

# Submission to the Sentencing Advisory Council's Sentencing Occupational Health and Safety Offences in Victorian Consultation Paper

Dear Dr McGorrery,

We refer to the Sentencing Occupational Health and Safety Offences in Victoria Consultation Paper published by the Sentencing Advisory Council in February 2024. The Centre for Innovative Justice (CIJ) wishes to make a submission in response to question 9, which asks for submissions about the potential use of restorative justice conferences in OHS cases.

The CIJ was engaged by WorkSafe Victoria to look at their Occupational Health and Safety enforcement and workers compensation scheme management functions between 2017-2018, with the aim of exploring whether restorative principles, practices and processes could contribute to workplace safety, respond to the harm caused by workplace deaths and injuries, and improve the experience of claimants in the compensation system administered by Worksafe.

In 2018, the CIJ produced a report for WorkSafe, *Restorative Justice Opportunities within WorkSafe Victoria: Summary Report* (November 2018) which summarises the results of this work.

In light of the Sentencing Advisory Council's review, and the relevance of this report to the review, we have sought and obtained permission from the Chief Executive Officer of WorkSafe Victoria, Mr Joe Calafiore, for this report to be annexed as CIJ's submission to this review, and to be published by the Council.

The report may be cited as 'Winford, S & Polis, M. (2018). Restorative Justice Opportunities within WorkSafe Victoria: Summary Report. Melbourne: RMIT University Centre for Innovative Justice.'

Best wishes,



Stan Winford (he/him)  
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Centre for Innovative Justice, RMIT University



A project for:



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# Restorative Justice Opportunities within WorkSafe Victoria

Summary Report  
(November 2018)

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Centre for Innovative Justice



## Thank you

The CIJ would like to express our gratitude to each of the injured workers, family members and employers, and union and employer representatives and other stakeholders who participated in this research. These people generously gave their time to share their personal experiences and views with us in order to contribute to the potential for improving these processes for others.

## Centre for Innovative Justice

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

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## Foreword

Those who work in the criminal justice system have long understood the power of restorative justice.

Put simply, restorative justice aims to meet the justice needs of people by exploring what happened, how people were affected and what needs to happen to make amends for the harm and ensure it does not happen again.

It has proved an important healing tool for victims of crime and so, here at WorkSafe, we asked a very simple question: could the same concept work within the legislative boundaries of Victoria's occupational health and safety and workers' compensation schemes?

While many injured workers return to work happy and healthy, others – both injured workers and grieving families – feel that the harm they have suffered has not been fully acknowledged by the perpetrator, and that WorkSafe's legal and other processes have not been sensitive to their needs.

In 2017, WorkSafe commissioned RMIT University to identify opportunities to apply restorative justice processes and principles in its enforcement and claims processes.

The university's Centre for Innovative Justice interviewed injured workers, family members of people killed at work, employers, representatives from trade unions and employer groups, academics, researchers and WorkSafe staff and agents who work with injured workers every day.

Their experiences, which you can read in this report, are confronting. The insights and depth of feedback are compelling. And the recommendations contained in this report are already being acted on.

WorkSafe will continue to listen to those who have suffered a workplace trauma. To families who have lost a loved one. To workers who have been seriously injured.

We owe this to everyone who hasn't got home safely at the end of the day.

**Clare Amies**

Chief Executive  
WorkSafe Victoria





## Introduction

WorkSafe Victoria has responsibility for regulating occupational health and safety (OHS) in Victoria through its enforcement and compliance processes and for administering the State's workers' compensation scheme through its claims processes.

The majority of injured workers and their family members who come into contact with WorkSafe have a straightforward experience of the system, and are able to recover from the effects of the incident and resulting injuries and return to work relatively swiftly. However, for some injured workers and their families, these processes become complex and protracted, and, rather than helping them to recover from the effects of a workplace incident, they instead prolong or exacerbate the original harm, and may even cause further psychological injury.

This phenomenon is not unique to Victoria, nor is it confined to the workers' compensation or OHS context: research conducted in Australia and internationally over many years has documented the negative effects that criminal justice processes can have on the victims of the offences being prosecuted, and that compensation systems can have on the very individuals whose interests they exist to serve. Research suggests that this holds true whether these compensation systems are statutory, common law or a combination of both, and whether they relate to injuries that arise out of workplace incidents, transport accidents, medical error, crimes or other circumstances.

WorkSafe, through its strategic plan, WorkSafe 2030, has committed to transforming the way in which it performs its functions, identifying new ways of working, and increasing its focus on improving health and wellbeing outcomes for injured workers and their employers. The goals of WorkSafe 2030 are to embed a proactive, prevention-led approach that focuses on the needs of clients; and to provide a personalised, client-focused service for every Victorian who comes into contact with WorkSafe.

In 2017, WorkSafe commissioned RMIT University's Centre for Innovative Justice (CIJ) to undertake a project with the specific purpose of exploring whether restorative justice processes could play a role in improving the experience that injured workers and their families have of its enforcement and claims processes.

Restorative justice programs have been demonstrated to have important benefits for individuals affected by crime and institutional harms, often because they are able to meet people's 'justice needs' or 'non-pecuniary interests' in ways that conventional and formal justice systems are not designed to do. This suggests they may equally have benefits for those affected by adverse events in the workplace. Indeed, a previous research project led by Dr Derek Brookes examined the potential of adopting a restorative justice response to workplace deaths in Victoria, and reported a supportive response from key stakeholders. And in New Zealand, restorative justice processes are now a standard option at the pre-sentence stage in OHS prosecutions, and have been used in connection with enforceable undertakings entered into by defendant employers.

## About restorative justice

Restorative justice is a model of justice which focuses on the personal harms caused by a crime or other wrong, rather than on the violation of a law, or on the technical elements of a legal duty owed to another party. Its purpose is not to adjudicate or negotiate people's legal rights or responsibilities, but instead to explore at a personal level what happened, how people were affected, and what needs to occur to repair the harm caused. Restorative justice processes generally operate as an adjunct to the legal system, in recognition that both have a role to play in responding to the public and private dimensions of wrongdoing.

Among the core principles underpinning restorative justice practices and processes are the importance of involving all people affected by a wrong in the resolution of its effects and its implications for the future, and of not causing any further harm to the parties in circumstances where they are already feeling the impact of the original harm.


Restorative justice processes can have benefits and outcomes that are not generally available through adversarial legal proceedings, which tend to focus on technical legal details and can also entrench oppositional and defensive positions and states of conflict. Restorative processes, by contrast, foster the taking of responsibility by wrongdoers and can operate to transform conflict into cooperation.

The benefits of restorative justice processes also derive in large part from the fact that they are designed to meet the needs of victims (and other participants) in ways that conventional justice processes too often fail to do. Research on the experience of victims of crime—notably the work of Daly, Bolitho and Toews—shows that in order to feel that justice has been done following a crime, the response must address a victim's individual 'justice needs'. There are numerous articulations of what constitute a victim's justice needs or interests, but they generally include the need to tell the story of what happened (voice), the need to be acknowledged and believed (validation), the need to see the wrongdoer take responsibility or be held to account (accountability), the need for answers to questions about what happened (information) and the need to see changes implemented to ensure others will not suffer in the same way (prevention).

These needs can sometimes be met through criminal and civil proceedings, for example when people have the opportunity to give evidence in court, or when a court delivers a verdict or judgment that confirms that a wrong has been committed by a party and harm has been caused to a victim or plaintiff as a result. However, outcomes such as these may be elusive (for example if a matter is resolved by negotiation without the need for evidence to be given in court) or tempered by other effects of the legal process (such as delay, cost and adversarial conduct on the part of lawyers). On the other hand, restorative justice processes—which involve direct participation, on their own terms, by those personally affected by an incident, and facilitate dialogue between them in a safe and structured environment—have a greater capacity to meet an individual's full range of justice needs.

The most common restorative justice process is restorative justice conferencing, where those affected by an offence, harm or situation of conflict collectively discuss and resolve how to deal with the aftermath of what has happened and its implications for the future. Restorative justice conferencing usually involves the victim or other person harmed, the person responsible for or implicated in the harm, members of their communities, families, supporters and/or representatives. The conference takes place at a time when the person harmed is ready and willing to participate and unlikely to be further harmed by the process, and the party implicated in the harm is prepared to take responsibility for his or her actions.

Victims have the opportunity to describe the impact of the incident in question and to identify the types of actions that might help make amends for the harm caused (these may include an apology, a symbolic or material gesture of remorse, answers to questions about what happened or a commitment to take steps to avoid re-offending). This is intended to facilitate remorse on the part of the wrongdoer, and validation, healing and recovery on the part of the victim.



The convenor of the conference is an independent skilled professional who ensures that the process is safe, respectful and fair for everyone involved. One of the convenor's key responsibilities is to manage any power imbalances between participants, which they do by assessing parties' underlying motivations for participation, ensuring more vulnerable parties have an equal voice during the conference, and examining the fairness and feasibility of any agreed outcomes.

Restorative justice conferencing is not equivalent to the model or models of mediation practised in Australia (such as in connection with civil proceedings), although they can share some similar goals and practices. Restorative justice conferencing focuses on repairing harm and conflict, whereas mediation is generally focused on negotiating and resolving disputes about contested facts or positions about entitlements according to legal principles. That said, mediation of the latter type (and other forms of dispute resolution such as conciliation) can certainly have some restorative effects for participants.

A distinction is also drawn between restorative justice and restorative practices. Although these concepts are interconnected, restorative justice processes are invoked as a response to a past harm or wrong, whereas restorative practices proactively seek to prevent harm by maximising the participation and collaboration of all members of an organisation or other community.



## About the project

The project was conducted over a period of 15 months during 2017–2018. To inform our analysis and recommendations, the CIJ:

- spoke to workers injured as a result of OHS breaches, as well as family members of workers who had died as the result of a workplace incident who had experience of WorkSafe's enforcement processes (in this report, when discussing enforcement processes we use the term 'victim' to describe both workers injured as a result of an incident giving rise to an investigation or prosecution, and family members of deceased workers)
- spoke to injured workers who had experience of WorkSafe's claims processes, including some who had made, or were contemplating making, claims for common law damages (in total we consulted approximately 32 victims and injured workers)
- interviewed seven employers who had had staff who had been injured at work and had made claims for statutory benefits and entitlements through WorkSafe and its agents
- consulted representatives of trade unions and employer associations who play active roles in supporting their members through WorkSafe's enforcement and claims processes
- conducted workshops and meetings with officers from across WorkSafe and its scheme partners (claims agents, the Accident Compensation and Conciliation Service, Medical Panels and external WorkSafe lawyers)
- met with several academics, researchers and regulators with expertise in areas including workplace injuries, regulation and restorative justice.

These interactions assisted the CIJ to understand the particular dynamics and impacts of workplace deaths and injuries, the needs of the individuals affected, and their expectations of the various processes that follow. They also provided an opportunity to explain the concepts, principles and processes that underpin restorative justice, and to explore their potential application in the WorkSafe context.

The CIJ also reviewed key legislative, academic and policy resources and literature relevant to WorkSafe's functions; needs of victims of crime generally; the experiences of workers involved in workplace incidents, the health and return to work outcomes for workers involved in compensation processes; the impacts of compensation systems generally on people claiming in relation to personal injuries of all types; the role of 'perceived injustice' in the recovery of people injured in a range of circumstances; the non-pecuniary needs of personal injury claimants; and the role of apologies in response to civil wrongs. A list of key materials that have informed our work is included at the end of this report.

This summary report provides an overview of:

- what we heard during interviews and consultations about the needs and experiences of people affected by workplace deaths and injuries
- why restorative justice has a role to play in response to workplace deaths and injuries
- the various opportunities WorkSafe has to offer restorative justice options in the context of both its enforcement and claims processes
- the principles and safeguards which would need to be in place in the delivery of any restorative justice program
- some suggestions for other improvements to the enforcement and claims processes.





## WorkSafe's enforcement and claims processes

WorkSafe's enforcement and claims processes play essential roles in promoting workplace health and safety, preventing workplace harms and helping workers to recover from injury and, where possible, to return to work. They each operate within defined legislative frameworks which aim to fulfil particular objectives and deliver specific outcomes according to prescribed procedures.

The enforcement processes (that is, those processes that form part of WorkSafe's compliance functions under the *Occupational Health and Safety Act 2004* (Vic) (the OHS Act)) aim to secure the health, safety and welfare of workers, and to eliminate risks to the health, safety or welfare of workers and others. The OHS Act empowers WorkSafe to take action to promote compliance with OHS standards, and to prosecute employers for breaches of OHS laws. Prosecution of offences under the OHS Act generally focus on whether an employer (or other duty holder) has failed to protect against risks to workers' health and safety, rather than on whether their actions or inactions have caused a death or injury. As in other criminal prosecutions, the victim of an alleged offence is not a party to a prosecution under the OHS Act—their role is limited to that of a witness, or as someone entitled to make a victim impact statement to inform the court's decision on sentence. The penalties that are available for offences under the OHS Act include fines and orders to undertake improvement projects. A sentence of a term of imprisonment is only available in extremely limited circumstances.

The claims processes (that is, those processes relating to claims for compensation and other entitlements, and access to support services, under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (the WIRC Act)) provide benefits to injured workers and aim to help them get back to safe and sustainable work. Benefits include weekly payments, medical and allied health treatment, hospital treatment, personal and household help, lump sum payments for permanent impairment, and common law damages. A claimant's entitlements are determined by reference to matters including the nature and degree of their injury and impairment, their pre-injury earnings, and assessments about the treatment required to support their rehabilitation.

The claims system is an insurance-based one administered by WorkSafe and its agents. It is to a large extent a no-fault system, which means that to access statutory benefits claimants do not have to prove that their injury was caused by the negligence or fault of their employer. By contrast, a claim for common law damages (available only in certain circumstances) still relies on proving such negligence or fault. Employers have certain rights and obligations under the WIRC Act, primarily in relation to a worker's return to work, but they do not have carriage of the response to a worker's claim for statutory benefits or common law damages. One of the features of the insurance relationship between the employer and WorkSafe is the general prohibition in section 71 of the WIRC Act that prevents the insured employer from making any admissions or accepting liability in respect of a claim.

Although these processes exist to achieve essential outcomes for the community and workers, they have not been designed to meet the full range of justice needs that individual victims and injured workers may have. Some victims and workers may therefore seek and expect outcomes that fall beyond the scope of what the current enforcement and claims processes can deliver.


## Victims' experience of the enforcement process

The victims interviewed by the CIJ conveyed the gravity of the impact of the incident on their lives. Injured workers had suffered both physical and psychological injuries as a direct consequence of the incident or course of conduct in issue, leaving them unable to return to work. One such worker had developed severe mental ill health as a result of bullying, harassment and verbal abuse at work. Family members of deceased workers described the devastation of losing a loved one in such an unexpected and unjust way, and their ongoing grief and despair. For all of the victims interviewed, the impacts of the incident continued to affect their lives deeply even after the investigation and prosecution processes had run their course.

Overall the victims interviewed for the project were pleased that the employers in question had been charged, because they wanted to see them held publicly to account, to be aware of what they had done, and to learn something from the experience. They generally valued the process of making a statement to investigators, the opportunity to make a victim impact statement to the court, and being present in court (despite it being an emotionally difficult experience) as a way of reminding accused employers, judges and juries about the human cost of not taking occupational health and safety risks seriously.

However, they also expressed disappointment and dismay at both the response to the incident, and a number of elements of the enforcement process itself:

- Victims expressed a desire or need, immediately following an incident, for the employer to ask after their wellbeing, to recognise the value of the employee to the organisation, to acknowledge what happened and/or to offer an apology or other gesture of regret or concern. Only one victim interviewed had received any such response from the employer. A common statement was 'No one ever contacted me to see how I was.'
- Victims also felt aggrieved that when the matter was in court—generally the first time there had been any contact between the parties—employers did not approach them to express any regret, acknowledge their presence, or even look at them. In one case the victim described the accused entities as 'cold', recounting that 'none of them cared what they did to us' and that they treated the family of the deceased 'like enemies' during the trial.
- They believed the sentences imposed by the court, usually fines, were an inadequate response, and not sufficient to send a strong enough message to industry, or to ensure the necessary changes would be made in the workplace. They felt that fines could be readily absorbed by a business, and did not necessarily lead to any genuine insight on the employer's part about the full impact of the incident or the importance of maintaining safe work practices.
- In those instances when an employer had made a statement of remorse to the court, or had provided a written apology to the victim at the conclusion of the prosecution, victims perceived these actions as motivated by self-interest and lacking in genuine sentiment.
- All victims wanted to ensure that what happened to them, or their loved one, would not happen to anyone else, and for their experience to contribute to a deeper appreciation of the human value of workplace health and safety. No victims we interviewed were satisfied that the employers had made the necessary changes to their workplaces, or more importantly, that they had changed their attitudes or developed a genuine commitment to protecting their workers from harm.
- Victims often remained focussed on needing to understand how and why the incident occurred, and to find out about the investigation findings, and any remedial action taken by the employer as a result. However, they often struggled to obtain any information from WorkSafe, or the employer, in response to these needs, especially if no public hearing had been held. This need to understand how and why the incident occurred would often persist despite the outcome of the investigation, and even if a prosecution resulted in a conviction.



Some of these experiences were also reflected by stakeholder representatives and WorkSafe representatives who made the following observations:

- Every indication points to the benefits of employers and workers/victims engaging with each other early on after a workplace incident: such contact is incredibly beneficial to the injured worker and their family. In cases where the employer has been sympathetic towards the victim, has considered their interests, made ex gratia payments or established a memorial, the victim's victim impact statement tends to be benign towards the employer. By contrast, if the employer has taken no steps to contact or support the victim, the victim impact statement tends to be damning of the employer.
- There are, however, a range of barriers to such engagement. Many employers feel unsure and scared about making contact with victims, even if they are genuinely concerned about their wellbeing. Employers are frequently advised by lawyers not to make any statements that may be construed as an admission, in case that might compromise their legal position in relation to a prosecution or common law claim. There are also no clear legal or policy protections for apologies or statements acknowledging the harm caused, which can inhibit such statements being made.
- Enforcement action can be inconsistent, inadequate and ultimately ineffective in achieving genuine accountability or culture change within organisations. As a result, some employers and industries do not take OHS seriously, or prioritise measures that achieve mere compliance with laws rather than proactively identifying and preventing risks to OHS in their workplaces.

## Injured workers' experience of the claims process

The injured workers who had experience of WorkSafe's claims processes interviewed for the project described in detail the impact the injury had had on their lives. The injuries sustained included both physical and psychological injuries, and generally involved significant non-visible symptoms and enduring pain. These injuries had far-reaching consequences for their physical health, mental health, quality of life, relationships and entire sense of identity. Workers who were unable to return to work experienced profound consequences including loss of meaning in their life and loss of social networks. Many felt completely isolated, and had become depressed as a result. They were aggrieved that their employers and colleagues were desensitised to the emotional and other impacts of a workplace injury.

Workers often believed the incident that caused the injury was avoidable, and they believed there were steps that could and should have been taken by the employer or WorkSafe before the incident to ensure the incident was prevented. Most workers blamed the employers for the injury, or at least expressed resentment towards them for failing to ensure a safe workplace or not caring enough about their employees' health and safety.

Many workers observed that as soon as the incident happened and they were unable to work they lost all contact with their employers, who appeared absent or removed from the process, failed to enquire after their wellbeing, did not offer any support or take any responsibility for the incident and in some cases were actively hostile. Interviewees felt very hurt by these responses, feeling that they had been loyal employees over many years and deserved to be supported. Workers often observed that 'to be listened to' was all they really needed. Several said that they had hoped they would receive an apology from their employer, but they never did, with denial of any responsibility a more common response.


A few workers had received an apology from their employers on the day of the incident, commitments to address the relevant safety issue, and/or ongoing contact throughout the claims process. These workers indicated that these responses were sufficient for them to feel acknowledged and appreciated.

Many also mentioned with regret that they lost all contact with co-workers with whom they had previously had daily contact and who they considered friends. In some cases, they felt that their co-workers had become resentful towards them as a result of their taking time off work or making a claim for compensation.

Workers had an abiding interest in the circumstances giving rise to the injury and whether any changes to work practices or plant or equipment had been made following their injury. However, there were few opportunities for them to discuss their safety concerns during the course of the claims process, either with their employer or with WorkSafe. If they happened to discover that no changes had been made, they felt frustrated, angry and worried about the ongoing risk and what might happen to other workers. Some workers had returned to work in an OHS role and found that to be rewarding and productive because they were engaged in activities aimed at preventing other workers from being injured.

Although those interviewed were grateful that Victoria has a system for supporting workers to recover from a workplace injury, and some received valuable assistance from WorkSafe and some of its scheme partners, all interviewed recounted negative experiences of the claims process. Workers believed that the processes involved hindered their recovery—in particular, they found the obligation of continuing to have to prove their injury and justify their claims to be time-consuming, confusing and remote from the efforts needed to achieve their recovery and rehabilitation. For those workers with psychological injuries this induced feelings of guilt and being under suspicion, which they felt exacerbated their conditions.

Workers felt they had very few opportunities throughout the claims process to explain the full impact of the injury on their lives, with claims staff and others only interested in very specific issues relevant to their statutory entitlements.



A number of workers indicated they had pursued common law claims partly because of how they had been treated by their employer or WorkSafe, or because they thought it would help drive changes in the workplace. Workers with common law claims had appreciated being able to explain the full impact of the injury on their lives to their lawyers.

The employers interviewed for the project emphasised the importance of responding to a workplace injury as soon as it occurs—including through early, ongoing and direct communication with the injured worker—to ensure the worker seeks appropriate treatment, the injury does not escalate, there is timely and effective return to work, and that proper procedures are followed. Some employers noted that they had had past experience in other workplaces or industries where workplace injuries were not taken seriously and not managed properly, and as a consequence claims tended to become protracted and problematic.

The stakeholders with responsibility for supporting their members through the claims process made a range of observations about the claims process and the response to workplace injuries. Among these were comments to the following effect:

- When a worker's needs remain unmet this can have negative effects for the worker, even more so if the employer blames them for the incident. They stay 'stuck in a loop' of conflict with their employer, and outrage about the system and service providers. The worker will ruminate on what they experience as an injustice and lack of support for the hard work that they do. This can impede their recovery and return to work.
- Workers who have a professional commitment to working in demanding and potentially dangerous workplaces do not necessarily hold their employers responsible for injuries they sustain (for example if they are injured by a client in an incident of occupational violence). However they do expect a high level of support and acknowledgement from their employers about the risks they face and any injuries they sustain, as well as a commitment to finding ways to reduce the frequency and severity of such incidents.
- Interpersonal conflict is the most challenging factor for successful return to work. There tend to be a range of underlying dynamics at play, multiple parties involved, and minimal employer support. There are few effective ways to address claims that arise out of interpersonal conflict. Instead workers can become isolated and their psychological state deteriorates. Sometimes mediation is used in the context of return to work in these cases, but workers often find that the standard process simply goes through a routine set of steps and outcomes without addressing the underlying factors causing the conflict.
- Employers can also find the compensation process very stressful, particularly if they are running a small business. Many small businesses do not understand how the system works. There is guidance provided to employers, including about how to communicate with injured workers, but much more simplified information is required.

## Unmet justice needs and their consequences

What these experiences indicate is that—in addition to their **primary goals** of recovery and rehabilitation, financial security and return to work; and in the case of OHS breaches, seeing a public prosecution process and the imposition of an appropriate sentence—injured workers and victims have a set of **justice needs**. These represent the types of outcomes a victim or injured worker seeks or wishes to pursue in order to feel that 'justice has been done' in response to a workplace death or injury.

Drawing on previous conceptualisations of victims' justice needs (by Daly, Toews, Bolitho and Brookes), and the needs and desires expressed in interviews we conducted with victims and injured workers, the CIJ has articulated a set of workers'/victims' justice needs. These are set out the table on the following page.

Not all victims or injured workers will have any or all of these justice needs following a workplace incident. The extent to which such needs arise will depend on the nature of the incident, the nature of the injuries suffered, the actions and attitudes of others in response to the incident, and each individual's personal demeanour and outlook. Some people have few or no justice needs arising from the workplace incident, and are focused on attaining their primary goals as efficiently as possible. Some justice needs relate to the original incident, while others develop subsequently in response to the injured worker's experiences, including their perceptions of the attitude and behaviours of the employer and/or claims system.

Although some elements of existing processes do serve to meet victims' and workers' justice needs, there are some notable gaps. Critically, existing processes do not provide people with the opportunity to explain to employers the impact the incident has had on their lives, to receive apologies from employers, or to have input into prevention measures that might ensure no one else has to go through what they have endured.

In the context of enforcement processes, victims of the alleged offence can also feel excluded from the investigation and prosecution process, and frustrated when investigators and lawyers appear to be focussed on gathering evidence that is narrow and technical in nature rather than information about the full impact on themselves, as people directly affected by the incident. As noted above, they may also feel disappointed with the penalties that are imposed on employers, which victims regard as being not necessarily useful in generating any genuine insight on the part of the employer about the importance of workplace health and safety for individual workers.

Such experiences can have a range of consequences that compound and exacerbate the primary harm experienced by victims. They may result in disrupted recovery from the physical and mental effects of the incident, feelings of anger, frustration, depression, and in some cases suicidal ideation. They may also lead to the adoption of adversarial positions, litigiousness, hostile behaviour towards those working in the system and ultimately a lack of faith in the regulatory and legal system itself.

On the other hand, when victims are supported to understand the nature of the legal process, and are provided with opportunities for their needs to be met (by employers, WorkSafe or the court), they are able to derive some level of satisfaction that the response to the death or injury has been a positive and meaningful one.

## Injured Workers & Victims' Justice Needs

Justice Needs	Description
<b>Voice</b>	<ul style="list-style-type: none"> <li>– To express feeling and emotion</li> <li>– To have others listen to and understand the impact of the incident on all aspects of one's life</li> </ul>
<b>Validation</b>	<ul style="list-style-type: none"> <li>– To have others enquire after, believe and affirm one's experience, in particular those who are in a position of authority and/or were implicated in the incident</li> <li>– Not to be blamed for the incident and its effects</li> <li>– To receive support from the employer and co-workers, and an apology where appropriate</li> <li>– To have a worker's life, health and safety recognised as valuable and worth protecting; and to experience collective regret about the death/injury that has occurred</li> </ul>
<b>Information</b>	<ul style="list-style-type: none"> <li>– To understand more about the incident—what happened and why</li> <li>– To know what steps have been taken since the incident to rectify the circumstances that gave rise to it</li> </ul>
<b>Accountability</b>	<ul style="list-style-type: none"> <li>– To see the employer held accountable for the incident giving rise to the injury where there has been some level of fault, responsibility or exposure to risk (as opposed to an incident that was entirely accidental), and for the particular impact the incident has had on individuals               <ul style="list-style-type: none"> <li>– May encompass punishment (including fines), public acknowledgement, apology/expression of remorse, other forms of recompense/reparation (which in the case of a workplace death may include a memorial or charitable donation to honour the deceased worker)</li> <li>– May evolve to apply to actors other than the employer who also contribute to the worker's sense of injustice, including claims agents, WorkSafe, Independent Medical Examiners, health care providers and others</li> </ul> </li> <li>– To be able to acknowledge any degree of responsibility for one's own role in the incident, without being blamed or penalised</li> </ul>
<b>Relationships</b>	<ul style="list-style-type: none"> <li>– To preserve and maintain relationships with colleagues</li> <li>– To restore damaged relationships with the employer and/or colleagues and broader community, to neutralise conflict, to accept that a relationship has come to an end</li> <li>– To manage relationships upon return to work</li> </ul>
<b>Prevention</b>	<ul style="list-style-type: none"> <li>– To ensure what happened will not happen to anyone else</li> <li>– To ensure that the unsafe practices that gave rise to the incident in question have been addressed and rectified</li> <li>– To have a role in improving workplace health and safety</li> <li>– To see something positive happen as a result of the incident/injury</li> <li>– To be able to discuss issues of workplace health and safety in an open and collaborative way</li> <li>– For people in positions of authority and influence to listen to workers and be committed to effecting specific, systemic or cultural change</li> </ul>
<b>Resolution</b>	<ul style="list-style-type: none"> <li>– To get on with life, to be focussed on the future not the past</li> <li>– To arrive at an acceptable narrative about what has happened, to be able to move on, to obtain closure</li> </ul>



In the context of claims for compensation following a workplace injury, there are few opportunities for injured workers to explore those justice needs that relate to concepts of fault, responsibility, blame, accountability or injustice. This is because the system is essentially a no-fault scheme (albeit with some common law rights available). This means that such concepts are irrelevant to the determination of an individual's entitlements and are therefore displaced from the system (unless a common law claim or prosecution ensues) even though they may remain central to the way in which the injured worker experiences and rationalises the injury and its impacts.

In addition, the experience that some injured workers have of the claims process—its complexity and duration, its apparent incoherence and its one-size-fits-all approach—can thwart their capacity to achieve their primary goals of recovery, rehabilitation and return to work, and fail to align with or meet their expectations about the entitlements they should receive and the support and respect they deserve.

As a consequence, there is a cohort of injured workers who have poor recovery and rehabilitation outcomes and diminished return to work prospects, are susceptible to further psychological distress and ill-health, and whose interactions with WorkSafe's processes can become avenues for the expression of frustration, anger and distress, resulting in hostile and adversarial behaviours. The process also becomes challenging for the scheme itself and those administering it, with considerable time spent on managing workers' expectations about what the process can deliver, and matters escalating into complex disputes because there are limited options for responding to workers' needs early in the process.

The following diagram (Figure 1) depicts the relationship that may exist between an injured worker's primary goals and their justice needs, demonstrating that justice needs can assume a position of significance that is comparable to that of a worker's primary goals.

Figure 1:

**Relationship between injured worker's primary goals and justice needs**



## The benefits of a restorative justice response: WorkSafe's enforcement processes

Based on what we heard during the project and drawing on what we know about the role restorative justice can play in the context of criminal justice systems, the CIJ believes the availability of restorative justice responses would have benefits for victims, employers and the OHS system generally if made available in suitable cases as part of WorkSafe's enforcement function.

Such responses would have the potential to:

- meet the needs of victims to be heard, to have their questions answered, and to have a say in any actions that should be taken in response to the incident in question (by way of reparation and/or prevention)
- deliver tangible outcomes for victims that are not available through other justice processes, for example a memorial to a loved one who has died in a workplace accident
- provide a justice process for victims for whom no other outcome is available, for example if a prosecution does not proceed or where it results in a not guilty finding or a verdict of acquittal
- encourage employers who have presided over unsafe work practices to understand the human impact of those practices, to offer a genuine apology and to take proactive responsibility for ensuring their workplaces are safe environments in the future
- support employers to communicate freely with victims without fear of adverse legal consequences, and meet their needs to recover from traumatic events and to make amends for their actions (or inaction)
- enable the participation of multiple parties and individuals who are collectively responsible for the harm
- provide a process that is sufficiently flexible to take a holistic view of the incident and its impacts (including those giving rise to compensation claims), to explore issues that might be excluded from consideration in any prosecution on legal or evidentiary grounds, and to support the participation of individuals less directly affected by an incident, including colleagues, managers and extended family members
- encourage parties and stakeholders to adopt a collaborative and problem-solving approach to workplace health and safety, and in doing so to inculcate a practical perspective about the range of changes that can and cannot reasonably be made in any particular workplace or industry
- complement WorkSafe's existing strategies to reduce workplace health and safety risks, and to instil confidence in the capacity of WorkSafe's enforcement jurisdiction to meet its statutory objectives to secure workplace health and safety in an effective manner.



## The benefits of a restorative justice response: WorkSafe's claims processes

Similarly, the CIJ also believes restorative justice processes have particular potential in the context of workers' compensation schemes for the following reasons:

- They are designed to meet participants' justice needs for non-pecuniary outcomes (including apologies) which compensation processes are often ill-equipped to do, particularly those where an insurer assumes the role of the other party and/or fault is deemed irrelevant. Meeting an injured worker's needs through a complementary process may assist workers to participate more effectively in the administration of the formal claims processes.
- They provide a forum for exploring and possibly resolving injured workers' perceptions of injustice directed at employers and others, thereby overcoming a known barrier to recovery from injury. Research studies by Professor Michael Sullivan and colleagues on the role of 'perceived injustice' in the recovery of people injured in a range of circumstances show that individuals who blame others for their injuries, or retain a sense of injustice about the original incident and/or subsequent response to it by employers, claims staff, health care providers and friends have poorer health and recovery outcomes than those who do not hold these attitudes. Perceived injustice has been associated with higher degrees of persistent pain and disability, more severe depressive symptoms, greater use of health care services, compromised relationships with rehabilitation providers, and identified as a predictor of an intention to litigate.
- As the claims process (excluding of course the common law jurisdiction) is a no-fault system there is presently no opportunity for injured workers to pursue their accountability needs because, from a legal perspective, any blame or fault on the part of the employer is irrelevant when determining a worker's entitlements. A restorative justice process could offer such an opportunity.
- They represent a relatively informal and flexible justice process that can be convened where no other relevant process (such as a prosecution or common law claim) exists.
- They can explore the roles each party has played in an incident and the events leading up to and following it, navigating complex questions of fault, blame and responsibility without having to reach technical legal conclusions to those questions.
- They may have particular application in cases where interpersonal conflict has played a significant role in the injury and subsequent response, such as in cases involving bullying, by working towards the restoration or re-setting of relationships.
- They may provide a forum for all people affected by the incident giving rise to the injury (the worker, employer, colleagues, health care providers, family members) to collaborate in a plan to support the worker to recover and return to work, and to put in place changes to avoid future similar incidents.
- Restorative justice processes share key objectives with tort-based and compensation schemes, namely to repair and overcome the effects of a wrong. Similarly, their focus on future actions could support WorkSafe's safety and prevention objectives.

# Opportunities and recommendations

The CIJ recommends that WorkSafe:

1. establish a pilot restorative justice conferencing program
2. promote and facilitate the application of restorative practices by employers in response to workplace deaths and injuries, and by WorkSafe and its scheme partners in all interactions with victims and injured workers
3. explore opportunities for other improvements to the enforcement and claims process.

## 1. Establish a pilot restorative justice conferencing program

The CIJ believes WorkSafe should establish a pilot program to test the benefits of providing a restorative justice option to victims and injured workers following a workplace death or injury. The introduction of such a service has the potential to meet the needs of injured workers, their families and employers in ways that formal processes are not designed to do, and has the general support of many of the major organisations that represent workers and employers in connection with the enforcement and claims processes.

In making this recommendation the CIJ emphasises that a restorative justice response would not be of interest or value for all victims or injured workers, nor would every employer embrace it. It would, therefore, represent a voluntary, additional option for those parties with a genuine inclination and capacity to address and resolve outstanding issues and conflict.

Over the course of consultations, stakeholders queried at what point in the claims or enforcement process a restorative justice conference should be convened. Some expressed firm views about which stage or stages would be appropriate for holding a conference, and which would be inappropriate.

The CIJ's experience in the design and implementation of restorative justice processes in a range of different contexts highlights the importance of avoiding the temptation to engineer an overly prescriptive model. A model reliant on complex and detailed rules runs the risk of replicating the kinds of constraints found in conventional justice processes. Our experience suggests that the benefits of restorative justice lie in their unique capacity to provide an alternative, flexible response to incidents of workplace harm. As is evident from the contributions made by victims, injured workers and stakeholders throughout this project, individuals respond in different ways to workplace incidents and have diverse needs and motivations. This makes it difficult to assume or predict when a victim and employer will be ready and willing to participate in a conference, or for what particular reasons.

It is for this reason that we propose the introduction of a flexible victim/worker-centred model, rather than a stage-specific model. A victim/worker-centred model would necessitate supporting victims to make a choice about when they might most value participating in a conference, and providing them with a roadmap of the options available to them. There are clearly certain stages when a conference is unlikely to be feasible (for example when an investigation or prosecution is underway) because the parties will prioritise the protection of their legal rights and interests. However, there may be rare circumstances in which the parties' needs and interest in meeting at a particular stage coalesce, or the issues to be canvassed at a conference are sufficiently discrete, such that the prospect should not be ruled out. For example, a conference might simply facilitate the victim's desire to convey to the employer the impact of the incident on their life, with no expectation or need for the employer to respond other than by listening and acknowledging what they have heard.

While the primary purpose of the program would be to assist injured workers and victims to recover from the effects of a workplace incident, it is acknowledged that it could also have benefits for employers (who are also affected by workplace incidents and the demands of the claims and enforcement processes) and must also respect their rights and interests.

While the program should be flexible enough to be able to offer a restorative justice conference regardless of the stage at which a matter is in any associated enforcement or claims process, WorkSafe may wish to focus initially on identifying cases at the points in the process set out in the table below. Further, it may be valuable for WorkSafe to focus on particular types of incidents or injuries in the pilot phase, for example those involving fatalities, mental health injuries or occupational violence cases.

**Points in WorkSafe’s processes when a restorative justice conference could be considered**

Enforcement	Claims
<ul style="list-style-type: none"> <li>– As part of an enforceable undertaking</li> <li>– Pre-sentence</li> <li>– Post-sentence</li> <li>– Following dismissal/withdrawal of prosecution, or not guilty outcome</li> <li>– Following a decision by WorkSafe not to prosecute</li> </ul>	<ul style="list-style-type: none"> <li>– Upon receipt of a claim that discloses unmet justice needs</li> <li>– In the context of a worker’s return to work (including as part of the WorkSafe’s Facilitated Discussions Pilot)</li> <li>– When a worker is unable to return to work</li> <li>– Upon the resolution of a statutory or common law claim</li> </ul>

Diagrams depicting these potential points of intervention appear as Appendices to this report.

In order to ensure that the rights and interests of all participants are protected, and other potential risks of a restorative justice response are addressed, we have articulated a number of principles and safeguards that would need to underpin any restorative justice conferencing pilot.

**Purpose and objectives**

There should be a clear articulation of what the program’s purpose and objectives are. In the CIJ’s view, these should be to provide:

- a voluntary, safe and structured environment in which parties involved in and affected by a workplace incident are able to come together to discuss what happened and why, how people were affected, and what steps might be taken to repair or make amends for the harms caused
- an additional service aimed at assisting injured workers to recover from the effects of workplace injuries and at meeting their full range of justice needs (for voice, validation, information, accountability, prevention, relationship repair, and resolution)
- a process that can address and resolve conflict between parties, but which is not adjudicative or determinative of any party’s rights or entitlements
- a forum for the exploration of the human and emotional dimensions of the incident, freed from the otherwise restrictive constructions imposed by the legal system
- a process to facilitate the giving of apologies and expressions of remorse by employers in response to workplace deaths and injuries.

**Guiding principles and safeguards**

The program should be governed by a set of guiding principles to the following effect:

- The program must be victim/worker-centred in its design and delivery, meaning the process should be tailored to an individual’s needs, and should maximise their choice and control.
- Participation in a restorative justice conference must be voluntary for all participants.
- The restorative justice conference must be safe and do no further harm to the participants.
- There should be careful preparation in the lead up to any conference between the parties to ensure that the needs they are seeking to address and the outcomes they wish to achieve can realistically be met through the conference process

- The program must be viewed as part of a broader suite of services and benefits available to victims and injured workers and as a complement to, not a substitute for, pursuing outcomes through legal processes.
- A restorative justice conference must not be used as a forum for the adjudication, negotiation or settlement of a participant's legal rights, entitlements or obligations.

In order to ensure that participants' rights and interests are protected, and to remove some of the potential barriers to participation in a conference, the program should incorporate a number of clear safeguards of the following nature:

- The program should be operated by a service independent of WorkSafe to protect against any actual or perceived risk that WorkSafe might use any information disclosed through the process to inform any enforcement action or decisions to be made about a claimant's benefits and entitlements.
- Participants must not be asked to waive any legal rights as a condition of participating in a conference.
- Participants must be supported to provide informed consent to participate in the program.
- No information disclosed or statements made during or as part of the process should be able to be used in any other associated process or forum (unless the parties agree otherwise, or to the extent necessary to inform the court in the pre-sentencing context).

There are a range of potential mechanisms for protecting the confidentiality of communications. These include requiring participants to undertake in advance to treat all communications in a conference as confidential; reliance on existing common law and statutory protections of apologies and without prejudice negotiations; the publication of WorkSafe guidelines; and, if necessary, the introduction of specific legislative protections.


#### **Other considerations**

- The program should be delivered by appropriately skilled and experienced restorative justice convenors.
- Participation in the program should be at no cost to the participants.
- The decision about who should attend a conference on behalf of an employer (and otherwise) should be informed by the wishes, needs and preferences of the victim or worker. Representatives of corporate employers will need to be supported in the lead up to a conference to ensure that their approach and demeanour convey a genuine appreciation of the victim or worker's experience of harm.
- Participants should be able to be accompanied by a support person of their choice. The role of the support person should be to assist the victim or worker to participate on their own terms, to tell their own story and meet their own individual needs.
- The program should operate, to the extent that confidentiality requirements permit, within a transparent environment so that all stakeholders understand its parameters, and lessons learned through the process can be shared more broadly with the community. To this end, there should be mechanisms for collecting de-identified information about the operation of the program and participants' experience of and level of satisfaction about the program, for the purpose of evaluation and reporting to stakeholders.

## **2. Promote and facilitate application of restorative practices**

The CIJ also recognises that the justice needs of victims and injured workers can and should be met on a more routine basis following a workplace death or injury, particularly in the period immediately following an incident.





To this end, the CIJ suggests that WorkSafe consider expanding existing guidance materials for employers (and the colleagues of injured workers) to promote the therapeutic value of early expressions of support and remorse following a workplace death or injury. Existing materials encourage employers to offer support to injured workers and focus primarily on their return to work obligations. These materials could be expanded to promote taking steps such as:

- enquiring after the wellbeing of workers and their families following workplace incidents that result in injuries or death
- offering material support
- making personal contact to ascertain the victim’s openness to their attending the funeral of a deceased worker or visiting an injured worker in hospital
- expressing regret and apologising for what has happened
- creating a memorial or making a charitable donation in honour of a deceased worker
- arranging visits to the site of the incident
- keeping injured workers and their families informed about changes implemented at the workplace as a result of the incident and/or involving the victim or worker (as well as other affected workers) in ongoing measures to improve safety at the workplace.

The CIJ acknowledges that the development of guidance materials of this nature will likely require further consideration of the legal status of apologies under the OHS Act, the WIRC Act, the *Wrongs Act 1958* (Vic) and at common law.

It is also suggested that WorkSafe identify opportunities to promote and facilitate the adoption of restorative practices in the performance of its functions and those of its agents and scheme partners, such as the Accident Compensation Conciliation Service. The purpose of doing so would be to meet the justice needs of victims and injured workers in a proactive way, and thereby to maximise the capacity of WorkSafe to prevent future workplace injuries and fatalities, and to support injured workers and help them return to work.

The adoption of restorative practices may be achieved in a number of possible ways including by:

### **Enforcement**

- Permitting victims to make more wide-ranging statements to WorkSafe officers that go to issues beyond those directly relevant to questions of risk
- Providing for a more prominent role for victims in the negotiation of the terms of an enforceable undertaking—for example, WorkSafe could convey to the employer’s lawyers the types of outcomes (such as donations or particular safety improvement programs) the victim would welcome as part of an undertaking
- Assisting victims to exchange letters with defendant employers, or permitting them to make more substantial victim impact statements which could be submitted to employers outside the court context, not only in connection with the sentencing process
- Investigating ways to overcome the legislative barriers to disclosure of information to victims about the incident and any subsequent changes implemented at the workplace
- Keeping victims abreast of initiatives aimed at preventing recurrences of the type of incident central to their case, and providing them with opportunities to have input into relevant OHS policies and advocacy
- Facilitating contact between the family members and colleagues of injured or deceased workers in ways that do not compromise the integrity of any evidence to be given by witnesses at trial.

### **Claims**

- Providing claimants who indicate a need to do so with greater opportunities to recount to WorkSafe and others the story of the incident and the full impact it has had on their lives.

- Training staff to appreciate the value of acknowledging and validating claimants' experiences, and of providing an apology on behalf of the organisation and community where appropriate (for example upon the settlement of a common law claim).
- Providing information to parties such as colleagues, family members, and health care providers, about the value of listening to and validating injured workers' accounts of the incident and its impacts.
- Encouraging the use by clinicians of evidence-based clinical interventions (such as validation and forgiveness techniques and written anger expression) that have been shown to be effective in shifting perceptions of injustice that operate as barriers to an injured worker's recovery from injury.
- Establishing clearer pathways for injured workers to provide feedback about the specific OHS concerns they have, and have input into ongoing initiatives to improve OHS in particular sectors or industries.
- Applying restorative principles and practices when investigating and responding to complaints from claimants about WorkSafe's processes and service delivery. In this context, a restorative justice conference between the claimant and WorkSafe (and its agents) may also be an effective option in certain cases.

### 3. Explore opportunities for other improvements to the enforcement and claims processes

Finally, it is important to acknowledge that while restorative justice processes can offer benefits to those who participate in them, they are neither a substitute for formal legal frameworks, nor are they a panacea for the shortcomings or limitations associated with those frameworks. The need for fair, robust, consistent and effective legal processes remains essential, and the introduction of a restorative justice option should not distract from ongoing efforts to improve those processes.

There is therefore scope for WorkSafe to review its compliance and enforcement function to ensure its processes serve, as far as possible, to meet the needs and expectations of victims. Among the various strategies worth considering are those that:

- ensure victims have access to information about the nature and purpose of the overall enforcement process and of each step along the way and the roles of all system actors in clear and accessible language and a range of formats
- invite victims to identify any questions about the incident to which they seek answers, and the types of investigation or enforcement outcomes they believe would be appropriate
- explain clearly the reasons for all decisions made during the investigation and prosecution processes
- communicate the outcomes of investigations, prosecutions and other compliance activities to victims
- enhance all interpersonal interactions between staff and victims to ensure that they display fairness, respect, appropriate questioning, trust, friendliness, and openness.

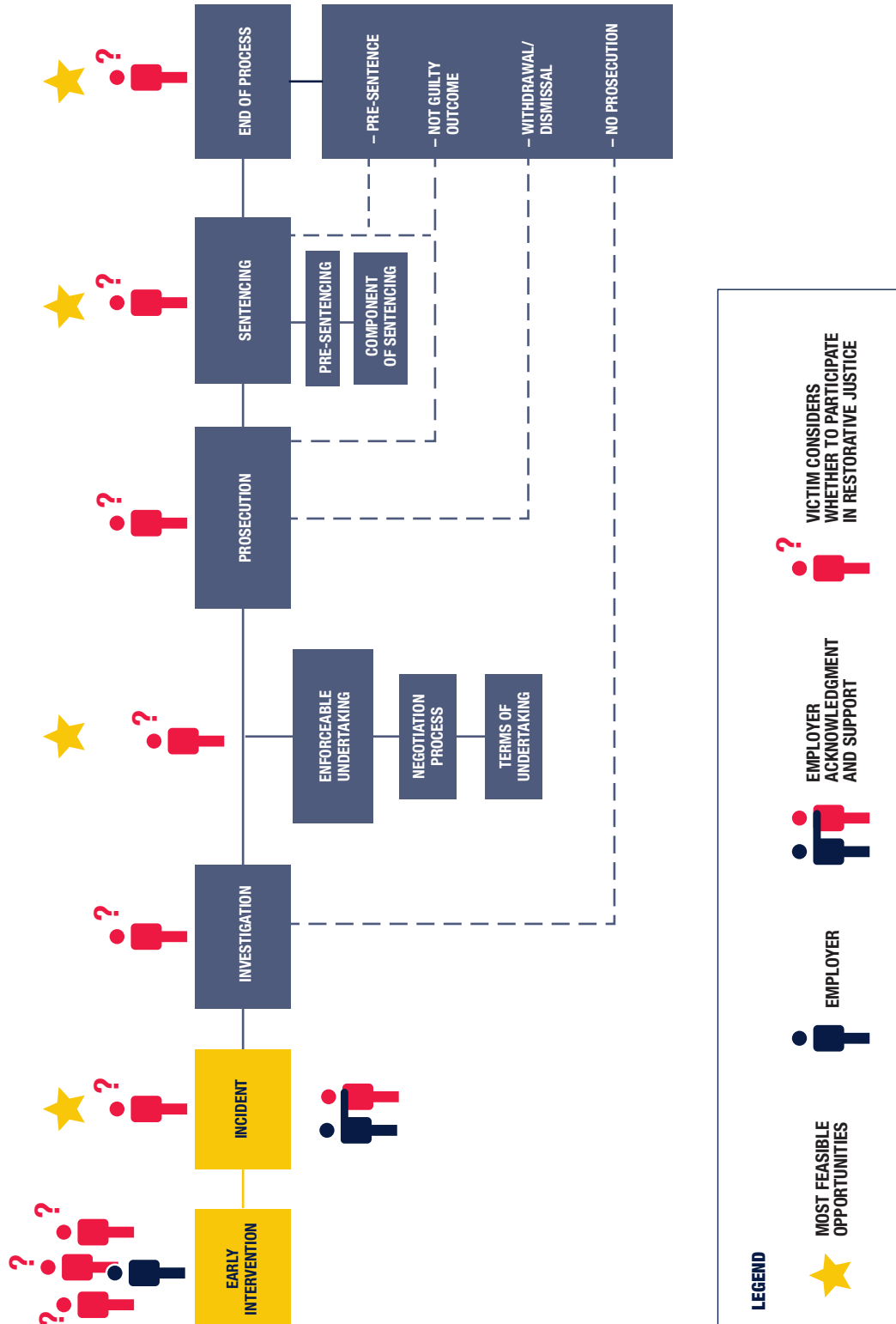
Similarly, there is scope for WorkSafe to review its claims and associated dispute resolution processes so they serve to meet the needs of workers, and manage expectations about the role and function of those processes.

Among the various strategies for ensuring the claims system is best able to fulfil its objectives and functions and remains fair and accessible are those that:

- adopt a client-centred approach, such as by identifying and meeting individual claimants' specific goals and needs in a proactive and tailored way
- communicate in user-friendly formats and language the role of WorkSafe, the purpose and limits of its functions, what its processes are intended to achieve, and what it can be like to go through them
- promote early resolution and access to services and entitlements, and improve the quality and timeliness of decision-making
- inculcate shared and consistent values, behaviours and guiding principles across all system actors.

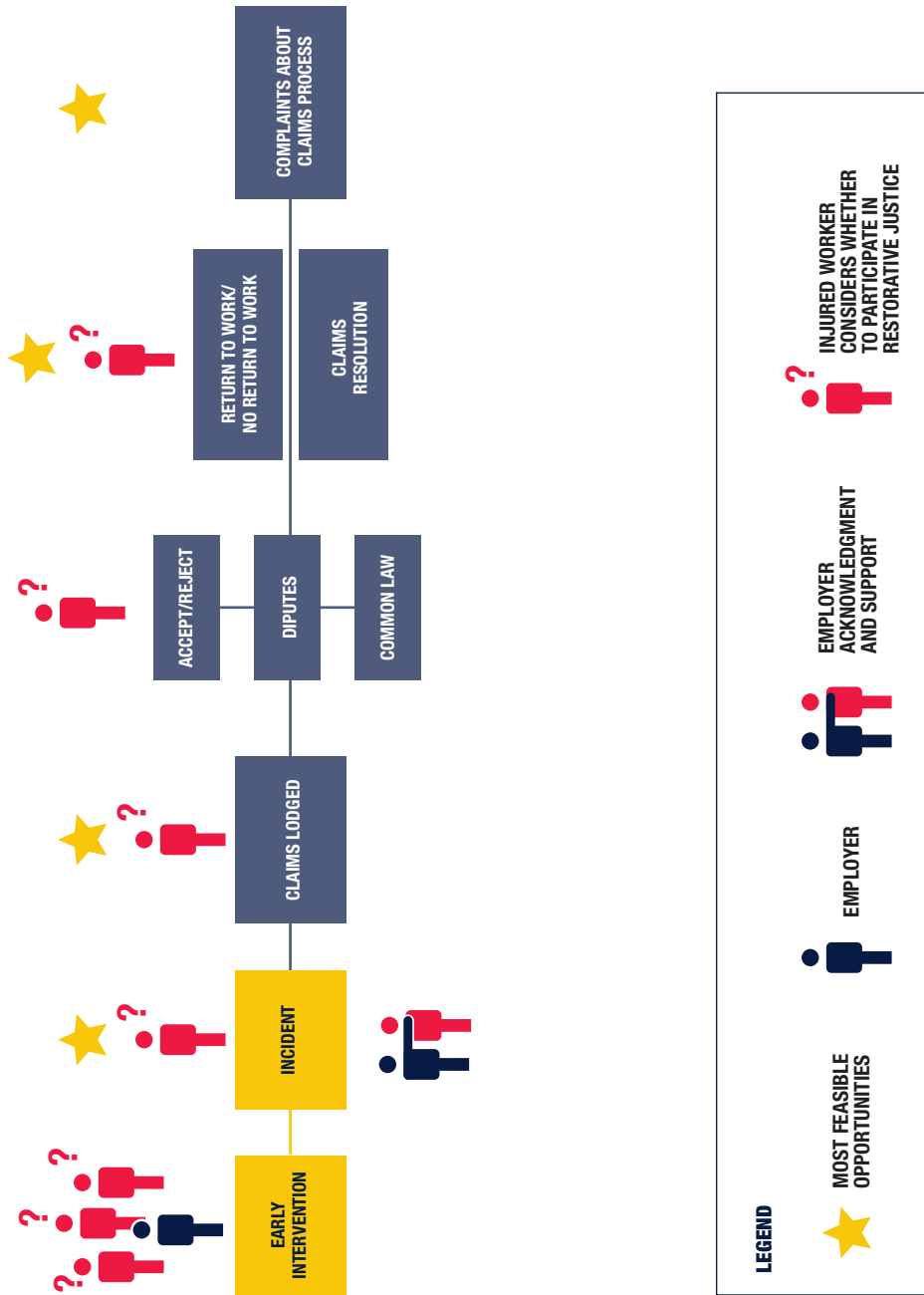
# Appendix A:

## Potential points of intervention for restorative justice responses (Enforcement)



# Appendix B:

## Potential points of intervention for restorative justice responses (Claims)





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