

Centre for
Innovative Justice

Innovative justice responses to sexual offending

– pathways to
better outcomes for
victims, offenders and
the community

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Executive Summary

Sexual assault is complex, pervasive and insidious. The criminal justice system is expected to deliver a sense that justice has been done, yet its current response is inadequate for the large majority of sexual assault victims.

Victims of sexual assault have historically been met with denial and disbelief, with society failing to develop an adequate response to a crime it did not fully recognise or understand, and to gendered assumptions it refused to relinquish. In recent decades, hard won improvements - called for by reformers and feminists, and implemented by well-intentioned governments - have seen sexual assault taken more seriously in legal and political arenas alike. Investigation, prosecution and court procedures have improved; specialisation has been encouraged; and victims have been provided with fairer treatment and additional support services.

Despite this, however, sexual assault remains the most under-reported form of personal violence, while estimates suggest that the crucial evidentiary requirements and standards of proof demanded by the criminal process mean that the chance of a sexual assault incident resulting in a conviction is as low as, and potentially lower than, one in one hundred. Hard hitting policies of tougher penalties, longer sentences and stringent release practices, meanwhile, do little to address the majority of sexual offending, instead making offenders reluctant to take responsibility for their offending and choosing to contest the allegations. This in turn makes victims reluctant to pursue a prosecution, not wanting to be drawn into the protracted adversarial process.

In other words, most victims of sexual assault do not report to the police, do not pursue a prosecution, or if they do, do not secure a conviction. This means that the conventional criminal justice system, with its single option of investigation by police and prosecution through the courts, is failing to provide an adequate response to the majority of victims of sexual assault. While the prosecution and collective denunciation of sexual offending should continue to be pursued, and while ongoing efforts to reform the conventional criminal justice system remain critical, alone they will not markedly change this state of affairs. Additional non-criminal law based avenues, meanwhile, such as the pursuit of statutory compensation or damages through the civil jurisdiction, have significant limitations attached.

Clearly, victims need more choice in their pursuit of justice – a suite of options from which they can identify the path or paths that best suit their circumstances; options that provide them with the opportunity to tell their story, to have the harm acknowledged, to participate in the process and to have a say in the outcome. Some of these options may, to date, not have been pursued precisely because the area of sexual assault is so complex, yet may improve the justice system's response if implemented in the right way. Accordingly, this report argues that the justice system should be responsive, inclusive, flexible and fair – that justice processes should be designed in a way that make them accessible and a more realistic prospect to more victims of sexual assault, rather than reserved for a select few who happen to have cases which are able to meet high legal thresholds.

This report by the Centre for Innovative Justice (CIJ) was commissioned by the Attorney-General's Department (Cth) as one of a series of reports identifying important innovations in the justice system. The CIJ's objective in this report is to identify innovative justice processes that have the potential to meet more of the needs of victims of sexual offending; to address public interest concerns; and to prevent reoffending in ways that the conventional justice system has limited capacity to achieve.

In doing so, the report suggests that reform does not depend upon a choice between a 'tough' and a 'soft' response but, rather, upon providing an *appropriate* response – one that is able to

meet the disparate needs of victims, while maintaining the integrity of the rights of offenders. As such, the report builds upon existing theoretical work and proposes a best practice, sexual offence restorative justice conferencing model and framework, influenced by national and international innovations, and which is able to be tailored and implemented in all Australian jurisdictions. Restorative justice conferencing involves a facilitated, safe and structured encounter between the victim and the offender, providing an opportunity to repair the harm caused by the offending.

The report explains that, to date, restorative justice conferencing practices have tended to exist on the periphery of Australian criminal justice systems and have not been extended to sexual offending in the adult jurisdiction. This is primarily because of legitimate concerns about victims being re-victimised and sexual assault being re-privatised, rather than condemned in the public sphere. While these concerns must be heeded, the CIJ draws from a range of existing examples and concludes that - with comprehensive safeguards and a coordinated, properly resourced system - sexual offence restorative justice conferencing has the potential to meet more of the justice needs of those victims who are being failed by the existing system.

In detailing a best practice restorative justice conferencing model for sexual offending, the report addresses such issues as:

- The importance of legislation, overarching principles and operational guidelines
- The importance of a restorative justice oversight body, incorporating a specialist gender violence team, to oversee and monitor the implementation of the model
- The need for skilled and specialist restorative justice conference facilitators
- The need for an expert assessment panel to determine the suitability of individual cases for restorative justice conferencing
- The importance of basic eligibility criteria, including that all parties consent, and the need for offender and victim age limits
- Pathways into and out of restorative justice conferencing, with appropriate police, prosecution and judicial oversight at different stages of the process
- The need for protections around admissions made during a conference
- The importance of consultation with Aboriginal and Torres Strait Islander communities and culturally and linguistically diverse communities around any innovative justice initiatives
- The importance of restorative justice processes being responsive to the needs of victims and offenders with cognitive impairments, disabilities and mental illness
- The potential outcome agreements and what to do in the event of breakdown
- The importance of funded, accessible community based sexual offender treatment programs to complement a restorative justice approach, and
- The balance required between victim autonomy and public policy considerations.

Importantly, the report addresses critical questions regarding the types of offences and categories of offenders which are appropriately dealt with in this context. In recognition of the diverse experience of victims and the fact that individual harm is not necessarily proportionate to common conceptions of the offence's severity, the CIJ believes that there should be no explicit offence or offender exclusions. Rather, victim autonomy, the consent of both parties, and expert forensic assessment should guide the decision about which cases are suitable.

This is not to suggest that standards, processes, gatekeepers, safeguards and judicial and prosecutorial oversight – all of which are explored – should not be addressed at certain stages. Rather, the CIJ suggests that there should be no public prescription of offences or offenders that are either more or less suited to sexual offence restorative justice conferencing.

Taking account of the contentious nature of the proposals, the CIJ recommends that sexual offence restorative justice conferencing be implemented in a phased approach – similar to the way in which restorative justice conferencing evolved in New Zealand, and is prescribed in the Australian Capital Territory (ACT). This will allow the criminal justice system to adapt; legal culture to change; professionals to develop expertise; and services to evolve.

As such, the CIJ presents a model which is victim-centred, which does not compromise offenders' legal rights, and which addresses community safety objectives. Though only appropriate in certain cases, taken in conjunction with the criminal justice system and other therapeutic justice initiatives, restorative justice conferencing has significant potential to expand the existing criminal justice response and move the debate and discussions that surround it forward.

Beyond restorative justice conferencing, the report looks to national and international therapeutic justice initiatives, such as New York State's Sexual Offense Courts. While primarily offender focused, initiatives such as problem-solving courts, specialist practices and courts, re-entry courts, and circles of support and accountability, all aim to reduce reoffending, and therefore reduce victimisation. In other words, such courts do not demonise or stigmatise offenders but, rather, recognise that community interests are best served by creating incentives for the rehabilitation of offenders. Accordingly, this report argues that addressing offending behaviour within a rehabilitative and reintegrative framework should be a critical component of any systemic response to sexual assault.

Further, the report considers the value of mechanisms that have a 'truth-telling' function. Such mechanisms include the crimes compensation jurisdictions, as well as innovative aspects of the Royal Commission into Institutional Responses to Child Sexual Abuse and the Defence Abuse Response Taskforce, all of which offer victims the opportunity to have their experience acknowledged by an authority in a safe and supported environment.

Finally, the report also comments on the limitations of crimes compensation and civil damages claims, noting scope for further application of restorative and therapeutic practices to enhance the potential of these jurisdictions to provide more victims with meaningful justice options.

Overall, the report makes a suite of recommendations aimed at achieving greater justice for more victims; holding more offenders to account; and more effectively preventing crime. It argues that the damaging and widespread nature of sexual assault requires an appropriately tailored and flexible response from the justice system – one that seeks to tackle and unpack the complicated nature of sexual crimes; to operate as part of the solution not only to individual offences but also to the systemic nature of sexual violence; and to draw on expert knowledge of sexual offending. In doing so, the report demonstrates that innovation is possible and that the current dearth of sexual offence victims accessing meaningful justice, and offenders being held to account, can be redressed.

Ultimately, the report argues that justice processes should be viewed as an essential service and therefore not be beyond the reach of majority of sexual assault victims. Achieving this requires whole of government responses, as well as fundamental social and cultural change to entrenched attitudes and behaviours. It also requires a challenge to assumptions about what is, and what is not, achievable in the area of law reform - testing the limits with appropriate care and caution, simply because the needs of victims are too important to do otherwise.

5 - List of Recommendations

Restorative Justice Conferencing for Sexual Offending

1. All jurisdictions should develop a restorative justice statutory framework. This will ensure consistency, accountability and transparency. Legislation should not be overly prescriptive, in recognition of the importance of flexibility and case-by-case assessments.
2. Restorative justice conferencing principles and guidelines should be developed. Guidelines should be both general and specific to sexual offending, and be based on the two-tiered guidelines developed in New Zealand.
3. Restorative justice units should be introduced within respective state and territory Departments of Justice to oversee all restorative justice conferencing programs.
4. Specialist gender violence teams should be incorporated within each restorative justice unit to oversee the administration of sexual offence restorative justice conferencing.
5. Assessment panels should be established to determine suitability for sexual offence restorative justice conferencing on a case-by-case basis. The assessment panels should comprise forensic mental health professionals, representatives of the OPP, senior restorative justice conference facilitators, and victim and offender specialists. The specialist gender violence team should coordinate and support the assessment panel.
6. A workforce of victim and offender specialists, modelled on New Zealand's Project Restore program, should be developed. A victim and offender specialist should be assigned to each case deemed suitable by the assessment panel.
7. Further consultations should be held with forensic mental health professionals, the justice sector and the gender violence sector to explore whether decisions of the assessment panel should be reviewable.
8. Two sets of minimum restorative justice facilitator competencies should be developed, the first relating to general restorative justice conference facilitators and the second relating to sexual offence restorative justice facilitators. These should be modelled on the core competencies devised in New Zealand. Associated facilitator specialist accreditation processes should also be developed.
9. Jurisdictions should adopt a two-stage process for determining whether a sexual offence case is appropriate for a restorative justice conference: first, eligibility and second, suitability.
10. Basic eligibility criteria should be developed, with no specific offence or offender exclusions.
11. Further consultations should be conducted in relation to whether there should be a minimum age for victims to participate in sexual offence restorative justice conferencing.
12. Ten years should be the minimum age for offender participation, in appropriate cases.
13. Opportunities for referral to restorative justice conferencing should be provided at all stages of the criminal justice system.
14. Further consultation should take place with police, the OPP, the legal profession and counsellors in relation to developing either oral or written information about restorative justice conferencing that can be given to victims during the 'options talk' and at the prosecution stage.

15. Referrals for restorative justice conferencing made by police at the pre-charge stage should only be permissible in those cases not being referred for prosecution (and where the eligibility criteria are met), with proper oversight of police discretion.
16. The OPP should only be permitted to suggest a restorative justice conference at the prosecution stage in cases where a successful prosecution is unlikely. Any such decision should be made according to published guidelines and by a number of OPP personnel.
17. There should be judicial oversight of any proposed referral to restorative justice conferencing made at the post-charge prosecution stage.
18. Subject to further consultation and consideration, a wholesale immunity should apply to admissions made during a restorative justice conference. The exception to this is that a facilitator should be permitted to make a report either to child protection or to the police if they consider someone to be at immediate risk. If this qualification is to apply, the offender must be advised of this qualification at the outset. Any immunity should be explicit and codified.
19. Further consultation should occur in relation to whether the fact that an offender has participated in and completed a conference should be recorded and able to be used for relevant public safety purposes.
20. A comprehensive consultation process should be undertaken with Aboriginal and Torres Strait Islander communities and a range of community organisations in relation to the justice needs of these communities. This should occur prior to the implementation of any restorative justice model to ensure that the perspectives and needs of Aboriginal and Torres Strait people are accounted for early in the design phase.
21. A comprehensive consultation should be undertaken to ensure appropriate application of restorative justice conferencing to culturally and linguistically diverse communities.
22. More community based sexual offending treatment services should be funded and linked in with restorative justice programs so that reoffending and rehabilitation can be properly addressed.
23. Restorative justice conferencing should be introduced in three phases, relating to type of offending and stage of the criminal justice process:
 - First: non-sexual, general adult restorative justice conferencing at all stages of the criminal justice system
 - Second: sexual offence restorative justice conferencing at all stages of the criminal justice system, except the post-charge stage, and
 - Third: post-charge sexual offence restorative justice conferencing.
24. Ongoing monitoring and evaluation of the restorative justice program should be a core function of the restorative justice units and specialist gender violence teams.

Sexual Offence Specialist and Problem-Solving Courts

25. All Australian jurisdictions should, as a minimum, develop specialist court-based practices for dealing with sexual offence matters, building on the suite of specialist practices implemented in Victoria.
26. Governments should consider the value of developing and implementing specialist sexual offence courts as a way to respond to the complexities of sexual offending and to deliver more responsive justice outcomes to victims of sexual assault.

27. Governments should consider establishing pilot sexual offence problem-solving courts initially in the Magistrates'/Local Courts, with a view to their possible subsequent expansion to the higher courts.
28. Any consideration of specialist and problem-solving courts should include close examination of the New York Sexual Offense Courts as a best practice example of a multifaceted specialist and problem-solving approach to sexual offending.
29. Governments should review the benefits of sexual offence pre-release or re-entry courts in an Australian parole context.
30. Governments should review the benefits of Circles of Support and Accountability for sex offenders and implement pilot programs as an additional strategy for reducing reoffending and supporting offender reintegration.

Truth-telling Mechanisms and Civil Justice Responses to Sexual Offending

31. All jurisdictions should review their crimes compensation tribunals and procedures to ensure that they incorporate appropriate therapeutic practices to improve the experience of victims, and to make them more accessible to more victims.
32. Further consideration should be given to the development of referral pathways from the crimes compensation and civil jurisdictions to sexual offence restorative justice conferencing.
33. All jurisdictions should examine the potential and options for incorporating therapeutic and restorative justice practices into procedures for making civil claims in respect of sexual assault, including exploring the use of judicial or quasi-judicial authority to reinforce their value.