

**National Justice CEOs Group**

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**National Guidelines or Principles for Restorative Justice Programs in Criminal Matters**

Dear members of the National Justice CEOs Group

Thank you for the opportunity to comment on the Discussion Paper 'National Guidelines or Principles for Restorative Justice Programs & Processes for Criminal Matters' (March 2011).

About the Federation

The Federation is the peak body for fifty community legal centres (CLCs) across Victoria. The Federation leads and supports CLCs in pursuing social equity and access to justice.

The Federation:

- provides information and referrals to people seeking legal assistance;
- initiates and works for law reform to develop a fairer legal system that better responds to the needs of the disadvantaged;
- works to build a stronger and more effective community legal sector;
- provides services and support to CLCs; and
- represents CLCs' priorities and interests.

CLCs are independent community organisations. They draw on the work of volunteers to provide free legal services to the public. CLCs provide free legal advice, information and representation to more than 100,000 Victorians each year.

Our client base includes people facing multiple sources of disadvantage such as homelessness, mental illness, disability and financial hardship. The most recent government review of CLCs noted that 58% of community legal sector clients received some form of income support, 82% of clients earned less than \$26,000 per annum, and almost 9% of clients had some form of disability.<sup>1</sup>

Our comments broadly concern the issues raised in Questions 1-7 and Question 9.

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<sup>1</sup> Review of the Commonwealth Community Legal Services Program March 2008, 6.  
<<http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP6DE98B3437EEB6FDCA25742D007B0738>>

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Question 8, which asks whether there should be separate or additional guidelines relating to restorative justice programs and processes that address sexual assault and family violence offences, is addressed in a separate letter co-authored by the Federation in our capacity as co-leader of the Victorian Family Violence Justice Reform Campaign.

#### The need for national restorative justice standards

The Federation broadly supports the concept of restorative justice due to its emphasis on crime prevention, rehabilitation and recidivism reduction, rather than on punitive measures which result in increased penalties and imprisonment rates or further stigmatisation of offenders who have completed their sentence.

In principle, the Federation supports the application of restorative justice approaches to a broader range of offenders and offences, and at different stages of the criminal justice process, than tends to be currently the situation in Victoria. Genuine access to justice means that there must be adequate and appropriate remedies available to address violation of rights. The Federation believes that restorative justice, as part of a suite of alternative dispute resolution models, may improve access to justice for our clients in appropriate circumstances.

For example, a restorative justice model can prevent costly and traumatic litigation and may produce more meaningful and positive outcomes for some victims of crime. It is also important that young offenders in particular are given an opportunity to avoid custody and learn not to reoffend, and accordingly the Federation welcomes the recent increase in Victorian State Government funding for the Youth Justice Group Conferencing program.<sup>2</sup>

However, restorative justice programs in criminal matters are generally at an early stage in Victoria and Australia, with little in the way of rigorous evidence and evaluation of their efficacy. This is particularly the case for restorative justice programs where serious criminal matters are involved.

We believe that a broader range of information and consultation modes is necessary in order to obtain informed community views about restorative justice approaches. This needs to be supported with an issues paper which clearly and in detail outlines the different types of models of restorative justice, their use to date in different jurisdictions, which types of offences and offenders have been involved, and the strengths and weaknesses of current evaluative research applied to such approaches.

Restorative justice approaches are nevertheless increasingly informing programs and processes for criminal matters around Australia. It is therefore important to begin to discuss national standards for restorative justice programs. We therefore respond in broad terms to the Discussion Paper in the expectation of further and more widespread consultation at a later stage. We stress again that such standards

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<sup>2</sup> 'Strengthening youth justice and helping young people avoid a life of crime', Minister for Community Services, 3 May 2011 <http://www.budget.vic.gov.au/CA25783300199E40/webmediareleases>

cannot be set in any meaningful way without extensive consultation, including with marginalised and disadvantaged Australians.

#### Why national restorative justice standards?

As the Discussion Paper notes (pp7-8), Principle 12 of the United Nations *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (UN Basic Principles) encourages member States to consider establishing guidelines and standards that govern the use of restorative justice programs. Principle 12 states that these guidelines and standards should respect the UN Basic Principles.

In our response to the Discussion Paper we therefore refer to 'standards', which we envisage as being underpinned by fundamental restorative justice (RJ) principles, and as setting the benchmark for RJ processes and practices. We also prefer 'standards' to 'guidelines', because the former implies a stronger commitment to core best practice RJ approaches.

While the question of whether standards should be mandatory requires extensive community consultation,<sup>3</sup> we believe that it would at least then follow that governments and government-funded organisations should use those appropriate RJ processes and practitioners conforming to those standards.

#### Content of standards – underlying principles

National standards (the Standards) should incorporate a statement of basic principles applicable to any RJ process. We believe that this should be an elaboration of the UN Basic Principles, along the following lines:

- RJ processes should be used only where there is sufficient evidence to charge the offender and with the free and voluntary consent of the victim and the offender. The victim and the offender should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily and should contain only reasonable and proportionate obligations.<sup>4</sup>
- The victim and the offender should normally agree on the basic facts of a case as the basis for their participation in an RJ process. Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings.<sup>5</sup>
- A victim or offender considering whether to participate in or withdraw from an RJ process must have meaningful access at all stages to legal advice, in order to assist them to decide which avenue to choose for their particular legal issue or problem.

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<sup>3</sup> See eg Peter Condliffe and Kathy Douglas, 'Reflections on conferencing practice: The need for accreditation and the dangerous debate?' (2007) 18 *ADR Journal* 140.

<sup>4</sup> UN Basic Principles, Principle 7.

<sup>5</sup> UN Basic Principles, Principle 8.

- Where RJ processes are not suitable or possible, the case should be referred to the criminal justice authorities and a decision should be taken as to how to proceed without delay. In such cases, criminal justice officials should endeavor to encourage the offender to take responsibility vis-à-vis the victim and affected communities, and support the reintegration of the victim and the offender into the community.<sup>6</sup>
- RJ processes should be followed in appropriate cases only, with extra safeguards where there is clearly an imbalance of power.<sup>7</sup>
- RJ processes should be conducted in a way that promotes the empowerment of, and the fair, respectful and active involvement of, all participants.
- In order to help to ensure equitable access, RJ processes must be supported by facilitators' understanding of the contribution of systemic inequalities to the offence, its impact and its resolution.
- The fundamental human rights of victim and offender, and the rule of law, are to be safeguarded in any RJ process eg right to fair hearing, procedural fairness.
- All parties have the right to physical, cultural and psychological safety at all times.
- The victim and the offender must be fully informed of their rights and about RJ processes and their relationship to the larger criminal justice and legal system. This must be done in an appropriate and accessible manner, including translation and interpretation of materials where necessary.<sup>8</sup>
- Appropriate assistance and support must be provided to victims and offenders who are minors or who have a cognitive disability.
- RJ processes should be flexible and responsive.
- Facilitators should perform their duties in an impartial manner, with due respect to the dignity of the parties. In that capacity, facilitators should ensure that the parties act with respect towards each other and enable the parties to find a relevant solution among themselves.<sup>9</sup>
- RJ should be conducted in a way that will assist offenders to understand and

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<sup>6</sup> UN Basic Principles, Principle 11.

<sup>7</sup> The Federation is responding separately to the question of whether sexual assault or family violence offences are ever suitable for RJ processes.

<sup>8</sup> We note the finding of the *Inquiry into Alternative Dispute Resolution and Restorative Justice* (Parliament of Victoria Law Reform Committee, May 2009, 92) that, despite the provision of some free interpreting services in Victoria, 'language barriers may still prevent significant segments of the community from accessing ADR services'. It is therefore highly likely that the same difficulties of access will apply to restorative justice processes.

<sup>9</sup> UN Basic Principles, Principle 18.

take responsibility for their offence.

- The victim should be the primary beneficiary of any reparation agreed to in recognition of the harm suffered.
- Discussions in RJ processes that are not conducted in public should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by law.<sup>10</sup>
- The results of agreements arising out of RJ programs should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgments. Where that occurs, the outcome should have the same status as any other judicial decision or judgment and should preclude prosecution in respect of the same facts.<sup>11</sup>
- Where no agreement is reached among the parties, the case should be referred back to the established criminal justice process and a decision as to how to proceed should be taken without delay. Failure to reach an agreement alone shall not be used in subsequent criminal justice proceedings.<sup>12</sup>
- Failure to implement an agreement made in the course of an RJ process should be referred back to the RJ program or, where required by law, to the established criminal justice process and a decision as to how to proceed should be taken without delay. Failure to implement an agreement, other than a judicial decision or judgment, should not be used as justification for a more severe sentence in subsequent criminal justice proceedings.<sup>13</sup>
- There should be regular consultation between criminal justice authorities and administrators of RJ programs to develop a common understanding and enhance the effectiveness of RJ processes and outcomes, to increase the extent to which RJ programs are used, and to explore ways in which RJ approaches might be incorporated into criminal justice practices.<sup>14</sup>
- The Attorney-General's and Justice Departments from all nine Australian jurisdictions should promote research on and regular evaluation of RJ programs, in order to assess the extent to which they result in restorative outcomes, serve as a complement or alternative to the criminal justice process and provide positive outcomes for all parties. The results of research and evaluation should guide further policy and program development.

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<sup>10</sup> UN Basic Principles, Principle 14.

<sup>11</sup> UN Basic Principles, Principle 15.

<sup>12</sup> UN Basic Principles, Principle 16.

<sup>13</sup> UN Basic Principles, Principle 17.

<sup>14</sup> UN Basic Principles, Principle 21.

Content of standards – best practice

The Federation participated in the Victorian Association for Restorative Justice's (VARJ) key community stakeholder consultation on 19 August 2009. We broadly support VARJ's resulting *Best Practice Standards for Restorative Justice Facilitators* and *Accreditation Scheme for Restorative Justice Facilitators* (both 14 October 2009).<sup>15</sup>

We believe that wider release of these two documents would facilitate community consultation about the most appropriate programs, practices, safeguards and staff necessary to conform to the RJ principles.

However, we reiterate that our support does not extend to RJ for sexual assault or family violence offences which we consider in a separate letter to you.

Sincerely



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Policy Officer

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<sup>15</sup> <http://www.varj.asn.au>