



# Australian Law Reform Commission: Justice Responses to Sexual Violence

Submission by Centre for Innovative Justice, RMIT  
University regarding use of restorative justice in  
response to sexual violence

May 2024

# 1 Introduction

## 1.1 Centre for Innovative Justice

The Centre for Innovative Justice (CIJ) at RMIT University was established in 2012. Aiming to make the justice system a positive intervention in people's lives, the CIJ develop solutions by working with those who have lived experience of the justice system and by drawing on restorative justice, therapeutic justice and human-centred design principles.

The CIJ's work includes research on therapeutic jurisprudence, restorative justice, victims' experiences of legal processes, family violence, women's decarceration and disability in the criminal justice system, as well as the application of human-centred design to legal issues and processes.

The CIJ works with governments, courts and tribunals, not-for-profit entities, community organisations, including Aboriginal-led and community-controlled organisations, and private corporations.

Considering CIJ's breadth of work in relation to areas of interest for this ALRC inquiry, we are making two submissions. This submission will draw from the experience of our restorative practice arm, Open Circle, and consider the use of restorative justice as a response to sexual violence, with a focus on what is needed to support its use where it has the potential to meet the needs of victim survivors.

## 1.2 Open Circle

Established in 2019, the CIJ's restorative practice arm Open Circle provides restorative justice processes for individuals, restorative program design for organisations, and restorative engagement facilitation for institutions and government redress schemes. Our clients include individual victim survivors as well as the Commonwealth Ombudsman Defence Force restorative engagement program, Services Australia Listen to Learn program, the Transport Accident Commission, the National Redress Scheme and the Territories Stolen Generations Redress Scheme.

Open Circle is a direct provider of restorative processes in a wide range of contexts including sexual violence, racial discrimination, death and/or serious injury from motor vehicle collisions, and other causes of harm. Referrals regarding sexual violence come to Open Circle from victim survivors, people responsible for using sexual harm, sexual assault support agencies, Victoria Police and victim support programs.

## 1.3 Glossary

**Restorative justice process** – while practices can differ across programs, in this submission the term ‘restorative justice process’ refers to the opportunity for a person harmed to meet with the person responsible for that harm for a facilitated dialogue to discuss the harm, the impacts of that harm, and what can be done to address or attend to those impacts. This meeting occurs after extensive individual preparation with program facilitators, and other support staff as necessary.

**Person harmed** or **victim survivor** – the harm to be addressed by a restorative justice process is not always a crime, therefore the term ‘person harmed’ is used to denote the role of ‘victim’/ ‘victim survivor’/ ‘complainant’ in the restorative justice process.

**Person responsible for harm** or **person responsible** – as the harm addressed by a restorative justice process is not always a crime, or the person responsible may have no interaction with the criminal justice system, the term ‘person responsible’ for harm is used to denote the role of ‘offender’/ ‘perpetrator’/ ‘convicted person’ in the restorative justice process. The terms ‘offender’ and ‘accused person’ are also used throughout this submission, as relevant to the context.

**Facilitated dialogue** – the supported interaction between the person harmed and the person responsible for that harm. Sometimes referred to as a restorative justice conference or meeting, though the dialogue can happen in-person, online or in shuttle form (such as through letter writing).

**Facilitator** – the professional who guides the restorative justice process and supports the facilitated dialogue.

## 1.4 Restorative justice in response to sexual violence

One of the first research papers published by the Centre for Innovative Justice in 2014 was [Innovative justice responses to sexual offending](#). In considering pathways to better outcomes for victims, offenders and the community, the CIJ made a strong case for the use of restorative justice conferencing in response to sexual harm, and recommendations for the framework that would make it effective and accessible.

In many Australian jurisdictions, restorative justice was initially associated only with youth offending, however, in recent years it is increasingly used as an effective response for adults, and in situations of serious harm. In this time, victim survivors and the wider community have become more knowledgeable about the limitations of the justice system as a response to sexual harm and the existence of other innovative responses that can be more aligned to an individual’s needs.

Open Circle, the restorative justice practice arm of the CIJ, has become one of the few organisations offering victim survivors of sexual violence the opportunity to address their justice needs through a restorative justice process—sometimes referred to as a conference or facilitated dialogue—with the person responsible for harm.

By focusing on the harm and its effects rather than the crime and punishment, restorative justice provides a victim-focused, trauma-informed option for dealing with the experience of sexual violence. Its purpose is to meet the justice needs of the victim survivor, which might include the need for voice, validation, information, accountability, relationship restoration and prevention of further harm. In doing so, restorative justice processes offer victim survivors something they often cannot find in traditional responses, and that may be additional to the community needs for safety and punishment. The process has also been found to be beneficial to the person responsible for harm, allowing them to better understand the impacts of their actions, take accountability for their behaviour, and commit to behaviour change.

Recent research, inquiries and reports have reiterated the effectiveness of restorative justice as a way of addressing the ‘justice needs’<sup>1</sup> of victims or people who have experienced harm, including sexual violence.<sup>2</sup> Victim survivors have expressed strong support for restorative justice, as well as frustration at the barriers that currently prevent it from being widely available (Victorian Law Reform Commission, 2021). While restorative justice may not be suitable for every victim survivor, it is immensely disappointing for those victim survivors seeking to participate in a restorative process that the framework necessary to enable its use is not in place. In practice this means that while Open Circle continues to receive referrals from victim survivors themselves and counsellor advocates at Centres Against Sexual Assault (CASAs) across Victoria, a restorative justice process frequently cannot take place because of uncertainty about how the process may interact with criminal justice processes. Often these relate to the potential adverse impact on the legal rights or interests of the person responsible, but they may also relate to protecting the confidentiality of information that may be disclosed by the victim survivor as part of the process.

There is widespread support across the legal, sexual assault counselling and justice sectors for restorative justice as a response to sexual violence. In an attempt to mitigate some of the barriers discussed throughout this submission, the CIJ has assembled a working group attended by victim-survivor advocates, representatives of victims of crime, and members of Victoria Legal Aid, Victoria Police, the Office of Public Prosecutions, members of the Law Institute and the Victorian Bar, and Centres for Sexual Assault and other sector members.

In addition, the Oceania Network of Restorative Practices for Sexual Harm, also convened by the CIJ, has a membership from across Australia and New Zealand. It includes members from community-based and government-based restorative justice services (in Victoria, NSW, ACT, Queensland and South Australia), as well as academics, victim-survivor support workers and men’s behaviour change practitioners. Many of the members are currently working in restorative justice services that are looking to expand their work into addressing harm caused by sexual violence, in response to need expressed by their communities.

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<sup>1</sup> See section 1.5 below for an explanation of ‘justice needs’.

<sup>2</sup> There is a strong and growing evidence base that demonstrates the value of restorative justice as a beneficial process for people who have been harmed by, and people who use, sexual violence (see bibliography for relevant references). Given the weight of the evidence clearly establishes this point, the CIJ’s has instead directed the focus of this submission on a range of issues the Commission may wish to consider in this review that are broadly associated with the opportunities and barriers to making restorative justice a more accessible process for those impacted by sexual violence.

Despite this growing interest – from victim survivors and across the relevant sectors – since CIJ’s initial recommendation in 2014, we are not aware of any significant legislative reform to specifically enable the use of restorative justice as a response to sexual violence in any Australian jurisdiction.<sup>3</sup> The Victorian Government has created a restorative justice program for use in the context of family violence, and expanded this service to victims of any crime on the Victims Register whose adult offender is serving a sentence of imprisonment or a parole order. However, the lack of legislative framework in Victoria and nationally acts as a barrier to individuals currently trying to access restorative justice beyond this limited post-sentence context, and to a justice system that genuinely wants to see better options for survivors of sexual violence.

There is scope and appetite for law reform that will support the use of restorative justice as a response to sexual violence amongst most sectors involved in responding to sexual violence. Victim survivors who have experienced the benefits of participating in restorative justice processes in response to sexual violence have strongly advocated for this reform.

This submission draws on CIJ and Open Circle’s practice and policy experience to make recommendations for the law reform and resources needed to make restorative justice available and accessible to victim-survivors of sexual violence in Australia.

## 1.5 Meeting victims’ justice needs

Unlike a criminal prosecution where the victim is not a party to proceedings and where their needs are not the main focus, restorative justice processes have the potential to offer victims an opportunity to participate in a process specifically designed to address the harm they have experienced. In the context of sexual harm, restorative justice processes have the potential to meet victim survivors’ justice needs in the ways described in the table below.

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<sup>3</sup> Previously published reports can provide further detail about the use of restorative justice in Australian jurisdictions and their legislative frameworks, with little change in the last ten years. See Jaqueline Joudo Larsen, *Restorative justice in the Australian criminal justice system*, Australian Institute of Criminology, Canberra, 2014; *Improving the Response of the Justice System to Sexual Offences*. Melbourne: Victorian Law Reform Commission (2021).

Justice Need	The capacity of restorative justice processes to meet victim survivors' justice needs
<b>Voice</b>	<p>Victim survivors commonly experience feeling silenced; they encounter pressure that hinders them from speaking out about what happened. A restorative justice process can provide a forum within which victim survivors can be supported to talk about what happened and how this has affected them.</p> <p>The victim survivor can tell their story in their own way, unlike what happens when victim survivors give evidence in criminal justice processes, where legal rules shape what can be said.</p>
<b>Validation</b>	<p>Within a restorative justice process, the victim survivor is believed.</p> <p>The victim survivor's experience is recognised and treated as meaningful within the process. It is not challenged or subject to attack via cross-examination.</p>
<b>Information</b>	<p>The victim survivor can directly ask the offender questions. Even if there has been a criminal justice process, the victim survivor may have unresolved questions for the offender, for example, 'Why did you do this to me?'</p> <p>In the case of restorative justice processes that involve meetings between the victim survivor and their family members, the victim survivor may want to ask family members questions such as why they did not support them, or whether they were aware of the offending at the time.</p>
<b>Accountability</b>	<p>Given the low numbers of cases of sexual harm that result in a conviction, most victim survivors will not have experienced the offender being subject to any formal kind of accountability. In this context, a restorative justice process can offer the opportunity for a victim to witness the offender acknowledge the wrongfulness of their actions and the harm they have caused.</p> <p>Even in cases where the offender has been found guilty in a criminal justice process, victim survivors may benefit from experiencing the offender offer a personal acknowledgement of wrongdoing and having caused harm. This is very different from what occurs in criminal justice processes via mechanisms such a plea of guilty, which is made on the offender's behalf via their lawyer.</p>
<b>Relationships</b>	<p>The victim survivor may not want to have future contact with the offender, however they have the opportunity to address any outstanding issues, such as what to do if, by chance, they encounter each other in the community.</p> <p>Instead of, or as well as meeting with the offender, some victim survivors seek a restorative process with their own family members. This provides the opportunity for victim survivors to address issues such as family members' failure to believe and support the victim survivor when they disclosed the sexual harm.</p>

Justice Need	The capacity of restorative justice processes to meet victim survivors' justice needs
<b>Prevention</b>	The victim survivor has the opportunity to encourage the offender to take steps towards addressing the offending behaviour and preventing it from happening again. This may include the offender agreeing to participate in a sex offender behaviour change program.
<b>Resolution</b>	<p>Given the low reporting rates for sexual offences, and the high attrition rates in cases that are reported, many victim survivors may feel that there has not been a response to what happened. Taking part in a restorative justice process may allow victim survivors to feel that they have done what 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 survivor no longer feels the effects of the crime. Resolution does not necessarily mean 'closure.'</p>

## 2 Interactions with the justice system

Open Circle holds the view that restorative justice should be an option available to all victim survivors of sexual violence regardless of jurisdiction, and regardless of whether they choose to report to police. Research in the UK suggests that when offered restorative justice<sup>4</sup>, more than half of victims choose to participate, with the uptake of convicted offenders being even higher (Gavrielides, 2018).

Victim survivors should have the opportunity to explore whether a facilitated dialogue with the person responsible for using sexual violence will address their justice needs, and be supported to engage in such a process. A person who accepts that they are responsible for using sexual harm should have the opportunity to voluntarily participate in a restorative justice process at the invitation of the victim survivor.

This should be available in the following circumstances:

- a) The victim/survivor has not reported the sexual harm to police, and does not want to do so.
- b) The victim survivor has not reported the sexual harm to police, but may want to do so in the future.
- c) The victim survivor has reported the harm to police. Police have investigated and decided not to bring charges.

<sup>4</sup> The *Crime and Courts Act 2013* (UK) makes provision for restorative justice at the request of either the victim or the offender. Sentencing can be deferred to allow restorative justice to take place.

- d) Charges have been brought and a criminal justice process is underway, including in the following circumstances:
- Where the offender has admitted responsibility and the matter will proceed by way of diversion
  - Where the offender has admitted responsibility and the matter will proceed by way of a plea of guilty
    - i. following a plea of guilty, before the offender is sentenced ('pre-sentence')
    - ii. a court has imposed a finding of guilt, the offender has been sentenced and is serving the sentence
    - iii. The offender has completed their sentence.

Some have argued that restorative justice processes should only be offered to victim survivors as a post-sentencing option. These arguments may relate to concerns about the effect on criminal justice processes or the application of sentencing principles. Sometimes these arguments are underpinned by the idea that the formal criminal process should be prioritised over the needs or interests of victim survivors, and the potential for information communicated in restorative processes to be used in ways not intended by participants.

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

Legislation could address the issues that could arise in circumstances where there will not be a criminal prosecution.

## 2.1 Current legislation

In Australia, there is a lack of legislation governing the interaction of restorative justice with the criminal justice system in most jurisdictions. This is both regarding restorative justice in general, and as specific to its use in response to sexual violence.

While there are some barriers to the use of restorative justice as a post-sentencing option (such as a lack of programs and awareness of the option), it is primarily the absence of legislation that hampers the use of restorative justice as a community response (where victim survivors do not want the person responsible charged with a criminal offence) or as a pre-plea or diversionary response (when the victim survivor is seeking to address a justice need that won't be met by the criminal justice system).



Restorative justice has traditionally been used for youth offending or for less serious adult offending. While no Australian jurisdiction currently provides diversionary adult restorative justice processes in relation to serious sexual violence, most states and territories provide for post-sentence conferencing in the context of all serious harms, including sexual violence (often referred to as victim-offender mediation).<sup>5</sup> Considering the low rate of sexual offences that are prosecuted and result in a conviction, limiting restorative justice to only a post-sentence stage significantly restricts its use as a mainstream option for victim survivors.

The *Crimes Restorative Justice Act 2004* (ACT) provides for the use of restorative justice for serious sexual offences (when the offender pleads or is found guilty); however, there is only limited application for restorative justice use at any pre-plea stage for less serious sexual offences when the Director-General is satisfied there are exceptional circumstances. In Queensland, the *Dispute Resolution Centres Act 1990* (Qld) allows for its use at the diversion stage, but is primarily used for less serious offences.

Youth conferencing, a restorative justice practice, is legislated for in every Australian youth justice jurisdiction, though practices differ across each. Youth conferences are most commonly applied at the diversionary or pre-sentence stages, and legislatively restricted to use for less serious offending.

The lack of legislation governing restorative justice means there is no formalisation of its interactions with the justice system. This leads to uncertainty about its use (even where there are programs available) and a level of risk aversion, which does not serve the needs of victim survivors.

## 2.2 Protection of confidentiality

A restorative justice process requires both the victim survivor and the person responsible for harm to talk about what has happened, who was responsible, the effect of the harm, and what can be done to address that harm.

In doing so, a victim survivor is able to give voice to her experience, and to talk about it as something that is part of but does not define or limit her. Being listened to and having her harm acknowledged is a way of having her experience validated rather than questioned or pushed aside. That it is the person who was responsible for enacting that harm who must listen and respond can be an important way of countering the power imbalance created by the initial harm.

For the person responsible, the opportunity to step into accountability can be an important way of acknowledging the wrong they have done, reconnecting with their own values and acting in a positive way that goes some way to addressing the harm they have caused. It can be an opportunity to offer a genuine apology directly to the person they have harmed.

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<sup>5</sup> See the Victorian Law Reform Commission inquiry report *Improving the Justice System Response to Sexual Offences* Appendix E for an overview of restorative justice for sexual offences in Australia and New Zealand.

These conversations, and the preceding preparation sessions, can be difficult. They ask people to speak about an experience or behaviours that can bring up feelings of shame, regret, anger and fear, and for these feelings to sometimes be shared and discussed. They are not small conversations, and when participants come to the process and speak with honesty and sincerity, they are powerful conversations.

Participants agree to restorative justice processes being confidential. This allows participants to speak freely, to show vulnerability and often to give or receive an apology. Making the process confidential both supports its integrity and effectiveness for the participants, while also ensuring the legal rights of all parties are maintained.

Unfortunately, while this confidentiality is agreed to by all participants, there is currently no legislation to support it. Without legislation there is significant uncertainty about if or how these conversations could be used as evidence in criminal justice proceedings. Should there be subsequent or concurrent legal proceedings, there is a concern that information disclosed by the victim survivor during any part of a restorative justice process could be used as a basis for questions about their mental health, substance use or prior relationships and behaviours, with the aim of undermining their account. Inconsistencies between the victim survivor's statement of evidence and what is said during a restorative justice process may also become detrimental to their situation.

For the person responsible for harm, safeguarding the restorative justice process against admissibility ensures that they can express remorse, take accountability and offer an apology, knowing that what they say will not be used against them in legal proceedings, or be published in a public forum.

In practice, the uncertainty around whether confidentiality is protected is preventing victim survivors from accessing restorative justice. Open Circle requires the person responsible for using sexual harm to obtain independent legal advice before participating in the process. The victim survivor is aware that this requirement may discourage the person responsible from taking part. It can also affect the quality or nature of participation, including the person responsible being reticent about taking accountability or refusing to provide written documentation. For victim survivors who would prefer a letter exchange rather than meeting in person, this can limit the effectiveness of the process and not be in line with their justice needs.

## Example

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

*Jenna wants to be able to tell Joe the impact his offending has had on her. She wants him to be accountable. She doesn't want him to go to jail. Jenna's parents want Joe to get help and want to support their daughter to address the harm. They are worried that a criminal prosecution will be traumatic for Jenna and will further damage relationships. Given the option, Jenna and her parents would prefer a restorative justice process to criminal prosecution. Joe's parents are worried that anything Joe says in a restorative justice process might be used as evidence by the police to bring charges against Joe and are not sure that he should participate.*

## **Safeguards and admissibility legislation**

There is a need for legislation that ensures that what is said or done during a restorative justice process is inadmissible in any criminal proceedings or civil action. This would prevent concerns about the restorative justice process being used as an investigative tool, and allow all participants to take part to the fullest extent possible.

The ACT provides such safeguards specifically in relation to their restorative justice scheme:

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

Most Australian jurisdictions currently provide forms of indemnity from prosecution to ensure genuine and honest participation in a process predicated on disclosure. For example:

- Section 61 of the *Coroners Act 2008* (Vic) empowers the Coroner to give a certificate indemnifying the witness against any self-incriminatory evidence given during an inquest from prosecutorial action.
- Admissions made pursuant to a Therapeutic Treatment Order in the Children's Court of Victoria are immune from use in any criminal prosecution against the child.<sup>6</sup>

Examples where disclosures are protected from use in any subsequent legal proceedings include:

- Section 131 of the *Evidence Act 2008* (Vic) makes provision for the exclusion of evidence of settlement negotiations.
- Section 90, *Evidence Act 2008* (Vic) provides judges with discretion to exclude admissions if the evidence was adduced by the prosecution and having regard to the circumstances in which the admission was made, it would be unfair to an accused to use the evidence.

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<sup>6</sup> *Children, Youth and Families Act 2005* (Vic) ss 244 – 258.

There are no precedents of which we are aware for how this kind information would be treated by a court should charges be brought after a restorative justice process had occurred. However, neither of these sections provide for the specific circumstance of an admission being made by an accused in the context of a restorative justice process.

Section 131 does not completely rule out the use of such evidence, as it enables a judge to exercise their discretion to admit evidence of settlement negotiations. Further, section 131(5)(b) expressly excludes settlement negotiations in relation to ‘criminal proceedings’ or ‘anticipated criminal proceedings’, suggesting that even if any protection were available, it would apply to civil matters and not criminal matters.

There are also a range of provisions that seek to enable full and frank discussions to take place in one or forum by protecting them from disclosure in another:

- Section 127 of the *Criminal Procedure Act 2009 (Vic)* prohibits anything said or done in the course of a committal case conference from being admissible in any proceeding before any court or tribunal, unless there is prior agreement from all parties.
- Admissions made during a NSW Forum Sentencing pre-sentence conference are exempt from use in any civil matter or criminal prosecution.<sup>7</sup>
- In the civil jurisdiction, s 24(A) of the *Supreme Court Act 1986 (Vic)* excludes anything said or done during a referred mediation from being used in evidence in relevant civil proceedings.

## 2.3 Inequities in access across jurisdictions

Each jurisdiction currently has a different approach to restorative justice. This translates into clear inequities for victim survivors across Australia, and highlights the need for a national, harmonised approach. Some victim survivors are able to access post-sentence victim-offender mediation, others have legislated restorative justice or dispute mediation programs that may be applied to cases of sexual harm (at the program or court’s discretion), some have community-based programs and others have no restorative justice options available to them at all. The barriers noted in this submission, combined with an understandable aversion to risk (both on the part of participants and institutions in the justice system) leave restorative justice as an inaccessible and underutilised option in many Australian jurisdictions.

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<sup>7</sup> New South Wales Government, ‘Forum Sentencing Operating Procedure’ (6 April 2011). At [http://www.lawlink.nsw.gov.au/lawlink/cpd/ll\\_cpd.nsf/vwFiles/Operating\\_Procedure\\_June2011.pdf/\\$file/Operating\\_Procedure\\_June2011.pdf](http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/vwFiles/Operating_Procedure_June2011.pdf/$file/Operating_Procedure_June2011.pdf).

In Victoria, Open Circle has encountered a reluctance from some courts and prosecuting authorities to support restorative justice in the absence of legislation. While courts and prosecutors acknowledge there is nothing in the law that currently prevents restorative justice taking place, many are looking for a clearer signal from the legislature that it is permissible. It is our view that until there is more clarity in the form of legislation, Victorian courts will continue to be reluctant to consider restorative justice whether as part of a diversionary process, to enable participation in a restorative process while a sentence is deferred,<sup>8</sup> or to allow proceedings to be adjourned to enable the option to be explored by willing participants.

Another consequence of the inconsistency of approaches between jurisdictions, and the patchwork of available programs in each jurisdiction is that there is a degree of confusion and a lack of community and professional awareness of what restorative justice is, how it works and what it offers for victim survivors. Despite restorative justice having been recommended by many law reform bodies and parliamentary inquiries and restorative practices informing the operation of a growing number of redress schemes,<sup>9</sup> and being understood by the victim-survivor community, there is a relatively low level of awareness of restorative justice amongst the judiciary, police, prosecutors and defence lawyers. This means that even in situations where restorative justice could be used or recommended and, most importantly, provide a beneficial response to the needs of a victim survivor, it is not.

Restorative justice should not be an option available to victim survivors only if they happen to encounter a court or legal professional who is aware of it, and prepared to support facilitating access to it. Police, sexual assault support services, prosecutors, courts and victim support services need consistent and comprehensive information to provide to participants about what restorative justice is, whether it is available, and its interaction with other justice processes.

In the UK, the *Code of Practice for Victims of Crime 2020* specifies that victims have the right to be provided with information about restorative justice when reporting a crime, specifically:

3.4 If the offender is an adult, you have the Right to receive information about Restorative Justice from the police and how to access Restorative Justice services in your local area. If the offender is under the age of 18, you have the Right to receive information about Restorative Justice from the Youth Offending Team.

3.5 Although the police are responsible for providing you with information on Restorative Justice initially, all service providers must consider whether you would

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<sup>8</sup> See, for example, recommendation 1 of the Victorian Sentencing Advisory Council, *Reforming Sentence Deferrals in Victoria Final Report* (May 2024) that recommends that section 83A of the *Sentencing Act 1991* (Vic) be amended to make it clear that a sentence can be deferred for the purpose of enabling participation in a restorative justice process.

<sup>9</sup> There are now many redress schemes operating nationally and in Australian states and territories that include established restorative engagement programs to enable institutions to acknowledge and respond to harm experienced by survivors of abuse, including sexual abuse, perpetrated within institutions including government, religious organisations, schools, police and the defence forces (eg Territories Stolen Generations Territories Redress Scheme; National Redress Scheme; Defence Restorative Engagement Scheme).

benefit from receiving this information at any stage of the criminal justice process (Ministry of Justice UK, 2020).

Creating positive obligations for justice system agencies to inform victim survivors about restorative justice processes will increase the likelihood of their participation, and the effective use of restorative justice to address identified needs.

## 2.4 Restorative justice as diversion

Restorative justice has been used with the aim of ensuring offenders are accountable for their behaviour, while promoting their rehabilitation. This approach has been taken up in the youth justice context in Australia, and to some extent has influenced perceptions amongst justice stakeholders of the suitability of restorative justice to youthful offenders and more broadly to the appropriate application of restorative justice in Australian jurisdictions.

In some jurisdictions restorative justice is part of formal diversion programs, which enable a person to accept responsibility for their conduct without admitting criminal liability.<sup>10</sup> In the course of criminal prosecutions, some matters are appropriate for diversion. In such circumstance the accused person admits responsibility for the offending but a finding of guilt is not recorded against them. A diversion plan is then agreed to which may include steps the accused person must take to seek treatment for any underlying issues that contributed to the offending behaviour.

There are circumstances where a victim survivor, having reported the sexual violence to police, might see a restorative justice process that enables acknowledgment, accountability and the potential for prevention as a better course of action than a criminal justice process in which their needs are not addressed. Where the accused person has admitted responsibility and it is not in the public interest to pursue a prosecution, restorative justice could be an option as part of a diversion plan.

Voluntary participation is an essential principle of restorative justice. Pursuing a restorative justice process as a diversion from a criminal justice prosecution has the potential to compromise this aspect of a perpetrator's participation. It is important that everyone involved understands and accepts that a process will only proceed if all parties consent freely.

### Example

*Fatimah was sexually assaulted by Ali, the son of a close family friend, between the ages of 10-12 years and when Ali was 13-15. Now in her thirties, Fatimah is still impacted by the sexual harm she experienced as a child and has recently made a report to the police. The events have caused great divisions within her family and their close-knit circle of friends.*

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<sup>10</sup> In addition to use of restorative justice as a diversionary option, in Victoria restorative justice occurs in the form of group conferencing, which takes place pursuant to section 414 of the *Children, Youth and Families Act 2005* (Vic) as part of a deferral of sentence.

*The police have charged Ali. However, the police believe that pursuing criminal charges against Ali is unlikely to meet Fatimah's needs. Police believe that a conviction is unlikely because of the age of the witnesses and the time since the alleged offending. Due to the age of the accused at the time of the alleged offending, the most likely outcome, if charges are proven, is a dismissal. Fatimah speaks of wanting Ali to accept responsibility and acknowledge the harm he has caused her. She also wants other family members to acknowledge the harm that he has caused her. The possibility of exploring financial redress for the harm she experienced is also important to Fatimah, because it has impacted her capacity to work.*

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

In the UK, restorative justice is used as part of conditional cautioning, where the *Code of Practice for Adult Conditional Cautions* states that prosecutors should consider whether any of the following are applicable:

1. Opportunities to provide reparation or compensation to any victim or relevant neighbourhood or community
2. Use of conditions to reflect and secure the interests of the victim and neighbourhood or community (for example by requiring the offender to stay away from a specific area)
3. Use of restorative and reparative processes to have a positive impact on the community or individuals affected by the offending behaviour
4. Opportunities to provide reparative unpaid work that benefits the community
5. Use of a financial penalty condition to punish the offender and deter future offending (Ministry of Justice UK, 2013).

## **2.5 Deferrals and effects on sentencing**

The lack of legislation or a framework governing the interactions between restorative justice processes and the criminal justice system means that in most jurisdictions there is no clear guidance on whether restorative justice can be used as a post-plea, pre-sentence option and, if so, what effect participation in a restorative justice process will have on sentencing. Similarly, if restorative justice is used post-sentence, what impact it would have on parole.

If the effects of participation are not clear, the victim survivor may feel disinclined to participate – they may not wish for the person responsible to gain any forensic benefit, or be put off by the uncertainty of what the effect is. They may also feel the person responsible is only participating in order to reduce their sentence or to gain parole, which is likely to reduce the efficacy of the restorative process if they feel the accused person's participation, apology and remorse are self-serving rather than genuine.

In Victoria, we believe there is already a legislative mandate for criminal charges in the Magistrates Court or County Court to be adjourned for the purpose of the facilitation of a restorative justice process involving the offender and victim survivor. Section 83A of the *Sentencing Act 1991* (Vic) allows the Magistrates Court or County Court to defer sentencing for up to 12 months to allow the offender to participate in a program aimed at addressing the impact of the offending on the victim or for any other purpose that the court considers appropriate having regard to the offender and the circumstances of the case.<sup>11</sup>

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

### Example

*Tanya, who is now 27, was sexually assaulted by her uncle when she was 16 years old. Tanya's uncle groped her breasts when they were in the kitchen at a family function. Tanya has avoided her uncle since this occasion, often missing out on important family events. She recently reported the assault to the police and her uncle was charged. Her uncle made full admissions and pleaded guilty to the charge. He told the police that he was really sorry and wanted to apologise to Tanya.*

*During the plea hearing, the Magistrate raised the possibility of a restorative justice process, explaining that she could adjourn proceedings to give the victim and accused time to engage in a restorative justice process prior to sentencing. The prosecutor discussed the option of restorative justice with Tanya, explaining that her uncle's participation in a restorative justice process could be taken into account by the Magistrate for sentencing purposes. Tanya decided that she would like the opportunity to tell her uncle about how his actions harmed her, and that this was just as important as any sentence that a court might impose. The matter was referred to a restorative justice provider and the sentence hearing was adjourned for 6 months to allow the restorative justice process to take place.*

In the UK the *Sentencing Act 2020* (section 7) allows a court to make a deferment order to undertake restorative justice, if all parties consent. The restorative justice process is described as an activity:

- a) where the participants consist of, or include, the offender and one or more of the victims,
- b) which aims to maximise the offender's awareness of the impact of the offending concerned on the victims, and
- c) which gives an opportunity to a victim or victims to talk about, or by other means express experience of, the offending and its impact.

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<sup>11</sup> See, for example, Victorian Sentencing Advisory Council, *Reforming Sentence Deferrals in Victoria Final Report* (May 2024).



Non-statutory guidance issued by the Ministry of Justice supports the delivery of pre-sentence restorative justice, and facilitators must have regard to this guidance with a view to encouraging good practice. The court must be satisfied that deferment is in the interests of justice and is guided to give indication of the type of sentence it would have imposed.

Parole guidance in the UK acknowledges that the impact of restorative justice can be difficult to measure and directs members to consider restorative justice alongside ‘the full range of information they would ordinarily use to inform decision-making, using objective measures of risk.’ It reminds members that restorative justice is ‘not designed to reduce reoffending or risk of serious harm – its primary function is to repair harm done’ (The Parole Board, 2021).

## 3 Considerations

### 3.1 First Nations

In the wake of the No vote in the 2023 referendum, CIJ believes that it is more imperative than ever to do the work of both divesting power back to First Nations communities and elevating and promoting First Nations ways of being, knowing and doing.

Restorative justice is deeply rooted in First Nations culture as a way of dealing with harm and dispute resolution through Elders Council circles, and CIJ considers that First Nations communities should not be prevented from self-determined ways of achieving justice.

This includes addressing the barriers to accessibility in Australian jurisdictions identified elsewhere in this submission that both restrict alternative approaches to justice and inhibit self-determination. It also requires providing the necessary power and resources to support First Nations communities to develop modern ways to run restorative justice processes either via partnerships between communities and community based restorative justice service providers or directly funding Aboriginal Community Controlled Organisations (ACCOs), to begin this work and increase access and meaningful participation in restorative justice for First Nations people. In CIJ’s view, the result will be restorative processes that are not only culturally appropriate and safe but that honour culture, elevate First Nations skills and wisdoms, and create an alternative to the criminal justice system that continues to further oppress and harm First Nations people.

An example of this approach is the work CIJ has done in partnership with the Wotjobaluk community drawing on restorative principles and practices and cultural knowledge, which resulted in the establishment of the Yallum Yallum Elders and Respected Persons Council. In Yallum Yallum, through accountability, participants are offered an opportunity to strengthen their cultural identity and are supported to address any issues they are struggling with that may have led to causing harm. The more people that move through the Yallum

Yallum process, the stronger and more connected the community becomes. This is what divesting power and elevating First Nations skills and knowledges looks like in action.<sup>12</sup>

## 3.2 Accessibility for people with cognitive disability

People with disability are over-represented in criminal justice systems around Australia as both victims and offenders. As noted by the *Final Report of the Disability Royal Commission* (Vol. 8) this is not due to an inherent link between disability and criminality, or disability and victimhood, but largely due to the structural barriers that exist for people with disability in many areas of their lives. Women with disability are over-represented as victims of sexual and violent crimes and are more likely to experience family violence. As offenders, people with cognitive disability are more likely to experience the criminalisation of disability-related behaviour and be drawn into the criminal justice system due to a range of complexities, including lack of disability support in the community.

Because people with disability are over-represented as both victims and offenders it is important to consider restorative justice as a means to repair the harm caused by crime, but also potentially to divert people away from the criminal justice system. For many people with cognitive disability who have difficulty comprehending legal processes, restorative justice has the potential to provide an accessible, inclusive and more meaningful alternative or addition to their justice system experience. In providing a more disability-sensitive experience, restorative justice has the potential to meet the needs of people with disability who may otherwise become entrenched in the system or may be harmed by engaging in a disability-insensitive legal processes.<sup>13</sup>

### Capacity and decision-making

The issue of cognitive capacity is sometimes raised in criminal legal proceedings, especially as it pertains to fitness to plead, fitness to provide instructions, and at sentencing. In civil law, people with cognitive disability often have their capacity questioned in relation to management of their finances and lifestyle decisions.

Cognitive disability is not necessarily static in nature, and not always ‘global’, meaning that impairment to a person’s comprehension of information and their decision-making capacity may not be uniform, and may differ depending on a range of factors, and at different stages in the person’s life. A person with cognitive disability may not be able to comprehend complex legal processes, but they may be able to comprehend other complex information and make all decisions in their own lives. Similarly, a person with cognitive disability may not be able to comprehend complex language used to describe legal processes, but if the language is modified, they may easily be able to comprehend the same processes.

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<sup>12</sup> For further information on this work, please refer to CIJ’s Nuther-mooyoop (submission) to the Yoorrook Justice Commission on Systemic Injustice in the Criminal Justice System (December 2022), at <https://cij.org.au/research-projects/download-our-submissions-here/>

<sup>13</sup> For more on restorative justice considerations for people with disability, see Jane Bolitho, ‘Complex cases of restorative justice after serious crime: Creating and enabling spaces for those with disability’, in Theo Gavrielides (ed) *Routledge International Handbook of Restorative Justice* (2019).

Capacity should be assessed against criteria specific to restorative justice, and not criteria used in other legal settings. It is important that a person's comprehension of restorative justice processes and their capacity to make decisions about their participation is assessed in a person-centred, rights-based manner that takes into account the individual factors that may influence their comprehension and decision-making.

To ensure restorative justice is inclusive and based on best practice in supported (rather than substitute) decision-making, it is important that people with cognitive disability are assumed to have decision-making capacity but are offered supported decision-making processes (SDM) if they are not fully able to independently make decisions about their participation in restorative justice processes. In circumstances where a person cannot comprehend any part of the restorative justice process, and cannot articulate any benefit to themselves or others, the process would not be appropriate. To ensure people with cognitive disability can make independent decisions about their participation, it is important that those supporting the decision-making are free of conflicts of interest, and do not have vested interests in the outcome of the decision to participate.

### **Distress and re-traumatisation**

Many people with disability have experienced various forms of harm throughout their lives, such as discrimination, exclusion, segregation, violence, abuse and neglect. For this reason, the risk of re-traumatisation or further harm may be especially significant for some people with disability who wish to engage in restorative justice.

### **Behaviours of concern and forensic risk**

Where a person's complex or concerning behaviour poses a risk to others, especially victims, it is important that restorative justice practitioners can develop an understanding of how that person's risk may affect the restorative justice process. Ensuring practitioners have consent to consult with clinicians and other support staff about their level of risk, the treatment or programs they are engaged in, and the ways in which restorative justice may affect their risk status is vital to the safety of both victims and the person who poses risk.

### **Self-incrimination**

It is known that people with cognitive disability at times make admissions and self-incriminate in police interviews, sometimes even in instances where they have not in fact committed a crime. There are a range of reasons for this phenomenon, but in the context of restorative justice it is vital that legislation providing safeguards around admissibility protects people with cognitive disability from self-incrimination.

## Settings

The setting in which harm has occurred is an important consideration for people with cognitive disability wishing to engage in restorative justice. For people who have experienced harm in closed settings such as disability group homes or treatment facilities, understanding the complex issues that are often endemic to these settings is an important first step in ensuring people with cognitive disability can be kept safe if they continue to reside in those settings and participate in restorative justice. It is also important for the issues specific to closed settings to be understood prior to engaging in restorative justice with people with cognitive disability so that practitioners can determine if restorative justice is the most appropriate approach, or if the problems that have caused harm should be resolved through civil legal action or handled by safeguarding and complaint bodies.

## Supports

People with cognitive disability may need additional supports to enable them to fully participate as a victim survivor or person responsible for using harm. This can include a need for:

- accessible materials, including Easy Read and plain English documents, videos and audio
- decision-making supports (via the person's existing decision-making supports, or through the formation of a circle for the purpose of supporting the person's decision making as they participate in restorative justice).
- disability support workers
- allied health professions such as speech therapists and occupational therapists – where a person has specific communication needs
- additional time and preparation sessions.

### 3.3 Maintaining a victim-centred approach

It is important for restorative justice programs to exist in connection to the criminal justice system but not be reliant upon or managed by this system. Restorative justice processes should be victim-centred and designed to address the harm experienced. While they may offer benefits to the person responsible for harm they should not be used by courts, prosecutors or defence lawyers as a means of managing caseloads or resolving contested charges. Nor should restorative processes be required to meet procedural timelines at the expense of the readiness of the participants.

In the context of youth justice, restorative justice processes are often framed around their potential to achieve rehabilitation and behaviour change for the young person. To this end, victim involvement is optional and secondary. While behaviour change and prevention of further harm may be positive outcomes of restorative justice processes in the context of adult sexual offending, they should not be pursued at the cost of maintaining a victim-centred approach.

Apart from the initial reporting of sexual violence, the criminal justice system is largely concerned with the management of the accused person rather than the needs of victim survivors. If restorative justice is only, or predominately, offered at points related to the accused person's interactions with the criminal justice system, it cannot give proper consideration to the needs of the victim survivor.

Restorative justice initiated by the person responsible (or requested when it is convenient to their legal situation) is not victim-centred – it can be re-traumatising and intrusive, and even if motivated by genuine remorse it may appear self-interested. Restorative justice that is offered after prolonged proceedings where the accused person has spent significant time and effort trying to mitigate their responsibility, may be less beneficial and satisfying to the victim survivor.

The lack of national guidance or legislation for restorative justice has encouraged an ad hoc approach, resulting in a diversity of programs across jurisdictions. Restorative justice programs that operate as dispute mediation options or are restricted to post-sentence victim-offender mediations can struggle to operate consistently with victim-centred practice. Because of the lack of legislation dealing with the use of information disclosed as part of restorative processes, for example, community-based organisations such as Open Circle are required to proceed with caution and not infrequently confronted with challenges that create a risk of prioritising the accused person's needs above the victim survivor's. Some of these relate to requests to modify the approach taken within the process to what the accused may agree to be accountable for, and how information is recorded. Resolving these challenges at an individual process level, and for Open Circles' program generally can lead to delay in individual processes. In CIJ's view, it is critical for restorative justice processes—perhaps even more so in restorative responses to sexual violence—to avoid recreating poor experiences of criminal justice processes where victim survivor's justice needs may be perceived as a secondary concern when compared with the accused person's due process rights. However, appropriate and nationally consistent legislative safeguards in relation to the confidentiality of information that forms part of the restorative justice process would attend to these challenges and ensure that the accused person's participation would not put them at risk of self-incrimination.

### **3.4 Supports to enable participation**

Using restorative justice to address sexual violence requires participants to discuss the harm and its impacts that they have experienced or enacted. Doing so is not an easy undertaking, and it is important for all participants to be supported throughout the process. This includes informal support of friends and family but also the possibility of support from therapeutic and other professionals, including those who specialise in providing support in the context of sexual violence.

Participation should not be restricted to only those who can afford to privately fund such support, or who have accessed supports through a state- or territory-based victims of crime register. If restorative justice is to become a mainstream option, it needs to be accessible to all people in the community and properly resourced.

Provisions need to be made for funding of specialised counsellors and victim supports, as well as specific supports for people with cognitive disability, culturally appropriate supports for First Nations people, supports for people from culturally and linguistically diverse backgrounds, and other victim survivor groups who have not been able to access justice.

### **3.5 Support for people who use sexual harm**

There is a lack of support for people who use sexual harm throughout Australia, despite acceptance that community safety is improved when people who use sexual violence are able to change their behaviour and be supported to reintegrate into communities. For example, Circles of Support and Accountability have been shown to help offenders build new identities as non-offenders, while also being held to account by community-based volunteers (Richards, Death, & McCartan, 2020). While Men's Behaviour Change Programs may address some elements of gender-based sexual violence, they are primarily focused on family violence perpetration and have limited availability, particularly to perpetrators of sexual violence outside of this context.

Many victim survivors who have a strong prevention need want to see steps taken to reduce the likelihood of the person responsible reoffending, in order to prevent others from being harmed in the way they have been harmed. This can particularly be the case when they do not seek a punitive outcome but are primarily concerned with wanting the perpetrator to understand their culpability and change their future behaviour. They may hope that the person responsible will agree to take part in treatment that addresses the offending behaviour but specialist treatment programs are rarely available, as is the case in Victoria.

If the offender is a child or young person, there are limited harmful sexual behaviour programs available in some jurisdictions. If the offender is an adult and has been sentenced to a term of imprisonment for sexual offences, that person should, in theory, be able to access one of the sex offender treatment programs run within prisons, however, it is well-known that these treatment programs are over-subscribed and under-resourced. If the criminal justice system has not been engaged, or if there has been a criminal justice system process but the person responsible did not receive a term of imprisonment, it is unlikely they would be able to access a specialist sex offender treatment program. In Victoria, for example, we are not aware of any free (or publicly funded) community-based programs of this nature.

Restorative justice can operate as the entry point for perpetrator intervention and behaviour change if there is adequate resourcing of such specialised treatment programs. However, considering the current paucity of treatment programs, participation in restorative justice should not be contingent on an accused person's completion of such a program.

### **3.6 Sexual harassment in the workplace**

Restorative justice should also be available as a more widespread option to address sexual violence that occurs in the workplace.

In the Respect@Work report, the Australian Human Rights Commission concluded that the response to workplace sexual harassment requires a new and more holistic approach that is victim-focused and offers victims a choice of different supported options, instead of the default responses of a formal investigation or mandated training programs for staff (Australian Human Rights Commission, 2020). International research has also exposed the failures of standard training programs and grievance procedures to prevent workplace sexual harassment, and has highlighted the benefits of informal reporting and resolution processes, and the importance of empowering leaders to change workplace culture (Dobbin & Kalev, May-June 2020).

In the CIJ's view, the starting point for reforming the approach to workplace sexual harassment should be to engage with the responses and outcomes victims want, and to design and build processes and pathways that meet their aspirations.

Based on the CIJ's own research, consultation work and the findings of other relevant research projects and reviews, it is apparent that victims are likely to seek any one or more of the following responses and outcomes:

- To explain what happened, to be heard and believed
- To receive therapeutic, practical and financial support and any necessary workplace and career-progression adjustments
- For the behaviour in question to stop
- To have choice and agency in the decisions that are made about the actions taken in response to the report of the incident, and in relation to whether the report is confidential, anonymous or public
- To understand the steps that have been taken by the employer in response to the report
- For the employer to understand and acknowledge the incident and harm caused, to demonstrate genuine insight, and to take responsibility for failing to create a safe, respectful and inclusive workplace
- For the employer to take steps to prevent future incidents, and to establish a safe, respectful and inclusive workplace culture in which such incidents do not occur, including by calling out and addressing the specific behaviour the subject of the report
- For the direct perpetrator of the harm to understand the ramifications of their behaviour, to acknowledge and take responsibility for the harm caused, and/or to be made accountable for their behaviour including through disciplinary measures
- To receive genuine apologies from the direct perpetrator and/or employer
- For colleagues to understand the impacts of the behaviour and to respect the victim's decision to report
- Not to be subject to any retaliation from the direct perpetrator, colleagues or managers for having reported the behaviour in question

- To participate in initiatives aimed at preventing future incidents of sexual harassment and establishing a safe and inclusive workplace culture
- To put the matter behind them and get back to work in a safe and supportive environment.

While some of these outcomes relate to achieving primary goals of personal safety and response, many of them are justice needs better served by a restorative justice response than an investigation process.

The AHRC recommended that the Australian Government implement a disclosure process to enable victims of historical workplace sexual harassment matters to have their experience heard and documented with a view to promoting recovery. Similar programs have been established in other workplaces but there is a need for national guidance and consistency in providing these options. Some examples of programs are listed below.

**Victoria Police** – the Restorative Engagement and Redress Scheme was established to provide redress support to former and current Victoria Police employees who had experienced past workplace sex discrimination or sexual harassment. The scheme opened in December 2019 and closed for applications on 30 April 2024.

**Ambulance Victoria** – in December 2020, the Victorian Equal Opportunity and Human Rights Commission (the Commission) undertook an Independent review into workplace equality at Ambulance Victoria. A key recommendation included the establishment of an independent restorative engagement scheme for current and former employees and volunteers who experienced discrimination, sexual harassment, bullying or victimisation at Ambulance Victoria. The Commission advised that a restorative engagement scheme would go a significant way to restoring trust in Ambulance Victoria. The Victorian Government has commenced work on the design of a scheme for Ambulance Victoria employees and volunteers.

**RMIT University** - the CIJ developed RMIT's restorative engagement program to respond to historical cases of sexual assault and harassment at RMIT University. The program provides a pathway for students and former students who have in the past experienced sexual abuse, assault or harassment and feel aggrieved about the university's failure to protect them and/or to respond appropriately or adequately once the harm they had experienced had been disclosed.

## 4 Governance

For restorative justice to become a mainstream option for victim survivors of sexual violence, there needs to be properly resourced national oversight to provide consistency in quality and standards, accreditation, training, monitoring and evaluation. While legislation might address interactions between restorative justice programs and state and territory criminal justice systems, it will also be important to establish a body, such as a restorative justice council or commission to maintain nationally consistent standards for restorative justice programs.



## 4.1 Guiding principles

There are widely agreed upon principles that guide restorative justice programs (Victorian Law Reform Commission, 2021). In brief, these include:

- Voluntary
- Confidential
- Victim-centred
- Trauma-informed
- Flexible in approach
- Committed to doing no further harm

In addition, restorative justice in the context of sexual violence requires specialist expertise that is both trauma-informed and informed by expert knowledge of sexual violence. The New Zealand Ministry of Justice has developed Restorative Justice Standards for Sexual Offending Cases recognise the additional safeguards and principles required for restorative justice processes that respond to sexual harm, including addressing power dynamics and the need for specialist skills (Ministry of Justice, 2013).

## 4.2 Community-based providers

There are well-documented reasons victim survivors often do not want to report experiences of sexual violence to the police. While there will always be a need for criminal justice responses, we believe there is strong value in providing community-based responses in this context. Sexual violence often ruptures communities – misplaced shame for the victim survivor and a lack of proper accountability for the person harmed can destroy the relationships of the victim survivor and the person responsible for harm to their respective communities.

Restorative justice for sexual violence should not be limited to victims and offenders linked into courts, state- and territory-based Victims Registers or Corrections Departments. A victim survivor should have the option of accessing a restorative justice process without reporting their sexual assault to the police, if this is their preference. In New Zealand and the UK, government, community-based organisations and private practitioners all play a role in delivering restorative justice services.

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

If restorative justice is only provided by government providers it risks not being responsive to community needs. A community based provider will have the agility to work directly with and respond to the needs of communities, such as First Nations and other cultural groups or communities such as the disability community supporting the creation of self-determined restorative justice alternatives. Examples of this include CIJ's work in partnership with:

- the Wotjobaluk community to establish the [Yallum Yallum Elders and Respected Persons Council](#).
- Africause to establish an [African Circle of Support](#)
- Preliminary work with the disability community and disability service providers in developing restorative engagement programs.

### 4.3 Professional standards and accreditation

The creation of national professional standards and accreditation would support a mix of community and government run restorative justice services to provide programs that can still be tailored to the needs of their particular cohorts but are consistent in quality. Similar to New Zealand and the UK, facilitators could undertake training and professional development through a national accreditation body, with additional facilitator competencies to provide restorative justice in the context of sexual harm.

### 4.4 Monitoring and evaluation

One of the issues restricting more widespread adoption of restorative justice as a response to sexual harm is the lack of consistent evidence to support its efficacy. While individual studies and evaluations have found benefits, programs and measures are so varied as to make it difficult to draw useful comparisons. Evaluation is also influenced by the context in which the programs are delivered and funded, so that measures are often focused on offender reoffending and cost efficiencies related to incarceration.

National guidance on evaluation and monitoring would allow Australia to build the evidence regarding restorative justice's ability to address victim survivor justice needs, while also ensuring that individual programs are meeting participant needs.

## 5 Recommendations

The Australian Law Reform Commission should take this opportunity to recommend the creation of a national framework, supported by legislation, to establish restorative justice as a mainstream victim-centred response to harm caused by sexual violence.

Such a framework requires adequate resourcing to ensure the quality of restorative justice programs is consistent across jurisdictions, responsive to the needs of victim survivors, and a gateway to behaviour change of people who use sexual violence.

A restorative justice process that responds to sexual offending and associated harm must be focused on the needs of victim survivors, and must be able to be tailored so that it addresses the needs of each victim survivor participant as an individual. Like the criminal justice system, restorative justice can be resource intensive. Participants require extensive preparation by highly qualified professionals.

### **Recommendation 1 – Development of a national restorative justice framework**

A national restorative justice framework should be established to promote consistency and transparency as to how restorative justice interacts with the criminal justice system, and to promote equal access to high quality restorative justice processes to victims survivors across all Australian jurisdictions.

This framework should include guidance including:

- how and when a restorative justice option should be introduced to victim survivors who have reported sexual violence to police
- what matters may be diverted to restorative justice and the consequences for all parties
- effects on sentencing or parole considerations of participation in a restorative justice process.

### **Recommendation 2 – Legislation to safeguard against admissibility**

A national restorative justice framework should be accompanied by model legislation that ensures what is said or done during a restorative justice process, including any information that is exchanged, is not admissible in any criminal proceedings or civil action.

It is not necessary to introduce legislation to govern all aspects of a restorative justice process (such as timelines, referral pathways and outcome agreements) as this risks creating prescriptive programs that cannot meet the varied needs of unique victim survivors. Rather, any legislation should focus on enabling restorative justice as an option available for all types of harm, with safeguards against any unintended consequences for either participant.

### **Recommendation 3 – Direct resourcing to ACCOs to develop restorative justice programs for First Nations participants**

Funding should be provided to support First Nations communities to develop self-determined restorative justice processes, either via partnerships between communities and community-based restorative justice services, or directly funding ACCOs to develop and operate such programs.

### **Recommendation 4 – Victim-centred guidelines**

National restorative justice victim-centred guidelines specific to sexual violence should be established to provide clear pathways and entry points in the community and justice systems for victim survivors to access restorative justice. These guidelines should mandate the

provision of information for victim survivors to ensure that they made aware of their right to explore restorative justice process as an option and how to access it.

### **Recommendation 5 – Resourcing and support for community-based restorative justice programs**

Community-based restorative justice provision should be supported rather than restorative processes being provided exclusively through government departments and agencies. Funding and resources should be provided to facilitate community-based models of service provision to ensure providers have the agility to work with individual communities to develop restorative justice options that are tailored and responsive to their needs.

### **Recommendation 6 – Properly resourced support for people who use sexual harm**

Government should ensure there is properly resourced, community-based support for both children and adults who use sexual violence. Properly resourcing this form of support is a necessary precondition to delivering accessible restorative processes in response to sexual harm.

### **Recommendation 7 – Guidelines for the establishment of restorative justice programs to address workplace sexual harassment**

National guidelines should be established for workplaces wanting to develop restorative engagement schemes for current or former employees who experience discrimination and sexual harassment in their place of work.

### **Recommendation 8 – National standards and accreditation**

National standards and training and accreditation guidelines should be established that allow community-based organisations to run restorative justice processes, supported by national standards relating to training and accreditation, monitoring and evaluation.

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