

SENTENCING 5310 – 2019 – RESEARCH ASSIGNMENT

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TOPIC:

THE JOURNEY NOT THE DESTINATION-

THE CASE FOR THE ESTABLISHMENT OF A STATUTORY SCHEME FOR RESTORATIVE JUSTICE CONFERENCES TO BE AVAILABLE FOR ANY INDICTABLE AND SUMMARY OFFENCES PROSECUTED IN VICTORIAN COURTS.

Restorative Justice has been described as “one of the most researched justice innovations of the twenty-first century”¹. New Zealand has been using restorative justice conferences in its criminal justice system for almost three decades. In Canada, the use of restorative justice programs have been growing rapidly over the past four decades. The Australian Capital Territory enacted legislation to allow restorative justice as a supplementary response for serious offences committed by adults in February 2016², and will expand its availability for sexual offences and family violence offences at a later date. In 2016 the Victorian Law Reform Commission recommended the establishment of a statutory scheme for restorative justice conferencing for indictable offences in Victoria³. Yet Victoria still does not give victims of crime (either indictable or summary) committed by adults the option to participate in a restorative justice conference. In Victoria, there is still no statutory scheme for restorative justice conferencing in any court except the Childrens’ Court⁴.

This paper will first set out what restorative justice is, and then consider the arguments and concerns most often raised by opponents of the expansion and use of restorative justice conferences for indictable and summary offences. The potential benefits of restorative justice conferences will be outlined, and weighed against the perceived risks. These concerns, potential benefits and risks will be used to inform and guide how a statutory scheme for restorative justice conferences for indictable and summary offences can be rolled out in all Victorian courts.

¹ Jane Bolitho, “Putting Justice Needs First: A Case study of Best Practice in Restorative Justice” (2015) 3(2) *Restorative Justice* 256, 257

² *Crimes (Restorative Justice) Act 2004 (ACT)*

³ Recommendation 32 – Victorian Law Reform Commission, *The Role of Victims in the Criminal Trial Process* Report August 2016, Page 194

⁴ Section 415 *Children Youth and Families Act 2005 (Vic)* – The Childrens’ Court may defer sentencing to allow a child to participate in a Group Conference

The title of this paper seeks to address one of the most common misconceptions of restorative justice conferences- that they are focused on a destination (outcomes such as compensation, apology, or a reduction in reoffending etc.) rather than the journey itself (the process of participation)⁵.

What is Restorative Justice?

Restorative justice is a different philosophy of how we look at crime and how we respond to it. Traditionally, the English Common Law has assumed that the victim's interests are identical with the wider public interest represented by the crown⁶. As a result, the state represents both the victim and the community. The victim is forced to share representation with the state. Often, when the needs of the victim and those of the state diverge, the needs of the victim may be disregarded (or at least leave victims with the impression that their views are disregarded). This is frequently the case when the Director of Public Prosecutions (DPP) makes a decision to discontinue a prosecution. In these cases, Section 9 of the *Victims Charter Act 2006* (Vic) only obliges the OPP to provide the victim with information regarding the prosecution, but does not require consultation with the victim at all. The Office of Public Prosecutions (OPP) Service and Communication Charter goes slightly further, but still only obliges the OPP to:

- (a) seek the victim's views when a decision to discontinue is being considered;
- (b) inform the victim of the outcome of the decision; and
- (c) provide the victim with reasons for the decision⁷.

Once that decision to discontinue a prosecution is made, the victim has effectively lost their voice in the process, and will likely never have the chance to tell their story. A victim who suffers an injury from an act of violence may still make a victim's of crime application to the Victims of Crime Assistance Tribunal (whether or not a perpetrator is charged) and receive some financial assistance and access to free counselling, however the case is often determined "on the papers" without a hearing⁸. Restorative justice conferences can meet the previously neglected needs of victims and of the community. It may therefore be argued that restorative justice conferences have grown out of the desire by both community and victim's rights groups to have a separate input into how the consequences of crime are dealt with, and how victim's needs are met. One of the first victim-offender mediations sanctioned by a court was the Victim-Offender Reconciliation Project developed in Ontario, Canada in 1975-

⁵ Daly, Kathleen, "What is Restorative Justice? Fresh Answers to a Vexed Question" (2015) 12 *Victims and Offenders* 1, 13

⁶ Johnstone, Gerry, "*Restorative Justice, Ideas, Values, Debates*" 2002, Willan Publishing, Portland, Oregon, Page 67

⁷ Office of Public Prosecutions Service and Communication Charter, available on the OPP website:

www.victimsandwitnesses.opp.vic.gov.au/victims/commitment-to-you

⁸ Section 7 Victims Of Crime Assistance Act (Vic) 1996

following one of the first such meetings between vandalism offenders and their victims in Ontario in 1974⁹.

It is beyond the scope of this short paper to even scratch the surface of the practice of restorative justice by First Nations peoples around the world. However, a great deal of work has been done with the First Nations in Canada. Amongst the Plains Cree in the Fort Qu'Appelle, Saskatchewan areas in Canada, the role of the Chief "*was to solve a dispute through the use of mediation and the giving of gifts (restitution), similar to restorative justice.*"¹⁰. According to the answers of participants in a study conducted by Masters Candidate Mirian Handel at the University of Regina, Canada, in 2003, healing of the victim, and of the person who caused the disruption in the social order, by restoring the person's balance, are important elements of the *holistic* philosophy of First Nations justice¹¹. However, it is important to bear in mind that whilst restorative and holistic elements existed and continue to exist among First Nations Justice, the practices were direct, swift, and harsh¹². Overall, there is clear evidence to support the argument that the practice of restorative justice is an attempt, at least, to recreate some of the practices of First Nations justice.

The philosophy behind restorative justice also incorporates *Socrates'* view of criminal responsibility. Socrates argued that virtue is in essence knowledge of what is good, knowledge is so powerful that it guarantees its own efficacy. Logically, therefore, vice is rooted in ignorance, and criminals ought to be educated rather than punished¹³. It is possible to argue therefore, that the education of the criminal comes about when he or she understands the impact of the crime on the victim. Such understanding is often best achieved when the criminal is confronted, face to face with the victim and they engage in dialogue.

For the purposes of this paper, the United Nations Handbook on Restorative Justice Programmes' terminology for restorative process will be used: "*any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator*"¹⁴. This view of restorative justice places as much emphasis on the process as on the outcome or agreement of a restorative justice conference.

Arguments over the definition and scope of restorative justice sometimes produce "*passionate and strongly worded debates*"¹⁵. Perhaps one of the greatest hurdles to restorative justice conferences being accepted and implemented within the criminal

⁹ King, Freiberg, Batagol, Hyams, "Non-Adversarial Justice" 2nd Edition 2014 The Federation Press, page 42-43

¹⁰ Handel, Miriam, "*Pushing the boundaries*": *Restorative Justice practice in a First Nations community*" 2003, The University of Regina (Canada) ProQuest Dissertations Publishing, Page 18

¹¹ *Ibid* at page 173-174

¹² *Ibid* at page 176

¹³ Pangle, Lorraine Smith, "Moral and Criminal Responsibility in Plato's Laws" August 2009 *American Political Science Review* Volume 103, Number 3 Page 457

¹⁴ United Nations Office on Drugs and Crime, "*Handbook on Restorative Justice Programmes*", 2006, United Nations, New York, at Page 7

¹⁵ King, Freiberg, Batagol, Hyams, "Non-Adversarial Justice" 2nd Edition 2014 The Federation Press, Page 51

justice system is that there is really no agreement as to what restorative justice in fact seeks to restore- whether it is as simple as restoring peace between victim and offender; restoring the dignity and self-worth of the victim; restoring the moral character of the offender; or restoring the social and moral well-being of the entire community¹⁶. Putting aside arguments about what restorative justice seeks to restore, it is argued that what is important for victims, offenders, and the community, is the process of the meeting itself, rather than a focus on what the meeting hopes to achieve.

Notwithstanding the heated debates among proponents of restorative justice, it is argued that Victoria's criminal justice system will eventually incorporate a pragmatic "hybrid" model of restorative justice by picking and choosing the best features of all approaches and adapting them to the needs of the system¹⁷.

The use of restorative justice conferences in relation to family violence is inappropriate

Restorative justice conferences in such cases have the likelihood of re-privatising gendered crimes, reinforcing power imbalances, re-traumatizing victims¹⁸ and are unsafe. Some critics contend that conducting a restorative justice conference for domestic violence or sexual assault offences could undermine the victims', offenders', and communities' perception of the seriousness of such offences. When, on 10th February, 2016 the Attorney General of the ACT discussed the implementation of restorative justice in the ACT justice system, the Leader of the Opposition made the point that restorative justice will not address domestic violence cases, that a specialized domestic violence court needs to be properly established and properly funded instead. Furthermore, that resources need to be spent on funding police, the courts, the Office of Public Prosecutions and the prisons¹⁹.

Other criticisms along the same theme are that victims of domestic violence (the overwhelming majority of whom are female) leave the perpetrator (usually male) and seek safety and assistance from the police and support agencies. A restorative justice conference would bring the victim back into the sphere of influence of the perpetrator, and promote the healing of the relationship²⁰. The very opposite of what the victim wanted when she sought help. The common dynamic or "cycle" in family violence cases: offender perpetrates violence on the victim; perpetrator becomes *remorseful* and *seeks forgiveness*; the *victim forgives*; there is a "honeymoon" period, the perpetrator erupts with violence again- are some of the very processes that a

¹⁶ Pangle, Lorraine Smith, "Moral and Criminal Responsibility in Plato's Laws" August 2009 *American Political Science Review* Volume 103, Number 3 Page 457

¹⁷ See also UN Social and Economic Council, Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, ESC Res 2002/12, 37th plenary meeting 24 July, 2002

¹⁸ Victorian Law Reform Commission, *The Role of Victims in the Criminal Trial Process* Report August 2016, Page 190

¹⁹ Mr Hanson, Leader of the Opposition in the Legislative Assembly for the ACT, 10 February, 2016 Week 1 *Hansard* at Page 131

²⁰ King, Freiberg, Batagol, Hyams, "Non-Adversarial Justice" 2nd Edition 2014 The Federation Press, page 55

restorative justice conference seeks to achieve (apology and forgiveness). Other identified and oft referred to risks of allowing restorative justice conferences for cases involving violence against family members is that the victim may be pressured to put his or her needs to one side in favour of the needs of the family unit.

From the outset it is acknowledged that concerns for the safety of the victim, the risks of bringing a victim back into a violent relationship, the need for the community to see that family violence is treated seriously, and the need to properly fund support services are unquestionably valid. What needs to be taken into account is that a principled denial of the opportunity for a victim of family violence to participate in a restorative justice conference takes away a victim's autonomy and contributes to the victim feeling that others know best what is in his or her interests and what he or she can and cannot achieve²¹. Furthermore, restorative justice conferences should not be seen as the "cure all" for the scourge of family and intimate partner violence in our community²². There are some cases of domestic violence that will not be suitable for a restorative justice conference. A properly trained and well supported assessor will be able to conduct a thorough assessment of the case, speak to the victim, the perpetrator and their respective supporters and the matter deemed unsuitable for a restorative justice conference at that stage. It is argued that even if the conference is not proceeded with at this early stage, that these discussions with the victim are beneficial in and of themselves. They empower the victim by giving them the option to proceed and allow referrals for services to be put in place.

Can the concerns regarding victims be ameliorated and are the benefits of a restorative justice conference worthwhile

As the title to this paper alludes to, much of the discourse concerning restorative justice conferences revolves around the outcome: will the conference lead the perpetrator to desist from committing crime; will the victim be coerced into agreeing to something against his or her interests, will the community see the outcome of the conference and say that the perpetrator "got off scot free". It is argued that when one considers the "process" of the restorative justice conference itself (independent assessment, voluntary participation, thorough and extensive preparation, support for victim and perpetrator prior, during and after the conference, properly trained and resourced expert family violence convenors and family violence practitioners, and flexibility during the course of the conference) rather than the agreement at the end- this will usually mitigate those concerns. Furthermore, a restorative justice conference is not the conclusion or end of the process, it is not even the tip of the ice-berg. As Julia Hennessy, Mike Hinton and Natalia Taurima, argue: "*the use of a restorative process cannot stand in isolation and be deemed successful without effective follow-up programmes or courses, monitoring and the implementation of programmes that address all of the harm and its implications*"²³.

²¹ *Ibid.* Page 190

²² Hayden and Gelsthorpe and Morris, "A restorative approach to Family Violence: Changing Tack", 2014, Taylor and Francis Group, Chapter 10, Page 114

²³ *Ibid.* Julia Hennessy, Mike Hinton and Natalia Taurima, "*Restorative Practice with Family Violence*" Page 124

The abovementioned concern that female victims of domestic violence would be encouraged to restore the relationship with their perpetrator if a restorative justice conference is attended to by the preparatory work that takes place with the victim prior to the conference. The preparatory work in meeting the victim, his or her support people and arranging appropriate services for the victim all takes place before the conference date or venue is even considered. A flexible restorative justice program will not have a time limit by which a conference is to take place. The conference itself will take place when and if all of the parties are ready. The *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* produced by the United Nations Social and Economic Council makes this point very well:

*“Some cases involving very serious offences are highly sensitive and require extensive preparations prior to a face-to-face encounter. It is at this stage that the risks of re-victimization are, perhaps, the highest. In some recorded cases, preparations for a restorative justice session between the offender and the victim extend over a period of several years”*²⁴.

The United Nations Social and Economic Council, “*Basic principles on the use of restorative justice programmes in criminal matters*” sets out the following best practice guidelines that seek to address the potential for undue pressure on victims and re-traumatization:

- Restorative processes should be used only with the free and voluntary consent of the parties. The parties should be able to withdraw such consent at any time during the process;
- Obvious disparities with respect to factors such as power imbalances and the parties' age, maturity or intellectual capacity should be taken into consideration in referring a case to and in conducting a restorative process. Similarly, obvious threats to any of the parties' safety should also be considered in referring any case to and in conducting a restorative process. The views of the parties themselves about the suitability of restorative processes or outcomes should be given great deference in this consideration.
- Neither the victim nor the offender should be induced by unfair means to participate in restorative processes or outcomes;
- Facilitators should be responsible for providing a safe and appropriate environment for the restorative process. They should be sensitive to any vulnerability of the parties.²⁵

When these principles are followed, when the victim and offender is properly prepared, appropriate referrals put in, and the conference is responsive to the needs of the victim, then the risk of re-traumatizing the victim and allowing the victim to be brought back into the violent relationship is ameliorated. When one looks at the

²⁴ United Nations Office on Drugs and Crime, “*Handbook on Restorative Justice Programmes*”, 2006, United Nations, New York, at Page 60

²⁵ United Nations Social and Economic Council, “*Basic principles on the use of restorative justice programmes in criminal matters*”, ECOSOC Resolution. 2000/14, at Page 35

restorative justice conference as a “process”, then even if the conference is ultimately cancelled for safety reasons, or because the offender is uncommunicative, then “*it may be that simply going through the process of preparing for a conference and having to talk about the offence, explain one’s behaviour and so on, can be viewed as delivering some of the restorative goals*”²⁶. Furthermore, there are studies that support the proposition that where there is truly informed consent to participate in a restorative justice conference by the victim and offender, that the risk of reoffending can decrease²⁷. Another study involving an empirical synthesis of existing restorative justice literature on the effectiveness of restorative justice practices carried out by Jeff Latimer, Craig Dowden and Danielle Muse in 2005 found that restorative justice programmes, on average, yielded reductions in recidivism compared to non-restorative approaches to criminal behavior, and offenders in the treatment groups were significantly more successful during the follow up period²⁸.

Even though there has been an obvious shift in Victorian policy direction since the 227 Recommendations of the Royal Commission into Family Violence was released in March 2016,²⁹ the challenges faced by female victims of intimate partner violence continue in the current model of the criminal justice system in Victoria. These challenges include:

1. Obtaining a Family Violence Intervention Order (even with the help of police), and making a statement to police after an episode of family violence requires the victim to come into contact with the perpetrator at court. Some regional country courthouses in Victoria (such as Kyneton, Dromana, Horsham) do not have safe witness rooms, and only one waiting area necessitating the female victim of family violence to sit in the same small waiting room awaiting the case to be heard as the perpetrator. Often this is the first time that the victim has laid eyes on the perpetrator since the incident of violence took place, and without any proper preparation or counselling as to how to cope.
2. Female victims just want the physical and emotional violence and abuse to stop;
3. Female victims want advice and support, not necessarily arrest and prosecution and would prefer to avoid the trauma of a trial. One female victim of family violence gave evidence at a public hearing at the Victorian Royal Commission into Family Violence in 2016 and said “*...for me experiencing the trial was horrendous...if there was such restorative justice where he could admit he’s done something wrong if he was willing to, and I could express the*

²⁶ Hooper, Christopher, “*Your Story and Theirs: The Youth Justice Group Conference Program*” Monash University Law Review 2013 Vol 39 Issue 2, Page 563

²⁷ Gelsthorpe, L, “*The Promise and Possibilities of Restorative Justice as a Way of Addressing Intimate Partner Violence in England and Wales*” in Hayden, Gelsthorpe and Morris, “*A restorative approach to Family Violence: Changing Tack*”, 2014, Taylor and Francis Group, Page 113

²⁸ Latimer, Dowden, Muise, “The Effectiveness of Restorative Justice Practices: A Meta Analysis” (2005) 85 (2) *The Prison Journal* 127 at Page 137

²⁹ *Ibid*

level of hurt and open his eyes to the layers of hurt from self-doubt...the nightmares...[He] was initially my high school friend. I know there's a soul there somewhere. I feel if I was face-to-face with him and tell him...if it was an environment that was safe, if he could hear it, surely it would pull at his heartstrings to change...I would have much preferred to sit face-to-face and tell him how his actions-the long-term effects [they] have on me. That would be therapeutic...For him to hear it and apologise would be justice. The effect is the same, that he won't do it to someone else''³⁰.

4. The arrest, prosecution and incarceration of men in already overcrowded prisons in Victoria may make matters worse, because the criminal justice system has a brutalizing effect.
5. Prison sentences (in particular short sentences) quite often do not provide programs for rehabilitation prior to the offender being released³¹.

These problems already exist in the criminal justice system, but when the process of restorative justice conferences is followed carefully and flexibly, then even these limitations can be addressed.

1. Restorative justice conferences can be conducted in a “shuttle” format, where the victim sits in a separate room with his or her family, counsellors and support people (and enters from a secure entrance unknown to the offender). The offender enters from a separate entrance.
2. In many cases of family violence the last time that the victim saw the offender, the former was powerless, the victim may well have been powerless throughout the relationship. Through the course of a restorative justice conference the power dynamics change. The agreed facts of the family violence are read out. The victim confronts the perpetrator in a safe environment to describe how the crime affected him or her and the ongoing suffering he or she experiences, then the victim's family and supporters tell the offender how the family violence impacted upon them. The perpetrator has an opportunity to speak and seek an apology. The perpetrator is then vulnerable in the presence of the victim and the victim is empowered to grant or withhold forgiveness³². This shift in the power dynamics in favour of the victim opens the way for a problem-solving dialogue to take place. When an offender is actively involved in the process of working out an appropriate outcome he or she is more likely to abide by it. Such an outcome may include a commitment to undertake courses or programmes, abide by a safety plan, or restitution. This is supported by an empirical synthesis of existing restorative justice literature on the effectiveness of restorative justice practices carried out

³⁰ Victoria, Royal Commission into Family Violence, Summary and Recommendations (2016) Victorian Government Printer, at Page 139

³¹ Emeritus Professor David Brown, Justice Reinvestment, Lecture, Sentencing Advisory Council Website: <https://www.sentencingcouncil.vic.gov.au/.../David%20Brown%20Justice%20Reinvestment.doc>

³² King, Freiberg, Batagol, Hyams, “Non-Adversarial Justice” 2nd Edition 2014 The Federation Press, Page 61

by Jeff Latimer, Craig Dowden and Danielle Muse in 2005. That study found that offenders who participated in restorative justice programs tended to have substantially higher compliance rates than offenders exposed to other arrangements, and they were also significantly more likely to complete restitution agreements³³.

Furthermore, the evidence of Professor Leigh Goodmark, from the University of Maryland in the United States at the Royal Commission into Family Violence was telling:

Restorative justice places a great deal of power in the hands of the victim survivor, including the power to decide whether restorative justice processes are appropriate, to confront their partners, and to have their partners admit responsibility and seek reparations”³⁴.

This argument applies as much for those victims who for various reasons do not wish to separate from the perpetrator as for those victims who wish to separate, but whose’ contact with the perpetrator will continue:

“For people who are going to be co-parenting, and for people who are living in the same small geographic or ethnic or religious communities, figuring out how to re-order relationships after intimate partner violence, knowing that there will be ongoing contact between the parties, is especially important. I think there’s a real place for restorative justice there”³⁵.

3. The Royal Commission into Family Violence submissions listed several conditions for a restorative justice programme including: victims would need to request a restorative justice conference, consent and continue to consent to it throughout. Victims felt safe during the process, that any restorative justice process would hold offenders to account, and that it be accessible to all victims, including culturally and linguistically diverse victims³⁶ (and LGBTIQ and those with a disability).

Restorative justice conferences and the reduced sentences imposed by the courts as a result of participation will diminish the public’s confidence in the criminal justice system

Because discussions in restorative justice conferences are privileged, the community may well perceive that a secretive “backroom deal” has been arranged between victim and offender, or that the victim has been coerced into accepting an apology and outcome plan from the offender. Furthermore, there is the possibility that a restorative justice conference will result in:

- (a) the offending not being publicly denounced;
- (b) that a restorative justice conference will be seen as a “soft option” for offenders or

³³ Latimer, Dowden, Muise, “The Effectiveness of Restorative Justice Practices: A Meta Analysis” (2005) 85 (2) *The Prison Journal* 127 at Page 137

³⁴ Victoria, Royal Commission into Family Violence, Summary and Recommendations (2016) Victorian Government Printer, at Page 139

³⁵ *ibid*

³⁶ *Ibid* at Page 141

(c) a second-rate justice outcome³⁷.

Public awareness of the process and safety mechanisms involved in preparing for and conducting a restorative justice conference will allay concerns with regards to secretive agreements or victims being pressured into agreeing to less than they deserve. The best practice standards for restorative justice facilitators produced by the Victorian Association for Restorative Justice include a range of participants who can be involved in the dialogue, depending on their needs, wishes, risks and availability. These include: the person harmed, the person responsible, support person for the person harmed and person responsible, a representative of an agency (such as police or community), and an observer. The observer can be any member of the public who does not participate, but whose presence is accepted by the participants³⁸. The presence of an impartial observer will go a little of the way to de-mystifying the transformations and changes in power dynamics that appear too good to be true in theory until one experiences it in practice. Similarly, inviting members of the public to participate and become involved in the restorative justice conferencing programme will create a broad basis of support of it.

Section 5 of the Victorian Sentencing Act 1991 sets out the only purposes for which an offender may be sentenced. The purposes that a restorative justice conference may undermine include subsection (1)(b): deterring the offender (“specific deterrence”) and other persons (“general deterrence”) from committing the same or similar offences and subsection (1)d) denunciation of the offender’s conduct. Therefore, serious offences dealt with in a restorative justice conference not being publicly denounced and possibly seen as a soft option are clearly valid concerns. These concerns are allayed when the restorative justice conference is seen as “supplementing”³⁹ the formal process of investigation, prosecution and sentence in the criminal justice system. What is meant by supplementary is that it does not operate instead of or diversion away from the normal course of a criminal prosecution. In this way, restorative justice conferences will not be perceived by the community as a “second-best” option instead of prosecution, conviction and sentence.

In New Zealand any court, including the High Court (New Zealand’s highest court that can deal with cases at first instance) can adjourn sentencing for a restorative justice conference to take place⁴⁰. In the ACT, section 22 of the *Crimes (Restorative Justice) Act 2004* (ACT) includes a useful table (Annexure “A” below) that sets out the stage of the criminal justice process at which and by whom a case may be referred for a restorative justice conference. As can be seen in the table, restorative justice conferences are very much a part of the process of criminal justice in the ACT, and that indictable offences prosecuted by the Director of Public Prosecutions must first be commenced in court before they are referred for a restorative justice conference. The ACT Director-General (Restorative Justice) may make a referral for a restorative justice conference after an offender has been sentenced to a term of imprisonment, but

³⁷ Victorian Law Reform Commission, *The Role of Victims in the Criminal Trial Process* Report August 2016, Page 177

³⁸ Victorian Association for Restorative Justice, “Best Practice Standards for Restorative Justice Facilitators”, 2009, Victorian Association for Restorative Justice, Inc. at Page 10

³⁹ Victorian Law Reform Commission, *The Role of Victims in the Criminal Trial Process* Report August 2016, at Page 177

⁴⁰ *Ibid*, Page 180 and see Section 25 *Sentencing Act 2002* (NZ)

before they have completed it. This model ensures that serious cases are dealt with and seen to be dealt with by the courts, and “*allows public accountability, denunciation, deterrence and punishment to occur in those cases where a prosecution can proceed*”⁴¹.

The much wider issue is whether imprisonment and longer terms of imprisonment actually have an effect on deterrence. Although it is beyond the scope of this research to properly investigate this worthwhile issue, it is helpful to consider the Sentencing Advisory Council 2013 Report on Reoffending Following Sentencing in the Magistrates’ Court of Victoria. That report makes the point that “the risk of reoffending following a term of imprisonment was higher than the risk following a suspended sentence. Interestingly, according to this report: “*With a fine as a reference category, the largest effect of any of the sentence types has been found for the Criminal Justice Diversion Program: this outcome is associated with a 41.3% decrease in the risk of reoffending when compared with a fine*”⁴². The Criminal Justice Diversion Programme⁴³ is the only program in Victoria in which victims of crime committed by adult offenders are given an opportunity (usually a Diversion Coordinator attempting to contact the victim) as to the effect of the crime on them and as to possible outcomes. Diversion is generally reserved for low end offences and first time offenders. It is, however, a powerful statistic that deserves further research: that a restorative justice process resulted in a 41.3% decrease in the risk of reoffending when compared with a fine.

A Victorian Restorative Justice Model

Just as the process that participants go on during the stages of a restorative justice conference is just as important as the agreement generated at the end of the conference, so too is the journey that Victoria needs to go on in embracing restorative justice principles just as important as the statutory scheme that is ultimately adopted. The ACT has been working on its criminal justice restorative justice program for the past 24 years, and has looked at using it in its schools, universities and retirement villages⁴⁴. Canberra is still not there yet, it has a vision of becoming a restorative justice city like Wanganui in New Zealand, Nova Scotia in Canada, and Hull in the UK.

For Victoria to begin this process, it will require justice re-investment, adequate funding and implementation of a Restorative Justice Unit by the Department of Justice and Regulation, and extensive funding improvements for victim support agencies, family violence practitioners, and offender rehabilitation programmes.

The Restorative Justice Unit would need to have best practice protocols on how to recruit and train professional, independent, and specialist restorative justice suitability assessors and convenors. Ideally, those convenors dealing with serious cases would have specialist training and experience in family violence (intimate partner and youth

⁴¹ Victorian Law Reform Commission, *The Role of Victims in the Criminal Trial Process* Report August 2016, at Page 177

⁴² Sentencing Advisory Council, “*Reoffending Following Sentencing in the Magistrates Court of Victoria*”, June 2013, Sentencing Advisory Council, Melbourne, at Page 24

⁴³ Section 59, *Criminal Procedure Act 2009 (Vic)*

⁴⁴ ACT Legislative Assembly, Hansard 10 February, 2016, Page 125 (Ms Porter, Member for Ginninderra)

family member), in sexual assault, and in violent crime restorative justice conference cases.

A scheme for restorative justice conferences in Victoria would not necessarily require recognition in the Sentencing Act 1991 (Vic), Magistrates Court Act 1989 (Vic) or Criminal Procedure Act 2009 (Vic), as the existing powers of deferral of a sentence would suffice for the purposes of a restorative justice conference. However, it is argued that the existing provision in section 83A(1A) of the Sentencing Act 1991 (Vic) has the following limitations:

- (1) It is restricted to offences dealt with by the Magistrates and County Court Courts. The family of a deceased would not have the option of confronting the person who took their relatives' life in a Manslaughter or Murder Case in the Supreme Court;
- (2) Pursuant to Section 83A(1)(b) sentencing is deferred only if it is in the interests of the offender. This may cause the scheme to become too offender centric rather than victim centric or independent;
- (3) Deferral is currently limited to 12 months. There are some cases involving serious violent or especially complex issues that may require several years of preparation before the parties are ready to participate in a conference.

For these reasons, the legislation needs to be amended to give any scheme for restorative justice conferences in Victoria the proper foundations. Concerns regarding serious crimes not being prosecuted but instead diverted into the restorative justice programme would be addressed by the incorporation of a similar Table at Annexure "A" but that which is tailored to Victoria's needs.

ANNEXURE “A-Section 22 *Crimes (Restorative Justice) Act 2004 (ACT)*

Table 22 Referring entities

column 1 item	column 2 <u>referring entity</u>	column 3 stage of criminal justice process
1	chief police officer director-general (restorative justice) director-general (children and young people) police officer <u>victims of crime commissioner</u>	(a) after the <u>offender</u> is cautioned or apprehended; and (b) before a <u>prosecution referral</u> is made for the <u>offender</u>
2	director of public prosecutions	(a) after a <u>prosecution referral</u> is made for the <u>offender</u> ; and (b) before a second mention hearing for the <u>offence</u> by a court has begun
3	Magistrates Court (including the <u>Childrens</u> Court) Supreme Court	unless, or until, the <u>offender</u> pleads guilty to the <u>offence</u> — (a) after a second mention hearing for the <u>offence</u> has begun; and (b) before the end of a pre-hearing mention or case status inquiry for the <u>offence</u>
4	Magistrates Court (including the <u>Childrens</u> Court) Supreme Court	if the <u>offender</u> pleads guilty to, or is found guilty of, the <u>offence</u> — (a) after the <u>offender</u> pleads guilty to, or is found guilty of, the <u>offence</u> (whether or not the <u>offender</u> has been convicted or sentenced); and (b) before the end of the proceeding
5	director-general (children and young people) director-general (corrections)	(a) after a court has made a <u>sentence-related order</u> in relation to the <u>offender</u> ; and (b) before the end of the term of the <u>sentence- related order</u> or the sentence (if any) of which it forms part (whichever is later)

	<p>director-general (restorative justice)</p> <p>sentence administration board</p> <p>victims of crime commissioner</p>	
6	<p>referring entity prescribed by regulation</p>	<p>stage of the criminal justice process prescribed by regulation</p>

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