

# Submission to the Sentencing Advisory Council's inquiry into Restitution and Compensation Orders

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April 2018

The Centre for Innovative Justice ('the CIJ') welcomes the opportunity to contribute to the Sentencing Advisory Council's Restitution and Compensation Orders inquiry.

The CIJ's objective is to develop, drive and expand the capacity of the justice system to meet and adapt to the needs of its diverse users. It is committed to finding innovative and workable solutions to complex problems that manifest in the justice system.

## The Scope of this Submission

The CIJ notes that in its 'Issues and Options Paper' for the current inquiry the Sentencing Advisory Council has raised the issue of whether restorative justice may provide an avenue for victims to seek restitution and compensation. In this submission, the CIJ will focus on responding to this particular issue. We hope that our expertise in restorative justice may allow us to make a useful contribution to this inquiry.

## The CIJ's Expertise in Restorative Justice

The CIJ has undertaken extensive work around the role that restorative justice can play in relation to mainstream justice processes, including our 2014 report *Innovative Justice Responses to Sexual Offending – Pathways to Better Outcomes for Victims, Offenders and the Community*.<sup>1</sup> Currently, the CIJ is carrying out a project funded by the Victorian Legal Services Board, the 'Restorative Justice Conferencing Pilot Program.' Under this project, we have designed, developed and are now delivering a pilot restorative justice conferencing program designed to meet the needs of people who have experienced a serious motor vehicle collision. Additionally, the CIJ is currently designing a restorative justice model for the Transport Accident Commission to add to the options available to meet the needs of supported recovery clients. Further, we are assisting WorkSafe to examine how they might incorporate restorative justice practices and processes when responding to injured workers and their families.

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<sup>1</sup> Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending – Pathways to Better Outcomes for Victims, Offenders and the Community* (2014).

## Restorative Justice

Restorative justice is a way of responding to crime that focuses on harm caused to people, rather than on the violation of laws. In restorative justice processes, the people most affected by a crime are centrally involved in a process designed to address the harm. The focus is on victim healing, accountability of the person who has caused the harm, community restoration, addressing harm and loss and repairing damaged relationships (where this is appropriate and what people want).

Restorative justice can involve:

- The person harmed telling the person responsible for the harm how their life has been affected;
- The person responsible for the harm acknowledging their responsibility;
- The person harmed hearing from the person who caused the harm, and having the opportunity to ask questions, such as what the person was thinking or why the person committed the offence;
- The person responsible for the harm offering an apology;
- The person harmed and the person responsible for the harm reaching an agreement for the person responsible to do specific things aimed at addressing the harm.

## Financial Harm

Financial loss has been identified as one of the common ways in which crime impacts on victims.<sup>2</sup> Restorative justice processes provide an avenue to address harm that results from crime, including the financial loss a victim may have experienced. First, in a restorative justice conference, a victim has the opportunity to tell the offender about the ways in which the crime has affected them. As part of this process, the victim can explain to the offender how their financial position has been impacted by the crime. This provides an opportunity for this loss to be acknowledged, which is very important for some victims. Further, as noted above, in a restorative justice conference there is the opportunity for a victim and an offender to enter into an agreement about actions to be taken, often by the offender, to address the harm resulting from the crime. As part of this process, an offender may agree to provide some form of financial redress to the victim. As noted by the Sentencing Advisory Council in its Issues and Options Paper, research suggests that where an offender has made an agreement to provide financial redress to a victim as part of a restorative justice process, the victim is far more likely to receive payment from the offender, compared to where a court makes an order that an offender make a payment to a victim.<sup>3</sup> This may suggest that restorative justice processes present an effective mechanism for victims to use in order to seek financial redress from offenders. However, the CIJ takes the view that seeking to promote restorative justice to victims in this way is problematic.

## Different Types of Harm

It is important to acknowledge that victims are not a homogenous group, and that the harm of the crime will impact on each victim differently. As the Australian Institute of Criminology has observed,

the impact of crime victimisation varies with the individual. It can be short- or long-lasting; some may find the psychological impact hardest; for others it may be the physical injuries.

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<sup>2</sup> Joanna Shapland and Matthew Hall, 'What Do We Know About the Effects of Crime on Victims?' (2007) 14 *International Review of Victimology* 175, 178.

<sup>3</sup> Sentencing Advisory Council, 'Restitution and Compensation Orders' (Issues and Options Paper, 2018), 70, citing Jeff Latimer et al, 'The Effectiveness of Restorative Justice Practices: A Meta-Analysis' (2005) 85 *The Prison Journal* 127, 137.

Research continues to prove that each victim will react differently according to their life experience.<sup>4</sup>

Financial harm is one form of harm that a victim may experience. For some victims, it may be the most significant consequence of the crime. For these victims, achieving financial redress may be a pressing concern in the aftermath of the crime. It is also important to acknowledge that financial redress can be important to victims in different ways. For some victims this will be a practical concern; the financial impact of the crime has affected their lives in concrete ways, and achieving financial redress can address these material consequences. For other victims, the importance of achieving financial redress can be symbolic, and no less important. Receiving payment may be experienced by victims as acknowledgement that they were wronged. If the payment comes from the offender, victims may experience this as a form of offender accountability.<sup>5</sup> On the other hand, some victims feel very strongly that they do not want to receive any form of financial redress from the offender; they do not want to participate in anything that connects them to the offender. For victims who feel this way, access to state-funded redress schemes may be very important.

Some victims may not experience financial loss as a result of the crime. For some victims, financial loss is but one of many harms experienced as a result of the crime. For these victims, financial loss can sometimes be the least significant harm. This is particularly likely to be true in cases involving very serious crime. In the CIJ's Restorative Justice Conferencing Pilot Program, we are working with victims who have lost family members or who have been seriously injured themselves. The Program aims to meet a range of 'justice needs' experienced by victims and incorporates an intake and preparation process prior to conferencing which enables victims to articulate what they hope to achieve. None of the victims of crime we have worked with in this program has mentioned obtaining financial redress as a motivation for participating in restorative justice conferencing. Of course, the devastating loss that many of the victims we have worked with in this Program have experienced goes so far beyond the realm of the financial. This is not to say that victims in these circumstances do not have practical financial needs arising from the crime which must be met, just that none involved in this Program have expressed interest in seeking financial redress from the offender. That being said, the availability of financial assistance through the Transport Accident Commission scheme could also be a contributing factor.

It is clear to us from our experience working with victims that victims are diverse, and when they experience crime, they have a range of expectations and needs arising from the harm. This is validated by the research literature, which makes it clear that victims have a range of pecuniary and non-pecuniary needs. Obtaining financial redress may be a reason why some victims wish to participate in restorative justice processes, but pecuniary needs are only a small sub-set of the range of 'victims' justice needs'.

## Victims' Justice Needs

The concept of victims' justice needs is central to restorative justice scholarship and practice. While all victims have unique experiences of crime and of the legal and justice systems, those in the restorative justice field have identified common themes in what victims are looking for in responses to crime. Kathleen Daly, a leading scholar in the area of restorative justice, conceptualises these themes as encompassing five elements: participation; voice; validation; vindication; and offender accountability.<sup>6</sup> She explains each element as follows:

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<sup>4</sup> Bree Cook et al, 'Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia', (Research and Public Policy Series No.19, Australian Institute of Criminology, 2009) x.

<sup>5</sup> Kathleen Daly, *Redressing Institutional Abuse of Children* (Palgrave MacMillan, 2014).

<sup>6</sup> 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.

**Participation** Being informed of options and developments in one's case, including different types of justice mechanisms available; discussing ways to address offending and victimization in meetings with admitted offenders and others; and asking questions and receiving information about crimes (e.g. the location of bodies, the motivations for an admitted offender's actions).

**Voice** Telling the story of what happened and its impact in a significant setting, where a victim can receive public recognition and acknowledgement. Voice is also termed truth-telling and can be related to participation in having a speaking or other type of physical presence in a justice process.

**Validation** Affirming that the victim is believed (i.e. acknowledging that offending occurred and the victim was harmed) and is not blamed or thought to be deserving of what happened. It reflects a victim's desire to be believed and shift the weight of the accusation from their shoulders to others (family members, a wider social group, or legal officials). Admissions by a perpetrator, although perhaps desirable to a victim, may not be necessary to validate a victim's claim.

**Vindication** Having two aspects of the vindication of the law (affirming *the act* was wrong, morally and legally) and the vindication of the victim (affirming *this perpetrator's actions* against the victim were wrong). It requires that others (family members, a wider social group, legal officials) do something to show that an act (or actions) were wrong by, for example, censuring the offence and affirming their solidarity with the victim. It can be expressed by symbolic and material forms of reparation (e.g. apologies, memorialization, financial assistance) and standard forms of state punishment.

**Offender accountability** Requiring that certain individuals or entities 'give accounts' for their actions. It refers to perpetrators of offences taking active responsibility for the wrong caused, to give sincere expressions of regret and remorse, and to receive censure or sanction that may vindicate the law and a victim.<sup>7</sup>

Daly is specifically referring to the experiences of victims of sexual offences, however her findings are consistent with the research on victim experiences more broadly,<sup>8</sup> and offer a useful template for understanding what victims seek from a justice or legal process. Daly prefers the term 'justice interests' to 'justice needs,' in recognition that the victim is a citizen as well as someone who may have experienced psychological harm.<sup>9</sup> However, other researchers have found the term 'justice needs' to be a closer fit with victims' own narratives.<sup>10</sup> The CIJ uses the term 'justice needs'. In the CIJ's experience, another justice need not covered by Daly's list, which victims often raise with us is that of 'prevention'.<sup>11</sup> Victims often seek opportunities to bring about changes that will ensure that no one else in the future has to suffer in the way that they have, or that the death of a loved one has not been 'in vain'.

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<sup>7</sup> Ibid, 388.

<sup>8</sup> E.g. Victorian Law Reform Commission, 'The Role of Victims of Crime in the Criminal Trial Process' (Report, 2016).

<sup>9</sup> Kathleen Daly, 'Reconceptualizing sexual victimisation and justice' in I. Vanfraechem, et al (eds.) *Justice for victims: perspectives on rights, transition and reconciliation* (Routledge, 2014) 378–395.

<sup>10</sup> Jane Bolitho, 'Putting justice needs first: a case study of best practice in restorative justice' (2015) 3 *Restorative Justice: An International Journal* 256, 267.

<sup>11</sup> The need for 'prevention' has been identified in CIJ research with the families involved in coronial processes, injured workers and claimants involved in justice processes associated with WorkSafe and TAC compensation systems (unpublished research).

Some commentators have concluded that even substantial reform of the current criminal justice system cannot meet all of the justice needs of victims.<sup>12</sup> Certainly, it is difficult to see how each of the victims' justice needs identified by Daly and described above could be accommodated within the existing criminal justice system. The criminal trial process, for example, is an adversarial process in which the main roles are fulfilled by prosecutors and the accused, limiting the role of the victim to witness for the prosecution. By contrast, restorative justice processes have the potential to meet many of the justice needs of victims in ways the conventional legal system cannot. The CIJ takes the view that restorative justice processes can usefully operate alongside the criminal justice system as a complementary process to meet some of these justice needs.

## How can Restorative Justice Processes meet Victims' Justice Needs?

In restorative justice conferencing the victim is directly involved in the process (participation). The victim has the opportunity to explain the impact of the offending directly to the offender and tell their story in their own way (voice). The victim can seek answers in relation to unresolved questions about what happened from the offender, who is sometimes the only person who has this information (participation). Being directly addressed by the victim about how the crime has affected their life provides the offender with the opportunity to gain a full understanding of the impact of their actions (offender accountability). Gaining this insight may mean that the offender takes steps to ensure they do not repeat the behaviour in the future (prevention). Studies of restorative justice conferencing programs consistently find high levels of victim satisfaction with the process.<sup>13</sup> Recent research also suggests that participating in restorative processes can reduce post-traumatic stress symptoms among victims of violent crimes.<sup>14</sup>

## The Risks of Framing Restorative Justice as a way to Achieve Financial Redress

While a restorative justice process may result in a victim receiving financial redress from an offender, this is but one of the potential benefits that a victim may obtain from participating in the process. Victims have a range of justice needs, and it is critically important that restorative justice processes remain open and flexible enough to allow this range of justice needs to be accommodated.

Any attempt to re-frame restorative justice processes as a new means of achieving financial redress for victims would be of concern to the CIJ, since framing restorative justice in this way would have the effect of limiting its desirable qualities of openness and flexibility.

Framing restorative justice through the lens of achieving restitution or compensation outcomes may compromise its ability to deliver its other potential benefits for victims. On the one hand, it may unduly focus victims towards achieving pecuniary outcomes without allowing them the capacity to identify the range of needs that they may have, and which the process may be able to address. It may also compound some of the harms associated with the crime, since framing restorative justice as an opportunity for financial redress may raise – and yet still fail to meet - victims' expectations of achieving such redress.

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<sup>12</sup> E.g. Marcia Neave 'Restorative Justice: When is it Appropriate?' (6 October 2004) *La Trobe University Law School*. At <http://www.lawreform.vic.gov.au/publications-and-media/speeches/restorative-justice-when-it-appropriate>.

<sup>13</sup> Jacqueline Joudo Larson *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology, 2014) 26.

<sup>14</sup> Caroline Angel et al, '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.

It is important to avoid framing restorative justice processes in this way in order to preserve their capacity to respond flexibly to the diversity of victims' justice needs. Responding to the broad range of justice needs of victims – those needs which are often unable to be met through conventional justice processes – in complementary manner is a unique quality of restorative justice processes. It is critically important to preserve this flexibility for victims of crime, rather than require it to deliver a response better achieved by an existing process.

In a restorative justice conference, the victim and offender, supported by a facilitator known as a 'convener', engage in a dialogue. The convener assists the participants to talk about what happened, how they have been affected, and what can be done to make things better. There are boundaries set around this process before it begins, including agreements about confidentiality and respectful engagement. However, within these boundaries the process is very flexible and is guided by what the participants want to achieve. For some victims, seeking answers from the offender motivates them to participate. In these cases, the focus of the conference may be on the offender providing information to the victim. In other cases, victims seek an opportunity to positively intervene in the offender's life. In one conference that went ahead under the CIJ's Restorative Justice Conferencing Pilot Program, the victim wanted to encourage the offender to make the most of his life once he was released from prison. The victim sought to communicate to the offender that she did not want him to continue to be overwhelmed by what he had done, but to make sure he contributed positively to the community in the future. In that conference, the victim and offender both shared many details of their lives. The victim also shared stories about the deceased man; who he was as a person, and how he had lived his life. The feedback from our Program, which is consistent with the research, is that participating in a restorative justice conference can be a profound experience for both victims and offenders.

Not all conferences result in an 'outcome agreement': an agreement made between the victim and the offender aimed at addressing the harm. In her book *After the Crime*, Susan Miller presents a series of case studies of victim-offender restorative justice conferences that were held in the USA.<sup>15</sup> All the crimes involved were extremely serious. Many of the conferences that took place did not result in an outcome agreement. In these cases, it seems that the victims achieved what they wanted, such as the opportunity to tell the offender how the crime had affected them, to ask questions, and to receive an acknowledgement, through the process itself. It seems that some victims therefore did not have a need to see the offender take further steps in response to the crime. However, there were some conferences included in Miller's collection of case studies where an outcome agreement was reached. In one such case study, 'Leigh' and 'Jenny' participated in a restorative justice process together. At the time, Jenny was serving a term of imprisonment for having caused a motor vehicle collision while intoxicated, in which Leigh's son 'Cameron' died. An outcome of the conference was that Jenny made a promise to Leigh that she would never drink drive again, and to make every effort to live a better life and give back to society.<sup>16</sup> In another case involving a motor vehicle collision, 'Julie' met with 'Kevin'. Kevin had caused a collision while drunk driving, which resulted in the deaths of Julie's mother and brother. At the end of their restorative justice conference, Julie and Kevin made an outcome agreement under which:

- Kevin promised never to drink and drive again;
- Kevin agreed to send a yearly progress report about his rehabilitation to the restorative justice organisation that had arranged the conference, who would send the report to Julie;
- At Julie's request, Kevin agreed to visit the gravesite of Julie's mother and brother after his release from custody.<sup>17</sup>

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<sup>15</sup> Susan Miller *After the Crime: The Power of Restorative Justice Dialogues between Victims and Violent Offenders* (New York University Press, 2011).

<sup>16</sup> *Ibid*, 118.

<sup>17</sup> *Ibid*, 126.

In summary, then, every restorative justice conference is unique, and is shaped by the individuals who participate in it. Where participants choose to enter into outcome agreements, they are able to craft these to be highly responsive to their own needs and the particular circumstances. Because of this openness and flexibility in the process, participants appear to be able to create agreements that are deeply personal and meaningful to them.

If a victim is presented with an opportunity to engage in a facilitated conversation 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.

In its 'Issues and Options Paper' the Sentencing Advisory Council refers to the New Zealand context, where restorative justice processes have successfully been used to achieve financial redress for victims. However, it is important to note that restorative justice is well established in the New Zealand justice system. The broader aims of restorative justice are well understood in that jurisdiction. In Victoria, restorative justice still exists on the fringes of our criminal justice system,<sup>18</sup> and developmentally in its infancy. If restorative justice processes were to be expanded in Victoria on the basis that they could deliver a new, preferred avenue for victims of crime achieving financial redress, this would have a significant and detrimental impact the ability of restorative justice achieve its promise as a process capable of meeting a broad range of victims' justice needs.

## **Victims' Expectations**

In the course of developing the Restorative Justice Conferencing Pilot Program, the CIJ conducted extensive consultations with victims, victim advocates and victim support service providers. A clear theme that emerged from these consultations was the importance of managing victims' expectations around any justice system process or associated program. We were told repeatedly that victims encounter many disappointments in the justice system. However, the impact of these disappointments depends greatly on how the process is presented to victims from the outset. For example, if it is explained to a victim of a sexual offence that the conviction rates for this type of offending are very low, that victim is likely to cope much better with an acquittal, compared with a victim who has not been given this information, or has been given false hope that the prosecution is certain to succeed.

In this scenario, presenting restorative justice to victims as an avenue through which they will be able to seek redress from the offender risks establishing unreasonable expectations. As the

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<sup>18</sup> The Youth Justice Group Conferencing Program is well-established in Victoria and included in the Children Youth and Families Act 2005, however this program only operates in relation to youthful offenders. A number of pilots for adult offenders and victims, including the CIJ's and the implementation of a recommendation of the Royal Commission into Family Violence for restorative justice conferencing are underway in Victoria. Despite this, it must be acknowledged that restorative justice practices, processes and programs remain on the periphery of the justice system in Victoria.

Sentencing Advisory Council has noted throughout its ‘Issues and Options Paper,’ people who are convicted of criminal offences generally do not have the means to provide victims with financial redress. If victims elect to participate in restorative justice processes in order to obtain financial redress from offenders, most victims will be sorely disappointed. If this is the case, victims’ sense of injustice will only be heightened, and the impact of the crime compounded. Therefore, to frame restorative justice as a means for victims to obtain financial redress risks creating false expectations, which are likely to result in dissatisfaction for victims. The reality is that most offenders simply do not have any financial assets or have insufficient means to provide redress for victims, and a restorative justice process, however it is framed, cannot alter this fact.

## Conclusion

Restorative justice processes can deliver a range of meaningful benefits to victims of crime. In some cases, a restorative justice process may result in an offender providing a victim with financial redress, including as part of an ‘outcome agreement.’ However, victims have a range of justice needs that extend beyond their pecuniary needs. Achieving financial redress may be important to some victims of crime, but it is less so for others. Restorative justice has the capacity to meet a broad range of victims’ justice needs. The CIJ does not recommend that restorative justice be framed as a mechanism – or primarily as a mechanism - to deliver financial redress for victims. Doing so would weaken the important and unique capacity of restorative justice to deliver other, non-pecuniary outcomes for victims. Further, emphasising financial redress as *the* purpose—or perhaps even highlighting redress as *a* purpose—of restorative justice processes could mean that the broad range of potential benefits of restorative justice for victims may be lost, with very little gained in return. Offenders rarely have the financial means to provide redress to victims, and this fact remains true whether a victim seeks redress through conventional legal avenues or via restorative justice processes. Promoting restorative justice processes to victims as an avenue for achieving redress would mean that in most cases, victims’ expectations will be unrealistically raised, potentially leaving victims with an even greater sense of injustice than they may already hold in the aftermath of crime.

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20 April 2018