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# **It's healing to hear another person's story and also to tell your own story:**

Report on the CIJ's Restorative  
Justice Conferencing Pilot Program



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# Part 1: Executive Summary

■ ■ *Something has been faced up to, dealt with. Sometimes you have to step out of your comfort zone and confront things that hurt. I now know something about a person who was previously just a faceless defendant deserving of punishment. Knowing what he looks like, how he talks and how he feels helps me. [Participant in the CIJ's RJC program]*

*...saying sorry will never bring [the deceased person] back, but [restorative justice] gave me an opportunity to speak and not make it out that I'm a cold-hearted person and I didn't care, when I do care and I really appreciate having this opportunity. [Participant in the CIJ's RJC program]*

Victims of crime have a range of justice needs that are not readily identified or met through existing legal processes. These justice needs are for voice, validation, information, accountability, prevention, relationship repair and resolution.

The processes of the criminal justice system are not able to meet all victims' justice needs. This does not mean that the criminal justice system is deficient. The criminal justice system fulfils a range of functions; it is not primarily designed to address victims' needs. A central element of the criminal justice system, the criminal trial process, has the core functions of determining questions such as whether a crime has been committed, whether an accused person is guilty, and if so what sentence is appropriate to impose in the circumstances. Critically, its mechanisms uphold the rights of the accused in recognition of the imbalance of power and resources that necessarily arises when the state prosecutes an individual.

It is important that the criminal justice system continues to serve its key purposes. If it became solely focused on meeting the needs of victims, its other functions would be compromised.

This also means that if the full range of victims' justice needs that victims experience in the aftermath of crime are to be appropriately addressed, then other mechanisms capable providing these responses must be offered in addition to the processes of the criminal justice system.

It is in this context that the potential of restorative justice processes to meet the needs of victims becomes clear. Such processes can meet individual victims' justice needs in ways that the traditional criminal justice system cannot. Rather than replacing or offering an alternative to the traditional criminal justice system, restorative justice processes can operate alongside it, in ways that complement it.

Research findings consistently show that restorative justice processes deliver a range of benefits to victims who take part in them. Significantly, recent studies indicate that participation in restorative justice processes can reduce the traumatic effects of crime for victims. This suggests that it may be particularly helpful to provide restorative justice processes in response to very serious offences, because victims of those crimes are likely to have experienced significant trauma, and therefore may have the greatest need for ways that can helpfully address trauma.

In Victoria the only ongoing<sup>1</sup> restorative justice program that responds to criminal offences operates solely within the youth jurisdiction: the highly regarded Youth Justice Group Conferencing Program. Extending this program to respond to adult offending in Victoria might seem a logical next step. However, some justice system stakeholders have historically taken the view that restorative justice should only be used to respond to young offenders who have committed relatively minor offences. This view is associated with several ideas about restorative justice conferencing. These ideas include that restorative justice conferencing is a way to help young offenders realise the impact of their offending, thus assisting their rehabilitation and reducing reoffending; and a diversionary option for young people who have committed minor offences. That is, young offenders can participate in a restorative justice conference *instead* of being prosecuted for the offence. Certainly, restorative justice conferencing can be all of these things, and the advantages of using restorative justice processes to support the rehabilitation of young offenders and their diversion from the criminal justice system are clear.

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<sup>1</sup> The Department of Justice and Community Safety is currently operating a restorative justice program that responds to family violence, including that which is perpetrated by adults. However, this program is currently a pilot.

However, the Centre for Innovative Justice (CIJ) formed the view that, given the evidence about the benefits of restorative justice for victims of crime, these processes should be made more widely available for victims, including in cases where the offender is an adult, and where the offending is serious. For these reasons, the CIJ decided to pilot a restorative justice conferencing program for serious offences committed by adult offenders, with the aim of demonstrating that a restorative justice program of this kind could work in the Victorian context.

From late 2015 to mid-2018, the CIJ embarked on a project to design and implement a pilot restorative justice conferencing program (the RJC program). The RJC program made restorative justice conferencing available to people affected by motor vehicle collisions that resulted in death or serious injury in Victoria, where the offending driver was an adult.

The project aimed to:

- meet the justice needs of victims of motor vehicle collisions through the provision of a restorative justice program that was fair to offenders and did not negatively impact on the traditional criminal justice system; and
- build awareness of and support for restorative justice within the Victorian criminal justice system and associated support services; and
- contribute to knowledge about best-practice delivery of restorative justice processes in response to serious crimes committed by adults, with a particular focus on learning what worked in the Victorian context.

This report describes the activities conducted by the CIJ during the course of this project, which was undertaken in two phases. In phase one of the project the CIJ consulted and built relationships with individuals and agencies who worked with victims and offenders, and all relevant criminal justice system actors and institutions. We wanted to make key stakeholders aware of the RJC program in the hope that they would support it and make referrals to it. Just as importantly, the CIJ aimed to raise general awareness about restorative justice with these stakeholders, given that restorative justice was not in widespread use in Victoria. We therefore sought opportunities to meet with stakeholder organisations and talk with them about restorative justice, inviting people to ask questions and raise any concerns they might have. We encouraged stakeholders to think about how restorative justice could benefit their clients and/or align with their organisational priorities. Through this work, we hoped to contribute to better understanding of and support for restorative justice within the criminal justice system in Victoria. Phase one also involved the development of the RJC program framework.

In phase two of the project, the RJC program became operational and we began to accept referrals. Fourteen referrals were accepted into the program. A face-to-face restorative justice conference was held in two of these cases.<sup>2</sup> While these numbers are relatively small, we are confident that the project delivered significant outcomes. This conclusion is primarily based on our analysis of feedback that RJC program participants provided. This feedback was obtained via a research process for which we sought and obtained ethics approval. People who had been accepted into the RJC program were invited to participate in one-on-one semi-structured interviews with an independent researcher. These interviews generated rich data that allowed us to gain valuable insights into participants' experience of the RJC program. This is discussed in depth in Part 5 of this report. Significantly, all participants reported that taking part in the RJC program had been beneficial for them. Further, their interviews indicated that the RJC program met a range of justice needs for these participants. Some participants said that taking part had allowed them to express themselves and to feel heard (voice):

**FF** *...this is probably the most positive thing that we've ever had in some ways with regards to being heard.*<sup>3</sup>

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<sup>2</sup> After the pilot ended the CIJ continued to receive requests for restorative justice processes. Consequently, we have since conducted a number of additional face-to-face conferences.

<sup>3</sup> P7

Others commented that participating in the process had allowed them to feel that the harm they had experienced was recognised and understood (validation):

☐☐ *I felt like [program staff member] is one of the...only people who took the time to sit down and really understand the gravity of the crime upon me.*<sup>4</sup>

Some participants said that they got answers via the process (information):

☐☐ *We got different answers. We found out the background of the other person and the events that led up to the day, and that put our minds at rest and answered some questions.*<sup>5</sup>

One participant said that he appreciated the opportunity to offer an apology and express his remorse (accountability):

☐☐ *...saying sorry will never bring [the deceased person] back, but you gave me an opportunity to speak and not make it out that I'm a cold-hearted person and I didn't care, when I do care and I really appreciate having this opportunity to do it.*<sup>6</sup>

A number of participants said that their participation in the RJC program had assisted them to feel that they had taken action to prevent the harm they had experienced from happening again (prevention):

☐☐ *I think my main game was that [the offender] wouldn't get out there and offend again. He'd been arrested for drunk driving a couple of months before and it hadn't been dealt with, you know, the system just does not deal with these things.*<sup>7</sup>

*...all I've got now is my feeling that if I can make some change to some parts of the mental health system... it will mean that our son's life is not for absolutely nothing, that somebody else will not go through what we went through if we can make some changes.*<sup>8</sup>

Comments made by some participants implied that the conference had helped them to experience a sense of resolution:

☐☐ *It helped me to feel a bit more at peace.*<sup>9</sup>

The cases accepted into the RJC program involved collisions where the people affected had not known each other beforehand. Nonetheless, participants' accounts often focused on how the conference had changed the way they related to, or thought about the other RJC program participants (relationship repair):

☐☐ *[The other participants are now] real people to me and I feel as though we do have a bond with them...I think it's feeling sort of a greater sense of peace maybe having met them and feeling that they don't blame us as a family or just feeling that there is openness between the two families. Or there's a connection and that it's not sort of acrimonious. Yeah I think that's the best thing. And even though it's sort of difficult it's also really good.*<sup>10</sup>

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5 P5  
6 P2  
7 P1  
8 P4  
9 P7  
10 P7

Some participants made comments indicating that participating in the restorative justice process had addressed matters that were important to them that they felt had not been responded to by the justice system:

- FF *...the emphasis is placed upon the offender in the court setting, so it just felt like we were always discarded [and thought of last] in the process. And often we were told, 'this is what's going to happen in court today', and the complete opposite happened...It felt like everything was going wrong all the time, and that no care was taken to explain any of it to us... what I appreciated about [program staff member], is she took the time to make sure she explained it all, and gave me all the possible scenarios, and gave me the space I needed to make that decision.<sup>11</sup>*
- FF *When we could say actually something, it made us feel like [the deceased person] was of some consequence and he was not just nothing because I felt that with [the coronial inquest] that [the deceased person] may as well have been an ant or a something you could just squash and say, 'well, goodbye; that one's gone, where's the next one?'...the [the coronial inquest] was totally impersonal and there's no justice in that level of impersonality.<sup>12</sup>*

The reflections quoted above indicate that these RJC program participants felt that taking part in the program had met needs that were important to them.

Through a restorative justice lens, we recognise these kinds of needs as 'justice needs'. The participants' experience was that the RJC program was able to meet needs that the traditional justice system had not been able to address for them. These reflections suggest that the RJC program delivered the benefits CIJ intended and hoped that it would for those who took part in it.

A close reading of the participants' interviews also provided the basis for us to deepen our understanding of effective restorative justice program delivery in the context of serious crimes committed by adults. Key lessons learned included:

- A careful preparation process that supports each participant in the lead up to the conference is necessary
- Participants need to build trust and rapport with program staff, particularly the convener, prior to the conference
- Each process involves significant complexity. The needs of all participants must be taken into account and addressed to the greatest extent possible. However, the needs and wishes of some participants may at times be in tension with those of others. Further, program principles must be upheld. However, sometimes the needs and wishes of participants may also be in tension with program principles. Great care is needed to navigate these complexities. Each process will present unique challenges that will need to be worked through as they arise.

In summary, our project:

- built further understanding of and support for restorative justice within the criminal justice system and associated support services in Victoria
- provided evidence that Victorian criminal justice system stakeholders are prepared to accept the expansion of restorative justice into the adult criminal jurisdiction, as demonstrated by the facts that they engaged constructively with us, and referred cases for conferencing to the RJC program
- delivered a pilot restorative justice program that addressed serious crimes committed by adults, with the result that participants experienced the process as beneficial. Their reflections indicate that the process met their justice needs in ways the traditional justice system was not able to
- did not appear to have had a detrimental effect on any criminal justice proceedings, or to have compromised the legal rights of accused persons or offenders.

In the CIJ's view, these findings indicate that restorative justice processes that respond to crime committed by adults should be made available on an ongoing basis in Victoria. We make the following recommendations in support of this proposal.

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# Recommendations

The Victorian Government can play an important role in bringing restorative justice from the margins of the criminal justice system into the mainstream. Government leadership and support is crucial for ensuring that those who could benefit the most from participating in restorative justice processes are aware that the option exists and able to access it. To this end, Government should take the following steps:

1. endorse the use of restorative justice as a process complementary to the adult criminal justice system in Victoria
2. support the establishment of a restorative justice program or programs with the following features:
  - a primary focus on responding to the harm experienced by individuals as a consequence of crime
  - direct participation of victims, offenders and others affected by crime
  - dialogue-based
  - flexible and non-prescriptive
  - underpinned by core restorative justice principles
3. facilitate access to restorative justice services by: supporting the provision of education and training; supporting the development of workforce capability, funding programs and services; and establishing a legislative basis for restorative justice processes in the context of the adult criminal justice system.

## 1. Endorsing restorative justice

The Victorian Government should endorse the use of restorative justice as an optional process that is complementary to (that is, not as a substitute for) the adult criminal justice system in Victoria. An official endorsement from the Government would lay the groundwork for restorative justice programs and services to develop with confidence in Victoria, and to remove some of the concerns or uncertainty that stakeholders or potential participants may have about the legitimacy of this type of response to adult offending.

### Recommendation 1

The Victorian Government should endorse the use of restorative justice as an optional process complementary to the adult criminal justice system in Victoria.

## 2. Supporting a restorative justice program

Restorative justice programs vary considerably in how they operate, both within Australia and internationally. The evidence base about restorative justice combined with our experience of conducting this pilot program suggests that an appropriate program structure for the adult criminal jurisdiction in Victoria has the following characteristics.

### Focused on the harm to individual people caused by crime

Restorative justice can be a useful complement to the traditional criminal justice system by providing what that system cannot: a process that focuses on the human impact of crime. A restorative justice program for the adult criminal jurisdiction should be a forum within which the needs of those harmed (victims and others affected) can be acknowledged and responded to. Restorative justice processes can have other incidental objectives and benefits for individuals and systems—for example encouraging offenders to take steps to avoid reoffending, or enhancing public confidence in the criminal justice process. However, it is important that the primary focus of the process—meeting the needs of individuals—is not constrained by or subordinated to other objectives.

## **Direct participation of victims, offenders and others affected by crime**

In contrast to the traditional criminal justice system where professionals are the key actors, a restorative justice program for the adult criminal jurisdiction should facilitate the direct participation of those most affected by the crime.

### **Dialogue-based**

A restorative justice program for the adult criminal jurisdiction should be focused on facilitating dialogue or other forms of communication or interaction between the people most affected by the crime.

### **Flexible delivery**

The program must be responsive to the individual needs of its participants. It should therefore be flexible and non-prescriptive as to both timing and process.

It should allow for restorative justice to be offered at multiple points in the criminal proceedings, including pre-sentence and post-sentence. It should also be available in other contexts, subject to other relevant considerations, including but not limited to cases where there has been a police investigation but charges will not proceed, and in cases where there has been a finding of not guilty. As this report has outlined, in cases of serious harm it is crucial that a thorough preparation phase takes place before participants are brought into contact with each other. Each participant has unique needs, and the timeframes of each restorative justice process must accommodate these.

The participants should determine who takes part in a particular process—subject to program staff guidance and oversight. In some cases, a participant might want to meet with only one other person. In other cases, whole family groups might be brought together. Sometimes it may be appropriate and valuable for professional and community representatives to participate as well. Some cases might involve a victim and an offender. Other cases might involve people who do not fit within either category, but who have nonetheless been affected by a crime. The program structure must accommodate these different scenarios.

### **Underpinned by core restorative justice principles, including:**

#### **– Does no further harm to any participant**

This principle is fundamental to any restorative justice process. Restorative justice offers a way to respond to crime that is constructive and non-punitive. No one should be worse off after participating.

#### **– Voluntary**

Free and informed consent of all participants is a pre-requisite for restorative justice processes. Participants should never be required or coerced into taking part, as this would undermine the capacity of the process to be a forum within which people can participate with agency and on their own terms.

#### **– Respects the dignity and equality of all participants**

Restorative justice offers the opportunity for people to be brought into dialogue with each other. Participants are given space to tell their own stories and must also be prepared to listen to others and interact with them respectfully. People who have caused harm are invited to acknowledge and take responsibility for the harm caused, but the process must not be punitive or de-humanising for them. The process is about creating opportunities for people to actively participate in a response to harm. It is not forum for 'doing things to' participants.

#### **– Recognises and addresses particular characteristics or vulnerabilities of participants**

The program must be broadly accessible. This means that it must be tailored to meet the particular needs of its participants, for example by including measures designed to enhance cultural safety for Aboriginal and Torres Strait Islander participants, by adapting procedures to ensure they are suitable for people with cognitive impairments, and by including other sources of support such as interpreters or disability advocates, so that all participants are given the opportunity to fully take part in the process.

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– **Recognises and addresses power imbalances**

Restorative justice processes must be delivered in a way that acknowledges structural power imbalances in society and how these can shape interpersonal dynamics. Program staff must have the requisite skills and awareness to recognise and address power imbalances, and to take steps to prevent these being replicated by the restorative justice process. Doing so is a key aspect of restorative justice practice, and is particularly important in some contexts, for example when restorative justice processes are used to respond to gendered harms such as sexual offences or family violence.

– **Confidential**

Participants must feel free to express themselves openly and honestly without fear of reprisals, or detriment to their legal and other interests. What is said during a conference process must not be able to be used in subsequent legal proceedings, or any other way made public unless all participants consent. Taking part in the process must not compromise participants' legal rights.

Consideration should be given to the question of the restorative justice program's relationship to other entities such as government and the courts. Given the need to ensure that the restorative justice program can be as responsive as possible to the needs of participants, it may be desirable for the program to be delivered independently from the courts, so that priorities such as court timeframes and scheduling do not overly influence the operation of the program.

The proposed restorative justice program is intended to operate alongside the criminal justice system. The criminal justice system is an adversarial environment, in which the interests of victims and offenders are generally understood to be in opposition. In contrast, restorative justice processes are designed to deliver benefits to all participants, to promote shared understandings, and to highlight mutual interests.

To facilitate a non-adversarial approach and to minimise potential barriers to voluntary participation, it is important that participants perceive restorative justice processes to be neutral. Participant perceptions may be influenced by the alignment of a convener or their service with a particular category of participant (victim or offender). We acknowledge that there are a broad range of restorative justice programs in existence, and that victim-focussed services and offender-focussed services are, respectively, involved in their successful delivery. However, in the context of a restorative justice program operating alongside the criminal justice system, the perception of neutrality may be enhanced where the program is delivered by an organisation that is not aligned to particular categories of participants, and is capable of delivering programs and services that may benefit all participants.

## Recommendation 2

The Victorian Government should support the establishment of a restorative justice program or programs with the following features:

- a primary focus on responding to the harm experienced by individuals as a consequence of crime
- direct participation of victims, offenders and others affected by crime
- dialogue-based
- independent
- flexible and non-prescriptive
- underpinned by core restorative justice principles.

### 3. Facilitating access to restorative justice services

#### Support stakeholder education and training

Restorative justice is not well understood within the criminal justice system in Victoria. Key criminal justice system organisations including the judiciary, the courts, Victoria Police, the Office of Public Prosecutions, Victoria Legal Aid and services for victims and offenders should be supported to educate and train their staff about restorative justice objectives, principles and processes. The legal profession's representative bodies should also be encouraged to make restorative justice training available to their members. This will enable effective referrals to be made to the restorative justice program.

#### Support the development of workforce capacity

Rigorous and effective restorative justice programs responding to crime and serious harm rely on highly skilled professional staff. As there are currently limited restorative justice programs in Victoria, and thus few opportunities to work in this field, there is only a small pool of suitably qualified restorative justice practitioners in the state. To support the expansion of restorative justice practice there must be growth in the number of trained, skilled, qualified and experienced practitioners. The Government should investigate ways to foster this expansion.

#### Fund delivery of restorative justice services

A quality restorative justice program that is capable of supporting people who have experienced serious harm must be appropriately resourced. Financial support by Government will be important for ensuring that people are able to access restorative justice services when they are ready to do so, and for removing financial barriers to their participation.

#### Provide a legislative basis

It is not essential for a restorative justice program to have a legislative basis in order for it to operate successfully. However, a legislative foundation would help to establish the legitimacy of the restorative justice program and confidence in it across the criminal justice system. Legislation should expressly provide that disclosures made during a restorative justice process are not admissible in legal proceedings. Legislative provisions could also clarify how participation in a restorative justice process might be taken into account for sentencing or other purposes.

#### Recommendation 3

The Victorian Government should facilitate access to restorative justice programs and services by:

- Supporting stakeholder education and training about restorative justice
- Supporting the development of workforce capacity
- Funding delivery of restorative justice services
- Providing a legislative basis for the use of restorative justice in the context of the adult criminal justice system.

## Thank you

Thank you to the Victorian Legal Services Board for funding this project. Thank you to our Advisory Committee and other individuals and stakeholder organisations who contributed their time and expertise by providing input into the project. Most of all, thank you to the program participants. People who had experienced great harm took part in the program in the knowledge that it was a pilot, and therefore an evolving model. Your generosity in taking part under these circumstances allowed us to learn a great deal, which will mean we can improve on our process to the benefit of future participants.

## A note on terminology

### **‘Victim’ and ‘offender’**

Throughout this report the terms ‘victim’ and ‘offender’ are used frequently. However, these terms can be problematic in many respects. Some people who have had crimes perpetrated against them prefer not to refer to themselves as ‘victims.’ Instead, they identify with the terms ‘survivor’ or ‘victim/survivor.’ This is often the case for people who have experienced sexual violence and/or family violence. In some restorative justice discourse there is a preference for using the term, ‘person harmed’ rather than ‘victim.’ Further, in the context of criminal proceedings, the term ‘victim’ has a specific meaning. In this report, we sometimes use the word ‘victim’ in circumstances where the applicable legal term would be ‘complainant.’ We have opted to use the term ‘victim’ for convenience and ease of understanding. However, we acknowledge that not everyone who has experienced a crime or other harm identifies with this description. Further, in our restorative justice practice it is our sincere aim to recognise people for the complex individuals they are. By using the term ‘victim’ we do not mean to narrowly define someone’s identity solely with reference to their experience of being offended against or harmed.

Similarly, we recognise that using the term ‘offender’ to describe someone is potentially limiting and stigmatising. Some restorative justice scholars and practitioners prefer to say, ‘person responsible for causing harm.’ In our restorative justice practice we create opportunities for people to accept responsibility for wrongdoing. However, we recognise our participants as people with complex identities, rather than seeing them exclusively as wrongdoers. We also recognise that, as abundant research on prison populations makes clear, most people who have been found guilty of criminal offences have themselves experienced victimisation in addition to other forms of disadvantage including poverty, mental illness and cognitive disabilities.

Although this report often uses the terms ‘victim’ and ‘offender’ when referring to restorative justice conferencing participants, the pilot program reported on here did not use these categories to define eligibility. Rather, the program was available to ‘people affected by a serious motor vehicle collision.’ This included people who identified as victims or offenders, and/or who had been assigned these categories as the result of a criminal prosecution. It also included a wider range of people who did not necessarily fit into either category. For example, one restorative justice conference held under the pilot program responded to a collision in which two people lost their lives. However, a criminal prosecution did not proceed. Family members of each person who had died took part in the conference. None of the participants were victims or offenders in the context of the collision, but all had been deeply affected by the tragedy.

# Part 2: Introduction

## Restorative justice

Restorative justice has been defined as, 'a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.'<sup>13</sup>

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

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

The most common restorative justice practice is restorative justice conferencing, where those affected by a crime, other harm or situation of conflict collectively discuss how to respond to the aftermath of what has happened and its implications for the future. Participation in a restorative justice conference is voluntary for all participants. The convener of the conference is a skilled professional who ensures that the process is respectful and fair for everyone involved. A restorative justice conference generally proceeds in three phases, with all parties discussing: what happened; how people were affected; and what needs to happen to address the harm. Restorative justice practices can also be used in ways other than conferencing or face-to-face meetings between parties, including through indirect communication and the exchange of correspondence.

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<sup>13</sup> Tony Marshall, 'The evolution of restorative justice in Britain' (1996) 4 *European Journal on Criminal Policy and Research* 31, 37.

## Victims' justice needs

Victims of crime are not a homogenous group and their distinct characteristics and experiences shape how the crime affects them and their interests and needs following the crime. Nonetheless, the literature about victims' experiences identifies common themes that help us understand the range of actions and outcomes that victims want when they look for a justice response to a crime. Some scholars refer to these themes collectively as 'victims' justice interests.'<sup>14</sup> However, other researchers have found the term 'justice needs' to be a closer fit with victims' own narratives.<sup>15</sup> The CIJ uses the term 'justice needs'. Based on the research and the CIJ's experience of working directly with victims of crime, the CIJ has developed the following description of victims' justice needs:

| Justice Need   | Description   |
|----------------|---|
| Voice          | The need or desire to tell the story of what happen/9/9ed and its impact.<br><br>Some victims have a specific need to tell the offender about how they feel about the crime, to express emotion, to have the offender listen to and understand the impact of the crime on all aspects of their life.  |
| Validation     | To have others believe and affirm their experience.   |
| Information    | The need to understand more about the crime, about what happened and why.   |
| Accountability | May encompass punishment, public acknowledgement, apology/expression of remorse, other forms of recompense/reparation.  |
| Relationships  | To restore damaged relationships with others involved in or affected by the crime, family members and the community.<br><br>To make arrangements for how any future interactions will be managed, whether or not a relationship is ongoing. For example, a victim may not want future contact with an offender, but may want to make arrangements to cover the possibility of them unexpectedly encountering each other in the community.<br><br>In cases where the victim and offender did not know each other before the crime, a relationship of harm is nonetheless created between them through the event of the crime. Some victims want to address this relationship, which may allow them to change the way they think about or imagine the offender. |
| Prevention     | To see that what happened to them does not happen to anyone else.<br><br>To address the circumstances that contributed to the crime. This can mean trying to ensure that the particular person responsible does not repeat their actions in the future, and/or contributing to change at a societal level.  |
| Resolution     | To feel that what needs to happen in order for the crime to be addressed has occurred.  |

14 Kathleen Daly, 'Reconceptualising Sexual Victimization and Justice' in Inge Vanfraechem, Antony Pemberton & Felix Mukwiza (eds) *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Taylor & Francis, 2014) 387.

15 Jane Bolitho, 'Putting justice needs first: A case study of best practice in restorative justice' (2015) 3(2) *Restorative Justice* 256, 267

## The criminal justice system cannot meet all the justice needs of all victims

If we map each of the above justice needs against what the criminal justice system is capable of delivering for victims, it becomes clear that the criminal justice system as it is currently constituted is unlikely to be able to meet all of them. To consider the need for voice: some victims who have a strong need for voice may feel that this need is met via the criminal justice process if they give evidence, or if they make a victim impact statement. However, not all victims have these opportunities. In some cases, police may decline to bring charges, or a prosecution may be discontinued in the early stages. This is often the experience of victims of sexual offences, given the high attrition rate in the prosecution of these matters. Even in cases where victims do have opportunities to exercise voice during criminal proceedings they may not necessarily find these experiences satisfying; the legal structures governing these processes may not be conducive to victims feeling able to tell their stories in the ways they want to tell them, or to feel that they have been heard by the offender. Further, there is no mechanism within the traditional criminal justice system to facilitate direct communication between victims and offenders. Therefore, victims who have a specific need to voice their experience to the offender are unlikely to have this need met via the traditional criminal justice system.

The criminal justice system does have the potential to deliver victims a sense of validation and offender accountability in cases where offenders plead guilty or are found guilty. In those circumstances a guilty outcome may be experienced by a victim as evidence that the criminal justice system has believed them, that it has called out the behaviour as wrong, and has attributed the wrong to the offender and imposed a punishment on them. However, not all criminal proceedings result in a guilty verdict. Even in cases that do, we know that some victims have negative experiences of the criminal justice system and may feel that the system fails to acknowledge their victimisation and fails to adequately hold the offender accountable.<sup>16</sup> Other victims may have specific validation and/or offender accountability needs that cannot be met via formal criminal justice system mechanisms. For example, some victims of sexual offences may seek validation in the form of their own family members acknowledging the harm they have experienced. This is not a process the criminal justice system can deliver. For some victims it is crucially important to know whether an offender is genuinely remorseful, beyond any formal acknowledgment of responsibility that might be indicated on the offender's behalf via their lawyer. These victims may seek an opportunity to speak directly with the offender in order to gauge whether the offender truly understands the consequences of the offending. As noted above, this is not an interaction that the traditional criminal justice system facilitates.

Victims who have a prevention need may express a strong desire to ensure that the victimisation they have experienced does not happen to anyone else in the future. Victims with a prevention need may, for example, recognise that factors such as an offender's mental health or substance abuse issues contributed to the offending. Some of these victims will seek opportunities to encourage an offender to seek treatment, with the aim of helping the offender make changes that will mean they are at a lesser risk of repeating the offending behaviour in the future. Some victims want to contribute to broader social change to address issues that contributed to the offending on a structural level.

In summary, the criminal justice system may be able to meet some justice needs, to some extent, for some victims, some of the time. This is not to say that the criminal justice system is failing to fulfil its purpose. Criminal justice system processes are not primarily designed to address victims' needs. The core function of a criminal prosecution is to determine questions such as whether a crime has been committed, whether an accused person is guilty, and if so what sentence is appropriate to impose in the circumstances. Critically, its mechanisms uphold the rights of the accused in recognition of the imbalance of power and resources that necessarily arises when the state prosecutes an individual.

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<sup>16</sup> Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Final report* (Victorian Law Reform Commission, report 34, 2016),



In recent decades in Victoria, as has been the case in many other comparable jurisdictions, a suite of reforms to the criminal justice system has enhanced victims' ability to participate in criminal proceedings. These reforms have aimed to ensure that victims are kept informed about developments in the prosecution, that they have opportunities to be consulted about certain prosecution decisions and that they receive support throughout the process. More work can and should be done to ensure that victims are included in criminal proceedings, and that they are well supported through the process. However, the fact remains that the parties to criminal proceedings are the state and the accused. The victim is not a party. Given this reality, the criminal justice system will always be limited in its capacity to meet victims' justice needs. Therefore, we need to find other processes that are capable of meeting victims' justice needs in ways that the criminal justice system cannot. Restorative justice is a clear example of such a process, as will now be discussed.

## Restorative justice can meet victims' justice needs in ways the criminal justice system alone cannot

Unlike a criminal prosecution where the victim is not a party to proceedings and therefore their needs are not the main focus, restorative justice conferencing has the potential to offer victims an opportunity to participate in a process specifically designed to address the harm they have experienced. Restorative justice conferencing has the potential to meet victims' justice needs in a range of ways, as the table below describes:

| Justice Need   | Restorative justice conferencing's capacity to meet victims' justice needs   |
|----------------|--|
| Voice          | The victim has the opportunity to explain the impact of the offending directly to the offender and to tell their story in their own way, freed from the constraints of the legal process.  |
| Validation     | The victim's experience is recognised and treated as meaningful within the process. It is not challenged or subject to attack.   |
| Information    | The victim can seek answers from the offender in relation to unresolved questions about what happened. The offender is sometimes the only person who has this information.   |
| Accountability | Being directly addressed by the victim about how the crime has affected their life provides impetus for the offender to gain a full understanding of the impact of their actions, which can promote offender accountability. In some conferences, the offender will offer an apology to the victim.  |
| Relationships  | <p>The victim has the opportunity to restore damaged relationships with others involved in or affected by the crime, family members and the community.</p> <p>If the victim does not want a relationship to continue, they have the opportunity to address any outstanding issues with the offender, such as what to do if by chance they encounter each other in the community.</p> <p>Victims who did not know offenders before the crime have the opportunity to reassess the way they have thought of or imagined the offender.</p>  |
| Prevention     | <p>The victim has the opportunity to convey the gravity of the effects of the crime to the offender, which may allow offenders to develop greater insight, and may assist offenders to gain the resolve they need to address the circumstances that gave rise to the offending.</p> <p>The victim has the opportunity to encourage the offender to take steps towards rehabilitation/desistance.</p> <p>Some victims find that participating in restorative justice conferencing assists them to engage in broader systemic advocacy, for example because they uncover further information that supports their aims, or in some cases because other participants agree to join forces with them.</p> |
| Resolution     | <p>Some victims who take part in restorative justice processes report that doing so allowed them to feel that they had done what they needed to do in order to address the crime.</p> <p>Note: it is not expected that participating in restorative justice processes will necessarily mean that the victim no longer feels the effects of the crime such as grief and sadness. Resolution does not necessarily mean 'closure.'</p>  |

## The relationship between restorative justice and the criminal justice system

As the above table illustrates, restorative justice conferencing can meet a range of victims' justice needs that the traditional criminal justice system is not capable of meeting. However, this is not to say that restorative justice conferencing should replace the traditional criminal justice system. It is vitally important that the criminal justice system continue to perform its functions of determining questions of guilt based on evidence, determining sentences according to law and ensuring that criminal prosecutions are fair and the rights of the accused upheld. The criminal justice system serves the entire community and because of this broad role it would not be appropriate for the needs and wishes of individual victims to become the central focus of criminal proceedings.

There is also likely to be a limit to how much the criminal justice system can be modified in the interests of accommodating the needs and interests of victims before the system's integrity and capacity to perform its other functions inevitably becomes compromised. While the traditional criminal justice system's response to victims must continue to improve and evolve, the necessary limitations of the system must be acknowledged. Recognising the distinction between what a properly functioning criminal justice system can deliver for victims, and what it cannot, also provides some guidance on the appropriate relationship between restorative justice processes and traditional criminal justice processes. It suggests that restorative justice conferencing can and should operate alongside the criminal justice system in a complementary way, by providing a forum in which the human impact of crime can be the central focus and victims' needs can be expressly responded to.

The availability of restorative justice conferencing as a complementary process can also help protect the integrity of the criminal justice system, reducing the pressure for it to incorporate approaches incompatible with other functions, and improving victim satisfaction.

## Research findings: benefits of restorative justice for victims

Restorative justice has been described as 'one of the most researched justice innovations of the twenty-first century.'<sup>17</sup> However, establishing a clear evidence base for the benefits of restorative justice programs has proved a difficult task. Restorative justice programs differ considerably and therefore it is difficult to draw general conclusions from dataset comparisons.<sup>18</sup> Nonetheless, there is now a solid research base that indicates that restorative justice processes offer benefits for victims who participate in them.

The studies comprising this research base have frequently measured victims' level of satisfaction with a restorative justice process compared to victims' level of satisfaction with court processes. For example, a well-known study by Heather Strang examined the impact on victims of crime of a restorative justice program in Canberra (the 'Reintegrative shaming experiments' or 'RISE').<sup>19</sup> Conducted over five years, the study randomly assigned cases to either a restorative justice conferencing program or to usual court processes. Victims who took part in the restorative justice program were significantly more satisfied with their experience compared to those who went to court. While a small percentage of victims reported dissatisfaction with the restorative justice process, Strang found that this was usually related to poor practice rather than the nature of the process itself.

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17 Jane Boliitho, above n 15, 257.

18 Ibid.

19 Heather Strang *Repair or revenge: Victims and restorative justice* (Oxford University Press, 2002).

In a further study, Strang and her colleagues compared the RISE results with those from randomised controlled tests conducted in relation to three restorative justice conferencing programs in the UK.<sup>20</sup> As was the case with the RISE program, victims who took part in the three UK-based programs also reported significantly higher levels of satisfaction compared to those who had only gone to court.<sup>21</sup> Across the four restorative justice programs, victims' sense of satisfaction with their participation in restorative justice was associated with feeling that they had had an opportunity to participate meaningfully in the process and that they had felt fairly and respectfully treated.

Strang and her colleagues also found that victims from a diverse range of backgrounds, who had experienced offences that ranged from relatively minor crimes to very serious crimes and included those committed by juveniles and by adults, consistently reported feeling better off after taking part in restorative justice processes.<sup>22</sup> Another study found evidence that suggests that victims of serious offences are even more likely to be satisfied with their experience of a restorative justice process compared to victims of less serious crimes.<sup>23</sup>

Jaimie Beven and his colleagues conducted a randomised controlled test in which they compared the experience of victims who took part in a restorative justice program with those of a control group of victims who went through the court process. They found that the victims who took part in the restorative justice program reported significantly greater levels of perceptions of safety compared to the control group.<sup>24</sup> In fact, most of the victims who had taken part in the restorative justice program reported perceptions of safety that were higher than their pre-offence levels.<sup>25</sup> Consistent with other studies, the victims who took part in the restorative justice program reported higher levels of satisfaction with the quality of their participation in the process compared to the victims who went through court. A recent study has also suggested that participation in conferencing can reduce the traumatic effects of crime for victims.<sup>26</sup>

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- 20 Heather Strang, Lawrence Sherman, Caroline Angel, Daniel Woods, Sarah Bennett, Dorothy Newbury-Birch, and Nova Inkpen, 'Victim Evaluations of Face-to-Face Restorative Justice Conferences: A Quasi-Experimental Analysis' (2006) 62 *Journal of Social Issues* 281.
- 21 In the UK studies, one group of victims took part in a restorative justice process and also experienced the court process, while the control group only went to court. In contrast, in the RISE study one group of victims took part in a restorative justice process *instead of* the crime being dealt with by a court, whereas the crimes control group proceeded through the courts in the usual way.
- 22 Heather Strang, above n 20.
- 23 Joanna Shapland, Anne Atkinson, Helen Atkinson, Becca Chapman, James Dignan, Marie Howes, Jennifer Johnstone, Gwen Robinson and Angela Sorsby, *Restorative justice: the views of victims and offenders. The third report from the evaluation of three schemes* (UK Ministry of Justice, 2007).
- 24 Jaimie Beven, Guy Hall, Irene Froyland, Brian Steels & Dorothy Goulding, 'Restoration or Renovation? Evaluating restorative justice outcomes' (2005) 12 *Psychiatry, Psychology and Law* 194.
- 25 Ibid.
- 26 Caroline Angel, Lawrence Sherman, Heather Strang, Barak Ariel, Sarah Bennett, Nova Inkpen, Anne Keane and Therese Richmond, 'Short-term effects of restorative justice conferences on post-traumatic stress symptoms among robbery and burglary victims: A randomised controlled trial' (2014) 10 *Journal of Experiential Criminology* 291.

## Research findings: impact of restorative justice participation on reoffending

A common question asked of criminal justice system programs is whether they reduce reoffending. The research on the impact of restorative justice programs on reoffending is somewhat mixed. Certainly, large-scale studies of restorative justice programs have found evidence indicating that restorative justice participation is more effective than court processes in preventing reoffending.<sup>27</sup> However, such findings have been criticised on the basis that many studies of restorative justice programs do not account for factors such as the differences between the restorative justice and court cohorts.<sup>28</sup> When researchers who examined the effectiveness of youth justice conferences in New South Wales expressly adjusted their methodology to consider factors such as the differences between control and treatment groups they could not establish that participation in a restorative justice processes was more likely to prevent reoffending than the usual Children's Court process.<sup>29</sup> Other researchers have argued that one of the reasons why it can be difficult to determine whether participation in restorative justice prevents reoffending is that multiple factors impact the likelihood of an offender avoiding reoffending. In particular, the level of support provided to an offender, outside of the restorative justice process, is an extremely significant determinant of reoffending.<sup>30</sup>

Nonetheless, a number of randomised controlled tests conducted in respect of restorative justice programs have produced reliable findings indicating that restorative justice can reduce the risk of reoffending in certain contexts. For example, a study that looked at the 'Reintegrative shaming experiments' or 'RISE' program in Canberra found that while there was no significant difference in reoffending outcomes between court and restorative justice participants for young offenders who had committed relatively minor crimes such as shoplifting or property offences, reoffending was significantly lower amongst adult restorative justice participants who had committed violent crimes.<sup>31</sup> A recent study involving randomised control tests assessing a UK government-funded restorative justice program did not find a statistically significant difference in reoffending rates between the restorative justice cohort and the court cohort. However, those who participated in restorative justice committed significantly fewer offences in the two-year period after the conference compared with those in the court cohort.<sup>32</sup> Therefore, restorative justice was not found to reduce reoffending, but it was found to contribute to desistance from offending.

As the previous section discussed, the research on restorative justice makes it clear that there are benefits in participating in restorative justice processes for victims, broadly defined as a cohort. These benefits are not associated only with victims that have specific characteristics such as age or gender, or with victims who have experienced only particular types of crime. However, while the research indicates that restorative justice can reduce reoffending in certain contexts, it is less clear that it has this effect with all offenders regardless of their characteristics or type of offending behaviour. However, importantly in the context of our project, there is an evidence base suggesting that offering restorative justice in the context of serious offences is more likely to reduce reoffending.

While the focus of research dealing with the effects of restorative justice for offenders is usually the issue of reoffending, it is important to note that preventing reoffending does not necessarily need to be the central aim of restorative justice programs. Indeed, too much emphasis on restorative justice's capacity to prevent reoffending may risk overshadowing the important benefits it can deliver for those who take part in it.

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27 For example, Jeff Latimer, Craig Dowden and Danielle Muise, 'The effectiveness of restorative justice practices: A meta-analysis' (2005) 85 *The Prison Journal* 127; Lawrence Sherman and Heather Strang, *Restorative Justice: The Evidence* (The Smith Institute, 2007).

28 For an overview, see Jacqueline Joudo Larson *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology, 2014) 24.

29 Nadine Smith and Don Weatherburn, 'Youth justice conferences versus children's court: a comparison of re-offending' (2012) *Crime and Justice Bulletin* 160, 1.

30 Lawrence Sherman and Heather Strang, 'Verdicts or inventions? Interpreting results from randomized controlled experiments in criminology' (2004) 47 *American Behavioral Scientist* 575.

31 Lawrence Sherman, Heather Strang and Daniel Woods, *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments (RISE)* (Australian National University Press, 2000)

32 Joanna Shapland, Anne Atkinson, Helen Atkinson, James Dignan, Lucy Edwards, Jeremy Hibbert, Marie Howes, Jennifer Johnstone, Gwen Robinson and Angela Sorsby, *Does restorative justice affect reconviction? The fourth report from the evaluation of three schemes* (UK Ministry of Justice, 2008).

## Restorative justice conferencing in other jurisdictions

Restorative justice conferencing programs have operated successfully in other jurisdictions for many years. A brief overview of two notable examples is provided below.

### Australian Capital Territory

A pilot restorative justice conferencing program was introduced in the ACT in 1994. The pilot program was diversionary and delivered by ACT police. Evaluations of the pilot program found that there were benefits for victims who took part and that there was a reduction in reoffending for certain offence types.<sup>33</sup> Following the success of the pilot program, the ACT government developed a strategy to expand the availability of restorative justice throughout its criminal jurisdiction. This strategy was implemented in three phases. In phase one, restorative justice processes were made available in response to less serious crimes committed by young people (those aged 17 or younger) that involved a victim. Sexual violence and family violence matters were expressly excluded. In phase two, the scheme was expanded to include serious crimes committed by young people and crimes committed by adults, including serious crimes. Sexual violence and family violence matters were still excluded under phase two, however phase three, which commenced in 2018, introduced specialist restorative justice processes to respond to these types of offences.

As such, the ACT now has a restorative justice program operating in the youth and adult jurisdictions. The program does not limit eligibility on the basis of offence type; serious offences including sexual offences and family violence can be referred for restorative justice conferencing. Under the program, a restorative justice conference can go ahead at any stage in a criminal proceeding. The ACT's restorative justice program has a legislative basis. It is delivered by the ACT Restorative Justice Unit, which sits within the ACT government's Justice and Community Safety Directorate. The Restorative Justice Unit describes its restorative justice program as a 'victim-centred response which prioritises the safety and interests of people who have been impacted by crime.'<sup>34</sup>

### New Zealand

Restorative justice has been an established feature of New Zealand's criminal justice system for decades. In 1989, New Zealand introduced family group conferencing. This restorative process, underpinned by the *Children, Young People, and Their Families Act*, provided opportunities for young people who had committed offences to come together with their family members, members of their extended community, victims and police to talk about the impact of the crime, what had contributed to it, and what an appropriate response to it might be.

In the early 2000s four pieces of legislation were passed<sup>35</sup> that had the effect of formalising the use of restorative justice in response to crimes committed by adults.<sup>36</sup> Since 2014, New Zealand legislation has provided that all criminal cases (subject to certain criteria) must be adjourned for restorative justice to be considered prior to sentencing, although parties can opt out if they do not wish to participate. No offence type is expressly excluded, very serious crimes including sexual offences and family violence can be referred for restorative justice conferencing.

A recent study of victims' experience of participating in restorative justice conferencing in New Zealand found that 84% of victims were satisfied with the conference they took part in, and that 81% would recommend restorative justice to others.<sup>37</sup>

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33 Lawrence Sherman et al, above n 30.

34 ACT Government Justice and Community Safety Directorate, 'Restorative Justice' [www.justice.act.gov.au/criminal\\_and\\_civil\\_justice/restorative\\_justice](http://www.justice.act.gov.au/criminal_and_civil_justice/restorative_justice).

35 *Sentencing Act 2002* (NZ), *Parole Act 2002* (NZ), *Victims' Rights Act 2002* (NZ), *Corrections Act 2004* (NZ).

36 Jim Boyack, Helen Bowen and Chris Marshall, 'How does restorative justice ensure good practice?' In Howard Zehr and Barb Toews (eds) *Critical Issues in Restorative Justice* (Criminal Justice Press, 2004).

37 Ministry of Justice, New Zealand, *Restorative Justice Victim Satisfaction Survey* (Research report, 2016) 4.

## Restorative justice conferencing in Victoria

In Victoria there is only one ongoing<sup>38</sup> restorative justice conferencing program operating alongside the criminal justice system: Youth Justice Group Conferencing. The program is highly regarded and has been positively evaluated.<sup>39</sup> As its name suggests, this program operates solely in the youth jurisdiction – in response to offences committed by children and young people. A key aim of the program is to divert the young person from more intensive criminal justice system involvement. Consistent with the principles that guide Victoria's criminal justice responses to young people, rehabilitation of the young person is the central focus of the Youth Justice Group Conferencing program, as is appropriate given the vulnerability and particular needs of this cohort. Victims or victim representatives may attend conferences however they are not required to, and their absence will not prevent a conference from going ahead. A conference will therefore not necessarily involve the offender meeting directly with the victim: an offender/victim interaction is not a fundamental feature of this program. The program has a legislative basis.

At the time of writing we are aware of two Victorian restorative justice pilot programs designed to respond to experiences of crime. In response to recommendation 122 of the Royal Commission into Family Violence, the Department of Justice and Community Safety has developed a pilot program for the delivery of restorative justice options to victim survivors of family violence. The Family Violence Restorative Justice (FVRJ) Service is victim survivor-centred. Victim survivors are supported to identify with whom they would like to have a restorative conversation, which may include family members, close friends, representatives of organisations or, in appropriate cases, the person responsible for using family violence against them. All participants are prepared by FVRJ Service staff to safely engage in the conversation. The FVRJ Service can work with victim survivors if they are involved in criminal justice processes, and can also work with victim survivors if they have had no other involvement with the criminal justice system. The FVRJ Service is currently in its pilot phase, however the intention is that it will transition to an ongoing program following an evaluation.

In addition, the South East Centre Against Sexual Assault (CASA) has established a restorative justice pilot program that responds to sexual offences. This pilot has been operating for a number of years and has been evaluated by Monash University.<sup>40</sup> This program is intended to operate at a complete remove from the formal criminal justice system. That is, victims of sexual violence can access the program if they are not intending to report the crime to police. The program functions as an alternative option for people who do not want to engage the criminal prosecution process. Other than these pilots, there are no restorative justice programs currently operating in Victoria that accept referrals of matters involving crimes (or harms that could potentially constitute crimes) committed by adults.<sup>41</sup>

Given the clear benefits of restorative justice conferencing and the fact that its use has been mainstream in other jurisdictions for some time it seems surprising that it is not more widely available in Victoria. The history of the development of restorative justice programs in Australia helps to explain this situation. Across Australia, restorative justice programs were initially introduced in response to youth offending.<sup>42</sup> Often these programs were diversionary in nature and they were underpinned by the considerations that apply to other diversionary programs. That is, participation was seen as most appropriate when the crime in question was at the less serious end of the spectrum and committed by a first-time offender, or an offender without a lengthy criminal history. Restorative justice programs became conceptualised as rehabilitation mechanisms aimed at young offenders whose offending was of a relatively minor nature.<sup>43</sup>

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38 The Department of Justice and Community Safety is currently operating a restorative justice program that responds to family violence, including that which is perpetrated by adults. However, this program is currently a pilot.

39 KPMG *Review of the youth justice group conferencing program: Final report* (Melbourne, 2010)

40 Bebe Loff, Bronwyn Naylor and Liz Bishop, *A Community-Based Survivor-Victim Focussed Restorative Justice – A Pilot* (2019; Australian Institute of Criminology)

41 There have been some restorative justice processes conducted in response to adult crime in Victoria. However, these have been 'one-off' occurrences rather than processes conducted under ongoing, established programs.

42 Heather Strang *Restorative justice programs in Australia: A report to the Criminology Council* (Australian Institute of Criminology, 2001).

43 Jacqueline Joudo Larson Larson, above n 28, 5.

In fact, these assumptions about the use of restorative justice contradict the evidence, discussed above, that suggests that restorative justice is most effective in reducing offending when used in response to violent offending; that is, to serious crime. Ultimately, however, arguments about which demographic of offender restorative justice programs should be targeted towards are missing the point. Restorative justice at its core is about recognising the harm caused by crime to actual people: namely, to victims. If restorative justice programs are designed in response to victims' needs, questions of whether an offender is an ideal candidate for rehabilitation or diversion become less relevant. The research tells us that restorative justice can offer significant benefits for victims, including reducing the traumatic effects of crime. In light of this, it is not logical to limit victims' access to restorative justice to cases of minor crimes committed by young people. Indeed, victims who have experienced serious crimes may have a greater need for the benefits that restorative justice can deliver. From a victim-centred perspective, it makes sense to argue that restorative justice should be broadly available, regardless of the degree of seriousness of the offence or the characteristics of the offender. Support for this view seems to be growing in Victoria, as demonstrated by a suite of recommendations to expand the use of restorative justice made by law reform and policy bodies.

## Recent recommendations to expand restorative justice in Victoria

Over the last two decades in Victoria, numerous legal policy bodies have recommended expanding restorative justice programs to include crimes committed by adults. These include:

- In 2009 the Victorian Parliament Law Reform Committee made a suite of recommendations aimed at shifting restorative justice from the margins of the criminal justice system into the mainstream. The Committee's recommendations included implementing a staged rollout of restorative justice conferencing in the adult jurisdiction, which would include serious offences but exclude all sexual offences and family violence offences.<sup>44</sup>
- In 2014 the Centre for Innovative Justice produced a report that explained how restorative justice conferencing is capable of meeting the needs of victims of sexual offences in ways the criminal justice system alone cannot. The report proposed that restorative justice conferencing should be made available to victims of sexual offences as part of a suite of options available to them. It went on to outline a best practice restorative justice conferencing model for sexual offending. The report made a series of recommendations designed to guide the successful implementation of the proposed program.<sup>45</sup>
- In 2016 the Victorian Royal Commission into Family Violence recommended that the Department of Justice and Regulation (now the Department of Justice and Community Safety) develop a framework and pilot program for the delivery of restorative justice options for victims of family violence.<sup>46</sup> As noted above, this framework was developed and the pilot program is now operating.
- In 2016 the Victorian Law Reform Commission (VLRC) reported on its review of the role of victims of crime in the criminal trial process. The VLRC recommended that the Victorian Government establish a statutory scheme for restorative justice conferencing for indictable offences in Victoria.<sup>47</sup>
- In 2017 the Coronial Council of Victoria recommended the development of a restorative justice program to assist families who are involved in coronial investigations.<sup>48</sup>

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44 Law Reform Committee, Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009).

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

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

47 Victorian Law Reform Commission, above n 16.

48 Coronial Council of Victoria, *Coronial Council Appeals Review* (reference 4, 2017).



- In 2018 the Sentencing Advisory Council (SAC) considered whether restorative justice conferencing could usefully play a role in facilitating victims' access to financial restitution and compensation. The SAC expressed support for the development of referral pathways to restorative justice processes for victims, and endorsed the view that restorative justice processes play an important role in complementing the traditional criminal justice system, and can provide significant benefits for victims. However, the SAC ultimately declined to recommend the use of restorative justice conferencing for the express purpose of obtaining financial reparation for victims, stating that doing so would detract from the non-pecuniary benefits that restorative justice processes can provide victims.<sup>49</sup>
- In 2018 the VLRC reported on its review of the operation and effectiveness of the *Victims of Crime Assistance Act 1996 (Vic)* (VOCAA) and the Victims of Crime Assistance Tribunal (VOCAT). It recommended that its proposed future state-funded financial assistance scheme for victims should include a mechanism allowing decision makers to refer victims to restorative justice programs.<sup>50</sup>

## The CIJ's Restorative Justice Conferencing Pilot Program

In summary, the CIJ commenced its Restorative Justice Conferencing Pilot Program in the following context:

- There was a clear body of research establishing that victims have a range of justice needs
- It was evident that the traditional criminal justice system alone cannot address all the justice needs of all victims
- It was clear that restorative justice processes have the capacity to meet victims' justice needs in ways that the traditional criminal justice system cannot
- There was a solid evidence base that established that participating in restorative justice is beneficial for victims, and has the potential to help victims to recover from the traumatic effects of crime
- Other jurisdictions had well-established restorative justice programs that operated in respect of both youth and adult offending
- In Victoria there were no ongoing restorative justice programs that victims of crimes committed by adults could access, despite multiple recommendations from leading policy bodies that restorative justice programs be expanded to the adult jurisdiction
- Therefore, only a limited proportion of victims of crime in Victoria had access to the benefits that restorative justice can provide.

In light of these considerations, the CIJ decided to take action to expand the availability of restorative justice programs for Victorian victims. Because the benefits of restorative justice for victims were already well known we wanted to go beyond merely adding to this body of research. Rather, we sought to demonstrate that victim-focused restorative justice conferencing could actually be introduced in response to crimes committed by adults in Victoria. We hoped to show that restorative justice conferencing could function in a complementary way to the adult criminal justice system, and to develop a program framework that could serve as a blueprint for the expansion of restorative justice programs in the adult jurisdiction.

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49 Sentencing Advisory Council, *Restitution and Compensation Orders Report* (2018).

50 Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996*, Report No 38 (2018).

## Why we chose to focus on serious motor vehicle collision offences

Given that we intended to conduct a time-limited pilot, we needed to confine the scope of the program. We decided to make our restorative justice conferencing pilot program available to people affected by a motor vehicle collision offence that resulted in a death or serious injury because we saw that restorative justice could be particularly helpful in this context. The harm caused to victims of road trauma and families of people who have died in collisions is significant. Post-traumatic stress symptoms are a common response to criminal victimisation in general, however family members of those who have died as a result of a motor vehicle collision are known to suffer particularly severe grief responses. Those who work with family members in this position have found that they 'view the death of their relative as being the result of a senseless, meaningless, irrational act; a preventable death that should not have happened, and; the ultimate violation of their loved one's life.'<sup>51</sup> Restorative justice processes may be of particular assistance in these circumstances by providing a forum for family members to seek answers from the offender and to speak about how the offending has affected them.

Further, in a significant proportion of motor vehicle collision offences that result in death or serious injury, the victim and the offender were known to each other prior to the collision. Restorative justice conferencing may be particularly useful in cases where there is a pre-existing relationship and/or shared social and communal ties between the victim and the offender, given the potential of the process to allow the repair of relationships, if this is what people want.

We also anticipated that there would be less resistance to including this particular cohort of offenders in restorative justice processes compared to offenders responsible for other types of serious crime. In cases of culpable driving and similar offences, the behaviour of a driver has fallen short of community standards to the degree that a crime has occurred. The consequences have been devastating. However, in these cases it is unlikely that the offender intended to cause those consequences. That is, they did not set out to deliberately harm the victim. Therefore, it was less likely that offenders in these type of matters would seek to use a restorative justice conference as an opportunity to cause further harm to a victim. This is in contrast to family violence or sexual offence matters, where an offender has deliberately inflicted harm on a victim, and therefore valid concerns exist about whether a restorative justice conference may be used by an offender to inflict further harm on the victim.

Another reason that we considered serious motor vehicle collisions to be particularly appropriate was the dissatisfaction that victims of these offences commonly express regarding sentences for these crimes. Compared to other forms of unlawful death an offender's culpability in these matters is low. As discussed above, offenders in these matters generally do not intend to bring about the consequences that flowed from their actions. In contrast the offence of murder requires that the offender intended to cause the death of the person that they killed. Nonetheless, the consequences in cases of culpable driving and similar offences are that someone has died. Victims of these offences often make statements to the media indicating that they cannot reconcile the sentence imposed with the fact of their loved one's death; the sentence does not seem to correspond to the loss of life. In these circumstances there seemed to be a stark gap between what victims need and what the criminal justice system can offer, and therefore we considered that restorative justice may be particularly beneficial.

In addition to our reasoning, outlined above, findings from a recent Belgian project that made restorative justice processes available in response to a wide variety of road traffic offences indicated that restorative justice was particularly helpful when offered in that context.<sup>52</sup>

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51 Vivienne Bateman, 'Death as a result of culpable driving: Impact and Intervention' (2010) *Grief Matters* 16.

52 Ingrid Marit, *Restorative Justice in Road Traffic Offences: A manual for professionals and victim-volunteers* (Justice Programme of the European Union, 2018).

# Part 3: The project: Restorative Justice Conferencing Pilot Program

## Overview

At the end of 2015, the CIJ received a grant from the Victorian Legal Services Board ('VLSB') to conduct a project to develop and implement a Restorative Justice Conferencing (RJC) Pilot Program ('the RJC program'). The RJC program would be made available to people affected by a motor vehicle collision that resulted in death or serious injury. The collision must have occurred in Victoria, in circumstances where the offending driver was an adult.

The program intended to offer a process whereby those affected by a motor vehicle collision (victims, offenders, their family members and other people affected by the collision) resulting in death or serious injury would have the option of participating in a safe, supported conference to address what happened and its impact.

The aims of the pilot were to:

- meet the justice needs of victims of motor vehicle collisions through the provision of a restorative justice program that was fair to offenders and did not negatively impact on the traditional criminal justice system; and
- build awareness of and support for restorative justice within the Victorian criminal justice system and associated support services; and
- contribute to knowledge about best-practice delivery of restorative justice processes in response to serious crimes committed by adults, with a particular focus on learning what worked in the Victorian context.

The program was designed to proceed in two phases:

**Phase one:** extensive consultation and relationship building with the key stakeholders; program design; creation of program documents and recruitment of conveners.

**Phase two:** the program would be implemented, referrals would be accepted and restorative justice processes would take place.

## Project activities

This part of the report outlines the work that was done during the project. It is divided into two sections, describing phases one and two of the project. The first section will cover phase one, in which we focused on laying the foundations for the RJC program. This involved designing a framework for this program, drawing on Australian and international literature, and on the practical experience of those working at a local level with: victims of crime; offenders; the criminal justice system; and restorative justice practices. We also spoke directly with victims of crime. Further, we established a program Advisory Committee (details at Appendix 3). The other key aspect of phase one was raising awareness of the RJC program, especially among organisations working directly with people affected by serious motor vehicle collisions. This was for the dual purposes of building understanding of and support for restorative justice within the sector, and also to establish referral relationships. In phase two we continued the work of encouraging referrals, and concentrated on operating the RJC program.

## Phase one

In phase one of the project we established the foundations of the RJC program. Our primary activities were: consulting and establishing relationships with key stakeholders; establishing an Advisory Committee; designing the RJC program; and engaging conveners. Each of these activities is described below.

### **Consultation and establishing relationships**

During phase one of the project we conducted an extensive consultation process in which we identified and engaged with three categories of stakeholder: organisations that have primary contact with people affected by serious motor vehicle collisions; legal sector stakeholders; and those working in the restorative justice field. There is some overlap between these categories; for example, some justice sector stakeholders also deliver support to victims and/or offenders. However, keeping this caveat in mind, our aims for consulting with each category of stakeholder are explained below.

*A full list of organisations that we consulted is included in this report at Appendix 2.*

### **Organisations supporting people affected by serious motor vehicle collisions**

Given the project's focus on meeting the justice needs of victims, and on delivering a process that engaged in a meaningful and beneficial way with all participants, we sought input into the program's design from individual victims, as well as from people who work directly with victims and/or offenders. To this end we gave briefings to these organisations and individuals on the project's aims and objectives, provided them with a draft program framework, and invited comments and discussion. As restorative justice is not widely practiced in Victoria, we also used these consultation meetings as an opportunity to raise awareness about restorative justice. We also approached these meetings as way to start building relationships with the organisations that we hoped would refer participants to the RJC program once phase two of the project began.

### **Legal sector**

As was the case with our meetings with organisations working directly with victims and/or offenders, we sought to use our consultations with legal sector stakeholders to promote an understanding of restorative justice and its benefits. We also sought to determine whether these stakeholders had any concerns about potential risks to the legal rights or interests of victims or offenders should they participate in our program, so that we could address these issues in the program's design. Further, we sought input, particularly from the courts, as to whether they perceived any issues regarding the program's relationship to criminal justice legal processes.

### **Restorative justice sector**

During the consultation phase we met with representatives from Jesuit Social Services, who deliver the Youth Justice Group Conferencing program, with a representative of the Victorian Association for Restorative Justice ('VARJ'), which is a professional association for restorative justice practitioners and researchers, and with individual restorative justice practitioners. The purpose of these consultations was to deepen our understanding of restorative justice practices and to learn from those with experience in establishing and delivering restorative justice services in the Victorian context.

### **Consultation themes**

The following section provides an overview of the themes that emerged from the consultation process.

### **Strong support for a restorative justice program for motor vehicle collision offences**

Overwhelmingly, stakeholders expressed support for the idea of a restorative justice conferencing program that addressed the harm caused by motor vehicle collision offences. Stakeholders who worked directly with victims of these offences said that they could readily see how such a program could assist victims. Some said that in driving matters knowing *why* the collision happened is very important to victims, as these matters can seem random and incomprehensible to them. Therefore, they saw merit in a process that allowed victims to ask offenders questions. Others working with victims, and some victims themselves, saw this process as providing a valuable opportunity for victims to have a voice and tell their story in ways not open to them in criminal justice processes.

Stakeholders who worked with offenders commented that offenders responsible for motor vehicle collision offences often had a genuine desire to apologise to the victim. They also expressed the view that participating in restorative justice processes could help offenders rehabilitate. Some stakeholders noted that in motor vehicle collision offences that happen in rural contexts the victim and the offender can be known to everyone in the community, and sometimes the aftermath of an offence will have a 'ripple' effect that can divide the entire community. These stakeholders expressed the view that restorative justice could be of great benefit in these circumstances. One stakeholder who worked closely with CALD communities told us that this type of process would work well within these communities.

Significantly, we repeatedly heard from stakeholders who worked directly with victims of crime that victims regularly told them that they wanted to meet the offender, and that they asked for assistance to arrange such a meeting. However, unless the offender was a young person who was eligible for the Youth Justice Group Conferencing program, there were no programs that stakeholders could refer victims to. This feedback suggests that there was already a demand for restorative justice programs among victims of crime.

### **Common assumptions about restorative justice programs**

Leaving the restorative justice sector to one side, which of course has an in-depth knowledge of restorative justice, most other stakeholders we consulted had at least heard about the concept of restorative justice. However, some of these stakeholders strongly associated restorative justice with the particular programs they knew about. This was, of course, entirely understandable. However, this had the consequence that they assumed that the CIJ's RJC program would have the same features as the programs they were familiar with. For example, some stakeholders thought that restorative justice programs were by nature diversionary; that a restorative justice process was always something done *instead* of prosecuting the offender via the criminal justice system. This assumption meant that some stakeholders were initially sceptical about the CIJ's RJC program. Some thought that it proposed to offer restorative justice conferencing as an alternative to a criminal prosecution for motor vehicle collisions, which they regarded as inadequate and inappropriate given the very serious nature of these offences in which someone has been killed and/or seriously injured. We were able to explain that restorative justice processes can operate alongside, rather than as an alternative to criminal prosecutions, and that the CIJ's RJC program would offer a process that was in addition and complementary to the prosecution process.

Another common assumption was that restorative justice programs were necessarily focused on the rehabilitation of the offender, and that if victims played any part in them at all, it was a minor role. We explained that there is a great diversity of restorative justice programs, and that while some are primarily concerned with intervening with the offender to prevent them reoffending, the CIJ's RJC program would be primarily concerned with meeting victims' justice needs and therefore the process we propose to offer would be victim focused. However, the program was also designed to offer benefits to offenders and to treat them fairly and respectfully.

## Ensuring the process does not re-traumatise victims

Some stakeholders were concerned that victims might be re-traumatised if they participated in a restorative justice conference. Most stakeholders who expressed this view could see the benefits of participation for victims, but also saw the potential for victims to be harmed if the process was not well managed. Two specific concerns were commonly raised:

- **What if the offender does not want to participate?** Given that participation in the RJC program was voluntary, a number of stakeholders who worked directly with victims said that it might be very difficult for a victim if they decided to pursue restorative justice conferencing, but then the offender declined to participate. Some stakeholders said that such an experience might be disempowering for victims, and may replicate their experience of the criminal justice system, which some victims perceived as a forum where the offender has all the decision making power.
- **What if the offender has ulterior motives and/or does not behave in the way the victim is hoping for?** Some stakeholders were concerned that offenders might choose to participate in the process in order to gain a forensic benefit for themselves, namely a lighter sentence than would otherwise apply. They worried that the offender may not participate in the process authentically and therefore would not behave in a way that was sensitive or empathetic to the victim. Stakeholders felt that in these circumstances victims may be re-traumatised.

Some stakeholders, in some cases the same people who had expressed the above concerns, proposed ways of addressing these concerns:

- **Expectation management** Stakeholders, particularly those who worked directly with victims, stated that it was important to manage victims' expectations about the process from the start of their engagement with the RJC program. They said it was crucial to emphasise the voluntary nature of the program and to continually reinforce the message that the offender might decline to participate. They suggested that program staff should encourage victims to take time to reflect on how they would feel if they offender did not want to participate before program staff have initiated contact with the offender.
- **Victim empowerment through information and choice** Victims who spoke directly with us said that they would prefer to be given all of the information about the program, including the risks, so that they could make the decision about whether they would like to participate. They said very clearly that they would like to make this decision themselves, rather than have someone else decide on their behalf whether or not they might be re-traumatised through participation.
- **Thorough preparation** Stakeholders from the restorative justice sector explained that an essential component of a successful restorative justice conferencing process is the thorough preparation of all conference participants. This involves the convener working intensively with each participant to ensure they are ready to participate, and that their aims for participating are consistent with the program's aims. Restorative justice practitioners told us that during the preparation process it becomes very clear whether someone is participating in good faith or otherwise. They said that if they have concerns that the behaviour or demeanour of one participant may re-traumatise or otherwise harm another participant, they will not allow a conference to proceed. Restorative justice practitioners also said that they had been involved in cases where an offender initially agreed to participate in the process because their lawyer advised them to do so in order to obtain a sentencing discount, but that through the preparation process the offender was able to access empathy for the victim and to show remorse, and was ultimately able to take part in a conference in a way that was helpful to the victim.

A small number of stakeholders expressed the view that restorative justice conferencing was inherently too dangerous for victims of serious offences and should not be attempted. These stakeholders thought that the process was open to manipulation by offenders and their lawyers and that victims who participated in good faith were unlikely to gain any benefit from the process and would only be re-traumatised by it.

## **Restorative justice will not suit every victim**

A question that was commonly asked by stakeholders who worked directly with victims was, 'what if the victim is too angry to participate?' These stakeholders said that some victims they worked with were furious with the offender and seemed to be focused primarily on retribution. The stakeholders said that in some cases they would have fears for offenders' physical safety if victims were to meet with them. They said that in other cases there might not be a risk of physical violence, however any meeting was likely to become a shouting match, which would not lead to a helpful or constructive response to the harm. Some stakeholders – both those who worked with victims, and those who worked with offenders – expressed concerns about the impact on vulnerable offenders, particularly those in custody, of being exposed to very angry victims.

However, the comments made by stakeholders also offered potential ways to address this issue. Some Victim Assistance Program workers said that they had worked with victims when they considered participating in the Youth Justice Group Conferencing Program. These stakeholders said that some victims could initially be attracted to participating in this program because they thought that the process was an avenue for retribution through which they could channel their anger. However, once the program and the nature of restorative justice was explained to victims coming from this perspective they tended to lose interest in participating. Thus, in the experience of these stakeholders, victims for whom restorative justice programs were not a good fit often chose not to see the process through. Some Victim Assistance Program workers and other stakeholders who worked directly with victims said that they could see that some victims would benefit enormously from participating in a restorative process. However, their view was that restorative justice was not for everyone, and that there would always be some victims for whom these processes would not be a good fit.

Restorative justice practitioners said that the way to address this issue, as with many other concerns that were raised, was to ensure that the program incorporates a careful preparation process. They said that, as is the case with working with offenders to ensure they will be able to participate in a conference in a respectful and constructive way, conveners must engage intensively with victims during preparation to ensure that victims' aims are consistent with what the process offers. Ultimately, it is the convener's role to ensure that no further harm is done to any participant. If the convener forms the view that a victim is not able to engage in a conference with an offender in a way that is respectful and likely to be mutually beneficial, the convener will not allow the conference to go ahead.

On the other hand, restorative justice practitioners also told us that there can and should be a place for victims' anger and other strong emotion within the process. They said that it is to be expected that some victims will have feelings of anger towards the offender, and victims should not be automatically excluded from participating in the program simply on the basis that they are expressing anger. Whether a conference will be appropriate will depend on a range of factors, including whether the victim has aims that can be achieved through the process – such as asking the offender questions – or whether their sole motivation for participating is incompatible with the process – for example, if the victim was only interested in 'yelling at' or berating the offender. If the victim does have aims that are compatible with what the program is offering, the convener will work with them during preparation around whether and how their anger or other strong emotion can be accommodated without compromising the program's principles of 'do no further harm' and ensuring that the dignity and humanity of all participants is respected throughout the process. Restorative justice practitioners said that in their experience the preparation process often succeeds in helping victims who initially present as overwhelmed by anger or other strong emotions to shift to a place where they can participate in a conference with the offender in a respectful and constructive way.

### **Pre-sentence conferencing: concerns about potential sentencing benefits for offenders**

Some stakeholders expressed concerns about the prospect of the restorative justice process going ahead at a pre-sentence stage. Stakeholders' concerns about the potential for offenders to participate in the process solely for the purpose of trying to obtain a sentencing discount are discussed above. However, in addition to those concerns, some stakeholders thought that even if an offender's motivation was genuine it would be problematic to engage in the conferencing process at a pre-sentence stage. These stakeholders expressed the view that even if the offender participated in good faith, it would be unfair if the offender was able to rely on their participation in the process as a mitigating factor during sentencing and potentially receive a lighter sentence than otherwise would have applied.

Other stakeholders said that holding a restorative justice conferencing process at a pre-sentence stage might benefit some victims. Some stakeholders who worked directly with victims said that they could think of many cases where a pre-sentence conferencing process may have made a significant and positive difference to how these victims experienced the criminal justice system. Stakeholders who worked directly with victims also noted that victims are diverse and not all victims want the offender to receive a lengthy prison sentence. They commented that in some motor vehicle collision cases where the victim and offender knew each other before the collision, the victim does not want the offender to go to gaol at all. These stakeholders expressed the view that in these scenarios, victims would be unlikely to be concerned if the offender received a lighter than otherwise sentence because they participated in a restorative justice conference, and in fact such an outcome would be welcomed by some victims. However, these stakeholders also emphasised that it was important that victims were fully informed about any potential impact on an offender's sentence prior to deciding whether they wished to participate in the RJC program.

### **Pre-sentence conferencing: the issue of parity in sentencing**

A number of stakeholders from the legal sector expressed the concern that if participation in the RJC program can be taken into account in an offender's favour at sentencing (which legal sector stakeholders tended to agree would be the case if the process was held at a pre-sentence stage) this may raise issues regarding sentence parity. The principle of parity in sentencing requires that similar sentences should be imposed for similar offences committed by offenders in similar circumstances. Some legal sector stakeholders commented that whether an offender was able to participate in a restorative justice process under the RJC program, and therefore had the opportunity of receiving a sentencing benefit due to their participation, was dependant on whether the victim wished to take part. Therefore, similar cases involving offenders with similar circumstances may result in different outcomes based on the wishes of individual victims. This situation, according to these particular stakeholders, would offend the principle of parity.

However, some legal sector stakeholders, including some who saw parity as an issue, thought that it was a matter of how participation in the restorative justice process was regarded by the court. If participation *per se* was seen as a mitigating factor, then this could create parity issues. An alternative would be for the court to regard the restorative justice conferencing process as a valid mechanism for the court to inform itself about the offender's remorse.



The CJJ acknowledges that whether an offender had the opportunity to participate in a restorative justice conference in the RJC program did depend on whether an individual victim wished to participate, and therefore not all offenders had the same ability to rely on their participation as a mitigating factor. However, it could be argued that this fact does not impinge the principle of parity to a greater extent than is the case with other accepted ways of establishing mitigating factors. For example, if financial loss is the result of a crime and the offender makes monetary reparation prior to being sentenced, the court will take this fact into account as a demonstration of the offender's remorse. However, the financial positions of offenders differ. Offenders who are impecunious will not be able to make financial reparations. Therefore, this avenue for establishing mitigating factors is not equally available to all offenders. A similar argument may be made regarding psychological and psychiatric reports. Being able to present such a report to the court at sentencing may establish mitigating factors in an offender's favour. However, not all offenders can afford to commission such reports and restrictions to legal aid funding mean that their availability for impecunious offenders cannot be guaranteed. We should not prevent psychological or psychiatric reports being tendered in mitigation simply because not all offenders can obtain them, given their benefits to the court in understanding the offenders before them, and their utility in providing pathways to appropriate support and treatment for offenders. Similarly, given the benefits of restorative justice for both victims and offenders, the parity principle should not prevent offenders' engagement in restorative justice conferencing. It is an unfortunate reality that various accepted avenues for establishing mitigating factors are not equally open to all offenders. We took the view that this fact should not operate as a barrier to offenders participating in a constructive activity, especially one that may deliver significant benefits to victims.

These points may be argued from either side. However, it is worth noting that other common law jurisdictions, for example the UK, have introduced widespread restorative justice conferencing including at a pre-sentence stage. The parity principle has not been found to be a barrier to the successful delivery of restorative justice conferencing in the UK.

#### **Pre-sentence conferencing: there must be no detriment to the offender if they decide not to participate**

Stakeholders who worked directly with offenders commented that choosing to take part in the program may be a confronting prospect for offenders. Some expressed the view that in order for the program to be truly voluntary for all participants it was important to ensure that offenders were not penalised if they decided not to take part. That is, offenders should not receive a lengthier sentence than otherwise would have applied because they had been offered the opportunity of participating in the RJC program and had declined, or if they decided to take part but later pulled out of the process. These stakeholders also expressed the view that if an offender decided to engage in the program but the process did not go well, this should not detrimentally affect them either.

#### **Information disclosed during a conference**

Stakeholders from the legal sector, particularly defence lawyers, were concerned that in the absence of legislative protections an offender's legal rights and interests could be compromised if they disclosed new, adverse information during a conference. However, some of these stakeholders also expressed the view that there were some cases where participation in the RJC program would carry very little forensic risk to offenders.

#### **Extra considerations need to apply if the offender is in custody during the process**

Stakeholders who worked with offenders noted that people in custody are cut off from their key supports. They told us that particular care would need to be taken to ensure offenders who participated in the RJC program while in custody received the support they needed.

Stakeholders who worked with victims commented that entering a prison environment may be confronting for victims. They said that in cases where conferences were held in custody, victims would need to be prepared for how it may feel for them to be in a gaol, and for the various security processes they would need to navigate in order to gain entry.



### **Enhancing cultural safety by including an Aboriginal convener**

Stakeholders who work with Aboriginal people noted that Aboriginal people can feel alienated by mainstream legal system processes. They said that this can be particularly true if someone is the only Aboriginal person involved in a process, for example if there is a court proceeding where the judicial officer, lawyers, court staff and other party (victim or offender) are all non-Aboriginal and the Aboriginal person is the only Aboriginal person in the room. These stakeholders advised that the RJC program needed to ensure that it did not replicate this experience for Aboriginal participants. They suggested that a way for Aboriginal participants to feel supported would be to engage Aboriginal conveners. They commented that, alternatively, a non-Aboriginal convener might invite an Elder or other respected community member to co-convene the process with them, or to be otherwise involved.

# Part 4: Designing the RJC Program framework

The governing framework for the RJC program drew on the following sources:

- The CIJ’s report *Innovative Justice Responses to Sexual Offending*<sup>53</sup>
- Considerations that emerged from consultations with key stakeholders, as outlined in the preceding section of this report
- United Nations ‘Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters’
- Australian and international literature on restorative justice and victims’ experience of criminal justice processes
- Input from the project’s Advisory Committee.

The RJC Program Framework we developed is included at Appendix 1.

## Defining the RJC program

The term ‘restorative justice’ is notoriously difficult to define. Worldwide, there is a proliferation of programs that adopt this label, and they vary significantly. This section of the report attempts to describe the approach taken by the CIJ’s RJC program, and to contrast it with some other restorative justice programs. Our intention is not to criticise other models or make claims that our program was superior to others. Rather, we seek to clarify what it was that this particular restorative justice program offered.

### Victim-centred

The primary purpose of the RJC program was to meet victims’ justice needs. Recognising that many victims have unmet needs to exercise voice and to actively participate in processes that respond to the crime they have experienced, the program was focused on the direct participation of victims. This is in contrast to some restorative justice programs that do not offer a role for victims at all. For example, some programs use restorative practice to engage with offenders and may provide opportunities for offenders to meet with members of their own family and other community and justice system representatives, however victims are not included. Programs of this nature often see the rehabilitation of the offender as their key objective. Other programs are similarly focused on the rehabilitation of the offender, but also include a role for the victim if the victim wishes to participate. However, if the victim does not wish to do so the restorative process still proceeds. Some programs include a victim perspective, for example via the use of victim panels, whereby people who have experienced a similar crime to that committed by the offender are included in the process to provide their viewpoint, but the actual victim of the offender’s crime does not take part. Distinct from these types of programs, our RJC program facilitated the victim’s direct participation. A process only went ahead under the RJC program if the victim wanted to take part.

### Dialogue based

Some programs may be restorative in nature and be focused on meeting victims’ needs, but do not provide for the victim to have any form of interaction with the offender or other people directly involved in the crime. For example, some programs provide avenues for victims to tell their story in public forums. In contrast, the RJC program provided the opportunity for victims to enter into dialogue with the offender, or in some cases the offender’s family, or in other cases other relevant people connected to the crime. This dialogue was able to be face-to-face in the form of a restorative justice conference, or via the facilitated exchange of letters. The communication was two way; the victim had the opportunity to speak, as did other participants. Listening to other participants was part of the process offered by the CIJ’s RJC program.

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53 Centre for Innovative Justice, above n 45.

In the RJC program both victim and offender were participants in an interaction with each other. Each had the opportunity to tell their story, and each was expected to listen to the other and treat the other with respect. The focus was on providing a process that was meaningful for all participants. Some restorative justice programs have the stated aim of being offender focused. However, on examination they may be more accurately described as justice system focused, in that they prioritise the system's goals for the offender rather than creating a space that allows offenders to take part on their own terms.

## **Process not outcome focused**

In some restorative justice programs involving victim and offender interactions the process can be focused on achieving an end result. Often the outcome will involve an agreement by the offender to do certain things aimed at repairing the harm they caused. For example, in programs that respond to relatively minor offences committed by young people, the outcome of a process involving a criminal damage offence may be that the offender agrees to clean up the graffiti they were responsible for. Some other programs – usually not those focused on young offenders – are expressly designed to facilitate reparation payments by offenders to victims.

In the CIJ's RJC program the process may have resulted in an offender or another participant agreeing to take particular actions in response to the harm. However, within the program the emphasis was on the process, not on achieving a particular outcome. The primary aims of the program were to meet victims' justice needs. The process itself had the capacity to meet these needs, by providing an avenue for victims to exercise voice, feel validated etc. Some restorative justice programs respond to relatively minor offences. These programs may emphasise reaching outcomes that are described as measures by which offenders can repair the harm they have caused. For example, someone who has engaged in graffiti might agree to repaint the affected surface, or might agree to pay the costs of its removal. However, the RJC program responded to extremely serious harms, involving serious injury or death. Such harms cannot be 'repaired.' Therefore focussing on achieving a particular agreement with an offender about activities they might undertake in response to the harm was unlikely to be as beneficial to victims as ensuring that the process met their needs to the greatest possible extent.

Financial reparation could have been a result of a process held under the CIJ's RJC program. However, the program was not primarily a vehicle for victims to seek monetary redress from offenders. If a victim is presented with an opportunity to engage in a facilitated dialogue with an offender, this is a very different prospect to that of a victim being told that they can take part in a restorative justice process in order to seek financial redress from an offender. In the first scenario, the victim can be encouraged to determine their own aims in engaging in the process, and the process remains open, able to respond to what arises as the participants engage. In the second scenario, the dominant purpose of the process is presented as being the achievement of financial redress. Therefore, this is likely to be what the victim focusses on going into the process. Instead of an open dialogue, the process in this scenario may become more of a negotiation or mediation. This brings a more adversarial aspect to the process; people may become positional and operate in strategic ways. Further, an outcome in which financial redress is central is pre-supposed in this scenario. Alternative outcomes, which may be more meaningful to a victim, may never be contemplated. This would be an extremely narrow version of restorative justice. The full range of victims' justice needs is unlikely to be catered for under such an approach.

## **The convener's role**

The convener's role is in some ways similar to that of a mediator. He or she is a neutral figure who is there to ensure that the process is constructive, fair and that all participants have the opportunity to have their say. However, a mediator is quite active in guiding parties towards a resolution. The convener is less interventionist. Instead they focus on allowing the participants to share their experiences. The skills needed to perform this role are extremely nuanced. The convener must be acutely aware of the emotional dynamics throughout the conference, and be able to subtly guide the process without being invasive. Part of the convener's role is also to be aware of how structural power imbalances might affect the interpersonal dynamics involved in a conference process, and to try to prevent the conference process from being shaped by these dynamics.

In addition to managing the process during the actual conference, it is the convener's responsibility to prepare participants in the lead up to it. This involves spending time with each party, talking through the conference process and listening to the person's concerns and aims for the conference. Restorative justice processes are not mainstream in Victoria at this time. Restorative justice may be a foreign concept to participants, who might need time and support to come to terms with the idea, and to work out whether it will be helpful for them. Therefore, the preparation phase is extremely important.

Another important aspect of the convener's role is that he or she has the responsibility of determining whether each potential participant is suitable to participate in the process. This assessment is performed on an ongoing basis throughout the preparation phase. It is a core aspect of a convener's role to determine the suitability of conference participants. Experienced conveners are highly skilled in carrying out these assessments, which enable a convener to make a decision about whether it is appropriate for a conference to go ahead. Therefore, assessment is something conducted by the convener in the ordinary course of his or her role. Restorative justice programs for the adult jurisdiction in other Australian states and territories that respond to crimes of a general nature (i.e. crimes that do not involve family violence or sexual violence) all allocate the responsibility of determining participant suitability to the convener. We decided that in our RJC program it was of crucial importance that decisions about whether participants were suitable to take part in the program were made by people with qualifications and expertise in restorative practice. We considered that these professionals were best-placed to determine whether individuals were going to be able to take part in a restorative process in a constructive way. Conveners do so by intensively working with and observing a potential participant during the preparation phase and gauging whether that person is suitable to continue to the part of the process where they interact (directly or indirectly) with other participants. Their assessment is not based, for example, on preconceived notions of what a person who has experienced trauma can or cannot cope with, or what a person with cognitive disability is capable of. Of course, however, processes held under the RJC program were intended to be tailored as much as possible to respond to each participant's unique strengths and challenges.

Some restorative justice programs have the following features:

- An assessment panel comprising experts to determine suitability for restorative justice conferencing
- Victim and offender specialists.

In the CIJ's report *Innovative Justice Responses to Sexual Offending*<sup>54</sup> which set out a best practice restorative justice conferencing model and framework for the specific context of sexual offences (reflecting the approach of New Zealand's Project Restore model), the above features were recommended. The CIJ saw them as necessary elements of a sexual offences program because the complex dynamics of sexual offending, the specific effects on victims (such as not being believed, feelings of shame and guilt) and common behaviours of offenders (such as grooming, abuse of power and distorted understandings of responsibility for the offending) are not commonly understood. Without drawing on specialist expertise, a restorative justice program for sexual offending would be at risk of the power dynamics that shaped the offending influencing the restorative justice process, thereby potentially re-traumatising victims and inappropriately validating offenders.

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54 Centre for Innovative Justice, above n 45.

However, while a high level of scrutiny and expert involvement is necessary for sexual offences, where issues such as the psychiatric profile of the offender and ongoing risk to the victim and the community are pertinent, we determined that this approach was not necessary for motor vehicle collision matters. The traumatic effect motor vehicle collision offences can have on victims is undeniable. However, the complex dynamics associated with sexual offences are not similarly present. Driving offences are not generally the product of an abuse of power by the offender over the victim. Usually, the consequences of a motor vehicle collision were not intended by the offender, even if a gross breach of acceptable driving standards occurred. It would not seem that gendered social narratives shape the way that victims of motor vehicle collision offences are responded to as a group. Therefore, we did not consider it necessary to include specialist roles in the RJC program equivalent to those required for a sexual offences restorative justice program.

Further, because the risks involved in providing restorative justice processes in response to sexual offences do not apply to driving offences to the same extent, we thought it appropriate to limit the amount of control given to professionals without restorative justice expertise to determine which victims and which offenders could take part in the RJC program. Research on victims' experience makes it clear that many victims feel that too often professionals make decisions on their behalf about what is and is not good for them. Victims often say that they want greater scope to make decisions themselves about what happens in the aftermath of crime. As such, we did not want our RJC program to allow professionals without restorative justice expertise to decide that, for example, a victim was not suitable to participate because they had a certain mental health diagnosis. Victims by definition have experienced trauma, and this trauma may be expected to have lasting effects. Victims should not be excluded from a process designed to meet their needs based on a diagnosis of someone who may be an expert in their own field but may not have a deep understanding of restorative justice practice. Rather, each victim's suitability to participate should be made via a tailored assessment of their ability to take part in the particular restorative process that is proposed. We considered that the best-placed person to undertake this role was the convener.

The involvement of professionals without restorative justice expertise may also unduly prevent offenders taking part in restorative processes. A professional without restorative justice expertise may decide that an offender should not take part because, for example, they have a prior criminal history, or a particular mental health diagnosis, or a cognitive impairment or substance abuse issues. An offender is very likely to have one or more of these characteristics, given what the research tells us about the prison population. However, none of these factors, alone or in combination, necessarily indicates that an offender cannot appropriately take part in a restorative process. As was the case regarding victim participants, we took the view that a convener was best-placed to determine whether an individual offender was suitable to participate in the RJC program.

## Confidentiality

Our program was a time-limited pilot. It was not possible for a legislative foundation for the RJC program to be established within the time of the pilot's lifespan. We were therefore unable to rely on a legislated provision to protect the confidentiality of restorative processes held under the RJC program. The restorative justice literature and our consultations made it clear that it was essential for participants to feel comfortable to speak openly and honestly in restorative justice conferences. In order to allow this to occur there needed to be mechanisms to ensure that what was said in a conference could not be disclosed by a participant in another context, and most importantly, could not be used against a participant in subsequent legal proceedings. In our view, the best way to create such a protection was via legislation, similar to a provision that applies to the Youth Justice Group Conferencing program.<sup>55</sup> However, we considered that it was still possible to proceed with the pilot without such legislative protection. We noted that the well-established New Zealand restorative justice program does not have legislation governing the subsequent admissibility of statements made in conferences, and issues relating to confidentiality have not been the basis of any legal disputes there as far as we have been able to determine. Therefore, our RJC program relied on a confidentiality form that participants were required to sign before they took part in it. However, we recognised that the signing of this form would not prevent matters from being disclosed if evidence law permitted or required this.

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55 *Children, Youth and Families Act 2005 (Vic)* s 415(10).

## Relationship with the criminal justice system

Restorative justice conferencing is not a fact-finding process. It cannot take the place of criminal justice system processes in determining criminal responsibility for offences. The RJC program was designed to be an additional option that could occur alongside criminal justice processes, rather than instead of a criminal prosecution. Further, given the seriousness of the motor vehicle collision offences the CIJ's RJC program was designed to respond to, we did not propose that the program would operate as a form of diversion.

We took the view that not all stages of a criminal prosecution would be compatible with the RJC program. The table below explains the points in the criminal justice process that the RJC program would be made available:

| Stage in criminal justice process | Circumstances in which a Restorative Justice Conference could take place   |
|-----------------------------------|--|
| <b>Post-investigation</b>         | <p><b>When police have completed their investigation and a decision is made not to proceed with charges</b></p> <ul style="list-style-type: none"> <li>– A conference could be held to address the consequences of the collision for those affected (drivers, injured parties, family members) even though no one has been found criminally responsible for causing it.</li> </ul>   |
| <b>Pre-sentence</b>               | <p><b>Where a finding of guilt has been made (either by the offender pleading guilty or after having been found guilty through a trial)</b></p> <ul style="list-style-type: none"> <li>– The matter could be referred for a restorative justice conference pre-sentence.</li> <li>– The court may take the offender's participation in the RJC process into account during sentencing</li> </ul>   |
| <b>Post-sentence</b>              | <p><b>Immediately after the offender has been sentenced</b></p> <ul style="list-style-type: none"> <li>– Depending on the nature of the sentence imposed, a restorative justice conference could be held in a custodial setting or in the community.</li> </ul> <p><b>Pre-release</b></p> <ul style="list-style-type: none"> <li>– A restorative justice conference could be held when an offender serving a term of imprisonment is nearing the completion of the sentence.</li> <li>– An issue to be considered is what impact (if any) a prisoner's participation in a restorative justice conference should have on consideration of his or her suitability for parole.</li> </ul> |

We decided that the RJC program would *not* be offered when a matter was at the following point in a criminal justice process:

- When a police investigation is still on foot
- After charges have been brought, but before the matter has resolved. That is, a matter was not eligible in a pre-trial phase unless and until a plea of guilty was agreed to; and was not eligible during a trial.

We considered that holding a restorative justice process at these points, before the facts had been settled/agreed to, would not be appropriate. Doing so would have created unacceptable risks to the accused person's legal rights, and may have compromised the criminal prosecution process.

## Defining an 'RJC process'

Participation in the CIJ's RJC program was voluntary. We thought it likely that some cases would advance to the preparation stage and then one or both parties might decide not to go ahead with a face-to-face conference. Alternatively, after working with one or both parties, RJC program staff and/or the convener might form the view that one or both was not suitable to engage in a face-to-face conference, and therefore would decline to convene the conference. In such scenarios a face-to-face conference would not eventuate, however much work would have been done by RJC program staff and the convener.

We wanted to be able to accept all referrals that met the RJC program's eligibility criteria<sup>56</sup>, rather than limiting the acceptance of referrals to those that were certain of proceeding to a face-to-face conference. This was to ensure fairness to our potential participants – we sought to offer the process to all victims and offenders who were interested in participating, rather than 'cherry picking' matters that appeared to be less complex/have more chance of proceeding to a face-to-face conference. Further, the restorative justice literature indicates that engagement in restorative justice processes, whether or not a face-to-face conference results, can deliver significant therapeutic benefits to participants. Our evaluation data supported this proposition: people who participated in the RJC program explained that they found the preparation phase of the process extremely useful. Some said that it was more important than the face-to-face conference itself. This is discussed in detail in Part 5 of this report. Therefore, if a case was accepted into the RJC program, and participants engaged in the process, we would have provided participants with the opportunity to take part in a beneficial process even if the case did not ultimately result in a face-to-face conference. In light of these considerations we defined an 'RJC process' as a case that was accepted into the RJC program.

### A flexible approach to the structure of the process

Within restorative justice discourse a distinction is sometimes drawn between 'victim/offender mediation,' which generally denotes a restorative justice process involving a facilitated interaction solely between a victim and an offender, and 'restorative justice conferencing,' which generally denotes a larger group of people, all of whom have been affected in some way by the crime, and which may include a victim and an offender, having a facilitated interaction. Some restorative justice programs offer one of these processes exclusively. Our approach was to be guided by the wishes and needs of individual participants. In circumstances where a participant wanted to have a facilitated interaction with just one other person we complied with this preference. In other circumstances we responded to participants' wishes to include a larger group of people in the process.

### Phase two

The emphasis during phase two of the project was on developing and promoting referrals into the RJC program, and the implementation of the RJC program.

#### Generating referrals

The international restorative justice literature reveals that many restorative justice programs have been hampered by a lack of referrals due to reliance on external agencies as a source of referrals.<sup>57</sup> This was a challenge we faced. The CIJ did not previously have day-to-day or regular direct contact with people affected by motor vehicle collisions or involved in criminal trial processes. In order to generate referrals to the RJC program we therefore had to rely on third parties. This meant that generating referrals was beyond our immediate control; we had to encourage external organisations to do this for us, and they were under no obligation to do so.

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<sup>56</sup> Matters that met the eligibility criteria were also assessed for suitability.

<sup>57</sup> Janet Bright, *Improving victim take-up of restorative justice: A Restorative Justice Council research report* (Restorative Justice Council, 2017) 22.



In response to this challenge, we established relationships with organisations that had primary contact with people affected by motor vehicle collisions and encouraged them to refer their clients or service users to the RJC program. In particular, given the victim-focused nature of the RJC program, we concentrated on building relationships with victim support and advocacy organisations, and other organisations that have direct contact with victims of crime. These organisations included:

- Victims Support Agency (Department of Justice and Community Safety)
- Victoria Police
- The Office of Public Prosecutions
- Road Trauma Support Services Victoria (which provides services to people affected by road trauma, including victims and offenders)
- The Office of the Victims of Crime Commissioner
- The various social service agencies across Victoria that deliver the Victims Assistance Program.

We consulted all these organisations during phase one of the project, which meant that we had already established relationships with them by the time the RJC program was ready to start accepting referrals. We then did further work to engage these organisations and encourage them to refer cases to the RJC program. Our aims in engaging these organisations included:

- to explain restorative justice, given that restorative justice programs are not widely available in Victoria and there is not widespread understanding of restorative justice practice here
- to provide an overview of the RJC program, so that our audience gained an understanding of what we were offering
- to explain how the RJC program could benefit the clients of the organisation we were addressing.

Our engagement strategy was successful. The number of referrals we received allowed us to conduct enough processes in which we could put our framework into action, and learn from the outcomes.

It should be noted that generating large numbers of referrals was not a primary aim of the project. Rather, we wanted to concentrate on delivering the best process possible in a small number of cases and then closely examining the feedback we received in order to learn from the process.

### **Cases referred to the RJC program**

Over the course of the pilot, the RJC program received a total of 21 referrals. Of these, seven cases were not eligible for the program. More information about this category of cases is provided in Part 4 of this report. Fourteen cases were eligible and were accepted into the program. More information about this category of cases is provided in Part 4 of this report. Two of these 14 cases involved a face-to-face conference between participants.<sup>58</sup>

### **Sources of referrals**

We received referrals from the following sources:

- 6 cases: defence lawyers
- 5 cases: Victoria Police
- 3 cases: participants self-referred
- 2 cases: Witness Assistance Service (a division of the Office of Public Prosecutions)
- 2 cases: Road Trauma Support Services Victoria
- 1 case: letter sent to victims of motor vehicle collisions registered with Victim Support Agency
- 1 case: Grief counsellor in private practice
- 1 case: other Victorian statutory authority

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<sup>58</sup> After the pilot ended the CIJ continued to receive requests for restorative justice processes. Consequently, we have since conducted a number of additional face-to-face conferences.

The largest number of our referrals came from defence lawyers and were therefore initiated on behalf of offenders. It is interesting to note that none of the victims in those cases chose to participate in the RJC program. Conversely, all of the cases where both a victim and an offender from the same case chose to participate in the RJC program (at least initially) were initiated by or on behalf of a victim.

### **Matters that were not eligible**

Most of the cases that were referred to the RJC program and found to be ineligible involved offences that did not relate to a motor vehicle collision. The offences in these ineligible matters included homicides and sexual offences. In some cases, the referrer was aware that the RJC program was limited to driving offences, however they attempted to make a referral anyway as they did not know of any other avenues they could pursue to connect their clients with restorative justice processes. In most cases there were in fact no other referral options and it was disappointing not to be able to assist people who wanted to engage in restorative justice. These attempted referrals indicate that there is a demand for restorative justice programs for a broad range of offences and provide evidence of the need to provide additional programs in order to meet this need.

Other referrals that were not eligible for the RJC program were cases that involved driving offences, however there were criminal proceedings on foot that were at a stage where the RJC program did not offer conferencing. For example, in one case police intended to bring charges but were still investigating at the time the matter was referred to the RJC program.

One case that was referred was not accepted into the program because it appeared that it was unlikely to be able to proceed in a manner consistent with the program framework.

### **Matters accepted into the RJC program**

Fourteen cases were eligible and were accepted into the RJC program. In all 14 cases, those involved participated in a restorative justice process to some extent. Two of these 14 cases involved a face-to-face meeting between participants.

Participants who were accepted into the RJC program were invited to take part in our evaluation interviews. Data from their interviews is discussed in Part 5.

### **Face-to-face conferences**

One conference involved the victim, who was a family member of a person who had died in a collision, meeting with the offender who was responsible for the collision. The offender was serving a custodial sentence at the time the conference took place. The conference was held at a prison.

Another conference involved a meeting between members of two families. In this case, there had been a collision between two single occupant cars. Both drivers had died in the collision. Family members of each person who died met with each other. This conference differed from the structure that we had envisaged when we designed the program. It did not involve a victim and their supporters meeting with an offender and their supporters. There was no offender involved in this conference, and perhaps all the participants could be thought of as victims. This matter was nonetheless eligible for the program, because it involved people who had been affected by a serious motor vehicle collision who wished to engage in a restorative justice process.

### **Initial agreement to participate from both the victim and the offender**

Two cases that were accepted into the program involved both 'sides' agreeing to participate and a convener being engaged. However these cases did not proceed to face-to-face conferences.

In one case, which had been initiated by the victim, the offender agreed to take part. When this was conveyed to the victim, the victim said that the fact that the offender was willing to take part told them what they needed to know about that person, which was that they must have some degree of remorse, and this was enough for them at that time.

In another case, both victim and offender agreed to participate. However, the offender then changed her mind. The offender was serving a custodial sentence at the time. She did not agree to have further contact with program staff after she decided to take no further part in the process. As such, we are not able to explain why she decided not to proceed.

### **The other 'side' did not want to participate**

In 10 cases one 'side' engaged in the program, however the other 'side' decided not to participate. Reasons that the other 'side' did not take part included:

- 'Gatekeepers' including lawyers and other family members did not allow program staff to have contact with the potential participant to invite them to participate in the process. In effect, these 'gatekeepers' made the decision on behalf of the potential participants, who were never given the option of deciding whether or not to take part.
- In some cases that were referred by defence lawyers, the referral was made in the lead up to a significant court event. In some of these cases, victims were told about the restorative justice process at court. We received feedback that this felt overwhelming for some victims, who were already dealing with the challenge of coping with the court event. None of these cases resulted in a victim deciding to participate.
- In one case, the victim did not want to participate in the process because appeal proceedings were on foot. The victim was concerned that participating in the process may have resulted in a forensic advantage for the offender. However, the victim said that they might be interested once the proceedings had concluded.

Although these cases did not result in a face-to-face conference, it seemed that engaging with the process was nonetheless beneficial for those involved. For example, program staff assisted participants to achieve the following outcomes:

- In one case a large company had a connection with the collision in question. We invited the CEO of this company to participate in the restorative justice process with the victims. The CEO declined, but agreed to an informal meeting with the two victims. This meeting took place.
- In one case, the participant and other victims affected by the collision wanted to make victim impact statements at the plea hearing that related to the collision. However, the driver in this case was charged with careless driving, and was not held to be criminally responsible for the deaths that had occurred. Initially, the police prosecutor with carriage of the matter told the victims that they could not make victim impact statements because careless driving was a 'victimless crime.' Program staff contacted the Victims of Crime Commissioner's office on behalf of these victims. The Victims of Crime Commissioner's office intervened, and as a result the victims were able to make victim impact statements.

In addition to these outcomes, many participants told program staff that even though a conference did not go ahead, they had appreciated being able to tell their story to program staff, and had felt heard during the process. This may indicate that the preparation process addressed the justice need of 'voice' for these participants.

# Part 5: RJC program participants' experiences

The RJC Pilot Program was intended to be small-scale. We did not set out to generate a large amount of data. Rather, we aimed to conduct a small number of restorative justice conferences with as much care as possible. We intended to learn from this experience by seeking detailed feedback from the participants and listening carefully to what they said. Therefore, obtaining participants' reflections on their experiences was a fundamental aspect of the project. We based our assessment of the project's strengths and weaknesses primarily on the feedback we obtained from the participants.

To assist us to reflect on the project, we commissioned Clear Horizon Consulting to develop a monitoring and evaluation plan for the RJC program. This plan governed the way data (chiefly participant interviews) was collected and analysed. We applied for and obtained ethics approval to conduct interviews with RJC program participants and program conveners from the following ethics committees: Corrections Victoria Research Committee; Justice Human Research Ethics Committee; and RMIT University Human Research Ethics Committee.

All interviews were conducted by an independent researcher. People who were accepted into the RJC program as participants were invited to take part in a one-on-one semi-structured interview about their experience. Support people who took part in the RJC program and the convener who facilitated program processes were also invited to take part in interviews. The interviews were recorded and transcribed. The data was then de-identified and coded thematically. This section of the report draws on this data.

## Participants' experiences of the RJC program

In this part we discuss the themes that emerged from interviews with those who took part in the RJC program.

### Apprehensions about the process

Interviews with participants revealed that they had experienced various forms of trepidation about participating in the process. Some interviewees spoke of fearing that they were going to be judged. For example, one participant, an offender, said:

**FF** *The part that felt the most scary would have been that going into this I did not know if I was going to be looked at as a bad person who did not care about what I had done. You could say it was a little intimidating at first – but the people involved made me feel safe in the room and I could open up then.<sup>59</sup>*

Some participants, who were family members and not offenders themselves, had similar concerns, namely that they would be personally blamed by the other people taking part in the conference. A number of interviewees explained that while they hoped that they would get a sense of who the other participants were as people, the idea that they would then become 'real' was also confronting. One interviewee commented that her biggest fear was that the conference process might fail to recognise the humanity of her deceased family member. Others were worried that if the process did not go well, more 'drama' or 'bad feeling' might result. One interviewee said that she was most apprehensive about the initial moment of meeting the other conference participant. She said she wondered, 'what would he look like? What would he say? How would we communicate for the first time—speak, shake hands? Would I feel empathy or would I instinctively feel repulsed by him?'<sup>60</sup> Another interviewee said she needed to take a 'leap of faith' to overcome her doubts and anxieties about the process and agree to take part in it.

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59 P2

60 P1

One interviewee, who took part in a conference as a support person for an offender, explained that in her view the initiation of the restorative justice process caused the offender to confront his role in what had happened in a new way and that this was an intense and difficult experience for him:

FF *...when we first started really getting into this he said that he wasn't sleeping so well and so he really started thinking about, I think the role that he played in someone losing their life and we had some discussions about that and...whilst he's always admitted yes, he took someone's life and he was in the wrong, I think it finally dawned on him the gravity of that and so he struggled a little bit for a while.<sup>61</sup>*

## Preparation

In their interviews participants spent a lot of time discussing the preparation part of the conferencing process. Their comments indicate that they experienced preparation as highly significant. Many said that preparation was intensive. Some found it challenging. For example, one interviewee said:

FF *...in all the lead up...they [program staff] asked some really hard questions...they called a spade a spade but there was this incredible sense of caring and empathy.<sup>62</sup>*

Another interviewee commented that she found the preparation process more challenging than the conference itself:

FF *I had two preparation phone calls and I found those much, much more difficult than the actual meeting. I guess because it was more personal and because I shared a lot more and spoke a lot more about the stuff that's really, really difficult. And because I'd already gone through that with [the convener] in terms of thinking about meeting the [other family] actually meeting them was easier because it was a group context and less personal and I'd already thought things through or I'd already done the difficult groundwork.<sup>63</sup>*

Significantly, this interviewee's experience was that because such hard work had been done during the preparation phase, this allowed the conference itself to be an easier experience. Other interviewees made similar comments, for example:

FF *...in those [preparation] meetings with [the conveners] our conversations were really amazingly good, I can't imagine that I would have persisted with it if they hadn't been as good...it was challenging having to think about the hypothetical scenarios or perhaps likely scenarios, but it made the meeting much less daunting having dealt with all those things beforehand in a supportive way.<sup>64</sup>*

Most interviewees expressed the view that the fact that the preparation stage of the process was so careful was the reason that the conference went well, as the following comments illustrate:

FF *...everything about the meeting had a lot of thought put into it and I think the results of the meeting were a culmination of [the conveners] preparing us and being thoughtful about the facilities and preparing us and the [other] family.<sup>65</sup>*

*I think probably the success of the day was due to what went beforehand...I mean the day was also important but I think what went beforehand was very important, probably a bit more so.<sup>66</sup>*

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61 P9

62 P6

63 P7

64 P8

65 P4

66 P7

The restorative justice literature makes it clear that restorative justice conferencing can result in beneficial outcomes for those who take part. Often the literature focuses on what occurred during the conference, which can lead to an impression that what happens during the few hours that participants meet face-to-face is responsible for the totality of the benefits that participants experience. However, the comments above suggest that significant outcomes occur for participants during the preparation phase. Additionally, one interviewee said that the preparation phase altered her perception of the other party, an outcome often attributed to the restorative justice process, but one that is usually associated with what occurs during a face-to-face conference. Her comment was:

FF *The exchange of information about me and the offender through [program staff], about our respective attitudes and feelings about it prior to the meeting helped me to prepare. Knowing a little about the offender and his attitude was helpful. Learning how apprehensive he was made me feel more compassionate towards him.*<sup>67</sup>

This interviewee said that she thought that the preparation process would have offered crucial reassurance to the offender in her case:

FF *...prior to the meeting there were discussions with both parties and there was subtle communication back and forth, so it wasn't a blank sheet and that was important [to its success] I think, not so much for me perhaps, but certainly for [the offender] to know that, I wasn't just going to go in there and sound off.*<sup>68</sup>

This comment conveys the sense that this interviewee was aware that the offender would have found the prospect of engaging in a restorative justice conference with her to be daunting. Further, her view was that it was necessary to address the offender's concerns in order to create the conditions needed for a successful conference.

A number of interviewees said that because the preparation process had involved multiple meetings with program staff and conveners, some of which had been lengthy and had involved in-depth discussion, they had developed a relationship of trust with the program staff and conveners, which helped them feel comfortable when they took part in the conference. One interviewee noted:

FF *... in terms of all of us managing our emotions it probably helps if you have got someone in the room who knows exactly where you're coming from.*<sup>69</sup>

On the other hand, one interviewee said that she had felt frustrated with the convener at times during preparation:

FF *[The convener] wanted to, and I use the words, 'wishy-washy down our questions' ...I got very angry because I had a list of very specific questions.*<sup>70</sup>

However, this interviewee went on to say that in hindsight she is glad that the convener intervened and convinced her to alter the tone of her communication with the other conference participants. As the comment below implies, this interviewee now takes the view that at the time she was very focused on her own goals, which made it hard for her to think about the potential impacts of her behaviour on the other conference participants. In hindsight, she now appreciates the fact that the convener was able to help her communicate with the other conference participants in a way that did not cause harm or distress to them:

FF *[The convener] was excellent in the fact that she was very aware of how to not cause threat to the other person...I think [the convener] was very aware that [the other family] would perhaps be feeling a lot of guilt for what had happened.*<sup>71</sup>

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67 P1

68 P1

69 P7

70 P4

71 P4

A number of interviewees said that having time to reflect along the way and not feel rushed during the preparation process helped them, as the following comments illustrate:

FF *...the amount of time it took between each party talking to each other and submitting questions, etc, I think that gave everybody a chance to sort of think about the other side.<sup>72</sup>*

*Not rushing. Yeah not rushing, in the beginning my mum especially just wanted it to be over and done with so she was a bit frustrated that the time frame was a bit slow but I think it was actually a very good thing, so that you got time to process one interview before you had the next one and then time to process all that before you had the actual meeting.<sup>73</sup>*

### **Defining the purpose of the meeting**

An aspect of the preparation process that interviewees said they found particularly useful was an exercise the convener conducted, which involved developing a set of shared purposes to guide the conference. The convener based these shared purposes on ideas that people had expressed during preparation meetings. The shared purposes were then circulated among all parties. All parties were provided an opportunity to give feedback on the shared purposes. Ultimately, the shared purposes were agreed to. Of this process, one interviewee made the following comments:

FF *[The convener] put together a list of core values that she felt for all of us would underpin our meeting... There were core values and maybe either sort of goals or something like that. And they were just so wise...all of us had thoroughly talked through what our goals were, and we had a consensus of goals that we agreed on. I think that is what really made a big difference.<sup>74</sup>*

### **Participating in the conference was both difficult and positive**

All interviewees who participated in a face-to-face conference said that it was a positive experience, although many noted that it was also challenging. 'It was difficult but good,'<sup>75</sup> was the assessment of one interviewee. Others said:

FF *...it was quite daunting at the time. It was nice when it was over. But it was also good to know that some good came out of it.<sup>76</sup>*

*I think it was a very tough day. But I certainly do not regret doing it at all... I see it as something positive. Certainly I feel it's been positive for us.<sup>77</sup>*

*I guess it can be stressful in having to deal with a lot of difficult issues, but it is worthwhile... learning about the other family and what they actually think and feel was a positive experience.<sup>78</sup>*

One interviewee who participated in a conference as a support person for the offender commented on the courage that participants demonstrated in taking part in the conferencing process, given how challenging it is:

FF *[The victim] is a hell of a woman, she is very brave I think and it must be so hard to sit in front of somebody like that, that's taken the life of one of your family members and she had so much concern for [the offender] which was so admirable...<sup>79</sup>*

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One interviewee engaged in the restorative justice process but did not experience a conference due to the other party changing their mind about participating. This interviewee said that the fact that a conference did not proceed was disappointing. However, she still saw the process as valuable. She said:

FF *...it's a real shame that my conference didn't go ahead, but I still... really see the value in it. Part of the work that I'm doing as a victims' advocate is doing peer support; I'm really advocating for some peer support programs, particularly for victims of crime, and that has connected me with lots of people who've been impacted upon, including by crimes such as the one that I have been through. And I can see that if these other victims could engage in that process, and it's done properly, that it could be a very successful thing and give victims real closure. So even though my process wasn't smooth and it didn't end up in a conference, I still certainly believe in the practice.<sup>80</sup>*

## Effects of participating in the conferencing process

Interviewees were asked to reflect on what, if anything, participating in the conference process had achieved for them. If we apply the lens of victims' justice needs, a concept that is discussed in Part 2 of this report, many participants' accounts imply that the process met one or more of their justice needs, although they themselves did not use the language of justice needs. As explained in Part 2 of this report, victims' justice needs may include one or more of the following: voice, validation, information, accountability, prevention, resolution and relationship repair. Many interviewees' accounts of what the conferencing process delivered for them correspond to these categories of justice needs.

### Voice

Some interviewees explained that the process allowed them to express themselves and to feel heard, as the following comments illustrate:

FF *I think [the restorative justice process] gives the opportunity to speak frankly.<sup>81</sup>*

*The satisfaction of the meeting and the whole process I couldn't knock that really...when [the program staff] got back to me I thought, 'hah, hooray, someone is listening. Someone has heard me,' so that was the start of a very good feeling about, 'maybe there is something here that recognises people in our situation.'<sup>82</sup>*

*...this is probably the most positive thing that we've ever had in some ways with regards to being heard.<sup>83</sup>*

*I feel like the court process really swallows victims up, it doesn't really give them a voice, and [program staff member] did give me a voice and she's always been really helpful.<sup>84</sup>*

One interviewee appreciated both the opportunity to tell her own story and also that of hearing another person's:

*I think it's quite healing to hear another person's story... also to tell your own story. And that's in essence what happened...I got the opportunity to hear someone else's story that I wouldn't have heard.<sup>85</sup>*

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## Validation

A number of interviewees commented that participating in the process had allowed them to feel that the harm they had experienced was recognised and understood. One interviewee said that her interactions with a member of the program staff gave her this experience:

☐☐ *I felt like [program staff member] is one of the...only people who took the time to sit down and really understand the gravity of the crime upon me.<sup>86</sup>*

Another interviewee said that she felt a sense of shared understanding with the other participants in the conference:

☐☐ *...When any of my friends come to visit, they're too scared to talk about anything in case it gets really upsetting or whatever but in that situation we kind of felt it was okay... being able to talk with the other family who are wearing the same shoes as we're wearing in a sense, you know that also made it much easier to talk. So anything I said I felt as though they sort of understood, and anything they said I felt I understood.<sup>87</sup>*

## Information

Some interviewees commented that participating in the restorative justice process meant that they got answers, as the following comments show:

☐☐ *We got different answers. We found out the background of the other person and the events that led up to the day, and that put our minds at rest and answered some questions.<sup>88</sup>*  
*...a bunch of unknowns became known in a sense.<sup>89</sup>*

Some interviewees said that the information they wanted was about the other party – it was important to them to know who they were as a person. For example, one interviewee reflected:

☐☐ *I now know something about a person who was previously just a faceless defendant deserving of punishment. Knowing what he looks like, how he talks and how he feels helps me.<sup>90</sup>*

Another said:

☐☐ *And it helped me to just have a more complete picture. Instead of me just sort of blocking it out I know what [the deceased person] was like now and I know his family and I know a bit of what they're experiencing and I'm all right with that.<sup>91</sup>*

On the other hand, one interviewee explained that because a conference had not taken place in her case, she did not receive the answers she was looking for about the other party and their thoughts and motivations. As she explains below, this means that she is left still wondering:

☐☐ *...it's still the same, and I think [her decision not to participate in a restorative justice conference] solidifies my ideas about her remorse and her ability to look beyond her own situation. There were times in court where she was really deceitful and it was exposed, and I just thought, 'God, she really just doesn't care.' So the fact that this process didn't go through just solidifies that for me, but, again, I have that acute awareness that I am guessing. I'm still guessing, because I never had the process. So I feel like maybe if the process had gone through I might've got a better insight into her motivations for acting a certain way, or, you know, maybe that's just her personality. But, again, I'm guessing.<sup>92</sup>*

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## Accountability

One interviewee said that he appreciated the opportunity to offer an apology and express his remorse:

FF *...saying sorry will never bring [the deceased person] back, but you gave me an opportunity to speak and not make it out that I'm a cold-hearted person and I didn't care, when I do care and I really appreciate having this opportunity to do it.*<sup>93</sup>

## Prevention

A number of interviewees said that their participation in the restorative justice process had assisted them to feel that they had taken action to prevent the harm they had experienced from happening again. One person explained that her primary motivation for taking part in the restorative justice process was to convey to the offender her hope that he would change the behaviour that had contributed to the collision. She said:

FF *I think my main game was that he wouldn't get out there and offend again. He'd been arrested for drunk driving a couple of months before and it hadn't been dealt with, you know, the system just does not deal with these things.*<sup>94</sup>

This interviewee went on to reflect positively on how she and the offender had discussed issues of his substance abuse during the conference. She stated, 'I left feeling hopeful for his future.'<sup>95</sup>

Another interviewee, an offender, explained that during the conference he was able to convey to the other participant that he had made a commitment to himself that he would not 'go back to [his] old life' once released from gaol. He said that due to taking part in the conference, he now felt that this had become a goal he shared with the other participant, who he now knew wanted him to turn his life around.

Preventing future harm was of central importance to another interviewee, who explained:

FF *...all I've got now is my feeling that if I can make some change to some parts of the mental health system... it will mean that our son's life is not for absolutely nothing, that somebody else will not go through what we went through if we can make some changes.*<sup>96</sup>

This interviewee explained that the conference allowed her to obtain more information about the circumstances that led to her son's death, which she felt would assist her with her advocacy plans.

## Resolution

Comments made by some interviewees implied that the conference had helped them to experience a sense of resolution:

FF *It helped me to feel a bit more at peace.*<sup>97</sup>

*Something has been faced up to, dealt with. Sometimes you have to step out of your comfort zone and confront things that hurt.*<sup>98</sup>

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## Relationship repair

The people directly involved in the collisions addressed during the pilot program did not know each other. The conferences therefore brought together people who had not met each other before, and therefore from one perspective they did not have prior relationships with each other. However, restorative justice proponents and practitioners take a different view, which is that after a crime or a significant harm has occurred, those affected by it are necessarily brought into a relationship with each other. The figure of an offender may loom large in a victim's life even if they have never met in person. The 'relationship' the victim has with this idea of the offender may be distressing for the victim. Restorative justice presents an opportunity to address these types of relationships, as well as those where people knew each other prior to the offence or harm.

Consistent with restorative justice philosophy, our interviewees' accounts often focused on how the conference had changed the way they related to, or thought about the other participants. A common observation was that the other participants had become 'real.' For example, one interviewee said:

FF *[The other participants are now] real people to me and I feel as though we do have a bond with them...I think it's feeling sort of a greater sense of peace maybe having met them and feeling that they don't blame us as a family or just feeling that there is openness between the two families. Or there's a connection and that it's not sort of acrimonious. Yeah I think that's the best thing. And even though it's sort of difficult it's also really good.<sup>99</sup>*

Similar to the interviewee quoted above, others described feeling a connection to the other conference participants. Some talked about feeling that they had much in common with each other, and knew what the others were going through:

FF *...well I think as we said on the day, we both, we've all been travelling down the same path. We've been thinking of one another, we've been feeling for the other family. You know [other participant] and I have both lost a son. So there was a lot that we actually had in common. And I think in a way that was comforting, if that's the word to use, I'm not sure.<sup>100</sup>*

*We were able also to tell [the other participants] that we felt for them and that we didn't blame them and we felt their pain, and they were able to say the same to us and it was very ... you could see by looking at them it was very genuine, so the face-to-face was very important, was a really good thing.<sup>101</sup>*

One interviewee, an offender, commented that his understanding of how the other participant viewed him changed as a result of the conference:

FF *...first of all I really did think that the other family hated me and would not want to know me at all because of what I had done. But as soon as I saw [participant] face to face, she made me feel welcome and let me open up a little and talk about my background. I thank [participant] for that.<sup>102</sup>*

Another interviewee explained that meeting the other participants had alleviated some of the anxiety she had previously felt about the prospect of unexpectedly coming into contact with another participant:

FF *...what would happen if I ran into [participant] on the street, or if she ran into me? You know it's sort of scary for people because there is so much emotion.<sup>103</sup>*

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## The process met participants' needs in ways that the justice system did not

Our interviewees were not specifically asked to reflect on their experiences of the justice system. However, most did so of their own accord. Of those who did, all made comments indicating that participating in the restorative justice process had addressed matters that were important to them that they felt had not been responded to by the justice system. For example, one participant said:

FF *...the emphasis is placed upon the offender in the court setting, so it just felt like we were always discarded [and thought of last] in the process. And often we were told, 'this is what's going to happen in court today', and the complete opposite happened...It felt like everything was going wrong all the time, and that no care was taken to explain any of it to us...what I appreciated about [program staff member], is she took the time to make sure she explained it all, and gave me all the possible scenarios, and gave me the space I needed to make that decision.<sup>104</sup>*

Other interviewees also contrasted their experience of the restorative justice process with that of criminal justice system processes or other legal processes, as the following comments illustrate:

FF *The whole experience [of the coronial inquest] was just horrendous and...a complete contrast to this restorative justice perspective, we really had a sense that they would support us.<sup>105</sup>*

*I would say I was a hundred percent satisfied with [the RJ process]. The coroner's report came nowhere near it.<sup>106</sup>*

*When we could say actually something, it made us feel like [the deceased person] was of some consequence and he was not just nothing because I felt that with [the coronial inquest] that [the deceased person] may as well have been an ant or a something you could just squash and say, 'well, goodbye; that one's gone, where's the next one?' ...the [the coronial inquest] was totally impersonal and there's no justice in that level of impersonality.<sup>107</sup>*

*...[in court] you've got to sit there and listen to the judge...you can't say what you really think. You can't give [the victim] a letter or what not, if they're going to ask you a question you can't respond or if you do you're scared they'll want to use it against you...[restorative justice] gives you an opportunity to talk and try and resolve things.<sup>108</sup>*

One interviewee's comment implied that she appreciated being able to encounter the offender outside of the adversarial paradigm imposed by criminal justice system processes:

FF *I suppose it's a different emphasis in that being engaged in the sentencing process, you're aligned with the prosecution in a sense, which is a completely different thing from actually meeting the offender on really equal terms.<sup>109</sup>*

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## Reflections on how the restorative justice process was managed

### Strengths of the RJC program design and delivery

Generally, interviewees expressed high praise for the way in which program staff (including those performing intake worker and convener roles) conducted the process. Some participants said that they appreciated the thoughtful and caring way that program staff interacted with them and conducted the process, as the following comments demonstrate:

☐☐ *It was done in a very sensitive way.*<sup>110</sup>

*[Program staff member] has always taken the time and the care to try and understand the victim perspective, which has been great. Which meant that I trusted her going into this process a lot more than I had trust in other professionals that I'd dealt with. So just that level of engagement was really beneficial and positive.*<sup>111</sup>

In the above comment, the interviewee says that she trusted the program staff member. Similarly, other interviewees said that they had confidence in the program staff, for example one interviewee noted:

☐☐ *I think all of us had a hundred percent confidence in [the conveners] and the fact that their process was really thorough and well thought out... Yeah and I think, like you know if I just speak for myself I can really say that I had a hundred percent confidence that [the conveners] knew what they were doing.*<sup>112</sup>

Another interviewee said that she appreciated the convener's ability to use a combination of kindness, emotional intelligence and strength:

☐☐ *...[the convener] has a very gentle way of doing things and she's very smart in the way she guides the thinking and she can challenge too, and when your head is blocked with emotion that is the way it has to be and that's the best way to be I think.*<sup>113</sup>

Some interviewees commented that in their view the skills and approach of program staff contributed significantly to the success of the conference, as the following comments illustrate:

☐☐ *I have to say that [the conveners], I could not speak more highly of both of those ladies. Two of the most beautiful women I've come across in a long time... And I think that their input and their presence had a very big contribution, well certainly for me as to how that day went.*<sup>114</sup>

*...it's great that there were people who were so experienced at dealing with these kinds of things that are running it because I can imagine, I'm not very people orientated, and I can imagine that with some inept handling it could be a really traumatic experience for people and not constructive at all. So, I think in some ways the process hangs on the incredible skills of [the conveners] from my perspective.*<sup>115</sup>

One interviewee found the fact that program staff kept him fully informed throughout the process reassuring:

☐☐ *... they make sure at all times you know what's going on and what will be asked. So there isn't anything from left field.*<sup>116</sup>

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A number of interviewees commented that overall the process went smoothly and appeared to them to have been well-managed, as the following comments illustrate:

FF *I think it was amazingly well done. Really the process beforehand and also the actual day was just so well managed and everything was just so well done.*<sup>117</sup>

*The girls from RMIT did a great job of putting it on. I do not think I could have done a better job myself.*<sup>118</sup>

*And then on the day, it all just went – I kept expecting something to go wrong [but] it just all went so smoothly and so well.*<sup>119</sup>

### **The process was voluntary**

Some interviewees said that the voluntary nature of the process was very important to them, as the following comments illustrate:

FF *...on many occasions [program staff] reiterated that if anything got to be too much you could pull out. You didn't have to see it right through to the end*<sup>120</sup>

*The most important thing is they make sure you're happy with everything and can stop at any time.*<sup>121</sup>

### **Flexible locations were offered**

One interviewee identified the fact that the program was able to offer flexible locations for preparation meetings and the conference as being beneficial:

FF *I do appreciate the fact that [the conveners] came up to us so we didn't have to travel to Melbourne all the time.*<sup>122</sup>

### **Unhelpful aspects of the RJC program**

The following section summarises victims' views on the aspects of the program that were problematic for them.

#### **The language used to describe the program was unhelpful**

One interviewee said that she found the term 'restorative justice' alienating. In particular, the inclusion of the word 'justice' carried negative connotations for her, as she explains in the excerpt below:

FF *...our initial response to the title of the project, 'restorative justice', we found that a bit challenging because we didn't see there as being any justice in any of this. It was just a tragedy on all accounts. And in a way it made me question whether the other family, who we obviously didn't know at all, were the ones looking for justice of some sort. Looking for justice in terms of holding someone accountable or blaming someone for something. And then, yeah looking for justice in that situation. And because [deceased person]'s not with us anymore we found that whole thing a bit difficult to handle... I know that the program as such that is the title, restorative justice and I understand that when there's a hit and run or a you know mugging or something like that... But I think if it were to be used in some situation similar to this, a different title would be less confronting... It was the 'justice' bit that we found a bit challenging... certainly I would not have hesitated as long as I did were it not for that title.*<sup>123</sup>

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### **The process did not always feel victim-centred**

Most victims who participated in the evaluation research reported positive experiences of the process. However, one interviewee's experience was more mixed. This interviewee explained that at times during the process it seemed to her that too much consideration was being given to the offender's needs, which felt unfair to her. She felt that, as the victim, she should have been the priority throughout the process:

☐☐ *...it felt like sometimes I wasn't made the priority...for me, being a priority as the victim in a victim-led restorative process is important; it's a big part of my value in participating was that this was something that was principally for me and not for [the offender].<sup>124</sup>*

### **One interviewee did not experience a personal connection with the convener**

One interviewee commented that, for her, a negative aspect of her participation in the process was that she did not experience a personal connection with the convener. She said:

☐☐ *I didn't really feel like I connected with [the convener] as much as I did [with the program staff member]. It felt really clinical, and not personal.<sup>125</sup>*

### **Being asked to sign a confidentiality form was difficult**

Under our RJC program, as is commonly the case with restorative justice programs, what occurred during a restorative justice conference was confidential. This was to ensure that participants felt able to express themselves openly and honestly. It also protected participants' legal rights. In our RJC program, conference participants were asked to sign a confidentiality agreement prior to taking part in a conference. One interviewee explained that being asked to sign this document was problematic for her:

☐☐ *...it caused me distress when we had to sign the confidentiality thing because to me the confidentiality was going to hinder my wanting to [engage in advocacy]. Well, that's how I perceived it but [program staff member] did say, in the end, when I put that to her, she said, 'it's alright, you can still tell your own story but you may not be able to tell the other story unless the other family gives you permission.' I thought, well, okay, I have to accept that. I'll still go through with the process because I'm still hopefully going to be more aware of getting some answers to the questions that have been bugging us for so long.<sup>126</sup>*

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### **Another participant agreed to take part and later changed their mind. This was unsettling and disappointing**

One interviewee explained that in her case, another participant (the offender) initially agreed to take part in the process. However, the offender later changed her mind and decided to withdraw. The interviewee said that she found this experience confusing. In her view, program staff could have done more to ensure that she was shielded from this experience, as she explains in the following extract:

FF *...it was always a possibility in my mind that [the conference] wouldn't go ahead. However, when [program staff member] first came back and said '[the offender]'s willing to do it', and then [the convener] came back and said, 'no, she's not doing it', that was a shock. And then [the convener] went back to [the offender], and then it was back on again. So it was a little bit backwards and forwards... So I feel like that caused a lot of confusion on my end. And I know why they were keeping me so informed, because they were trying to keep me in the loop and help me understand it, but I feel like that created a lot more uncertainty about my situation...It was really confusing and added to the confusion in the process.<sup>127</sup>*

## **The convener's perspective**

The same convener conducted all the conferencing processes that proceeded under the RJC program. She was interviewed about her experiences by the independent researcher and her responses are discussed in this section. These responses relate specifically to the work she did with this program, although she is an experienced convener and has been involved in many other restorative justice processes.

### **The preparation aspect of the process is key**

As discussed above, the restorative justice participants emphasised how significant the preparation phase of the process had been for them. Similarly, the convener said in her interview that the preparation process was centrally important to the success of the conference itself. She said:

FF *I would say it's all in the preparation...I have a belief that the preparation is really key in this and my role as the convener is to prepare each party for what they might meet on the other side, you know, to really talk about that so that they're going in eyes wide open, really clear about what they're doing and what they might be met with and how they might respond. I think the other thing is really building a very quick rapport with them so that they feel freed up to be able to do what they need to do, knowing that your role is to guide both people and to step in if anything goes a little awry. If you build quite a strong, steady relationship with them quite early on, I think that really frees them up to be able to do what they have to do because [they feel], 'okay, I trust this person to be able to hold the energy of this and hold the space and so then I don't have to worry about social anxiety or any of those things, I get to be able to do what I need to do.'<sup>128</sup>*

The comment above echoes those made by some of the restorative justice participants, who explained they needed to trust the convener in order to feel comfortable taking part in the process.

In further reflections on the preparation aspect of the process, the convener explained that what she focussed on was establishing goodwill between the participants so that this shared sentiment could function as a foundation for the conference, once it occurred:

FF *So I'm really intentionally sharing information that will build goodwill between each participant before they're coming together, with the consent, of course, of everyone...so I'm particularly choosing different narratives, stories that will build the goodwill I suppose which then builds the ground beneath them to create stronger ground, so it's not so kind of shaky or fragile anymore.<sup>129</sup>*

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Consistent with some of the restorative justice participants' comments, the convener observed that the preparation aspect of the process could often involve profound, transformative experiences for participants.

## Challenges

Despite her view that preparation is crucial, the convener went on to explain that managing the preparation phase could be very challenging for her. One example she gave was that in the lead up to one conference it became clear to her that the participants held very different understandings of the events that surrounded the collision they had been affected by. She said she was conscious that one participant in particular held strong views about what had occurred. She was concerned that hearing these views may cause distress to other participants, who saw things differently.

In effect, what the convener described indicates that certain principles underpinning the RJC program came into tension with each other. According to the program's approach, the participant with strong views should have been supported to express them, because the process was designed to function as an avenue for people to exercise voice. This was a fundamentally important part of what the process offered. At the same time, other program principles included ensuring that the process offered benefits to all participants, and that the particular needs and vulnerabilities of all participants were recognised and accommodated. In this situation, some of the things that one participant wanted to say may have been very confronting for other participants, which may have meant that their ability to experience the process as beneficial would have been compromised. Further, the convener was aware that some of the other participants – who were not 'offenders' and in fact bore no responsibility for the tragedy that had happened – nonetheless were struggling with feelings of guilt. The convener felt that it was important that the process did not have the result that these participants felt blamed.

The convener's task, then, was to try to find a way forward that upheld all the program principles, even though some were in tension with each other. The convener said that she went about this task by talking with the other participants about the fact that one participant held particular views, so that they were prepared for what they might hear during the conference, and could decide whether or not hearing these views would be too distressing, in which case they had the option of not going ahead with it. She also talked at length with the participant who held the strong views, encouraging her to make space for the possibility that multiple views can coexist. The fact that the conference was successful, as determined by all the participants, indicates that the convener was able to work with the participants in such a way that when they met they were able to express themselves in ways that did not result in harm to each other.

The convener's reflections on this conference also indicate that although facts may not be formally in dispute, participants' understandings of events could vary significantly. In this case, there had been a legal determination of the cause of the collision, however the participants nonetheless interpreted the circumstances very differently. The RJC program required facts to be settled before a case could be referred for conferencing. This particular case illustrates that even when this criterion was formally met because there was a legal finding, participants' views about what happened still varied to a degree that created the potential for conflict.

Another challenge the convener described involved working with participants who had particular expectations about how a victim-centred process should operate. Some participants who identified as victims seemed to find it difficult to accept that in order for a conference to proceed, the needs of other participants also needed to be factored into the process. Some wanted their own needs to be determinative at all times, and had trouble accepting that the convener needed to take other factors into consideration as well. The convener talked about an example of a participant who wanted the process to go in a certain way, a way that the convener thought might be distressing to other participants. When she talked about this with the participant, her perspective was initially not well received. The convener explained that this participant, 'said that she felt like again it was another process where they had to just sort of bow down to and worry about [the other participants] which had been their experience of the [legal process].'<sup>130</sup> However, the convener was able to talk to the participant about her primary aims for the conference, and work with her to make sure those aims could be met, while at the same time ensuring the process did no further harm to any participant, and was going to provide the opportunity for all participants to benefit. The convener said that she explained to the participant; 'my job is to try to help figure out what's going give us the best chance of the conference going well, which means that it's going to give it the best chance of you ultimately getting the [outcome] you want.'<sup>131</sup>

Again, this reflection by the convener illustrates that there was the potential for the different principles that underpinned the RJC program to sit in tension with each other. One of the tensions here was between the victim-focused principle and the principle of voluntary participation: if the victim's wishes had been followed to the letter, it was the convener's view that the resulting process may have been so unappealing to the other participants that they may have chosen to walk away rather than engage.

## Participants displayed great generosity towards each other

Although the convener reflected on the challenges she had faced in convening the conferences held under the RJC program, her overall view was that each conference had been profound and that each participant had taken part with great kindness and sensitivity. The description she often used was that people related to each other during the conferences with much 'generosity of spirit.' Of one conference she said:

FF *...what was key in making this conference go well was that both participants really came to this conference with...I'll call it a generosity of spirit towards the other and I suppose there was a joining in terms of me looking at how to approach the conference, there was some real shared territory there around wanting to help each other. If either one could be of assistance or in the service of the other then that's where they were both coming from... it was really extraordinary and really generous.<sup>132</sup>*

Of another conference she commented:

FF *...they were both beautiful families and both incredibly generous to each other in their kindness...there was a beautiful solidarity in it.<sup>133</sup>*

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# Part 6: Was the pilot program successful?

The CIJ's aim in conducting the RJC program was to demonstrate that a victim-centred restorative justice program responding to offences committed by adults could be successfully implemented in Victoria. Our key indicators of a successful program in this context were:

- That the RJC program met victims' justice needs
- That the RJC program was fair to offenders
- That the RJC program was compatible with criminal justice system processes.

Our analysis of the data gathered during the project suggests that the RJC program met each of these three key objectives.

## Victims' justice needs

As described in Part 5 of this report, those interviewed about their experiences of participating in the RJC program all reported that the process had been beneficial. Each person's account demonstrates that the process met one or more of their justice needs. Further, a number of participants commented that taking part in the RJC program had addressed an important need for them that had not been met by criminal justice system processes or other justice system processes. This data tells us that for these participants the RJC program was able to fill the gap between what the justice system was able to deliver, and what they needed in response to the harm they had experienced.

## Was the RJC program fair to offenders?

The program's guiding principles were designed to ensure that the process was fair to all participants, including offenders. All the principles addressed this concern to some extent. However, those that were particularly relevant to ensuring fairness to offenders are discussed below.

- **The program and conference process must do no further harm to the participants**  
This principle underpinned all aspects of the restorative justice processes offered by the RJC program. It applied to *all* participants, including offenders. Doing no further harm encompassed the need to ensure that participants were not further harmed emotionally or psychologically, and also to ensure that their legal rights or interests were not compromised by the process.
- **The conference process offers benefits to all participants**  
In the RJC program, it was important that the process did not become something that was 'done to' offenders, but rather was a process that offenders gained something of value through participating in.
- **The process is underpinned by respect for the dignity and equality of all participants**  
The RJC program involved some people who had been harmed (victims) and some who were responsible for causing the harm (offenders). However, regardless of these distinctions, the process was based on a voluntary meeting between individuals, all of whom were entitled to be treated with respect and dignity. The process offered the opportunity to participate in a respectful dialogue, and those who chose to engage in it needed to be willing to both speak and listen.

- **The program encourages participants who have caused harm to be accountable and take responsibility. However, it is not a way to inflict (further) punishment**

The RJC program did not offer restorative justice processes as a form of diversion but rather as something people could choose to do in addition to the traditional criminal justice process. Given that an offender who might choose to participate in the restorative justice process would be facing a sentence imposed by the court, or would have already have been sentenced, it was important for us to ensure that the restorative justice process we provided did not operate as an additional punishment for offenders.

- **Particular challenges or vulnerabilities that may affect individual participants are recognised and accommodated**

People who have contact with the criminal justice system as accused people/offenders are likely to have experienced significant disadvantage. For example, this cohort of people is far more likely to experience mental health problems and cognitive disabilities compared with the broader population. In addition, people who are imprisoned are removed from their community and support network. For these reasons, offenders who chose to participate in the process, particularly those who were in custody, were likely to have vulnerabilities. The process needed to recognise these vulnerabilities and be responsive to them.

Our intention, when designing the program, was to ensure that the process was fair to offenders. To gauge whether this intention was realised, we examined two sources of data: the comments made by the offender who participated in our evaluation research, and the program's case files.

The offender who participated in the RJC process said that he valued the opportunity to take part, that he felt respectfully treated throughout the process, and that he felt supported by program staff. In addition, the fact that defence lawyers were the main source of referrals to the program indicates that these professionals, who are tasked with protecting the legal rights of their clients, were confident that participating in the RJC process would not compromise their clients' interests. Therefore, the available evidence suggests that our program was fair to offenders.

### **Program data**

The fact that defence lawyers were the main source of referrals to the RJC program indicates that the process was fair to offenders for the following reasons:

- Defence lawyers would not have referred their clients to the program if they considered that it had the potential to jeopardise their clients' legal interests
- The involvement of defence lawyers in the process meant that many offenders who were referred to the program had the opportunity to obtain legal advice regarding their participation in it.

## To what extent was the RJC program compatible with criminal justice system processes?

The RJC program was designed to be complementary to the criminal justice system. That is, it was not intended to operate as an alternative forum for determining questions of criminal responsibility, or for sentencing. Rather, it was intended to provide an additional process that victims and offenders could choose to engage in, recognising that restorative justice processes are able to address needs that the criminal justice system cannot. It was crucial to ensure that our program did not undermine the criminal justice system. If the RJC program compromised the rights and protections accorded under criminal law, participation in it could result in unfairness to participants; an unacceptable outcome in itself. Further, if restorative justice is to occupy a more mainstream position in Victoria it needs to be accepted by the legal sector. If our program interfered with criminal justice system processes or principles the legal sector would, understandably, be critical of it, and our aim of promoting the growth of restorative justice would be undermined.

### **There is no evidence to suggest that participation in the program caused tensions with criminal justice system processes**

During the course of the pilot we accepted 14 cases into the program, and nothing came to light to indicate that either offenders' rights were compromised because of their participation in the program, or that the administration of justice was in any way adversely affected. However, the cases that resulted in face-to-face conferences occurred after the relevant legal system processes had been finalised. In one case, criminal proceedings had been brought and had concluded; the offender had been sentenced and was serving a term of imprisonment. In the other case, both people involved in the collision had died and therefore there had not been criminal proceedings. There had been a coronial inquest, and this had finalised before the conference took place. Therefore, these conferences took place at some remove from criminal justice system processes and thus there was little risk that they would adversely affect them, in contrast to a conference that might take place at a pre-sentence stage. However, one case accepted by the program did involve a referral at a pre-sentence stage, and did feature in the criminal justice process. Considering this case presents an opportunity to reflect on how our program interacted with the criminal justice system.

### **Case 4 – Summary**

The collision in this matter occurred between two cars. Two people in one of the cars both died in the collision. The driver of the other car (the offender), who was its sole occupant, survived the collision and was charged in relation to it. The offender's lawyer referred them to the program. The referral was made on the morning of the day on which the offender's criminal charges were listed for trial, however the charges had resolved to a plea of guilty. A program staff member attended court and conducted an intake process with the offender. The offender was assessed as eligible and suitable for the program. The matter was called and the defence counsel sought a three month adjournment to allow a restorative justice conference to take place. After hearing further information about the CIJ's Restorative Justice Conference Pilot Program the presiding judge stated that he thought restorative justice was a useful approach but he had concerns about its use in this matter, which were:

- The victims' families had waited over two years for proceedings to conclude, and they may not want to wait longer
- Another two or three months is a significant extra delay

However, he went on to note:

- There do need to be processes like this in place to help victims
- Programs such as this have been taken up overseas and have shown that positive outcomes can come out of this sort of process

The judge said that there was a need to ascertain whether the victims were interested as soon as possible, to avoid the matter dragging out. He then said he wanted to know more about the CIJ's program. The CIJ staff member was called to give evidence. The staff member said in evidence:

- Conveners for our program are drawn from a pool of accredited professionals
- The minimum timeframe for conducting a conferencing process would be three months. This would be to allow victims to think about the process and to decide whether they were interested. If they were, a convener would be appointed. Preparation with all parties would then take place. The importance of the preparation process was explained
- A conference is able to take place in a prison if necessary.
- A conference can take place via video link. The evidence suggests that the process is more effective in person but if a video link meets a victim's needs better we can be flexible and provide this.

The judge said it sounded like the CIJ was 'serious about the program and it sounds like they will make sure it happens in the right way.' He said that it was a matter for the victims as to whether they were interested.

The judge said that the victims should not feel pressured to decide right away, but that seeing everyone was at court the conversations should start immediately. He adjourned the matter for a few days and said he wanted to know by that date whether the victims were interested in participating.

After the matter was adjourned, the victims who had been present at court (family members of the two deceased people), along with prosecution Counsel, the OPP solicitor, the informant and a Witness Assistance Service ("WAS") social worker spoke with the CIJ staff member about the possibility of the victims participating in a conference with the offender.

After this discussion, the CIJ staff member and the prosecution lawyers left the victims to consider the issue. The WAS social worker stayed with the victims. The victims made a decision, which was conveyed to the CIJ staff member via Counsel for the prosecution, who said that the victims did not want to participate in a restorative justice conference for the following reasons:

- In terms questions the victims might have, the offender said that he could not remember what happened leading up to the collision. The victims did not want to sit in a room with the offender and hear him say he could not remember.
- The victims did think that the offender understood the gravity of what happened. They did not think there was a need for a conferencing process to be held in order for the offender to truly appreciate the harm he had caused.
- The victims felt that providing Victim Impact Statements had allowed them to adequately convey their feelings about the offence.
- The victims did not want to delay the plea/the finalisation of the criminal justice process – they wanted it all over and done with.

### **Effect on sentencing**

The sentencing remarks in this case included the following comment by the judge: 'I should note for the record your preparedness to engage in a restorative justice project which was not proceeded with.'

### **Implications**

In the context of this case, our program was shown to operate in ways that are entirely compatible with criminal proceedings, as demonstrated by the following points:

- The court was able to accommodate making extra time available for: the victims to consider whether they wanted to participate; for the preparation process and conference to take place, if the victims decided to take part
- The judge was satisfied that restorative justice was a worthwhile process and that the CIJ's program was sound. His Honour did not have any objections to a restorative justice process being held before the criminal proceedings he was overseeing had concluded
- The reference to restorative justice conferencing in the sentencing remarks indicates that that neither the offender's willingness to participate nor the fact that the conferencing process did not go ahead materially impacted the sentence that was ultimately imposed.

# Part 7: Lessons learned from conducting the RJC program

## The preparation part of the process is significant

Those interviewees who had participated in a face-to-face conference all said that the conference they experienced went well. All of them attributed the success of the conference to the fact that there had been a careful and in-depth preparation process. Similarly, the convener said that a careful preparation phase was the most important aspect of the RJC process. In serious matters such as those our pilot responded to, it seems that participants need to be provided with intensive support prior to an interaction (either indirect or face-to-face) with others, to minimise the potential for re-traumatisation and maximise the potential for them to benefit.

In our small-scale pilot we were able to ensure that program staff and the convener were able to spend as much time as necessary with participants during the preparation phase. However, should the program be scaled up it may be challenging to reproduce this experience for participants. Providing participants with multiple meetings and ample communication opportunities with program staff and conveners is certainly resource intensive. Nonetheless, this seems to be what is required in order to provide restorative justice processes in response to very serious offences or harms.

## Participants need to trust the program staff and the convener

Although interviewees expressed high levels of satisfaction with the process, their comments also indicated that the process was difficult at times, and that they experienced degrees of anxiety and trepidation. In the convener's words, participants were on 'fragile ground' when they chose to engage in the RJC process. The convener commented that part of her role was to build trust with participants; they need to trust her and feel supported by her in order to feel stable enough to fully participate in the process. A strong theme in the interviews was that interviewees valued the sensitive and thoughtful way that program staff and the convener interacted with them. Their comments indicate that the skills and approach of program staff were an important aspect of the process for participants. Conversely, one interviewee said that she did not experience a personal connection with the convener; their interactions felt 'clinical' rather than 'personal' to her. This experience seemed to be a significant aspect of this person's experience of the process. Therefore, it seems clear that a successful RJC process must involve the establishment of trust and rapport between participants and program staff. This might mean taking care to ensure that there is the right fit between participants and program staff, particularly the convener. If the program were to be scaled up this may prove challenging, given the relatively small pool of restorative justice conveners currently practising in Victoria. Further workforce development may be needed.

## Significant complexities arose in each process

### Tensions between the RJC program's underlying principles

The RJC program framework was designed to be flexible, so that it would be best able to respond to participants' individual needs. Further, it was firmly underpinned by principles intended to ensure that the process occurred in a way that was compatible with restorative values, particularly the imperative that the process must do no further harm to any participant.

Interviews with RJC program participants and the convener indicate that there was potential for the RJC process to unfold in ways that could bring the program's underlying principles into tension with each other. The comments of a participant and those of the convener revealed that the principle that the program was victim-centred at times sat uneasily with other program principles. As we saw above, one interviewee commented that at times she did not experience the process as victim-centred. She commented that she wanted to be treated as the program's priority; she wanted the process to be something that was primarily for her rather than the offender. Further, the convener said that some participants who identified as victims found it difficult if considerations other than their own needs were taken into account during the process.

These comments presented issues of some complexity. The RJC program was victim-centred. It was premised on the recognition that victims often feel marginalised by and powerless within justice system processes. We expressly did not want victims to have the same experience when they took part in the RJC program. Rather, we wanted to offer a process in which victims felt like they *mattered*, where they were treated with respect, listened to, and able to exercise agency. In other words, a process able to meet victims' justice needs. However, it seems clear that when delivering an RJC program, the wishes expressed by victims sometimes needed to be considered in light of other program principles. One program principle was that the process must offer benefits to all participants. Program staff needed to consider how the words and actions of a victim participant may impact on other participants. If the effect on other participants was likely to be overwhelmingly negative, the resulting process would not be consistent with the program's framework. Another program principle was that the needs and vulnerabilities of all participants would be recognised and accommodated. In addition to meeting the needs of participants who were victims, the process needed to be responsive to the needs of all participants, and to provide them with the consideration and support each required so that they could take part in a meaningful way.

We did not think it was desirable, and it may not even be possible, to develop a prescriptive standard formula for resolving tensions between program principles. All the underpinning principles were important, and all needed to be upheld in every RJC process conducted under the program. The ways in which tensions may arise, and the appropriate solutions, will depend on the circumstances of each process. It was encouraging to learn that the convener who we interviewed reported that she was able to find ways through the tensions that arose in the matters she facilitated. Her account indicates that she managed this while respecting all program principles rather than compromising one in the service of another. Her approach of encouraging participants to think about what was likely to help the RJC process to go as well as possible so that there was the best chance that their aims would be met seemed to be effective.

It may be useful to reflect on whether we can communicate more clearly about what we meant when we described the RJC program as 'victim-centred.' For us, the term was a way of distinguishing the program from criminal prosecutions, the latter in which the victim is not a formal party and their needs and wishes are not a primary focus. It was also a way to differentiate the form of restorative justice process we offered from other restorative justice programs that have a deliberate focus on the rehabilitation of the offender, and may either not involve the victim at all, or may involve the victim in merely a peripheral way. For us, the term 'victim-centred' also related to the idea of being 'person-centred' that is, a process or service that was responsive to people's unique needs and wishes rather than prioritising rigid bureaucratic rules and procedures.

In hindsight, we perhaps could have better communicated the message that within the RJC program we sought to make every attempt to support victims and provide them with space to exercise agency. However, this did not mean that the needs or wishes of victim participants could be exercised to the detriment of other participants. In addition, it would have been helpful for us to be very clear from the outset of each process that while the purpose of the RJC program was to meet victims' justice needs, the program had particular parameters. It was up to program staff, particularly the convener, to make sure that processes that took place under the program adhered to its principles. It was the convener's role to ensure that if a process was unfolding in a way that was not compatible with program principles, it did not proceed at that time.

### **The voluntary nature of the process created challenges**

The stakeholders who worked with victims with whom we consulted in phase one of the project were concerned that victims who wanted to participate in an RJC process might be distressed, even re-traumatised, if an offender declined to participate or pulled out after having decided to take part. As described above, one interviewee explained that in her case, another participant (the offender) initially agreed to take part in the process. However, the offender later changed her mind and decided to withdraw. The comments of the interviewee who took part in our program do not suggest that she was traumatised by her experience, however she was understandably disappointed, and it is a great shame that she did not get what she hoped for from the process.



It is difficult to reconcile the risk of disappointment or worse to participants caused by the fact that the other party may decline to participate or pull out, with the fact that the program was designed to be voluntary. Indeed, some interviewees commented that the voluntary nature of the process was very important to them. One victim interviewee said that she had found being reminded of this by program staff reassuring. An offender interviewee said that the fact that he could stop at any time if the process became too much was the 'most important' consideration for him when he was worried about taking part. The fact that participation was voluntary for all participants was an essential part of the program's framework. This aspect of the program supported the program's aims of doing no further harm, ensuring that the process was fair to everyone, and that the process was capable of delivering benefits to everyone, rather than being something 'done to' some participants. Certainly, if offenders had been compelled to participate – and there is no mechanism that conceivably could have compelled victims to participate, so involuntary participation could only have theoretically applied to offenders – it would be difficult to argue that the resulting RJC process was other than punitive in nature. The conferencing process was underpinned by the notion of a respectful dialogue between people who chose to engage with each other on an equal footing. If offenders had been compelled to attend, this approach would have been undermined.

A voluntary RJC process cannot avoid the risk that one party may decline to participate or may pull out prior to a conference taking place. Clear expectations around this issue need to be established at the commencement of interactions with a participant, and reinforced throughout the process. Careful attention should be paid to how communications with victims are handled, and how victims can best be supported in the event that an offender does decide to pull out of the process.

# Part 8: Recommendations

We cannot expect the traditional criminal justice system and its processes —the purposes of which include determining criminal responsibility and appropriate sentences in the service of the broader community—to completely satisfy the needs of all individual victims. Restorative justice can play a complementary role by providing a separate forum that is capable of meeting victims’ justice needs in ways that the traditional criminal justice system cannot. Restorative justice processes that sit alongside criminal justice processes allow for victims’ justice needs to be addressed.

A restorative justice program that is complementary to the traditional criminal justice system does not replace the fact-finding or sentencing functions of that system. It is not an alternative forum for determining guilt or imposing punishment. Rather, it provides opportunities for the human effects of crime to be recognised and responded to on an individual and interpersonal level. Restorative justice processes can be held in parallel to criminal proceedings, at a point of time and in ways that do not compromise those proceedings.

There is already a well-established restorative justice program operating in the youth crime jurisdiction in Victoria (Youth Justice Group Conferencing). The benefits of restorative justice are clear. In recent years there have been numerous recommendations that restorative justice be expanded to the adult criminal jurisdiction in Victoria. Our pilot indicates that doing so is both desirable, and possible.

The Victorian Government can play an important role in bringing restorative justice from the margins of the criminal justice system into the mainstream. Government leadership and support is crucial for ensuring that those who could benefit the most from participating in restorative justice processes are aware that the option exists and able to access it. To this end, Government should take the following steps:

- endorse the use of restorative justice as a process complementary to the adult criminal justice system in Victoria
- support the establishment of a restorative justice program or programs with the following features:
  - a primary focus on responding to the harm experienced by individuals as a consequence of crime
  - direct participation of victims, offenders and others affected by crime
  - dialogue-based
  - flexible and non-prescriptive
  - underpinned by core restorative justice principles
- facilitate access to restorative justice services by: supporting the provision of education and training; supporting the development of workforce capability, funding programs and services; and establishing a legislative basis for restorative justice processes in the context of the adult criminal justice system.

## 1. Endorsing restorative justice

The Victorian Government should endorse the use of restorative justice as an optional process that is complementary to (that is, not as a substitute for) the adult criminal justice system in Victoria. An official endorsement from the Government would lay the groundwork for restorative justice programs and services to develop with confidence in Victoria, and to remove some of the concerns or uncertainty that stakeholders or potential participants may have about the legitimacy of this type of response to adult offending.

### Recommendation 1

The Victorian Government should endorse the use of restorative justice as an optional process complementary to the adult criminal justice system in Victoria.

## 2. Supporting a restorative justice program

Restorative justice programs vary considerably in how they operate, both within Australia and internationally. The evidence base about restorative justice combined with our experience of conducting this pilot program suggests that an appropriate program structure for the adult criminal jurisdiction in Victoria has the following characteristics.

### **Focused on the harm to individual people caused by crime**

Restorative justice can be a useful complement to the traditional criminal justice system by providing what that system cannot: a process that focuses on the human impact of crime. A restorative justice program for the adult criminal jurisdiction should be a forum within which the needs of those harmed (victims and others affected) can be acknowledged and responded to. Restorative justice processes can have other incidental objectives and benefits for individuals and systems—for example encouraging offenders to take steps to avoid reoffending, or enhancing public confidence in the criminal justice process. However, it is important that the primary focus of the process—meeting the needs of individuals—is not constrained by or subordinated to other objectives.

### **Direct participation of victims, offenders and others affected by crime**

In contrast to the traditional criminal justice system where professionals are the key actors, a restorative justice program for the adult criminal jurisdiction should facilitate the direct participation of those most affected by the crime.

### **Dialogue-based**

A restorative justice program for the adult criminal jurisdiction should be focused on facilitating dialogue or other forms of communication or interaction between the people most affected by the crime.

### **Flexible delivery**

The program must be responsive to the individual needs of its participants. It should therefore be flexible and non-prescriptive as to both timing and process.

It should allow for restorative justice to be offered at multiple points in the criminal proceedings, including pre-sentence and post-sentence. It should also be available in other contexts, subject to other relevant considerations, including but not limited to cases where there has been a police investigation but charges will not proceed, and in cases where there has been a finding of not guilty. As this report has outlined, in cases of serious harm it is crucial that a thorough preparation phase takes place before participants are brought into contact with each other. Each participant has unique needs, and the timeframes of each restorative justice process must accommodate these.

The participants should determine who takes part in a particular process—subject to program staff guidance and oversight. In some cases, a participant might want to meet with only one other person. In other cases, whole family groups might be brought together. Sometimes it may be appropriate and valuable for professional and community representatives to participate as well. Some cases might involve a victim and an offender. Other cases might involve people who do not fit within either category, but who have nonetheless been affected by a crime. The program structure must accommodate these different scenarios.

### **Underpinned by core restorative justice principles, including:**

#### **– Does no further harm to any participant**

This principle is fundamental to any restorative justice process. Restorative justice offers a way to respond to crime that is constructive and non-punitive. No one should be worse off after participating.

#### **– Voluntary**

Free and informed consent of all participants is a pre-requisite for restorative justice processes. Participants should never be required or coerced into taking part, as this would undermine the capacity of the process to be a forum within which people can participate with agency and on their own terms.

– **Respects the dignity and equality of all participants**

Restorative justice offers the opportunity for people to be brought into dialogue with each other. Participants are given space to tell their own stories and must also be prepared to listen to others and interact with them respectfully. People who have caused harm are invited to acknowledge and take responsibility for the harm caused, but the process must not be punitive or de-humanising for them. The process is about creating opportunities for people to actively participate in a response to harm. It is not forum for 'doing things to' participants.

– **Recognises and addresses particular characteristics or vulnerabilities of participants**

The program must be broadly accessible. This means that it must be tailored to meet the particular needs of its participants, for example by including measures designed to enhance cultural safety for Aboriginal and Torres Strait Islander participants, by adapting procedures to ensure they are suitable for people with cognitive impairments, and by including other sources of support such as interpreters or disability advocates, so that all participants are given the opportunity to fully take part in the process.

– **Recognises and addresses power imbalances**

Restorative justice processes must be delivered in a way that acknowledges structural power imbalances in society and how these can shape interpersonal dynamics. Program staff must have the requisite skills and awareness to recognise and address power imbalances, and to take steps to prevent these being replicated by the restorative justice process. Doing so is a key aspect of restorative justice practice, and is particularly important in some contexts, for example when restorative justice processes are used to respond to gendered harms such as sexual offences or family violence.

– **Confidential**

Participants must feel free to express themselves openly and honestly without fear of reprisals, or detriment to their legal and other interests. What is said during a conference process must not be able to be used in subsequent legal proceedings, or any other way made public unless all participants consent. Taking part in the process must not compromise participants' legal rights.

Consideration should be given to the question of the restorative justice program's relationship to other entities such as government and the courts. Given the need to ensure that the restorative justice program can be as responsive as possible to the needs of participants, it may be desirable for the program to be delivered independently from the courts, so that priorities such as court timeframes and scheduling do not overly influence the operation of the program.

The proposed restorative justice program is intended to operate alongside the criminal justice system. The criminal justice system is an adversarial environment, in which the interests of victims and offenders are generally understood to be in opposition. In contrast, restorative justice processes are designed to deliver benefits to all participants, to promote shared understandings, and to highlight mutual interests.

To facilitate a non-adversarial approach and to minimise potential barriers to voluntary participation, it is important that participants perceive restorative justice processes to be neutral. Participant perceptions may be influenced by the alignment of a convener or their service with a particular category of participant (victim or offender). We acknowledge that there are a broad range of restorative justice programs in existence, and that victim-focussed services and offender-focussed services are, respectively, involved in their successful delivery. However, in the context of a restorative justice program operating alongside the criminal justice system, the perception of neutrality may be enhanced where the program is delivered by an organisation that is not aligned to particular categories of participants, and is capable of delivering programs and services that may benefit all participants.

## Recommendation 2

### **The Victorian Government should support the establishment of a restorative justice program or programs with the following features:**

- a primary focus on responding to the harm experienced by individuals as a consequence of crime
- direct participation of victims, offenders and others affected by crime
- dialogue-based
- independent
- flexible and non-prescriptive
- underpinned by core restorative justice principles.

## 3. Facilitating access to restorative justice services

### **Support stakeholder education and training**

Restorative justice is not well understood within the criminal justice system in Victoria. Key criminal justice system organisations including the judiciary, the courts, Victoria Police, the Office of Public Prosecutions, Victoria Legal Aid and services for victims and offenders should be supported to educate and train their staff about restorative justice objectives, principles and processes. The legal profession's representative bodies should also be encouraged to make restorative justice training available to their members. This will enable effective referrals to be made to the restorative justice program.

### **Support the development of workforce capacity**

Rigorous and effective restorative justice programs responding to crime and serious harm rely on highly skilled professional staff. As there are currently limited restorative justice programs in Victoria, and thus few opportunities to work in this field, there is only a small pool of suitably qualified restorative justice practitioners in the state. To support the expansion of restorative justice practice there must be growth in the number of trained, skilled, qualified and experienced practitioners. The Government should investigate ways to foster this expansion.

### **Fund delivery of restorative justice services**

A quality restorative justice program that is capable of supporting people who have experienced serious harm must be appropriately resourced. Financial support by Government will be important for ensuring that people are able to access restorative justice services when they are ready to do so, and for removing financial barriers to their participation.

### **Provide a legislative basis**

It is not essential for a restorative justice program to have a legislative basis in order for it to operate successfully. However, a legislative foundation would help to establish the legitimacy of the restorative justice program and confidence in it across the criminal justice system. Legislation should expressly provide that disclosures made during a restorative justice process are not admissible in legal proceedings. Legislative provisions could also clarify how participation in a restorative justice process might be taken into account for sentencing or other purposes.

### Recommendation 3

**The Victorian Government should facilitate access to restorative justice programs and services by:**

- Supporting stakeholder education and training about restorative justice
- Supporting the development of workforce capacity
- Funding delivery of restorative justice services
- Providing a legislative basis for the use of restorative justice in the context of the adult criminal justice system.

# Appendix 1: Restorative Justice Conferencing Pilot Program Framework

## Centre for Innovative Justice Restorative Justice Conferencing Pilot Program Framework

This document sets out the framework for the Centre for Innovative Justice (the CIJ)'s Restorative Justice Conferencing Pilot Program (the program).

The framework is intended to guide the establishment and operation of the program, and should be regarded as a dynamic document that is adapted in response to issues that emerge over the course of the pilot.

It covers the following matters:

- Overview and background
- Purpose and objectives
- Guiding principles
- Safeguards
- Processes

### Overview and background

#### Restorative justice

The term 'restorative justice' refers to a broad range of practices that seek to address the harm caused by a crime, other wrong, injustice or conflict, by collectively including those with a stake in the wrongdoing in its resolution.

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

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

The most common restorative justice practice is restorative justice conferencing, where those affected by a crime, other harm or situation of conflict collectively discuss how to respond to the aftermath of what has happened and its implications for the future. Participation in a restorative justice conference is voluntary for all participants. The convener of the conference is a skilled professional who ensures that the process is safe, respectful and fair for everyone involved. A restorative justice conference generally proceeds in three phases, with all parties discussing: what happened; how people were affected; and what needs to happen to address the harm. Restorative justice practices can also be used in ways other

than conferencing or face-to-face meetings between parties, including through indirect communication and the exchange of correspondence.

In Victoria the only established restorative justice program that responds to criminal offences operates solely within the youth jurisdiction. Historically, some justice system stakeholders have taken the view that restorative justice should only be used to respond to young offenders who have committed relatively minor offences. This view is associated with particular ideas about restorative justice conferencing, namely that restorative justice conferencing is: a way to help young offenders realise the impact of their offending, thus assisting their rehabilitation and reducing reoffending; and a diversionary option for young people who have committed minor offences – that is, young offenders can participate in a restorative justice conference *instead* of being prosecuted for the offence.

The benefits of using restorative justice processes to respond to young offenders are clear. However, the CIJ takes the view that restorative justice offers a unique opportunity to respond to victims of crime. Victims of crime have a range of ‘justice needs’ that are not readily identified or met through existing legal processes or services. Those needs are for voice, validation, information, accountability, prevention, and in some cases relationship repair and resolution. The criminal justice system is not able to meet all of these needs. Restorative justice conferencing can provide a forum for a victim of crime to talk about the impact of the offending in their own words and to ask the offender questions, for the offender to offer an apology and for the victim, the offender and other conference participants to craft an agreement about steps to be taken, often by the offender, to address the effects of the crime and prevent it from happening again.

Research findings consistently show that restorative justice processes deliver a range of benefits to victims who take part in them. Significantly, recent studies indicate that participation in restorative justice processes can reduce the traumatic effects of crime for victims. This suggests that from the perspective of addressing victims’ needs it is helpful to provide restorative justice processes in response to serious offences that can result in significant trauma for victims.

The CIJ takes the view that given the evidence about the benefits of restorative justice for victims of crime these processes should be made widely available, including in cases where the offender is an adult, and where the offending is serious. The CIJ decided to pilot a restorative justice conferencing program for serious offences committed by adult offenders with the aim of demonstrating that this type of program can work in the Victorian context.

### **The CIJ’s Restorative Justice Conferencing Pilot Program**

In 2015 the CIJ received funding from the Victorian Legal Services Board to development, implement and run a restorative justice conferencing pilot program.

The CIJ decided to make the program available to people affected by a motor vehicle collision offence that resulted in a death or serious injury because we saw that restorative justice could be particularly helpful in this context. The harm caused to victims of road trauma and families of people who have died in collisions is significant. Post-traumatic stress symptoms are a common response to criminal victimisation in general, however family members of those who have died as a result of a motor vehicle collision are known to suffer particularly severe grief responses. Those who work with family members in this position have found that they ‘view the death of their relative as being the result of a senseless, meaningless, irrational act; a preventable death that should not have happened, and; the ultimate violation of their loved one’s life.’<sup>134</sup> Restorative justice conferencing may be of particular assistance in these circumstances by providing a forum for family members to seek answers from the offender and to speak about how the offending has affected them.

Further, in a significant proportion of motor vehicle collision offences resulting in death or serious injury the victim and offender knew each other prior to the collision. Restorative justice conferencing may be particularly useful in cases where there is a pre-existing relationship and/or shared social and communal ties between the victim and the offender, given the potential of the process to allow the making of amends and the repair of relationships.

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134 Vivienne Bateman, ‘Death as a result of culpable driving: Impact and Intervention’ (2010) Grief Matters 16.



## Purpose and objectives

The purpose of the program is to provide people affected by a motor vehicle collision with the opportunity to participate in a restorative justice process in response to the incident in which they and/or their loved ones were involved. The principal process to be offered as part of the program is a restorative justice conference, although a face-to-face conference may not actually eventuate, and other processes may be adopted according to the needs and preferences of the people participating. For the purpose of this framework, these processes are collectively referred to as 'the conference process.'

The conference process is a voluntary, safe and structured environment in which individuals involved in, or affected by a motor vehicle collision can come together—directly or indirectly—to achieve one or more of the following objectives:

- Meet victims' individual justice needs (for voice, validation, information, accountability, prevention, relationship repair and resolution)
- Discuss what happened and why, how people were affected, and what steps could be taken to address the harm caused
- Explore the human and emotional dimensions of the collision free from the constraints of associated legal processes, for example by expressing remorse and offering apologies

The following are not central to the program's purpose or objectives

- The rehabilitation of offenders, although the program may also promote this
- A reduction in reoffending, although the program may also promote this

## Guiding principles

The following principles will apply to the operation of the program:

- The program is centred around identifying and addressing victims' justice needs
- Participation in the conference process is voluntary for all participants
- The program and conference process must be safe and do no further harm to the participants
- The conference process offers benefits to all participants
- The process is underpinned by respect for the dignity and equality of all participants
- The program encourages participants who have caused harm to be accountable and take responsibility. However it is not a way to inflict (further) punishment
- There should be careful preparation in the lead up to any conference to ensure that the needs participants are seeking to address and the outcomes they wish to achieve can realistically be met through the conference process
- Potential participants are not automatically entitled to take part in the program. The process will only go ahead in cases where program staff have assessed all potential participants as suitable and ready to engage
- Communications during the program and conference process will be treated as confidential and not be able to be used in other processes or forums.
- Particular challenges or vulnerabilities that may affect individual participants are recognised and accommodated
- Power dynamics that may exist between participants are addressed

## Safeguards

In order to protect the wellbeing, rights and interests of all participants in the program, the following safeguards apply:

- Participants will be supported to provide informed consent to participate in the program. In seeking a participant's informed consent, program staff should be clear about what outcomes can and cannot be achieved in the program.
- Any participant may withdraw at any stage of the process.
- Participants may be accompanied by a professional support person during the conference process (noting that the role of the support person is to support the party to participate on their own terms, not to advocate or speak on their behalf).
- Participants may also invite a personal support person, such as a family member, to attend the conference with them in a support role.
- The conference process is not a fact-finding forum, and does not determine questions of criminal or civil responsibility.
- The process will not be offered in circumstances where the facts of the offending are in dispute.
  - Where criminal proceedings have been initiated, the process will not be offered unless and until a finding of guilt has been made.
- Participants will agree in advance to treat all communications in the conference process as confidential.

**Note that although confidentiality is a key requirement of the process, some limitations do apply. It is critical that these be discussed with the participants at an early stage of the process:**

- The participants may agree to certain statements or information being communicated or disclosed to other parties following the conference process.
  - De-identified data, information and reports about the program may be gathered and used as part of the evaluation of the pilot.
- Participants will be asked to undertake:
  - not to use any verbal or written apology extended by another participant at or following the conference process as any admission of legal liability
  - not to use any statements made by another participant during the conference process in any related process, proceeding, or investigation.
- The program's intake and conference processes will be delivered by service providers and conveners who are independent of the participants.

## Program relationship to the criminal justice system

- The conferencing process occurs alongside the criminal justice system. This program is not a form of diversion. It is not intended to operate as an alternative to a criminal prosecution. Participants can choose to engage in the process as something additional to, and separate from, any criminal proceedings relating to the collision.
- The conferencing process can only take place at the following stages of a criminal prosecution:
  - After a discontinuance
  - After a plea of guilty has been entered, prior to the sentencing of the offender
  - After the offender has been sentenced. There is no time limit for a conference to be held after sentencing. A conferencing process can be held in circumstances where the offender is serving a Community Corrections Order, and where the offender is serving a custodial sentence.
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- In circumstances where a conferencing process is held before the offender is sentenced, the offender’s legal representative may choose to make submissions during the sentencing hearing arguing that the offender’s participation in the conferencing process is a mitigating factor. What weight (if any) is given to these submissions is a matter for the sentencing judicial officer. If a conference process is proposed at the pre-sentence stage, victim participants must be fully informed about the potential for the offender to argue that their participation in the process is a mitigating factor at sentencing, and about the potential for this to result in a more lenient than otherwise sentence for the offender. The process is entirely voluntary for all participants. If victims are uncomfortable with the possibility of an offender receiving a sentencing discount due to their participation in the process, it is open to the victims to choose not to engage at that time.
- In circumstances where an offender serving a custodial sentence participates in the conferencing process, it is possible that the Adult Parole Board will be notified that the process has taken place. What weight (if any) is given to that fact is a matter for the Adult Parole Board. Victim participants must be informed of this possibility prior to their participation in a conferencing process. If victims are uncomfortable with this possibility, it is open to the victims to choose not to engage with the program at that time.

## Program Processes

### Eligibility

The program is available to people affected by serious motor vehicle collisions: collisions that resulted in serious injury or death. The offending driver must have been an adult at the time of the collision. The collision must have occurred in Victoria.

People affected by serious motor vehicle collisions can include:

- a victim of the offence. A victim can be someone who was directly involved in the collision, for example a person who was seriously injured. A victim can also be a family member of a person who died in a collision. Where there are multiple victims, one victim or multiple victims may participate in the conferencing process.
- the offending driver

### Timing

The process can be held at any time after the collision, subject to the requirement that the process take only place at certain stages of a criminal prosecution (see previous section).

Subject to external constraints, such as the timing of criminal proceedings, the process should be held at a time that would be most helpful for the participants.

### Identifying victims who may benefit from participating

The conferencing process is victim-initiated. In order to exercise the option of participating in the process, victims need to be informed about it. Those who work in support services and criminal justice system organisations who have contact with victims of crime are uniquely placed to suggest participating in the conferencing process to victims who may benefit from it.

Not all victims who have been affected by serious motor vehicle collisions will have needs that can be met through a restorative justice conference process, nor an interest in pursuing it as an option.

The process of identifying people who may be interested in and may benefit from a restorative justice process should be informed by reference to the set of factors set out in Appendix A to this framework **(Factors indicating that a victim may be interested in considering a restorative justice conference process).**

Those wishing to make a referral to the program may seek the advice and input from the CIJ about whether a particular person should be approached about their interest in the program.

## **Inviting victims to consider participating**

The way that a potential restorative justice participant is informed about the availability of a restorative justice service and invited to take part in it can determine whether that person decides to engage. Therefore it is crucial that a person making an approach to a potential participant understands how to do so in an effective way.

It is also important that the introduction to a restorative justice process neither exposes the potential participant to further traumatisation, nor unrealistically raises the person's expectations about what the process can deliver.

Advice about how to introduce and suggest restorative justice to a potential participant is set out in **Appendix B** to this framework (**Guide to suggesting restorative justice to potential participants**).

### **Referral and intake: victim**

If a victim indicates that they are interested in pursuing a restorative justice option further, the referrer should seek the person's consent to refer them to the restorative justice Service Provider (which, for the purposes of the pilot, will be the CIJ). The CIJ will then contact the victim to: explain the process in further detail; discuss their individual interests, needs and motivations; determine whether they would like to pursue a restorative justice process; confirm eligibility; and identify who the offender and/or other potential participants may be.

The CIJ will also, in consultation with the victim, undertake an initial assessment of the victim's suitability and readiness to proceed with the conference process. The assessment of the suitability of a matter for the conference process is critical for ensuring that the process does not further harm the victim or any of the other participants.

Factors relevant to a victim's suitability for the conference process include whether:

- the victim's needs are such that they are likely to benefit from participation in the conference process
- the victim has the capacity to provide informed consent to participate, is able to cope with the emotional demands of the conference process, has realistic expectations of what the conference process can achieve, and whether there are any concerns about their, or any other participant's, physical and psychological safety
- the outcomes the victim is seeking can be realised through the conference process, or whether they would be better pursued through other avenues
- the victim understands the purpose, principles and structure of the conference process and agrees to participate in accordance with them

If it is determined that it would not be suitable for the conference process to proceed at that time, the matter could be revisited at a later stage if circumstances change.

### **Who else needs to agree to participate in order for the process to go ahead?**

This program is based on the restorative justice practice of bringing together the person harmed and the person responsible for the harm, along with other people who have a stake in the harm and its resolution. In this program the emphasis is on facilitating the victim and the offending driver to meet, and including other relevant people in the meeting.

The program's general approach is that as a minimum both a victim and an offender affected by the same collision must both agree to take part before this process can go ahead. Other restorative justice programs offer processes whereby an offender, their supporters and community representatives participate, but a victim does not necessarily take part. However, the focus of this program is on meeting victims' needs by providing a process whereby those most affected by a serious motor vehicle collision engage in a dialogue together. Therefore we generally require that both a victim and an offender agree to participate.

However, the program aims to be flexible and to meet the individual needs of people affected by serious motor vehicle collisions. If it is appropriate, people who have been affected by a serious motor vehicle collision may participate in the process in circumstances where they and/or other participants may not meet a definition of victim or offender. Whether the process will go ahead in these circumstances is at the discretion of program staff.

For clarity and ease of expression this document refers to conference process participants as 'the victim' and 'the offender' even though these categories may not apply in all cases.

### **Contacting the offender**

Before intake staff initiate contact with the offender the victim should be reminded that the process is voluntary and that the offender may decline to participate in the conferencing process. The victim should be asked to think carefully about how they might feel if this is the case. They should be encouraged to discuss this with a professional support person (such as a counsellor or psychologist) and take any other necessary steps to ensure that they will be ready to cope with the decision of the offender, whatever it may be.

Intake staff will work with the victim to determine what personal information will and will not be shared with the offender when the intake staff member makes contact.

Once the victim has given their informed consent to proceed, intake staff will make contact with the offender.

Program staff will make contact with the offender in the most appropriate way, being that which is most likely to minimise shock, distress or trauma to the offender. For example, contact with an offender may be best initiated through their lawyer.

In circumstances where the offender is in custody, intake staff will make contact with the CIJ's liaison person at Corrections Victoria and ask them to assist in locating the offender and arranging a meeting or phone call.

### **Intake: offender**

Program staff will endeavour to make contact with offenders in ways that are likely to minimise any distress this contact may cause them. Where possible, program staff will identify a third person working with the offender, for example their lawyer, and make contact via this person.

In circumstances where the offender is in custody, intake staff will make contact with the CIJ's liaison person at Corrections Victoria and ask them to assist in locating the offender and arranging a meeting or phone call.

At the intake meeting with the offender, program staff will explain:

- the concept of restorative justice
- the purpose and objectives, principles and process of this program
- that the victim would like to engage in the conferencing process with them
- why the victim is interested in participating in the conferencing process and what the victim's aims are

Intake staff will also undertake an initial assessment of the offender's suitability and readiness to proceed with the conference process.

Factors relevant to an offender's suitability for the conference process include whether:

- the offender has the capacity to provide informed consent to participate, is able to cope with the emotional demands of the conference process, has realistic expectations of what the conference process can achieve, and whether there are any concerns about their, or any other participant's, physical and psychological safety
- the offender understands the purpose, principles and structure of the conference process and agrees to participate in accordance with them

## **Preparation for and delivery of the conference process**

If both the victim and the offender indicate a willingness to proceed with the process, the service provider will retain a skilled and experienced convener to prepare them for their participation in the conference process, and will make all necessary practical arrangements.

Each participant will be invited to bring a support person to any conference, and will be encouraged to nominate a support person who has a prior personal and ongoing relationship with them. The support person may be known to the participant in a professional capacity, however their role is to provide personal support and not to act in a professional capacity, nor to advocate on behalf of the participants during the conference process.

The service provider and convener will support the participants to provide their informed consent to participate in the program, and will arrange for them to complete and sign a written consent form. This will involve explaining the confidentiality requirements of the process and any potential risks to a participant's legal rights or interests.

The participants and the convener will decide whether a face-to-face conference will be convened, and if so, what format it will take. In some cases the participants may prefer to communicate with one another indirectly.

If face-to-face conference goes ahead, the participants and the convener will decide on a mutually convenient time and location for the meeting. However, if one of the participants is in custody the conference will need to be held in the gaol where they are serving their sentence.

The CIJ and the convener will contact the participants following the conference process to 'debrief' them, respond to any questions about the conference process, and, if necessary, will monitor any follow up actions that may have been agreed to.

The CIJ will maintain data and records about the program sufficient to enable a robust evaluation of the program to be undertaken at the conclusion of the pilot phase. These records will be treated as private and confidential and will be stored securely.

### **The convener's role**

The convener is responsible for ensuring that the process is safe, fair and that all participants have the opportunity to participate fully in the conference. The convener plays a neutral role and is required to consider the needs and wellbeing of all participants.

During the preparation phase of the process the convener engages in ongoing assessment of the participants. If the convener forms the view that one or more participant is not ready or suitable to participate in a conference, the convener will not allow a conference to go ahead.

### **What happens if a participant is not suitable or not ready?**

During the intake phase, program staff may decide that a participant is not ready or not suitable to participate in a conference. During the preparation phase, the convener may decide that a participant is not ready or not suitable to participate in a conference. In either case a conference will not be held under this program. Where a decision of this nature has been made, program staff and/or the convener will provide each participant with the opportunity to meet and discuss the decision.

### **Additional arrangements for conferences that take place in custody**

If an offender is in custody at the time the conference takes place there will usually be no other option than to hold the conference at the prison where the offender is located.

The prospect of entering a prison may be daunting for victims. Prior to the conference taking place, victims need to be prepared for:

- the procedures that are involved in visiting a prison, for example the various security checks they will be subjected to
- the psychological or emotional impact that being in a gaol may have for them
- delays that can occur when visiting prison, for example if there is a lock-down

Program staff and the convener need to recognise and address the increased vulnerability incarcerated offenders face because of the fact of their imprisonment. Imprisoned people are cut off from their families and communities and therefore accessing support may be difficult. Particular care should be taken to determine what support is available to offenders while they are in custody, and to what extent they will be able to access ongoing support throughout the conferencing process if they need it.

Further, engaging in the conferencing process requires a degree of emotional vulnerability from participants. However, the prison environment is not necessarily a safe environment for offenders. Offenders need to be advised to think carefully about who, if any, of their fellow prisoners they disclose their participation in the conferencing process to.

Under Victorian law, prisoners are entitled to have the location of the gaol they are serving their time in remain private. Program staff and the convener must remember not to disclose the offender's location to the victim unless and until it is clear that a conference is going to go ahead.

## Evaluation

At the end of the pilot, the program will be evaluated. The evaluation will seek to identify what worked well in the program, and where the program could be improved. It will also attempt to contribute to the state of knowledge about how participating in a restorative justice conference process affects people who have been impacted by serious crimes, and whether it is a helpful process for them.

The key indicator of whether or not the pilot was successful will be how participants experienced the program. Therefore we will interview participants and ask them for their reflections. All people who participate in the program will be invited to take part in the evaluation research however their participation in this aspect of the program is voluntary. An independent researcher will conduct interviews with program participants who choose to participate in the evaluation. The data will be analysed, de-identified and coded thematically. The CIJ will release a report presenting the findings of the evaluation research.

### **Factors indicating that a victim of crime may be interested in considering a restorative justice conference process: A guide for those working directly with victims of serious motor vehicle collisions**

Victims of crime may not be aware of the existence of restorative justice, or may not think of exploring this process of their own accord. However, aspects of what victims convey to those working with them may indicate that they would benefit from this process. People working with victims can be alert for general statements and comments victims may make that would suggest that this process would be helpful. These include but are not limited to statements and comments conveying:

- a desire to make contact with the offender
- an expectation that the offender would have contacted them to see how they are, or to offer and apology
- a desire for information about the offence that cannot be ascertained from any other source
- curiosity about the offender and how they have been affected by the offence
- a need to know whether the offender has taken any steps since the offence to address behaviours that were responsible for the offending
- a need to put the offence behind them
- a persistent focus on the circumstances of the offence, and on the offender
- an overall sense that the offence and the response to it has been unfair and unjust.

## Victims' Justice Needs

| Justice Need   | Restorative justice conferencing's capacity to meet victims' justice needs  |
|----------------|---|
| Voice          | The victim has the opportunity to explain the impact of the offending directly to the offender and to tell their story in their own way, freed from the constraints of the legal process.   |
| Validation     | The victim's experience is recognised and treated as meaningful within the process. It is not challenged or subject to attack.  |
| Information    | The victim can seek answers from the offender in relation to unresolved questions about what happened. The offender is sometimes the only person who has this information.  |
| Accountability | Being directly addressed by the victim about how the crime has affected their life provides impetus for the offender to gain a full understanding of the impact of their actions, which can promote offender accountability. In some conferences, the offender will offer an apology to the victim.   |
| Relationships  | <p>The victim has the opportunity to restore damaged relationships with others involved in or affected by the crime, family members and the community.</p> <p>If the victim does not want a relationship to continue, they have the opportunity to address any outstanding issues with the offender, such as what to do if they by chance see each other in the community.</p> <p>Victims who did not know offenders before the crime have the opportunity to reassess the way they have thought of or imagined the offender.</p>   |
| Prevention     | <p>The victim has the opportunity to convey the gravity of the effects of the crime to the offender, which may result in the offender developing insight and resolving to address the circumstances that gave rise to the offending.</p> <p>The victim has the opportunity to encourage the offender to take steps towards rehabilitation/desistance.</p> <p>Some victims find that participating in restorative justice conferencing assists them to engage in broader systemic advocacy, for example because they uncover further information that supports their aims, or in some cases because other participants agree to join forces with them.</p> |
| Resolution     | <p>Some victims who take part in restorative justice processes report that this allowed them to feel that they had done what the needed to do in order to address the crime.</p> <p>Note: in very serious cases it is not expected that participating in restorative justice processes will mean that the victim no longer feels the effects of the crime such as grief and sadness. Resolution does not necessarily mean 'closure.'</p>  |



## Guide to suggesting restorative justice to victims of crime

This document provides a guide to raising the possibility of participation in a restorative justice (RJ) process. It is aimed at those who work directly with victims, such as members of Victoria Police and professional support people, who are planning to suggest participating in an RJ process to a victim of crime.

### Scope and purpose of the conversation

The worker needs to:

- avoid causing distress or further harm to the victim
- make the victim aware that there is an RJ process available to them
- provide a brief explanation of what RJ is
- provide a brief explanation of how RJ might be able to address some of the victim's individual needs

The worker should first form a view about whether the victim is in a frame of mind where the introduction of the concept of meeting or communicating with the offender would not cause them distress. It is desirable to raise the topic only once a rapport with the victim has been established, and once some preliminary questions have been asked about the victim's wellbeing and response to the offence.

The worker does not need to explain the full details of the RJ process to the victim, or to facilitate an in-depth discussion of the risks and benefits of an RJ process for that person. Rather, the main aim for the worker is to provide the victim with enough information and support to allow the victim to decide whether they would like to learn more about RJ and how an RJ process might benefit them, and if so, to be referred to the CIJ's intake team. In other words, the worker needs to do enough to spark the victim's curiosity about RJ, and then facilitate a referral to the CIJ. It is the CIJ's job to engage in a thorough discussion of the process and to help the victim work through whether they want to do it, and what the particular issues are that would need to be addressed if the victim decided to participate.

### Having the conversation: basics

- The conversation should ideally occur face-to-face. If it is not convenient to have the conversation face-to-face, it should be done via telephone.
- Brochures or information sheets about RJ might be provided to the victim in the course of the conversation. However, the primary way that the victim should be informed about RJ should be via a conversation, not through a letter or email or other written form of communication. This ensures that the victim has the opportunity to ask questions, and also provides the opportunity for the victim to learn about RJ in a way that demonstrates how RJ would be relevant to their personal situation.
- The worker should be familiar with the victim's circumstances and the details of the offence. Ideally, the conversation should take place after some rapport has already been established between the worker and the victim.

### How to give a brief explanation of RJ

'There is a process that some people who have experienced serious traffic collisions have found useful. It involves the people involved in the collision being supported to have a dialogue with each other. There is a professional facilitator involved, who guides the conversation, and makes sure that the process is safe for everyone. These meetings often involve people talking about how the collision has affected their lives. Often those involved have questions for each other. Sometimes there will be an apology. Sometimes the people involved make a plan to do something aimed at making things better for one or both of them.'

## Important points

- The process is voluntary for everyone – the other person involved in the collision does not have to participate and may not want to
- People can bring support with them to the meeting, e.g. a family member
- What is said in the meeting is confidential
- The meeting is about a dialogue. It is not a way to negotiate a financial outcome or to decide on questions of legal liability

## Strategies for initiating the conversation

Listen for themes in the victim's story that may indicate that the victim could benefit from RJ and respond by suggesting that the victim participate in RJ.

For example:

- The victim might say something like, 'I just can't get over the fact that he/she didn't contact me to apologise after the offence.' The worker could respond by acknowledging the victim's need to receive an apology, and then by explaining that there is a process that allows people who have been affected by a serious motor vehicle collision to be supported to meet each other in a safe environment, and this process allows the opportunity for apologies to be made.
- The victim might be fixated on a detail of the offence that they do not understand. The worker might explain to the victim that there is a process that allows for people affected by a serious motor vehicle collision to be supported to meet each other in a safe environment and to have a dialogue. This dialogue provides an opportunity to ask questions of the offender.
- Similarly, the victim might say something like, 'I just don't know whether the offender has any understanding of how their actions have affected my life.' The worker could ask the victim whether they would like to find out what the offender is thinking, and/or whether they would like to tell the offender how their life had been affected by the collision. If so, the worker could explain to the victim that RJ provides a mechanism for people affected by a serious motor vehicle collision to engage in a safe, supported dialogue. This process would give the victim the opportunity to tell the offender how their life has been affected, and to find out what impact it has had for the offender.

Alternatively, the worker could simply say, in the course of a meeting with victim, 'there is a process called RJ that I would like to tell you about.' They could then give a description of RJ (see above). They could then explain why they think RJ might be useful for this person, based on what they know of them and their history. That is, the worker should explain the potential benefits of RJ in a personal, particularised way. For example, the worker might say, 'when you said last time that you felt like you have experienced a huge injustice because the offender has never really had to face up to the harm you have suffered. I wondered whether you might get something out of having the chance to meet with them and explain how you feel to them. Other people who have participated in RJ processes have found that being able to tell the person responsible for what has happened about the impact their behaviour has had on their lives allows them to feel that the person responsible was held accountable.'

## Tips

- Avoid using jargon. Let the victim know that the process is called RJ, but otherwise explain that the process is a facilitated conversation or dialogue
- Avoid creating unrealistic expectations. Let the victim know that this is a beneficial process, but that it is not right for everyone, and whether the offender wants to participate is up to them
- Let the victim know that while it might seem confronting to meet the offender, the process is taken one step at a time, and a lot of support is provided
- Tell the victim that they do not have to decide whether or not they want to do RJ right there, but that you think it would be a good idea for them to meet with a member of the CIJ's intake team so that the victim can hear more about the process and work out whether they would like to give it a try
- Don't worry! You are simply providing the victim with some information about a process that might help them. The CIJ's experience has been that people really appreciate being given the option of participating in a process that is designed to help them recover, even if they decide not to do it.

# Appendix 2: List of consultations

## In chronological order:

- Road Trauma Support Services Victoria
- David Moore, President, Victorian Association for Restorative Justice
- Russell Jeffrey, Manager, Community Conferencing, Neighbourhood Justice Centre
- Victims Support Agency
- Jay Jordens, Neighbourhood Justice Officer, Neighbourhood Justice Centre
- Victims of motor vehicle collision offences: forum organised with the assistance of Road Trauma Support Services Victoria
- Jesuit Social Services
- Windermere, Victim Assistance Program, Narre Warren
- CoHealth, Victim Assistance Program, Footscray
- EACH Social and Community Health, Victims Assistance Program, Ringwood
- Centacare, Victim Assistance Program, Ballarat
- Individual with a personal experience of road trauma
- St Luke's Anglicare, Swan Hill
- Fitzroy Legal Service
- Chief Judge of the County Court of Victoria
- Merri Health, Victim Assistance Program, Preston
- Victorian Association for the Care and Resettlement of Offenders (VACRO)
- Law Institute of Victoria, Criminal Law Section
- Chief Magistrate, Magistrates' Court of Victoria
- Chairperson and Chief Administrative Officer, Adult Parole Board
- Office of Public Prosecutions (including lawyers and social workers)
- Victoria Legal Aid
- Victims of Crime Commissioner
- Carolyn Worth, South Eastern Centre Against Sexual Assault
- Dave Vinegrad, restorative justice practitioner
- Terri Stewart, Aboriginal Liaison Officer, County Court of Victoria
- Victoria Police
- Kate Walker, Koori Conference Convenor, Children's Court of Victoria
- Peter Condliffe, restorative justice practitioner, barrister and academic
- Corrections Victoria
- Coroners Court of Victoria

# Appendix 3: Advisory Committee

In phase one of the project we convened a project Advisory Committee, whose terms of reference were as follows:

- The Advisory Committee is intended to deliver advice and strategic guidance to CIJ’s project team to support the successful implementation of the project.
- Advisory Committee members will also play a role in informing their respective organisations and/or sectors about the project.
- The CIJ is solely responsible for project implementation in accordance with its obligations to the project’s funders under the funding agreement.
- Given the project’s focus on meeting the needs of victims, Advisory Committee members will include victims and representatives from organisations that provide support services to victims, who can provide a victim perspective in the design and delivery of the program.
- Advisory Committee members will also include experts in restorative justice practice; judicial officers; criminal lawyers, including prosecutors and defence lawyers; Victoria Police members; and social service professionals involved in the delivery of support to victims and offenders.

Members of the Advisory Committee were:

- Magistrate Michael King;
- John Cain, Solicitor for Public Prosecutions, Office of Public Prosecutions Victoria;
- Melinda Dine, victim of a motor vehicle collision offence;
- Detective Sergeant Mark Amos, Victoria Police;
- Trieu Huynh, Program Manager, Indictable Crime, Victoria Legal Aid;
- Russel Jeffrey, Manager, Community Conferencing, Neighbourhood Justice Centre;
- Lyndal Bugeja, Deputy Director – Operations, Community Operations and Victim Support Agency;
- Chris Harrison, Manager, Education Services, Road Trauma Support Services Victoria;
- Peter Condliffe, restorative justice practitioner, academic and barrister;
- Daniel Clements, General Manager – Justice Programs, Jesuit Social Services.

**Associate Director, Research, Innovation and Reform**

Stan Winford

**Project coordinator and author**

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**Consultant**

Mary Polis

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The Centre for Innovative Justice researches, translates, advocates and applies innovative/alternative ways to improve the justice system, locally, nationally and internationally, with a particular focus on appropriate/non-adversarial dispute resolution, therapeutic jurisprudence and restorative justice.

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