

# Reforming Sentence Deferrals in Victoria

## Centre for Innovative Justice submission to Sentencing Advisory Council

December 2022

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### Introduction

The Centre for Innovative Justice ('the CIJ') welcomes the opportunity to contribute to the Sentencing Advisory Council ('the SAC')'s consideration of the use of sentence deferrals in Victoria. The CIJ notes that sentence deferrals were initially introduced as a mechanism to promote offender rehabilitation, and that this remains the most common reason for their use.<sup>1</sup> The CIJ supports the use of justice system mechanisms that provide opportunities for the underlying causes of offending to be addressed, and for offenders to be connected with support and treatment. We also take the view that judicial officers should have at their disposal a broad range of sentencing tools and options to enable them to craft orders that are tailored to the individual case and the particular circumstances of each offender. For these reasons we are broadly supportive of the use of sentence deferrals. However, the focus of the CIJ's submission will be on considering how sentence deferrals could be used to increase access to restorative justice in the adult criminal jurisdiction in Victoria.

The CIJ has consistently advocated for victim-oriented restorative justice to be made broadly available. As recent inquiries,<sup>2</sup> the #MeToo movement and high-profile prosecutions remind us, criminal prosecutions do not deliver a positive experience of justice for all victims who participate in them. This is particularly true for victim survivors of sexual and family violence. Other options for delivering justice need to be

made available. As we will outline in this submission, restorative justice has the capacity to meet victims' justice needs in ways that criminal prosecutions alone cannot. Evidence tells us that victims are more likely to feel satisfied with restorative justice than they are with criminal prosecutions. Further, restorative justice can deliver significant therapeutic benefits for victims. Through its restorative practice arm, Open Circle, the CIJ has ongoing contact with victims and those supporting them who continually tell us that they want opportunities to take part in restorative justice.

It is clear that restorative justice needs to be made broadly available to victims. However, Victoria is lagging behind other jurisdictions in this regard. While there is a well-established, offender-rehabilitation-focused restorative program in the youth jurisdiction in Victoria, access to restorative justice for victims of crimes committed by adults remains patchy at best. We need linkages to restorative justice to be embedded in the adult criminal prosecution process in Victoria.

Ideally, restorative justice should be available at multiple points in a criminal prosecution, as well as when a victim chooses not to engage the criminal justice system at all. Legislation authorises the use of sentence deferrals for restorative justice at pre-sentence stage, making this an ideal starting point to grow awareness and use of restorative justice. Currently this is the only aspect of Victorian legislation governing adult criminal law and procedure that is

understood as allowing for restorative justice (although the term ‘restorative justice’ is not explicitly used by it). In the context in which restorative justice is not yet a mainstream feature of the criminal justice landscape, it is helpful to draw attention to the restorative justice purpose of sentence deferrals, as a means of sending the message to the legal sector that this is a legitimate practice that parliament has authorised.

In this submission, the CIJ will outline the benefits of using sentence deferrals to enable restorative justice to take place at a pre-sentence stage. We will go on to outline key features that must be put in place to support the successful delivery of victim-oriented restorative justice in this context, and other measures needed to ensure that sentence deferrals for the purpose of restorative justice can operate at their full potential.

#### **About the Centre for Innovative Justice**

*The CIJ is part of RMIT University. Founded in 2013, the CIJ’s objective is to develop, drive and expand the capacity of the justice system to meet and adapt to the needs of its diverse users. The CIJ meets this objective by conducting rigorous research which focuses on having impact – taking our research findings, most of which involve direct engagement with service users, and using them to develop innovative and workable solutions.*

#### **About Open Circle**

*Open Circle is the CIJ’s restorative practice arm and is a direct provider of restorative justice processes. Open Circle offers opportunities for victims and victim survivors to directly participate in a supported, carefully planned dialogue with the offender and/or other people involved. Open Circle is staffed by a highly qualified team of restorative justice practitioners who facilitate these processes.*

*In this submission, references to ‘the CIJ’ incorporate CIJ as the umbrella organisation, and to Open Circle, CIJ’s restorative practice arm.*

## **Terminology**

### **‘Victim’ and ‘offender’**

Throughout this submission the terms ‘victim,’ ‘victim survivor’ (to refer specifically to people who have experienced family or sexual violence) and ‘offender’ are frequently used. We have used these terms for the sake of clarity, given the submission addresses legislation that also uses these terms. However, we acknowledge that this language can be problematic, and in some restorative justice discourse there is a preference for using the term, ‘person harmed’ rather than ‘victim.’ Further, in the context of criminal proceedings, the term ‘victim’ has a specific meaning. In this submission, we sometimes use the word ‘victim’ in circumstances where the applicable legal term would be ‘complainant.’ We have opted to use the term ‘victim’ for convenience and ease of understanding. However, we acknowledge that not everyone who has experienced a crime or other harm identifies with this description. Further, in our restorative justice practice it is our sincere aim to recognise people for the complex individuals they are. By using the term ‘victim’ we do not mean to narrowly define someone’s identity solely with reference to their experience of being offended against or harmed.

Similarly, we recognise that using the term ‘offender’ to describe someone is potentially limiting and stigmatising. Restorative justice discourse often uses ‘person responsible for causing harm.’ In our restorative justice practice we create opportunities for people to accept responsibility for wrongdoing. However, we recognise our participants as people with complex identities, rather than seeing them exclusively as wrongdoers. We also recognise that, as abundant research on prison populations makes clear, most people who have been found guilty of criminal offences have themselves experienced victimisation in addition to other forms of disadvantage including poverty, mental illness and cognitive disabilities. However, we use the term ‘offender’ (or ‘accused person’) in this submission for the purpose of clarity, given the legislation being considered by the SAC uses this terminology.

## The CIJ's expertise in restorative justice

From 2015–2018 the CIJ piloted a restorative justice program that offered restorative processes in response to motor vehicle collision offences where someone died and/or was seriously injured.<sup>3</sup> Following the success of this pilot, the CIJ sought and obtained funding from RMIT University to establish Open Circle, an ongoing restorative justice service. Open Circle was launched in 2019. Open Circle offers restorative processes in a broad range of contexts and has facilitated these processes in response to the following types of harm:

- death and/or serious injury resulting from motor vehicle collisions
- homicide
- racism
- sexual violence (including sexual assault and sexual harassment)
- armed robbery
- assault.

In addition to providing individual restorative justice processes, the CIJ also has expertise in designing restorative engagement programs for external organisations. These programs provide avenues for a victim or person harmed to meet with a representative of an organisation responsible for harm, in order for the harm to be acknowledged and responded to. The CIJ has designed restorative engagement programs that respond to the following types of harm:

- students' experiences of sexual assault and sexual harassment in connection with their university study
- staff members who have experienced sexual assault or sexual harassment in connection with their employment at a large mining company.

The CIJ also contributed to the design and implementation of a truth-telling program for people of colour and First Nations staff and players who experienced racism in connection with an AFL club.

Additionally, the CIJ has advised the Transport Accident Commission, WorkSafe Victoria and the Coroners Court on developing restorative practices specific to each organisation's needs.

The CIJ is also a leader in restorative justice research and advocacy. One of the first projects that the CIJ engaged in involved a consideration of the systemic responses to sexual offences and possible additional approaches. This work, commissioned by the Attorney General's Department (Cth), resulted in a detailed proposal for a best practice restorative justice response to sexual offences.<sup>4</sup> The CIJ has since published widely on restorative justice practices,<sup>5</sup> on victims' experiences of criminal justice system processes<sup>6</sup> and has made numerous submissions advocating for the expansion of restorative justice in Victoria.<sup>7</sup>

In making this submission, the CIJ draws on its restorative justice practice experience, its experience in the design and implementation of restorative justice programs, and its research expertise.

### What is restorative justice?

A commonly used definition of restorative justice by Tony Marshall is as follows:

*A process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.<sup>8</sup>*

Marshall's definition focuses on process, or what restorative justice can look like in action. Restorative justice is also a philosophy; a particular way of understanding crime and its effects. As Howard Zehr, a key proponent of restorative justice, puts it:

*Although the term 'restorative justice' encompasses a variety of programs and practices, at its core it is a set of principles and values, a philosophy, an alternative set of guiding questions. Ultimately, restorative justice provides an alternative framework for thinking about wrongdoing.<sup>9</sup>*

Restorative justice is a way of asking different questions to those asked in criminal proceedings. Zehr describes restorative justice as focusing on the harms done, and consequent needs and obligations of all parties involved (victims, offenders and the communities in which the harm occurred). Zehr sees restorative justice as guided by the following six questions:

1. Who has been hurt?
2. What are their needs?
3. Whose obligations are these?
4. What are the causes?
5. Who has a stake in the situation?
6. What is the appropriate process to involve stakeholders in an effort to address causes and put things right?<sup>10</sup>

Acknowledging harm caused by crime and other acts of wrongdoing is central to restorative justice. A core principle of restorative justice is to avoid doing further harm when addressing the crime or wrong. Another central tenant is that people most affected by a crime should be centrally involved in the response to it.

### **The need for victim-oriented restorative justice**

As noted above, restorative justice is a philosophy and also a description of a range of practices that seek to put that philosophy into action. The form that these practices take can vary widely. Worldwide, there are a huge range of restorative programs that operate in contexts including schools, workplaces and in connection with criminal justice system processes. The aims and foci of these programs also vary. The well-established Youth Justice Group Conferencing program that operates in the youth justice jurisdiction in Victoria has a primary focus on enabling rehabilitation of young offenders who take part in it. This is consistent with the

principles that guide Victoria's criminal justice responses to young people, and is appropriate given the vulnerability and particular needs of this cohort.

The CIJ has long been advocating for the expansion of restorative justice into the adult criminal justice jurisdiction in Victoria. We take the view that, distinct from the offender-focused restorative justice that already exists in the youth jurisdiction, victim-oriented restorative justice is needed in response to crimes committed by adults. As will now be explained, central to this view is the recognition that victims have justice needs following their experience of crime, which cannot all be met by criminal prosecutions. Restorative justice has the capacity to meet some of the justice needs that the criminal justice system cannot.

#### **Victims' justice needs**

*It is often said that, after experiencing a crime, victims seek 'justice.' But what does 'justice' mean for victims? Recognising that victims of crime are not a homogenous group and their distinct characteristics and experiences shape how the crime affects them and their interests and needs following the crime, there are common themes in what victims want to happen in order for them to feel that justice has been done. The CIJ refers to these themes collectively as 'victims' justice needs.'*<sup>a</sup>

*Based on the research and the CIJ's experience of working directly with victims of crime, the CIJ uses the following categories of victims' justice needs: voice, validation, information, accountability, relationships, prevention, and resolution.*

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<sup>a</sup> Some scholars refer to these themes collectively as 'victims' justice interests,' e.g. Kathleen Daly, 'Reconceptualising Sexual Victimization and Justice' in Inge Vanfraechem, Antony Pemberton & Felix Mukwiza (eds) *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Taylor & Francis, 2014) 387. However, other researchers (e.g. Jane Bolitho, 'Putting justice needs first: A case study of best practice in restorative justice' (2015) 3(2) *Restorative Justice* 256, 267) have found the term 'justice needs' to be a closer fit with victims' own narratives, which is also the experience of the CIJ, and therefore we use the term 'justice needs'.

## **Victims' experiences of criminal prosecutions**

Recent inquiries into victims' experiences of criminal prosecutions in Victoria have highlighted that some victims come away from their contact with the justice system feeling dissatisfied, and in some cases, re-traumatised.<sup>11</sup> The #MeToo movement and recent high-profile sexual offence prosecutions in Australia have also drawn attention to the particular difficulties that victim survivors of sexual assault face when they seek justice.

The criminal justice system has not been designed to meet victims' individual justice needs, and cannot, of itself, meet the diverse range of needs victims have. Some justice needs may be met by criminal justice system processes. For example, giving evidence in a trial may meet a victim's need for voice. Some victims may experience a sense of validation and offender accountability in cases where offenders plead guilty or are found guilty. In those circumstances a victim may feel that the criminal justice system has believed them, that it has called out the behaviour as wrong, and has attributed the wrong to the offender and imposed a punishment on them.

However, not all victims have these opportunities. In some cases, police may decline to bring charges, or a prosecution may be discontinued in the early stages. This is often the experience of victims of sexual offences, given the high attrition rate in the prosecution of these matters. Even in cases where victims do give evidence, doing so may not always meet their need for voice. The legal structures governing this process are not designed to facilitate victims feeling able to tell their stories in the ways they want to tell them. Victim survivors of sexual offences often report feeling re-traumatised rather than empowered by the process of giving evidence, particularly by the experience of being cross-examined.

For some victims it is crucially important to know whether an offender is genuinely remorseful,

beyond any formal acknowledgment of responsibility that might be indicated on the offender's behalf via their lawyer in a plea of guilty. These victims may seek an opportunity to speak directly with the offender in order to gauge whether the offender truly understands the consequences of the offending. Others may want to directly tell the offender about the effects that the offending has had on them. Again, the criminal justice system does not facilitate such interactions.

In summary, the criminal justice system as currently constituted cannot meet all victims' justice needs. Its capacity to meet the justice needs of victim survivors of sexual violence is particularly limited. This is not to say that the criminal justice system is failing to fulfil its purpose. The core function of a criminal prosecution is to determine questions such as whether a crime has been committed, whether an accused person is guilty, and if so, what sentence is appropriate to impose in the circumstances. Criminal justice system processes are not primarily intended to address victims' needs, and perhaps could never fully meet all victims' justice needs without compromising their other functions. Instead of expecting the criminal justice system to deliver everything that victims need, other processes that are better suited to meeting these needs must be offered in addition to the existing criminal justice processes. Restorative justice processes have much potential in this regard.

## **Restorative justice can meet victims' justice needs**

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

## Victims' justice needs and restorative justice

Victims' justice needs	Description	Restorative justice conferencing's capacity to meet victims' justice needs
<b>Voice</b>	The need or desire the victim might have to tell the offender how they feel about the crime, to express emotion, to have the offender listen to and understand the impact of the crime on all aspects of their life.	The victim has the opportunity to explain the impact of the harm directly to the offender, and to tell their story in their own way, freed from the constraints of the legal process.
<b>Validation</b>	To have others believe and affirm their experience.	The victim's experience is believed, recognised and treated as meaningful within the process. It is not challenged or subject to attack.
<b>Information</b>	The need to understand more about the crime, about what happened and why.	The victim can seek answers from the offender in relation to unresolved questions about what happened. The offender is sometimes the only person who has this information.
<b>Accountability</b>	A desire that might encompass punishment, public acknowledgement, apology/expression of remorse, or other forms of recompense/reparation.	Being directly addressed by the victim about how the crime has affected their life provides impetus for the offender to gain a full understanding of the impact of their actions, which can promote accountability. In some processes, the offender may offer an apology to the victim.
<b>Relationships</b>	<p>To restore damaged relationships with others involved in or affected by the crime, including family members and the community.</p> <p>To make arrangements for how future interactions will be managed, whether or not a relationship is ongoing. For example, a victim may not want future contact with an offender, but may want to make arrangements to cover the possibility of them unexpectedly encountering each other in the community.</p> <p>In cases where the victim and offender did not know each other before the crime, a relationship of harm is nonetheless created between them through the event of the crime.</p>	<p>The victim has the opportunity to restore damaged relationships with others involved in or affected by the crime, family members and the community.</p> <p>If the victim does not want a relationship to continue, they have the opportunity to address any outstanding issues with the offender, such as what to do if by chance they encounter each other in the community.</p> <p>A victim who did not know the offender before the crime has the opportunity to reassess the way they have thought of or imagined them.</p>
<b>Prevention</b>	That what happened to the victim does not happen to anyone else.	The victim has the opportunity to convey the gravity of the effects of the crime to the offender, which may result in them developing insight and resolving to address the circumstances that gave rise to the offending.

	To address the circumstances that contributed to the crime. This can mean trying to ensure that the particular person responsible does not repeat their actions in the future, and/or contributing to change at a societal level.	The victim has the opportunity to encourage the offender to take steps towards rehabilitation/desistance.  A victim may find that participating in a restorative process assists them to engage in broader systemic advocacy.
<b>Resolution</b>	To feel that what needs to happen in order for the crime to be addressed has occurred.	Participating in a restorative justice process can allow a victim to feel the harm has been properly addressed, and they have had agency in this resolution.  Note: it is not expected that participating in restorative justice processes will necessarily mean that the victim no longer feels the effects of the crime such as grief and sadness. Resolution does not necessarily mean 'closure.'

### Research findings: benefits of restorative justice for victims of crime

Well-respected studies using random control methods have found that victims who take part in restorative justice processes have a higher level of satisfaction with their experience of justice compared to those who experienced criminal prosecutions.<sup>12</sup> Victims' sense of satisfaction with their participation in restorative justice was associated with feeling that they had had an opportunity to participate meaningfully in the process and that they had felt fairly and respectfully treated.<sup>13</sup> Victims from a diverse range of backgrounds, who had experienced offences that ranged from relatively minor crimes to very serious crimes and included those committed by juveniles and by adults, consistently reported feeling better off after taking part in restorative justice processes.<sup>14</sup> In fact, there is evidence that suggests that victims of serious offences are even more likely to be satisfied with their experience of a restorative justice process compared to victims of less serious crimes.<sup>15</sup>

Participation in restorative justice has been shown to improve victims' feelings of safety.<sup>16</sup> There is also evidence of restorative justice's therapeutic benefits for victims.<sup>17</sup> A study looking at the experiences of victims of burglary and robbery who took part in restorative justice and met face-to-face with the offenders found that

these victims' symptoms of post-traumatic stress disorder were lower in comparison with victims who only experienced a criminal prosecution.<sup>18</sup>

The evidence-base for the effectiveness of restorative justice in response to sexual violence is still emerging.<sup>19</sup> However, there is some evidence to suggest that restorative justice processes can be effective in this context. A meta-study published in 2016 examined restorative justice processes operating in Australia and internationally that offer restorative justice processes in response to sexual offences. It noted that the majority of these processes were designed to positively benefit victim survivors' wellbeing, and that the evidence suggests that participating in them was satisfying for victim survivors. Ultimately, the report concluded that restorative justice processes can be used successfully following sexual harm, if processes satisfied certain conditions.<sup>20</sup>

### Our experience

*Through Open Circle, the CIJ provides restorative justice services in response to a diverse range of harms. We are a relatively new service, however, since our inception we have received a steady stream of inquiries and referrals from victims (directly, and indirectly on their behalf from people supporting them), who want to participate in restorative justice.*

*Victims and those who work with them commonly tell us that even if a victim has engaged in psychological or other therapeutic treatment in response to the harm they have experienced, many feel that engaging in a restorative justice process would be a meaningful step in their healing and recovery process.*

### Options for victims

The CIJ's position, articulated in more detail in previous reports,<sup>21</sup> is that given the evidence about the benefits of restorative justice for victims, the limitations of criminal prosecutions to deliver satisfaction for victims (particularly victim survivors of sexual violence) and that victims themselves are calling for the opportunity to take part in restorative justice, victim-oriented restorative justice should be made widely available to victims in Victoria.

Restorative justice will not suit all victims, and cannot of itself meet all victims' justice needs. However, it can meet justice needs that criminal prosecutions alone cannot. The CIJ takes the view that victims should be given a range of options when they seek a justice response. Restorative justice should be one of the available options.

Consistent with the principle of expanding the justice options open to victims, the CIJ does not advocate for restorative justice to replace criminal prosecutions. Rather, it is our view that victims should be able to choose to engage in restorative justice *as well as* pursuing a criminal prosecution.

We also acknowledge that many victims, and particularly victim survivors of sexual violence, choose not to report to police or otherwise engage with the criminal justice system. Restorative justice should also be an option in those circumstances. As such, the CIJ takes the view that restorative justice should be available in the following circumstances:

- the victim chooses not to report to police
- the victim has reported to police, and police have decided not to initiate charges

- a prosecution is underway, and a withdrawal of charges or discontinuance is being considered
- as a condition of diversion
- pre-sentence
- post-sentence.

In its recent report into improving justice system responses to sexual violence, the Victorian Law Reform Commission recommended making restorative justice available in all of the above circumstances, in the context of sexual violence.<sup>22</sup>

### Availability of restorative justice in Victoria

While the Youth Justice Group Conferencing program is an embedded feature of the youth justice system, until recently the adult criminal justice system in Victoria had no established restorative justice programs. The following services are recent additions to the landscape:

#### Open Circle

As noted above, Open Circle provides restorative justice processes in response to a broad range of harms and crimes, including sexual violence. Open Circle seeks to offer restorative justice processes at multiple points in the criminal prosecution process, including pre-sentence.

#### Victim-Centred Restorative Justice (VCRJ) Program

The Victorian Department of Justice and Community Safety operates a restorative justice program. Initially established as a service for victim survivors of family violence in response to a recommendation of the Victorian Royal Commission into Family Violence, the program has recently been expanded. It now offers restorative justice processes for eligible victims of a broader range of offence types. However, these processes are only available post-sentence (if and when the person responsible has been convicted and sentenced).<sup>23</sup>

Despite the existence of the above programs, restorative justice is not a mainstream feature of the adult criminal justice system in Victoria, and



is currently rarely used in the context of crimes committed by adults. In this, Victoria lags significantly behind other jurisdictions, such as the ACT, which has a legislated restorative justice program that is available in response to most offence types, and New Zealand, where all criminal prosecutions involving a victim are referred for restorative justice.<sup>b</sup>

As the SAC notes in *Reforming Sentence Deferrals in Victoria: Consultation Paper*, (Para 4.12) numerous legal policy bodies have expressed support for, or explicitly recommended, making restorative justice a feature of the Victorian adult criminal justice system. Given the well-established benefits of restorative justice, discussed above, the CIJ takes the view that offering visible, accessible restorative justice processes alongside criminal prosecutions is well overdue in Victoria. In the next section of this submission, we will explain that greater use of sentence deferral to allow for restorative justice processes to be held would help to promote the expansion of restorative justice in the Victorian context.

### **Restorative justice at a pre-sentence stage**

One of the four possible uses of the deferral power is to ‘allow the offender to participate in a program or programs aimed at addressing the impact of the offending on the victim.’<sup>24</sup> This section does not explicitly use the phrase ‘restorative justice,’ and the second reading speech for the 2010 bill that introduced this provision does not use the term either.<sup>25</sup> However, in the second reading speech the then Attorney-General stated that the new provision defining the four permissible reasons for sentence deferrals was intended to reflect the recommendations of the SAC to broaden the ability to defer a sentence.<sup>26</sup> The SAC’s recommendation included broadening the sentence deferral power in order to encourage the use of restorative justice, and stated:

*From a victim’s perspective, the use of restorative justice could result in greater satisfaction with the process, while for the*

*offender it may lead to a better understanding of the impact of his or her offending behaviour on those directly affected by it.*<sup>27</sup>

Therefore, we can read *Sentencing Act 1991* (Vic) ss 83A(1A)(d) as reflecting the SAC’s recommendation regarding the use of sentence deferrals for the purpose of restorative justice. Further, victim-centred restorative justice processes would logically fall within the definition in this section, as processes of this nature are clearly opportunities for offenders ‘to participate in a program or programs aimed at addressing the impact of the offending on the victim.’ Therefore we can read ss 83A(1A)(d) of the *Sentencing Act* as authorising the use of sentence deferrals for the purpose of restorative justice.

As outlined above, the CIJ takes the view that restorative justice processes should be available at multiple points in a criminal prosecution. This creates more opportunity for victims to be able to access a restorative justice process at a time when doing so will be most useful to them. This will be different for each victim, however, in the CIJ’s experience, there are some victims for whom the opportunity to take part in restorative justice at a pre-sentence stage will be particularly helpful.

Some victims seek the opportunity to directly participate in a response to the harm or crime they have experienced. They may feel frustrated by the limitations on victim participation that are a feature of criminal prosecutions. Being able to experience a restorative justice process, in which they are full participants, at a pre-sentence stage may provide victims with a sense of meaningful involvement in the prosecution. Further, Open Circle has worked with victims who, in addition to experiencing the ongoing harm that the crime has resulted in for them personally, also express concern about the impact of the criminal prosecution on the offender and their family. Some seek the opportunity to express this care before the

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<sup>b</sup> Matters are referred for an assessment for restorative justice at a post-plea, pre-sentence stage. Either party can elect not to participate.

prosecution finalises. It can be important to some victims that the offender knows that they do not wish them ill, and do not wish for them to be heavily punished. Some want to convey this so that the offender knows that the sentence they receive will reflect the will of the court, but not necessarily the wishes of the victim. The idea that seeking a punishment that is as harsh as possible for the offender is not the primary objective for all victims does not seem to receive much consideration in public commentary. However, it is Open Circle's experience that not all victims want an offender to receive a lengthy sentence. This is consistent with the research on victims' justice needs.<sup>28</sup>

Of course, for some victims the sentence the offender receives is extremely significant. Some victims feel very strongly that they would not want to contribute in any way to a process that might result in a lighter sentence for the offender. As restorative justice should be voluntary, victims who feel this way should have the option of choosing not to participate in restorative justice at a pre-sentence stage. If they were interested in exploring restorative justice after the prosecution was over and the offender sentenced, they could do so at that point. Crucially, if restorative justice is offered at a pre-sentence stage, the possible effect on the offender's sentence should be clearly explained to the victims (and to the offender). Victims who have concerns about this potential effect of the sentence might choose not to take part. However, given that each victim has a different experience and has different priorities, the fact that some victims may object to offenders receiving sentencing benefits due to participation in restorative justice should not prevent those victims who might want to engage in the process at a pre-sentence stage from doing so.

In addition to providing the opportunity for victims who want to engage in restorative justice at a pre-sentence stage, use of the sentence deferral mechanism has the potential to encourage offenders to participate in restorative justice. Restorative justice should always be voluntary for participants. However, offenders choosing not to take part in restorative justice can be

disappointing for victims who would like to experience the process. Offering the opportunity of a sentence deferral to an offender in circumstances where their participation will be taken into account in the sentencing process may mean that a restorative justice process that would otherwise not have gone ahead can be held. In turn, this process could be highly beneficial for a victim who strongly wishes to engage in restorative justice.

A contrary view is that incentives should not be offered to encourage offenders to participate in restorative justice. The concern is that offenders may not participate authentically and may not show appropriate victim empathy. The CIJ's observation is that there are already many initiatives that use various forms of coercion in order to leverage consent from participants. While valid criticisms may be made of these practices, it might also be said that despite the manner in which consent has been obtained, these programs and initiatives still have benefits for participants and others. Arguably, the coercive leverage of the criminal justice system is used to positive effect, for example, in processes used in the Drug Court, or the practice of imposing bail conditions requiring a person to engage in therapeutic treatment. An accused person may comply with the conditions imposed in these contexts primarily in order to gain a better sentence or to remain at liberty, however a positive outcome is nonetheless achieved. The same can be said for using a sentence deferral to encourage an offender to take part in restorative justice – the offender may primarily participate in restorative justice in order to gain a forensic benefit, however if this means that they take part in circumstances where this is greatly desired by the victim, this may nonetheless be considered a positive outcome.

Concerns about an offender's capacity to participate respectfully in a restorative justice process can be addressed by ensuring that the restorative justice programs available in this context have rigorous screening and assessment processes. Open Circle's restorative justice processes also involve multiple intensive preparation sessions with each participant, that take place before people

are brought together. These sessions with offenders help the person become ready to hear the victim's story and understand the impact that the crime has had on the victim, so that they can participate meaningfully when it is time for the participants to come together in a facilitated dialogue. It is the experience of Open Circle's facilitators, and other restorative justice practitioners we have spoken with, that the preparation phase of restorative justice processes can see significant shifts and growth for participants. This can mean that an offender might initially agree to the process because they are primarily motivated by seeking a forensic benefit for themselves. However, if they engage, the preparation process can help them access an empathetic aspect of themselves and help them to take responsibility on a personal level. This can in turn lead to meaningful experiences for victims.

It should also be noted that victims who want to engage in restorative justice have a range of aims they are hoping to achieve through this process. Not all victims are looking for the offender to show deep insight or genuine remorse and may not be concerned about the underlying motivation for an offender's participation in the process. For these victims, having the opportunity to participate in a restorative justice process may be the most important consideration, not whether or not there were incentives offered to the offender in order to achieve that outcome, or whether or not the offender received a lighter sentence than otherwise would have been the case.

### **Promoting the use of sentence deferrals for the purpose of restorative justice**

In *Reforming Sentence Deferrals in Victoria: Consultation Paper*, the SAC notes that the extent to which deferral has been used for the purpose of restorative justice is unclear (Para 4.13). The CIJ suggests that it is unlikely that it has been used in this way often, if at all. It is possible that *ad hoc* restorative justice processes have been held, and deferrals used to allow them to do so, but we are not aware of any examples. Prior to Open Circle starting in 2019

there were no restorative justice programs designated to operate alongside a prosecution in the adult criminal justice system, so there would have been no obvious service to which to refer matters if a deferral for this purpose was contemplated. Open Circle has facilitated restorative justice processes at a pre-sentence stage, and has also received referrals for restorative justice at a pre-sentence stage that did not ultimately proceed. However, in all of these cases the Court used its general power to adjourn a criminal hearing to allow for an assessment for restorative justice suitability to take place<sup>29</sup>, or for a restorative justice process to be held, rather than deferring sentence for these purposes.

As recognised by many legal policy organisations, there is a need to expand the availability of restorative justice in Victoria.<sup>30</sup> The currently under-utilized mechanism of a sentence deferral for the purpose of restorative justice presents an opportunity to encourage the use of restorative justice in connection with criminal prosecutions. As will now be explained, it is the CIJ's view that a number of courses of action would assist with this goal.

### ***Legislation to give greater effect to the purpose of sentencing deferrals as addressing the impact of the offending on the victim***

In enacting ss 83A(1A)(d) of the Sentencing Act, Parliament clearly intended to allow restorative justice processes to occur in the context of criminal prosecutions. To give effect to this intention, further legislation is needed. As recognised by the VLRC, it is crucial that what is said and done within a restorative justice process is not able to be used as evidence in current or future legal proceedings, and the best way to ensure this is via legislation.<sup>31</sup> In the CIJ's experience, it is possible to engage in restorative justice in the absence of such legislation, however, there is a pressing need for legislation that has the definitive effect of making what is said and done inadmissible in other legal proceedings, both civil and criminal. This is to protect the restorative justice process, and also to give confidence to legal system stakeholders.

## **Greater awareness that the sentence deferral power allows restorative justice**

While the wording of ss 83A(1A)(d) clearly allows for restorative justice, the term 'restorative justice' is not explicitly used. To send the message that restorative justice is a valid feature of the criminal justice landscape, it would be useful to amend this section so that it clearly names 'restorative justice' as the process it contemplates. In the alternative, 'restorative justice' could be identified specifically as at least one of the processes contemplated by this provision. Amending the Sentencing Act in this way would create the opportunity to raise awareness within the legal sector about the restorative justice purpose of the sentence deferral power.

### **Proposal: how should restorative justice work when used in the context of sentence deferrals?**

In this section of our submission, we will provide an outline of key features a referral process that would enable restorative justice to take place in the context of a sentence deferral.

## **Restorative justice must be suggested to victims in a considered way**

The CIJ advocates for the use of *victim-oriented* restorative justice in the adult jurisdiction. Victim-oriented restorative justice refers to restorative justice processes that are designed to meet victims' justice needs. As outlined above, the CIJ also takes the view that victims should be given as much choice and agency as possible when deciding what pathways to take when seeking justice. From that view, restorative justice is useful in that it presents another option, in addition to a criminal prosecution, that victims can consider engaging in, and it therefore expands the justice options open to victims, whether or not they choose to take part. It is important that restorative justice in the context of sentencing deferrals is offered in a way that allows a genuine opportunity for a victim to exercise choice and agency.

If the prospect of seeking a sentence deferral in order for restorative justice to take place is raised

during a criminal prosecution, and the idea did not originate with the victim themselves, the prosecuting agency should explore the idea with the victim in a way that best enables the victim to make an informed decision about whether participation in restorative justice is right for them. This communication should be informed by best-practice standards for communicating with victims during criminal proceedings,<sup>32</sup> and therefore should have the following characteristics:

- The person initiating the conversation with the victim should have an already established rapport with the victim, and should have a good understanding of that person's justice needs. This will allow them to explain how participation in a restorative justice process may be able to meet the victim's individual justice needs.
- The discussion about restorative justice should be held at a time and place that will allow the victim to consider the information without feeling under pressure to make a quick decision.
- The victim should be informed that it is their choice about whether to take part, and that if they decide not to, a restorative justice process will not go ahead.
- The victim should be given clear information about the benefits of restorative justice for victims, and about the likely effects of engaging in restorative justice at a pre-sentence phase. That is, the victim must be informed that the accused person would seek to rely on their participation in restorative justice at sentencing, and may receive a lighter than otherwise sentence because of this.

If defence lawyers were to explore restorative justice as a possibility on behalf of their clients, they should do so at an early stage in proceedings. We understand that criminal law is practiced in a fast-paced environment, particularly in the summary crime arena, and that practitioners are under significant time pressure. However, raising restorative justice as a possibility on the day that a plea hearing is scheduled at court is unlikely to be warmly

received by the victim. It is more likely that a victim would be disinclined to explore restorative justice if it is suggested in that way, as they may (perhaps correctly) view the suggestion as a cynical attempt on behalf of the accused person to acquire mitigating material at the last minute. This would be unfortunate, as restorative justice has the capacity to deliver significant benefits to victims, but this is unlikely to be appreciated by a victim if the option of restorative justice is not raised with them at an appropriate time.

### **Setting clear expectations**

The CIJ takes the view that offenders who take part in restorative justice at a pre-sentence stage are entitled to have their participation recognised when they are sentenced. The restorative justice processes offered by Open Circle require intensive engagement from all participants. Sometimes what is required would be comparable with intensity and frequency of complying with obligations under a community corrections order. It is only fair that these efforts are taken into account. Further, as discussed above, the possibility of a sentencing benefit may encourage an offender to participate in restorative justice, which ultimately provides the victim with the opportunity to experience a restorative justice process.

As also noted above, some victims will not choose to participate in a restorative justice process if doing so may result in a lighter than otherwise sentence for the offender. Those victims can elect not to take part in restorative justice at a pre-sentence stage. In order to allow victims to make an informed decision, they must be clearly informed about the consequences of agreeing to take part, and as explained above, given enough time to make a considered decision.

Consistent with international standards on the provision of restorative justice,<sup>33</sup> offenders should not be penalised for deciding not to take part in restorative justice. Further, restorative justice is voluntary for all participants, and an offender should not be penalised for attempting to take part in a restorative justice process and then withdrawing from it. Both victim and offender participants must be prepared for the

possibility that the other party might decide to end their participation at any time. Open Circle's approach is to prepare potential participants for this potential eventuality from the outset, in order to ensure that if it does occur, it does no further harm to participants.

### **Ensuring restorative justice is a realistic option prior to a sentence deferral**

Before a sentence deferral for restorative justice to occur is sought by legal representatives or ordered, it is crucial that the matter has already been assessed by a restorative justice provider, and that the provider is able to confirm that the matter is suitable, and that both the victim and the offender have agreed to take part.

The restorative justice processes offered by Open Circle require both the victim and the offender to agree to participate before a process can take place. Further, Open Circle conducts robust assessments with each participant before accepting a referral. In these assessments, Open Circle examines whether each participant's aims for the restorative justice process are consistent with what the process can achieve, whether each participant appears able to take part in a respectful and constructive way, and whether each participant agrees to take part in accordance with the program's principles. Not all referrals are found suitable.

Until suitability assessments have been completed, and informed consent to take part has been given by each party, Open Circle cannot say whether a matter is suitable for a restorative justice process. Without this certainty, there is the risk that a sentence deferral may be ordered in circumstances where a restorative justice process has no chance of taking place.

### **Addressing concerns about the use of sentence deferrals**

In *Reforming Sentence Deferrals in Victoria: Consultation Paper*, the SAC explains some of the common concerns stakeholders have expressed regarding the use of sentence deferrals (Para 2.22). In this section of our submission, the CIJ will consider how these

concerns apply in the context of using sentence deferrals in order for restorative justice to take place.

### **Concerns of delay to criminal proceedings**

A common concern is that increased use of deferrals may delay criminal proceedings, and concerns that delays caused by deferral will have a detrimental effect on victims of crime, particularly in cases involving physical and sexual violence

In this submission, the CIJ advocates for sentence deferrals to be used to allow *victim-oriented* restorative justice to occur. If sentence deferrals are used for this purpose, this will be because the victim has elected to take part in a restorative justice process that has been intentionally designed to meet their needs. As outlined above, restorative justice may be even more appealing to victim survivors of family violence and sexual violence. Therefore, any delay resulting from the use of sentence deferrals for the purpose of restorative justice will be unlikely to cause further harm to a victim, because their wishes will have led to the delay. Of course, it is crucial that victims are fully informed that if they decide to take part in restorative justice at a pre-sentence stage, this will mean that it will take longer for the criminal prosecution to finalise.

Concerns that delays caused by the use of sentence deferrals will impact the backlog of cases the courts are experiencing should not, in the CIJ's view, stand as a barrier to the use of this mechanism to promote the use of restorative justice. Given the evidence that victims are more likely to be satisfied with their experience of restorative justice than they are with their experience of the criminal justice system, every opportunity to provide victims with access to restorative justice should be taken. The CIJ submits that providing an avenue for victims to meaningfully experience justice should outweigh any inconvenience to the courts caused by cases taking longer to finalise.

Further, if there has been a sentence deferral, no court time or resources will necessarily be taken up between the date the deferral order is made,

and the return date. This is in contrast to matters that may be failing to finalise without a good reason, and may be taking up valuable court time by being subject to multiple adjournment applications.

### **Judicial caution about ordering a deferral in cases where imprisonment is inevitable**

From a restorative justice perspective, sentence deferrals should not be limited to cases where a community-based disposition is the expected outcome. If restorative justice programs are designed in response to victims' needs, questions of whether an offender is likely to receive a sentence of imprisonment or not should not determine whether a victim has the opportunity to engage. The research tells us that restorative justice can offer significant benefits for victims, including reducing the traumatic effects of crime. From a victim-centred perspective, it makes sense to make restorative justice broadly available to all victims, regardless of the degree of seriousness of the offence or the likely sentence that the offender will receive.

### **Practitioners requesting deferrals without having developed a plan of available supports**

In the context of requesting sentence deferrals for restorative justice to take place, the CIJ recommends that, as explained above, the following steps occur prior to a request for deferral being made:

- a referral to a restorative justice provider is made
- the provider assesses the matter for suitability
- informed consent to participate is obtained from the victim and the offender.

If these steps are followed, practitioner requests for sentencing deferrals for the purpose of restorative justice should only be made after it has been established that restorative justice can realistically go ahead in the matter before the court.

### ***Lack of awareness of sentence deferrals***

As noted above, the CIJ takes the view that there is an opportunity to promote the understanding and use of restorative justice by educating the legal sector about the fact that sentencing deferrals can be used for this purpose, and that the most effective way of achieving this would be by inserting the words 'restorative justice' into the relevant provision of the Sentencing Act.

### ***Concerns about funding for lawyers representing legally aided clients to cover all necessary preparation and appearances for cases where a sentence has been deferred***

The CIJ recognises that providing thorough and holistic legal support for clients, which may include assisting them to connect with therapeutic and rehabilitative services, may include referring them for restorative justice, and may include multiple court appearances, is resource intensive. Legal service providers should be adequately resourced to enable them to offer holistic services to their clients.

### ***The limited availability of relevant services***

There are currently a limited number of restorative justice providers in Victoria. If there is an increased use of sentence deferrals for the purpose of restorative justice, which, in the CIJ's view, should occur, greater resourcing of the restorative justice sector will need to take place.

As outlined above, the CIJ takes the view that restorative justice can be particularly useful in the context of sexual violence. A challenge to the successful delivery of restorative justice that responds to sexual violence is the current absence of community-based treatment programs for adults who have used sexual violence, in cases where the person's behaviour is not at a level that would be classed as serious or repeat sexual offending. There is a need to provide services that can address a lower-level range of sexually harmful behaviour, in the Victorian community.

### **Conclusion**

The option of restorative justice should be made widely available to Victorian victims. Currently, restorative justice is rarely used in the context of crimes committed by adults in this jurisdiction. It is the CIJ's view that we should take the opportunity to address this situation by promoting awareness that the Sentencing Act currently provides for the use of sentence deferrals for the purpose of restorative justice. It may be useful to amend ss 83A(1A)(d) of the Sentencing Act so that it clearly names 'restorative justice' as the process it contemplates. In the alternative, 'restorative justice' could be identified specifically as at least one of the processes contemplated by this provision.

There should also be greater use of sentence deferrals for the purpose of restorative justice. This would have the effect of:

1. making restorative justice available to victims and offenders who want to engage in it as a pre-sentence stage
2. expanding awareness across the justice system that restorative justice is an option in connection with criminal prosecutions, one which can be engaged in at pre-sentence and other stages, and which offers significant benefits for victims and offenders who take part.

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