

Centre for
Innovative Justice

Innovative justice responses to sexual offending

– pathways to
better outcomes for
victims, offenders and
the community

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Centre for Innovative Justice

The Centre for Innovative Justice (the CIJ) was established by RMIT University in October 2012 and opened by former Prime Minister Julia Gillard in March 2013. The 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. RMIT is a global university focused on creating solutions that transform the future for the benefit of people and their environments.

The CIJ is dedicated to finding innovative and workable solutions to complex problems that manifest in the justice system. Our analysis is not limited to problem definition; we strive to develop practical ways to address problems. The CIJ's focus is on identifying alternatives to the traditional approaches to criminal justice, civil dispute resolution and legal service provision. Our mission is to identify strategies that take a holistic approach and address the reasons people come into contact with the justice system.

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Executive Summary

Sexual assault is complex, pervasive and insidious. The criminal justice system is expected to deliver a sense that justice has been done, yet its current response is inadequate for the large majority of sexual assault victims.

Victims of sexual assault have historically been met with denial and disbelief, with society failing to develop an adequate response to a crime it did not fully recognise or understand, and to gendered assumptions it refused to relinquish. In recent decades, hard won improvements - called for by reformers and feminists, and implemented by well-intentioned governments - have seen sexual assault taken more seriously in legal and political arenas alike. Investigation, prosecution and court procedures have improved; specialisation has been encouraged; and victims have been provided with fairer treatment and additional support services.

Despite this, however, sexual assault remains the most under-reported form of personal violence, while estimates suggest that the crucial evidentiary requirements and standards of proof demanded by the criminal process mean that the chance of a sexual assault incident resulting in a conviction is as low as, and potentially lower than, one in one hundred. Hard hitting policies of tougher penalties, longer sentences and stringent release practices, meanwhile, do little to address the majority of sexual offending, instead making offenders reluctant to take responsibility for their offending and choosing to contest the allegations. This in turn makes victims reluctant to pursue a prosecution, not wanting to be drawn into the protracted adversarial process.

In other words, most victims of sexual assault do not report to the police, do not pursue a prosecution, or if they do, do not secure a conviction. This means that the conventional criminal justice system, with its single option of investigation by police and prosecution through the courts, is failing to provide an adequate response to the majority of victims of sexual assault. While the prosecution and collective denunciation of sexual offending should continue to be pursued, and while ongoing efforts to reform the conventional criminal justice system remain critical, alone they will not markedly change this state of affairs. Additional non-criminal law based avenues, meanwhile, such as the pursuit of statutory compensation or damages through the civil jurisdiction, have significant limitations attached.

Clearly, victims need more choice in their pursuit of justice – a suite of options from which they can identify the path or paths that best suit their circumstances; options that provide them with the opportunity to tell their story, to have the harm acknowledged, to participate in the process and to have a say in the outcome. Some of these options may, to date, not have been pursued precisely because the area of sexual assault is so complex, yet may improve the justice system's response if implemented in the right way. Accordingly, this report argues that the justice system should be responsive, inclusive, flexible and fair – that justice processes should be designed in a way that make them accessible and a more realistic prospect to more victims of sexual assault, rather than reserved for a select few who happen to have cases which are able to meet high legal thresholds.

This report by the Centre for Innovative Justice (CIJ) was commissioned by the Attorney-General's Department (Cth) as one of a series of reports identifying important innovations in the justice system. The CIJ's objective in this report is to identify innovative justice processes that have the potential to meet more of the needs of victims of sexual offending; to address public interest concerns; and to prevent reoffending in ways that the conventional justice system has limited capacity to achieve.

In doing so, the report suggests that reform does not depend upon a choice between a 'tough' and a 'soft' response but, rather, upon providing an *appropriate* response – one that is able to

meet the disparate needs of victims, while maintaining the integrity of the rights of offenders. As such, the report builds upon existing theoretical work and proposes a best practice, sexual offence restorative justice conferencing model and framework, influenced by national and international innovations, and which is able to be tailored and implemented in all Australian jurisdictions. Restorative justice conferencing involves a facilitated, safe and structured encounter between the victim and the offender, providing an opportunity to repair the harm caused by the offending.

The report explains that, to date, restorative justice conferencing practices have tended to exist on the periphery of Australian criminal justice systems and have not been extended to sexual offending in the adult jurisdiction. This is primarily because of legitimate concerns about victims being re-victimised and sexual assault being re-privatised, rather than condemned in the public sphere. While these concerns must be heeded, the CIJ draws from a range of existing examples and concludes that - with comprehensive safeguards and a coordinated, properly resourced system - sexual offence restorative justice conferencing has the potential to meet more of the justice needs of those victims who are being failed by the existing system.

In detailing a best practice restorative justice conferencing model for sexual offending, the report addresses such issues as:

- The importance of legislation, overarching principles and operational guidelines
- The importance of a restorative justice oversight body, incorporating a specialist gender violence team, to oversee and monitor the implementation of the model
- The need for skilled and specialist restorative justice conference facilitators
- The need for an expert assessment panel to determine the suitability of individual cases for restorative justice conferencing
- The importance of basic eligibility criteria, including that all parties consent, and the need for offender and victim age limits
- Pathways into and out of restorative justice conferencing, with appropriate police, prosecution and judicial oversight at different stages of the process
- The need for protections around admissions made during a conference
- The importance of consultation with Aboriginal and Torres Strait Islander communities and culturally and linguistically diverse communities around any innovative justice initiatives
- The importance of restorative justice processes being responsive to the needs of victims and offenders with cognitive impairments, disabilities and mental illness
- The potential outcome agreements and what to do in the event of breakdown
- The importance of funded, accessible community based sexual offender treatment programs to complement a restorative justice approach, and
- The balance required between victim autonomy and public policy considerations.

Importantly, the report addresses critical questions regarding the types of offences and categories of offenders which are appropriately dealt with in this context. In recognition of the diverse experience of victims and the fact that individual harm is not necessarily proportionate to common conceptions of the offence's severity, the CIJ believes that there should be no explicit offence or offender exclusions. Rather, victim autonomy, the consent of both parties, and expert forensic assessment should guide the decision about which cases are suitable.

This is not to suggest that standards, processes, gatekeepers, safeguards and judicial and prosecutorial oversight – all of which are explored – should not be addressed at certain stages. Rather, the CIJ suggests that there should be no public prescription of offences or offenders that are either more or less suited to sexual offence restorative justice conferencing.

Taking account of the contentious nature of the proposals, the CIJ recommends that sexual offence restorative justice conferencing be implemented in a phased approach – similar to the way in which restorative justice conferencing evolved in New Zealand, and is prescribed in the Australian Capital Territory (ACT). This will allow the criminal justice system to adapt; legal culture to change; professionals to develop expertise; and services to evolve.

As such, the CIJ presents a model which is victim-centred, which does not compromise offenders' legal rights, and which addresses community safety objectives. Though only appropriate in certain cases, taken in conjunction with the criminal justice system and other therapeutic justice initiatives, restorative justice conferencing has significant potential to expand the existing criminal justice response and move the debate and discussions that surround it forward.

Beyond restorative justice conferencing, the report looks to national and international therapeutic justice initiatives, such as New York State's Sexual Offense Courts. While primarily offender focused, initiatives such as problem-solving courts, specialist practices and courts, re-entry courts, and circles of support and accountability, all aim to reduce reoffending, and therefore reduce victimisation. In other words, such courts do not demonise or stigmatise offenders but, rather, recognise that community interests are best served by creating incentives for the rehabilitation of offenders. Accordingly, this report argues that addressing offending behaviour within a rehabilitative and reintegrative framework should be a critical component of any systemic response to sexual assault.

Further, the report considers the value of mechanisms that have a 'truth-telling' function. Such mechanisms include the crimes compensation jurisdictions, as well as innovative aspects of the Royal Commission into Institutional Responses to Child Sexual Abuse and the Defence Abuse Response Taskforce, all of which offer victims the opportunity to have their experience acknowledged by an authority in a safe and supported environment.

Finally, the report also comments on the limitations of crimes compensation and civil damages claims, noting scope for further application of restorative and therapeutic practices to enhance the potential of these jurisdictions to provide more victims with meaningful justice options.

Overall, the report makes a suite of recommendations aimed at achieving greater justice for more victims; holding more offenders to account; and more effectively preventing crime. It argues that the damaging and widespread nature of sexual assault requires an appropriately tailored and flexible response from the justice system – one that seeks to tackle and unpack the complicated nature of sexual crimes; to operate as part of the solution not only to individual offences but also to the systemic nature of sexual violence; and to draw on expert knowledge of sexual offending. In doing so, the report demonstrates that innovation is possible and that the current dearth of sexual offence victims accessing meaningful justice, and offenders being held to account, can be redressed.

Ultimately, the report argues that justice processes should be viewed as an essential service and therefore not be beyond the reach of majority of sexual assault victims. Achieving this requires whole of government responses, as well as fundamental social and cultural change to entrenched attitudes and behaviours. It also requires a challenge to assumptions about what is, and what is not, achievable in the area of law reform - testing the limits with appropriate care and caution, simply because the needs of victims are too important to do otherwise.

Scope, Limits and Methodology

In formulating this report and its recommendations, the CIJ reviewed extensive national and international research into, and commentary on, conventional and innovative justice responses to sexual assault. This report does not aim to reiterate in detail the content of that body of work but, rather, to build on it to develop a model for an innovative program that the CIJ believes would represent a feasible, best practice and important addition to justice systems around Australia.

The CIJ also consulted with a broad range of stakeholders - both in individual meetings and in a facilitated, roundtable discussion, framed by an internal discussion paper. Stakeholders included key members of the legal profession, such as Victorian Court of Appeal and County Court Judges, Magistrates, members of the Victorian Bar, the Office of Public Prosecutions (OPP), Victoria Legal Aid, Victoria Police, forensic professionals, and representatives from organisations such as the South East Centre Against Sexual Assault (SECASA), Knowmore Legal Service and the Victorian Association for Restorative Justice. Because the CIJ is located in Victoria, most individuals consulted were based in Victoria. Several stakeholders from other Australian jurisdictions, including NSW and the ACT, were also consulted, as well as a number of experts in New Zealand. A full list of stakeholders is available in the Appendix. Stakeholders gave generously of their time and expertise, and the CIJ greatly appreciates their input and participation.

This report is primarily informed by current practices in the Victorian criminal justice system, and innovative practices in a number of Australian jurisdictions and in New Zealand. The recommendations, however, are intended to have potential for application in a range of jurisdictions, given the shared challenges of successfully responding to sexual assault.

Although the report touches on claims for redress through the civil and crimes compensation jurisdictions, its primary focus is on identifying processes and strategies that can overcome the limitations of, and/or complement the criminal justice system. Similarly, while the report briefly discusses innovative justice responses emerging in response to sexual assault that has occurred within institutions, it does not seek to articulate in detail recommendations for specific application in those contexts. It is hoped, however, that the restorative and therapeutic processes examined and proposed in this report can also inform current and future research, policy development and justice responses in these contexts.

Crucially, the analysis in this report borrows key concepts from Professor Kathleen Daly's extensive work in the field of innovative justice responses to sexual offending. First, Daly's dichotomy between innovative and conventional justice mechanisms is adopted as a useful way of discussing and distinguishing between the two types of reform.¹ As Daly also notes, innovative and conventional justice reforms are not mutually exclusive but, rather, are often overlapping and complementary.² Second, Daly's notion of 'victims' justice needs' is used to identify what it is that victims of sexual assault want, in general terms, from a criminal justice response. This includes five elements: participation, voice, validation, vindication and offender accountability.³ Third, this paper echoes Daly's conclusion that, rather than one justice option for victims of sexual assault, a menu of justice options with multiple pathways is needed.⁴ Finally,

1 K Daly, 'Reconceptualizing Sexual Victimization and Justice, in I Van Fraechem, A Pemberton and F Ndahinda (eds), *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Routledge, 2014), 378-396, 378.

2 Ibid, 382.

3 Daly draws these five elements from literature relating to victims' sense of justice. K Daly, 'Conventional and Innovative Justice Responses to Sexual Violence' (2011) 12 *Australian Centre for the Study of Sexual Assault*, 1-35, 2; See, J Herman, 'Justice from the victim's perspective' (2005) 11(5) *Violence Against Women*, 571-602; M Koss, 'Restoring rape survivors: Justice, advocacy and a call to action' (2006) 1087 *Annals of the New York Academy of Sciences*, 206-234.

4 Daly, Ibid.

the CIJ agrees with Daly's assessment that more constructive methods of responding to sexual offending need to be identified, methods which do not rely on increasing the criminalisation and stigmatisation of offenders but which respond more effectively to sexual assault.⁵

This report is intended to move the debate and discussion around innovative justice mechanisms for sexual offending forward by proposing a best practice model of sexual offence restorative justice conferencing, and a range of practical recommendations for the implementation of therapeutic justice mechanisms. These include specialist courts, problem solving courts and re-entry courts. The innovative justice mechanisms discussed are designed to create justice options for victims; better meet their needs; properly respond to offenders' rehabilitative and reintegrative needs; and significantly improve the capacity of the criminal justice system to respond adequately and holistically to the majority of sexual assault cases.

The CIJ hopes that analysis of, and debate about, the proposed model and recommendations put forward in this report will help develop and refine both current and future restorative and therapeutic justice programs. The CIJ welcomes feedback and comments from interested governments, stakeholder groups and members of the community.

Important terminology used throughout this report

Sexual offence/sexual assault

Sexual offences are defined in the Criminal Acts and Codes of all Australian jurisdictions.⁶ In summary, they involve a sexual act directed at someone who does not consent, consents under duress, or is incapable of consenting.

The terms 'sexual assault', 'sexual violence', 'sexual offence', and 'sexual offending' are used interchangeably throughout this report. They include a range of non-consensual or coercive sexual behaviours, and broadly include: rape, indecent assault, sexual abuse, sexual acts with a child, exposure offences, and an attempt or threat to do any of the former.

Given that the majority of sexual assault victims are women and girls, and that the majority of offenders are men, the pronoun 'she' is used with reference to victims, and 'he' with reference to offenders. This also recognises that sexual violence is a gendered crime.⁷

Victim

The term 'victim' is used to describe an adult or child who has been sexually assaulted. It is acknowledged that other professionals in the sector prefer the term 'survivor' and/or 'victim/survivor', as a more empowering expression. The term victim is chosen for ease of reference and for general understanding. The term 'victim' is also used in instances where the term 'complainant' could equally apply.

5 K Daly, 'Formal and Informal Justice Responses to Youth Sex Offending' (September 2011) Paper presented at the *Research-Policy-Practice Symposium on Preventing Youth Sexual Violence and Abuse*, Griffith University, South Bank Auditorium. At http://www.griffith.edu.au/_data/assets/pdf_file/0004/364828/formal-and-informal-justice-responses-1-September-2011.pdf.

6 While there is likely to have been legislative changes since publishing, a comprehensive table outlining all sexual offence legislative provisions in Australia is provided at, M Heath, 'The Law and Sexual Offences Against Adults in Australia' (2005) 4 Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies. At http://www.aifs.gov.au/acssa/pubs/issue/i4_tables.htm#table2.

7 Approximately 83 per cent of victims of sexual violence are women or girls. Australian Bureau of Statistics, 'Recorded Crime – Victims – Australia' (2012). At <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/E850B8189D9F2A44CA257B88001295CF?opendocument>.

Offender

The terms 'offender' and 'perpetrator' are used interchangeably throughout this report to refer to someone who has committed a sexual offence. They are often used presumptively in circumstances where the offence has not been substantiated at law. Accordingly, these terms are used in places where the terms 'alleged offender', 'accused person' and 'defendant' could equally apply.

The terms refer to offenders who commit sexual violence against adults (often known as 'rapists'); offenders who commit sexual violence against children within their own family groups (often known as 'incest offenders'); and offenders who commit sexual violence against children not belonging to their family (often known as 'child molesters').⁸

The terms 'offender' and 'perpetrator' are chosen for ease of understanding. They are also used because the alternative justice mechanisms discussed below are not adjudicative, and are only intended to operate in circumstances where the offence, or elements of the offence, are acknowledged to have occurred – that is, the offender has taken responsibility and is not denying the sexual act.

Conventional Justice System and Conventional Justice System Reform

The terms 'conventional justice system' and 'conventional criminal justice system' are used interchangeably to refer to the body of laws and procedures which comprise the current criminal justice system.

Conventional justice system reforms make changes to procedural and substantive laws and policies which aim to increase the efficiency, efficacy and fairness of the criminal justice system. The emphasis is generally on improvements to legislation, policing, prosecutions and court systems.⁹ While central to the proper administration of justice, conventional criminal justice reforms are generally confined to the current adversarial, court based model, rather than looking to alternative or additional justice approaches.

Innovative Justice Reform

Innovative justice reforms focus on improving victims' access to justice and experience of justice, while also focusing on offender rehabilitation and community repair.¹⁰ The emphasis is on trying new approaches and creating a 'menu' of justice options, recognising that not all cases require the same justice response.¹¹ Innovative justice reforms can exist within the criminal justice system, or independently of it. Innovative justice reforms should be seen as an addition to the criminal justice system – as a means of providing diverse justice options to more victims and offenders.

Innovative Justice Mechanism

The term 'innovative justice mechanism' is used as an umbrella term to refer to processes which are primarily non-adversarial, and include the following practices: restorative justice, therapeutic justice, mediation practices and truth-telling mechanisms. Innovative justice mechanisms can complement the criminal justice system, or exist entirely independently of it.

8 K Gelb, 'Recidivism of Sex Offenders: Research Paper' (January 2007) *Sentencing Advisory Council*, 3. At https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/recidivism_of_sex_offenders_research_paper.pdf.

9 Daly, above n 3, 8-11.

10 Ibid.

11 Ibid.

Restorative Justice

The term 'restorative justice' refers to a broad range of practices which attempt to repair the harm caused by a crime by collectively including those with a stake in the offence in its resolution.¹² Restorative justice initiatives can be incorporated at any stage of the criminal justice process, or exist independently of it. In the context of the criminal justice system, restorative justice has, to date, almost exclusively been applied where there is no substantial need for adjudication. It is not a fact-finding process but, rather, operates at a stage in the process when the offender is prepared to take responsibility for his actions, and the victim is ready and willing to participate.

While restorative justice practices are also employed in a range of civil matters, including child protection and workplace disputes,¹³ in the context of this paper the term restorative justice is used with reference to its application in the criminal justice system.

Restorative Justice Conferencing

Restorative justice conferencing is one of the more common applications of restorative justice in the criminal justice system. It involves a scheduled, mediated encounter between a consenting victim and offender, and/or their representatives and, in some cases, their families and broader communities,¹⁴ in order to decide collectively how to repair the harm caused by a crime.¹⁵

In this paper the term 'restorative justice conferencing' is used broadly to cover both the adult and youth jurisdictions and refers to a process that can apply at multiple stages of the criminal justice system, or independently of it. The term also includes practices traditionally called youth conferencing, adult conferencing, pre-sentence conferencing, victim-offender mediation, family group conferencing and diversionary conferencing. All of these practices can be captured under the umbrella term restorative justice conferencing, as they have largely common characteristics.

Therapeutic Justice

Therapeutic justice practices are intended to have a positive and therapeutic impact on parties to proceedings by improving court procedures and outcomes.¹⁶ This is achieved by removing any processes that alienate or stigmatise; by ensuring that parties engage with and understand the relevant process; and by giving attention to the underlying reasons for the offending. Therapeutic justice processes traditionally exist within the adversarial system, and usually operate once an offender has indicated a plea of guilty.

Truth-telling processes

Truth-telling practices provide victims with an opportunity to tell their story in a safe and supported environment, and to communicate the impact of the offending to a body or a person of standing, such as members of the judiciary, members of parliament or an expert panel. Truth-telling practices focus on affirmation and validation of the victim's experience. Truth-telling practices are not contingent on offender participation, acknowledgement or consent, and instead focus on providing victims with the opportunity to have formal acknowledgement of the harm done to them.

12 See generally, H Strang, 'Restorative Justice as Evidence-Based Sentencing', in J Petersilia and K Reitz (eds), *The Oxford Handbook of Sentencing and Corrections* (Oxford University Press, 2012), 215-243; J Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002); T Marshall, *Restorative Justice: An Overview* (1996) Home Office—United Kingdom, 5.

13 See generally, K Daly, 'Restorative Justice: The real story' (2002) 4(55) *Punishment and Society*, 55-79.

14 What 'community' means will differ from case to case. Some cases do not involve community, however when they do, it most often involves support people for the victim and offender, such as friends, broader family, Elders, religious groups or community support people.

15 See generally, Strang, above n 12.

16 See generally, M King, A Freiberg, B Batagol and R Hyams, *Non-Adversarial Justice* (The Federation Press, 2009), 22-38.

1 - Chapter 1: Introduction & Context

1.1 Introduction

For the vast majority of sexual assault victims, a chasm exists between the criminal justice system's promise and what it can actually deliver. This is in part because, at its core, the prosecution process was developed to ensure a fair process and to test the Crown's case against an accused, rather than to directly address the harm caused to victims.

Accordingly, this report proposes the widespread adoption by justice systems across Australia of innovative justice processes in response to sexual offending – processes that enhance and complement the conventional justice system, and which are better able to meet the justice needs of victims of sexual assault, address the rehabilitative needs of offenders, and support endeavours to prevent future offending. In doing so, this report identifies a number of innovations which build upon the justice system's response to sexual assault. These include:

- Restorative justice conferencing (Chapter 2)
- Specialist practices (Chapter 3)
- Problem-solving courts (Chapter 3)
- Pre-release courts (Chapter 3)
- Circles of Support and Accountability (Chapter 3)
- Truth-telling mechanisms (Chapter 4), and
- Improved crimes compensation and civil justice practices (Chapter 4).

Although this report explores these listed innovative justice mechanisms broadly, its key focus is on restorative justice conferencing. Accordingly, a best practice sexual offence restorative justice model is proposed, and its introduction is recommended at multiple points throughout the criminal justice system. In doing so, this report builds upon existing theoretical work and attempts to address unresolved policy questions in relation to design, development and implementation.

The CIJ believes that implementing sexual offence restorative justice conferencing in a safe and well-resourced way will facilitate access to justice for more victims than the current system allows. Ultimately, both conventional and innovative justice reform should be pursued in a complementary way. This recognises the diverse and unique nature of sexual offending; the diversity of victims' justice needs; the importance of upholding offender rights; and the complex public policy considerations that must be balanced.

1.2 Context

The prevalence and nature of sexual offending is not particularly well understood in the wider community. Contrary to public perceptions, most sexual offending is not committed by unknown predators, but in private settings where the offender is either a family member or an acquaintance known to the victim.

Before contemplating any developments in the law's response to sexual assault, therefore, it is important to outline some of the factual background against which sexual offending occurs.

The prevalence and realities of sexual assault

While sex offenders are commonly classified as 'deviant predators', in reality most sexual offending is perpetrated by men connected to their victims as family or friends, operating under a façade of 'normal' relationships.¹⁷

Approximately 17 per cent of all women and four per cent of all men over 18 years have experienced sexual assault from the age of 15 years.¹⁸ Further, approximately 12 per cent of women and 4.5 per cent of men have experienced sexual abuse before reaching the age of 15 years.¹⁹ Importantly, sexual assault is the most under-reported form of personal violence,²⁰ and therefore the true prevalence of sexual assault is unknown.²¹ It is estimated that only 17 per cent of all sexual assault incidents are reported to police.²²

Women are at far greater risk of becoming a victim of sexual assault than men, and men are the overwhelming majority of perpetrators.²³ Aboriginal and Torres Strait Islander women are approximately three times more likely to be victims of sexual assault than non-Indigenous women,²⁴ and statistics indicate that 50-90 per cent of people with a disability will be sexually assaulted in their lifetime.²⁵ Further, sexual assault is far more likely to be perpetrated in a private residential setting by a man known to and trusted by the victim, than by a stranger in a public location.²⁶

Conversely, women who are victims of stranger sexual violence are far more likely to have their cases successfully prosecuted.²⁷ This is possibly because the presence of corroborative

17 K Gelb, above n 8, 10.

18 It should be noted that data between sources varies depending on the different compositions of the population measured, and counting and collection methodologies. Despite this variation, all point to the high incidence, and low reporting and conviction rates associated with sexual assault. See, Australian Bureau of Statistics, 'Personal Safety Survey Australia' (2012). At <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4906.0Chapter5002012>.

19 Australian Bureau of Statistics, 'Personal Safety Survey Australia' (2005). At [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/\\$File/49060_2005%20\(reissue\).pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/$File/49060_2005%20(reissue).pdf); For a more general discussion, see, J Wundersitz, *Child Sexual Assault: Tracking from Police Incident Report to Finalisation in Court* (2003), prepared for the Office of Crime Statistics and Research, 9; K Richards, 'Misperceptions about child sex offenders' (September 2011) *Australian Institute of Criminology: Trends & issues in crime and criminal justice no.429*. At <http://www.aic.gov.au/publications/current%20series/tandi/421-440/tandi429.html>.

20 D Lievore, 'Non-Reporting and Hidden Recording of Sexual Assault in Australia' (June 2003) *Australian Institute of Criminology*. At http://www.aic.gov.au/media_library/conferences/policewomen3/lievore.pdf, 3; Victorian Law Reform Commission (VLRC), 'Sexual Offences: Law and Procedure, Final Report' (2004) *Report No 5*, 80.

21 The main sources of statistical data are reports made to police and surveys of victims. Relying on statistics from reports made to police underestimates the real incidence. Victim surveys provide a more reliable source of information, but are still only an indicator of the incidence of sexual assault in the community.

22 This figure varies between 5-30 per cent. See generally, VLRC, 'Sexual Offences: Law and Procedure' (2001) *Discussion Paper No 2*, 21; S Curtis-Fawley and K Daly, 'Justice for victims of sexual assault: court or conference?', in K Heimer and C Kruttschnitt (eds), *Gender and Crime: Patterns of Victimisation and Offending* (New York University Press, 2006), 230-65.

23 This is not to suggest that women are not also perpetrators of sexual violence. For an overview of female offenders, see, M Stathopoulos, 'The exception that proves the rule: Female sex offending and the gendered nature of sexual violence' (March 2014) *Australian Centre for the Study of Sexual Assault: Australian Institute of Family Studies*. At <http://www.aifs.gov.au/acssa/pubs/researchsummary/ressum5/index.html>.

24 J Fitzgerald and D Wetherburn, 'Aboriginal victimisation and offending: the picture from police records' (December 2001) *New South Wales Bureau of Crime Statistics and Research*. At [http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/BB17.pdf/\\$file/BB17.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/BB17.pdf/$file/BB17.pdf); J Stanley, 'Child sexual abuse in Indigenous communities' presented at the *Child Sexual Abuse: Justice Response or Alternative Resolution Conference* (Adelaide, May 2003). At <http://www.aic.gov.au/conferences/2003-abuse/stanley.pdf>.

25 Australian Human Rights Commission, 'Equal Before the Law: Towards Disability Justice Strategies' (2014), 12. At https://www.humanrights.gov.au/sites/default/files/document/publication/2014_Equal_Before_the_Law.pdf.

26 For a general overview, see Lievore, above note 20.

27 Brett Sonnet, stakeholder consultation. Beyond the evidentiary considerations, this is generally attributed to the prevalence of 'rape myths'. For a discussion, see generally, N Taylor, 'Juror attitudes and biases in sexual assault cases' (August 2007) No. 344, *Australian Institute of Criminology*, 2. At http://www.aic.gov.au/media_library/publications/tandi2/tandi344.pdf.

evidence, such as injuries or witnesses, is strongly associated with the likelihood of conviction,²⁸ as is the contemporaneous nature of a complaint and subsequent prosecution. In other words, unlike the minority of sexual assault cases that involve stranger sexual violence, the nature of the evidence available in the majority of sexual assault cases generally makes the evidentiary burden of proof an untenable threshold.

A summary of sexual assault facts:²⁹

- One in six adult women has experienced sexual assault since the age of 15 years
- Sexual assault is the most under-reported form of personal violence
- Most sexual assault is perpetrated by a male known to the victim,³⁰ or a male family member³¹
- Most sexual assault is perpetrated in the home³²
- Despite public perception, stranger rape is rare³³
- Persistent sexual offenders comprise a tiny proportion of the overall sex offender population³⁴
- Most sexual offenders are not mentally ill or impaired³⁵
- Sexual offenders are not a homogeneous group³⁶
- Aboriginal and Torres Strait Islander women are three times more likely to be sexually assaulted than non-Aboriginal or Torres Strait Islander women
- People with a cognitive impairment or intellectual disability have a 50-90 per cent chance of being sexually assaulted in their lifetime, and
- Most sexual offences are never reported, and of those that are reported, most never proceed to prosecution.

Attrition rates

Attrition rates, in the context of sexual assault, relate to the reduction or decrease in cases at each point in the criminal justice process. Attrition rates between reporting, prosecution and conviction are high, with approximately 10-15 per cent of sexual assault cases reported to police resulting in a conviction.³⁷ In Victoria, the OPP reports that discontinuance rates are increasing due to victims being understandably unwilling to proceed through the adversarial and lengthy court process.³⁸ Of those cases that do make it to court, many victims describe their experience

28 See generally, K Daly and B Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries', in M Tonry (ed), *Crime and Justice: A Review of Research* (University of Chicago Press, 2010, Vol 39), 565-650.

29 For a brief summary, see generally, Legal Information Access Centre, 'Hot Topics: Legal Issues in Plain Language, Sexual Assault' (2007) 56 State Library of NSW. At http://www.legalanswers.sl.nsw.gov.au/hot_topics/pdf/sexual_assault_56.pdf.

30 Approximately 49 per cent. See, Australian Institute of Criminology, 'Australian Crime: Facts and Figures 2012'. At http://www.aic.gov.au/publications/current%20series/facts/1-20/2012/4_offender.html.

31 Approximately 31 per cent, *Ibid*.

32 Approximately 60 per cent, *Ibid*.

33 Approximately 15 per cent, *Ibid*.

34 Gelb, above n 8, 9.

35 *Ibid*, vii.

36 *Ibid*, 10.

37 See, K Daly and S Curtis-Fawley, 'Restorative Justice for Victims of Sexual Assault', in K Heimer and C Kruttschnitt (eds), *Gender and Crime: Patterns of Victimisation and Offending* (New York University Press, 2006), 230-65; for a useful summary of attrition rates around Australia, see, 'Reporting, Prosecution and Pre-Trial Processes: Attrition in Sexual Assault Cases', in Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response*, Final Report (11 November 2010), 1187 – 1190. At <http://www.alrc.gov.au/publications/26.%20Reporting.%20Prosecution%20and%20Pre-trial%20Processes/attrition-sexual-assault-cases>.

38 Brett Sonnet, stakeholder consultation.

as re-victimising.³⁹ Ultimately, there is a remarkably remote chance of a conviction in sexual assault cases – many statistics estimate this to be as low as, and potentially lower than, a one in one hundred chance.⁴⁰ Indeed, conviction rates in a number of common law countries, including Australia, have decreased, despite significant law reform.⁴¹

Sexual assault trials occupy a large proportion of County/District Courts' lists – in Victoria it is close to 50 per cent.⁴² Over the last ten years, the number of sexual assault trials in Victoria has increased by 81 per cent – reflecting an increase in the number of sexual assault cases reported, prosecuted and contested at trial.⁴³

People accused of sexual assault are less likely to plead guilty than those accused of other offences and are more likely to be acquitted.⁴⁴ Whereas 73 per cent of overall cases before the County Court of Victoria are finalised through a plea of guilty, this figure falls to 45 per cent in relation to sexual offence cases.⁴⁵ Further, when an offender is found guilty, they are more likely to appeal than for any other offence.⁴⁶ It is therefore apparent that the current criminal justice system plays a relatively minor role in responding to victims of sexual assault as a whole, and an even smaller role in apprehending and ultimately convicting offenders.⁴⁷

Table 1: An overview of reasons victims do not report sexual assault⁴⁸

Personal	Systemic
Has dealt with it themselves	Fears that the police will not do anything
Feels that the offence is too trivial /not serious enough to report	Dislike of the police
Feels that the offending is a 'private matter'	Fears/dislikes the criminal justice process
Unsure whether the offence constituted a 'real crime'	Fears being treated badly by police
Unsure whether harm was intended	Not enough proof to report – fears being disbelieved
Fear of backlash by offender	Unsure how to report
Desire to protect offender	Fears the police will not be able to provide adequate protection
Desire to protect children or other family/community relationships	Fears the police will remove children
Feels shame or embarrassment	Fears of not being listened to by professionals within the justice system

39 Daly and Curtis-Fawley, above n 37, 2-3; Describing the courtroom as the site of a 'second rape' see, N Bluett-Boyd and B Fileborn, 'Victim/survivor-focused justice responses and reform to criminal court practice: Implementation, current practice and future directions' (April 2014) *Australian Institute of Family Studies, Research Report No. 27*, 12. It should be noted, however, that an evaluation of Victoria's sexual offence law reforms indicate that victims are increasingly satisfied by their treatment in the criminal justice system. See, Success Works, 'Sexual Assault Reform Strategy: Final Evaluation Report' (January 2011) Victorian Government, Department of Justice. At <https://assets.justice.vic.gov.au/justice/resources/76d44d20-99e9-44a3-b6bf-de229c2bc1ea/sexualassaultreformstrategyfinalevaluationreportjanuary2011.pdf>.

40 See generally, Gelb, above n 8, 4; A 'One in One Hundred' sexual assault awareness raising campaign was run in New Zealand. See, 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>.

41 Daly, above n 3, 1.

42 County Court of Victoria, 'Annual Report: 2012-2013', 10. At [https://www.countycourt.vic.gov.au/sites/default/files/CountyCourt_AnnualReport_Final%20\(lo-res\).pdf](https://www.countycourt.vic.gov.au/sites/default/files/CountyCourt_AnnualReport_Final%20(lo-res).pdf)

43 Victorian Department of Justice, 'Review of Sexual Offences: Consultation Paper' (2013), vii. At <http://assets.justice.vic.gov.au/justice/resources/2b77afcd-3c35-4a89-913a-54ced67529c3/reviewofsexualoffencesconsultationpaper2013.pdf>.

44 Gelb, above n 8, 3.

45 Victorian Department of Justice, above n 43, 54.

46 See, for example, Australian Bureau of Statistics, 'Sexual Assault in Australia: A Statistical Overview' (2004) *Report No 4523*, 14; Daly and Bouhours, above n 28.

47 VLRC, 'Sexual Offences: Law and Procedure, Final Report' (2004) *Report No 5*, 100.

48 Much of the information in this table is taken from, Lievore, above n 20, 6.

Table 2: An overview of reasons for high attrition rates

Attrition at the police stage, after reporting an offence, occurs for a range of reasons including:

- The victim does not want to pursue a prosecution, or
- After investigating, the police find insufficient evidence to refer a matter to the relevant prosecuting agency.

Attrition at the prosecution stage, after the case has been referred from police to the courts, occurs for a range of reasons including:

- The victim withdraws the complaint either before the court process has begun or during the court process because she does not want to proceed further
- Insufficient evidence is available (this may be because the evidence is inadmissible, insubstantial or unreliable)
- A forensic decision is made that there is no reasonable prospect of securing a conviction (this decision takes into account factors such as the strength of the evidence, the credibility of witnesses, how the evidence is likely to be perceived by a jury, and any available defences), and
- The Director of Public Prosecutions decides to discontinue based on public interest grounds, (this includes considerations in relation to the seriousness of the offence, the need for deterrence, public concern in relation to the offending, the length and expense of the case, and the attitude of the victim to the prosecution).⁴⁹

The current criminal justice response to sexual offending

The response to rape and sexual violence seems to be contradictory: there is a minimization of sex offending and victimization, on one hand, and a demonization of certain groups of ‘sex offenders’, on the other... Minimization occurs because most sex offending bears no relationship to the monstrous sex offender... demonization occurs because the ‘sex offender’ is a convenient scapegoat for social fears and vulnerabilities, which are amplified by sensational media stories about highly atypical cases.⁵⁰

Despite the factual background described in the preceding sections, sexual offending attracts a political and social response which largely belies it.⁵¹ Increased penalties, extended supervision orders and registration schemes arguably perpetuate the myth of predatory, stranger sexual violence, rather than addressing the reality that most sexual offending occurs in an intrafamilial context, or where the victim knows the offender, and is unreported. Many stakeholders consulted by the CIJ noted that the increased criminalisation and stigmatisation of offenders has resulted in fewer offenders taking responsibility for their offending.⁵² Indeed, this form of ‘symbolic justice’⁵³ has resulted in the large majority of sexual assault victims being ignored, with no recourse to justice; while a very small proportion of sexual offenders are ostracised and penalised at significant financial expense.⁵⁴

49 For an example of prosecutorial discretion guidelines, see, Director of Public Prosecutions Victoria, ‘Director’s Policy: The Prosecutorial Discretion’ (27 July 2013). At <http://www.opp.vic.gov.au/getattachment/c19fca74-1629-41df-a13c-9e017aabd79d/2-The-Prosecutorial-Discretion.aspx>.

50 Daly, above n 1, 378-379.

51 See generally, Gelb, above n 8, 9-11; E Janus, ‘Closing Pandora’s Box: Sexual Predators and the Politics of Sexual Violence’ (2004) 34 *Seton Hall Law Review*, 1233-50 (discussing how the effect of politics and public outcry fuels the expansion of anti-therapeutic sexual offence management programs).

52 For a further discussion, see generally, B Naylor, ‘Effective Justice for Victims of Sexual Assault: Taking Up the Debate on Alternative Pathways’ (2010) 33(3) *University of New South Wales Law Journal*, 662-684; Daly, above n 1.

53 Daly, above n 1, 381.

54 Ibid.

Reform, of course, is complex when the system is tasked with balancing the needs of the victim, the rights of the accused and the public interest in ensuring community safety. Fundamental to our legal system is the concept that an accused person is entitled to be presumed innocent until proven guilty, a presumption which creates a swathe of evidentiary hurdles that the prosecution must overcome to be successful. Robust testing of evidence is essential when the consequences of being found guilty of a sexual offence can be a substantial loss of liberty and life-long stigma.⁵⁵ Given the frequent absence of corroborative evidence, however, this often means that the credibility of the victim will be tested against a beyond reasonable doubt evidentiary standard. Despite reforms attempting to mitigate against these inherent limitations of the criminal justice system, most cases still proceed on a 'word-on-word' basis, with a finding of guilt beyond reasonable doubt markedly rare.

At the same time, low reporting and conviction rates for sexual offences concern public policy makers,⁵⁶ with most Australian jurisdictions pursuing reform projects over the past two decades to develop better ways of responding to sexual assault. These reforms have included extending the definition of rape; criminalising marital rape; removing presumptions in relation to corroborative evidence; establishing procedures which attempt to reduce the trauma associated with giving evidence; and introducing programs to instil cultural change within the police, the prosecution and the courts.

These comprehensive reforms demonstrate the hard work of feminists and policy makers alike and, as a result, evidence shows not only that the police, courts and wider community are taking sexual violence far more seriously than before, but that more victims are coming forward.⁵⁷

Emerging sexual offence reforms and developments

Despite these encouraging indications, tangible improvement remains modest, with many legal reformers now looking to the next iteration of change. While improved reporting and conviction rates should not be the sole benchmark of law reform initiatives, Daly notes that a reduction or stagnation in these rates suggests that 'we may have exhausted the potential of legal reform to effect significant change.'⁵⁸ Accordingly, recognition is growing of the criminal justice system's inherent limitations, which any amount of reform will not ameliorate.

Certainly, alternative justice mechanisms, including specialist courts, problem-solving courts and restorative justice conferencing, have existed in various guises in all Australian jurisdictions for over a decade. These have primarily focused on youth or lower level offending. However, in light of the documented successes of these programs and the concurrent limitations of the criminal justice system, reformers have begun to question whether innovative justice mechanisms can be applied in the adult jurisdiction, and in more serious categories of cases.

To this end, legal professionals,⁵⁹ academics,⁶⁰ and people working in the community sector⁶¹ have begun to consider innovative justice mechanisms as an important addition to the justice armoury in response to sexual assault, examples of which are outlined throughout this report. These experts are of the view that, while conventional criminal justice reform should continue to be pursued, innovative justice options should also be made available.

55 VLRC, above n 47, 81.

56 Ibid, 80.

57 See generally, Success Works, 'Sexual Assault Reform Strategy: Final Evaluation Report' (January 2011) Victorian Government Department of Justice. At <https://assets.justice.vic.gov.au/justice/resources/76d44d20-99e9-44a3-bebf-de229c2bc1ea/sexualassaultreformstrategyfinalevaluationreportjanuary2011.pdf>.

58 Daly, above n 3, 2.

59 See, F Tomazin, 'Melbourne's legal fraternity considers restorative justice for sex assault victims' (15 December 2013) *The Age*. At <http://www.theage.com.au/victoria/melbournes-legal-fraternity-considers-restorative-justice-for-sex-assault-victims-20131214-2ze9l.html>.

60 See generally, Naylor, above n 52; M Koss, 'Restoring rape survivors: Justice, advocacy and a call to action' (2006) 1087 *Annals of the New York Academy of Sciences*, 206-234.

61 Carolyn Worth, stakeholder consultation.

Importantly, the National Council to Reduce Violence Against Women and their Children recommended in its 2009 *Time for Action* report that, in relation to restorative justice and gender based violence, trials should be undertaken and evaluated 'with necessary caution...to explore the utility and suitability of restorative justice for cases of domestic and family violence and sexual assault.'⁶² Similarly, in 2004, the Victorian Law Reform Commission's Final Report, *Sexual Offences: Law and Procedures* noted that 'it is important that people harmed by sexual assault should not see the criminal justice system as the only way of assisting them to recover from the wrong done to them, or of acknowledging the effect of sexual assault on their lives'.⁶³ Equally, the Australian Institute of Family Studies in their 2014 Report *Victim/survivor-focused justice responses and reforms to criminal court practice*, recommended that future policy and law reform should involve 'alternative justice responses, including inquisitorial systems and restorative justice practice'.⁶⁴

These suggestions have been met with considerable resistance, primarily due to concerns in relation to victims being re-victimised; gendered violence disappearing from the public view; and attention being diverted from fixing the conventional criminal justice system. Nonetheless, some jurisdictions have begun trialling innovative justice mechanisms, such as restorative justice conferencing, for some sexual offence cases.

Examples include South Australia's sexual offence youth restorative justice conferencing diversion program, and the ACT's substantial restorative justice program, phase two of which will allow for restorative justice conferencing in some adult sexual offence matters. Beyond the criminal justice system, innovative justice mechanisms are being discussed and trialled in the context of institutional sexual offending, such as in the Royal Commission into Institutional Responses to Child Sexual Abuse and the Defence Abuse Response Taskforce. Outside Australia, New Zealand has, for the last decade, provided restorative justice conferencing for sexual offence matters.

This growing recognition of the value of innovative approaches, both nationally and internationally, is explored further in Chapter 2. Certainly policy makers increasingly acknowledge that innovative justice mechanisms are not a 'soft' option but, rather, have the capacity to provide a justice response to many more victims of sexual assault than the current system is able. In short, as Daly notes, the 'trade-off is not between a more or less serious response, but between any response at all'.⁶⁵

This is not to suggest that innovative justice mechanisms do not have their own inherent limitations. Rather, pursuing innovative reform in conjunction with conventional reform is likely to provide more opportunities for victims to experience a sense of justice; for offenders to take accountability for their offending; and for broader public policy objectives to be met. Accordingly, it appears that the door is opening for respective state and territory criminal justice systems to consider introducing innovative justice responses to sexual offending to provide more victims with more justice options.

62 National Council to Reduce Violence against Women and their Children, 'Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children' (2009-2011), Rec 4.5.2, 122. At http://www.dss.gov.au/sites/default/files/documents/05_2012/the_plan.pdf.

63 VLRC, above n 47, 101.

64 N Bluett-Boyd and B Fileborn, 'Victim/survivor-focused justice responses and reform to criminal court practice: Implementation, current practice and future directions' (April 2014) *Australian Institute of Family Studies, Research Report No. 27*, xi.

65 Daly, above n 1, 382.

1.3 Philosophy of this Report: 'Victims' Justice Needs' and a Victim-centred Approach

Women who have been sexually assaulted have needs that in many ways resemble the needs of other victims of violent acts: questions to ask, anger to show. They want their suffering to be recognised and validated by the one who has caused it. They want an apology, or justification. They want what happened to them not to happen to anyone else. They want to get on with their lives, to live no longer in 'his' shadow. They want to feel free and safe again. They want to add another narrative to the story of the assault and restore their dignity.⁶⁶

Individual victims of sexual assault have diverse experiences and demands of the justice process. The term 'victims' justice needs/interests' is borrowed from Daly's work and refers to five key elements important to victims' sense of justice: participation, voice, validation, vindication and offender accountability.⁶⁷ Similarly, Justice Marcia Neave, in her former capacity as Chairperson of the Victorian Law Reform Commission, noted that the criminal justice system often fails to meet sexual assault victims' justice needs, and listed these needs as:

- More information about the process
- To be treated respectfully and fairly
- Acknowledgement of the wrong they have suffered by the perpetrator and to have other significant people know about this wrong
- To ensure that other people (e.g. siblings) are protected from the perpetrator
- To ensure that the perpetrator receives treatment, and
- An opportunity to tell their story in a way that the adversarial trial process does not allow.⁶⁸

Significantly, Justice Neave concluded that, even if the justice system underwent substantial reform, all of these listed needs would never be met.⁶⁹ The criteria listed by both Justice Neave and Daly, and the associated terminology of 'victims' justice needs', are used to inform this report in relation to what victims want from a justice response, in general terms, and which justice mechanisms are best able to address these needs.⁷⁰

This report also maintains that victims' justice needs and interests should be prioritised through adopting a victim-centred approach. A victim-centred approach to sexual violence ensures that the needs and interests of victims are met, wherever possible, by giving victims a say in the process. A victim-centred response also allows victims a degree of control and choice over how they want their justice needs met. This is particularly important in sexual assault cases, because the very nature of the offending can involve a removal of autonomy.

Obviously the criminal justice system will, and should always remain, society's principal response to sexual offending. It must always remain impartial and fulfil its role of condemning crime and holding offenders to account; it must be uncompromising in upholding offender

66 B Pali and K Madsen, 'Dangerous Liaisons? A Feminist and Restorative Justice Approach to Sexual Assault' (March 2011) *Temida*, 49-65, 59.

67 Daly, above n 1, 388.

68 Prof M Neave, 'Restorative Justice: When is it Appropriate?' (6 October 2004) *La Trobe University Law School*. At <http://www.lawreform.vic.gov.au/publications-and-media/speeches/restorative-justice-when-it-appropriate>.

69 *Ibid*.

70 The justice needs identified in this report are also supported by the recent conclusions in, Bluett-Boyd and Fileborn, above n 64, ix.

rights, and cannot be solely victim driven. That said, victims can be given a greater degree of choice, flexibility and opportunity for participation.⁷¹

This means that, while this report emphasises the importance of any justice response to sexual offending being victim-centred, no reforms should come at the expense of the rights of an accused person to be presumed innocent; to have a fair trial; and to have their liberty curtailed proportionately and only after being found guilty beyond reasonable doubt. This is why the CIJ considers it critical that alternative justice mechanisms have inbuilt safeguards so that offenders can participate freely and without having their rights restricted.

The CIJ is strongly of the view that innovative justice mechanisms can be victim-centred and deliver justice to victims, without compromising these core rights or the integrity of the criminal justice system. Further, innovative justice mechanisms should be viewed as complementary, or as an addition to, the current justice system with the potential to greatly improve it.

71 Larson notes that 'there remains a tendency among advocates for victims and offenders to characterise any benefit for, or enhancement in the rights of, one party as being at the "expense of the other". Research on the impact of restorative justice has contradicted this zero-sum approach and has been relatively consistent in reporting satisfaction among victims. Research has also failed to show that the offender's rights are violated in restorative justice processes.' J Larson, 'Restorative justice in the Australian criminal justice system' (2014) *Australian Institute of Criminology: Research and Public Policy Series, No 127*, vii.

2 - Chapter 2: Sexual Offence Restorative Justice Conferencing

As explored in the previous chapter, the conventional criminal justice system does not and cannot adequately meet all of the justice needs of many victims of sexual assault. This is, in part, because of the limitations of the criminal justice system, as well as the unique nature of sexual offending and the complex dynamics that surround it. At the same time, concerns surrounding this complexity and the seriousness of sexual offending have prevented many of the recently emerging innovations across the wider justice system from benefitting sexual assault victims who, arguably, most need additional options and choice.

This chapter attempts to address many of those concerns and to move associated debates forward, with 24 practical recommendations for the development of a best practice, restorative justice conferencing model for sexual offences. The recommendations are framed broadly and are relevant across a range of jurisdictions. Accordingly, particular jurisdictions will need to tailor them to take account of specific legal practices and existing systems of governance.

In making these recommendations, the chapter attempts to address questions about the relationship between restorative justice conferencing and the formal criminal justice system; the range, processes, standards, and safeguards necessary for restorative justice conferencing; and whether restorative justice conferencing should be extended to more serious offences, such as sexual offences, or remain 'justice-at-the-margins'.⁷²

The chapter is divided into six parts. Part 2.1 defines and contextualises restorative justice conferencing using examples and evaluations of general, as well as sexual offence specific, conferencing programs to support the conclusion that a model should be trialed.

Drawing on a number of national and international examples outlined in Part 2.1, Part 2.2 then describes a best practice model for sexual offence restorative justice conferencing, designed for phased implementation in Australian jurisdictions. Part 2.3 goes on to propose a process for resolving how to determine which types of cases are both eligible and suitable for restorative justice conferencing; and also discusses appropriate offences and offenders.

Part 2.4 maps potential pathways into and out of restorative justice conferencing from different stages of the criminal justice system and details the associated processes and considerations involved at each stage. Part 2.5 addresses outstanding policy and implementation issues, before Part 2.6 sets out the CIJ's recommendations.

The model proposed in this chapter is not suggested as a 'one size fits all'. Rather, it is designed from the CIJ's research, as well as discussions with stakeholders and other jurisdictions regarding best practice approaches. The CIJ therefore considers it essential that governments consult widely prior to implementation.

72 B Hudson, 'Restorative Justice and Gendered Violence' (2002) 42 *British Journal of Criminology*, 616-634, 617.

2.1 Restorative Justice Conferencing

Defining restorative justice

*What is certain is that where restorative justice is done well, it goes beyond what traditional responses can achieve and as a result, the potential impact upon individuals, communities and society is substantial.*⁷³

Restorative justice is an umbrella term used to denote a wide range of justice practices, with a shared focus on repairing the harm caused by crime to individuals and their broader communities.⁷⁴ Restoration is primarily achieved through a deliberative process, in which all people impacted by the crime have a voice in the resolution, rather than it being determined solely by a judge.⁷⁵ The focus is on victim healing, offender accountability, community restoration, and redress for harm and loss caused.⁷⁶ Restorative justice scholar Howard Zehr explains: 'Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.'⁷⁷ This report concentrates on one of the most common restorative justice practices, being restorative justice conferencing.

Defining restorative justice conferencing

Restorative justice conferencing brings all parties impacted by a crime together. This includes the victim, offender, and where appropriate, their families and communities, who meet in a facilitated and structured process to discuss and resolve the impact and consequences of the offending.⁷⁸ The process prioritises the victim's voice and autonomy, and emphasises the offender's responsibility and the importance of reparation for the harm done.⁷⁹

Restorative justice conferencing provides a mediated forum for the victim to explain the impact of the offending, either themselves or through their nominated representative; and for the offender to gain an insight into the harm caused, as well as to provide a genuine apology. Questions answered; fears allayed; and, to some degree, restoration of the harm done, are all possible during a conference due to the interactive and conversational model.⁸⁰

There are three overarching requirements for a successful restorative justice conference:

- A victim who is willing and capable of participating in the conference; and who is unlikely to be further harmed by the process
- An offender who is willing to take responsibility for his behaviour; willing and capable of participating in the conference; and unlikely to commit further harm, and
- A conference facilitator who is skilled at managing the unique dynamic of the conference, and at ensuring a safe and consensual environment.⁸¹

⁷³ Larson, above n 71, 36.

⁷⁴ The academic commentary is worth noting: many argue that there is no agreed definition of restorative justice. See generally, J Stubbs, 'Restorative Justice, Domestic Violence and Family Violence' (2004) *Domestic Violence and Family Violence Clearing House, Issues Paper 9*, 2; K Daly, 'The Limits of Restorative Justice' in, D Sullivan and L Tiftt (eds), *Handbook of Restorative Justice: A Global Perspective* (Routledge, 2006), 134-146.

⁷⁵ See generally, J Braithwaite, 'Setting Standards for Restorative Justice' (2002) 42(3) *British Journal of Criminology*, 563-577.

⁷⁶ King, Freiberg et al, above n 16, 40.

⁷⁷ H Zehr, *The Little Book of Restorative Justice* (Goodbooks, 2003), 37.

⁷⁸ See generally, H Strang, L Sherman, E Mayo-Wilson, D Woods and B Ariel, 'Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Recidivism and Victim Satisfaction – A Systemic Review' (2013) 9 *Campbell Systemic Reviews*, 3.

⁷⁹ See generally, K Daly and R Immarigeon, 'The Past, Present and Future of Restorative Justice: Some critical reflections' (1998) 1(1) *The Contemporary Justice Review*, 21-45.

⁸⁰ Ibid, 138.

⁸¹ See, for example, K Daly, 'The Limits of Restorative Justice' in, D Sullivan and L Tiftt (eds), *Handbook of Restorative Justice: A Global Perspective* (Routledge, 2006), 134-143.

The term restorative justice conferencing is used broadly in this paper to refer to a number of practices with similar, restorative elements, including:

- Victim-offender mediation
- Family group conferencing
- Community conferencing
- Youth conferencing, and
- Diversionary conferencing.

These different practices are combined under the one heading because, in practice, their distinguishing features often blur. For example, victim-offender mediations might also include the participation of family or community members, such as friends, neighbours, members of religious groups, colleagues and support people. Equally, a youth conference may involve bringing the offender and victim face-to-face in a mediation. Accordingly, the single term ‘restorative justice conferencing’ is preferred and includes a diversity of conference configurations and practices. The types of practices include:

- Face-to-face conferences involving just the victim and offender
- Face-to-face conferences involving the victim, offender, families/guardians and/or broader community members
- Meetings between the offender and the victim’s representative
- Meetings with the offender where a statement by the victim is read out
- Meetings with the offender where a pre-recorded statement by the victim is played
- Teleconferencing, and
- Videoconferencing.

The benefits of restorative justice conferencing

Restorative justice conferencing has the potential to deliver a number of benefits both to the victim and the offender which are currently largely unavailable in the criminal justice process. The following table outlines some of the potential benefits of restorative justice conferencing for both the victim and the offender.

Table 3: Potential benefits of restorative justice conferencing	
Restorative justice conferencing: benefits for the victim	Restorative justice conferencing: benefits for the offender
Opportunity to be directly involved in the justice process	Opportunity to take responsibility for the offending by understanding the full effect that the offending had on the victim
Opportunity to tell the offender directly the impact that the offending has had	Opportunity to apologise
Opportunity to receive answers in relation to unresolved questions about the offending	Opportunity to repair relationships, where appropriate, with the victim, family and broader community
Opportunity to resolve relationships with the offender, family or the broader community, where appropriate	Opportunity to engage in treatment and rehabilitation and to avoid future offending
Opportunity to have input into the outcome, including an opportunity to request compensation without needing to go through a formal court process	Opportunity to make amends by agreeing to the outcomes sought by the victim

The benefits of restorative justice conferencing can also be reflected in the outcome agreements that may result. A successful restorative justice conference ends in a consensual agreement, which reflects the actions needed for the victim to start to recover. It may contain provisions such as payment of compensation, a donation to a designated charity, a commitment to undertake treatment or a letter of apology. Importantly, the outcome agreement is intended to be flexible and responsive to the needs of the parties, but should not contain overly punitive or degrading clauses. Section 2.4 discusses outcome agreements further.

Restorative justice conferencing in practice: an overview

Restorative justice conferencing has been implemented in a number of forms, and in a number of jurisdictions around the world, most commonly in lower level and youth offending contexts. Victim-offender mediation programs were implemented in Canada in the 1980s and in almost every North American state throughout the 1990s.⁸² They were also introduced in the United Kingdom and throughout Western Europe in the 1990s.⁸³ At a similar time, New Zealand introduced youth and community conferencing specific to Maori communities – a variation of which was first adopted in the Australian regional city of Wagga Wagga, and has subsequently spread throughout Australia.⁸⁴

In Australia, as with the rest of the world, restorative justice conferencing has traditionally been directed either at youth offenders, at less serious offending, or at the post-sentence stage once the criminal justice process has concluded.⁸⁵ When restorative justice conferencing is provided for within the adult criminal justice system, such as at a pre-sentence stage, sexual offences are invariably excluded.⁸⁶

‘Youth conferencing’ is legislated for in every Australian youth justice jurisdiction, though practices differ across each. Youth conferences occur at various stages of the criminal justice process, but are most commonly applied at the diversionary or pre-sentence stages, being either before the offender is charged or before she or he is sentenced.

Youth conferences are facilitated by the police, courts, independent mediation services, or government youth justice units. Although their nature varies, generally conferences involve bringing the young offender together with the victim and their respective families and communities to discuss the harm done, to provide an apology and to discuss an outcome plan.⁸⁷ Sexual offences are excluded from youth conferencing in all jurisdictions except South Australia.

Restorative justice conferencing in the adult jurisdiction is far less common. No jurisdiction currently provides diversionary (as an alternative to court), adult restorative justice practices and only NSW provides for pre-sentence adult conferencing in legislation though most serious offences, including sexual offences, are excluded.⁸⁸ Most states and territories (except Victoria, South Australia and the ACT) provide for post-sentence conferencing, but generally without legislative frameworks. Post-sentence conferencing is usually referred to as victim-offender mediation, and is most commonly initiated by the victim making a request to the relevant corrective services department.⁸⁹ Post-sentence restorative justice conferences usually involve

82 King, Freiberg et al, above n 16, 40-42.

83 Ibid.

84 Ibid.

85 See generally, B Naylor, above n 52, 684; Hudson, above n 72.

86 For an overview of the restorative justice programs currently operating in Australia and their respective governing statutes, see Larson, above n 71, 6-9.

87 See, for example, Victorian Government Department of Human Services, ‘Youth Justice Group Conferencing: program guidelines’ (June 2010). At http://www.dhs.vic.gov.au/_data/assets/pdf_file/0018/720306/Group-conferencing-program-guidelines-June-2010.pdf.

88 Criminal Procedure Regulation (2010) Div 3.

89 Larson, above n 71, 6.

fewer parties and there are generally no offence exclusions. In fact, the majority occur in homicide or sexual offence cases.⁹⁰

Many Indigenous courts, or those employing circle sentencing practices,⁹¹ have restorative elements. They are not included in this report as an example of restorative justice conferencing, however, as their primary focus is generally considered to be on culturally relevant justice practices, community empowerment, diversion from custody and offender rehabilitation, rather than on victim restoration.⁹² Arguably, these courts are more aptly described as a form of therapeutic justice, or even as being in an independent category.⁹³

Numerous studies have evaluated different types and aspects of restorative justice conferencing, with mixed conclusions about its effectiveness in meeting victims' justice needs, or in reducing recidivism of participating offenders.

Advocates comment that '[t]he evidence on RJ (restorative justice) is far more extensive and positive, than it has been for many other policies that have been rolled out nationally', and that 'RJ is ready to be put to far broader use...'.⁹⁴ Detractors, meanwhile, have commented that '...contrary to mainstream opinion, victim-offender mediations do not seem to work but face enormous problems, which prevent the procedure from putting into practice its intended aims.'⁹⁵

Given the diverse circumstances within which restorative justice conferencing occurs, it is not useful to make generalisations from the findings of specific evaluations. In particular, it is unclear whether successes in relation to more minor offences will necessarily transfer to sexual offending, and likewise, whether successes in relation to young offenders will translate to adult offenders.

Additionally, given that restorative justice conferencing can only ever occur in circumstances where both the offender and victim consent, it is difficult to draw comparisons with parties' experiences of the conventional criminal justice system, in which a prosecution is brought on behalf of the state, and is not predicated upon consent.⁹⁶ Further, wherever restorative justice programs involve a treatment requirement, it can be difficult to distinguish between the conference's effects independent of the associated treatment provided.

Despite these qualifications, it is reasonable to conclude from the range of literature that:

- Substantial evidence exists to suggest that restorative justice conferencing has the capacity to meet a number of victims' justice needs and interests, and is less re-victimising than the criminal justice system⁹⁷
- Growing evidence suggests that restorative justice conferencing is more effective for more serious offences and for crimes involving personal victims than for lower level, non-violent offences,⁹⁸ and

90 NSW Restorative Justice Unit, stakeholder consultation.

91 See generally, E Marchetti and K Daly, 'Indigenous Courts and Justice Practices in Australia' (2004) *Trends & Issues in Crime and Criminal Justice* no 277, 1-6.

92 Larson, above n 71, 15.

93 See, for example, E Marchetti, 'Australian Indigenous sentencing courts: Restoring culture in the sentencing court process', in J Bruce, G Mason and J Bolitho, (eds), *Restorative Justice: Adults and emerging practice*, The Institute of Criminology Monograph Series, No. 30 (The Federation Press, 2012).

94 Strang, above n 12, 4.

95 S Trankle, 'In the shadow of penal law: victim-offender mediation in Germany and France' (2007) 9(4) *Punishment and Society*, 395-415.

96 Strang, Sherman, et al, above n 78, 47.

97 See, for example, J Shapland, 'Restorative justice: the views of victims and offenders - The third report from the evaluation of three schemes' (June 2007) *Centre for Criminological Research University of Sheffield*: Ministry of Justice Research Series 3/07. At <http://www.restorativejustice.org/articlesdb/articles/8166>; Strang, Sherman, et al, above n 78, 47.

98 Larson, above n 71, 24, citing, Strang, above n 12.

- Tentative evidence suggests that restorative justice conferencing provides a meaningful opportunity for offenders to take responsibility for their offending, resulting in a reduced likelihood of reoffending.⁹⁹

The following are examples of relevant restorative justice conferencing programs in Australian jurisdictions and their associated evaluations.

New South Wales: Forum sentencing

Pre-sentence conferencing is currently offered in NSW adult, Magistrates' Court jurisdictions through a process called Forum Sentencing.¹⁰⁰ Offenders must have pleaded guilty and be likely to receive a jail sentence in order to participate.¹⁰¹ Most serious offences are excluded, including sexual offences.¹⁰² If an offender is eligible, the magistrate adjourns sentencing to allow a conference to take place. The outcome is then taken into account either as a mitigating or aggravating feature in sentencing.

Two evaluations have found no evidence that offenders referred to the program were less likely to re-offend than similar offenders who were dealt with through the normal court process,¹⁰³ though reduced recidivism is just one of a number of other goals of the program, which also include increased victim and community satisfaction.¹⁰⁴

Restorative justice conferencing is typically not designed to address offender risk factors, such as drug and alcohol abuse or unemployment, which is likely why recidivism rates may not be significantly impacted by restorative justice interventions.¹⁰⁵ There is, therefore, a strong argument that restorative justice programs should operate within, or as a companion to, broader therapeutic and treatment programs which do address causes of offending in a systemic and ongoing way.¹⁰⁶

Importantly, a 2013 study commissioned by the NSW Department of Attorney General & Justice considered the different elements of a restorative justice conference that contribute to achieving a 'successful' process, and provided recommendations for improving the operation of Forum Sentencing.¹⁰⁷ The recommendations included developing active referral pathways; ensuring offender suitability for conferencing; streamlining the process of making contact with victims; and mentoring of facilitators by more experienced practitioners.¹⁰⁸ These recommendations have contributed to the design of the model proposed in Part 2.2, and should be closely examined before implementing any restorative justice conferencing program.

99 See, for example, D Weatherburn and M MacAdam, 'A review of restorative justice responses to offending' (2013) 1 *Evidence Base*, 1-20.

100 Criminal Procedure Regulation 2010 (NSW) Div 3.

101 Criminal Procedure Regulation 2010 (NSW) s 63(1).

102 Criminal Procedure Regulation 2010 (NSW) Div 3.

103 C Jones, 'Does forum sentencing reduce reoffending?' (2009) *Crime and Justice Bulletin: Contemporary Issues in Criminal Justice* No 129 (Sydney: BOCSAR); S Poynton, 'Rates of recidivism among offenders referred to Forum Sentencing' (2013) *Crime and Justice Bulletin: Contemporary Issues in Criminal Justice* no 172 (Sydney: BOCSAR).

104 There has been no specific evaluation in relation to whether the program meets these other goals, but other research has concluded that victims who participate in restorative justice programs are generally more satisfied than those whose matters are dealt with through the conventional criminal justice system. Further, there is also evidence of general public support for restorative justice programs. See generally, MacAdam and Weatherburn, above n 99.

105 Weatherburn and MacAdam, above n 99.

106 Ibid.

107 M Rossner, J Bruce and M Meher, 'The Process and Dynamics of Restorative Justice: Research on Forum Sentencing' (July 2013) University of Western Sydney. At http://www.uws.edu.au/_data/assets/pdf_file/0004/522625/The_Process_and_Dynamics_of_Restorative_Justice_-_Research_on_Forum_Sentencing.pdf.

108 Ibid, 2-3.

The ACT: Restorative justice program

The ACT has implemented the most significant restorative justice legislation in Australia to date, through the *Crimes (Restorative Justice) Act 2004* (ACT) (the ACT's Restorative Justice Act). The ACT's Restorative Justice Act establishes a first and second phase to its restorative justice program, though only the first phase has been implemented. The first phase applies to less serious offences committed by young offenders, while the second makes specific provision for restorative justice practices to apply both to adults and to young people, as well as to more serious offences including family violence and sexual offending.¹⁰⁹ The CIJ understands that the ACT is preparing to begin phase two over the course of the coming years.¹¹⁰

Overall, the proposed restorative justice program in the ACT is wide-ranging; applicable at the diversionary, pre and post-sentence stages of the criminal process; and allows for multiple pathways through referrals from a range of agencies. There have been no evaluations of the first phase of the ACT's program to date.

Sexual offence restorative justice conferencing in Australia

As previously discussed, programs providing for sexual offence restorative justice processes are markedly limited in Australia. Accordingly, there have only been a small number of evaluations. These have resulted in some positive findings, including:

- An increase in victim satisfaction
- A reduction in reoffending (when combined with an intensive treatment program), and
- A reduction in the re-victimisation of victims through the justice process itself.¹¹¹

The following are examples of relevant sexual offence restorative justice conferencing programs and their associated evaluations.¹¹²

South Australia: Youth justice conferencing

Youth restorative justice conferencing is used as a diversionary tool in some youth sexual offence matters in South Australia.¹¹³ The young person concerned must accept responsibility in order to access a conference, but no formal finding of guilt is recorded. Either the court or the police can make a referral, and specialist Youth Justice Co-ordinators facilitate and organise the conferences.¹¹⁴ Most conferenced sexual assault matters are intrafamilial, where young men are the perpetrators. Matters that have been conferenced include rape and indecent assault.¹¹⁵

Daly and a team of experts evaluated this scheme over a period of almost seven years, during which approximately 31 per cent of youth sexual offence matters were dealt with by way of

¹⁰⁹ *Crimes (Restorative Justice) Act 2004* (ACT) ss 14-16.

¹¹⁰ S Anderson, 'Victims of sexual violence may be able to confront attackers under restorative justice program extension' (14 February 2014) *The Canberra Times*. At <http://www.canberratimes.com.au/act-news/victims-of-sexual-violence-may-be-able-to-confront-attackers-under-restorative-justice-program-extension-20140214-32qam.html>.

¹¹¹ K Daly, B Bouhours and S Curtis-Fawley, 'Sexual Assault Archival Study (SAAS): An Archival Study of Sexual Offence Cases Disposed in Youth Court and by Conference and Formal Caution in South Australia' (July 2007) *South Australia Juvenile Justice and Criminal Justice Research on Conferencing and Sentencing, Technical Report No. 3, 3rd Edition*, 64. At http://www.griffith.edu.au/_data/assets/pdf_file/0004/50287/kdaly_part2_paper4.pdf; For a more global evaluation, see, Strang, above n 12, 47.

¹¹² In addition to these examples, it should be noted that SECASA also provides restorative justice conferencing on an informal basis, if a client requests it as part of their counselling process. Further information is at footnote 212.

¹¹³ *Young Offenders Act 1993* (SA).

¹¹⁴ K Daly, B Bouhours, R Broadhurst and N Loh, 'Youth sex offending, recidivism and restorative justice: Comparing court and conference cases' (2013) 46(2) *Australian and New Zealand Journal of Criminology*, 241-267, 245.

¹¹⁵ For a full evaluation, see, *Ibid*; for a summary, see, K Daly, 'Formal and Informal Justice Responses to Youth Sex Offending' (7 April 2010) *Research-Policy-Practice Symposium on Preventing Youth Sexual Violence and Abuse*, Griffith University, South Bank Auditorium. At http://www.griffith.edu.au/_data/assets/pdf_file/0004/364828/formal-and-informal-justice-responses-1-September-2011.pdf.

restorative justice conference.¹¹⁶ In around half of the conferenced matters, offenders undertook to complete a specific youth sex offender treatment program at the Mary Street Adolescent Sexual Abuse Prevention Program.¹¹⁷

The evaluation found that cases which proceeded through a conference were resolved faster than those that went through the conventional criminal justice system.¹¹⁸ Of those that did go through court, charges were often downgraded.¹¹⁹ In approximately half, the offender/accused was not convicted.¹²⁰ Daly concludes that conferencing has the potential to offer victims a greater degree of justice than conventional court processes, and also that conference penalties did more for victims than court-ordered penalties.¹²¹

*Overall, we found that victims were better off if their case went to conference rather than court. The principal reason was that in conference cases, something happened, that is, there was an admission by the offender and a penalty... was decided... We concluded that the potential problems of RJ (restorative justice) in sexual assault cases may be less victimizing than what occurs in a court process.*¹²²

It should be noted that Daly's positive findings have been critiqued by Dr Annie Cossins, who argues that 'there is insufficient evidence to support the view that there are inherent benefits in the restorative justice process that provide victims of sexual assault with a superior form of justice.'¹²³ Daly provided a compelling response to Cossins; this exchange reflecting the fact that the criteria against which a program is evaluated are not always clear.¹²⁴

NSW: Cedar cottage

In 1989 NSW introduced the *Pre-Trial Diversion of Offenders (Child Sexual Assault) Act (1985)* which provided for the diversion of adult offenders who had sexually assaulted their child, or their spouse or de facto partner's child. The diversion involved participating in a two-year intensive, community-based treatment program at Cedar Cottage, administered by the Department of Health.¹²⁵

Though not a strictly restorative justice based program, the offender would write apologetic and restorative letters to the victim as part of the treatment, while the victim had the opportunity to ask questions of the offender.

In order to be admitted into the program, the victim had to be under 18 years, and the offender an adult with no prior sexual assault convictions. The OPP was the designated prosecutor in all cases and determined whether a matter was eligible for referral.¹²⁶ The Director of the Cedar Cottage Program, upon receipt of the referral, then conducted a suitability assessment. If an

116 Ibid, 247.

117 Ibid, 245.

118 Ibid.

119 This means a more serious charge was converted to a less serious charge. For example, a rape charge is downgraded to an indecent assault charge; Ibid.

120 Ibid.

121 Daly, Bouhours and Curtis-Fawley, above n 111; Daly, above n 3; K Daly, 'Formal and Informal Justice Responses to Youth Sex Offending' (7 April 2010) *Research-Policy-Practice Symposium on Preventing Youth Sexual Violence and Abuse*, Griffith University, South Bank Auditorium. At http://www.griffith.edu.au/data/assets/pdf_file/0004/364828/formal-and-informal-justice-responses-1-September-2011.pdf.

122 Daly and Curtis-Fawley, above n 37, 237.

123 A Cossins, 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48 *British Journal of Criminology*, 359-378.

124 For Daly's reply to the critique, see, K Daly, 'Setting the Record Straight and a Call for Radical Change: A Reply to Annie Cossins on "Restorative Justice and Child Sex Offences"' (2008) 48 *British Journal of Criminology*, 557-566.

125 For a general overview, see, NSW Government, 'The NSW Pre-Trial Diversion of Offenders Program' (Cedar Cottage). At <http://www.wslhd.health.nsw.gov.au/Cedar-Cottage>.

126 Ibid.

offender was approved for entry into the Cedar Cottage program, he was required to enter a plea of guilty to the offence charged or agreed upon. After the plea, a conviction was recorded, and the offender entered into an undertaking to complete the treatment program. Upon successful completion, there was no further prosecution.¹²⁷

An evaluation found that the treatment program sharply reduced the sexual offence, life-time recidivism rates for participants,¹²⁸ and noted that there was a strong connection between acceptance of responsibility for offending, and reduced likelihood of reoffending.¹²⁹ However, the evaluation also found that the Program was under-utilised and never operated at capacity, likely due to lack of awareness or misunderstandings about the program.¹³⁰ The Cedar Cottage Program was defunded in 2012 and no longer accepts referrals. The Regulation establishing the program was also not renewed.¹³¹

Restorative justice conferencing in New Zealand

New Zealand has a long history of providing restorative justice conferencing, first introducing restorative justice processes in 1989 with Family Group Conferencing. It was not until 2002, however, that restorative justice was entrenched through the introduction of three related pieces of legislation: the *Sentencing Act 2002*, *Parole Act 2002*, and the *Victims' Rights Act 2002*. Combined, the three Acts:

- Provide recognition and legitimacy to restorative justice processes
- Encourage the use of restorative justice processes wherever appropriate, and
- Allow restorative justice outcomes to be taken into account in the sentencing and parole of offenders, where relevant.¹³²

Further to this, the Victims of Crime Reform Bill 2011 (NZ) proposes to amend the *Sentencing Act 2002* (NZ) to include a provision which states that the District Court *must* adjourn sentencing proceedings to allow for a restorative justice conference assessment to take place in all matters where the offender has entered a plea of guilty.

Although this mandatory provision is yet to be enacted, it can still be said that New Zealand currently has a sophisticated, embedded and legislatively supported restorative justice conferencing program both for young people and for adults, with no sexual offence exclusions. The following sections outline relevant evaluations of New Zealand's general and sexual offence specific restorative justice programs.

General restorative justice conferencing

General restorative justice conferencing is currently offered to adults and to young people primarily at the pre and post-sentence stages. A 2011 New Zealand Ministry of Justice evaluation made a number of findings in relation to the 12 months following an offender's participation in a conference:

- They had a 20 per cent lower reoffending rate than comparable offenders who did not participate in a restorative justice conference

127 Ibid.

128 J Goodman-Delahunty, 'The NSW Pre-Trial Diversion of Offenders (Child Sexual Assault) Program: An Evaluation of Treatment Outcomes' (November 2009) Sydney West Area Health Services, 109; J Goodman-Delahunty and K O'Brien, 'Reoffence Risk in Intrafamilial Child Sexual Offenders' (January 2014) Criminology Research Grants. At <http://www.criminologyresearchcouncil.gov.au/reports/1314/44-1011-FinalReport.pdf>; For a summary, see, L Butler and J Goodman-Delahunty, 'Effectiveness of Treatment in Reducing Reoffending by Adult Intrafamilial Child Sex Offenders' (May 2011) AJA Conference, Brisbane. At <http://www.aja.org.au/Child%20Protection%202011/Presentations/Butler&G-Delahunty.pdf>.

129 Goodman-Delahunty, Ibid, 111.

130 Ibid, 113 and 121.

131 Pre-Trial Diversion of Offenders Regulation 2005 (NSW).

132 New Zealand Ministry of Justice, 'Restorative Justice: Best Practice in New Zealand' (2004), 7. At <http://www.justice.govt.nz/publications/global-publications/r/restorative-justice-in-new-zealand-best-practice/documents/RJ%20Best%20practice.pdf>.

- They reoffended 23 per cent less frequently, and were 33 per cent less likely to be incarcerated as a result of the offending, than comparable offenders who did not participate in a restorative justice conference
- There was no reduction in seriousness of offending, when reoffending occurred, and
- Restorative justice conferencing has been as effective for Maori as it has been for non-Maori victims and offenders.¹³³

Sexual offence restorative justice conferencing

Restorative justice conferencing in both sexual offence and family violence matters has been available in New Zealand since 2002. Restorative justice conferencing is provided for any type of sexual offence at a number of stages throughout the criminal justice system, most commonly at the pre and post-sentence stages.¹³⁴ Suitability for restorative justice conferencing is determined on a case-by-case basis by contracted, specialist restorative justice teams that operate throughout New Zealand. A detailed discussion of one that is considered best practice follows.

Project Restore

*Project Restore aims to provide victim-survivors with an experience of a sense of justice, support offenders to understand the impacts of their offending behaviour and to facilitate the development of an action plan. At the same time, it avoids any practice that might undermine the gains feminists have made at putting sexual violence on the agenda.*¹³⁵

(i) An overview

Project Restore is an Auckland based service that has been providing restorative justice conferencing to victims of sexual assault since 2005.¹³⁶ Project Restore employs a particular methodology that is victim-centred and acknowledges that a restorative justice encounter, in and of itself, is unlikely to heal or restore a victim, but is nevertheless likely to help them towards this goal.¹³⁷ Project Restore engages in rigorous assessment and pre-conference preparation which usually concludes with a conference. In this way it can be described as a process, rather than a one-off intervention, with the conference occurring towards the end of this process.¹³⁸

Project Restore also provides post-conference support and even a follow up conference if required. Importantly, not all cases referred to Project Restore will result in a restorative justice conference. Some matters will be deemed not to be appropriate, either before or during the preparatory sessions, in which case the service may facilitate other types of therapeutic interventions, such as letter writing.

133 New Zealand Ministry of Justice, 'Reoffending Analysis for Restorative Justice Cases: 2008 and 2009' (June 2011). At <http://www.justice.govt.nz/publications/global-publications/r/reoffending-analysis-for-restorative-justice-cases-2008-and-2009/publication>.

134 S Macaulay, 'Restorative Justice and Sexual Offending: What Clinicians Need to Know about Possible Trial Process Reform in New Zealand' (2013) 5(2) *Sexual Abuse in Australia and New Zealand*, 4-11, 4-5.

135 S Julich, K McGregor, J Annan, F Landon, D McCarrison and K McPhillips, 'Yes, There Is Another Way!' 2011(17) *Canterbury Law Review*, 222-228, 223.

136 For an overview of Project Restore, see, S Julich, J Buttle, C Cummins and E Freeborn, 'Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence' (May 2010) *Auckland University of Technology*, 1-99. At https://www.academia.edu/274691/Project_Restore_An_Exploratory_Study_of_Restorative_Justice_and_Sexual_Violence.

137 Project Restore's establishment was driven by victims groups and evidenced-based research. The service specialises in providing innovative justice responses to victims of sexual violence; *Ibid*.

138 Project Restore NZ, 'Restorative Justice for Sexual Violence: Principles of good practice' (February 2013), 1-11; S Julich and F Landon, 'Achieving Outcomes for Participants of Project Restore's Restorative Processes' (December 2012) Project Restore NZ, 1-15.

Project Restore comprises a specialist clinical team, including:

- A senior restorative justice facilitator with specialist knowledge of the dynamics of sexual violence and experience working in the criminal justice system
- A victim-survivor specialist who is a qualified sexual violence counsellor
- An offender specialist who has experience working with sexual offenders in a treatment context, and
- A clinical psychologist, who provides oversight and supervision.¹³⁹

All referrals, both community and court-based, are assessed collaboratively by the Project Restore clinical team. The Project Restore team determines:

- Which cases are appropriate, with careful consideration being given to maximising healing potential and minimising the chance of further harm to the victim
- Specific victim and offender needs, dictating the design of the response, including the nature and length of preparatory sessions
- Whether other professionals are required as support people, such as child therapists or mental health professionals
- The types of therapeutic interventions required prior to the conference, such as letter writing; challenges to grooming behaviours; ensuring that expectations are realistic; managing the impacts of disclosure on others; and family therapy
- How the conference should proceed and how power dynamics and impacts of disclosures and discussions should be managed
- Who should be present at the conference, including family or community members, and
- How agreed outcomes will be achieved, monitored and mediated.¹⁴⁰

Project Restore conducts between 30-40 cases per year, although this is likely to increase following a recent expansion in funding.¹⁴¹ Many are intrafamilial, historic, and/or involve contact offences and young victims.¹⁴²

(ii) Specialists involved in Project Restore

The role of the offender specialist is to prepare the offender for the conference, such as by discussing ground rules, appropriate behaviour and language. The offender must agree to engage in assessment for treatment and have the capacity and readiness to provide a genuine, non-manipulative apology. The preparatory process is considered sufficiently robust and expert to identify offenders who are not genuinely remorseful. In the preparatory sessions the specialist encourages the offender to take increasing levels of responsibility. The offender's distortions and denial patterns are also challenged.

The survivor specialist, meanwhile, identifies the victim's needs and builds these into the design and pace of the process. The survivor specialist will subsequently propose a way forward for the victim, which might involve the specialist:

- Facilitating therapeutic interventions such as writing letters and shuttle mediations (where peripheral facts may be in contention)

139 Julich, McGregor et al, above n 135; Julich, Buttle et al, above n 136.

140 Ibid.

141 Project Restore, stakeholder consultation.

142 Ibid.

- Conducting family therapy sessions prior to the conference, which may involve challenging destructive or distorted beliefs held by other family members in relation to the offending or the offender
- Discussing whether the victim wants to be present at the conference, or whether she would prefer to have her views represented by someone else (between 30-50 per cent of Project Restore's conferences involve other people representing the victim's views)
- Discussing and devising the ground rules for the conference
- Discussing whether the victim wants other family or community members present at the conference (recognising that the hurt between non-offending family members is often significant)
- Discussing a safety plan and ensuring that the victim's outcome and apology expectations are realistic, and
- Discussing the victim's post-conference needs.¹⁴³

(iii) The conference facilitator and clinical case manager

The conference facilitator is not involved in the individual, specialist engagement with the victim and offender, but does participate in case management meetings and the planning of conferences. The facilitator is not a generalist restorative justice practitioner, but is skilled at both restorative justice and mediation, and also has specialist knowledge of sexual violence. The facilitator ensures that the conference is fair, safe, free of any sort of violence and that ground rules are followed. He or she ensures that the conference remains focussed on the victim's healing and the offender's accountability.¹⁴⁴

The case manager is a clinical psychologist and provides important oversight and broad case management. He or she has no client contact, but ensures that processes are informed by clinical understandings of sexual offending dynamics including, trauma, denial and broad family therapy needs. He or she also provides important supervision and debriefing for staff.¹⁴⁵

(iv) An evaluation

In 2012 in conjunction with the New Zealand Ministry for Justice, Project Restore conducted a file review to identify the outcomes that victims and other participants had hoped to achieve out of a restorative process. Twelve files were reviewed as part of the first of two stages of the evaluation.

The review measured victim satisfaction rates according to Daly's victims' justice needs/ interests matrix, discussed in Chapter 1.¹⁴⁶ The file review concluded that, in most instances, the outcomes sought by victims, offenders and other participants were achieved in the restorative process, and that victims' justice interests were met.¹⁴⁷ The review noted that the small number of cases involved prevented any generalised findings being made. The second phase of the research will hopefully provide more insights into understanding sexual violence and restorative justice conferencing more generally.

143 S Julich and F Landon, 'Achieving Outcomes for Participants of Project Restore's Restorative Processes' (December 2012) Project Restore NZ, 1-15; Julich, Buttle et al, above n 136.

144 Ibid.

145 Ibid.

146 Daly, above n 3.

147 Julich and Landon, above n 143.

Sexual offence restorative justice conferencing: the concerns

Despite the preceding discussion and examples, it is important to note that there remains significant controversy around whether restorative justice conferencing is appropriate for sexual offending.¹⁴⁸ This debate exists within academic and feminist literature,¹⁴⁹ and also within public policy circles, for a range of legitimate reasons exemplified by the following observation of the Australian and New South Wales Law Reform Commissions in their 2010 Consultation Paper, *Family Violence: Improving Legal Frameworks*:

*The use of restorative justice practices for sexual offences ... appears to the Commissions to be inappropriate generally. The dynamics of power in a relationship where sexual offences have been committed make it very difficult to achieve the philosophical and policy aims of restorative justice in that context. The Commissions consider that restorative justice processes carry a high risk of secondary victimisation for victims of sexual offences.*¹⁵⁰

The debate around extending restorative justice into the areas of domestic violence and sexual offending is usually based on ideology, principle and precaution, rather than on findings about or evidence derived from actual practices. This is because of the paucity of programs and associated research and evaluations which are available to demonstrate success or failure.¹⁵¹ It is reasonable, however, to summarise some of the main arguments for and against restorative justice conferencing in sexual offence cases as follows.¹⁵²

148 See generally, J Stubbs, 'Justice for gendered violence: What does restorative justice offer?', in Bruce, Mason and Bolitho, above n 93.

149 See generally, J Ptacek (ed), *Feminism, restorative justice, and violence against women* (Oxford University Press, 2010); *Ibid.*

150 Australian Law Reform Commission and New South Wales Law Reform Commission, 'Family Violence: Improving Legal Frameworks' (April 2010), Consultation Paper, 559. At http://www.alrc.gov.au/sites/default/files/pdfs/publications/CP_1.pdf.

151 S Curtis-Fawley and K Daly, 'Victim advocacy groups and the idea of restorative justice' (2005) 11(5) *Violence Against Women*, 603-638.

152 See generally, Hudson, above n 72; K Daly, 'Sexual Assault and Restorative Justice', in H Strang and J Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002), 62-88. For a general overview of the positives and negatives of restorative justice, see, J Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts', in M Tonry (ed), *Crime and Justice: A Review of Research* (University of Chicago Press, 1999), 1-127.

Table 4: An overview of arguments for and against restorative justice conferencing in sexual assault cases

Potential of Restorative Justice Conferencing	Concerns about Restorative Justice Conferencing
Provides victims with justice options, as opposed to a single or no justice option	Dissipates the hard-won gains to have the criminal law respond appropriately to sexual violence
Studies show that, in most instances, the victim and offender found the process and outcome to be fair ¹⁵³	Risks re-privatising and decriminalising sexual violence
Provides victims with tailored justice options that can operate alongside or independently of the criminal justice system	No ability to monitor offenders to ensure the public's safety after completion
The public interest in validating victims' stories and in offenders taking responsibility is achieved	The public interest in prosecuting and punishing sexual offending is minimised
More efficient and less expensive than the formal criminal justice system	Restorative justice only focuses on the penalty stage, rather than the adjudication of facts
Facilitates victims' participation and validation	The potential for restoration is overstated: it assumes that victims will be forgiving, that offenders will be apologetic, and that their communities will be supportive ¹⁵⁴
Victims' credibility is not at the core of the proceedings – victims are not cross-examined	Victims are not protected in restorative justice conferencing through robust mechanisms such as vulnerable witness schemes, which are embedded into court processes. Victims may be pressured to participate in restorative justice conferencing
Fills the gap where legal reforms have failed to make significant changes	The ability for a restorative justice conference and facilitator to address the inevitable power imbalance between the victim and offender is questionable and unchecked
Decisions are not made by a judicial officer. Rather, the parties to the offending are central to shaping the process and outcome	Restorative justice does not challenge 'rape myths' or stereotypes prevalent in the community, which is a central reason for low reporting, prosecution and conviction rates
Encourages more admissions by offenders	No deterrent element for would-be offenders
More reintegrative and therapeutic benefits for offenders	Offenders are not punished and get off too leniently
There is potential to address violent behaviour in circumstances where the relationship is ongoing	Offenders can manipulate the process
Conventional reforms have gone as far as they can	Emphasis should be on improving the conventional criminal justice system

¹⁵³ See, for example, Daly and Curtis-Fawley, above n 37, 230-65.

¹⁵⁴ See, for example, Daly, above n 80, 138.

The CIJ's view

The CIJ believes that it is time for an adult sexual offence restorative justice conferencing program to be piloted in the Australian context. When too few victims of sexual assault have options in the criminal justice process, or the prospect of any real justice outcomes; and when evidence suggests that restorative justice conferencing meets victims' justice needs to a greater extent than the conventional criminal justice system, it is difficult to justify any further reluctance to embrace reform.

The CIJ is of the opinion that, while caution is necessary, safeguards can be put in place to address many of the concerns raised in relation to extending restorative justice conferencing to sexual offences. Building on examples in New Zealand and, specifically, on Project Restore, safeguards include highly trained, multi-disciplinary personnel; mechanisms to ensure that there is no coercion or pressure involved; an oversight body; forensic input; sufficient pre-conference preparation to determine suitability and pacing of the process; resourcing for treatment and rehabilitation; and sufficient post-conference follow-up.

The CIJ considers that, although sexual offence restorative justice conferencing programs are still in their initial stages, there is now sufficient research and experience from other jurisdictions to develop a best practice model - one which is victim-centred, flexible and able to address many of the limitations of the current criminal justice response. The next section envisages such a model.

2.2 A Model for Sexual Offence Restorative Justice Conferencing in the Criminal Justice System

Introduction

Building on the previous section's discussion of opportunities and challenges in relation to restorative justice conferencing, this Part of the report sets out a proposal for a best practice model of sexual offence restorative justice conferencing. The key elements of the proposed model include:

- A legislative framework which articulates overarching principles
- The development of operational guidelines
- A restorative justice unit within each jurisdiction's Department of Justice (or equivalent) to oversee all restorative justice practices
- A specialist gender violence team within the restorative justice unit to develop guidelines, oversight, training and monitoring and evaluation
- The establishment of an assessment panel, coordinated by the specialist gender violence team, to determine suitability for restorative justice conferencing
- Victim and offender specialists
- Trained and specialist conference facilitators
- An intake process that has two stages: an eligibility assessment (based on key, fixed criteria) and a suitability assessment (based on more detailed, subjective criteria), and
- Referral pathways into and out of restorative justice conferencing at all stages of the criminal justice system, including with requirements at key points of the process for referral to be subject to police, prosecution and/or judicial approval.

This part also aims to address key questions in relation to sexual offence restorative justice conferencing, such as the offences that are most appropriate; the offenders that are most suitable; and the stages of the criminal justice system at which conferencing should take place.

In response to these discussions, the CIJ ultimately recommends that sexual offence restorative justice conferencing be implemented through a three phased approach. The CIJ notes that

the model and implementation process articulated is undoubtedly resource intensive. The CIJ concludes, however, that there is significant public policy benefit in this kind of restorative justice conferencing being well-funded and properly implemented.¹⁵⁵

Legislative framework with overarching principles

Overarching principles for restorative justice conferencing are important to clarify the underlying philosophy and intentions of any restorative justice program. Principles should reflect the requisite balance between victims' wishes, public policy interests, and the rights of offenders. Ideally, principles would be codified in legislation to ensure clarity, transparency and consistency.

The ACT

A useful example of restorative justice legislation is the ACT's Restorative Justice Act. The guiding principles of the Restorative Justice Act, set out in the objects section, are:

- To enhance the rights of victims of offences by providing restorative justice as a way of empowering victims to make decisions about how to repair the harm done by offences,¹⁵⁶ and
- To enable access to restorative justice at every stage of the criminal justice process without substituting for the criminal justice system or changing the normal process of criminal justice.¹⁵⁷

The United Nations

The United Nations has produced two significant documents specific to the development of restorative justice programs and principles. Australia has long been a Member State of the United Nations, and the instruments outlined below should therefore guide Australia as it further develops its restorative justice practices.

In 2000 the United Nations commissioned an expert group to collate a set of guiding principles, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (the Basic Principles).¹⁵⁸

The Basic Principles were supported by subsequent resolution and include:

- The victim and the offender should normally agree on the fundamental facts of a case as the basis for their participation in a restorative process. Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings.¹⁵⁹
- Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process.¹⁶⁰
- Member States should consider establishing guidelines and standards, with legislative authority when necessary, that govern the use of restorative justice programmes.¹⁶¹
- Fundamental procedural safeguards guaranteeing fairness to the offender and the victim should be applied to restorative justice programmes... including the victim and the offender having the right to consult with legal counsel concerning the restorative process, and... minors should have the right to the assistance of a parent or guardian.¹⁶²

155 Further, it is also likely that the savings from reduced sentences and addressing victims' ongoing therapeutic needs will be significant and able to be reinvested in restorative justice programs.

156 *Crimes (Restorative Justice) Act 2004* (ACT) s 6(b).

157 *Crimes (Restorative Justice) Act 2004* (ACT) s 6(d).

158 United Nations Economic and Social Council, 'Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters' (24 July 2002) E/RES/2002/12.

159 *Ibid*, Clause 8.

160 *Ibid*, Clause 9.

161 *Ibid*, Clause 12.

162 *Ibid*, Clause 13(a)-(c).

- Member States should consider the formulation of national strategies and policies aimed at the development of restorative justice and at the promotion of a culture favourable to the use of restorative justice among law enforcement, judicial and social authorities, as well as local communities.¹⁶³

The Basic Principles were also built upon by the *Handbook on Restorative Justice Programs* (the Handbook),¹⁶⁴ which is aimed at assisting the design, implementation and evaluation of restorative justice programs.¹⁶⁵ The Handbook identifies key factors for strategic implementation of successful restorative justice programs as including:

- The integration of restorative processes into the justice system, rather than these processes being, or being viewed as, an ‘add on’
- Collaborative partnerships between criminal justice agencies and personnel and community-based organisations
- A clear operational framework, including protocols that define areas of jurisdiction and responsibility
- The development of criteria that guide the referral of cases to restorative processes, and
- Well-developed skill sets and areas of expertise among justice and community-based personnel.¹⁶⁶

The Handbook goes on to give an overview of restorative justice interventions, and the roles of various criminal justice personnel. Importantly, the Handbook also identifies features of successful restorative justice programs in various common law and civil law countries.¹⁶⁷

Operational guidelines

Operational guidelines are important to prescribe best practice implementation processes, and to ensure consistency and continuity throughout the program. Several sets of guidelines already exist in national and international jurisdictions.

Standing Council on Law and Justice

In October 2013 the Standing Council on Law and Justice (SCLJ) released *Guidelines for Restorative Justice Processes in Criminal Cases* (the SCLJ Guidelines).¹⁶⁸ The SCLJ Guidelines are intended to ‘promote a consistent approach by government agencies to Restorative Justice processes operating across Australia through the identification of general principles and procedural safeguards.’¹⁶⁹ They specifically *do not* apply to matters involving sexual assault or family violence.¹⁷⁰ Important points in the SCLJ Guidelines include:

163 Ibid, Clause 20.

164 United Nations Office on Drugs and Crime ‘Handbook on Restorative Justice Programmes’ *Criminal Justice Handbook Series* (New York, 2006).

165 Ibid, 1-3.

166 Ibid, 39-40.

167 Ibid, 71-73.

168 Standing Council on Law and Justice, ‘Guidelines for Restorative Justice Processes in Criminal Cases’. At <http://www.sclj.gov.au/sclj/news.html>. The SCLJ Guidelines followed release of a discussion paper in 2011: Standing Council on Law and Justice, ‘National Guidelines of Principles for Restorative Justice Programs & Processes in Criminal Matters’ (2011) Standing Council on Law and Justice. At http://www.sclj.gov.au/sclj/standing_council_consultations/standing_council_pastconsultations/standing_council_natrestorativejustice.html?s=1001.

169 Ibid, point 5.

170 Ibid, point 6.

- The facts of the offence must provide sufficient evidence to charge the offender at law¹⁷¹
- A victim or offender may ask for cultural assistance¹⁷²
- In circumstances where a restorative justice process is inappropriate, or is unable to be performed or completed, the case must be referred back to an appropriate authority or institution without delay¹⁷³
- The victim and the offender retain the right to seek legal advice¹⁷⁴
- Fundamental procedural safeguards and rights at law guaranteeing fairness must be upheld, including the right to:
 - the rule of law
 - natural justice (including the right to a fair hearing)
 - translation or interpretation assistance, and
 - the assistance of a parent, guardian and/or suitable adult if a victim or offender is a minor.¹⁷⁵
- All discussions that occur within a restorative justice process are confidential and may not be used in any subsequent legal process, excluding the following circumstances:
 - participants agree to their disclosure
 - disclosure is required by law, and/or
 - such discussions reveal an actual or potential threat to a participant's safety.¹⁷⁶
- The conduct of a Restorative Justice process must take into account the participants' safety, security and any power imbalances between the participants, with respect to a participant's age, maturity, race, gender, cultural background, intellectual capacity, position in the community or any other factors considered appropriate.¹⁷⁷

The ACT

Section 61 of the ACT's Restorative Justice Act allows guidelines to be issued in relation to a number of practices including referral procedures, the conduct of restorative justice conferences and the monitoring of restorative justice agreements.¹⁷⁸ It is understood that the ACT Restorative Justice Unit is consulting on the development of separate domestic violence and sexual offence guidelines, in preparation for the implementation of phase two of the restorative justice program.¹⁷⁹

New Zealand

The New Zealand Ministry of Justice has published general restorative justice guidelines, as well as guidelines specific to domestic and sexual violence cases. The general guidelines stipulate that restorative justice processes must be voluntary in nature; that they must hold the offender accountable; and that flexibility and responsiveness must be inherent characteristics of the

171 Ibid, point 9. In contrast to point 9 of the SCLJ Guidelines, the CIJ believes that sexual offence restorative justice conferencing should be provided at the pre-prosecution stage, and in circumstances where there might not be sufficient evidence to charge the offender. The CIJ's position takes account of the realities previously discussed: that many victims choose not to report to police; and many victims who do report, do not have their case referred to prosecution due to the nature of the evidence.

172 Ibid, point 18.

173 Ibid, point 13.

174 Ibid, point 15.

175 Ibid, point 17.

176 Ibid, point 21.

177 Ibid, point 24.

178 As far as the CIJ is aware, only the Australian Federal Police has issued guidelines to date. See, Australian Federal Police, 'AFP Practical Guide on diversionary conferencing – Restorative Justice Unit (ACT Policing)' (2010). At <http://www.afp.gov.au/about-the-afp/~media/afp/pdf/ips-foi-documents/ips/publication-list/PRA10075%20PG%20on%20Diversionary%20conferencing%20%20Restorative%20Justice%20Unit%20ACT%20Policing.ashx>.

179 ACT Restorative Justice Unit, stakeholder consultation.

restorative justice process.¹⁸⁰ The specific domestic and sexual violence guidelines build on this to include:

- The primary importance of the victim's ongoing safety
- The importance of specialist sexual violence knowledge, skills and processes
- The importance of a case management approach, with a restorative justice facilitator, victim specialist and offender specialist all working collaboratively with specialist, forensic supervision
- The delivery of an effective process which focuses on victim healing and offender accountability
- The establishment of realistic timeframes which allow for adequate pre-conference preparation and post-conference support, and
- A commitment to conducting restorative justice conferences only in appropriate cases, as determined by the specialist team and/or the judicial officer.¹⁸¹

The CIJ's view

The CIJ believes that there is merit in all jurisdictions developing a restorative justice statutory framework to ensure consistency, accountability and transparency. Legislation should contain overarching principles guided by the United Nations documents, and also allow for the issuing of appropriate guidelines relating to program implementation.¹⁸²

Further, the CIJ considers operational guidelines to be central and that two sets of guidelines - those relating to general restorative justice conferencing (building on the SCLJ Guidelines), and those specific to sexual violence restorative justice conferencing - should be developed.¹⁸³ In addition to the SCLJ and New Zealand guidelines outlined above, the CIJ considers the following points to be important:

- All participants should have any special needs met, to the greatest extent possible
- The rights of the victim and the offender should be respected and protected at all times
- The privacy of the victim and offender should be respected at all times
- Strengthening the victim and offender's family and community networks should be a priority
- The restorative justice process should be culturally and socially responsive
- The restorative justice process should be adaptive enough to take account of cognitive impairment, mental illness and physical disability, where possible
- Conference processes and procedures should be flexible enough to accommodate the widest possible range of cases, and
- Conference processes should be adaptive enough to ensure cultural relevance to various Aboriginal and Torres Strait Islander communities, and culturally and linguistically diverse communities.¹⁸⁴

180 New Zealand Ministry of Justice, above n 132.

181 New Zealand Ministry of Justice, 'Restorative Justice Standards for Sexual Offending' (June 2013), 26. At http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0CEUQFjAE&url=http%3A%2F%2Fwww.justice.govt.nz%2Fpublications%2Fglobal-publications%2Fr%2Frestorative-justice-standards-for-sexual-offending-cases%2Fpublication%2Fat_download%2Ffile&ei=CZP5UuC7OsW8kQWSz4DIaw&usg=AFQjCNGyByLZM1Th-Dmno2XJniga-nhQnQ&bvm=bv.61190604.d.dGl.

182 See generally, Braithwaite, above n 75, 563-577.

183 While domestic and family violence have not been the focus of this report, consideration should be given to the unique nature of this offending, and the ways in which it overlaps with sexual offending.

184 These additional principles are informed by the principles set out in, ACT Department of Justice and Community Safety, 'Restorative Justice Options for the ACT: Issues Paper' (October 2003), 14-15 ('ACT Issues Paper'). At http://cdn.justice.act.gov.au/resources/uploads/IssuesPaper_RJU_OCT20031.pdf

These additional points take account of a number of Australia's human rights commitments and obligations, specifically with respect to Indigenous people,¹⁸⁵ people with a disability,¹⁸⁶ and the rights of women¹⁸⁷ and children.¹⁸⁸

Developing sexual offence restorative justice conferencing in Australian jurisdictions

An oversight body: restorative justice units

If restorative justice conferencing is to be broadened and provided to large cohorts of the community, as well as at multiple stages of the criminal justice system, there is significant merit in establishing relevant oversight bodies within each jurisdiction.¹⁸⁹ A restorative justice oversight body would help to ensure consistency in standards, safeguards and procedures and could play a key role in ensuring that the community has confidence in the application of restorative justice to appropriate cases.

The CIJ recommends that restorative justice units should be established as the oversight body within respective Departments of Justice across all Australian jurisdictions.¹⁹⁰ These units should be charged with overseeing the delivery of all restorative justice services in each state and territory. This can include youth conferencing, adult diversionary conferencing, and pre and post-sentence conferencing in a range of cases. The functions of the restorative justice units should include:

- An oversight role
- The development and publication of guidelines for the delivery of services
- The development and delivery of generalist restorative justice training and accreditation processes, and
- A monitoring and evaluation role.

It should be noted, however, that restorative justice conferencing for sexual offending has commonly evolved out of the response of grass-roots organisations to victims' requests for more flexible and inclusive justice processes. This was certainly the case with Project Restore in New Zealand and with the informal restorative justice conferencing offered by SECASA in Melbourne. These programs have remained flexible and developed community-based services able to respond to the unique needs of their users, but have not been the subject of rigorous regulation or oversight. There are significant benefits to this grass-roots approach, and these services continue to do exceptional work. This should be taken into account in the design of any oversight body.

185 The United Nations Declaration on the Rights of Indigenous People was adopted by the General Assembly on 13 September 2007, and Australia announced its support in 2009. Article 22(2) prescribes that 'States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination'.

186 Australia was one of the first countries to ratify the Convention on the Rights of People with a Disability (CRPD) in 2008, and to sign the CRPD Optional Protocol in 2009. Article 16(1) states that: 'State Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities ... from all forms of exploitation, violence and abuse, including their gender-based aspects.'

187 Australia ratified the Convention on the Elimination of Discrimination Against Women (CEDAW) in 1983 and acceded to the Optional Protocol in 2008. CEDAW does not explicitly refer to violence as a form of discrimination, but the CEDAW Committee has defined gender-based discrimination to include gender-based violence. In 2010, the CEDAW Committee recommended that Australia take urgent action to address the violence and abuse experienced by women and girls with disabilities living in institutions.

188 Australia ratified the Convention on the Rights of the Child (CROC) in 1990. Violence and abuse against children is specifically addressed in Article 19(1) and Article 34. Importantly, Australia is yet to sign the CROC Third Optional Protocol, which allows individual children, or their representatives, to bring a complaint alleging a violation of their human rights to the Committee on the Rights of the Child.

189 This is consistent with Recommendation 50 of the Victorian Law Reform Committee, 'Inquiry into Alternative Dispute Resolution and Restorative Justice' (May 2009) Parliament of Victoria, xxvi.

190 The ACT, NSW and New Zealand all currently have Restorative Justice Units within their bureaucracies. Other jurisdictions may have different arrangements, for example, Victoria's Youth Group Conferencing is overseen by the Department of Human Services.

Accordingly, restorative justice units should be developed keeping in mind the balance that must be struck between regulation and oversight on the one hand, and the importance of community ownership, flexibility and responsiveness, on the other. Government involvement should be facilitative and receptive to community and legal needs.

Specialist gender violence teams

To account for the unique nature of family violence and sexual offending, specialist gender violence teams should be established within the restorative justice units. The gender violence teams should comprise senior professionals from the restorative justice, legal and gender violence sectors. The functions of the gender violence teams should include:

- Keeping up to date with relevant national and international research
- Drafting guidelines specific to gender based violence and restorative justice conferencing
- Ensuring that programs and guidelines are human rights compliant
- Liaising and consulting with the justice and community-based sector
- Developing facilitator competencies and maintaining a register of appropriately trained specialist facilitators
- Developing and delivering specialist restorative justice training and accreditation processes for sexual offence restorative justice conference facilitators
- Conducting monitoring and evaluation,¹⁹¹ and
- Coordinating the assessment panel.

An assessment panel

The CIJ considers that an assessment panel, similar to the Therapeutic Treatment Board used in the Children's Court of Victoria,¹⁹² is best placed to determine suitability of referred cases for restorative justice conferencing in a consistent and transparent manner (see the subsequent sections for a discussion of referral pathways). Assessment for conference suitability requires skilled and specialist practitioners from multi-disciplinary backgrounds. Similar to the Therapeutic Treatment Board, the assessment panel would comprise forensic mental health professionals, a representative of the OPP, a senior restorative justice conference provider, and victim and offender specialists (akin to those used in Project Restore). The specialist gender violence team within the restorative justice unit should coordinate and support the assessment panel.

This proposed process, and composition of the assessment panel, represents a hybrid of two programs which the CIJ considers to represent best practice: Project Restore and the Therapeutic Treatment Board in the Children's Court of Victoria.

The assessment panel should meet with both the victim and offender individually and be tasked with assessing and determining the suitability of all sexual offence cases referred to restorative justice conferencing. This should occur on a case-by-case basis, irrespective of the stage it has reached in the criminal justice process. This would ensure consistency in application of standards, and that only appropriate cases were ultimately referred for conferencing.

¹⁹¹ For further discussion, see VLRC, above n 47, xxvi, recommendations 46, 47 and 49.

¹⁹² The Therapeutic Treatment Board (TTB) was established by s 339 of the *Children, Youth and Families Act 2005* (Vic) (CYFA) to provide advice on the making of Therapeutic Treatment Orders (TTOs). Section 340 of the CYFA provides that the TTB is to be constituted of a member of Victoria Police, the OPP, an approved health services representative and a Department of Human Services representative. The TTB has 16 members, who are each members of one of four subgroups. The subgroups meet fortnightly to determine referrals for TTOs. The TTB also has an advisory role to the Minister. TTOs were developed to provide a therapeutic rather than criminal response to young people aged 10-15 years exhibiting sexually abusive behaviours. There are no criminal consequences for breaching a TTO – the order can simply be revoked and the matter continues through the prosecution process. For an overview, see PowerPoint presentation, Victorian Government Department of Human Services, 'The Victorian Therapeutic Treatment Board'. At <http://www.childhoodinstitute.org.au/Assets/198/1/TheVictorianTherapeuticTreatmentBoard-TrishMcCluskey.pdf>.

Consideration would need to be given as to whether decisions of the assessment panel should be reviewable in the case of an adverse finding, such as where an offender is deemed unsuitable for conferencing. While this would involve more work and require increased resources, it would, importantly, ensure that natural justice principles apply.

It was noted by some stakeholders that, anecdotally, Aboriginal young people are frequently deemed ineligible for Therapeutic Treatment Orders in the Children's Court of Victoria, and other restorative processes generally.¹⁹³ Allowing for a review mechanism in the case of an adverse finding will provide an important level of transparency around decision-making. As noted earlier, the SCLJ Guidelines maintain that 'fundamental procedural safeguards and rights at law guaranteeing fairness must be upheld...'¹⁹⁴ Accordingly, the question of a review mechanism requires further consideration.

Victim and offender specialists

If a case is assessed as suitable, victim and offender specialists should be assigned to the referred case. Similar to the Project Restore model, the victim and offender specialists would engage directly with the victim and offender as part of pre-conference preparation. The specialists would determine the needs of the victim and offender and the likely pacing of the process.

Once nearing the stage of readiness for a conference, the victim and offender specialists would refer the case to an appropriate conference facilitator, who may be employed by the restorative justice unit, or as an independent contractor. There are likely to be diverse facilitators with diverse skill sets, some more suited to different categories of cases than others. Importantly, all facilitators should be accredited by the specialist gender violence team as sexual offence restorative justice providers. The victim and offender specialists should attend the conference and ensure that both parties are supported, and that the outcome agreement is achievable.

At the completion of the outcome agreement, the offender should be required to meet again with the assessment panel for the case to be finalised. If the outcome agreement is not complied with, or if the conference breaks down, the case should be returned to the referral point. For example, if the referral for restorative justice conferencing came from the police, the case would be sent back to the police to continue through the usual criminal justice process.

Appropriately skilled facilitators

The role and skill of the facilitator is central to the success of the conference and safety of the participants. The facilitator is required to undertake preparatory work, ensure that the conference is safe and fair, and ensure that the outcome agreement can be implemented. Accordingly, the CIJ considers it critical that all restorative justice practitioners undergo an accreditation process. This currently occurs in a number of jurisdictions offering restorative justice processes, including the ACT, New Zealand and in Victoria (in relation to Youth Justice Group Conferencing).

(a) The importance of specialisation

In addition to generalist accreditation, the CIJ considers it crucial that sexual offence restorative justice facilitators be specialised, with demonstrated knowledge of the psychology of sexual offending and experience working in the sexual violence sector. This would obviously be a very niche area of expertise. Specialisation is critical, however, as sexual offending is markedly different to other types of offending and often involves patterns of shame and isolation; complex power dynamics; patterns of denial and repression; long-term trauma and distorted notions of appropriate behaviour.¹⁹⁵

193 These observations are consistent with the literature. See, for example, H Blagg, 'A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia' (1997) 3(4) *British Journal of Criminology*, 481-501; C Cunneen, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30 *Australia and New Zealand Journal of Criminology*, 292-311.

194 A review mechanism would be consistent with the SCLJ guidelines. See, Standing Council on Law and Justice, above n 168, point 17.

195 Julich and Landon, above n 143, 1-15.

(b) The New Zealand approach

The New Zealand Ministry of Justice has recently released facilitator competencies for sexual offence restorative justice practitioners.¹⁹⁶ These are in addition to the standard skill sets of generalist facilitators (minimum competencies for generalist restorative justice practitioners are also provided).¹⁹⁷ The competencies for facilitators working in the area of sexual violence take account of the intersection between sexual assault and family violence, and include:

- Knowledge of the dynamics and effects of family violence
- Knowledge of the dynamics and effects of sexual violence
- Knowledge of the impacts on children of family violence
- Knowledge of the social and cultural context of sexual violence
- Knowledge of the range of specialist services and agencies available to support victims and offenders in family and sexual violence cases, and commitment to utilising those services to support the victim and offender as part of the restorative justice process
- Ability to undertake a family violence risk assessment
- Ability to formulate a safety plan for the conference participants and to provide remedial action and support to reduce actual or potential harm
- Ability to minimise risks of re-victimisation or threats of violence at the conference and following the conference by working collaboratively with sexual offending violence specialists, and
- Ability to work in a team of specialists and formulate appropriate case management plans.¹⁹⁸

The following table demonstrates the proposed structure, role and functions of the oversight body, outlined above.

¹⁹⁶ New Zealand Ministry of Justice above n 181, 26-33.

¹⁹⁷ New Zealand Ministry of Justice, above n 132.

¹⁹⁸ New Zealand Ministry of Justice, above n 181, 20-33.

Diagram 1: Proposed oversight framework for sexual offence restorative justice conferencing



2.3 Determining Appropriate Cases for Restorative Justice Conferencing

A key question for sexual offence restorative justice conferencing is how to determine whether a case is appropriate. At the core of this discussion are questions regarding the extent to which victims' wishes should dictate the matters which are allowed to be conferenced and the extent to which public policy concerns should override victims' autonomy.¹⁹⁹

Public policy concerns may include considerations as to whether certain types of offences or offenders should be automatically excluded from restorative justice conferencing. A purely victim-centred approach would dictate that there should be no requirements beyond basic eligibility criteria, including that both parties are consenting. However, public policy considerations could conversely displace victims' wishes by creating limits that reflect broader policy objectives, such as a desire to prosecute and punish certain cases which the community considers particularly abhorrent, or to limit restorative justice conferencing to certain types of offenders.

An overview

There are various possible approaches to determining the appropriateness of a case for restorative justice conferencing. These range from an encompassing and prescriptive set of eligibility criteria, to a case-by-case assessment. The CIJ recommends a combined approach, whereby basic victim and offender eligibility is prescribed.

Accordingly, the CIJ recommends adopting a version of the two-staged approach developed in the ACT, whereby:

1. *Eligibility* is first determined by referring personnel, and
2. *Suitability* is then determined by the assessment panel.²⁰⁰

The primary difference between these two assessments is that eligibility is streamlined and objective, whereas suitability is much more subjective, specialist and complex.

In summary, once the basic eligibility criteria are met, the CIJ proposes that there should be no automatic eligibility exclusions relating to the nature of the offence or the offender. The assessment panel should instead be charged with making all other forensic decisions as to the subjective suitability of the case for restorative justice conferencing. This is a contentious proposal and a more detailed analysis of the reasoning behind this follows.

¹⁹⁹ Macaulay, above n 134, 4.

²⁰⁰ Ibid.

A detailed discussion of the referral process: eligibility and suitability

Eligibility

'Eligibility' refers to the first stage of determining whether a matter is appropriate for restorative justice conferencing. Developing eligibility criteria is important to ensure a level of consistency and transparency for referred cases. Eligibility criteria should be able to be used and applied at all stages of the criminal justice system and by all referring professionals, including counsellors, police officers, lawyers, prosecutors, judicial officers and corrections officers, without the need to make forensic assessments of an offender or victim.

(a) Basic eligibility guidelines

The CIJ recommends the following basic, core eligibility requirements with respect to both victims and offenders:

The core eligibility requirements in relation to victims should be:

- The victim has capacity to consent
- The victim provides free and informed consent, and
- The victim fully understands her rights.

The core eligibility requirements in relation to offenders should be:

- The offender takes responsibility for the offending
- The offender has capacity to consent
- The offender provides free and informed consent
- The offender fully understands his rights, and
- The offender is ten years or older.

With respect to an offender's age limit, the CIJ views ten years of age as the appropriate lower age limit. This is consistent with common notions of the minimum age for criminal responsibility. For such young offenders, consideration would need to be given to whether a parent/guardian or support person should be present, or even if consent should also be obtained from the parent/guardian in the first instance.²⁰¹

Depending on the referral point, referring professionals may only be privy to one party's eligibility. For example, a community referral from a counsellor would only determine the eligibility of the victim, with the assessment panel responsible for determining eligibility of the offender, along with a suitability assessment.

Accordingly, at some stages of the referral process, the victim's eligibility will be the deciding factor, and at others, the offender's. The two-stage process of first determining eligibility and then suitability ensures that all of these basic criteria are ultimately satisfied before any conference can take place.

Guidelines will also need to be put in place in relation to what professionals should do if there is uncertainty surrounding whether the offender or victim meets the eligibility criteria. An example may be where there is uncertainty as to whether the victim or offender has capacity to consent. These cases could be referred to the assessment panel to clarify any uncertainty through robust assessment.

²⁰¹ It should be noted that the United Nations Principles prescribe that 'minors should have the right to the assistance of a parent or guardian', see, above n 162. This is also consistent with the SCLJ Guidelines, Standing Council on Law and Justice, above n 168, point 17.

(b) More complex eligibility criteria

Beyond the basic eligibility criteria identified above, consideration could be given to whether more complex criteria should be put in place. More complex criteria could reflect public policy concerns, which, for example, may exclude recidivist offenders, or aggravated offending such as offending with a weapon, from restorative justice conferencing. The following discussion considers whether there is a need for more complex criteria in relation to the victim; the offender; and the nature of the offending.

(i) Victim criteria

The first and foremost gatekeeper of a restorative justice conference must be the victim. Without the victim's consent, the referral process and the conference cannot proceed. As discussed above, some referring professionals may not have any contact with the victim, so will necessarily only consider offender eligibility. In this situation, the first consideration of the assessment panel will be whether or not the victim is consenting to the process. The question then arises as to whether there should be any additional victim eligibility criteria beyond the basic eligibility criteria identified above.

Stakeholders consulted expressed diverse opinions as to whether restorative justice conferencing should be open to all categories of victims, including vulnerable victims, young people and cases involving multiple victims. Stakeholders raised concerns that vulnerable victims, such as those with a disability or cognitive impairment, or those who come from culturally and linguistically diverse backgrounds, may be pressured to pursue a conference in light of the difficulties of successfully prosecuting their cases.

Similarly, stakeholders identified a risk in intrafamilial cases that family or community members might exert pressure on a victim to pursue a conference instead of a prosecution. These concerns are legitimate and it is important that appropriate referral oversight mechanisms be put in place at respective referral stages. Police, prosecutorial and judicial oversight mechanisms are discussed in part 2.4.

Sexual offending against young people often involves grooming,²⁰² a behavioural pattern and dynamic particularly difficult to address and overcome in a conference setting. Accordingly, the CIJ considers that the process would generally only be open to victims aged 16 years or over, an age stakeholders nominated as generally indicating capacity to consent. However, exceptions should be able to be made in appropriate cases, such as those involving offenders who are also under 16 years.

If restorative justice conferencing is to be extended to younger victims, clear processes will need to be established for providing child representation, obtaining parental/guardian consent (in appropriate circumstances), managing young people who are at risk, and ensuring that appropriate child protection notification mechanisms are in place. The victim specialist would be well placed to determine specific needs. It should be noted that general restorative justice conferencing is available to victims under 16 years in a number of Australian jurisdictions, and sexual offence restorative justice conferencing is available to victims under 16 years in both South Australia and New Zealand.

In relation to vulnerable victims, the CIJ considers that, where possible, restorative justice processes should be flexible enough to cater to the special needs of these victims,²⁰³

202 Behaviours, activities and representations used by adults to normalise sexually exploitive interactions with children. See, for example, S Young, 'The Use of Normalization as a Strategy in the Sexual Exploitation of Children by Adult Offenders' (1997) 6(4) *Canadian Journal of Human Sexuality*, 285-295; A Mcalinden, "'Setting 'Em Up": Personal, Familial and Institutional Grooming in the Sexual Abuse of Children' (2006) 15 *Social and Legal Studies*, 339-362.

203 For a discussion of oral language competencies and the importance of tailoring restorative justice processes, see, H Hayes and P Snow, 'Oral language competence and restorative justice processes: Refining preparation and the measurement of conference outcomes' (November 2013) *Australian Institute of Criminology, Trends and Issues in Criminal Justice No. 463*. At http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi463.pdf.

with outstanding questions of capacity answered by the assessment panel. Further, stakeholders consulted noted that some vulnerable victims, such as those with a cognitive impairment, are especially unlikely to secure an outcome in the criminal justice system, despite improvements to relevant processes.²⁰⁴ Accordingly, a restorative justice conference may present an opportunity to tailor a justice response to meet special needs. Further consultation is required in relation to these considerations.

Lastly, the CIJ recommends that cases involving multiple victims should not be automatically precluded. Rather, the CIJ is of the view that the forensic decision should be left to the prosecuting agency to determine procedural questions relating to evidentiary issues that may arise in these cases. It may be that in some cases it is feasible for one victim to pursue a conference and the other a prosecution.

Certainly, Project Restore adopts a case-by-case approach in which, if assessed as appropriate, conferences will be held in cases involving multiple victims, young people and other categories of vulnerable victims. This occurs particularly in intrafamilial cases, where the offending may have been committed against a number of family members, some of whom would still be classified as a young person.

The only outright exclusion adopted by Project Restore is where a victim is assessed as being at risk. Questions of risk, both in relation to the victim experiencing further offending, as well as the offender reoffending, are significant and should be dealt with by the expertise of the assessment panel. Certainly, if there is an ongoing risk, the restorative justice conference should not proceed. Further consideration is needed in relation to clear guidelines with respect to determining ongoing risk.

(ii) Offender criteria

Various opinions exist as to whether restorative justice conferencing is only suited to a certain typology of offender. Additional offender eligibility criteria could consider questions such as the cognitive capacity of the offender; whether the offender has a prior criminal record; and the nature of the prior offending. These would be in addition to the basic eligibility criteria discussed above.

Because of the complexity and diversity of offenders, however, the CIJ concludes that there should be no additional eligibility criteria specific to the offender. First-time sexual offenders can still be serious offenders, facing a number of charges relating to a lengthy period of time, while recidivist offenders may be engaging in lower level offending.

Likewise, offenders with special needs or cognitive impairments should not be automatically excluded. Instead an attempt to moderate the process should be made so as to meet special needs. The assessment panel and the designated offender specialist will be best placed to determine both capacity and needs.

The CIJ's view is that subjective factors such as level of violence involved in the offending; degree of harm caused; the level of insight and remorse demonstrated by the offender; and whether the offending was behavioural (for example, the offender has psychopathic traits or cognitive distortions), or circumstantial (for example, the offending occurred in the context of depression and substance misuse), should be left to the assessment panel to make a case-by-case decision.

Finally, consideration will need to be given to the response to offenders facing a number of charges, some of which may be non-sexual, such as an assault or cause injury charge.

²⁰⁴ See generally, S Murray and A Powell, 'Sexual assault and adults with a disability: enabling recognition, disclosure and a just response' (2008) Australian Centre for the Study of Sexual Assault, *Issues No. 9*. At <http://www.aifs.gov.au/acssa/pubs/issue/i9.html>.

If all charges relate to the same sexual assault incident, the CIJ considers that these other charges should also be able to be referred for an assessment as to suitability. This issue will need to be canvassed further.

(iii) Offence criteria

Divergent opinions also exist as to the types of offences most suitable for restorative justice conferencing. There is no consensus in the literature, and no consensus amongst stakeholders as to one particular type of offence that should either be automatically included or excluded. The types of offences suggested as being appropriate range from historic offences; intrafamilial offences; lower level non-contact offences; offences involving a young offender; 'date rape' type offence scenarios; and all offences, including the most serious of rape cases.²⁰⁵ Further, many stakeholders felt strongly that offences that can be characterised as 'stranger rapes' should be explicitly excluded.

In responding to the question of offence type suitability, different considerations emerge at different stages in the criminal justice system. Equally, public policy considerations differ depending on the level of criminal justice system involvement. Accordingly, the discussion in relation to offence criteria is best contextualised within a detailed analysis of the different referral points throughout the criminal justice system, which follows in part 2.4.

Suitability

In keeping with the proposed two-stage approach, once an offender or victim has been deemed eligible by referring personnel, the case is then referred to the assessment panel for an assessment as to suitability. Appropriate and specialist assessment screening for conference suitability is critical to ensuring the success of sexual offence restorative justice programs.

Distinct from eligibility, assessment for suitability goes to individual factors relating to the offender, the victim and the particular case, and is therefore much more complex and subjective.

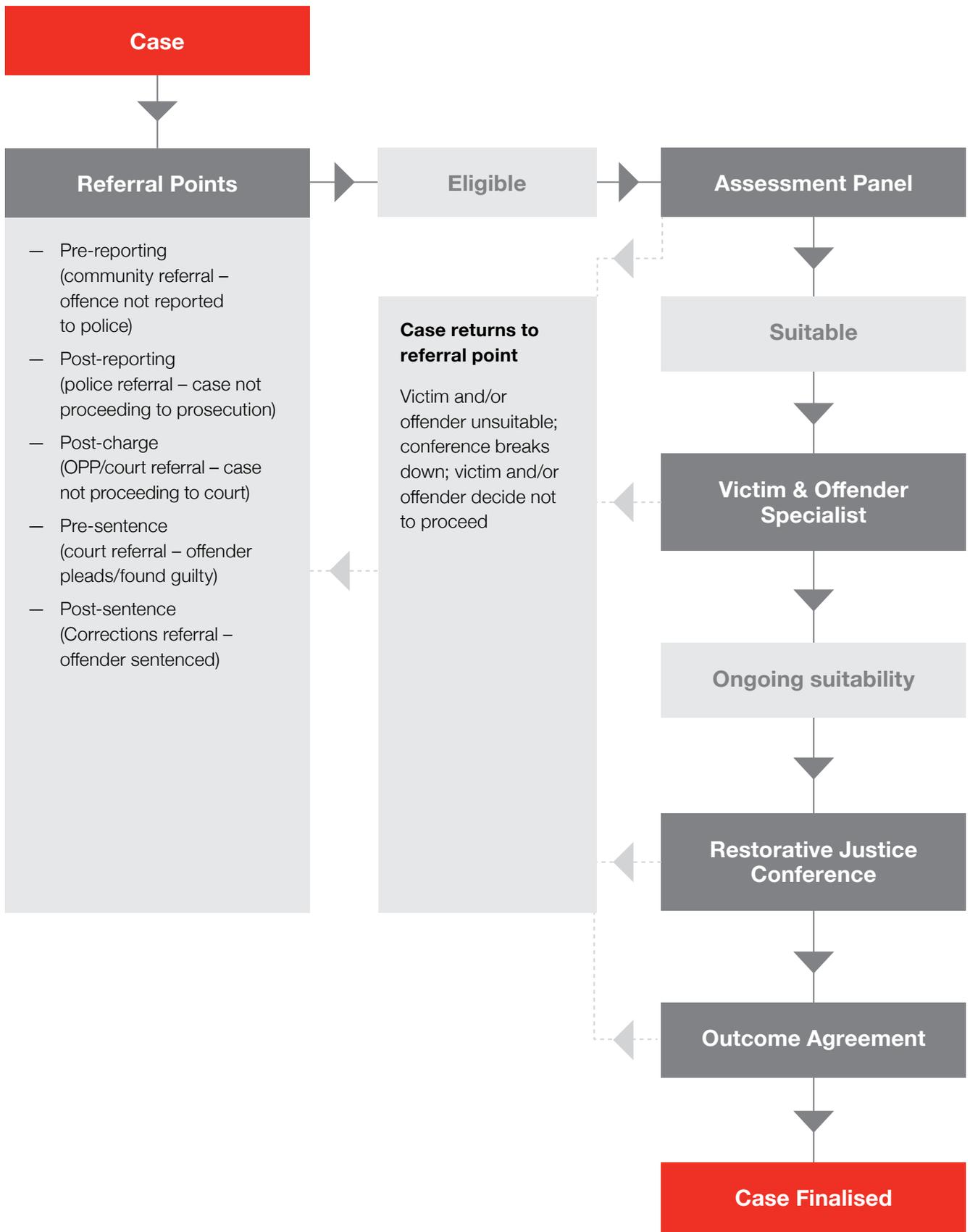
Assessment for suitability by the assessment panel is likely to include the following subjective factors:

- Personal characteristics of the victim and offender, including age, background and psychology
- The nature of the offending including the level of violence used and harm caused
- The victim and offender's particular sensitivities and needs
- The nature of the relationship between the victim and the offender
- The victim and offender's cognitive capacities
- The offender's criminal history
- Whether the offender poses an unacceptable risk, and should therefore only be dealt with in the criminal justice system
- The level of remorse and contrition demonstrated by the offender
- Willingness to participate in treatment – both sex offender specific, and broader relevant treatment, such as drug and alcohol counseling
- Potential power imbalances, and
- The broader family and community context in which the offending occurred.²⁰⁶

²⁰⁵ It should be noted that separate public policy considerations may apply to institutional offending, and further consultation should occur in this regard.

²⁰⁶ ACT Issues Paper, above n 184, 23.

Diagram 2: An overview of the eligibility and suitability process



2.4 Pathways into Restorative Justice Conferencing

An overview

Part 2.2 began by considering the structure of an oversight body, while Part 2.3 considered eligibility and suitability criteria. This Part now goes on to detail the process for entry into restorative justice conferencing at the different stages of the criminal justice system, as well as the various considerations at each stage.

There are five different stages of the criminal justice system where restorative justice conferencing can potentially be offered:

- Pre-reporting – where a victim has not reported the offence to the police
- Pre-charge – where the victim has reported, but the police have not referred the case for prosecution
- Post-charge – where the prosecution is underway
- Pre-sentence – where the offender has pleaded guilty or been found guilty, but is awaiting sentence, and
- Post-sentence – where the offender has been sentenced.

These stages can in turn be grouped into three categories as follows:

1. Pre-prosecution: referring to pre-reporting and pre-charge referrals
2. Prosecution: referring to post-charge referrals, and
3. Post-prosecution: referring to pre and post-sentencing referrals.

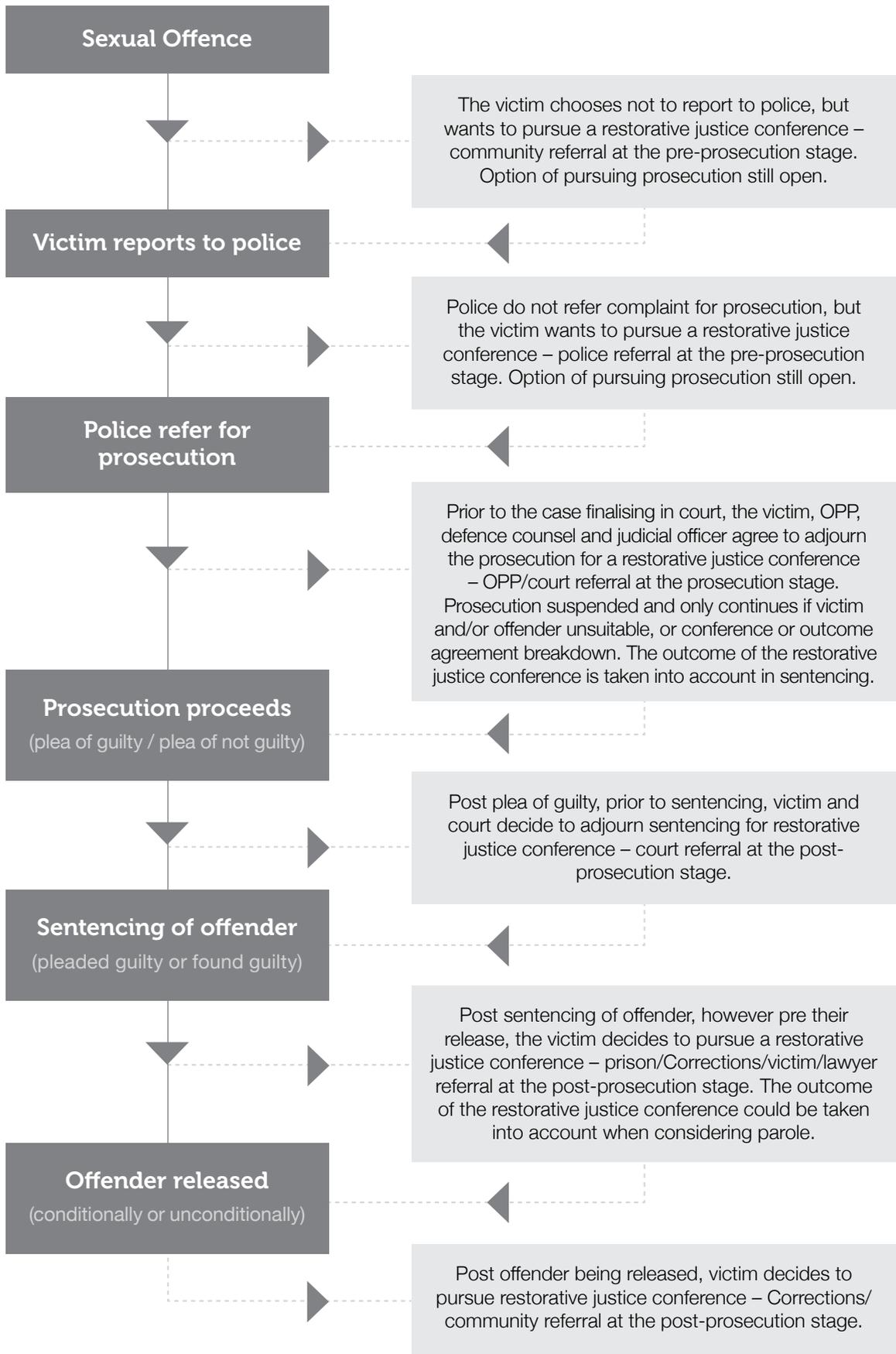
In practice, the application of restorative justice processes to the different stages of the criminal justice system leads to a number of complexities in relation to referral procedures; victim and offender rights; gate-keepers of the process; and the public interest. Some of these complexities arise at all stages of the criminal justice process, whereas others are unique to a specific stage.

Ultimately the CIJ concludes that opportunities for referral to restorative justice conferencing should be provided at all stages of the criminal justice system. This is based on two overarching considerations, being that victims should be provided with flexible justice options and that restorative justice conferencing has the potential to address a number of the different limitations that arise at particular stages of the conventional criminal justice system.

The following table and diagram provide an overview of the pathways and stages of the criminal justice process where restorative justice conferencing could occur.

Table 5: Referral points in the criminal justice system	
<p>PRE-PROSECUTION (complementary to the criminal justice system)</p>	<p>Pre-reporting</p> <ul style="list-style-type: none"> – For victims not wanting to report to police – Referrals made by victims themselves or community members, including counsellors, doctors, family and other service providers
	<p>Pre-charge</p> <ul style="list-style-type: none"> – For victims who have reported to police but whose case is not being referred for prosecution – Referrals made by police
<p>PROSECUTION (alternative to the criminal justice system)</p>	<p>Post-charge</p> <ul style="list-style-type: none"> – For victims whose case is before the courts but who choose to pursue a conference as an alternative, and where the prosecution is unlikely to succeed – Referral made by OPP/judicial officer
<p>POST-PROSECUTION (additional to the criminal justice system)</p>	<p>Pre-sentence</p> <ul style="list-style-type: none"> – For victims whose matter has resolved to a plea of guilty (or in certain, limited circumstances, where the offender has been found guilty), and who wish to pursue a restorative justice conference – Referrals made by the judicial officer
	<p>Post-sentence</p> <ul style="list-style-type: none"> – For victims whose matter resolved either by the offender pleading guilty or being found guilty, and who wish to pursue a conference – Referrals are made by any of the following: prison staff, Corrective Services, Probation Officer, other professional or community member, or victims themselves

Diagram 3: Potential pathways into restorative justice conferencing



Important referral pathway considerations

Conditions of referral

The CIJ recommends that referrals at certain stages of the criminal justice system only be allowed if pre-existing conditions are met. These include:

- Referrals by police at the pre-charge stage should only be made if a case is not suitable for a referral for prosecution, and
- Referrals by the OPP at the post-charge stage should only be made if it is unlikely that a case will proceed to successful finalisation in court.

These additional conditions ensure that the public policy desire to prosecute offenders wherever possible is not compromised by restorative justice conferencing. These conditions also mean that victims who want to pursue a restorative justice conference may need to wait until their case has reached the appropriate stage in the process. For example, victims at the police stage may need to wait for their case to reach the OPP, while victims at the prosecution stage may need to wait for their case to finalise in court before accessing restorative justice conferencing.

The CIJ recognises that, if a victim chooses not to proceed at the police or prosecution stage, it is highly unlikely that a case will continue in the absence of the victim's evidence. This is because there are rarely admissions or corroborative evidence to rely upon, with cases often pursued solely on the basis of the victim's evidence. To this end, the CIJ certainly supports recommendations for reform made by the Australian and New South Wales Law Reform Commissions aimed at reducing high attrition rates.²⁰⁷

Judicial gatekeepers

The CIJ recommends that referrals at certain stages of the criminal justice process should only be made subject to the respective judicial officer's discretion. In other words, the judicial officer should act as a gatekeeper at certain stages. These include:

- At the post-charge prosecution stage: the judicial officer should be satisfied that a referral to the assessment panel is appropriate in all the circumstances, and she or he should have the final say over whether the prosecution is adjourned for the conference to take place, and
- At the pre-sentence stage: the judicial officer should be satisfied as to the appropriateness of a referral to the assessment panel and similarly, she or he should have the final say over whether sentencing is adjourned for the conference to take place. This is likely to be a less onerous decision than at the post-charge stage, and one based largely on the victim's wishes.

Judicial oversight ensures a level of transparency and formality. This is particularly important at the post-charge stage, given the seriousness of diverting a case out of the criminal justice system. Consideration should be given to the factors a judicial officer would take into account.

For pre-sentence referrals, it may be that specific legislative provisions are necessary to permit the judicial officer to take conference participation into account in sentencing. In the future, Australian jurisdictions may wish to mirror the requirement being contemplated in New Zealand, where a referral to restorative justice conferencing *must* be made at the pre-sentence stage in all cases where the offender has pleaded guilty.²⁰⁸

207 Australian Law Reform Commission and New South Wales Law Reform Commission, 'Family Violence – A National Legal Response' ('ALRC and NSWLRC Final Report') (11 November 2010), Final Report, recommendations 26-2 and 26-3, chapter 26, 1187. At <http://www.alrc.gov.au/publications/26.%20Reporting,%20Prosecution%20and%20Pre-trial%20Processes/attrition-sexual-assault-cases>.

208 Victims of Crime Reform Bill 2011 (NZ).

A detailed analysis of pathways into restorative justice conferencing at the different stages of the criminal justice system

1. Pre-prosecution stages: pre-reporting and pre-charge

Providing for restorative justice conferencing at the pre-reporting stage takes account of the fact that most victims never report their case to police, and even fewer take their case to court.²⁰⁹ Nonetheless, many victims want a justice outcome, even if it does not involve the police and courts.²¹⁰

At the pre-prosecution stage there is no criminal justice system involvement, and participating in restorative justice conferencing does not and should not preclude the victim from pursuing a prosecution in the future.²¹¹ In this sense, restorative justice conferencing would complement, rather than act as an alternative, to the criminal justice system.

As the pre-prosecution stages are not technically part of the criminal justice system, an argument can be made that justice services should not extend to this cohort of cases. The CIJ considers it important, however, that justice services be made available to the significant number of sexual assault victims whose cases never make it to police or court and that provision should be made for restorative justice conference referrals at these early stages.

(a) Offence criteria at the pre-prosecution stages

Referral for restorative justice conferencing at the pre-prosecution stage would come either from the community, from victims themselves, or from police. Victims who choose not to report, or who report their matter but have cases with no prospects of being referred for prosecution, arguably should have a restorative justice conferencing option available, irrespective of the nature of the offence. This is because, other than accessing counselling, or potentially a civil claim and the crimes compensation jurisdiction, (discussed further in Chapter 4), there are no other justice options available for victims at the pre-prosecution stage of the criminal justice system. Restorative justice conferencing at these stages could therefore offer a significant number of victims an avenue to seek justice, and access should not be restricted by offence type.

(i) Pre-reporting - referral process

Pre-reporting, community referrals into restorative justice conferencing would involve service providers, counsellors, family, lawyers, community members, or victims themselves, directly referring a case to the assessment panel, prior to any engagement with the criminal justice system.

There are a few relevant examples of services currently providing sexual offence restorative justice conferencing at this stage, such as SECASA, who offer informal restorative justice conferencing to clients who request this as part of their counselling process.²¹²

209 See generally, Daly and Bouhours, above n 28.

210 Daly, above n 80, 140.

211 Further consideration should be given to whether there would be any adverse consequences in relation to the conduct of a future trial if the victim and offender were to participate in a conference prior to the trial being initiated. For example, it is likely that the victim will be prohibited from raising the conference and what was said during the conference during cross-examination.

212 Currently SECASA offers a restorative justice service on an informal basis. This emerged organically as a consequence of some SECASA clients wanting to have a conversation with the offender as part of their therapeutic counselling process. SECASA does not receive specific funding for this service, nor does it widely advertise its availability. It has been providing this service for a number of years and determines access on a case-by-case basis. Meanwhile, approximately 35 per cent of Project Restore's work is community referred. Referrals are made by counsellors, doctors, family and community members. Project Restore considers this an important aspect of their service, as it provides a justice option for victims who do not wish to engage with the criminal justice system. Additionally, the Centre for Victims of Sexual Assault (CVSA) is a one-stop, multidisciplinary centre for victims of rape or attempted rape, located at the Copenhagen Hospital in Denmark. There is a team of doctors, nurses, psychologists and counsellors on site. In 2002 restorative justice conferencing was introduced at the CVSA in response to victims' requests. The CIJ understands that the CVSA conducts approximately 16 conferences each year. For a discussion of the CVSA, see, Madsen and Pali, above n 66.

(ii) Pre-charge - referral process

Pre-charge referrals involve police advising victims of their option to pursue a restorative justice conference if their complaint is not being referred for prosecution. Victims who report to police, but whose case is not referred for prosecution, should have the option of a restorative justice conference, as providing for pre-charge, police referrals takes account of the significant attrition rate between cases reported to police and cases referred for prosecution. Project Restore is the only service that the CIJ is aware of that provides sexual offence restorative justice conferencing at this stage.²¹³

In discussions with Victoria Police and SECASA, it was noted that in Victoria, victims are provided an 'options talk' when they first report an incident of sexual assault. It is understood that the options talk is currently undergoing a formalisation process, and currently includes advising the victim that she may see a counsellor; have forensic samples taken; access support services; and report and provide a statement to a police specialist Sexual Offences and Child Abuse Investigation Team (SOCIT).

This options talk is tailored to all victims, including those reporting immediately after an assault and those reporting decades after an assault. In appropriate circumstances - and using appropriately trained and resourced personnel, such as police officers or counsellors - victims could be advised during the options talk that they can access a restorative justice process. An agreed upon document or information kit could be provided to victims outlining restorative justice conferencing.

Pre-charge referrals: further considerations

Decisions about referring a matter for prosecution, or providing a referral for restorative justice conferencing, can be influenced by negative attitudes towards victims of sexual violence, which potentially discourage many from reporting and pursuing a prosecution.²¹⁴ This is particularly so in relation to vulnerable victims, such as those with a cognitive impairment, and Aboriginal or Torres Strait Islander victims.²¹⁵ These communities already have comparably low reporting and prosecution rates, leading to a strong public interest in ensuring that police take complainants seriously.²¹⁶ Accordingly, appropriate standards and oversight protocols would need to be developed to ensure that police decision-making was consistent and transparent. To this end, further consultation with police and the community sector should occur prior to implementing restorative justice conferencing at this stage of the criminal justice process.

213 Project Restore receives approximately 10 per cent of their referrals from police in circumstances where the complaint is not proceeding to prosecution. During the stakeholder consultation they advised that they have had some cases where a conference occurs, and some years later the victim chooses to pursue the prosecution. On the whole, they report that the preparation, conference and post-conference support provide adequate justice redress to victims to the extent that they no longer wish to pursue a prosecution.

214 For an overview of these concerns, see generally, S Murray and M Heenan, 'Study of Reported Rapes in Victoria 2000 – 2003' (2006) Statewide Steering Committee to Reduce Sexual Assault, Office of Women's Policy, Department for Victorian Communities, 6; VLRC, above n 47, 109.

215 See generally, Lievore, above n 20, 53-60.

216 See generally, Murray and Heenan, above n 214; VLRC, above n 47.

Pre-charge referrals: the New Zealand Proposal

In its 2012 Issues Paper, *Alternative Pre-Trial and Trial Processes: Possible Reforms*, the New Zealand Law Commission developed a proposal for a diversionary process whereby victims who report to police can elect either to pursue a prosecution or a restorative justice conference.²¹⁷ Notably, this proposal does not contain a requirement that the case be unsuitable for a referral for a prosecution. This is distinct from the CIJ's proposal, which would only allow for a referral to restorative justice conferencing in cases where there would be no referral for prosecution.

If a referral to restorative justice conferencing were to occur and be pursued, the Law Commission proposed that cases be referred back to the police in three situations:

1. If information emerges that makes it unsuitable for the case to continue, such as if the offender discloses further offending against other victims, or more serious offending against the victim
2. If the victim or the offender opt out at any stage, and
3. If no agreed outcome can be reached, or the offender fails to participate in an acceptable way.²¹⁸

The Law Commission concluded that it is important to refer a case back to police to ensure public safety in the event of further offending, or more serious offending, coming to light. This would be irrespective of whether the victim wished to continue to pursue the conference, and would therefore act as a public safety protection.²¹⁹ The Law Commission's proposals have not yet been implemented.

Further consideration therefore needs to be given to whether there should be any situation which automatically results in a case being referred out of the restorative justice system and back to the original referral point.

2. Prosecution stage

Post-charge restorative justice conferencing at the prosecution stage is the most contentious of the proposed stages, posing a number of challenges. As far as the CIJ is aware, this option is not available in any adult jurisdiction in the world. Offering restorative justice conferencing at this stage is vexed because the criminal justice system is engaged, but the case has not been resolved by a court or prosecution agency.

At all other referral stages there is either no live prosecution, or instead, the prosecution has resolved through the offender pleading guilty or having been found guilty. By contrast, at the prosecution stage, restorative justice conferencing potentially substitutes for the criminal justice system as it acts as an alternative way of finalising the case. This means that the victim loses access, albeit consensually, to an outcome resolved through the traditional criminal justice system, providing that the conference is completed successfully.²²⁰

This raises a number of public policy questions given the community's expectation that offenders are publicly tried.²²¹ It also raises procedural challenges, given that offenders are highly unlikely to

217 New Zealand Law Commission, 'Alternative Pre-Trial and Trial Processes: Possible Reforms' (27 April 2012) Issues Paper, 348-52. At http://www.lawcom.govt.nz/sites/default/files/publications/2012/02/alternative_trial_processes_nzlc_ip30_-1.pdf. For a more fulsome discussion of alternative justice proposals in New Zealand, see, E McDonald and Y Tinsley (eds), *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, 2011).

218 New Zealand Law Commission, 'Alternative and Pre-Trial Trial Processes: Summary of Submissions to Consultation' (2012), 106-115. At http://www.lawcom.govt.nz/sites/default/files/publications/2012/12/alternative_trial_and_pre-trial_processes_submissions_summary.pdf.

219 Ibid.

220 MacAuley, above n 134, 5.

221 It should, however, be noted that restorative justice still includes punishment, and is not necessarily the opposite of retributive justice. For a discussion, see generally, Daly, above n 13, 63; K Daly, 'The punishment debate in restorative justice', in J Simon and R Sparks (eds), *The Sage Handbook of Punishment and Society* (Sage Publications, 2013), 356-374.

participate in a restorative justice conference in a fulsome and genuine way if there is an ongoing prosecution which, if they publicly admit to the offending, might result in a conviction, a term of imprisonment and/or registration.²²² Despite these challenges, restorative justice conferencing at this stage of the criminal justice process – with appropriate safeguards – has the potential to benefit victims, counter many of the limitations of the criminal justice system, and enhance the criminal justice system’s response to sexual assault.

Two Australian youth jurisdictions currently provide a restorative or diversionary process at this stage: the Children’s Court of Victoria²²³ and South Australia.²²⁴ It is not yet known what guidelines will be put in place in the ACT to govern the second phase of its restorative justice program, and whether referrals at the prosecution stage will be permitted in sexual offence cases.

(a) Offence criteria at the prosecution stage

Because there is a live, outstanding prosecution, the question of what types of offences are most suited, and whether any should be explicitly excluded, is most pressing at this stage. Stakeholders consulted had diverse and strong opinions about the types of matters which should be able to be diverted from the criminal justice system, variously believing that conferencing was only suited to historic offences; to intrafamilial offences; to lower level non-contact offences; or to offences involving a young offender. Some took the view that offences should be distinguished according to the level of violence and harm caused (maintaining that conferencing in cases of stranger sexual violence should not be permitted), while others thought that there should be no offences specifically excluded. Ultimately, tension lies between victims’ autonomy and any overarching public interest considerations. The following is a discussion of the main offence types which stakeholders identified as being appropriate for inclusion in a diversionary type program.

Non-contact, Magistrates’ Court matters

Some stakeholders felt that restorative justice processes were only suited to non-contact, or lower level offending, such as exposure type offences or low level indecent assault. This position was put on the basis that stakeholders considered the therapeutic benefits to be significant for these categories of offenders who tend to minimise their offending and perceive their offending to be victimless. Other stakeholders considered that restricting restorative justice initiatives to indictable offences triable summarily was the most strategic approach to take, given the politicised nature of sexual offending, and should be pursued first when introducing a restorative justice conferencing program.

Intrafamilial offending and historic cases

Many stakeholders considered that restorative justice processes could have the most impact for both the victim and the system if conducted in intrafamilial and historic cases. This recognises that, while there are a number of reasons why victims choose not to report to police, a significant impediment is likely to be the relationship between the victim and the offender.²²⁵ Stakeholder reasons for supporting conferencing in this type of case included:

- Many victims do not want the perpetrator/family member to be tried and incarcerated for a range of reasons including socio-economic factors
- There is often an ongoing relationship between the victim and offender

²²² Stakeholders consulted considered that offenders would be unlikely to participate if there was a risk of conviction and/or registration, and further reiterated the importance of guarantees and protections being in place at this stage. It should, however, be noted that participation in the NSW Cedar Cottage diversionary program did not result in incarceration, but was contingent on the offender pleading guilty and therefore being convicted of the offence.

²²³ Provisions in the *Children, Youth and Families Act 2005* (Vic) allow the Criminal Division of the Children’s Court of Victoria to stand a matter down and to make a Therapeutic Treatment Order.

²²⁴ Youth restorative justice conferencing can be used as a diversionary tool in youth sexual offence matters in South Australia. For an overview, see, Daly, Bouhours, et al, above n 114.

²²⁵ See generally, Lievore, above n 20, 5.

- The substantial evidentiary difficulties involved in prosecuting intrafamilial, historic cases
- The fact that these cases are most often contested and most often result in an acquittal
- The age and associated health problems of many offenders make the trial and any subsequent incarceration problematic
- The familial relationship lending itself more readily to a restorative justice encounter, and
- The need for broader family conferencing and healing stemming from the wider damage caused by the offending.

Where the offender perceived the victim to be consenting

Some stakeholders felt that a restorative justice conference presented an opportunity to correct a young offender's sexual misconceptions and to prevent future offending in cases involving what is often termed 'date rape'. Stakeholders considered that young, first time offenders in these cases are unlikely to reoffend, and also viewed the public interest in incarcerating these offenders as low. Likewise, some suggested that a successful prosecution was difficult to secure in these cases given that they involved 'perception on perception' type evidence. Conversely, other stakeholders raised concerns that this may trivialise young offenders engaging in non-consensual sexual relations, and that this category of offender should be held to account by the law on an equal basis.

Case-by-case

Many stakeholders felt that it was most appropriate to determine eligibility on the facts and circumstances of each case, and that an organic typology of appropriate cases would likely emerge through this process. This position was put on the basis that it was victim-centred, and also avoided public perceptions that a hierarchy of cases was being created. Further, it was put that this allowed for the reality that all types of offences and offenders exist on a spectrum from serious to less serious, and that proper clinical assessment of victim and offender eligibility and suitability should be the central concern.

The CIJ's view

The CIJ considers that a case-by-case approach is optimal. This recommendation is put for the following reasons:

- Distinguishing between types of offences risks suggesting that some forms of sexual violence are more serious than others
- Distinguishing between types of offences denies the subjective experience of victimisation and harm, which may not be proportionate to the nature of the offence, or common conceptions of offence seriousness
- Distinguishing between types of offences removes the autonomy of victims, and relies instead on system efficacy concerns (such as certain cases being difficult to prosecute), which is at odds with a victim-centred approach
- The assessment panel would have forensic professionals skilled at determining whether a case is suitable or not, and
- The CIJ proposes a referral model at the post-charge stage (elaborated below), which would only allow a referral after the OPP has assessed the merits of the case – this adds a public interest safeguard, ensuring that only matters where a successful prosecution is unlikely, are referred to restorative justice conferencing.

(i) Post-charge - referral process

Post-charge referrals involve a case that the police have referred to a prosecution agency subsequently being referred for a restorative justice conference prior to being finalised in court. This would require that the OPP, defence counsel and a judicial officer agree to refer the matter for a restorative justice conference. While there are significant benefits to avoiding a trial, providing victims with a more flexible response and encouraging offenders to take responsibility, important questions remain in relation to how such a scheme would be determined and administered. Given the concurrent public policy interest in pursuing prosecutions with good prospects of success, cases referred would ideally be those where a successful outcome in the conventional criminal justice system is unlikely.

The CIJ has endeavoured to develop a proposed referral method. Essentially, any referral for restorative justice conferencing at the post-charge stage should be transparent, subject to strict guidelines, and with ultimate decision-making powers residing with the judicial officer.

Proposed method

STAGE 1 – IDENTIFYING APPROPRIATE CASES FOR REFERRAL:

- The OPP/police prosecution unit should consult with the victim and determine whether a matter is eligible for a referral to a restorative justice conference. The primary factor in this initial determination should be the victim's wishes. In some instances, the OPP/police prosecution unit may consult with the victim after defence counsel raises the option of a restorative justice conference with the respective prosecuting agency.
- A previously designed and sector-wide agreed upon document should be provided to the victim explaining the process and outlining the respective advantages and disadvantages of proceeding to a restorative justice conference.
- If the police prosecution unit determines that a police matter is eligible for restorative justice conferencing, they should refer the matter to the OPP for final determination.
- The primary factor influencing any decision to refer a case for restorative justice conferencing would be the victim's wishes, ensuring that the victim is properly informed. A secondary, but important, public interest factor should be an assessment that a successful prosecution is unlikely.
- If the likelihood of a conviction is deemed low, and the victim wants to pursue restorative justice conferencing, a decision to raise the possibility of a referral with defence counsel and the court should be made. This decision by the OPP should be approved by a number of people such as the victim and OPP personnel, including the solicitor, the prosecutor, and the Director of Public Prosecutions.
- Similar to other guidelines developed by the OPP, guidelines should apply to identifying a case for a restorative justice conference. These guidelines should be published and publicly available.

STAGE 2 – REFERRAL AGREEMENT:

- If a case is identified as appropriate by the OPP, the OPP would seek agreement from defence counsel. The offender must take responsibility for the offending, but is not required to enter a plea of guilty.
- The OPP would raise the prospect of a referral as early as possible – ideally at mention/committal mention, or alternatively at any stage prior to the hearing/trial.
- While early identification, prior to witnesses giving evidence, is obviously preferred as the benefits of a restorative justice process are most powerful before parties become entrenched in the adversarial process, it must be recognised that often the strength of the prosecution case changes over the course of the trial (such that a successful prosecution might seem likely at the first mention, however less likely as the criminal justice process proceeds), as might the victim's wishes. Allowance should be made for this.

- Once defence consent has been obtained, the OPP should not directly refer a case to the assessment panel, but rather, should raise the prospect with the judicial officer. This means that it will ultimately be up to the judicial officer to make the referral for assessment to the assessment panel.

STAGE 3 – ASSESSMENT FOR SUITABILITY BY THE ASSESSMENT PANEL:

- With the consent of defence and the OPP, the judicial officer would consider the application and if appropriate, refer the case to the assessment panel.
- If the assessment panel found the case to be suitable, it would be up to the judicial officer to subsequently determine whether it was appropriate to adjourn the proceedings for the conference to take place. In this sense, the judicial officer would be the gatekeeper. Guidelines would need to be in place to support this decision. Further, the judicial officer could seek submissions from the parties and also hear expert evidence.
- If assessed as suitable and agreed upon by the judicial officer, the victim and offender specialists would develop a process to fit the needs of the individual case and give an indication of the length of time required for an adjournment. The prescribed legislative timelines relating to sexual offence cases would need to be considered and potentially extended at this point. Once agreed, the judicial officer would adjourn the matter for the requisite amount of time to allow the restorative justice conference to take place.

STAGE 4 – COMPLETION AND ASSESSMENT OF PARTICIPATION:

- After completion, the matter would return to court. If the accused genuinely participated and complied with the agreed outcomes, the OPP would discontinue the case. Many stakeholders felt that it should still be open to the court at this stage to make public comment about the wrongfulness of the offending behaviour.
- If the accused is deemed not to have participated genuinely or complied with the agreed outcomes, the prosecution could continue and the matter returned to the committal/trial stream.
- If the issue of genuine participation and compliance with the agreed outcome is in question, the judicial officer could hear submissions. Further, the judicial officer could be provided with access to the conference record to assist in her or his decision-making. If this was to occur, and the prosecution continued, the judicial officer would obviously be disqualified from presiding over the case.

Post-charge referrals: further considerations

Although the CIJ supports offering restorative justice conferencing at the post-charge, prosecution stage, there are a number of concerns and outstanding questions that would require consideration, including:

- Given that few sexual offence matters actually reach the prosecution stage in any event, whether the benefits of providing restorative justice conferencing should outweigh the public interest in keeping these cases in the system
- Both police and OPP stakeholders noted that victims are often highly emotional and potentially confused at this point in the process, and that many change their minds as to how they want their matter to progress. Consideration needs to be given, therefore, to what should happen if a victim changes her mind partway through the restorative justice conference, and
- Whether defence counsel should be conflicted out of the case if their client unsuccessfully participated in a conference, and when the matter returned to court, wanted to pursue a not guilty plea.

The CIJ's view

The CIJ considers that, in light of the concerns surrounding post-charge restorative justice conferencing, it should only be implemented as a third and final phase of any restorative justice program.

In many respects, this is how sexual offence restorative justice conferencing has emerged where it does already occur. Obviously different Australian jurisdictions already have diverse, existing restorative justice programs, and these will influence any implementation of a sexual offence restorative justice conferencing program. This proposed phased introduction is explained in the next section.

3. Post-prosecution stages: pre and post-sentence

At the post-prosecution stage, the case has been resolved either by the offender pleading guilty or being found guilty. Accordingly, restorative justice conferencing does not substitute for the criminal justice process but, rather, is additional to it. This is therefore one of the least contentious stages at which to offer sexual offence restorative justice conferencing, and should be one of the first sites of implementation.

(a) Offence criteria at the post-prosecution stages

Given that the prosecution has resolved at this stage, with the offender either awaiting sentence or having been sentenced, the CIJ sees little reason to exclude certain types of cases from restorative justice conferencing if the victim chooses this and if rigorous safeguards are in place.

(i) Pre-sentence - referral process

Pre-sentence restorative justice conferencing is relatively well developed in some Australian jurisdictions, most notably through the Forum Sentencing program in NSW.²²⁶ However, no jurisdictions currently provide for pre-sentence conferencing in sexual offence cases.

A pre-sentence referral to a restorative justice conference requires an offender first to agree to a plea of guilty. After a plea of guilty has been confirmed, either the defence or the prosecution could raise the prospect of a pre-sentence restorative justice conference with the other party. After the plea is entered, either party would then raise the prospect with the judicial officer, and she or he would consider the application. If the judicial officer agrees, a referral to the assessment panel would be made and if deemed suitable, sentencing adjourned to allow the conference to take place.

The outcome of the conference would then be taken into account as a mitigating factor at sentence. Factors taken into account can include:

- The offender's demonstration of remorse at the conference
- Statements of apology
- The offender participating in treatment
- An agreement being reached, and
- The offender complying with the agreement.²²⁷

This process could potentially also occur in select cases where an offender has been found guilty after a hearing/trial, such as where there was no denial of the sexual encounter, and the trial was run on the basis that the offender had a reasonable belief that the victim was consenting. In such cases, rigorous assessment and safeguards would be crucial.

²²⁶ Criminal Procedure Regulation 2010 (NSW) Div 3. Offenders must have pleaded guilty and be likely to receive a jail sentence. 'Serious offences' are excluded, including sexual offences.

²²⁷ For an example, see generally, Criminal Procedure Regulation 2010 (NSW) Div 3.

Notably, pre-sentence conferencing is the main form of sexual offence restorative justice conferencing in New Zealand. Project Restore was able to demonstrate its value in dollar terms by highlighting the savings resulting from offenders being sentenced to reduced sentences after having successfully participated in a restorative justice conference.²²⁸ Similar to the development in New Zealand, the success of a restorative justice program at this stage could form the basis for the expansion into other stages of the criminal justice process.

(ii) Post-sentence - referral process

Currently, post-sentence restorative justice conferencing for sexual offence matters is offered in a majority of Australian states and territories for all sexual offence matters, though without guiding legislation. On the whole, there are no offence restrictions. There is little available literature and few evaluations regarding these programs, but it is rare for concerns to be raised in this context, because both parties are consenting and the case has concluded. It remains essential, of course, that safeguards are in place to protect against any further victimisation.

Post-sentencing restorative justice conferencing involves an offender who is pre-release, on parole, or unconditionally released participating in a restorative justice conference with the victim/the victim's representative, or the victim's family. This is usually initiated through the victim/the victim's representative making a request through the respective Restorative Justice Unit within Corrective Services. Currently, it appears that each jurisdiction which offers this process has its own guidelines and assessment procedures.²²⁹

This form of conferencing generally takes place once a significant amount of time has elapsed since the offence. Its purpose is often to allay the concerns of victims or their families about reoffending and to answer outstanding questions in relation to the offence. In cases of intrafamilial offending, many offenders return home after being released, making therapeutic intervention to address unresolved trauma important.

Providing that the conference is victim-centred and that risk of harm to the victim is minimised through proper pre-conference preparation of both parties, and substantial safeguards, some stakeholders considered this to be a potentially appropriate and therapeutic process for offenders on Extended Supervision Orders,²³⁰ as a way of reducing risk and increasing victim empathy. This is obviously a contentious proposal which requires further consideration. Ideally, the expertise of the assessment panel could determine whether such cases were suitable.

In the future, post or pre-release conferencing could also form part of an offender's parole conditions, so as to create incentives for participation.

228 Project Restore, stakeholder meeting.

229 For example, post-sentence restorative justice conferencing is offered in NSW through the Restorative Justice Unit within Corrective Services. Conferencing only occurs if the offender takes responsibility for the offending. No offences are precluded. The Restorative Justice Unit has very few referrals each year. The reason for this may be that offenders have little incentive to participate, given that sentencing has already occurred. For more information, see Restorative Justice Unit, 'Victim Offender Conferencing' Corrective Services New South Wales. At http://www.correctiveservices.nsw.gov.au/_data/assets/pdf_file/0003/296760/victim-offender-conferencing-brochure.pdf.

230 *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic).

2.5 Implementing Restorative Justice Conferencing – Other Considerations

This section discusses other relevant considerations in relation to the implementation of restorative justice conferencing in sexual offence cases. These include:

- The extent to which admissions made during a conference should be immune from use as evidence in future prosecutions
- Conference outcome agreements and what should occur in the event of breakdown
- Whether there should be any record kept that an offender has participated in a restorative justice conference, to address public safety concerns
- The importance of funding and providing community-based treatment services
- The importance of consulting widely with Aboriginal and Torres Strait Islander communities and culturally and linguistically diverse communities, prior to implementing any restorative justice program
- Concerns about whether a restorative justice framework might lead to disparity of outcomes, and
- A proposal for the staged implementation of sexual offence restorative justice conferencing.

Admissions: safeguards and admissibility

Offender honesty, disclosure and accountability are essential to an effective restorative justice conference.²³¹ To this end, admissions to the offence in a conference setting are fundamental. Providing some form of exemption from prosecution for admissions made in relation to the relevant offence appears straightforward, given the need to ensure offender participation. The extent of this exemption, however, as well as how it applies to the different stages of the criminal justice system, is contentious and must be weighed against public policy concerns.

Many jurisdictions provide indemnity from prosecution to ensure bona fide and honest participation in a process predicated on disclosure. Examples of areas of the law where disclosures, either in a private or public setting, are protected from use in any subsequent legal proceedings include:

- Section 127 of the *Criminal Procedure Act 2009* (Vic) prohibits anything said or done in the course of a committal case conference from being admissible in any proceeding before any court or tribunal, unless there is prior agreement from all parties
- Section 61 of the *Coroners Act 2008* (Vic) empowers the Coroner to give a certificate indemnifying the witness against any self-incriminatory evidence given during an inquest from prosecutorial action
- Admissions made during a NSW Forum Sentencing pre-sentence conference are exempt from use in any civil matter or criminal prosecution²³²
- Admissions made pursuant to a Therapeutic Treatment Order in the Children's Court of Victoria are immune from use in any criminal prosecution against the child,²³³ and
- In the civil jurisdiction, s 24(A) of the *Supreme Court Act 1986* (Vic) excludes anything said or done during a referred mediation from being used in evidence in relevant civil proceedings.

231 See generally, H Zehr and H Mika, 'Fundamental Concepts of Restorative Justice', in E McLaughlin, R Fergusson, G Hughes and L Westmarland (eds), *Restorative Justice Critical Issues* (Sage Publications, 2003), 40-43.

232 New South Wales Government, 'Forum Sentencing Operating Procedure' (6 April 2011). At [http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/vwFiles/Operating_Procedure_June2011.pdf/\\$file/Operating_Procedure_June2011.pdf](http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/vwFiles/Operating_Procedure_June2011.pdf/$file/Operating_Procedure_June2011.pdf).

233 *Children, Youth and Families Act 2005* (Vic) ss 244 – 258.

The New Zealand approach

Interestingly, there are no explicit protections in the current New Zealand system for admissions made during a restorative justice conference. Project Restore explained that, to date, they have relied on existing protections relating to confidential counselling sessions.

In the New Zealand Law Commission's 2012 Issues Paper, *Alternative Pre-Trial and Trial Processes: Possible Reforms*, the Law Commission proposed that restorative justice conferencing conducted at the diversionary stage be privileged, but that information provided by the accused (such as in relation to other offending) could be used to trigger further investigation by the police – the outcomes of which could be used in a prosecution, although the admission itself would be inadmissible.²³⁴ The rationale behind this proposal is that the public interest in investigating sexual offences outweighs the offender's privilege. This may prove a disincentive to offender participation, and has not yet been implemented in New Zealand.

The CIJ's view

A number of questions remain in relation to admissions which require further consultation prior to the implementation of any restorative justice program. These include:

- If an offender makes admissions to offending that is unrelated to the subject of the conference, such as admissions in relation to other sexual offending, whether these should be able to be used as evidence in future prosecutions or even simply to trigger further investigations
- If an offender makes admissions that give rise to concerns that someone is at risk, whether the conference facilitator should be able to act on these concerns by making, for example, a child protection notification or a statement to the police
- If a conference breaks down at the post-charge stage and the matter returns to the trial list, whether it is unfair and potentially re-victimising to require a victim to remain silent in relation to the content of the conference under cross-examination; and whether admissibility of the conference in this scenario should be left to the judicial officer's discretion
- Whether anything less than a wholesale immunity from prosecution will discourage offenders from participating.

The CIJ's qualified recommendation is that wholesale immunity should apply to admissions made during a restorative justice conference, and that a similar provision to s 127 of the *Criminal Procedure Act 2009* (Vic) should codify the indemnity. This is consistent with the United Nations Principles and SCLJ Guidelines discussed earlier, and is put on the basis that the restorative justice conference should not be used as a quasi-investigative tool but that, instead, offenders should be encouraged to participate to the fullest extent possible after being properly assessed as both eligible and suitable.

The exception to this should be that a facilitator be allowed to make a report either to child protection authorities or to the police if they consider someone to be at immediate risk. The police or child protection authorities should then be able to act on this report, though the facilitator should not be compelled to give evidence in relation to the content of the conference. If this qualification is to apply, the offender must be advised of this qualification to immunity at the outset. Likewise, the extent of any immunity should be clearly codified, along with a definition of 'immediate risk'.

Parity concerns

An outstanding issue in relation to restorative justice conferencing at the post-charge and pre-sentence stages is that of parity, given that the process is invoked by an individual victim. The availability of restorative justice conferencing at these stages may lead to different outcomes for offenders who are in similar circumstances, and/or who committed similar offences, a difference arising out of victims' choices.

²³⁴ New Zealand Law Commission, above n 217, 50.

This issue of disparity is to some degree already present in a number of other criminal justice contexts. Certainly, Magistrates' Court diversion relies on victim consent, as does forum-sentencing in NSW. The subjective contents of victim-impact statements also have an impact on sentencing. Accordingly, the Centre considers that this issue is already tolerated within the criminal justice system, and should not discourage reform which may benefit some victims and ultimately spark wider systemic change.

Outcome agreements

A successful restorative justice conference results in an agreed outcome. Agreements often incorporate actions that will further address the harm caused, and might include:

- A letter of apology
- A safety plan (such as not contacting the victim and/or members of the victim's family)
- Ground rules around the conduct of future relationships
- Ground rules around disclosure of the offending to other family members
- A commitment to undertake community work
- An agreement to undergo treatment
- Financial support for the victim and the victim's family, and
- Reparations and compensation.

The conference facilitator should be charged with ensuring that outcome agreements are achievable, appropriate, are not demeaning and do not involve unreasonable punishments which are not proportionate to the offending.²³⁵ Likewise, there should be inbuilt mechanisms to account for changing circumstances, such as allowance for a payment to occur over a period of time. The outcome agreement should be acceded to by all conference participants. Further consideration is required in relation to how compliance with outcome agreements should be monitored.

In the event of a breakdown in the outcome agreement, the offender specialist should liaise with the offender to determine the cause of the breakdown. If necessary, the assessment panel, on advice of the offender specialist, should return the matter to the referring agency. If the referral occurred at the post-charge stage, the prosecution could then continue. If it occurred at the pre-sentence stage, failure to complete the outcome agreement could be taken into account as an aggravating factor in sentencing. Further consideration should be given to circumstances where there is partial compliance.

Consequences of participation

A number of questions persist in relation to whether conference participation, or the offender's acceptance of responsibility in that context, should be recorded and made available for certain public safety purposes. These include a Working With Children Check, registration on a sex offender register, and for child protection purposes. Another outstanding question is whether, if the offender reoffends in a similar manner, participation in the conference should be considered a prior matter for the purposes of sentencing. In the event of further offending, it would likely be inappropriate for counsel to represent their client as someone who has not offended before. These issues arise in relation to restorative justice conferencing occurring at the pre-prosecution and prosecution stages, but are not relevant to the post-prosecution stages, given that the offender has either pleaded guilty or been found guilty, thereby already giving rise to a criminal record.

The importance of maintaining community safety through mechanisms such as the sex offender register and the Working With Children Check must be weighed against the importance of creating incentives for participating in the restorative justice process. Offenders participating in

²³⁵ See, Standing Council on Law and Justice, above n 168, points 26-30.

pre-charge conferencing are unlikely to agree to be involved if their participation is recorded, given that there are otherwise no consequences and the offence remains unreported or unprosecuted. Accordingly, recording of participation at this stage would be unduly unfair to the offender, and the offender would likely choose or be advised not to participate.

In relation to post-charge conferencing, as discussed above, stakeholders were clear that offenders would be unlikely to participate if consequences such as a recording of guilt or registration ensued. Stakeholders noted that severe punishment and the stigmatising consequences of the current criminal justice response often act as a barrier to pleading guilty and accepting responsibility for the offending. Accordingly, it is particularly important at the post-charge stage that offenders are encouraged to participate in the restorative justice conference through appropriate incentives. However, there is a strong public safety argument to be made that authorities, such as child protection agencies, should be aware that an offender has accepted responsibility for sexual offending. The CIJ is aware that these are highly contentious issues which require further consideration and consultation.

The importance of treatment

The importance of treatment services being available and of them being made either a condition of entry into, or an outcome of, a restorative justice process is well understood.²³⁶ This is because a one-off restorative justice encounter is highly unlikely, in and of itself, to address an offender's long-term treatment needs but instead should be seen as a step along a continuum of rehabilitation.²³⁷ Accordingly, treatment prior to a restorative justice conference is ideal, as it is likely to shift an offender's patterns of denial and to increase his capacity for victim empathy. This will, in turn, facilitate a more open discussion, a more genuine apology, and a more therapeutic experience overall.

The reality, however, is that there is a paucity of publicly available, community-based (as opposed to prison-based) sexual offence treatment services, making it unlikely that all offenders would be able to access treatment prior to, or even after, restorative justice conferencing. Though some offenders may have the requisite means to pay for private services, it is likely that the majority will rely on public providers. This is why the CIJ has not recommended that treatment be a condition of entry into restorative justice conferencing.

Project Restore has addressed this issue by making it a condition of entry that an offender demonstrates a willingness to engage with treatment services. Further, Project Restore will actively advocate for offenders who are participating in their program to be given access to treatment.

Aboriginal and Torres Strait Islander groups and culturally and linguistically diverse communities

Restorative justice conferencing is grounded in a model that may, or may not, be suited to the myriad and diverse Aboriginal and Torres Strait Islander communities and cultures around Australia.²³⁸ Although this important issue is beyond the scope of this report, thorough and considered consultation is required before any programs are implemented to enable cultural relevance to be built into the model at the outset, rather than as an add-on at the end.²³⁹

236 This being so, it should be noted that there is contention surrounding whether sex offender treatment is effective, and what treatment practices are most effective. For a further discussion, see Gelb, above n 8, 33-39.

237 New Zealand Ministry of Justice, above n 181, 18.

238 Restorative justice advocates have often made claims to its 'indigenous roots'. This essentialist representation is well critiqued in Daly, above n 13, 55-79.

239 ACT Issues Paper, above n 184; For a useful discussion in relation to the utility of restorative justice conferencing in addressing sexual and family violence in Aboriginal communities, see, National Council to Reduce Violence against Women and their Children, above n 62, 106-107; H Blagg, 'Restorative justice and Aboriginal family violence: opening a space for healing in Restorative justice and family violence', in H Strang and J Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002), 191-205.

Further, lessons should be learned from the various jurisdictions already employing versions of restorative justice conferencing. Research reveals that Aboriginal young people have not benefited to the same extent as non-Aboriginal young people in relation to youth conferencing in a number of jurisdictions.²⁴⁰ This is for a range of reasons including police acting as gatekeepers; narrow eligibility criteria, such as excluding offenders with a prior criminal history; and because procedures are not culturally relevant.

In particular, the situation in Western Australia and the Northern Territory - where Aboriginal young people are channeled into the more punitive parts of the system, while non-Aboriginal young people benefit, to a greater extent, from restorative practices - should be avoided at the outset.²⁴¹ Work should be done during any program design phase to address issues, such as low participation or attendance rates, which have also been noted in other jurisdictions.²⁴²

It may be that an independent, Aboriginal operated restorative justice system is required.²⁴³ Such a service would provide Aboriginal people with a degree of control over justice responses that affect their communities, and could also take account of important social factors, such as high incarceration rates, high disability rates and drug and alcohol use.²⁴⁴ Alternatively, a specialist approach could be built into the main program, for example through the employment of appropriately trained Aboriginal staff, the employment and inclusion of Elders in the restorative justice process,²⁴⁵ and the adoption of other culturally relevant and inclusive initiatives.

Equally, extensive consultations with culturally and linguistically diverse (CALD) communities should also be undertaken to ensure that any restorative justice process is flexible enough to be culturally suited to a particular group.²⁴⁶ Again, a specialist approach may involve specifically training CALD facilitators, and the adoption of other strategies aimed at ensuring CALD communities benefit from the availability of restorative justice options.²⁴⁷

Phased implementation

The CIJ recommends that restorative justice conferencing be introduced in three phases. Similar to the ACT, all three phases could be provided for in an overarching legislative instrument, so that infrastructure could be put in place prior to the introduction of each phase.

1. Jurisdictions should first establish restorative justice units and implement non-sexual offence restorative justice conferencing in the adult jurisdiction. This will enable overarching structures to be put in place, and for a workforce of general conference facilitators to be developed. Consultation and consideration should occur regarding the offences to which general restorative justice conferencing should apply.
2. Jurisdictions should then establish the specialist gender violence teams and the assessment panel, and subsequently implement sexual offence restorative justice conferencing at the pre-prosecution and post-prosecution stages. This will allow for specialist workforce development, including victim and offender specialists and senior conference facilitators, cultural change and system growth.

240 See, for example, H Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Hawkins Press: 2008), chapter 4.

241 See, for example, C Cunneen, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30 *Australia and New Zealand Journal of Criminology*, 292-311; Blagg, above n 193, 481-501.

242 This has been a problem in South Australia, Western Australia and the ACT. See, ACT Issues Paper, above n 184, 15. Also, see generally, C Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin: 2001).

243 This was considered in the ACT Issues Paper, above n 184.

244 For a discussion of the importance of Indigenous ownership of justice processes, see Blagg, above n 240, chapter 10.

245 See, Victorian Law Reform Committee, above n 189, recommendation 53, xxvii.

246 Larson notes that 'further research is required to better understand the impact of restorative justice for racial and ethnic minority groups in Australia. See, Larson, above n 71, vii; For a discussion of sexual violence and the unique challenges in Aboriginal and Torres Strait Islander and culturally and linguistically diverse communities, see, N Taylor and J Putt, 'Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia' (September 2007) Australian Institute of Criminology, *Trends & Issues in Crime and Criminal Justice*, No. 345. At http://www.aic.gov.au/media_library/publications/tandi2/tandi345.pdf.

247 Victorian Law Reform Committee, above n 189, recommendation 54, xxvii.

3. Finally, jurisdictions should introduce post-charge, prosecution stage sexual offence restorative justice conferencing. In light of the concerns and contention surrounding post-charge restorative justice conferencing, this should only be implemented as the final phase of any restorative justice program once there is developed infrastructure and a pool of skilled and specialist conference facilitators.

This approach follows the way in which New Zealand and, to some degree, the ACT, have both introduced sexual offence restorative justice conferencing.

Importantly, monitoring and evaluation should be built in to the program design so that the system is responsive to the evidence that emerges, and so that more information and data is generally available in relation to sexual offence restorative justice conferencing. The SCLJ Guidelines provide useful criteria against which general restorative justice conferencing should be evaluated.²⁴⁸ These could be developed and adapted for sexual offence restorative justice conferencing.

2.6 Recommendations

1. All jurisdictions should develop a restorative justice statutory framework. This will ensure consistency, accountability and transparency. Legislation should not be overly prescriptive, in recognition of the importance of flexibility and case-by-case assessments.
2. Restorative justice conferencing principles and guidelines should be developed. Guidelines should be both general and specific to sexual offending, and be based on the two-tiered guidelines developed in New Zealand.
3. Restorative justice units should be introduced within respective state and territory Departments of Justice to oversee all restorative justice conferencing programs.
4. Specialist gender violence teams should be incorporated within each restorative justice unit to oversee the administration of sexual offence restorative justice conferencing.
5. Assessment panels should be established to determine suitability for sexual offence restorative justice conferencing on a case-by-case basis. The assessment panels should comprise forensic mental health professionals, representatives of the OPP, senior restorative justice conference facilitators, and victim and offender specialists. The specialist gender violence team should coordinate and support the assessment panel.
6. A workforce of victim and offender specialists, modelled on New Zealand's Project Restore program, should be developed. A victim and offender specialist should be assigned to each case deemed suitable by the assessment panel.
7. Further consultations should be held with forensic mental health professionals, the justice sector and the gender violence sector to explore whether decisions of the assessment panel should be reviewable.
8. Two sets of minimum restorative justice facilitator competencies should be developed, the first relating to general restorative justice conference facilitators and the second relating to sexual offence restorative justice facilitators. These should be modelled on the core competencies devised in New Zealand. Associated facilitator specialist accreditation processes should also be developed.
9. Jurisdictions should adopt a two-stage process for determining whether a sexual offence case is appropriate for a restorative justice conference: first, eligibility and second, suitability.
10. Basic eligibility criteria should be developed, with no specific offence or offender exclusions.

²⁴⁸ Standing Council on Law and Justice, above n 168, point 31.

11. Further consultations should be conducted in relation to whether there should be a minimum age for victims to participate in sexual offence restorative justice conferencing.
12. Ten years should be the minimum age for offender participation, in appropriate cases.
13. Opportunities for referral to restorative justice conferencing should be provided at all stages of the criminal justice system.
14. Further consultation should take place with police, the OPP, the legal profession and counsellors in relation to developing either oral or written information about restorative justice conferencing that can be given to victims during the 'options talk' and at the prosecution stage.
15. Referrals for restorative justice conferencing made by police at the pre-charge stage should only be permissible in those cases not being referred for prosecution (and where the eligibility criteria are met), with proper oversight of police discretion.
16. The OPP should only be permitted to suggest a restorative justice conference at the prosecution stage in cases where a successful prosecution is unlikely. Any such decision should be made according to published guidelines and by a number of OPP personnel.
17. There should be judicial oversight of any proposed referral to restorative justice conferencing made at the post-charge prosecution stage.
18. Subject to further consultation and consideration, a wholesale immunity should apply to admissions made during a restorative justice conference. The exception to this is that a facilitator should be permitted to make a report either to child protection or to the police if they consider someone to be at immediate risk. If this qualification is to apply, the offender must be advised of this qualification at the outset. Any immunity should be explicit and codified.
19. Further consultation should occur in relation to whether the fact that an offender has participated in and completed a conference should be recorded and able to be used for relevant public safety purposes.
20. A comprehensive consultation process should be undertaken with Aboriginal and Torres Strait Islander communities and a range of community organisations in relation to the justice needs of these communities. This should occur prior to the implementation of any restorative justice model to ensure that the perspectives and needs of Aboriginal and Torres Strait people are accounted for early in the design phase.
21. A comprehensive consultation should be undertaken to ensure appropriate application of restorative justice conferencing to culturally and linguistically diverse communities.
22. More community based sexual offending treatment services should be funded and linked in with restorative justice programs so that reoffending and rehabilitation can be properly addressed.
23. Restorative justice conferencing should be introduced in three phases, relating to type of offending and stage of the criminal justice process:
 - First: non-sexual, general adult restorative justice conferencing at all stages of the criminal justice system
 - Second: sexual offence restorative justice conferencing at all stages of the criminal justice system, except the post-charge stage, and
 - Third: post-charge sexual offence restorative justice conferencing.
24. Ongoing monitoring and evaluation of the restorative justice program should be a core function of the restorative justice units and specialist gender violence teams.

3 - Chapter 3: Specialist and Problem-Solving Courts

Therapeutic justice initiatives are an increasingly prominent feature of the criminal justice system. While the restorative justice approaches discussed in Chapter 2 represent additional options to those currently available in the criminal justice system, therapeutic justice developments primarily aim to improve and build upon the operation of existing processes.

In the context of refining the law's response to sexual offending, therapeutic justice practices such as problem-solving courts, specialist courts, specialist practices, re-entry courts and Circles of Support and Accountability – all initiatives examined in this chapter – are important developments. Informed by research and operational expertise, these initiatives provide benefits to victims by improving court processes; benefits to offenders by focusing on their rehabilitative needs; and meet broader objectives of reducing offending. Even though many of the initiatives discussed in this chapter are offender focused, treating, rehabilitating, and reintegrating offenders is central to a safer community. Such initiatives are therefore a vital inclusion in any suite of justice responses designed to address sexual offending.

Following a broader discussion of therapeutic justice principles, this chapter examines specific therapeutic responses to sexual offending, as listed above. The chapter then considers the benefits and challenges of therapeutic justice practices, recommending that they be tailored for implementation in all jurisdictions. Six general recommendations are made in terms of applying therapeutic justice practices at different points in the conventional criminal justice system. The recommendations are broadly framed and are intended for use and adaptation across a range of jurisdictions.

Ultimately, the CIJ sees a number of opportunities for developing and further embedding therapeutic justice practices within the conventional criminal justice system to improve the justice system's response to sexual offending. Importantly, the CIJ's view is that any holistic and specialist approach to sexual offences should support and accommodate both restorative justice initiatives and therapeutic justice practices.

3.1 Introduction – The Broader Principles of Therapeutic Justice

Therapeutic justice is an interdisciplinary approach which uses both a social and a psychological lens to consider the law and legal systems.²⁴⁹ Therapeutic justice views the law as having both positive and negative, or therapeutic and anti-therapeutic, consequences for those who engage with it.²⁵⁰ First developed in the 1980s in relation to mental health laws, therapeutic justice has since expanded to numerous other areas of legal practice.²⁵¹

Therapeutic justice initiatives develop and promote the positive impacts of legal intervention, while aiming to reduce its negative impacts.²⁵² This is achieved through the reshaping of legal

249 King, Freiberg et al, above n 16, 26. For a good overview of the development of therapeutic justice, see, D Wexler, 'Two Decades of Therapeutic Jurisprudence' (2008) 24 *Touro Law Review*, 17-29; B Winick, 'The Jurisprudence of Therapeutic Jurisprudence' (1997) 3(1) *Psychology, Public Policy and the Law*, 184-206.

250 See, for example, D Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990); D Wexler and B Winick, *Law in a Therapeutic Key: Recent Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996); D Wexler, 'Two Decades of Therapeutic Jurisprudence' (2008) 24 *Touro Law Review*, 17-29.

251 Wexler first used the term in 1987 in a paper presented to the National Institute of Mental Health. See D Wexler, 'Two Decades of Therapeutic Jurisprudence' (2008) 24 *Touro Law Review*, 17-29; D Wexler, 'Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence' (1992) 16(1) *Law & Human Behavior*, 27-38.

252 King, Freiberg et al, above n 16.

rules, procedures and the behaviour of legal professionals to refocus on the psychosocial needs of court users while being mindful not to compromise fundamental legal rights.²⁵³ To this end, Bruce Winick, one of the founders of therapeutic justice, argues that the:

*...law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness.*²⁵⁴

Given that current legal responses to sexual offence matters are remarkably counter-therapeutic for many victims and offenders, therapeutic justice principles have the potential to address some of the existing limitations in the way that sexual offence matters are currently dealt with.²⁵⁵

In relation to the impacts of the current criminal and adversarial process on offenders, Professor Michael Perlin describes multiple ways in which the adversarial court process entrenches the distortions in thinking that are apparent in many sexual offenders.²⁵⁶ Stakeholders consulted by the CIJ similarly observed that lengthy custodial sentences and inclusion on sex offender registers can act as a disincentive for offenders to take responsibility for their wrongdoing, hoping instead that pleading not guilty will result in an acquittal at trial. This, in turn, compounds offenders' tendency towards denial and potentially undermines subsequent willingness to engage genuinely in treatment and rehabilitation. By contrast, problem-solving approaches, discussed below, have the capacity to mitigate against these anti-therapeutic consequences, while specialist courts and practices, also discussed below, can likewise mitigate against the anti-therapeutic consequences of the conventional criminal justice system for victims.

In general, problem-solving, specialist and re-entry courts operate within the conventional criminal justice system, yet are underpinned by therapeutic justice principles.²⁵⁷ They employ specific strategies to address entrenched problems particular to an area of law, and also to achieve broader public policy and health objectives.²⁵⁸ The terms 'specialist courts' and 'problem-solving courts' are occasionally used interchangeably in relevant literature, but will be distinguished for the purposes of this discussion.

3.2 Specialisation

This section considers the value of specialist courts and specialist practices respectively within existing criminal justice processes. Notable dedicated specialist sexual offence courts exist in the United States state of New York and in South Africa. Australian jurisdictions have not established specialist sexual offence courts but have, to varying degrees, implemented specialist practices, such as sex offence lists, within existing court structures. Victoria is the most developed of Australian jurisdictions in this regard, and the specialist practices employed in that state have yielded a number of significant improvements.

253 H Cucolo and M Perlin, 'Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration' (2012) *Temple Political and Civil Rights Law Review*, 1-78, 59.

254 B Winick, 'A Therapeutic Jurisprudence Model for Civil Commitment', in K Diesfeld and I Freckelton (eds), *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, 2003), 26.

255 King, Freiberg et al, above n 16, 37.

256 Cucolo and Perlin, above n 253, 63-68.

257 See generally, B Winnick, 'Therapeutic Jurisprudence and Problem Solving Courts' (2002) 30(3) *Fordham Urban Law Journal*, 1055-1103.

258 See generally, King, Freiberg et al, above n 16.

An overview of specialist courts

*“General” courts are courts exercising general jurisdiction over a wide range of matters. “Specialist court” is an apt description of a court with jurisdiction limited to hearing and determining matters in a confined area of the law or a limited field of human activity.*²⁵⁹

Specialist courts are designed to deal with a specific area of law and to meet the unique needs of the parties concerned.²⁶⁰ Specialist courts recognise that processes are equally as important as outcomes, and that challenging areas of law require professional expertise, as well as specific procedures.²⁶¹ The main features of specialist courts are:

- Court processes which are tailored to a specific area of law
- Court processes which are accessible and which reduce delay
- Court processes which respond to particular social policy concerns
- Court processes which draw attention to a specific area of law that would not receive the same attention in a generalist court
- Judicial officers with specialist knowledge of the relevant area of law
- Legal professionals with expertise in the relevant area of law, and
- Co-location of specialist social and support services.

Specialist courts can function both as adjudicative and sentencing courts. Children’s Courts and even the Family Court are broad, early examples of specialist courts in the Australian context. Specialist courts are not directly founded on therapeutic justice principles, but do have clear therapeutic elements, such as ensuring that processes are tailored and responsive to the needs of court users.

Specialist sexual offence courts

As noted above, specialist sexual offence courts exist in both the state of New York and in South Africa. In addition to the general features of specialist courts highlighted above, the unique features of specialist sexual offence courts can be summarised as:

- A streamlined case management approach from bail/remand to conviction
- Court personnel specifically trained to respond appropriately to sexual violence cases
- Specific sexual offence victim services, and
- A team approach whereby the judicial officer, prosecutor, defence lawyer, corrections officer, community workers and treatment providers work together to ensure that the process is robust, therapeutic and fair to all parties involved.²⁶²

259 Justice M Moore, ‘The Role of Specialist Courts - an Australian Perspective’ (2001) *Federal Judicial Scholarship*. At <http://www.austlii.edu.au/au/journals/FedJSchol/2001/11.html>.

260 For an overview of the pros and cons of specialist courts in Australia, see *Ibid*; for an international overview, see, Department for Constitutional Affairs, ‘Review of the Effectiveness of Specialist Courts in other Jurisdictions’ (May 2005). At http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/research/2005/3_2005.pdf.

261 Moore, above n 259.

262 See generally, A Cossins, ‘Alternative Models for Prosecuting Child Sex Offences in Australia’, National Child Sexual Assault Reform Committee (University of New South Wales, 2010), 291-293; J Weber, ‘Domestic violence courts: Components and considerations’ (2000) 23 *Journal of the Center for Families, Children and the Courts*, 23-36.

New York

Since 2005, 'Sex Offense Courts' have been in operation throughout many counties in New York State.²⁶³ The mission of New York State Sex Offense Courts is to promote justice by providing a comprehensive approach to case resolution; increasing sex offender accountability; enhancing community safety; and ensuring victim safety while protecting the rights of all litigants.²⁶⁴

New York's Sex Offense Courts are not designed to provide alternative, community-based dispositions to incarceration. Rather, they are geared towards improving 'consistency, coordination, community collaboration and accountability.'²⁶⁵ In other words, the focus of this model is to improve the effectiveness of the existing system, rather than to provide an alternative to the conventional justice system.²⁶⁶

These courts are unique in that they are a combination of problem-solving and specialist courts, and have both adjudicative and sentencing functions. They also operate as re-entry courts by supervising offenders upon their release from prison. In this regard, they can be described as holistic, responding both to victims' justice needs, and to offenders' rehabilitative needs, from start to finish of the criminal justice process.

The courts have specialist police, prosecutors, judicial officers, defence counsel, probation and parole officers, and have strong links with the community sector to facilitate victim access to support services.²⁶⁷ The Sex Offense Courts operate to best practice standards, which include:

- Providing victims with updated information about the progress of the case
- Dedicated, specialist personnel
- Supervising offenders throughout the process including if an offender is on bail, serving a community-based disposition, or post release
- Working closely with service providers
- Streamlined and efficient case listing, and
- Ensuring that all personnel have regular, specialist training.²⁶⁸

Cases appropriate for referral to a Sex Offense Court are identified early at arraignment and allocated to a court. Offenders do not need to consent to be processed through the Sex Offense Courts. All felony-level²⁶⁹ sexual offences that would result in registration upon conviction are transferred to a Sex Offense Court.²⁷⁰ The court then handles all subsequent appearances and the same specialist judicial officer usually presides over the case throughout its duration.

If the offender pleads guilty or is found guilty, special conditions are imposed as part of a sentence, with treatment programs and polygraph testing available upon release to reduce risks of recidivism, as well as dedicated services available to support victims.²⁷¹ The Sex

263 For an overview, see, R Thomforde-Hauser and J Grant, 'Sex Offense Courts: supporting victim and community safety through collaboration' (2010) New York Centre for Court Innovation. At http://www.courtinnovation.org/sites/default/files/Sex_Offense_Courts.pdf.

264 K Herman, 'Sex Offense Courts: the next step in community management?'. At <http://www.courtinnovation.org/research/sex-offense-courts-next-step-community-management>.

265 Thomforde-Hauser and Grant, above n 263, 4.

266 Ibid.

267 Daly, above n 3, 14.

268 Herman, above n 264.

269 In America, criminal offences are classified as a felony, misdemeanor and infraction. Felonies are the most serious and generally offences with a maximum penalty of one year or more in custody are classified as felony offences. The CIJ understands that many sexual offenders in America are sentenced to a community-based disposition, as opposed to incarceration. See, Herman, above n 264.

270 Herman, above n 264.

271 Ibid; New York State Unified Court System, 'Sex Offense Courts: Community Supervision'. At https://www.nycourts.gov/courts/problem_solving/so/mission_goals.shtml.

Offense Courts have strong relationships with sexual offender treatment providers and work collaboratively to maximise the chance of successful rehabilitation.

The benefits of these courts are said to be the capacity to identify and respond swiftly to non-compliance; the effect of ongoing monitoring not only on offender behaviour but on community perceptions of safety; and a reduction in trauma for victims as a result of streamlined case management. The CIJ is not aware of any formal evaluations that have been conducted concerning these courts to date, although the Center for Court Innovation in New York has been collecting data about their operation to inform continuous improvement and future research about their effectiveness.²⁷²

South Africa

South Africa pioneered the development of victim-centred, specialist Sexual Assault Courts.²⁷³ First established in 1993 and operating within the conventional criminal justice system, the establishment of the courts was said to be concerned with 'a shift from a prosecution-driven judicial system to a more victim-centred approach.'²⁷⁴

In general, these courts are expected to feature specialist trained professionals; specialist equipment for the giving of evidence; expedited procedures; private waiting rooms; coordinated service provision across the justice and sexual violence sector; and a specialist program to assist victims to prepare for court, as well as with their post-court needs. The key objectives of the Sexual Assault Courts are:

- To reduce re-victimisation by adopting a victim-centred approach to prosecution
- To establish a coordinated and integrated approach between agencies in the justice and sexual violence sectors, and
- To improve the investigation and prosecution of sexual offence matters, and to increase reporting and conviction rates.²⁷⁵

By 2005, 74 of these courts were operational around South Africa, with a number of studies conducted during the early 2000s indicating substantially increased conviction rates.²⁷⁶ However, evaluations also found that re-traumatisation of victims during court processes was not generally reduced,²⁷⁷ while other challenges included the lack of a dedicated budget resulting in varying levels of resourcing, particularly in remote areas; the inconsistency of available training; and the lack of provision for monitoring and evaluation. As a result of these and other concerns, most of the Courts were defunded.²⁷⁸

However, South Africa's high levels of sexual assault prompted calls for reconsideration and a task force was commissioned to examine the re-establishment of the Courts. Their re-instatement was recommended, albeit with a number of improvements, including a comprehensive supporting policy framework and enabling statutory provision.²⁷⁹

272 Thomforde-Hauser and Grant, above n 263, 8.

273 For an overview, see, S Walker and D Louw, 'The South African court for sexual offences' (2003) 26(1) *International Journal of Law and Psychiatry*, 73–85.

274 *Ibid.*

275 Cossins, above n 262, 294.

276 Daly, above n 3, 14; Cossins, above n 262.

277 S Walker and D Louw, 'The South African court for sexual offences: Perception of the victims of sexual offences' (2005) 28(3) *International Journal of Law and Psychiatry*, 231–245; S Walker and D Louw, 'The South African court for sexual offences: Perception of the families of victims' (2005) 28(4) *International Journal of Law and Psychiatry*, 418–429.

278 R Sanchez, 'South Africa Reinstates Rape Courts' (14 August 2013) *Globalpost*. At <http://www.globalpost.com/dispatches/globalpost-blogs/rights/south-africa-reinstates-rape-courts>.

279 Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters, 'Report on the re-establishment of sexual offences courts' (August 2013) *Department of Justice and Constitutional Development*, 14. At <http://www.justice.gov.za/reportfiles/other/2013-sxo-courts-report-aug2013.pdf>.

An overview of specialist practices

While Australia has no specialist sexual offence courts, most jurisdictions have specialist court practices dedicated to responding to the unique nature of sexual violence cases. Specialist practices include specific sexual offence court lists with specialist judges and magistrates; specific witness procedures for the giving of evidence; and the provision of specialised support staff. The next section examines the specialist sexual offence practices adopted in the Victorian context.

Victoria's specialist sexual offence practices

Victoria has led the way in developing a range of sexual offence specialist practices. This has largely been in response to recommendations made by the 2004 Victorian Law Reform Commission's *Sexual Offences: Law and Procedure, Final Report*.²⁸⁰ Victoria's specialist practices include a number of innovations which have ensured that investigative and legal personnel are appropriately skilled; that court and case management systems are nuanced, efficient and responsive; and that victims are provided with specialist services to ensure a better experience of the adversarial process.

While specialist practices do not themselves provide additional justice options to victims, they can significantly improve experiences of the existing system, potentially making the principal option of pursuing a prosecution more appealing to victims who might not otherwise report an offence.²⁸¹ Importantly, in the context of this Report, specialist practices employed in the early stages of the court process could operate in conjunction with post-charge restorative justice conferencing, as a specialist magistrate would likely be more attuned to the needs of the parties and any opportunities for referral to restorative justice conferencing.²⁸²

Victoria's specialist practices include:

- Vulnerable witness facilities, including remote witness areas, CCTV and witness support services²⁸³
- A specialist sexual offence prosecution team within the OPP, with appropriately trained and specialist lawyers who are familiar with relevant legislative timelines, the dynamics of sexual violence and the associated importance of efficient and respectful justice processes²⁸⁴
- A recently developed specialist sexual offence defence team within Victoria Legal Aid's criminal law practice, with appropriately trained lawyers who work with specialised defence counsel
- Specialist sexual offence lists in both the Magistrates'²⁸⁵ and County Courts,²⁸⁶ featuring specifically trained magistrates and judges. These lists provide case management throughout and use skilled triaging, whereby cases appropriate to proceed as a plea do so as early as possible, while any pre-trial/hearing issues are identified and addressed to ensure that the trial/hearing runs without delay

280 VLRC, above n 47, 183-184.

281 See, for example, Success Works, above n 57.

282 For a discussion of the overlap between therapeutic and restorative justice, see J Braithwaite, 'Restorative Justice and Therapeutic Jurisprudence' (2002) 38(2) *Criminal Law Bulletin*, 244-262.

283 Special arrangements for adult victims include giving evidence from another location by CCTV; using screens in the courtroom to ensure that the accused person is not visible; allowing a support person to be present; and closing the courtroom to the general public. For an overview, see, Office of Public Prosecutions Victoria, 'Witnesses and Victims'. At <http://www.opp.vic.gov.au/Witnesses-and-Victims/Sexual-Assault>.

284 Office of Public Prosecutions Victoria, 'Specialist Sex Offences Unit'. At <http://www.opp.vic.gov.au/Our-Work/Specialist-Sex-Offences>.

285 *Magistrates Court Act 1989* (Vic) s 4R. See also, Magistrates' Court of Victoria, 'Sexual Offences List'. At <https://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/sexual-assault/sexual-offences-list>.

286 County Court of Victoria, above n 42, 12; For a more general explanation of the function of the County Court Sex List, see County Court of Victoria, 'Annual Report 2012-2013', 12. At http://www.countycourt.vic.gov.au/sites/default/files/County%20Court%20Annual%20Report_2011-2012.pdf.

- Multi-disciplinary centres in a number of locations throughout Victoria, to encourage reporting by ensuring that the first point of contact with the system following a sexual assault incident is as coordinated and supportive as possible.²⁸⁷
- Prohibitions on the direct cross-examination of victims by offenders, and other rules which prohibit inappropriate cross-examination by counsel,²⁸⁸ and
- Updated legislative provisions to meet the special needs of witnesses, such as child witnesses and witnesses with a cognitive impairment, including strict timelines and providing for the pre-recording of evidence.²⁸⁹

Whereas such reforms were not directly intended to increase conviction rates, nor have they necessarily achieved any such increase, an evaluation has found that the specialised processes introduced have improved victims' experience of the criminal justice system.²⁹⁰ Stakeholders directly involved in the Victorian specialist lists further noted a marked difference in the way that sexual offence matters proceed, anecdotally reporting that the processes have improved procedures, timelines and trial outcomes.²⁹¹

While Victoria's specialist practices have certainly yielded positive results and should be embedded throughout other Australian jurisdictions, additional reforms should also be considered. In their 2010 *Family Violence – Improving Legal Frameworks* joint summary consultation paper,²⁹² the Australian and the NSW Law Reform Commissions made a number of recommendations for improving the criminal justice system's handling of sexual offence matters, with a specific focus on reducing attrition rates.²⁹³

Dr Cossins has also published a number of papers on the topic of child sexual abuse, arguing for improved jury directions;²⁹⁴ specialist sexual abuse education sessions for practitioners, the judiciary and jury members to counter rape myths;²⁹⁵ the inclusion of expert child sexual abuse witnesses in trial proceedings;²⁹⁶ and improved and restricted cross-examination practices in relation to child witnesses.²⁹⁷

Although not the focus of this report, the CIJ strongly supports further consideration of the recommendations of both the Australian and New South Wales Law Reform Commissions and Dr Cossins,²⁹⁸ and views reforms to the conventional criminal justice system to be crucial if the justice system is to respond to victims of sexual assault more effectively.

287 Multi-disciplinary centres enable a specialist response to sexual offences and child sexual abuse. The centres co-locate child protection practitioners, Victoria Police Sexual Offences and Child Abuse Investigation Teams and Centres Against Sexual Assault while also having links to the Victorian Institute of Forensic Medicine (and the paediatric equivalent).

288 *Criminal Procedure Act 2009* (Vic) s 356.

289 *Criminal Procedure Act 2009* (Vic) ss 369–370. Adult complainant committals usually take place within six months of the charges being filed. Child or cognitively impaired complainant committals usually occur within five months of the charges being filed. Trials in adult matters usually take place within about nine months after the committal hearing. Trials in child or cognitively impaired complainant matters take place within three months of the committal hearing.

290 Success Works, above n 57, 90 and 115.

291 Laura McDonough and Brett Sonnet, stakeholder consultations.

292 At <http://www.alrc.gov.au/sites/default/files/pdfs/publications/Collated%20summary%20paper.pdf>.

293 ALRC and NSWLRC Final Report, above n 207.

294 J Goodman-Delahunty, A Cossins and K O'Brien, 'A Comparison of Expert Evidence and Judicial Directions to Counter Misconceptions in Child Sexual Abuse Trials' (2011) 44 *Australian and New Zealand Journal of Criminology*, 196-217.

295 A Cossins, 'Cross-Examining the Child Complainant: Rights, Innovations and Unfounded Fears in the Australian Context', in J Spencer and M Lamb, *Children and Cross-examination: Time to Change the Rules?* (Hart Publishing, 2012).

296 A Cossins, 'Expert witness evidence in sexual assault trials: questions, answers and law reform in Australia and England' (2013) 17(1) *The International Journal of Evidence & Proof*, 74-113.

297 A Cossins, 'Alternative Models for Prosecuting Child Sex Offences in Australia', *National Child Sexual Assault Reform Committee* (University of New South Wales, 2010).

298 It should be noted that Victoria is also undergoing a reform process with respect to sexual offences, specifically focusing on the definition of consent. See, Victorian Department of Justice, above n 43.

The CIJ's View: specialist courts versus specialist practices

Rather than expanding specialist sexual offence practices within existing mainstream courts, some academics and legal professionals have argued that Australian jurisdictions would benefit from the establishment of designated specialist sexual offence courts.²⁹⁹

Certainly, both the South African and New York specialist courts described above provide a useful example of the application of therapeutic justice principles to improve outcomes for victims and offenders. Consideration would need to be given, however, to whether Australia's context warrants a similar approach, or whether further development of specialist practices within conventional courts is to be preferred.

Further, given that sexual offence cases occupy close to one third of many County/District Courts' listed matters and close to half of their listed trials, it is perhaps unrealistic to suggest that such a large proportion of the caseloads of these courts be severed into a separate court. However, this should not preclude consideration of implementation of some form of specialist court, for example, only in relation to certain categories of offending, such as child abuse cases.³⁰⁰

Benefits to victims and meeting broader policy objectives of reduced offending should be the paramount concerns of any reform in this area. The CIJ therefore considers that each approach should be carefully examined by governments across each Australian jurisdiction to identify the most appropriate path for improving their respective justice system's response to sexual offending. The CIJ commends the holistic approach taken by the New York Sexual Offense Courts and considers there to be more opportunity for combining the approaches of specialist, problem-solving and post-release courts, to provide a comprehensive and systemic justice response to victims and offenders.

3.3 Problem-Solving Courts

Problem-solving courts have gained significant traction in the Australian context and have a legislative basis in all Australian jurisdictions. Drug and alcohol courts, mental health courts and domestic violence courts are all Australian examples of problem-solving courts.

Currently, however, Australia has no problem-solving courts that operate in relation to sexual offending. The following discussion provides an overview of problem-solving courts generally, and then considers the applicability of these to sexual offending. The relevant proposals of the New Zealand Law Commission's Issues Paper, *Alternative Pre-Trial and Trial Processes: Possible Reforms*, are also discussed. Ultimately, the CIJ considers problem-solving courts as having direct benefit in the Magistrates'/Local Court jurisdiction, and as being capable of complementing specialist practices. It explores, however, some of the challenges associated with their applicability to higher court contexts.

An overview

As with specialist practices and courts, therapeutic justice principles also underpin problem-solving courts.³⁰¹ Problem-solving courts adopt a multidisciplinary, therapeutic approach to addressing the rehabilitation of offenders.³⁰² By extension, they also aim to reduce reoffending rates by tackling the underlying social causes of criminal behaviour.

Problem-solving courts take a holistic view of rehabilitation, not simply seeing it as an absence of reoffending, but rather as 'the ability to lead a productive, harmonious and fulfilling life in the

299 See generally, A Cossins, 'Prosecuting Child Sexual Assault Cases: To Specialise or Not, That is the Question' (2006) 18 *Current Issues in Criminal Justice*, 318-342.

300 See generally, Cossins, above n 262.

301 King, Freiberg et al, above n 16, 29.

302 Ibid.

community.³⁰³ Contact with the criminal law is viewed as symptomatic of more entrenched social issues, which, if rectified, will potentially remove the criminality.³⁰⁴ In this sense, problem-solving courts are offender, rather than victim, focused. Obviously, however, the goal of reducing reoffending has broader social benefits.

The main features of problem-solving courts are:

- A focus on identifying the causes, as well as the consequences, of a crime
- The involvement of a multi-disciplinary team of social service providers, rather than just legal participants
- The involvement of judicial officers in case management, as well as the use of judicial authority to encourage an offender towards rehabilitation
- Collaboration between all professionals in the court towards the end goal of offender rehabilitation, and
- The use of therapeutic court processes to ensure that the environment is not alienating or stigmatising.³⁰⁵

Problem-solving courts do not traditionally have an adjudicative capacity, instead operating once an offender has pleaded guilty, but before he or she is sentenced. This is because the courts' mandate is to address the underlying causes of the offending by creating incentives for rehabilitation; as well as by providing case management and links to treatment and support services. This can only be achieved once an offender has taken responsibility for the offending and is not maintaining his or her innocence.

Problem-solving courts are thought to be most effective when an offender is at risk of going to prison.³⁰⁶ This is because the courts employ a carrot and stick process, with successful rehabilitative engagement resulting in a community-based, or substantially reduced prison sentence, and unsuccessful engagement resulting in a full custodial sentence.³⁰⁷

Accordingly, the use of a problem-solving approach is questionable in matters where there is no doubt that the offender will be sentenced to a lengthy term of imprisonment. While not necessarily mutually exclusive, the anti-therapeutic consequences of long-term incarceration may erase many of the gains achieved through court-supported rehabilitation. This is because a significant component of the rehabilitative process is a focus on reintegration: ensuring that housing is secure; that risks are removed; that addictions are addressed; and relationships restored.

The application of sexual offending problem-solving courts in Australia

While the use of problem-solving courts is widespread in Australia, they have never been used in the context of sexual offending. This is likely due to a number of reasons, both political and practical, including the strict punitive and penal response to sexual offending; the concern that judicial oversight and case management is not the most apt response to sexual offenders; the lack of community-based, sexual offence treatment services; and the fact that problem-solving courts are best applied in circumstances where an offender pleads guilty and is on the verge of receiving a term of imprisonment, or likely to receive a short term of imprisonment, as described above.

303 Ibid, 82.

304 Ibid.

305 See generally, Ibid, 138-169; G Berman and J Feinblatt, 'Problem-Solving Courts: A Brief Primer' (2001) 23(2) *Law and Policy*, 125-140.

306 See, for example, Judge S Cooper, 'The Carrot and the Stick: How effective sanctions and incentives succeed in overcoming addiction' (2003) *Michigan Bar Journal*, 20-14. At <http://www.michbar.org/journal/pdf/pdf4article527.pdf>; For an example, see, Magistrates' Court of Victoria, Drug Court, 'Eligibility Criteria'. At <https://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/drug-court/eligibility-criteria>.

307 Ibid.

These considerations mean that, arguably, sexual offence problem-solving courts are more appropriate in the Magistrates'/Local Court context than in a higher court context. Offenders who plead guilty to a sexual offence in the Magistrates'/Local Court jurisdictions are far more likely to receive a community-based disposition or short term of imprisonment than offenders pleading guilty in the higher courts. This is certainly the case for offences such as indecent assault³⁰⁸ and committing an indecent act with a child under 16 years.³⁰⁹

Accordingly, a specialist sexual offence court within the Magistrates'/Local court jurisdiction could be developed to promote the rehabilitation and reintegration of these offenders.³¹⁰ Specific consideration would need to be given to whether the traditional judicial case management and oversight model used in drug courts and mental health courts would be of equal relevance to sexual offending, or whether more tailored therapeutic and forensic responses are required.

While potentially useful, this approach would only address a relatively small cohort of offenders, and certainly not the most serious. In all Australian adult jurisdictions, serious sexual offences are dealt with in the higher courts, and sexual offenders who plead guilty in the higher courts usually receive a substantial term of imprisonment with no prospect of a community-based disposition.³¹¹ Whether or not an offender is granted parole is a matter for the Parole Board to decide at a future date. Accordingly, a sexual offence problem-solving court is unlikely to fulfil a useful therapeutic function in circumstances where offenders are routinely sentenced to lengthy prison terms.

Conversely, the CIJ notes that somewhat similar arguments were made when the extension of the Victorian Koori Court model from the Magistrates' Court to the County Court was considered. The Koori County Court nevertheless commenced operation in 2009³¹² and an evaluation found that it serves an important therapeutic role for Koori offenders and their broader communities, even when the offender is likely to receive a substantial term of imprisonment.³¹³ Obviously the reconciliatory and broader community aims of the Koori Court are markedly different from the objectives of sexual offence, problem-solving courts. However, the example is useful to demonstrate the utility of therapeutic justice approaches in the higher courts.

The New Zealand Law Commission's proposal

In its 2012 Issues Paper, *Alternative Pre-Trial and Trial Processes: Possible Reforms*, the New Zealand Law Commission considered the question of a specialist, problem-solving sexual offence court in the context of examining whether the adversarial criminal justice framework should be 'modified or fundamentally changed in order to improve the system's fairness, effectiveness and efficiency.'³¹⁴

308 See, for example, Sentencing Advisory Council, 'Sentencing Snapshot: Indecent Assault' (2008 No. 49). At https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/snapshot_49_sentencing_trends_for_indecent_assault_in_the_magistrates_court_of_victoria_june_2008.pdf.

309 See, for example, Sentencing Advisory Council, 'Sentencing Snapshot: Indecent Act with a Child Under 16' (2008, No. 50). At https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/snapshot_50_sentencing_trends_for_indecent_act_with_a_child_under_16_in_the_magistrates_court_of_victoria_june_2008.pdf.

310 While problem-solving courts such as drug courts and mental health courts have traditionally excluded sex offences, the Victorian Assessment and Referral Court has recently expanded to allow sexual offenders to participate. Section 4S(3)(a) of the *Magistrates' Court Amendment (Assessment and Referral Court List) Act 2010* (Vic), which prohibited sexual offences from being heard in the List was removed by the *Courts and Other Justice Legislation Amendment Act 2013* (Vic), effective from 1 February 2014.

311 See, for example, Sentencing Advisory Council, 'Sentencing Snapshot: Incest' (2010, No. 99). At https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/snapshot_99_sentencing_trends_for_incest_in_the_higher_courts_of_victoria_june_2010.pdf; Sentencing Advisory Council, 'Sentencing Snapshot: Rape' (2013, No. 145). At https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/snapshot_145_sentencing_trends_for_rape_in_the_higher_courts_of_victoria_june_2013.pdf.

312 *County Court Amendment (Koori Court) Act 2008*.

313 Clear Horizon Consulting, 'County Koori Court: Final Evaluation Report' (September 2011), 19. At http://www.countycourt.vic.gov.au/files/CKC%20Evaluation%20Report_FINAL_27Sep11.pdf.

314 New Zealand Law Commission, above n 217, 6.

The Commission did not view the imposition of a lengthy custodial sentence as a necessary impediment to a sexual offence court, instead concluding that the potential for a reduction in an overall prison sentence would be sufficient incentive for offenders to participate.³¹⁵ Further, the Law Commission noted the public interest in offenders accessing court supervised treatment and rehabilitation, given that they may not have a similar opportunity while in custody or on parole.³¹⁶

The key features of the sexual offence court proposed by the Law Commission were:

- Eligibility of matters determined according to a guilty plea, informed consent by the victim and offender suitability
- The development of an intervention plan comprising a tailored set of therapeutic actions for the offender to complete. This could include treatment, education, reparations and an apology
- Supervision of the intervention plan designated to a specialist team, rather than via the judicial supervision model used in other problem-solving courts
- A requirement for all counsel and judicial officers in the court to undergo specialist training, and
- At the conclusion of the intervention plan, sentencing of the offender according to her/his level of participation and progress. The sentence may or may not involve custody.³¹⁷

The Law Commission consulted with the legal and community sector and received ‘very strong’ broad based support for the above proposal.³¹⁸ Benefits were considered to include that:

- Offenders would be encouraged to accept responsibility for their offending, thereby increasing guilty pleas
- Offenders were more likely to participate in treatment and rehabilitation, reducing the risk of reoffending
- There would be greater flexibility in sentencing, countering the tendency to plead not guilty due to punitive sentencing laws and practices, and
- More victims might be encouraged to report, given the possibility that an offender might not receive a substantial term of imprisonment, in cases such as intrafamilial cases, where the victim might not want the offender to be incarcerated.³¹⁹

In summary, the Law Commission and the respective submissions it received in response to its Issues Paper concluded that a high level specialist, pre-sentence, sexual offence court would allow for greater flexibility than the current system, and would therefore address some of the acknowledged limitations.

The CIJ’s view

Sexual offenders have unique treatment and rehabilitation needs, and would undoubtedly benefit from the multi-disciplinary, therapeutic approach of a problem-solving court. At the Magistrates/ Local Court level, a sexual offence problem-solving court could complement current and developing specialist practices, and could exist in addition to sexual offence lists. While further consideration is needed in relation to whether sexual offence problem-solving courts are likely to be effective in the higher courts, there is obviously significant social benefit in addressing the underlying causes of sexual offending at all levels. Further, Australian jurisdictions should look to the New Zealand Law Commission’s proposal with respect to a model of case management.

Similar to the development of Koori Courts in Victoria, a pilot sexual offence problem-solving

315 Ibid, 45-47.

316 Ibid.

317 Ibid, 44-47.

318 New Zealand Law Commission, above n 218, 98-99.

319 Ibid.

court could therefore be established in the Magistrates'/Local Courts. Depending on its success, it could later be extended to the higher courts. Importantly, pre-sentence restorative justice conferencing should occur in tandem with a problem-solving court – providing avenues both for victims' justice needs and offenders' rehabilitative needs to be met.

3.4 Post-Release Therapeutic Innovations

The following discussion focuses on therapeutic justice initiatives at the post-release stage, that is, after an offender is conditionally released from prison. Although the innovations featured are offender focused, their underlying objectives are to increase the likelihood of successful reintegration and therefore reduce recidivism. This will, in turn, inevitably decrease the number of victims created by sexual offending, an important community objective.

An overview of re-entry courts

Re-entry courts aim to ease the transition of offenders from custodial living to life in the community.³²⁰ Re-entry courts function in a similar way to problem-solving courts, but operate post-sentence, immediately prior to an offender being unconditionally released from custody. Similar to problem-solving courts, re-entry courts are supported by community-based services and employ a judicial supervision, case management approach to encourage offender rehabilitation and reintegration. The carrot and stick method referred to above is used in relation to parole compliance. The overall aim of re-entry courts is to reduce recidivism and increase public safety.

The Harlem Parole Re-entry Court

Established as a model project in 2001, the Harlem Parole Re-entry Court is operated by the New York based Center for Court Innovation in conjunction with State criminal justice authorities. The Court was established in response to the high concentration of parolees returning to Harlem, Manhattan and provides intensive judicial supervision, as well as support services to new parolees in the first six months following release.³²¹

The aims of the Court are to improve reintegration by helping parolees to locate employment and secure housing; to address outstanding addiction issues; and to ensure that relationships are supportive and stable.³²² After the initial six months, the parolee is transferred to the conventional parole system.

An evaluation of the Harlem Parole Re-entry Court found that, while rearrests and reconviction rates were lower for participating parolees, revocations of parole as a result of non-compliance were higher.³²³ The evaluation report concluded that this might be because the increased supervision involved means that the Court is able to detect non-compliance more effectively than the conventional parole system. The evaluation suggested the imposition of a system of alternative sanctions in lieu of parole revocation.³²⁴

320 The CIJ understands that there are approximately 24 general re-entry courts throughout America. See, R Wolf, 'Reentry Courts: Looking Ahead' (2011) Center for Court Innovation. At https://www.bja.gov/Publications/CCI_ReentryCourts.pdf.

321 Z Hamilton, 'Do Reentry Courts Reduce Recidivism? Results from the Harlem Parole Re-entry Court' (2010) Center for Court Innovation, iii. At http://www.courtinnovation.org/sites/default/files/Reentry_Evaluation.pdf.

322 Ibid.

323 Ibid, ix.

324 Ibid.

Sexual offence re-entry courts

Drawing on therapeutic justice principles, sexual offender re-entry courts, it is argued, are able to monitor compliance and manage risk effectively by using incentives to encourage rehabilitation and reintegration.³²⁵ Where re-entry courts manage sex offenders, the offender is conditionally released under the supervision of a judicial officer as a means of managing the risk of reoffending.

The New York Sex Offense Courts also operate in a re-entry court capacity. Unlike other problem-solving or specialist courts, the Sex Offense Courts' mandate extends beyond sentencing. When an offender is on a community-based order or due for parole, the offender returns to the court and enters into a behavioral contract with the court to engage in treatment. The court can also order polygraph testing, use tracking devices and order other risk abatement measures.³²⁶ The court creates incentives for the offender to reintegrate successfully by gradually reducing the level of oversight and by allowing increased levels of unconditional liberty proportionate to the offender's compliance.

Given the increased use of preventative detention mechanisms and the introduction of serious sex offender legislation in jurisdictions throughout Australia,³²⁷ the CJJ considers that re-entry courts could be a cost effective and therapeutic way of managing risk post-release, in appropriate cases. This may be preferable to current approaches which stigmatise and isolate offenders, potentially increasing the risk of recidivism in the long term.³²⁸

Arguably, offenders are more likely to reintegrate and less likely to reoffend if their release is underpinned by therapeutic practices such as supervision, links to support services and intensive case management.³²⁹ Accordingly, jurisdictions should consider introducing re-entry courts, either in addition to specialist or problem-solving practices, or independent of them. Clear benefits are apparent in the integrated New York Sexual Offense Court approach, both in terms of continuity of care, as well as in terms of resourcing and specialisation.

Circles of support and accountability

Distinct from the initiatives discussed above, Circles of Support and Accountability, or COSA, operate outside the conventional criminal justice system. They apply a therapeutic, community based approach to the reintegration of sexual offenders through harnessing local community supports, and providing post-release sexual offenders, or 'core members', with a 'circle' of trained volunteers who help core members to remain accountable for their behaviour.³³⁰

Core members participate on a voluntary basis and must have demonstrated an understanding of the harm caused by their offending, as well as a desire to prevent its reoccurrence. The circle meets regularly during the initial post-release period before the needs of the core member are

325 J LaFond and B Winnick, 'Sex offender reentry courts: a cost effective proposal for managing sex offender risk in the community' (2003) *New York Academy of Sciences*, 300-323. At http://canatx.org/rrt_new/professionals/articles/LAFOND-SEX%20OFFENDER%20REENTRY%20COURTS.pdf.

326 Sex Offense Courts, New York State Unified Court System, Community Supervision. At http://www.nycourts.gov/courts/problem_solving/so/home.shtml.

327 Following the case of *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, serious sex offenders are now subject to preventive detention regimes in most Australian states and territories (excluding the ACT, South Australia and Tasmania). See generally, B McSherry and P Keyzer, *Sex offenders and preventive detention: Politics, policy and practice* (Federation Press, 2009).

328 See generally, H Wakefield, 'The Vilification of Sex Offenders: Do Laws Targeting Sex Offenders Increase Recidivism and Sexual Violence?' (2006)1 *Journal of Sexual Offender Civil Commitment: Science and the Law*, 141-149; Cucolo and Perlin, above n 253.

329 See, for example, Cucolo and Perlin, above n 253.

330 S Hannem and M Petrunik, 'Canada's circles of support and accountability: A community justice initiative for high-risk sex offenders' (2004) 66(7) *Corrections Today*, 98-101; K Richards, 'The Australian Capital Territory (ACT) Government Office for Women Audrey Fagan Churchill Fellowship to study Circles of Support and Accountability' (2010). At http://www.churchilltrust.com.au/media/fellows/Richards_Kelly_2010.pdf.

re-assessed. Volunteers are expected to report any increased risk or incidence of offending behaviour to the relevant authorities.³³¹

Originating in Canada, the COSA model now operates across a number of Canadian, US, UK and European jurisdictions.³³² As yet, no similar model has been formally adopted in Australia. Evaluations of the original Canadian project found a significant reduction in recidivism, as well as improvements in the reintegration of offenders and public perceptions of safety.³³³ Reviews of COSA pilots operating in the UK also found that they supported risk management and compliance as well as reduced social isolation.³³⁴

While it has limitations,³³⁵ the COSA model nevertheless offers another approach that sits alongside conventional processes and, in the CIJ's view, is an additional option that should be available in efforts to reduce sexual offending.

3.5 Recommendations

25. All Australian jurisdictions should, as a minimum, develop specialist court-based practices for dealing with sexual offence matters, building on the suite of specialist practices implemented in Victoria.
26. Governments should consider the value of developing and implementing specialist sexual offence courts as a way to respond to the complexities of sexual offending and to deliver more responsive justice outcomes to victims of sexual assault.
27. Governments should consider establishing pilot sexual offence problem-solving courts initially in the Magistrates'/Local Courts, with a view to their possible subsequent expansion to the higher courts.
28. Any consideration of specialist and problem-solving courts should include close examination of the New York Sexual Offence Courts as a best practice example of a multifaceted specialist and problem-solving approach to sexual offending.
29. Governments should review the benefits of sexual offence pre-release or re-entry courts in an Australian parole context.
30. Governments should review the benefits of Circles of Support and Accountability for sex offenders and implement pilot programs as an additional strategy for reducing reoffending and supporting offender reintegration.

331 K Richards, 'The Australian Capital Territory (ACT) Government Office for Women Audrey Fagan Churchill Fellowship to study Circles of Support and Accountability' (2010), 10-11. At http://www.churchilltrust.com.au/media/fellows/Richards_Kelly_2010.pdf.

332 For an overview of the origins of Circles of Support and Accountability, see, *Ibid*, 7-10.

333 *Ibid*, 17-24; Daly, above n 3, 15.

334 K McCartan, H Kemshall, S Westwood, J Solle, G MacKenzie, J Cattel and A Pollard, 'Circles of Support and Accountability (COSA): A Case File Review of Two Pilots' (2014) Ministry of Justice, 1. At https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/289300/cosa-research-summary.pdf; A Bates, R Saunders and C Wilson, 'Doing something about it: A follow-up study of sex offenders participating in Thames Valley circles of support and accountability' (2007) 5(1) *British Journal of Community Justice*, 19-42.

335 For a discussion of COSA limitations, see, Richards, above n 331, 26-30.

4 - Chapter 4: Truth-Telling Mechanisms and Civil Justice Responses to Sexual Offending

This chapter provides a general overview of justice options and pathways that are available to victims of sexual assault in a selection of inquiry, tribunal and court processes that are separate and distinct from the criminal justice process. These options feature what are known as truth-telling mechanisms, as well as processes for obtaining financial redress in the civil jurisdiction. The benefits and limitations of these options are explored, and consideration is given to how their potential to meet the justice needs of victims of sexual assault could be further harnessed through the incorporation of restorative and therapeutic justice practices.

4.1 Truth-telling Mechanisms

Overview

Unlike restorative justice and therapeutic justice, truth-telling mechanisms have not been the subject of detailed consideration in the Australian context. Where they are employed, however, they aim to provide the victim with an opportunity to tell her or his story in a safe and supported environment, and to communicate the impact of the offending to a body or a person of standing, such as a member of the judiciary, a member of parliament or an expert panel.

Truth-telling practices focus on affirmation and validation of the victim's experience. They occur in the absence of the offender; are not contingent on offender consent or acknowledgement; and, rather, are focused on providing victims with the opportunity to receive formal acknowledgement of the harm done to them. They generally rely on confidentiality of proceedings, or a restriction on the subsequent use of statements made as part of the truth-telling process in order to ensure fairness both to victims and to offenders.

Given that a considerable element of the trauma that victims of sexual assault experience is the denial and disbelief that many encounter, the value of this option should not be underestimated. The CIJ considers that the benefits of truth-telling mechanisms should be further explored in a range of areas as another justice option for victims of sexual assault.

Truth-telling mechanisms recently introduced in Australia

A number of recent examples exist in the Australian context which exhibit 'truth-telling' characteristics. These include the Royal Commission into Institutional Responses to Child Sexual Abuse, the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Organisations, as well as components of the work of the Defence Abuse Response Taskforce and certain police and defence reporting options.

The Royal Commission and Victorian Inquiry into Institutional Responses to Child Sexual Abuse

Though primarily concerned with examining organisational responses to sexual offending, both the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Organisations,³³⁶ and the Royal Commission into Institutional Responses to Child Sexual

³³⁶ 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>.

Abuse,³³⁷ recognised the significance of individual victims of child sexual abuse being able to tell their stories in a safe and supported environment.

Consequently, provision was made for victims to give evidence in a variety of ways. In the case of the Victorian Inquiry, victims could provide written submissions as 'public', as 'name withheld' (meaning published, but de-identified), or 'confidential'. Oral evidence could be presented at the Inquiry's public hearings after expressions of interest had been considered; or 'in camera' (privately) to Committee members with the support of staff from the Victims Support Agency.³³⁸

Similarly, though Royal Commissions are conventionally expected to be conducted in public, specific amendment was made to the *Royal Commissions Act 1902* (Cth) for the purposes of allowing 'private sessions',³³⁹ in which a victim or other person aware of abuse could present that information to only one or two Commissioners and a Commission officer.³⁴⁰ The Chair of the Commission has described this as the 'obligation of the Commissioners...to bear witness on behalf of the nation...'.³⁴¹ As such, the processes of the Inquiry and Commission have offered victims formal acknowledgment by an authority where the perpetrator or responsible institution have often failed to do so.

No formal evaluation of these truth-telling components has occurred. Anecdotally, however, the CIJ has been advised that the option of giving evidence in camera, or in a private session, has been used and appreciated by many victims.³⁴²

The Defence Abuse Response Taskforce

The Defence Abuse Restorative Engagement Program is an innovative example of an institution seeking to provide formal acknowledgment for abuse committed by and against its own members. The program was established by the Defence Abuse Response Taskforce (the Taskforce), which was developed following a review of specific complaints of sexual and other abuse against Defence personnel (the DLA Piper Review).³⁴³ The Taskforce is currently addressing approximately 2,400 complaints of abuse that were registered with the DLA Piper Review and the Taskforce during a certain timeframe.³⁴⁴

Amongst other things, the DLA Piper Review noted that a significant number of people who made complaints of abuse wanted Defence to acknowledge that this abuse had occurred and to express regret that it had. The DLA Piper Review recommended that a framework be established for facilitated, private resolution of complaints which drew on features of restorative justice and mediation.³⁴⁵

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

338 Family and Community Development Committee, above, n 336.

339 Explanatory Memorandum, *Royal Commissions Amendment Bill 2013* (Cth). At http://www.austlii.edu.au/au/legis/cth/bill_em/rcab2013314/memo_0.html.

340 Information provided in private sessions can be published in a de-identified form and contributes to understanding of the conduct of particular institutions. Where appropriate, it can also be referred to the relevant police force for further investigation. The Hon Justice P McClellan AM, '13th Australasian Conference on Child Abuse and Neglect' (12 November 2013) Melbourne, 5. At <http://www.childabuseroyalcommission.gov.au/13th-australasian-conference-on-child-abuse-and-neglect-melbourne/>; See also, 'Private Sessions', *Royal Commission into Institutional Responses to Child Sexual Abuse*. At <http://www.childabuseroyalcommission.gov.au/private-sessions/>; See also, 'Tell us Your Story', *Royal Commission into Institutional Responses to Child Sexual Abuse*. At <http://www.childabuseroyalcommission.gov.au/tell-us-your-story/>.

341 The Hon Justice P McClellan AM, above n 340, 5.

342 Laura McDonough, stakeholder consultation.

343 G Rumble, M McKean and D Pearce, 'Report of the Review of allegations of sexual and other abuse in Defence' (October 2011, Vol 1) DLA Piper. At <http://www.defence.gov.au/pathwaytochange/Docs/DLAPiper/DefenceDLAPiperReview-FullReport.pdf>.

344 Brief to CIJ, Defence Abuse Response Taskforce, provided 24 March 2014.

345 Rumble, McKean and Pearce, above n 343, 189.

Accordingly, the Restorative Engagement Program gives complainants the opportunity to have their experiences heard, acknowledged and responded to by a senior Defence representative.³⁴⁶ Representatives are nominated to participate by their Service Chiefs and the Taskforce delivers preparatory briefing sessions to provide information in relation to the Taskforce and, more specifically, the Restorative Engagement Program. Representatives participating in a particular matter meet first with the facilitator to prepare for the conference.

The conferencing model used in the Restorative Engagement Program can be described as a hybrid between a restorative justice conference and a truth-telling mechanism. Defence representatives participate to represent Defence in its own right as the organisation which allowed the abuse to occur (or did not prevent it) and failed to look after the complainant when it did occur. The Restorative Engagement Program thereby provides a forum in which the complainant can tell her or his story where the allegations of abuse are not challenged. The role of the Defence representative is to restore the relationship between Defence and the complainant.

Concluding responses can include an apology or expression of regret, or other action deemed appropriate, with conferences also providing insight into systemic cultural issues that have enabled abuse to occur. No discussion of financial reparation occurs in this context, as there are other mechanisms through which this can occur.³⁴⁷

Potential participants are assessed as suitable for the Restorative Engagement Program in terms of their emotional readiness and the plausibility of their allegations. The facilitator then helps participants to prepare for the conference. Complainants are also encouraged to nominate a support person. The Restorative Engagement Program's Guiding Principles include that no further harm be caused to complainants, that confidentiality remains paramount,³⁴⁸ and that the conference has an enduring positive effect on complainants' wellbeing.³⁴⁹

Participation in the Restorative Engagement Program does not require the signing of an agreement that would preclude further action, such as referring an allegation to the police, from being taken. However, the conference process will be put on hold until police can advise whether it is appropriate to proceed if the matter is being investigated further.³⁵⁰

Accordingly, the Restorative Engagement Program provides an additional option that complainants can pursue to meet some of their justice needs - in this case, one offering a source of formal acknowledgment and potential apology which is not dependent upon the perpetrator, or on the conventional criminal or military justice system.

The CIJ has been advised that an evaluation has been conducted of Phase 1 of the Restorative Engagement Program, which involved a total of 15 conferences, with the Chief and Vice-Chief of the Defence Force, and the Chiefs of Army, Navy and Air Force all participating in turn. The last Phase 1 conference was held in December 2013.

The evaluation found that complainants, support people and Defence representatives overwhelmingly endorsed the Program (and conferences in particular), as meeting or exceeding their expectations. Meanwhile, the CIJ was advised that more general feedback has also been extremely positive, with complainants indicating surprise at their own positive emotional

346 This generally occurs in a face-to-face meeting convened by a trained facilitator, although it can also be conducted via telephone, video-conferencing, email or letter. Defence Abuse Response Taskforce, 'Defence Abuse Restorative Engagement Program'. At <http://www.defenceabusetaskforce.gov.au/Outcomes/Pages/DefenceAbuseRestorativeEngagementProgram.aspx>.

347 The CIJ was advised by the Taskforce that reparation is determined by the Taskforce Independent Reparations Payments Assessor, with a range of prescribed categories to a maximum of \$50,000. Brief to CIJ, above n 344.

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

349 Brief provided to CIJ, above n 344.

350 Defence Abuse Response Taskforce, 'Restorative Engagement and Criminal Investigation'. At <http://www.defenceabusetaskforce.gov.au/Outcomes/Pages/DefenceAbuseRestorativeEngagementProgram.aspx>.

responses, some reporting a feeling of peace and empowerment as a result of the conference, and many expressing general appreciation that someone had listened to their story and acknowledged what occurred.³⁵¹

A number of suggestions to improve the Program were made through the evaluation and are being incorporated into Phase 2 of the Program, which commenced in February 2014. It is anticipated that approximately 1000 Conferences will be held across Australia during Phase 2.³⁵²

Anonymous/restricted reporting options

While not strictly a truth-telling mechanism, the anonymous reporting of sexual offences is an initiative that enables and encourages victims of sexual assault to report an offence, or tell their story, to the police or other agency, but to do so anonymously. Benefits of this approach include the provision of an avenue for victims to tell authorities what occurred, even in the event of not wanting police or court involvement, and to subsequently be directed to appropriate support services. Further, while no formal police investigation or prosecution of the offender can proceed on the basis of an anonymous report, details of the incident may assist police in future investigations, such as in relation to assaults in a particular geographical location. Finally, the public interest is served by a better understanding of the prevalence and circumstances of sexual assault.

Various versions of anonymous reporting initiatives exist in Australia. In NSW, victims can lodge an informal complaint with the police through the Sexual Assault Reporting Option (SARO).³⁵³ A victim may fill out an anonymous questionnaire which asks a series of questions regarding the nature of the offence and the identity of the offender. Likewise, in Queensland, an informal complaint known as an Alternative Reporting Option (ARO) can be made to police.³⁵⁴ Similar initiatives exist in the USA, including on university campuses, with victims able to fill out written or online forms.³⁵⁵

In the Defence environment, meanwhile, 'restricted disclosure' reporting has recently become available in an effort to increase reporting rates across the Australian Defence Forces.³⁵⁶ Former or serving Defence members who have been the victim of sexual misconduct may make a restricted disclosure outside the formal chain of command, which then allows them to access supports to assist in their recovery without triggering an investigation.

While the identity of the alleged offender also remains restricted, this mechanism nevertheless enables command to understand the prevalence of sexual misconduct in particular units or locations. A restricted report may then be converted to 'unrestricted' within a certain timeframe according to the victim's choice, though some matters are not considered appropriate for a restricted disclosure at all, such as where the victim is under 18 years or where any person is under imminent threat.³⁵⁷ This regime mirrors a similar reporting mechanism that has been available in the United States military since the beginning of 2012.³⁵⁸

351 Brief to CIJ, above n 344.

352 Ibid.

353 NSW Police Force, Australia, 'Sexual Assault Reporting Option'. At http://www.police.nsw.gov.au/community_issues/adult_sexual_assault.

354 Queensland Police Force, Australia, 'Alternative Reporting Options'. At <http://www.police.qld.gov.au/programs/adultassault/altReportOpt.htm>.

355 Fredonia Police Department in New York, USA, 'Sexual Assault Anonymous Report'. At <http://www.fredoniapolice.org/sexualassault.html>; Chapel Hill Police Department North Carolina USA (Sexual Assault Response Team Anonymous Reporting Initiative). At, <http://ovc.ncjrs.gov/sartkit/practices/law-report-nc.html>.

356 Interim Defence Instructions (General) PERS 35-4, Reporting and management of sexual misconduct, including sexual offences (effective 28 August 2013). Cited in, Australian Human Rights Commission, 'Review into the Treatment of Women in the Australian Defence Force – Audit Report 2014' (March 2014), 249. At <https://www.humanrights.gov.au/publications/review-treatment-women-australian-defence-force-audit-report-2014>; See also, Minister for Defence, 'Pathway to Change Milestones' (23 July 2013). At <http://www.minister.defence.gov.au/2013/07/23/minister-for-defence-pathway-to-change-milestones/>.

357 Interim Defence Instructions, Ibid.

358 US Department of Defense, 'Directive No. 6495.01' (23 January 2012). At <http://www.sapr.mil/public/docs/directives/649501p.pdf>.

The crimes compensation jurisdiction

The crimes compensation jurisdiction is one of three ways that victims of sexual assault may be financially compensated for the harm done.³⁵⁹ The other two – compensation through the civil courts and compensation as a component of sentencing – are discussed below. The crimes compensation jurisdiction is arguably the most accessible of the three avenues, and also has the most potential to develop therapeutic and truth-telling processes to better meet victims' justice needs.

Overview

Crimes compensation (also often known as Victims of Crime Assistance) tribunals exist in all Australian states and territories.³⁶⁰ They are designed to provide a source of assistance to victims in order to help them recover from a crime.³⁶¹ These schemes operate independently of the criminal prosecution process and effectively function as a form of public recognition of the harm that is caused by violent crime. Arguably, they also function as recognition of the limitations of conventional civil and criminal justice processes.

Given that these schemes are administered on a state and territory level, legislation and procedures vary between jurisdictions. In general, however, they have the capacity to award capped amounts of compensation to victims of crime in order to meet medical and counselling expenses; to compensate for loss of earnings; and, to a lesser extent, to address pain and suffering.³⁶²

The caps on available compensation, as well as the timeframes within which claims may be made,³⁶³ are obvious restrictions on the efficacy of this jurisdiction, particularly for victims who have experienced child sexual abuse and suffered life-long harm as a result. Other limitations include the fact that the compensation payable is funded by the taxpayer, rather than by offenders themselves, or by the institutions within which much sexual abuse has occurred.³⁶⁴

In this vein, the CIJ notes that the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Organisations recently recommended that the Victorian Government consider amending the *Victims of Crime Assistance Act 1996* (Vic) to better address the unique nature of child abuse in organisational settings.³⁶⁵

Advantages, however, include the jurisdiction's non-adversarial approach and the fact that, though the Tribunal must be satisfied on the balance of probabilities that the victim has suffered

359 ALRC and NSWLRC Final Report, above n 207, 182-184.

360 For example, *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA); *Victims of Crime Assistance Act 1996* (Vic); *Victims of Crime Assistance Act 2006* (NT); *Victims Support and Rehabilitation Act 1996* (NSW).

361 For a useful discussion of the philosophy and general availability of victims of crime compensation, see, ALRC and NSWLRC, Final Report, above n 207, 182-184.

362 For example, the Victorian Victims of Crime Assistance Tribunal may award a primary victim up to a total of \$60,000, including a maximum of \$20,000 for lost earnings, plus an additional \$10,000 in Special Financial Assistance. At <https://www.vocat.vic.gov.au/financial-assistance-available/types-assistance-available>; The maximum amount payable in WA is dependent upon the date of the offence, but for offences committed on or after 1 January 2014, the maximum amount payable is \$75,000. At http://www.courts.dotag.wa.gov.au/files/Compensation_for_VOC_brochure.pdf; In SA the maximum amount payable has remained stable at \$50,000 since 1990, although recent electoral promises to double this amount suggest an acknowledged shortfall. See, 'SA Labor to double crime victims payouts' (7 February 2014). At <http://www.news.com.au/national/breaking-news/sa-labor-to-double-crime-victims-payouts/story-e6frfku9-1226820297543>.

363 For example, in Victoria the timeframe is two years, although Applications for Extension of Time can be made and granted in certain circumstances. At <https://www.vocat.vic.gov.au/how-apply/time-apply>; In WA, the timeframe is three years from the date of the offence, or most recent offence. At http://www.courts.dotag.wa.gov.au/files/Compensation_for_VOC_brochure.pdf.

364 The limitations of this approach were examined by the 'Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Organisations', noting the flexibility in equivalent schemes in other jurisdictions to seek payments from offenders. Family and Community Development Committee, above, n 336, 560.

365 Family and Community Development Committee, above n 336, 553; The Inquiry also recommended consideration of a specific scheme for such victims which, amongst other things, makes non-government organisations responsible for the funding of compensation, needs and other supports at agreed amounts.

from a violent crime; and though the victim must have reported the crime to police, there is no need for the relevant perpetrator to have been identified, charged or convicted.

Rather, victims making a claim in this jurisdiction may tell their story to a Tribunal Member, usually a Magistrate, in a relatively informal hearing.³⁶⁶ The experience of having their story heard and accepted by a person in authority is acknowledged as a valuable way for victims to have certain aspects of their justice needs addressed.³⁶⁷ Other advantages of this jurisdiction include the absence of some of the legal barriers that exist in the area of civil litigation, discussed below; as well as the links that many schemes have with associated forms of support.³⁶⁸

The crimes compensation jurisdiction as a truth-telling mechanism

The absence of the offender from proceedings, as well as the role of the relevant Magistrate in formally acknowledging the victim's experience, can both be described as truth-telling dimensions of this jurisdiction. As such, the act of having a person in authority accept and acknowledge a victim's story is an option that the CIJ considers should be available to more victims of sexual assault.

Certainly, in circumstances where criminal prosecution is unlikely to proceed or succeed, and where civil litigation does not seem a realistic option, victims of sexual offences need options that are capable of meeting at least some of their justice needs. Truth-telling mechanisms, including the crimes compensation jurisdiction, offer victims the opportunity to have their story heard by someone in authority and then formally acknowledged – either on behalf of the wider community, or on behalf of the institution in which the offence occurred.

The CIJ is of the view that the benefits of this jurisdiction could therefore be strengthened by a greater emphasis on therapeutic practices, explored in Chapter 3, which would improve the experience of victims during the course of a hearing. This could include the tribunal adopting a more conversational, casual approach, allowing for greater integration and availability of sexual offence specific support people, and ensuring that the tribunal environment is informal and accessible. Importantly, the CIJ supports law reforms which would enable more victims of sexual assault to utilise the crimes compensation jurisdiction, such as by removing or relaxing the time limitations for lodging a claim.

366 Victims may also pursue their claims through an administrative process, or 'on the papers', if they do not wish to attend a hearing. At <https://www.vocat.vic.gov.au/how-apply/lodging-application>.

367 See, for example, Family and Community Development Committee, above n 336, 555.

368 See, for example, the Victims Support Service in Western Australia. At http://www.victimsofcrime.wa.gov.au/V/victim_support_services.aspx?uid=6434-5121-723-5876.

4.2 The Civil Jurisdiction

Overview

Beyond the truth-telling and statutory compensation mechanisms described above, victims of sexual assault can pursue a claim for damages through civil litigation.³⁶⁹ This can occur instead of, or in addition to, the criminal prosecution process, although it is often elected as an option where a prosecution does not proceed or has not been successful.

Given that so few sexual offence complaints ultimately result in conviction; and given that the circumstances in which most sexual offences are perpetrated mean that they are hard to prove beyond reasonable doubt; the lesser standard of proof in the civil justice jurisdiction theoretically offers victims a greater chance of vindication.

If a civil claim results in a favourable court judgment, it provides victims with formal and very public acknowledgment of the wrong that has occurred and, unlike the criminal prosecution process, positions the victim as an active party in proceedings. For a court to award damages it needs to be satisfied that, on the balance of probabilities, the assault has occurred. It will also take into account any compensation received from other avenues, such as through the crimes compensation jurisdiction, or as part of a sentencing order. The CIJ understands that, despite most jurisdictions having the power to order compensation from an offender as part of the sentencing order, this option is rarely employed.³⁷⁰

Nevertheless, civil litigation is still an adversarial, protracted, expensive and often damaging process for all parties involved. The fact that no publicly funded body acts on behalf of the victim and the state; and that no equivalent of legal aid is available for civil claimants, makes it a substantially costly exercise (albeit one often pursued on a deferred fee, or no-win, no-fee basis), with victims needing confidence that the potential damages awarded will exceed the costs of the litigation. Cost considerations are particularly relevant when the defendant is an individual with limited resources available to meet the damages ordered; or, alternatively, an institution with sufficient funds to defend the claim until the resources of the complainant are exhausted.

Further, despite the lesser standard of proof required, certain legal barriers still serve as an impediment to the success of many civil claims. These include the fact that, unlike the criminal jurisdiction, limitation periods exist which can prevent claims being brought in relation to older cases of sexual assault. Although this period can be waived at the court's discretion, the uncertainty and inconsistency of this approach makes limitation periods a tangible restriction on the options of many victims of sexual assault who feel unable to recount their experiences until years, or even decades, have passed.³⁷¹

Additionally, where an institutional, rather than individual, defendant is identified for potential redress - either because the individual defendant has died or has no resources - some are incapable of being sued. This is because, in the case of many religious organisations, they do

369 For a discussion of civil actions filed by victims in the context of clergy sex abuse, see generally, P Holdway and R Baker, 'Acting for victims of religious sexual assault challenges for Victorian lawyers' (October 2010) 84(10) *Law Institute Journal*, 18; in the Canadian and US context, see generally, B Feldthusen, O Hankivsky and L Greaves, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' (2000) 12 *Canadian Journal of Women and the Law*, 66; L Kanter, 'Invisible Clients: Exploring Our Failure to Provide Civil Legal Services to Rape Victims' (2005) 38 *Suffolk University Law Review*, 253; E Bublick, 'Civil Tort Actions Filed by Victims of Sexual Assault: Promise and Perils' (September 2009) National Online Resource Center on Violence Against Women. At http://www.vawnet.org/Assoc_Files_VAWnet/AR_CivilTortActions.pdf.

370 *Victims Support and Rehabilitation Act 1996* (NSW) ss 71, 77B; *Sentencing Act 1991* (Vic) s 85B; *Penalties and Sentences Act 1992* (Qld) s 35; *Criminal Law (Sentencing) Act 1988* (SA) s 53; *Sentencing Act 1997* (Tas) s 58; *Crimes (Sentencing) Act 2005* (ACT) s 18; *Sentencing Act 1995* (NT) s 88. Victorian Supreme Court Justice Bell commented that the fundamental purpose of this sentencing power is to give victims 'easy access to civil justice'. *RK v Mirik* (2009) 21 VR 623, 11.

371 Some international jurisdictions have extended or waived this limitation period in relation to victims of child sexual abuse. See discussion in Family and Community Development Committee, above n 336, 542.

not operate under an incorporated structure.³⁷² In the case of those institutions that are legally capable of being sued, courts have nevertheless been reluctant to attribute a delegable duty of care or vicarious liability to the institution.³⁷³

For the reasons described above, civil litigation in circumstances of sexual assault can fail to live up to its potential. Despite offering complainants a greater level of participation in the proceedings, as well as ultimate acknowledgment by a court of what has occurred, the civil process can sometimes be as damaging for victims as their experience in the criminal justice system, particularly when defendants adopt an acutely legalistic response, even after being relatively conciliatory in private discussions. In a particularly prominent example, John Ellis, a victim of child sexual abuse, has described the trauma, stress, financial strain and mental health impacts brought about as a result of the litigation tactics adopted by the Catholic Church in his civil claim against the Church.³⁷⁴

Further, although privately mediated settlements are viewed as a path through which to avoid the protracted cost and hardship of the adversarial process, victims often report a sense of being 'bought off' with a confidential payment, with no public denunciation of the wrong or acknowledgment of the victim's experience to balance this out. This means that the legalistic context in which mediations occur often mitigates their promise as a constructive choice for victims, as well as their capacity to meet their needs to the extent that might otherwise be assumed.

Restorative practices – enhancing the promise of civil jurisdictions

Chapter 2 of this Report explored in detail the way in which the use of restorative practices can meet a greater proportion of the recognised justice needs of victims, by providing an option that can potentially address their needs in a holistic and comprehensive way. As discussed, possible outcomes of restorative justice conferencing include an acknowledgment that the assault occurred, denunciation of the wrong, and payments of compensation or other tangible forms of redress. These are all outcomes that are equally sought by victims making claims for compensation through the civil or crimes compensation jurisdictions.

On this basis, were a restorative justice conferencing process of the sort recommended in Chapter 2 available to victims, it could complement the civil justice system, or in some cases potentially obviate the need for a victim to pursue civil proceedings. This would mean avoiding the limitations, delay and expense which have been outlined above, as well as the fragmentation of the various parts of the civil and criminal justice systems.

As such, the CIJ sees significant potential for restorative justice conferencing to address the civil justice, as well as the criminal justice, needs of victims, subject of course to appropriate safeguards. These would include the need to ensure that victims are not compelled to waive their rights to pursue a civil claim through the courts if they choose to do so, nor to submit to confidentiality clauses against their interests. The framework recommended in Chapter 2, which already contemplates oversight mechanisms and safeguards, could be further developed to incorporate referral points from the civil and crimes compensation jurisdictions in addition to those within the criminal justice system.

Beyond this, it may also be that the civil jurisdiction itself would benefit from the incorporation of restorative or therapeutic practices into its processes and hearings, to enhance its capacity to meet victims' justice needs.³⁷⁵

372 See discussion in Family and Community Development Committee, above n 336, 531-536.

373 Ibid, 543-552.

374 See Mr Ellis' Right of Reply Submission to the Victorian Parliamentary Inquiry. At http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Right_of_Reply/John_Ellis_Right_of_Reply.pdf.

375 See generally, B Feldthusen, O Hankivsky and L Greaves, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' (2000) 12 *Canadian Journal of Women and the Law*, 104-111. More broadly in relation to claims crossing jurisdictional boundaries, for a proposal for a restorative justice framework for cases involving workplace deaths, see D Brookes, 'Restorative Justice after a traumatic death: Quality Assurance Framework for a Pilot Restorative Justice Service, (2011) Creative Ministries Network, 2011.

Restorative Boards of Inquiry – Nova Scotia, Canada

To date, restorative justice practices have primarily focused on cases where there is agreement that the offender is responsible for the offence. Those explored thus far in this Report have not functioned in an adjudicative capacity, but in Canada, the Nova Scotia Human Rights Commission has begun to take a restorative approach to those human rights disputes that are not resolved at initial conference.

Disputes which remain unresolved are referred for adjudication either by a Traditional or Restorative Board of Inquiry, headed by a qualified Chair external to the Commission. Though a Traditional Board resembles a conventional civil trial and is considered appropriate for addressing questions of law, a Restorative Board is predominantly concerned with finding resolution, exploring any harm caused and developing possible solutions, and is conducted in a non-adversarial format.

After an initial stage of 'circle conferencing' with a restorative facilitator, those disputes which remain unresolved go through to a second inquiry stage which is open to the public.³⁷⁶ The Chair can determine the process used, as long as natural justice is observed.³⁷⁷ Broadly, however, all parties - including any lawyers, a Commission representative on behalf of the public interest, and the Chair - sit in a circle, with discussion led by the Chair. Following this, the parties may draft a consent resolution before the Chair makes any formal finding of discrimination and a decision is issued.³⁷⁸

Clearly, disputes regarding human rights occur in a different context to that of matters regarding sexual offences. It is nevertheless interesting to note the use of the Board's authority as central to this restorative model, as well as its use of restorative justice processes for adjudicative purposes. While it has only been in operation since late 2012³⁷⁹ and has not been subject to formal evaluation as far as the CIJ is aware, this may indicate a shift of the restorative approach from the periphery to the mainstream of the judicial/quasi-judicial function. Certainly much further consideration is required before restorative adjudication could potentially be applied in either a civil or general criminal context, and subsequently, in specific sexual offence cases. The CIJ raises this example to showcase an innovation that, although not presently applicable, may have relevance to future reforms.

4.3 Recommendations

31. All jurisdictions should review their crimes compensation tribunals and procedures to ensure that they incorporate appropriate therapeutic practices to improve the experience of victims, and to make them more accessible to more victims.
32. Further consideration should be given to the development of referral pathways from the crimes compensation and civil jurisdictions to sexual offence restorative justice conferencing.
33. All jurisdictions should examine the potential and options for incorporating therapeutic and restorative justice practices into procedures for making civil claims in respect of sexual assault, including exploring the use of judicial or quasi-judicial authority to reinforce their value.

376 Dalhousie Legal Aid Service, 'Human Rights Board of Inquiry' (January 2014) *Law Foundation of Ontario*, 2. At <http://www.dal.ca/content/dam/dalhousie/pdf/law/DLAS/LEAP/Discrimination%20and%20Human%20Rights%20-%20Board%20of%20Inquiry.pdf>.

377 'Legal Authority for Restorative Boards of Inquiry, Nova Scotia Human Rights Commission, April 27 2012', provided to the CIJ by the Nova Scotia Human Rights Commission on 30 August 2013. At <http://humanrights.gov.ns.ca/sites/default/files/files/RBO%20LEGAL%20BRIEF.pdf>.

378 Nova Scotia Human Rights Commission, 'Restorative Boards of Inquiry: Fostering Dignity and Respectful, Responsible Relationships, Draft Framework and Procedures' (April 2012). At <http://humanrights.gov.ns.ca/sites/default/files/files/RestorativeBOI.pdf>.

379 Ibid.

5 - List of Recommendations

Restorative Justice Conferencing for Sexual Offending

1. All jurisdictions should develop a restorative justice statutory framework. This will ensure consistency, accountability and transparency. Legislation should not be overly prescriptive, in recognition of the importance of flexibility and case-by-case assessments.
2. Restorative justice conferencing principles and guidelines should be developed. Guidelines should be both general and specific to sexual offending, and be based on the two-tiered guidelines developed in New Zealand.
3. Restorative justice units should be introduced within respective state and territory Departments of Justice to oversee all restorative justice conferencing programs.
4. Specialist gender violence teams should be incorporated within each restorative justice unit to oversee the administration of sexual offence restorative justice conferencing.
5. Assessment panels should be established to determine suitability for sexual offence restorative justice conferencing on a case-by-case basis. The assessment panels should comprise forensic mental health professionals, representatives of the OPP, senior restorative justice conference facilitators, and victim and offender specialists. The specialist gender violence team should coordinate and support the assessment panel.
6. A workforce of victim and offender specialists, modelled on New Zealand's Project Restore program, should be developed. A victim and offender specialist should be assigned to each case deemed suitable by the assessment panel.
7. Further consultations should be held with forensic mental health professionals, the justice sector and the gender violence sector to explore whether decisions of the assessment panel should be reviewable.
8. Two sets of minimum restorative justice facilitator competencies should be developed, the first relating to general restorative justice conference facilitators and the second relating to sexual offence restorative justice facilitators. These should be modelled on the core competencies devised in New Zealand. Associated facilitator specialist accreditation processes should also be developed.
9. Jurisdictions should adopt a two-stage process for determining whether a sexual offence case is appropriate for a restorative justice conference: first, eligibility and second, suitability.
10. Basic eligibility criteria should be developed, with no specific offence or offender exclusions.
11. Further consultations should be conducted in relation to whether there should be a minimum age for victims to participate in sexual offence restorative justice conferencing.
12. Ten years should be the minimum age for offender participation, in appropriate cases.
13. Opportunities for referral to restorative justice conferencing should be provided at all stages of the criminal justice system.
14. Further consultation should take place with police, the OPP, the legal profession and counsellors in relation to developing either oral or written information about restorative justice conferencing that can be given to victims during the 'options talk' and at the prosecution stage.

15. Referrals for restorative justice conferencing made by police at the pre-charge stage should only be permissible in those cases not being referred for prosecution (and where the eligibility criteria are met), with proper oversight of police discretion.
16. The OPP should only be permitted to suggest a restorative justice conference at the prosecution stage in cases where a successful prosecution is unlikely. Any such decision should be made according to published guidelines and by a number of OPP personnel.
17. There should be judicial oversight of any proposed referral to restorative justice conferencing made at the post-charge prosecution stage.
18. Subject to further consultation and consideration, a wholesale immunity should apply to admissions made during a restorative justice conference. The exception to this is that a facilitator should be permitted to make a report either to child protection or to the police if they consider someone to be at immediate risk. If this qualification is to apply, the offender must be advised of this qualification at the outset. Any immunity should be explicit and codified.
19. Further consultation should occur in relation to whether the fact that an offender has participated in and completed a conference should be recorded and able to be used for relevant public safety purposes.
20. A comprehensive consultation process should be undertaken with Aboriginal and Torres Strait Islander communities and a range of community organisations in relation to the justice needs of these communities. This should occur prior to the implementation of any restorative justice model to ensure that the perspectives and needs of Aboriginal and Torres Strait people are accounted for early in the design phase.
21. A comprehensive consultation should be undertaken to ensure appropriate application of restorative justice conferencing to culturally and linguistically diverse communities.
22. More community based sexual offending treatment services should be funded and linked in with restorative justice programs so that reoffending and rehabilitation can be properly addressed.
23. Restorative justice conferencing should be introduced in three phases, relating to type of offending and stage of the criminal justice process:
 - First: non-sexual, general adult restorative justice conferencing at all stages of the criminal justice system
 - Second: sexual offence restorative justice conferencing at all stages of the criminal justice system, except the post-charge stage, and
 - Third: post-charge sexual offence restorative justice conferencing.
24. Ongoing monitoring and evaluation of the restorative justice program should be a core function of the restorative justice units and specialist gender violence teams.

Sexual Offence Specialist and Problem-Solving Courts

25. All Australian jurisdictions should, as a minimum, develop specialist court-based practices for dealing with sexual offence matters, building on the suite of specialist practices implemented in Victoria.
26. Governments should consider the value of developing and implementing specialist sexual offence courts as a way to respond to the complexities of sexual offending and to deliver more responsive justice outcomes to victims of sexual assault.

27. Governments should consider establishing pilot sexual offence problem-solving courts initially in the Magistrates'/Local Courts, with a view to their possible subsequent expansion to the higher courts.
28. Any consideration of specialist and problem-solving courts should include close examination of the New York Sexual Offense Courts as a best practice example of a multifaceted specialist and problem-solving approach to sexual offending.
29. Governments should review the benefits of sexual offence pre-release or re-entry courts in an Australian parole context.
30. Governments should review the benefits of Circles of Support and Accountability for sex offenders and implement pilot programs as an additional strategy for reducing reoffending and supporting offender reintegration.

Truth-telling Mechanisms and Civil Justice Responses to Sexual Offending

31. All jurisdictions should review their crimes compensation tribunals and procedures to ensure that they incorporate appropriate therapeutic practices to improve the experience of victims, and to make them more accessible to more victims.
32. Further consideration should be given to the development of referral pathways from the crimes compensation and civil jurisdictions to sexual offence restorative justice conferencing.
33. All jurisdictions should examine the potential and options for incorporating therapeutic and restorative justice practices into procedures for making civil claims in respect of sexual assault, including exploring the use of judicial or quasi-judicial authority to reinforce their value.

Appendix – Consultation List

During the development of this Report, the CIJ consulted a range of stakeholders. All stakeholders were consulted individually, either face-to-face or over the telephone. Some participated in a Roundtable Discussion at RMIT University in Melbourne on Friday, 28 February 2014.

- **Justice Marcia Neave**, AO, Court of Appeal, Supreme Court of Victoria
- **Chief Judge Michael Rozenes**, AO QC, County Court of Victoria
- **Judge Meryl Sexton**, County Court of Victoria
- **Magistrate Mandy Chambers**, Magistrates' Court of Victoria
- **Jane Dixon SC**, Victorian Bar
- **David Sexton**, Victorian Bar
- **Dr Danny Sullivan**, Consultant Forensic Psychiatrist, Victorian Institute of Forensic Mental Health
- **Patrick Newton**, Forensic Psychologist
- **Jillian Prior**, Principal Legal Officer, Victorian Aboriginal Legal Service
- **Helen Fatouros**, Director, Criminal Law, **Gabriela Pulsczynski**, Senior Policy and Strategic Projects Officer and **Rebekah Haylock**, Manager, Sex Offences Team, Victoria Legal Aid
- **Patrick Tidmarsh**, Forensic Interview Advisor, Sexual Offences Child Abuse Investigation Team (SOCIT), Victoria Police
- **Brett Sonnet**, Crown Prosecutor, and **Kerry Maikousis**, Legal Prosecution Specialist, Specialist Sex Offences Unit, Office of Public Prosecutions, Victoria
- **Laura McDonough**, Senior Lawyer, and **Anaya Latter**, Communications Manager, Knowmore Legal Service (Royal Commission into Institutional Responses to Child Sexual Abuse)
- **Pasanna Mutha**, Policy & Campaigns Manager, Victorian Women's Legal Service
- **Dr Anastasia Powell**, Criminologist, RMIT University
- **Dr Asher Flynn**, Criminologist, Monash University
- **Carol Nikakis**, Chief Executive Officer and **Fiona Rogers**, Manager, Community Support Program, Victorian Association for the Care and Rehabilitation of Offenders
- **Carolyn Worth**, Manager, South Eastern Centre Against Sexual Assault
- **David Moore**, President, Victorian Association for Restorative Justice
- **Kate Milner**, Director, Restorative Justice and Assistant Commissioner
Dr Anne-Marie Martin, Department of Corrective Services, NSW (Sydney)
- **Dean Hart**, State Manager Forum Sentencing, Crime Prevention Division, Department of Justice and Attorney General NSW (Sydney)
- **Dymphna Lowrey**, Special Advisor - Restorative Practice, Restorative Engagement Program, Defence Abuse Response Taskforce
- **Amanda Lutz**, Manager, Restorative Justice Unit, ACT Department of Justice & Community Safety
- **Fiona Landon**, Program Director, **Jennifer Annan**, Victim-Survivor Specialist and **Tony Lindquist**, Offender Specialist, Project Restore (Auckland, New Zealand)

- **Mike Hinton**, General Manager, Restorative Justice Aotearoa (Wellington, New Zealand)
- **Judge Sir David Carruthers**, KNZM, Chair, Independent Police Conduct Authority (NZ) and former Chairman of the New Zealand Parole Board (Wellington, New Zealand)
- **Jo-Ann Vivian**, Senior Advisor, Provider and Community Services, Ministry of Justice New Zealand (Wellington, New Zealand).

The CIJ thanks all stakeholders and other contributors to this project, including individuals who preferred not to be named in this report, and students and volunteers at the CIJ who provided research assistance.

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