to respond to sexual offences risks undoing these gains. Rather than the offence being dealt with via the public mechanism of a criminal justice process, restorative justice processes take place between private individuals. The outcomes of restorative justice processes do not include the imposition of punishments such as imprisonment. Therefore, some argue that they fail to appropriately sanction offenders and the offending behaviour.

The CIJ takes the view that restorative justice processes that respond to sexual offences should be offered in addition to criminal justice system responses, not instead of them. Victim/survivors who wish to engage with the formal criminal justice system should be encouraged and supported to do so. Restorative justice should be offered as a process that victim/survivors can choose to engage with as well, as a complementary process that takes place alongside formal criminal justice processes. However, as we know, the majority of victim/survivors do not report to police. Other victim/survivors report, but charges are not pursued. These victim/survivors should also be offered the opportunity of participating in restorative justice processes. In such cases, restorative justice processes would not be replacing criminal justice system processes. Really, those victim/survivors

would be choosing between engaging in a restorative justice process, and not participating in any process at all.

Restorative justice processes risk compromising the rights of the offender

Criminal proceedings offer fairness to offenders via important protections such as the right to silence. There is a risk that an offender may participate in a restorative justice process in good faith, and then have what was said in the conference raised to their detriment in subsequent legal proceedings.

The CIJ takes the view that offenders' rights should not be compromised if they decide to participate in a restorative justice process. For this reason, what is said and done in a restorative justice process should remain confidential. Offenders should have access to legal advice before they participate in a restorative justice process and should be fully informed about the process and their rights before they make the decision to participate.

Restorative justice processes are difficult to manage in a context of cultural and linguistic diversity

The concern that restorative justice processes may not be culturally appropriate for all participants is sometimes raised. However, the CIJ takes the view that restorative justice processes should be accessible to people from any cultural background and can be offered in a flexible model that allows them to be tailored to the needs of individual participants. This can include the use of interpreters and seeking input from respected community members or elders of a participant's community. It may also include inviting respected community members or elders to directly participate in a restorative justice process if this is appropriate and is what the participant wants. It should be noted that some communities, particularly Aboriginal communities, have historically had negative experiences of the formal criminal justice system. Therefore, members of these communities may particularly benefit from having the option of participating in a process that is separate from the formal criminal justice system, if the process can be offered in a culturally safe way.

Restorative justice processes may be inappropriate for vulnerable participants

The concern is sometimes raised that restorative justice processes are not an appropriate forum for participants – whether victim/survivor or offender – who have particular vulnerabilities, including children and people with cognitive disabilities. Questions are raised about whether people with such vulnerabilities are able to understand a restorative justice process sufficiently to be able to provide informed consent to participating in it, and whether they are able to participate in such a heavily dialogue-based process to the extent that doing so will be meaningful for them, and for other participants. Further, in the context of sexual offences, the existing power dynamics between victim/survivor and offender may be exacerbated where a victim/survivor has a particular vulnerability. Offenders with vulnerabilities may be at more risk of compromising their legal rights should they participate.

However, a multitude of restorative justice programs aimed at children and young people successfully operate in the education sphere.¹⁹ Further, restorative justice processes that are suitable for participants with cognitive disabilities can and have been delivered²⁰ and some argue that the RJ's emphasis on the rights and circumstances of individuals may provide a correction to some of the limitations of the criminal justice system relating to disability.²¹ The CIJ takes the view that, given the potential benefits of restorative justice processes for participants, entire categories of people should not be excluded from taking part. If a restorative justice process that responds to sexual offences is offered, children or people with cognitive disabilities, or other vulnerabilities, should not be *prima facie* prevented from accessing it. Rather, each potential participant's capacity to take part, and their support needs, should be carefully assessed on a case-by-case

¹⁹ See, for e.g., Alba Katic, 'A Systematic Evaluation of Restorative Justice Practices: School Violence Prevention and Response.' (2020) 19 *Journal of school violence* 579.

²⁰ Nicholas Burnett and Margaret Thorsborne *Restorative Practice and Special Needs: A Practical Guide to Working Restoratively with Young People* (2015: Jessica Kingsley).

²¹ Jane Bolitho, 'Complex cases of restorative justice after serious crime: enabling spaces for those with disability' in Theo Gavrielides (ed) *Routledge International Handbook of Restorative Justice* (2019). See also Thomas Hafemeister, Sharon Garner and Veronica Bath, 'Forging Links and Renewing Ties: Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder' (2012) 60 *Buffalo Law Rev* 77.

basis. As much as possible, the restorative justice process should be tailored to individual participants' needs. This may include measures such as providing explanations of the process in accessible language and inviting specialist support people such as disability advocates to provide advice on and/or participate in the process.

The Victorian context

Victorian victim/survivors of sexual offences who would like to engage in a restorative justice process currently have few options to do so. As noted by the Victorian Law Reform Commission, South Eastern Centre Against Sexual Assault and Family Violence (SECASA) offers a restorative justice service.²² However, this program is only available for SECASA clients and furthermore does not have formal linkages with the criminal justice system.²³ Currently, in Victoria there is only one ongoing restorative justice program that connects with the criminal justice system: Youth Justice Group Conferencing. This program only accepts matters where the offender is a child or young person and does not currently accept sexual offences.

The CIJ takes the view that restorative justice processes that respond to sexual offences should be made widely available, so that all victim/survivors who want to take part have this opportunity. This requires restorative justice processes to operate alongside the criminal justice system. This is consistent with a previous recommendation by the Victorian Law Reform Commission. In 2016 the Victorian Law Reform Commission reported on its review of the role of victims of crime in the criminal trial process and recommended that the Victorian Government establish a statutory scheme for restorative justice conferencing for indictable offences, including sexual offences, in Victoria.²⁴

²² Victorian Law Reform Commission *Improving the Justice System Response to Sexual Offences: Issues Paper G Sexual Offences: Restorative and Alternative Justice Models* (Issues paper: 2020) 4.

²³ Ibid.

²⁴ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Final report* (Victorian Law Reform Commission, report 34, 2016).

It is relevant to note that, in response to a recommendation of the Victorian Royal Commission into Family Violence,²⁵ the Department of Justice and Community Safety, Victoria, has established a restorative justice program that responds to family violence.²⁶ This program does not accept sexual offences.²⁷ However, family violence offences involve a level of complexity similar to that of sexual offences. The concerns about power dynamics and the potential for victim/survivors to be retraumatized that are raised in relation to the use of restorative justice in response to sexual offending are also raised in the context of family violence. If the Victorian government has been satisfied that these concerns can be sufficiently addressed so that restorative justice conferencing in response to family violence can be offered, it is reasonable to suggest that the similar issues that relate to the use of restorative justice for sexual offences can also be resolved, and that therefore restorative justice can be made available for sexual offences.

Case studies exploring challenges and possible responses

Outlined below are examples of some deidentified examples of inquiries and referrals received by CIJ's Open Circle. This work demands a careful, compassionate and trauma-informed approach by skilled practitioners. Each referral involves its own combination of challenges, which the Open Circle team must work through with the individuals involved to ensure suitability and safety of all involved.

Through these examples, that are loosely based on deidentified and blended Open Circle referrals, we seek to demonstrate some of the challenges encountered when exploring restorative justice processes at various stages of the criminal justice process. We also outline some possible responses to these challenges that might lead to improving access to safe and supportive

²⁵ Victoria, Royal Commission into Family Violence, *Final Report* (2016).

²⁶ Department of Justice and Regulation (Vic), Restorative Justice for Victim Survivors of Family Violence (Framework, August 2017) 3 <<http://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>.

²⁷ Department of Justice and Regulation (Vic), Restorative Justice for Victim Survivors of Family Violence (Framework, August 2017) 3 <<http://www.justice.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>.

and restorative justice processes for victim/survivors who wish to explore them

1. Restorative justice processes before police involvement

Where victim/survivors and/or perpetrators seek a restorative justice process when the harm has not been reported to the police, a lack of certainty around whether information shared during the process is protected can impact upon the willingness of parties – particularly perpetrators – to participate.

While Open Circle's processes require parties to agree²⁸ that information exchanged throughout the process will remain confidential, we cannot offer a guarantee to parties that this information, such as any admissions made by a perpetrator, would be protected if police ultimately brought charges against the perpetrator for these offences²⁹ or if a victim/survivor brought civil proceedings against the perpetrator.

Example 1:

Jenna, who is 16, has recently disclosed to her parents that she has been sexually assaulted by Joe, her older cousin who is almost 18, persistently over the past 4 years. Jenna and Joe's families are very close and see each other often. Jenna's parents sought the assistance of sexual assault support services who were required to report the assault to the police because Jenna is a child. Police have told Jenna and her parents that they can charge Joe.

Jenna wants to be able to tell Joe the impact his offending has had on her. She wants him to be accountable. She doesn't want him to go to jail. Jenna's parents want Joe to get help and want to support their daughter to address the harm. They are worried that a criminal prosecution will be traumatic for Jenna and will further damage relationships. Given the option, Jenna and her parents would prefer a restorative justice process to criminal prosecution. Joe's parents are

²⁸ Open Circle asks all participants to sign confidentiality agreements prior to the restorative process commencing.

²⁹ Section 131 of the *Evidence Act 2008* (Vic) makes provision for the exclusion of evidence of settlement negotiations. Section 90, *Evidence Act 2008* (Vic) provides judges with discretion to exclude admissions if the evidence was adduced by the prosecution and having regard to the circumstances in which the admission was made, it would be unfair to an accused to use the evidence. Neither of these sections provide for the specific circumstance of an admission being made by an accused in the context of a restorative justice conference, providing a measure of uncertainty for how this information would be treated by a judge should charges be brought after a restorative justice process had occurred.

worried that anything Joe says in a restorative justice process might be used as evidence by the police to bring charges against Joe and are not sure that he should participate.

Possible responses

- There is currently nothing to prevent Jenna and her parents from inviting Joe and his parents to participate in a restorative justice process. However, Joe would need to acknowledge the harm he has caused and assume some risk in taking this approach, even where all parties agreed to the process remaining confidential.
- Greater certainty would be provided to restorative justice participants if a legislative scheme was introduced dealing with how information conveyed during a restorative justice process would be treated by a court dealing with charges relating to the harm or associated civil action.³⁰
- Ideally, Joe would be able to access a community-based perpetrator support service that could support him in addressing his concerning behaviours. As Joe is now an adult, he is unlikely to be able to access services. Ensuring that there is public community-based support for both child and adult perpetrators is an important complement to any restorative justice response to sexual harm.

2. Restorative justice as a component of diversion

The CIJ does not advocate for the creation of restorative justice mechanisms that are alternatives to the formal criminal justice system. The CIJ takes the view that victim/survivors should have the option of pursuing restorative justice processes in addition to criminal proceedings. However, in the usual course of criminal prosecutions, some matters are deemed appropriate to

³⁰ For example, Section 64 of the *Crimes (Restorative Justice) Act 2004 (ACT)* provides criminal repercussions for anyone performing functions under the act that discloses secret information obtained during a restorative justice process, including in criminal or civil proceedings. Section 59 of the same act makes any admission made during an RJ process or in an RJ agreement relating to the commission of a less serious sexual offence inadmissible in proceedings related to that offence.

proceed by way of diversion. In these cases, the accused person admits responsibility for the offending. However, a formal finding of guilt is not recorded against them. When the Court makes an order for diversion, a diversion plan is agreed to by the accused person. This will often include steps the accused person must take to address the harm they caused and to seek treatment for any underlying issues that contributed to the offending behaviour.

Participating in a restorative justice process could form part of a diversion plan in appropriate cases. It is the prosecution's role to decide whether to recommend diversion, and it is the court's role to ultimately decide whether diversion is appropriate in each particular case. However, it is the CIJ's view that in the context of sexual offences, the wishes of an informed victim/survivor must guide the decision about whether a matter proceeds as diversion. The range of options should be outlined to the victim/survivor, including any concerns around the likelihood of a successful prosecution and the impact of that process on the victim/survivor. Efforts to identify the needs of the victim/survivor should be made by the prosecution and an exploration of how to best meet those needs should be a collaborative process. The option of pursuing both a criminal justice prosecution and a restorative justice process should always be raised with the victim/survivor.

Voluntary participation is an essential principle of restorative justice. Pursuing a restorative justice process as a diversion from a criminal justice prosecution has the potential to compromise this aspect of a perpetrator's participation. While Open Circle's intake processes are robust and include an assessment of whether the person responsible acknowledges responsibility for the harm caused and is participating voluntarily, it is important that everyone involved understands and accepts that a process will only proceed if all parties consent freely.

Example 2:

Fatimah was sexually assaulted by Ali, the son of a close family friend, between the ages of 10-12 years and when Ali was 13-15. Now in her thirties, Fatimah is still impacted by the sexual harm she experienced as a child and has recently made a report to the police. The events have caused great divisions within her family and the close-knit circle of friends. The police have charged Ali. However, the police believe that pursuing criminal charges against Ali is unlikely to meet Fatimah's needs. Police believe that a conviction is unlikely because of the age of the witnesses and the time since the alleged offending. Due to the age of the accused at the time of the alleged offending, the most likely outcome, if charges are proven, is a dismissal. Fatimah speaks of wanting Ali to accept responsibility and acknowledge the harm he has caused her. She also wants other family members to acknowledge the harm that he has caused her. The possibility of exploring financial redress for the harm she experienced is also important to Fatimah, because it has impacted her capacity to work.

Fatimah is interested in a restorative justice process with Ali, however Ali is hesitant to participate, concerned that information will be used as evidence in future criminal and/or civil proceedings against him.

Possible responses:

- The introduction of a legislative scheme for restorative justice that includes provisions that deal with how information exchanged throughout the restorative justice process would be treated by a court dealing with charges relating to the harm or associated civil action (see above).
- Prosecutors and sexual assault support services require access to better information about restorative justice processes, how these can

be accessed and how they interact with any possible criminal justice processes. In particular, prosecutors require policy guidance around when and how to tell victim/survivors about the availability of restorative justice processes.

- An important factor that is currently missing in Victoria is community-based support for perpetrators of sexual violence. Although Open Circle can arrange support for an individual perpetrator while they participate in a restorative justice process, the absence of longer-term community-based perpetrator support may limit the capacity of a restorative justice service to challenge and address the underlying behaviours and ideas which led to perpetrators actions and for this work to continue beyond the restorative justice process. Addressing this shortfall is necessary for victim/survivors to be provided access to restorative justice processes that are safe, supportive and responsive to their needs.

3. Restorative justice as a post-plea, pre-sentence option

A restorative justice process can be facilitated in the time between when an offender has entered a guilty plea or has been found guilty of a sexual offence and the sentencing of that offender. In these circumstances, restorative justice and the criminal prosecution process are both pursued. The criminal prosecution can be adjourned to allow the restorative justice process to take place and some information about the offender's participation in the restorative justice process and sometimes a report on the outcomes is provided to the sentencing judicial officer. The sentencing judicial officer may take the offender's participation in the restorative justice process into account for sentencing purposes but, under current Victorian law, is not required to.

In jurisdictions with a legislative scheme for restorative justice, there are often provisions dealing with how the offender's participation is to be taken into account and how this is reported to the court.

We believe that there is already a legislative mandate for criminal charges in the Magistrates Court or County Court to be adjourned for the purpose of the facilitation of a restorative justice process involving the offender and victim survivor. Section 83A of the *Sentencing Act*³¹ allows the Magistrates Court or County Court to defer sentencing for up to 12 months to allow the offender to participate in a program aimed at addressing the impact of the offending on the victim or for any other purpose that the court considers appropriate having regard to the offender and the circumstances of the case.

However, there is not universal agreement among sentencing judges about the application of section 83A of the Sentencing Act to restorative justice processes. Some judges have expressed a preference for a specific legislative scheme to support the process and their decision making in this area.

Furthermore, aligning restorative justice process with criminal justice sentencing outcomes may not be supported by all victim/survivors. Some victim/survivors may question whether an offender is participating in a restorative justice process simply to derive a sentencing benefit. However, as with all restorative justice processes, the key principle of voluntary participation means that a victim/survivor can choose not to participate in a restorative justice process pre-sentence if they are concerned about the possibility of the offender's participation contributing to a lesser sentence.

The possibility of the offender's participation in a restorative justice process should be raised with the victim/survivor and if they are comfortable with that possibility, a post-plea, pre-sentence process may be suitable.

³¹ *Sentencing Act 1991* (Vic).

Example 3:

Tanya, who is now 27, was sexually assaulted by her uncle when she was 16 years old. Tanya's uncle groped her breasts when they were in the kitchen at a family function. Tanya has avoided her uncle since this occasion, often missing out on important family events. She recently reported the assault to the police and her uncle was charged. Her uncle made full admissions and pleaded guilty to the charge. He told the police that he was really sorry and wanted to apologise to Tanya. During the plea hearing, the Magistrate raised the possibility of a restorative justice process, explaining that she could adjourn proceedings to give the victim and accused time to engage in a restorative justice process prior to sentencing. The prosecutor discussed the option of restorative justice with Tanya, explaining that her uncle's participation in a restorative justice process could be taken into account by the Magistrate for sentencing purposes. Tanya decided that she would like the opportunity to tell her uncle about how his actions harmed her, and that this was just as important as any sentence that a court might impose. The matter was referred to a restorative justice provider and the sentence hearing was adjourned for 6 months to allow the restorative justice process to take place.

Opportunities:

- Some argue that a legislative mandate³² already exists for criminal charges in the Magistrates Court or County Court to be adjourned for the purpose of facilitating a restorative justice process. The introduction of a legislative scheme for restorative justice would give everyone involved certainty about how information exchanged throughout the restorative justice process would be treated by a court, both in terms of its admissibility and of the weight attributed to an offender's participation for sentencing purposes.

³² *Sentencing Act 1991* (Vic) s 83A.

4. Restorative justice as a post-sentence option

In some circumstances, Open Circle receives referrals from victim/survivors at the conclusion of a criminal justice process. In these circumstances, the criminal justice process has been unable to meet all of the needs of the victim/survivor even where the prosecution has resulted in a conviction. In some circumstances, the victim/survivor is not ready to consider a restorative justice process until criminal proceedings have concluded; for some, they did not want an offender's participation in a restorative justice process to impact on their sentence; in other circumstances, victim/survivors were simply unaware of the availability of restorative justice until after criminal proceedings had concluded.

Although there may be a handful of offenders that post-conviction and post sentence will be open to a restorative justice process, the fact is that so few sexual offence criminal prosecutions result in a conviction that convicted perpetrators represent a tiny fraction of the people responsible for sexual harm. In circumstances where an accused goes through a criminal prosecution and is found not guilty, the likelihood that they would agree to participate in a restorative justice process after those proceedings is slim. Of course, there may be circumstances where a perpetrator agrees to a restorative justice process after a criminal justice process, for example, in order to restore an important family relationship.

Nevertheless, the availability of restorative justice processes post-sentence is important and avoids the complexity of matters held at other stages of the criminal justice process. Concerns around the use of admissions and other information exchanged throughout the restorative justice process on future civil proceedings may still be an issue for restorative justice processes that take place at this stage. Other issues include barriers facilitating processes if an offender is serving a custodial sentence and if the offender is sentenced to a community-based sentence, the lack of community-based support for perpetrators of sexual violence. While Open Circle can establish ad hoc

support to enable while a restorative justice process takes place, in the long term, the absence of community-based perpetrator support will limit the capacity for a restorative justice service to meet the prevention needs of victim survivors. Addressing this shortfall is necessary for victim/survivors to be provided access to restorative justice processes that are safe, supportive and responsive to needs.

Example 4:

Between the ages of 13 and 15, Jasmine was in a relationship with Johnny, who was five years older than her. Jasmine and Johnny's relationship progressed to a sexual relationship. Over time, Johnny became controlling and non-consensual sex became a feature of the relationship. 10 years after the relationship, Jasmine reported the matter to the police and Johnny was charged with a number of offences including sex with a minor. Johnny was convicted and sentenced to a community corrections order. Jasmine sought a restorative justice process with Johnny because she felt the criminal justice process had not met her needs. She wanted to tell him how his behaviour had impacted her and for him to really understand why his behaviour was wrong. Open Circle approached Johnny but he declined to participate because he felt that he had already been 'punished enough' through the criminal justice process and he just wanted to move on. He said had restorative justice been offered at an earlier stage he may have been open to it.

Opportunities:

- Those working with victim/survivors in the criminal justice system and in the sexual assault support service system require access to better information about restorative justice processes, how these can be

accessed and how they interact with any possible criminal justice processes.

5. Restorative justice processes between victim/survivors and people other than the perpetrator

Open Circle sometimes receives referrals from victim/survivors who have no interest in pursuing a restorative justice process with the person directly responsible for harming them. Often, the response of immediate family members, particularly where sexual harm occurs within a family, can contribute to a victim/survivor's experience of trauma and cause divisions and further harms. Sometimes, a victim/survivor seeks a restorative justice process with members of their family if they feel they have experienced harm as a result of their failure to protect them following an incident or disclosure of sexual harm.

Example 5:

Romina was sexually assaulted by her uncle over a period of years when she was a teenager. Romina is now an adult with her own children. Approximately 5 years ago, Romina reported the sexual assault to the police and her uncle was charged, convicted and sentenced to a term of imprisonment. Romina wanted Open Circle to facilitate a restorative justice process between her and members of her immediate family who she felt did not respond to her disclosure in a supportive way.

Part 1B: A restorative justice approach for responding to sexual offences

In this section of our submission we discuss the features that restorative justice processes should have in order to respond appropriately to sexual offences.

There are two parts to the approach we propose. The first covers the principles that should guide this work. The second describes the features that a restorative justice response for sexual offences should incorporate.

Principles

Focused on the needs of victim/survivors

Restorative justice processes offer potential benefits to all who take part in them, and to the wider community. There is evidence to suggest that participating in restorative processes can enhance the likelihood that perpetrators will also take part in sex offender treatment/rehabilitation programs.³³ However, our focus in this submission is on the potential of restorative justice processes to meet the justice needs of victim/survivors. We therefore propose a restorative justice approach that is primarily focused on meeting these needs. A victim/survivor focused process should reflect the following principles:

- **Recognises the victim/survivor as the expert on their own life and their own healing/recovery.** The infliction of sexual harm involves victim/survivors' agency being violated. Victim/survivors commonly say that their encounters with the criminal justice system can also leave them feeling powerless, according them little say in decisions. A victim/survivor focused restorative justice process must ensure that it does not repeat these dynamics and therefore, as much as possible, it must be a process within which victim/survivors are supported to exercise choice and agency. Victim/survivors' decisions, including whether to engage with a restorative justice process, when it feels right for them to do so, and who else they want to include, must all guide the process.

³³ Kathleen Daly, Brigitte Bouhours, Roderic Broadhurst and Nini Loh, 'Youth sex offending, recidivism and restorative justice: Comparing court and conference cases' (2013) 46 *Australian & New Zealand Journal of Criminology* 241.

- **Flexible, so that the process can be tailored to the individual justice needs of each victim/survivor.** Sexual harm is a violation of victim/survivors' personhood, which can damage victim/survivors' sense of worth. This experience is compounded for some victim/survivors who encounter the criminal justice system. Victims are not parties to criminal proceedings, their needs are not central within these processes, and some victim/survivors can feel overlooked and as though they do not matter in the context of justice system processes. A victim/survivor focused restorative justice process must be one in which victim/survivors' individual needs are recognised. As discussed above, victim/survivors have a range of different justice needs. Which needs are most pressing, and the way they present in a victim/survivor's life will be different for each person. The process must be flexible enough to respond to each participant's unique needs. It must not be a 'one-size-fits-all' approach.
- **Part of a suite of options available to victim/survivors.** Consistent with the principles of prioritising victim/survivor choice, and responding to victim/survivors' differing individual needs, a restorative justice process for sexual offences must be one option among many that is open to victim/survivors following sexual harm. The CIJ takes the view that restorative justice should be complementary to the criminal justice system. The criminal justice system can meet some justice needs, and some victim/survivors want a criminal justice response. Restorative justice processes can meet some justice needs that the criminal justice system cannot. However, restorative justice processes cannot meet all needs for all victims. Victims must be able to decide on a course of action best suited to them. For some victims this will involve engaging with the criminal justice system *and* participating in a restorative justice process. It must always be the victim/survivor's decision as to whether to take part in a restorative justice process and deciding to do so must not prevent victim/survivors from accessing other forms of justice.

- **Trauma-informed -the ongoing effects of the harm the victim/survivor has experienced are recognised.** An understanding of the impacts of trauma is applied to the design of approaches which accommodate the vulnerabilities of trauma survivors and enable processes which minimise the risk of re-traumatisation. The work is collaborative and acts on the core principles of safety, trustworthiness, choice and empowerment.

Offenders are invited to take responsibility

- While focused on the justice needs of victim/survivors, the process offers offenders opportunities for positive change. Offenders are encouraged to reflect on and understand their behaviour.
- The process does not aim to punish or shame offenders. Recognition is given to the particular stigma that can be applied to people who have committed sexual offences, which may hinder their acceptance and acknowledgement of responsibility.
- Where possible and appropriate, offenders are encouraged to seek treatment. This principle is consistent with the focus on victim/survivor needs, as many victim/survivors want offenders to receive specialist help that addresses the offending behaviour, in the hope that they do not offend against other victims in the future (victim/survivors' prevention need).

Sexual harm is understood as a social issue

- The particular harm individual victim/survivors have experienced is understood in the context of wider social structures, which legitimise male violence and domination and undermine the experiences of victim/survivors ('rape culture'). These dynamics permeate society, and therefore have the potential to influence restorative justice processes. This potential must be recognised and addressed.
- Myths and misconceptions about sexual harm are understood, and steps to counter them form part of the process. For example, opportunities to

convey messages such as 'I believe you,' or, 'what happened was not your fault,' to the victim/survivor should be taken where this is appropriate.

- Sexual harm is understood as being most often a form of gender-based violence perpetrated by men against women and children. The particular dynamics of sexual harm, which involve an abuse of power, are recognised.

General restorative justice principles

In addition to the principles that should specifically govern a restorative justice response to sexual offending, discussed above, the general principles that guide all restorative justice work should also apply. The starting point for all restorative justice theory and practice is that no one should be (further) harmed by participating. Beyond a commitment to this key concept, restorative justice principles are expressed differently among restorative justice practitioners and scholars. The CIJ articulates the principles that guide our work as follows:

The CIJ's restorative justice processes are:

- Voluntary – people only take part if they want to
- Confidential – what is said during the process is confidential (unless everyone involved agrees otherwise)
- Supported – program staff spend time with each participant in the lead up to a conference to help everyone prepare
- Constructive – the process offers benefits to all who take part and care is taken to ensure no one is harmed by participating
- Flexible – as much as possible, the process is responsive to people's needs

Features of a restorative justice response to sexual offending

There is not a settled evidence base relating to the use of restorative justice in response to sexual offences.³⁴ Nonetheless, the existing research suggests that successful programs of this nature share the following features:

- specialism, which includes facilitator skill, knowledge and experience
- vigilant use of screening (relating to suitability, not just eligibility)
- the use of experts (in sexual offending and the dynamics of violence) throughout the process
- flexibility and responsiveness to participant needs
- timing of the meeting appropriate to victims/survivor readiness
- for offenders, participation in a targeted sex offender treatment program.³⁵

In light of the above research and drawing on elements of other similar programs³⁶ and our own experience of delivering restorative justice and designing restorative justice programs, we propose that a restorative justice approach that responds to sexual offending should have features as outlined below.

Specialist expertise

A restorative justice approach for sexual offences must be delivered by experts in restorative justice practice and must be informed by expert knowledge of sexual offending.

Conveners

Restorative justice processes are facilitated by a neutral person called a convener who is there to ensure that, as much as possible, the process is constructive, fair and that all participants have the opportunity to have their say. The convener must be acutely aware of the dynamics throughout the process. In the context of sexual harm, it is the convener's role to recognise the potential for

³⁴ Daye Gang et al, above n 7.

³⁵ Bolitho and Freeman, above n 5.

³⁶ Ministry of Justice (NZ) *Restorative justice standards for sexual offending cases*, June 2013; Vince Mercer and Karin Madsen, *Sexual violence and restorative justice: a practice guide* (Leuven Institute of Criminology, Leuven: 2015)

the power imbalance inherent to sexual harm to influence the restorative justice process, and to ensure that the process is not shaped by this dynamic. The skills needed to perform this role are extremely nuanced. A restorative justice approach that responds to sexual harm must engage extremely experienced conveners, who have the skillset required to manage the complex dynamics involved. Ideally, conveners should also have experience in the area of sexual violence.

Expert guidance

A restorative justice approach that responds to sexual harm must draw on the knowledge of experts on the subject of sexual violence. This should include specialist understanding of the effects of sexual violence on victim/survivors and their experiences, and specialist understanding of people who commit sexual offences. Some programs cover this expertise by having three people convene in each case; a general convener with expert skills in restorative justice practice, a victim/survivor specialist and an offender specialist.³⁷ Open Circle uses a different structure. For each restorative justice process, two experienced conveners are assigned to manage the process (including the preparation phase and the meeting between the participants). In each process, the conveners consult a panel of experts for advice on the particular issues relevant to the individual participants and the specific context. The panel of experts includes victim/survivor specialists and sex offender specialists. At minimum, they are consulted in each case. Depending on the circumstances, other experts may also be consulted, such professionals who work with people with cognitive disabilities, or Elders and respected members of Aboriginal communities. Members of the expert panel advise on any concerns about the proposed meeting between participants, and any measures that should be taken to address the concerns. They also advise on extra support mechanisms that should be offered to participants and may attend meetings with participants to offer that support should it be requested.

³⁷ Project RESTORE (NZ) and the Department of Justice Family Violence Restorative Justice

Screening and assessment

It is a core aspect of a convener's role to determine whether potential participants are ready to take part in a restorative justice process. Experienced conveners are highly skilled in carrying out these assessments, which enable a convener to make a decision about whether it is appropriate for a restorative justice process to go ahead. Conveners do so by intensively working with and observing a potential participant during the preparation phase and gauging whether that person is suitable to continue to the part of the process where they interact (directly or indirectly) with other participants. Their assessment is not based, for example, on preconceived notions of what a person who has experienced trauma can or cannot cope with, or what a person with cognitive disability is capable of.

Eligibility

All victim/survivors who have experienced sexual harm that occurred within Victoria should be able to access a restorative justice process, subject to the conveners' assessment process, as described above. Whole classes of person, for example children and young people or people with cognitive disabilities, should not be excluded outright. Each potential participant's capacity to take place in the process should be assessed on a case-by-case basis. While staying faithful to the program's guiding principles, every effort should be made to tailor the process so that participants can be enabled to take part.

Thorough preparation phase

Extensive preparation with parties is essential to understanding and addressing power imbalances between the participants.³⁸ It is also essential to delivering a trauma-informed service, that is responsive to the needs of each victim/survivor. Preparation processes should be flexible and adapted to the needs of the people involved and their circumstances. Preparation should be comprehensive and unrushed, giving conveners opportunity to explore with the victim survivor (in

³⁸ Shirley Julich, John Buttle, Christine Cummins & Erin Freeborn, *Project Restore: an exploratory study of restorative justice and sexual violence* (2010), Auckland University of Technology.

particular) and the offender what they want to say, how they might respond and things that they do not wish to discuss (for example, revisiting the details of sexual offence). Preparation is likely the longest part of any restorative justice process, especially where sexual harm is involved, and services should be designed (and resourced) to accommodate matters that they remain involved with for substantial periods of time.

A flexible approach to the structure of the process

Within restorative justice discourse a distinction is sometimes drawn between ‘victim/offender mediation,’ which generally denotes a restorative justice process involving a facilitated interaction solely between a victim and an offender, and ‘restorative justice conferencing,’ which generally denotes a larger group of people, all of whom have been affected in some way by the crime, and which may include a victim and an offender, having a facilitated interaction. Some restorative justice programs offer one of these processes exclusively. A restorative justice approach to sexual offences should offer both these structures, as determined by the wishes and needs of individual participants.

Further, it should accommodate other combinations of participants. We have heard that victim/survivors often seek a means to address their own family members’ response to the offending, particularly in cases where their families have not believed or supported them. A restorative justice approach that responds to sexual offences should offer victim/survivors the opportunity for a restorative process with their family group, or other relevant people. There should be no requirement for an offender to attend, if the victim does not want them to. Other forms of communication between participants, in addition to a face-to-face meeting, should also be offered, for example a facilitated letter exchange could be made available if this was the best fit for a victim/survivor.

As the approach we propose is victim/survivor focused, in the event that a victim was not interested in participating but the offender wanted to take part, the process should not go ahead.

Relationship with the criminal justice system

In order to maximise victim/survivors' capacity to exercise choice, restorative justice processes that respond to sexual offences should be available in all the following circumstances:

- the victim/survivor has not reported the sexual harm to police, and does not want to do so
- the victim/survivor has not reported the sexual harm to police, but may want to do so in the future
- the victim/survivor has reported the harm to police. Police have investigated and decided not to bring charges
- charges have been brought and a criminal justice system process is underway, including in the following circumstances:
 - where the offender has admitted responsibility and the matter will proceed by way of diversion
 - following a plea of guilty, before the offender is sentenced ('pre-sentence')
- a court has imposed a finding of guilt, the offender has been sentenced and is serving the sentence
- the offender has completed their sentence

Given the low rates at which sexual harms are reported to police, and the high rates of attrition in cases that are reported, it is important that restorative justice processes are available to victim/survivors who choose not to make a police report, and to victim/survivors who have reported, but whose matters do not proceed. That is, restorative justice processes should be available to victim/survivors in cases where there will not be a criminal prosecution.

Otherwise, the majority of victim/survivors of sexual harm would not be eligible to participate. This point is illustrated by research which compared two programs offering restorative justice in response to sexual harm. The two programs were similar, however one only accepted referrals of matters that were in the court system, and the other accepted referrals from the community, whether or not there had been a criminal justice system response. The latter provided services

in 30-40 cases annually, while the number of referrals to the former was consistently small.³⁹

Restorative justice processes should also be available to victim/survivors in addition to criminal justice system processes. Victim/survivors should not be forced to choose between a restorative justice process and a criminal justice process. Seeking a criminal prosecution is important to some victim/survivors, and where this is the case, they should be supported to pursue this option. Restorative justice processes have the potential to meet some justice needs that the criminal justice system cannot; however, they are not a replacement for the criminal justice system. Embarking on one process should not preclude a victim/survivor from engaging with the other. Rather, restorative justice processes should occur alongside criminal justice processes, as a complementary option.

Because of the desirability for restorative justice processes and criminal justice processes to exist side-by-side in complementary ways, a restorative justice process should not proceed at a point in time where this may compromise criminal proceedings. Examples include: when a police investigation is underway, during plea negotiations before the matter has resolved, and during a trial. Subject to this consideration, the timing of a restorative justice process should be a decision for the victim/survivor. It should not be influenced by administrative or criminal justice system aims and objectives. The availability of restorative justice processes should not be used by criminal justice system agencies as a rationale to decline to prosecute appropriate cases.

How much influence should a restorative justice process have on criminal proceedings?

Participation in a restorative justice process should be voluntary for all participants and should offer benefits for all participants. It should not be punitive. Therefore, participation in a restorative justice process should not form part of a sentence imposed on an offender by a court.

³⁹ Bolitho and Freeman, above n 5, 46.

Where an offender has taken part in a restorative justice process at a pre-sentence stage, this should be taken into account by the Court during sentencing. The impact of participation on the sentence imposed would be a matter for the Court. Some victim/survivors may feel that offenders should not be able to gain a sentencing benefit via participation in a restorative justice process. However, given that participation in a restorative justice process is voluntary, victim/survivors who take this view do not need to engage in a restorative justice process at a pre-sentence stage. Instead, they could wait until after the offender has been sentenced and then pursue a restorative justice process.

There is a view that a person responsible for sexual harm should not receive an incentive to participate in a restorative justice process, or a forensic benefit from doing so. However, our consultations with restorative justice practitioners indicate that while such benefits may provide the initial incentive for an offender to take part, the preparation phase of the process can allow the offender to start to develop insight and empathy, to the extent to which some can go on to participate meaningfully in an interaction with a victim/survivor.

For some victim/survivors, whether or not the offender receives a weighty sentence is not a high priority. If this is the case, and the victim/survivor would benefit from participating in restorative justice while the criminal justice process is still taking place, the option of a pre-sentence restorative justice process should be available. This is consistent with the principle of maximising victim/survivors' opportunities for decision-making, and with that of the program being flexible enough to cater for what best suits individual victims.

Safeguards for legal rights of participants

Part of the preparation process must be that potential participants are encouraged to obtain legal advice on how taking part in restorative justice may impact on their rights and interests in any existing or subsequent legal proceedings. Ideally, participants enter into the restorative justice process with a sound understanding of the implications of doing so for them. However, Open Circle recommends against allowing participants to be legally represented during

restorative justice conferences. The presence of lawyers in a conference introduces an adversarial dimension and can inhibit participants from fully expressing themselves.

The principle of confidentiality is designed to allow all participants to express themselves honestly and freely during the restorative justice process without fearing that what they say may be able to be used to their detriment in legal proceedings. Open Circle's current practice is to require participants to sign a confidentiality agreement prior to taking part in a restorative justice process. However, there is still some risk that what is said in a conference may be able to be used in evidence. Ideally, legislative provisions should be put in place to provide that disclosures made during a restorative justice process are not admissible as evidence in legal proceedings.

Who should run a restorative justice response to sexual offences?

Consideration should be given to the question of how a restorative justice response to sexual offences should sit in relationship to other entities such as government and the courts.

Given the need to ensure that restorative justice processes can be as responsive as possible to the needs of participants, it may be desirable for them to be delivered independently from the courts, so that priorities such as court timeframes and scheduling do not overly influence their operation.

The CIJ advocates for a restorative justice response to sexual offences that operates alongside the criminal justice system. The criminal justice system is an adversarial environment, in which the interests of victims and offenders are generally understood to be in opposition. In contrast, restorative justice processes are designed to deliver benefits to all participants, to promote shared understandings, and to highlight mutual interests.

To facilitate a non-adversarial approach and to minimise potential barriers to voluntary participation, it is important that participants perceive restorative justice processes to be neutral. Participant perceptions may be influenced by the alignment of a convener or their service with a particular category of participant

(victim or offender). We acknowledge that there are a broad range of restorative justice services in existence, and that victim-focussed services and offender-focussed services are, respectively, involved in their delivery. However, in the context of a restorative justice program operating alongside the criminal justice system, the perception of neutrality may be enhanced where the process is delivered by an organisation that is not aligned to particular categories of participants (neither victim nor offender), and is capable of offering a service that aims to benefit all participants.

Further, as outlined above, the CIJ takes the view that a restorative justice response to sexual offences that is truly focused on the needs of victim/survivors needs to be flexible. It must be able to be tailored to the individual needs and wishes of each participant, rather than being overly formulaic. If a government department provided a restorative justice response to sexual offences, rigid procedures may shape the delivery of restorative justice processes. Further, government has broad obligations it must act on. The interests of government may not always accord with the interests of individual victim/survivors. These considerations are important, as if restorative justice processes are to be of value to victim/survivors, they must not replicate their experience of the criminal justice system, where some feel that the system's priorities and mechanisms take absolute precedence while their own needs and views are rendered invisible.⁴⁰

In other jurisdictions, namely New Zealand and the UK, government, community-based organisations and private practitioners all play a role in delivering restorative justice services. It may be that a good outcome in the Victorian context would be for restorative justice processes that respond to sexual offences to be delivered by a similarly diverse range of providers. This is consistent with the principle of maximising victim/survivors' capacity for choice, as victim/survivors would have the opportunity to engage the provider that they

⁴⁰ Joanna Shapland, Jon Willmore and Peter Duff, *Victims in the Criminal Justice System* (Gower Publishing, 1985); Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler, 1996); Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002).

felt was the best fit for them. Ensuring high standards of practice would be of the utmost importance under such an approach. The CIJ's views on appropriate governance of a restorative justice approach for sexual offences are outlined below, under the heading 'governance and professional accreditation and support.'

Ultimately, a restorative justice approach for sexual offences should be delivered by an entity that has:

- expertise in the delivery of restorative justice services in response to complex and serious harm
- access to specialist knowledge of sexual harm
- social justice principles, especially a feminist understanding of violence against women
- the trust of community-based victim/survivor support and advocacy organisations, for example the Centres Against Sexual Assault
- relationships with criminal justice system organisations.

What is needed to make RJ for sexual offences viable?

While it is already possible to offer restorative justice in response to sexual harm, doing so without the support outlined below limits the awareness and availability of restorative justice processes as well as the potential the impact of the response. Addressing the following issues would provide victim/survivors and perpetrators greater access to safe, beneficial and viable services.

Legislation

A legislative foundation would help to establish the legitimacy of restorative justice processes and confidence in it across the criminal justice system.

Legislation should expressly provide that disclosures made during a restorative justice process are not admissible in legal proceedings.⁴¹ It should also clarify

⁴¹ For example, in NSW the *Criminal Procedure Regulations* (2010) provides that evidence of statements made in a forum sentencing conference is not admissible in any proceedings other than those that are the subject of the conference, and that any admissions by an offender are not admissible in relation to those proceedings: reg 86. In Victoria, the *Children, Youth and Families*

that participation in a restorative justice process should not indicate guilt for the purposes of a criminal prosecution.⁴² Legislation should further provide that an offender should not be further penalised if they are offered the opportunity to participate in restorative justice but decide not to do so.⁴³ Legislative provisions could also set out guidance as to how participation in a restorative justice process might be taken into account for sentencing or other purposes.

Introducing a legislative foundation for restorative justice would also send a strong message that the Victorian Government endorses the use of restorative justice as an option process that is complementary to the criminal justice system.

Resourcing

As outlined above, a restorative justice process that responds to sexual offending must be focused on the needs of victim/survivors, and must be able to be tailored so that it addresses the needs of each victim/survivor participant as an individual. Some victim/survivors may require a long and intensive period of preparation before they are ready to engage with other process participants, such as the offender. Further, a restorative justice process that responds to sexual offending must be delivered by highly qualified professionals, and must draw on different sources of expertise. These features mean that the process will be resource intensive. This is what is required if victim/survivors are going to receive the standard of service they deserve if they choose to engage in a restorative justice process. A quality restorative justice program that is capable of supporting people who have experienced sexual harm must be appropriately resourced. Financial support by Government will be important for ensuring that people are able to access restorative justice services when they are ready to do so, and for removing financial barriers to their participation.

Act (2005), which applies to Youth Justice Group Conferencing, provides that proceedings of a group conference are confidential and makes it a penalty to disclose what occurs in a conference without the leave of the Court or the consent of all the parties to the group conference: s 415.

⁴² There is a provision with this effect in the ACT legislation that governs restorative justice in that jurisdiction: *Crimes (Restorative Justice) Act* 2004 (ACT) s 20.

⁴³ See *Crimes (Restorative Justice) Act* 2004 (ACT) s 34.

Community based treatment for perpetrators

In this submission, the restorative justice response to sexual offences the CIJ is proposing is victim/survivor focused. However, an approach that is consistent with this focus must consider the issue of perpetrator treatment programs.

Victim/survivors who have a strong prevention need want to see steps taken to reduce the likelihood of the offender reoffending, in order to prevent others from being harmed in the way they have been harmed. Victim/survivors with this need who take part in a restorative justice process with the offender will aim to encourage the offender to agree to take part in treatment that addresses the offending behaviour. In this context, specialist sex offender treatment programs are required. If the offender is a child or young person, there are programs of this nature available in Victoria.⁴⁴ If the offender is an adult and has been sentenced to a term of imprisonment for sexual offences, that person should in theory be able to access one of the sex offender treatment programs run within prisons. However, if the criminal justice system has not been engaged, or if there has been a criminal justice system process but the offender did not receive a term of imprisonment, it is unclear whether the offender would be able to access a specialist sex offender treatment program. At this time in Victoria, there do not appear to be any community-based programs of this nature.

Strong referral pathways

As we have outlined above, to maximise the potential for victim/survivors to exercise choice, they should be able to access restorative justice processes whether or not they decide to report the sexual harm they have experienced to police. If they do make a report to police and a criminal prosecution goes ahead, victim/survivors should have the option of pursuing a restorative justice process at different stages of the prosecution process, and after the process has concluded. For these options to be tangible, victim/survivors need to be made aware of them. Therefore, there need to be referral points within the criminal justice system and within the broader service system. Those who work closely with

⁴⁴ Victorian Law Reform Commission *Sexual Offences Final Report* (2004) 466-7.

victim/survivors in a criminal justice context or otherwise need to be aware of victim/survivors' options regarding restorative justice process, and need to explain these to victims/survivors. To achieve this, a restorative justice service provider should have (or have the capacity to build) strong trusted relationships with CASAs and other community-based support services, and criminal justice system organisations including Victoria Police, the Office of Public Prosecutions and the courts.

In the UK, the Code of Practice for Victims of Crime provides that all victims of crime, regardless irrespective of their location, the age of the offender or offence committed against them, have a right to be informed about restorative justice and how to access it.⁴⁵ Criminal justice agencies, including the police and the Crown Prosecution Service, are required to give effect to this right. Creating positive obligations for justice system agencies to inform victim/survivors about restorative justice processes may assist Victorian victim/survivors to be fully informed about their options. Whether or not a formal requirement of this nature is created, key criminal justice system organisations including the judiciary, the courts, Victoria Police, the Office of Public Prosecutions, Victoria Legal Aid and services for victim/survivors and offenders should be supported to educate and train their staff about restorative justice objectives, principles and processes. The legal profession's representative bodies should also be encouraged to make restorative justice training available to their members. This will enable those working with victim/survivors and with offenders to understand the benefits of restorative justice processes and therefore to be in a position to support victim/survivors and offenders to make decisions about whether to take part.

⁴⁵ *Code of Practice for Victims of Crime in England and Wales (2020)* 4.5.

How to make sure it works in practice

Governance and professional accreditation and support

It is important that all restorative justice services are delivered skilfully and in accordance with best practice, however this is especially important in the area of sexual harm, where the risks require additional skills and safeguards.

In Victoria (and Australia), the landscape of restorative justice providers is relatively undeveloped. Service providers range from community-based not for profit services, private services and government services. Some services specialise in responding to particular kinds of harm (such as the Department of Justice's Family Violence Restorative Justice service); some services, such as Open Circle, offer services in response to a broad range of harms and people and others specialise in processes that respond to harms committed to particular groups of offenders (such as Jesuit Social Service's Youth Group Conferencing service). The Australian Association for Restorative Justice, a professional membership based association, plays a role in convenor accreditation and practice standards.

In other jurisdictions around the world, oversight of restorative justice service providers occurs through a range of structures. In New Zealand, where restorative justice is embedded within its criminal justice system, the Ministry of Justice contracts community based restorative justice providers and requires that their facilitators undertake and maintain training and professional development through the Resolution Institute, a dispute resolution membership organisation. The Ministry of Justice also sets facilitator competencies for sexual offence restorative justice practitioners⁴⁶ in addition to the standard skill sets of generalist facilitators⁴⁷.

⁴⁶ New Zealand Ministry of Justice, 'Restorative Justice Standards for Sexual Offending' (June 2013), 26. At <https://www.justice.govt.nz/assets/Documents/Publications/Restorative-justice-standards-for-sexual-offending-cases.pdf>

⁴⁷ New Zealand Ministry of Justice, 'Restorative Justice Best Practice Framework' (August 2017). At <https://www.justice.govt.nz/assets/Documents/Publications/restorative-justice-best-practice-framework-2017.pdf>

In the UK, oversight of restorative justice providers is provided by the Restorative Justice Council (UK) (RJC), “an independent body that promotes quality restorative practice for everyone”⁴⁸ that is endorsed by the Ministry of Justice (UK). The RJC provides quality assurance for restorative justice providers and is a unified voice advocating the use of all forms of restorative practice. While the RJC was initially established through funding from the Ministry for Justice and philanthropic sources, it now survives largely through membership fees from its large pool of restorative justice providers as well as fees generated from professional development and training sessions. However, Victoria (and Australia) currently lacks the proliferation of restorative justice service providers of the UK, such that a membership-based funding model would be unlikely to completely off-set the cost of regulation.

In Victoria, where some restorative justice services are delivered directly by government and others by community-based services, ensuring that restorative justice is an option that is made widely available to victim/survivors of sexual offences will require workforce development and capacity building, and in turn, the need for clarity in relation to the role of government in promulgating standards.

Monitoring and evaluation

According to Gang et al, who attempted to conduct a systematic review of evaluations of restorative justice programs for sexual and family violence offences, there is insufficient robust evidence to determine whether restorative justice is an effective intervention in response to sexual harm.⁴⁹

Gang et al point out that existing research on restorative justice approaches has considered their impact on reoffending, survivors’ motivations for seeking restorative justice, and the appropriateness of restorative justice for sexual assault or family violence, but, distinguishing this research from program evaluation, make a call for more rigorous, peer-reviewed program evaluation data to enable the reasons for success or failure and optimum program design in

⁴⁸ Restorative Justice Council ‘About the RJC’ <https://restorativejustice.org.uk/about-rjc>

⁴⁹ Gang et al, above n 7.

various settings to be identified, as well as the resolution of theoretical and practical problems associated with the use of restorative justice in the context sexual and family violence.⁵⁰

We endorse the call for rigorous evaluation to be a part of any restorative justice response to sexual harm. However, we consider that such evaluation should also adopt process and outcome measures in addition to those commonly used in the context of restorative justice program evaluation. Common measures of restorative responses in other contexts are victim satisfaction and the impact of participation on reoffending. Victim satisfaction is an important aim and outcome of restorative justice processes, but evaluations that seek to establish the impact of participation on the likelihood of future offending alone may unduly shift the focus from the needs of victim/survivors of sexual harm to the interests of institutional and systemic actors (including government, courts, the criminal justice system broadly) in meeting a very different and sometimes antithetical set of objectives.

Evaluation measures will of course in part be dependent on the identified aims of the restorative justice process itself, but in the context of victim/survivor focussed processes we think that evaluations should explore a range of additional questions. While further work will be required to define these questions, they include matters that dig deeper into the nature of the benefits of restorative processes for participants, such as whether, how and to what extent restorative processes have met the various 'justice needs' of participants; whether processes that are integrated within criminal justice processes or operate independently from them are more or less likely to meet the needs of victim/survivors, and for those programs that are integrated, how the interface between formal justice and restorative justice processes affects the experience and outcomes for victim/survivors; what influences the positive decision of

⁵⁰ See Gang et al, above n 7, for an overview.



prospective participants to engage with the process; what forms of support are required for safe and effective participation of victim/survivors and so on.

Answering these kinds of questions would enable access to restorative justice to be increased and processes to be improved for those who have experienced sexual harms and support policy makers and program designers to develop well-designed, effective restorative justice processes for people who have experienced sexual harm.

Part 2: Speaking and being heard

Is there a role for new initiatives to enable people who have experienced sexual harm to tell their stories and have them acknowledged? Why or why not?

As previously explained, restorative justice processes are capable of meeting justice needs experienced by victim/survivors, including those that are not able to be met by the traditional legal system. However, for a range of reasons, restorative justice processes will not always be suitable for or available to victim/survivors. This may include circumstances where an offender does not consent to participate in a restorative justice process, or where one or more participants is not ready to participate in a way that is consistent with the guiding principles, or where the person responsible has died.

Unlike restorative justice processes, truth-telling mechanisms can occur in the absence of the offender (or other person responsible) and are not contingent on offender consent or acknowledgement. The focus of truth-telling is providing victims with the opportunity to tell their story and the impact of the offending on them to a body or person of standing and to receive formal acknowledgement of the harm done to them. Despite the absence of the offender, truth telling processes provide an opportunity for the victim survivor to receive affirmation and validation of their experience. Truth-telling processes may offer significant benefits to victim/survivors of sexual assault, in particular, who experience considerable trauma as a result of the offending and from the disbelief that many experience following a disclosure.

Truth-telling processes can provide victim/survivors with affirmation and validation, particularly where other avenues are not available, and they should be included in the suite of options available to victim/survivors of sexual harm. A truth-telling process may have benefitted Romina (Example 5) and/or Fatimah (Example 2) in the examples provided above, where circumstances meant that a restorative justice process with the offenders was not appropriate, but their needs for validation and affirmation remained outstanding.

Recent processes which have provided truth-telling opportunities for victim/survivors of sexual harm (as well as other harms) include:

- Royal Commission into Institutional Responses to Child Sexual Abuse
- the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Organisations
- Defence Abuse Response Taskforce's Restorative Engagement Program
- Restorative Engagement and Redress Scheme for Victoria Police
- RMIT University's Restorative Engagement Program

While Royal Commissions and Parliamentary Inquiries are intended to be public hearings, provisions have been made for victims to give evidence in a variety of ways that maintain their confidentiality or ensured their evidence was deidentified. Victim/survivors found the process of telling their stories through the Royal Commission into Institutional Responses to Child Sexual Abuse⁵¹ and the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Organisations⁵² meaningful and beneficial. However, Royal Commissions and Inquiries occur during a fixed period of time and are not designed to be ongoing truth-telling avenues for victim survivors.

Truth-telling processes introduced by specific institutions seeking to provide formal acknowledgment for abuse committed by and against its own members or staff are often described as restorative engagement programs. Since the Defence Force Abuse Taskforce's introduction of its Restorative Engagement Program,⁵³ a number of other institutions have implemented or committed to

⁵¹ Family and Community Development Committee, 'Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Organisations' (tabled 13 November 2013) Final Report, Victorian Parliament. At <http://www.parliament.vic.gov.au/fcdc/article/1788>

⁵² Royal Commission into Institutional Responses to Child Sexual Abuse. At <http://www.childabuseroyalcommission.gov.au/>

⁵³ Defence Abuse Response Taskforce, 'Restorative Engagement Program Protocol'. At <http://www.defenceabusetaskforce.gov.au/Outcomes/Pages/DefenceAbuseRestorativeEngagementProgram.aspx>

implement restorative engagement programs, including Victoria Police⁵⁴ and RMIT University.⁵⁵ These programs give complainants the opportunity to tell their story without being challenged and to be acknowledged and responded to by senior institutional representatives. They provide institutions with opportunities to learn about the circumstances and cultural issues which enabled the abuse to occur which may inform their prevention and response strategies. Restorative processes provide opportunities for the institutional representative to offer an apology or expression of regret which can have significant benefits for the victim survivor.

Restorative Engagement Programs draw upon elements of both restorative justice conferences and truth-telling mechanisms. While Restorative Engagement Programs are positive innovative responses, they are only accessible by victim/survivors of sexual assault that has occurred within the institution offering the program. The vast majority of victim/survivors cannot access Restorative Engagement Programs. They are examples, however, of how a victim/survivor's need for validation, affirmation (as well as other needs such as prevention and relationships) can be addressed through processes which do not involve the offender.

There are several ways that victim/survivors might be provided access to truth-telling mechanisms. Victims of crime compensation jurisdictions provide some victim/survivors with the opportunity to tell their story, and to have their experience acknowledged by a person in a position of authority⁵⁶. Previously, the CIJ has highlighted⁵⁷ the capacity of crimes compensation jurisdictions (in

⁵⁴ Victoria Police 'Restorative Engagement and Redress Scheme: Supporting Victoria Police employees, former and current, who have experienced workplace sex discrimination or sexual harassment', <https://www.vic.gov.au/redress-police-employees>

⁵⁵ RMIT 'Restorative Engagement Program' <https://www.rmit.edu.au/about/our-values/respect-rmit/restorative-engagement>

⁵⁶ Denise Lieve, 'No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault' (Research Report, Australian Institute of Criminology, June 2005) vi.

⁵⁷ CIJ, above n 2.

Victoria, the Victims of Crime Assistance Tribunal) to offer victims the opportunity to have their story heard by someone in authority and then formally acknowledged. Providing a greater emphasis on therapeutic practices would enhance the capacity of crimes compensation commissions to be a truth-telling mechanism that meets victim/survivors' needs for acknowledgement.

Part 3: Aboriginal justice models

Are there Aboriginal justice models that you think should be considered for sexual offences? If so, what are their strengths and weaknesses?

The CIJ is not an Aboriginal controlled organisation and is therefore not able to speak with any authority on whether there are Aboriginal justice models that should be considered for sexual offences. However, we recommend that any Aboriginal justice models should be founded on principles of self-determination and developed through a co-design process⁵⁸ with Aboriginal representatives and groups, such as the Aboriginal Justice Caucus as well as Aboriginal women's organisations such as Djirra.

⁵⁸ An example of a codesign process is currently being undertaken by Jesuit Social Services and the Hume and Eastern Metropolitan Regional Aboriginal Justice Advisory Committees which is exploring culturally appropriate restorative justice models to pilot in Shepparton and Eastern Metro. Aboriginal Justice Agreement, Restorative Justice Responses, <https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-justice-outcomes-framework/goal-12-aboriginal-communities-are-safer-6>, accessed 19 January 2021.