



Australian Capital Territory

Restorative Justice Options for the ACT

Issues Paper

October 2003

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Produced for the Department of Justice and Community Safety by Publishing Services.

Publication No 03/1286

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CONTENTS

	<i>Page</i>
Executive Summary	I
Recommendations	4
PART A: INTRODUCTION	9
1. Background	9
2. What is Restorative Justice?	9
3. Does Restorative Justice Work?	10
4. Critics of Restorative Justice	11
5. Existing Restorative Justice Programs in the ACT	12
PART B: PRINCIPLES OF RESTORATIVE JUSTICE	13
6. Principles Overview	13
7. Outcomes and Evaluation	15
8. Aboriginal Interests	15
PART C: CONCEPTUAL AND LEGISLATIVE FRAMEWORK FOR RESTORATIVE JUSTICE CONFERENCING IN THE ACT	17
9. Need for a Legislative Framework	17
10. Referral Points	17
11. Acceptance of Responsibility Key Criterion for Offender Eligibility	18
12. Admission Safeguards	19
13. Admissibility of Evidence	19
14. Difference between Eligibility and Suitability Criteria	20
15. Offender Eligibility Criteria	20
16. Offence Eligibility – Staged Approach	20
17. Suitability Criteria	22
18. Age Applicability of Offenders	23
19. Participants in Conferencing	24
20. Convenor’s Role and Qualifications	25
21. Conferencing Venue	26
22. Conference Outcomes Agreement	26
23. Conference Breakdown	27
24. Monitoring and Review of Performance Agreement	28

PART D: PROPOSED RESTORATIVE JUSTICE ADMINISTRATIVE FRAMEWORK FOR CONFERENCING IN THE ACT	29
25. Who Administers?	29
26. Possible Options	29
Figure I: Single Agency Administrative Framework	33
APPENDICES	
Appendix A: Terms of Reference	34
Appendix B: List of Submissions	35
Appendix C: Conferencing in Australia – Matrix	36
REFERENCES AND SELECTED BIBLIOGRAPHY	39

EXECUTIVE SUMMARY

The Restorative Justice Sub-committee was established to report to the ACT Sentencing Review Committee on extending the use of restorative justice programs, particularly conferencing, in the ACT. The most recognised restorative justice program in the ACT is the pre-court diversionary conferencing run by ACT Policing since 1994.

Other justice sector activities which could be labelled as “restorative” (such as problem-solving courts, victim impact statements and reparation orders) are being addressed by the full Sentencing Review.

The core of restorative justice is victim-offender dialogue and conferencing is the forum in which it is typically delivered. The term ‘conference’ is used throughout this paper to denote a range of methods and technologies to deliver the core restorative justice dialogue.

Holding offenders accountable for their actions and the consequences of them for others, through acceptance of responsibility for the offence is a fundamental element of restorative justice. This acceptance of responsibility by the offender is a paramount criterion for a conference to proceed, but it should not necessarily equate to a legal admission of guilt.

Requiring offenders to acknowledge they have made a mistake focuses on restorative justice’s vital distinction between ‘bad actions and bad people’, enabling the shaming of behaviour while supporting the offender and their re-integration into society. Other fundamental objectives are repairing the harm, empowering victims and the broader community and offering offender rehabilitation.

Findings on the effectiveness of restorative justice programs in Australia and overseas are mixed, with research on violent offences showing that restorative justice may reduce re-offending, whereas for property offending the results are ambivalent. Evaluations show victim and offender satisfaction to be higher for restorative justice experiences than for court.

Concerns for victims surrounding restorative justice include their fears of revictimisation and pressure to participate, unequal outcomes for comparable offences/offenders, secrecy rather than open justice and lack of formal denunciation of the crime.

Concerns for offenders centre on the net-widening potential of some restorative justice practices and the risk of dominant parties dictating the process and outcome.

Restorative justice programs in Australia usually target young offenders, however restorative justice principles are equally applicable to adult offenders and their victims.

The Sub-committee was unanimous that a legislative framework was required in the ACT for restorative justice conferencing.

There are significant concerns within the ACT Aboriginal community about police-run conferences. Extensive offending histories can mean some Aboriginal people

will be excluded from restorative justice processes on the basis of recidivism. The Aboriginal Justice Advisory Committee wishes to see a separate Aboriginal restorative justice system explored and the Sub-committee recommends further consultation be undertaken with the ACT's Aboriginal community.

There is a vital distinction between eligibility for conferencing and suitability. Case assessment begins with offender eligibility. Eligibility assessments are basically objective, while suitability brings much more subjective criteria into play. The victim becomes a greater focus at the suitability assessment stages, which relates to all aspects of the case's parties and particulars.

Victim eligibility is a given, and their interests will directly influence the case's suitability assessment, including their willingness and readiness to participate, their sensitivities, safety and wellbeing.

Proceeding without a victim (or their interests) being represented may be counter-productive due to the offender's inability to respond and engage when presented with a victim's letter or video statement. For interpersonal offences such as sexual assault and family violence where victim interaction with the offender can be highly stressful, technology such as a teleconference or email conference offers possible resolutions.

Offender suitability for conferencing will consider questions such as contrition, degree or lack of premeditation, likelihood of re-offending and the level of violence involved and harm caused.

Eligibility also encompasses offence eligibility. In order to avoid a prescriptive and inflexible regime where certain offences are excluded, the Sub-committee considered that crimes of greatest seriousness, especially those involving high levels of violence and/or in family and sexual contexts may be appropriately excluded from (pre-court) diversion, but conferencing would remain an option available at sentencing. Conferencing for these types of offences would be in addition to, and co-exist with, traditional sentencing responses and would in no way preclude or diminish the possibility of a custodial sentence.

The Sub-committee saw the role of restorative justice being to complement and enhance traditional criminal justice responses through an overarching principle that restorative justice should be the 'recourse of first preference', and that every criminal justice agency should consider restorative justice first in dealing with an offender.

Restorative justice conferences could occur at:

- Apprehension/charging (referral by ACT Policing)
- Prosecution (referral by DPP)
- Pre-sentencing (referral by courts)
- Sentencing option (referral by courts)
- Post-sentencing (referral by Youth Services or Corrective Services)
- Parole (referral by Corrective Services);
- Pre-release (referral by Youth Services or Corrective Services); and
- Appropriate points during the course of a community-based sentence.

The selection of a conference venue similarly should not be prescriptive and should aim for a neutral location that suits all participants as fully as possible. ACT Policing advised that victims felt positive about conferencing occurring at a police station while some Sub-committee members questioned the neutrality of a facilitator in police uniform.

The minimum participation in a conference is victim(s); offender(s) and parent/guardians where applicable; victims' and offenders' support networks; and a suitably trained convenor, this latter role being pivotal to a conference's success.

For a conference to be considered successful, an outcomes agreement is required. These may involve financial reparation, an apology, a commitment to a workplan by the offender that benefits the victim (for example, mowing their lawns) or performing a service for a community organisation, with combinations of such elements being most likely. Agreement terms need to be ratified by at least the victim, offender and facilitator.

When a conference is incapable of proceeding to an agreement, the matter needs to return to the referral agency for consideration. If the court is the referring agency then it must take into account when sentencing that a conference was attempted, and any outcomes achieved.

The Sub-committee considered there are four key administrative options:

1. Every justice sector agency to act as a referral point, while a single integrated agency would be tasked with the decision-making role of assessing suitability for conferencing. The facilitator/convenor role could rest either with this agency or the courts.
2. Retain pre-court conferencing operated by ACT Policing in which police act as a referral point, assess suitability to conferencing and perform the role of facilitator/convenor.
3. Retain pre-court conferencing operated by ACT Policing with the addition of each criminal justice agency also taking on a similar role, depending on the point of referral. Each agency would operate unilaterally and independently.
4. A combination of retaining the current status of ACT Policing's pre-court Diversionary Conferencing program and augmenting this with a single integrated agency as in Option 1 which has the capacity to assess suitability and perform the role of facilitator/convenor.

RECOMMENDATIONS

The Restorative Justice Sub-Committee recommends that:

Recommendation 1

Throughout all processes and considerations associated with restorative justice, personal safety and human rights issues be of paramount concern, with this priority extending to any model's design, implementation and training. (6.6)

Recommendation 2

The overarching principle of "restorative justice as a recourse of first preference throughout the criminal justice process" should be adopted in legislation. (6.7)

Recommendation 3

Having regard to the social, economic, gender and cultural diversity of offenders, victims and the community, the fundamental restorative justice principles for the ACT should be: (6.8)

- Offenders should be encouraged to accept responsibility for their behaviour and acknowledge the impact of their offences;
- A primary consideration is that offenders and victims must not be required to participate in a conference if they are unwilling to do so;
- Conferences should aim for positive outcomes for all participants;
- All participants, but particularly offenders and victims, should be dealt with at all times in a respectful manner that reflects their needs and abilities and preserves their dignity;
- The rights of offenders and victims should be respected and protected and their safety assured;
- All participants should be empowered;
- Strengthening the offender's family or family group should be an important consideration throughout the processes of a restorative justice system;
- Offenders should be provided with developmental and support services that will enable them to overcome their offending behaviour and become a fully autonomous individual;
- The restorative justice process should be culturally and socially responsive wherever possible; and
- Conference procedures and processes, guided by restorative justice principles, should be sufficiently flexible to accommodate the widest number of cases.

Recommendation 4

Any proposed restorative justice model in the ACT be evaluated from commencement of operations through monitoring and reviewing its performance and effectiveness. (7.3)

Recommendation 5

The evaluation of the restorative justice model be based on the following outcomes: (7.4)

- Victim satisfaction and opportunities for meaningful participation;
- Offender rehabilitation;
- Community satisfaction;

- Reintegration of victim and offender into the community;
- Respect of the rights of all stakeholders in the process including the wider community;
- Victim/offender recognition of fairness of process and outcomes; and
- A reduction in recidivism.

Recommendation 6

The local Indigenous community be further consulted to address the concerns and interests of Aboriginal people about appropriate restorative justice models and further research into initiatives in other jurisdictions be undertaken. (8.9)

Recommendation 7

There be a statutory basis for conferencing in the ACT to ensure accountability and transparency in decision-making, process and outcomes. (9.3)

Recommendation 8

A flexible system be established in which processes are adaptable and take account of people's diversity in age, gender, disability, cultural or ethnic background, level of development and sexuality. (9.4)

Recommendation 9

There be opportunities for referral to conferencing along the entire criminal justice continuum. (10.6)

Recommendation 10

The threshold test to hold an offender accountable be 'acceptance of responsibility', rather than 'admission of guilt' or the New Zealand 'decline to deny' test. (11.5)

Recommendation 11

While a restorative justice system only diverts an offender who was 'owning up' to something, a plea of 'not guilty' in court should not necessarily equate to a denial of responsibility so as to prohibit referral to a conference. (11.6)

Recommendation 12

A person choosing to plead not guilty who is then found guilty should not be ineligible on the grounds of non-admission of guilt from post-court conferencing provided they then meet the minimum eligibility criterion of accepting responsibility for the offence. (11.7)

Recommendation 13

Safeguards against unreasonably coerced admissions of guilt be incorporated in any proposed restorative justice scheme. (12.3)

Recommendation 14

Evidence heard in a restorative justice conference should not be admissible in any subsequent hearings to determine the guilt of an alleged offender or the sentence to be imposed on an offender, without the consent of the offender and the victim. (13.4)

Recommendation 15

Offender eligibility assessments be based on agreed criteria which are primarily objective in nature, being an offender's:

- acceptance of responsibility for the offence;
- consent to conference;
- capacity to give consent (age, mental state, etc); and
- access to independent legal advice. (15.3)

Recommendation 16

A 'staged approach' to offence eligibility with more serious offences only able to be considered for conferencing once they have reached court. (16.7)

Recommendation 17

The point of intervention in a restorative justice system would determine the type of offence that could be referred to conferencing. For offences of a serious, violent and/or interpersonal (family violence; sexual assault) nature, consideration of restorative justice options would only commence upon the charge reaching court. (16.8)

Recommendation 18

The establishment of eligibility guidelines informed by community standards, safety and cultural appropriateness that determine whether to proceed to a conference, rather than a prescriptive regime identifying exclusions. (16.9)

Recommendation 19

The issue of recording of results be addressed in legislation. (16.10)

Recommendation 20

Suitability criteria for whether a conference should place would take into account: (17.7)

- Victim consent;
- Personal characteristics of the victim(s) and the offender(s) such as age, gender, capacity, etc;
- The victim's interests/sensitivities;
- The offender's interests/sensitivities;
- The appropriateness of an offence for conferencing at a particular point in the criminal justice system;
- All particulars of the incident, particularly the level of harm and violence involved in the offence;
- The offender's contrition, remorse;
- Any potential power imbalances; and
- The physical and emotional safety of participants.

Recommendation 21

Eligibility for an offender to participate in conferencing should extend to all persons above the age of ten years. (18.4)

Recommendation 22

The preferred minimum participation for a conference to proceed (with the possible exception of the parole stage) is victim(s); offender(s) and parent/guardians

where applicable; victim's and offender's support networks; and a suitably trained convenor, with the informant police officer's participation being highly desirable. (19.9)

Recommendation 23

The conference convenor have discretion and final authority over the inclusion of other conference participants. (19.10)

Recommendation 24

Convenors should be highly trained in conferencing and facilitation with a solid grounding in the criminal justice system and understanding of the role of restorative justice principles in its processes. (20.3)

Recommendation 25

Venue suitability criteria not be prescriptive, but that the selection of venue be determined by guidelines informed by such factors as safety and cultural appropriateness for the victim and offender. (21.4)

Recommendation 26

For a conference to be considered a success, an agreement is needed. (22.5)

Recommendation 27

A written agreement to effect outcome arrangements be required, signoff for which must be obtained from the victim, the offender and the conference convenor as a minimum requirement (with the possible exception of the parole stage, where victim involvement may be optional). (22.6)

Recommendation 28

Agreement terms must be fair and credible with outcome timeframes not to exceed six months maximum. (22.7)

Recommendation 29

The monitoring and review of agreements needs to be mindful of reconciling any changing circumstances with the original intention of the agreement. (22.8)

Recommendation 30

The conference convenor communicate to the victim that they can have the opportunity to provide input on changes to an agreement if and as they occur. (22.9)

Recommendation 31

No agreement may include punishment that exceeds that permissible to the court. (22.10)

Recommendation 32

If the court is the referring agency it must take into account the fact that a restorative justice conference was attempted or took place, and it must take into account the conference outcomes when sentencing. (22.11)

Recommendation 33

All conferences which have broken down should be returned to the referral point. There the matter should be dealt with in the normal way but taking into account the fact it has been conferenced. (23.2)

Recommendation 34

A case sent back to the referral agency must be concluded within a maximum timeframe of six months. (23.3)

Recommendation 35

All agreements be monitored and reviewed. (24.2)

Recommendation 36

The referral agency always receives a report on the performance of the conference agreement. (24.3)

PART A: INTRODUCTION

1. Background

1.1 A review of restorative justice options was forecast in the ACT Labor Party's Election Platform and in the *ACT Criminal Justice Strategic Plan 2002-2005*. The Restorative Justice Sub-committee was established to report to the ACT Sentencing Review Committee on extending the use of restorative justice programs, particularly conferencing, in the ACT. The Sub-committee's terms of reference are at Appendix A.

1.2 The Sub-committee comprised representatives from the Youth Services branch of the Department of Education, Youth and Family Services, ACT Corrective Services, ACT Legal Aid Office, ACT Policing, the Director of Public Prosecutions, Aboriginal Justice Advisory Committee (AJAC) secretariat, the courts, the Policy and Regulatory Division of the Department of Justice and Community Safety, the Australian National University and the Victims of Crime Coordinator.

1.3 The Sub-committee was also informed in its deliberations by views on restorative justice expressed in submissions received in response to the ACT Sentencing Review's Issues Paper (see list of submissions at Appendix B).

1.4 While the Sub-committee realised there are other justice sector approaches that could possibly be labelled as "restorative" (for example, problem-solving courts, victim impact statements and reparation orders), the Sub-committee considered that the full Sentencing Review would address these broader issues.

1.5 This issues paper focuses on restorative justice in the criminal justice setting. The Sub-committee recognised that restorative justice programs are also used in settings such as child protection, and to settle disputes in neighbourhoods, schools and in the workplace.

1.6 This issues paper reflects the range of issues encompassed by consideration of restorative justice and does not necessarily represent a full consensus of all agencies represented on the Sub-committee.

2. What is Restorative Justice?

2.1 Daly and Hayes maintain that '(r)estorative justice is not easily defined because it encompasses a variety of practices at different stages of the criminal process, including diversion from court prosecution, actions taken in parallel with court decisions, and meetings between victims and offenders at any stage of the criminal process (for example, arrest, pre-sentencing, and prison release)'.¹

2.2 Despite the difficulty in defining restorative justice, most definitions have common threads – repairing the harm, empowering victims and the broader community and offering offender rehabilitation, articulated succinctly by Daly as '... bring(ing) together those with a stake in a crime (typically a victim, an offender, and

¹ Daly K and Hayes H, *Restorative Justice and Conferencing In Australia*, Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice, No 186 February 2001, p.1

their supporters) to discuss the offence and its impact, and they decide what to do to repair the harm to the victim and perhaps also to a large collectivity'.²

2.3 Victim-offender dialogue is the core of restorative justice in the criminal justice setting, with conferencing being the forum in which it is typically delivered. Conferencing involves bringing together the victim and offender, each with support persons, under the facilitation of a neutral conference convenor (see section 19). The term 'conferencing' therefore is used throughout this paper to denote a range of methods which deliver that core restorative justice dialogue and may include:

- Face-to-face meetings;
- Written/recorded statements from either the victim or offender discussed at conferencing;
- Pre-recorded videos from either the victim or offender discussed at conferencing;
- Videoconferencing;
- Teleconferences;
- email-conferencing;
- One-way vision wall panels and microphone links.

3. Does Restorative Justice Work?

3.1 To date, findings on the effectiveness of restorative justice programs in Australia and overseas are mixed. For violent offences there is encouraging evidence from the ACT and internationally that restorative justice may reduce reoffending. For property offending, the results are very mixed with some programs showing a reduction in reoffending, but many showing no effect either way.³

3.2 Leaving aside the effect on re-offending rates, the Sub-committee believed a restorative justice model is still worth pursuing for other reasons particularly the high levels of victim, offender and community satisfaction.

3.3 Various evaluations undertaken on conferencing indicate that levels of victim and offender satisfaction are higher in the restorative justice setting in comparison to victims and offenders who are dealt with by court – see matrix at Appendix C. Evidence also suggests that there is a superior compliance with agreements/orders made within a restorative justice framework in comparison to the orders made in a traditional criminal justice setting.

3.4 Based on his literature review, Braithwaite maintains that there is considerable empirical evidence supporting the notion of restorative justice working to 'restore' victims, offenders and communities. There is high victim satisfaction with the

² Daly K, *Restorative Justice: The real story*, revised paper presented to the Scottish Criminology Conference, Edinburgh 2001, p.5

³ In Garth Luke and Bronwyn Lind's paper, they suggest there have been four main studies in Australian and New Zealand. Griffith's Victorian report on youth conferencing found no significant difference in reoffending when compared with a matched probation group. Studies in SA (Hayes and Daly (2001) and in New Zealand (Maxwell and Morris (2001)) found lower rates of recidivism when the young person showed remorse and agreed with the conference outcome. In the ACT (Sherman, Strang & Woods 2000), the Reintegrative Shaming Experiment (RISE) found a range of results for different types of offenders – very little difference for young property offenders, 6% increase in recidivism for drink driving adults and 38% decrease for young violent offenders. For a detailed summary of research on reoffending in restorative justice programs overseas and in Australia, see Luke G and Lind B, *Reducing Juvenile Crime: Conferencing versus court*, Bureau of Crime Statistics and Research (2002)

restorative justice process (though often lower levels of approval for other participants in the restorative justice process); extremely high offender satisfaction with restorative justice practices; and community members beyond the offender and victim also come away from the restorative justice processes with high levels of satisfaction.⁴

3.5 Importantly, Braithwaite believes that restorative justice should be designed to enhance the efficacy of deterrence, incapacitation of offenders, rehabilitation and community crime prevention.

4. Critics of Restorative Justice

4.1 Restorative justice has not been without its critics. Several concerns raised specifically by Sub-committee members were as follows. For victims, one of the major concerns, supported by some studies, is that restorative justice practices can increase victims' fear of revictimisation. Other concerns are that restorative justice programs can treat victims as no more than props in efforts to rehabilitate offenders or that victims may be pressured to participate before they are ready or willing.⁵ Other important concerns raised include the potential for unequal outcomes for otherwise comparable offences/offenders, secrecy rather than open justice and lack of formal denunciation of the crime.

4.2 Concerns for offenders centre on the net-widening potential of some restorative justice practices, particularly in pre-court diversionary conferencing. The other concern raised by the Sub-committee related to dominant parties disempowering the offender, especially young offenders in conferencing.

4.3 Regarding the net-widening potential, empirical evidence is limited. Studies in New Zealand and Wagga Wagga found little evidence to support this concern but did show an impact on decreasing the number of young offenders entering the criminal justice process.⁶

4.4 Dominant parties participating in conferencing such as family members or authorities dictating the process and outcome can have an adverse impact on the offender.⁷

4.5 Such concerns made the Sub-committee very mindful that major players, especially administrators and convenors/facilitators, should be suitably qualified, experienced and sensitive to both victim and offender's needs. The Sub-committee strongly believed that to safeguard against such potential problems described above highly trained personnel were required, underpinned by a legislative framework to ensure accountability and transparency (see 9.1).

4.6 The legislative framework and training needs are discussed in Part C of this report.

⁴ Braithwaite, J *Restorative Justice and Responsive Regulation* Oxford University Press, New York, 2002, Chapter 4

⁵ Braithwaite J op.cit. Chapter 5

⁶ Ibid. pp. 148-50

⁷ Ibid. pp. 159 –161 "I am a Thief" case

5. Existing Restorative Justice Programs in the ACT

5.1 In the ACT, the most recognised restorative justice program in the criminal justice setting is the pre-court diversionary conferencing run by ACT Policing since 1994. As elsewhere in Australia, this ACT restorative justice intervention has been used as a diversion from, and/or to supplement the outcomes at the stages of, court and post-sentencing (see 19.1).⁸

5.2 The Sub-committee was also advised of other restorative measures that have been practised in the ACT criminal justice system. These measures are not underpinned by any formal procedures and appear very much experimental. They have been facilitated primarily for post-sentencing and post-conviction.⁹

⁸ Strang H, *Restorative Justice Programs in Australia A Report to the Criminology Research Council*, March 2001, p.5

⁹ Advice from Victims of Crime Coordinator, email 10 April 2003 and submission to the Sentencing Review.

Examples cited included the Supreme Court Registrar facilitating a conference for a case which had been stood down at post-conviction with a probation officer and the Victims of Crime Coordinator assisting each party; neither the prosecution nor defence were present. Also there was a restorative justice intervention explored on behalf of a couple of victims of crime by the Victims of Crime Coordinator and ACT Corrective Services working with the Restorative Justice Unit in New South Wales Corrections; the offenders were ACT prisoners detained in New South Wales facilities.

PART B: PRINCIPLES OF RESTORATIVE JUSTICE

6. Principles overview

6.1 Braithwaite argues that if restorative justice programs work effectively, issues of social justice can be met by restorative justice practices, especially in terms of meeting the needs of the impoverished or marginalised (either as offenders or victims) who come into contact with the criminal justice process.¹⁰

6.2 The Sub-committee noted that in some jurisdictions restorative justice principles have been embodied in legislation for conferencing young offenders and their victims.¹¹ The Sub-committee believed these restorative justice principles are just as applicable to adult offenders and their victims (see section 18).

6.3 Principles of restorative justice identified by the Sub-committee would require the criminal justice system to:

For offenders

- Encourage offenders to accept responsibility for their behaviour and to hold them accountable for their behaviour;
- Deal with offenders in a way that reflects their rights, needs and abilities;
- Provide offenders with developmental and support services to help stop the offending behaviour;
- Encourage empathy towards the victim of their behaviour; and
- Be culturally appropriate.

For victims

- Express the victims' concerns and have questions answered;
- Meet and understand the offender and understand why the offence was committed;
- Deal with victims in a way that reflects their rights, needs and abilities;
- Influence more directly the way the criminal justice process deals with the offence;
- Enhance the rights and place of victims in the criminal justice process;
- Ensure victims are not further victimised by requiring/coercing their involvement in the restorative process;
- Have regard to the interests of victims including the need to make reparations to any victim and to facilitate access to support services; and
- Be culturally appropriate.

For the community¹²

- Empower families/supporters of offenders in making decisions about the offenders' behaviour and assisting to 'restore' the offender;
- Empower families/supporters of victims in making decisions on how to repair the harm done by the offence and assisting to 'restore' the victim;

¹⁰ Braithwaite, J *Restorative Justice and Responsive Regulation* Oxford University Press, New York, 2002, Chapter 5

¹¹ See Queensland *Juvenile Justice Act 1992* and New South Wales *Young Offenders Act 1997*

¹² The Sub-committee considered the term "community" in a restorative sense include all those affected by, or with an interest in, the offence such as family, friends, police, legal advisors but also includes the interests of the broader community.

- Ensure respect, dignity and fairness to all conferencing participants, particularly the offender and victim; ¹³
- Increase resolution of disputes without recourse to full criminal legal proceedings; and
- Encourage, where appropriate, early intervention, especially for young offenders, and mainly at the pre-court stage.

6.4 The Sub-committee saw the role of restorative justice being to complement and enhance the traditional criminal justice response in dealing with an offence. Just as there is an overarching sentencing principle in the ACT that ‘imprisonment is the punishment of last resort’, the Sub-committee agreed that there should be an overarching principle that restorative justice should be ‘the recourse of first preference’ throughout the criminal justice process. The Sub-committee believed that any agency at any given point along the criminal justice continuum should consider restorative justice first in dealing with an offender.

6.5 The Sub-committee was also mindful that restorative justice principles recognise the rights and dignity of the offenders and victims, and their social, economic, gender and cultural diversity.

6.6 The Sub-Committee recommends that throughout all processes and considerations associated with restorative justice personal safety and human rights issues be of paramount concern, with this priority extending to any model’s design, implementation and training.

6.7 The Sub-Committee recommends that the overarching principle of “restorative justice as a recourse of first preference throughout the criminal justice process ” be adopted in legislation.

6.8 The Sub-committee recommends that, having regard to the social, economic, gender and cultural diversity of offenders, victims and the community, the fundamental restorative justice principles for the ACT should be:

- **Offenders should be encouraged to accept responsibility for their behaviour and acknowledge the impact of their offences;**
- **A primary consideration is that offenders and victims must not be required to participate in a conference if they are unwilling to do so;**
- **Conferences should aim for positive outcomes for all participants;**
- **All participants, but particularly offenders and victims, should be dealt with at all times in a respectful manner that reflects their needs and abilities and preserves their dignity;**
- **The rights of offenders and victims should be respected and protected and their safety assured;**
- **All participants should be empowered;**
- **Strengthening the offender’s family or family group should be an important consideration throughout the processes of a restorative justice system;**

¹³ The Sub-committee was mindful that agreed conferencing outcomes should be proportionate to any sanctions imposed by the courts, that is, the broader community does not require any conferencing outcomes to be harsher or more lenient on the offender than what the courts would have imposed.

- **Offenders should be provided with developmental and support services that will enable them to overcome their offending behaviour and become a fully autonomous individual;**
- **The restorative justice process should be culturally and socially responsive, wherever possible; and**
- **Conference procedures and processes, guided by restorative justice principles, should be sufficiently flexible to accommodate the widest number of cases.**

7. Outcomes and Evaluation

7.1 The Sub-committee was mindful that any restorative justice initiative for the ACT should state clearly what the agreed model is designed to achieve once implemented.

7.2 The Sub-committee also considered that it would be essential to evaluate any proposed restorative justice model in the ACT by monitoring and reviewing performance and effectiveness.

7.3 The Sub-committee recommends that any proposed restorative justice model in the ACT be evaluated from commencement of operations through monitoring and reviewing its performance and effectiveness.

7.4 The Sub-committee recommends that the evaluation of the restorative justice model be based on the following outcomes:

- **Victim satisfaction and opportunities for meaningful participation;**
- **Offender rehabilitation;**
- **Community satisfaction;**
- **Reintegration of victim and offender into the community;**
- **Respect of the rights of all stakeholders in the process including the wider community;**
- **Victim/offender recognition of fairness of process and outcomes; and**
- **A reduction in recidivism.**

8. Aboriginal Interests

8.1 The Aboriginal Justice Advisory Committee (AJAC) has given a clear indication that the ACT's Aboriginal community wants some control over restorative justice processes as they affect their community.

8.2 Other jurisdictions (South Australia and Western Australia) have indicated problems of low participation rates and non-attendance at conferences by Aboriginal people¹⁴. ACT Policing advise that there have been some, but not many, conferences involving indigenous offenders.

8.3 AJAC has advised that there are significant concerns within the ACT Aboriginal community about police-run conferences with a strong perception that the participants in a conference may themselves be subject to scrutiny and checks (see 22.3).

¹⁴ *Social Justice Report 2001* – Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission (HREOC).

8.4 Concerns have been expressed in the Sub-committee that extensive offending histories can mean some Aboriginal people will be excluded from restorative justice processes on the basis of recidivism, which in practice under existing ACT Police guidelines does have the effect of rendering some indigenous offenders ineligible for conferencing.

8.5 In some jurisdictions criminal histories need not be a barrier to participation. New South Wales prevents a “child” being referred for a caution if they have been cautioned previously on three or more occasions, irrespective of offence type,¹⁵ but they are not so precluded from another conference.¹⁶

8.6 The Sub-committee understands AJAC wishes to see a separate Aboriginal restorative justice system explored. Addressing alternatives to custody, AJAC noted the ACT’s lack of ‘Indigenous-specific diversionary programs’. The Sub-committee noted however that positive discrimination, obliging Aboriginal people to use a separate system, is unfair if it precludes their access to an inclusive system. The Sub-committee understands that some Aboriginal people prefer to use mainstream agencies (for example, Legal Aid rather than the Aboriginal Legal Service), a tendency not limited to the justice sector.¹⁷

8.7 A prominent alternative is Circle Sentencing, which has been trialled recently in Nowra, New South Wales, with this description:

*Circle sentencing takes place outside the formal court setting and involves respected elders from the indigenous community, a judicial officer, New South Wales Police, prosecutors, the offender – and the victim, if they wish – sitting together and jointly determining an appropriate punishment within the existing law. This process will not be used for serious crime, but will give courts an alternative to continually sending Aboriginal people to jail.*¹⁸

8.8 Circle Sentencing adds a new model to restorative justice processes which the wider community may wish to consider adopting as an inclusive mechanism.

8.9 The Sub-committee recommends that the local Indigenous community be further consulted to address the concerns and interests of Aboriginal people about appropriate restorative justice models and further research into initiatives in other jurisdictions be undertaken.

¹⁵ *Young Offenders Act 1997*, section 38 (5)

¹⁶ *Young Offenders Act 1997*, section 37 (5)

¹⁷ *One Way Or Another*, report of the ‘Talking Together’ Indigenous Volunteering Project, Volunteering ACT, 2002, p.12.

PART C: CONCEPTUAL AND LEGISLATIVE FRAMEWORK FOR RESTORATIVE JUSTICE CONFERENCING IN THE ACT

9. Need for a Legislative Framework

9.1 The Sub-committee was unanimous that a legislative framework was required in the ACT for restorative justice conferencing. The Sub-committee was mindful that the framework should not be too prescriptive in order to ensure each case for a conference could be assessed and dealt with individually and on the basis of its particular circumstances, subject to agreed criteria.

9.2 The Sub-committee considered that restorative justice conferences have the potential to be used by the criminal justice system as a:

- pre-court diversion; or
- pre-conviction court order; or
- sentencing option; or
- process occurring after sentencing at the imprisonment/parole stage.

9.3 The Sub-committee recommends that there be a statutory basis for conferencing in the ACT to ensure accountability and transparency in decision-making, process and outcomes.

9.4 The Sub-committee recommends a flexible system be established in which processes are adaptable and take account of people's diversity in age, gender, disability, cultural or ethnic background, level of development and sexuality.

9.5 The principles articulated in Part B (in section 6) underpin those areas of practice and process that require a legislative framework, namely:

- Referral points;
- Acceptance of responsibility;
- Admissions safeguards;
- Admissibility of evidence;
- Eligibility criteria;
- Suitability criteria; and
- Age applicability.

10. Referral Points

10.1 The Sub-committee considered that the conferencing process to be used in a case may differ depending at which point it was offered and who were the participants.

10.2 Essentially, the Sub-committee envisages a restorative justice framework which can be implemented from the initial point of arrest through to imprisonment and parole.

10.3 In the ACT referral to (or intervention leading to) conferencing could occur at:

- Apprehension/charging (referral by ACT Policing [arresting officer])
- Prosecution (referral by DPP)
- Pre-sentencing (referral by Courts)

- Sentencing option (referral by Courts)
- Post-sentencing (referral by Youth Services or Corrective Services)
- Parole (referral by Corrective Services);
- Pre-release (referral by Youth Services or Corrective Services); and
- Appropriate points during the course of a community-based sentence.

10.4 The Sub-committee believed a face-to-face conference between the offender and victim at the parole stage may not be appropriate or necessary. However a conference could be a condition of parole – if consented to by both parties.

10.5 As shown by the matrix at Appendix C, referral points for conferencing in other jurisdictions vary.

10.6 The Sub-committee recommends that there be opportunities for referral to conferencing along the entire criminal justice continuum.

11. Acceptance of responsibility – key criterion for offender eligibility

11.1 Holding offenders accountable for their actions and the consequences of them for others, through acceptance of responsibility for the offence is a core element of the restorative justice referral criteria in every Australian jurisdiction.¹⁹ Taking as a starting point in a conference the acceptance of responsibility, rather than debating the offender's culpability, focuses the discussion on issues which are restorative, particularly of victims' sense of security.

11.2 New Zealand's *Children, Young Persons and Their Families Act 1989* approaches the issue of accepting responsibility less directly, with its threshold test for eligibility for conferencing not the positive acceptance of responsibility, but rather the double negative 'decline to deny' standard.

11.3 In some circumstances the Sub-committee felt partial admissions can be appropriate for a conference. A typical partial admission is where some property damage is admitted but the amount admitted is less than the victim's claims. Thus it admits an offence but not all the consequences.

11.4 The Sub-committee believes acceptance of responsibility in a restorative justice context should not necessarily equate to a legal admission of guilt (see 13.1).

11.5 The Sub-committee recommends the threshold test to hold an offender accountable be 'acceptance of responsibility', rather than 'admission of guilt' or the New Zealand 'decline to deny' test.

11.6 While the Sub-committee recommends a restorative justice system only divert an offender who was 'owning up' to something, they also recommend that a plea of 'not guilty' in court should not necessarily equate to a denial of responsibility so as to prohibit referral to a conference.

¹⁹ *Social Justice Report 2001*, HREOC, op cit.

11.7 The Sub-committee recommends that a person choosing to plead not guilty who is then found guilty should not be ineligible on the grounds of non-admission of guilt from post-court conferencing provided they then meet the minimum eligibility criterion of accepting responsibility for the offence.

12. Admission Safeguards

12.1 In order to protect the vulnerability of offenders, especially youth, from feeling coerced into making an acceptance of responsibility, the Sub-committee considered existing practices designed to safeguard admissions. These include requirements for a signed admission in Tasmania²⁰ and the New South Wales requirement that an admission by a young offender be made in presence of person “responsible for the child”.²¹

12.2 The Sub-committee believes the minimum safeguard is the offender’s access to independent legal advice prior to any formal acceptance of responsibility and that formal agreement by a young person to participate in conferencing needs to be made in the presence of a responsible adult.

12.3 The Sub-committee recommends that safeguards against unreasonably coerced admissions of guilt be incorporated in any proposed restorative justice scheme.

13. Admissibility of evidence

13.1 Behind much of the Sub-committee’s concern over admission thresholds is the possibility that an admission of guilt intended to be heard in the forum of a conference may be raised in court if the matter returns there due to a conference breakdown (see section 23) disputed performance of agreed outcomes or other reasons.

13.2 Concerns were expressed in the Sub-committee that police may use the promise of a conference instead of court to ‘buy’ guilty pleas. The Sub-committee also heard concerns over double jeopardy in offenders effectively being tried twice for the same offence if a conference is followed by court proceedings.

13.3 Both New South Wales²² and Queensland²³ prevent any admission made in the course of a conference convened under that Act from being admissible in other (“subsequent” in New South Wales) proceedings. (See ‘Conference Breakdown’, section 23).

13.4 The Sub-committee recommends evidence heard in a restorative justice conference should not be admissible in any subsequent hearings to determine the guilt of an alleged offender or the sentence to be imposed on an offender, without the consent of the offender and the victim.

²⁰ *Social Justice Report 2001*, HREOC, op cit.

²¹ Ibid.

²² *Young Offenders Act 1997*, Section 67

²³ *Juvenile Justice Act 1992*, Section 18P

14. Difference between eligibility and suitability criteria

14.1 The Sub-committee noted the vital distinction in the referral process between *eligibility* for conferencing and *suitability*.

14.2 The sequence of the assessment process begins with offender eligibility. The victim becomes a greater focus at the *suitability* assessment stages, whereas the offender is the primary focus of the eligibility assessment stage. Both victims and offenders need to be provided with all information and pre-conference preparation necessary for them to make an informed choice on whether to participate or not.

14.3 Victim eligibility is a given. To minimise victims' further victimisation, the offender's consent to conferencing must be secured prior to the victim being offered this opportunity.

14.4 The fundamental distinction between eligibility assessments and those for suitability is that eligibility assessments are basically objective while suitability brings much more subjective criteria into play.

15. Offender Eligibility criteria

15.1 Eligibility subdivides into offender eligibility and *offence* eligibility (see section 16), notwithstanding their close links. A discretion to refer can be a 'positive' one, which is the mandatory referral of people meeting certain criteria. An illustration of this is ACT Police's diversionary conferencing program, in which all children or young people with no previous criminal history must be considered for diversion.

15.2 The Sub-committee sees the criteria which are universal for eligibility being an offender's:

- acceptance of responsibility for the offence (see 11.1);
- consent to conference;
- capacity to give consent (age, mental state, etc); and
- access to independent legal advice.

15.3 The Sub-committee recommends offender eligibility assessments be based on agreed criteria which are primarily objective in nature, being an offender's:

- **acceptance of responsibility for the offence;**
- **consent to conference;**
- **capacity to give consent (age, mental state, etc); and**
- **access to independent legal advice.**

16. Offence eligibility – staged approach

16.1 Offences which include serious violence (causing death – New South Wales) and domestic violence, sexual offences and some traffic offences are currently excluded from eligibility for pre-court conferencing in the ACT, New South Wales, Northern Territory, Tasmania and Western Australia. Tasmania also excludes weapons offences and the ACT has a separate drug diversion program. No offences are excluded from pre-court conferencing in Queensland, South Australia and Victoria.

16.2 The Sub-committee wishes to avoid a prescriptive and inflexible regime where certain offences are excluded entirely. Crimes of greatest seriousness, especially those involving high levels of violence and/or in family and sexual contexts may be most appropriately dealt with by their being excluded from diversion at the pre-court stage.

16.3 For such offences conferencing could be an option available upon the charge reaching court and one that is additional to, and co-exists with, traditional sentencing responses. Availability of conferencing amongst the sentencing options for such offences would in no way preclude or diminish the possibility of a concomitant custodial sentence. Amongst an inclusive range of sentencing options, conferencing could thus take place when the offender had received a custodial sentence, as occurs in New South Wales.

16.4 The benefits of this, as seen by the Sub-committee, can be illustrated when considering how sexual assault offences are currently dealt with in the criminal justice system. It is acknowledged that the traditional criminal justice approach to sexual offences can be very distressing for victim/witnesses. The Sub-committee was of the view that a conference may be less stressful to the victim of sexual assault than court and thus more attractive to them. A victim may therefore be more prepared to report an allegation to police, and less likely to seek to have a matter withdrawn out of fear of the criminal justice process.

16.5 Offence suitability criteria such as level of violence and degree of harm caused could also be framed in such a way as to provide sufficient screening capacity to obviate the need for more prescriptive exclusions.

16.6 An important issue arising is the question of recording the conference and the result. At present, non-court dispositions are not recorded publicly in the same way as court dispositions are. Cautions, diversionary conferences and infringement notices (SCONE, TINS, etc) are not shown on a person's record while all sentences and other dispositions²⁴ are so recorded. Magistrates have been concerned for some time about the lack of information they have about the number of traffic infringement notices a person might have paid and yet appear in court as a 'clean-skin'. Given that the offender will, in some form, "accept responsibility", the lack of record could be quite significant. For example, if sex offences can be diverted (see 16.5), some record is required to allow police checks to pick up the fact of an "acceptance of responsibility" under child protection legislation.

16.7 The Sub-committee recommends a 'staged approach' to offence eligibility with more serious offences only able to be considered for conferencing once they have reached court.

16.8 The Sub-committee recommends a restorative justice system in which the point of intervention would determine the type of offence that could be referred to conferencing. This approach would allow all offences to be potentially conferenced, but only at appropriate stages in the criminal justice system. For offences of a serious, violent and/or interpersonal (family violence;

²⁴ including non-conviction dispositions under section 402 of the *Crimes Act 1900*

sexual assault) nature, consideration of restorative justice options would only commence upon the charge reaching court.

16.9 The Sub-committee recommends establishing eligibility guidelines informed by community standards, safety and cultural appropriateness that determine whether to proceed to a conference, rather than a prescriptive regime identifying exclusions.

16.10 The Sub-committee recommends that the issue of recording of results be addressed in legislation.

17. Suitability criteria

17.1 The Sub-committee believed that once an offender has agreed to conferencing and been assessed as eligible, then their *suitability* for conferencing would be considered. The question of suitability relates to all aspects of the case's parties and its particulars. The Sub-committee considered that an offender's suitability assessment differed from an eligibility assessment referral in several ways.

17.2 Offender suitability for conferencing will consider questions such as contrition, degree or lack of premeditation, likelihood of re-offending and the level of violence involved and harm caused. Such suitability assessment requires careful judgments based on evidence-based assessment tools made by practitioners with a sufficient depth of experience and appropriate level of supervision.

17.3 The victim's interests will start to directly influence the suitability assessment. The end decision will essentially focus on the suitability for the conference as a whole. The Sub-committee considered that this would be investigated in depth, taking into account matters such as:

- The victim's consent to participate;
- The victim's interests/sensitivities;
- The offender's interests/sensitivities;
- The appropriateness of an offence for conferencing at a particular point in the criminal justice system (see 16.2; 16.3);
- Level of violence and harm caused;
- Offender history (both offending and previous conferencing, where applicable);
- Offender's contrition, remorse;
- Any potential power imbalances; and
- The physical and emotional safety of participants.

17.4 The Sub-committee believed that at all times assessment for suitability should be evidence-based. Suitability assessment should include a 'proportionate to risk' factor and have regard to offenders' and victims' levels of support while also bearing in mind the interests of associated persons such as their children, parents or other close relatives.

17.5 Particular care is needed for people subject to care and protection orders. The Sub-committee is of the view that in some situations the apparent 'offender' may in fact be more victimised than their alleged 'victim'. This is particularly relevant in family violence situations where an older person may be able to manipulate an abusive

scenario, which they have generated and continue to dominate, to appear as one which presents in precisely the opposite way.

17.6 The Sub-committee also expressed concern that offenders in the ‘too hard’ basket such as those with strong substance dependencies may be ‘fobbed off’ and/or referred to a conference too soon and thus set up for failure. Court-mandated treatments may need to precede such an encounter.

17.7 The Sub-committee recommends that suitability criteria for whether a conference should place would take into account:

- **Victim consent;**
- **Personal characteristics of the victim(s) and the offender(s) such as age, gender, capacity, etc**
- **The victim’s interests/sensitivities;**
- **The offender’s interests/sensitivities;**
- **The appropriateness of an offence for conferencing at a particular point in the criminal justice system;**
- **All particulars of the incident, particularly the level of harm and violence involved in the offence;**
- **The offender’s contrition, remorse;**
- **Any potential power imbalances; and**
- **The physical and emotional safety of participants.**

18. Age Applicability of Offenders

18.1 Restorative justice programs in the Australian criminal justice setting usually target young offenders rather than adult offenders. Strang suggests that this derives from the following influences: the desire to try new programs first on less serious offenders; such programs are more appropriate to deal with minor offences; and the influence of the New Zealand experience where family group conferencing was introduced specifically as a juvenile justice initiative.²⁵

18.2 Queensland, Western Australia and the ACT are jurisdictions to offer conferencing to adult offenders, although none of these jurisdictions have a statutory basis for adult conferencing. On the other hand, legislative frameworks for conferencing young offenders are in place around Australia with the exception of the ACT and Victoria – see matrix at Appendix C.

18.3 The Sub-committee considered that children under ten who could not be held criminally responsible should still have the opportunity to participate in a conference on the proviso that the child was only taking part in a “dialogue/conversation” with the victim, and that the child had agreed to the conferencing in the presence of a responsible adult.

²⁵ Strang H, *op.cit.* pp 26-27

18.4 The Sub-committee recommends that eligibility of an offender to participate in conferencing should extend to all persons above the age of ten years.

19. Participants in Conferencing

19.1 The current arrangement for pre-court diversionary conferencing through ACT Policing requires the following participants to attend:

- the victim or a victim representative;
- if the victim is present, the victim's supporters;
- the offender; and
- the offender's supporters (minimum of four supporters);²⁶
- an interpreter, where necessary.²⁷

19.2 The Sub-committee heard suggestions that restorative justice processes can viably proceed without victim participation, but also heard arguments that such an approach focusses primarily on offender rehabilitation. Going forward without a victim or a victim's interests being represented may be counter-productive to restorative justice. This risk derives from an offender's inability to respond directly and engage in the dialogue (see 2.3) that is at the core of restorative justice when presented with a victim's statement in a letter or similarly unanswerable medium such as a video statement. The value of the conference may thus be significantly diminished and thus less appropriate as a diversion than as an ancillary response of the criminal justice system. Yet especially in interpersonal offences such as sexual assault and family violence, victim interaction with the offender can be highly stressful. Technology such as teleconference facilities, one-way wall panels or email links, offer possible solutions to reconcile the preference for realtime, live interaction without requiring personal contact.

19.3 In other jurisdictions conferencing participants have included:

- the conference convenor;
- legal practitioner (subject to limited participation, in some jurisdictions²⁸);
- a member of the offender's family;
- an adult nominated by the child (where the offender is a child);
- a representative from the referral agency (eg police, court); and
- any victim, or person chosen by the victim (including a member of the victim's family) to represent the victim, or a legal practitioner acting for the victim.

19.4 In New South Wales and Queensland, the convenor also has the discretion to invite other people to the conference. In Queensland, other people specified include a respected member of the community advising on relevant issues, an interpreter, a school representative, a social worker or other health professional.²⁹

²⁶ ACT Policing Practical Guide – Cautions and Diversionary Programs, p. 4

²⁷ Ibid.

²⁸ "Defence counsel, police officers and probation officers have a significantly different role from that they usually play in conventional court processes. In restorative processes, they generally have a supporting role and act as observers. They may offer advice and support but are not parties to any agreement put forward and should not dominate discussion at the conference... counsel should not play any major part in the conference itself." - *Draft Principles of Best Practice for Restorative Justice Processes in the Criminal Court*, Discussion paper, New Zealand Ministry of Justice, May 2003.

²⁹ see section 47 of *Young Offenders Act 1997 (QLD)*

19.5 The Sub-committee considered that preferred participants for adult and juvenile conferencing in the ACT should be:

- the convenor;
- the offender (without the offender's participation, the restorative justice principle of offender rehabilitation/restoration is not addressed);
- the victim or representative nominated by the victim (noting in the case of a proxy victim such as a relative, their suitability should be a consideration by the convenor);³⁰
- in the case of a juvenile offender, a parent or guardian; and
- the informant/arresting police officer, where practicable.

19.6 The rationale for providing support for offenders lies in the distinction between 'bad actions and bad people': shaming the behaviour while supporting the offender and their re-integration into society. It is contingent on their acknowledging they have made a mistake.

19.7 Nor should the requirement that these parties be prerequisites for a conference be interpreted as a means of coercing offenders or victims to agree to conferencing. Such coercion would undermine restorative justice principles, and have the potential of impacting adversely on the offender and victim.³¹

19.8 For some post-conviction, post-sentencing conferences, the offender's parole officer/Department of the Director of Public Prosecutions witness assistant may be more appropriate participants than the informing police, who may not have had contact with the relevant police person for some years.

19.9 The Sub-committee recommends that the preferred minimum participation for a conference to proceed (with the possible exception of the parole stage) is victim(s); offender(s) and parent/guardians where applicable; victim's and offender's support networks; and a suitably trained convenor, with the informant police officer's participation being highly desirable.

19.10 The Sub-committee recommends the conference convenor have discretion and final authority over the inclusion of other conference participants.

20. Convenor's Role and Qualifications

20.1 The Sub-committee considered the role of the convenor as pivotal to the success or failure of conferencing.³² The preparatory work for conferencing, the consideration of all suitable participants, ensuring that victim and offender needs are considered and ensuring that offenders and victims come away satisfied with the conference process and outcomes are just some of the aspects in guaranteeing a successful conference.

³⁰ The Sub-committee also noted the use of proxy victims in juvenile property cases involving big department stores and security people acting as "victims" was not working.

³¹ Braithwaite J, op.cit. 2002, Chapter 5

³² See Hayes et al 1998 on research indicating success of conferencing dependent on considerable preparation work done by convenors

20.2 The Sub-committee considered that after referral a review of any decisions made by the convenor can be requested of an “independent” person, possibly the decision-making arm of conferencing.

20.3 The Sub-committee recommends convenors should be highly trained in conferencing and facilitation with a solid grounding in the criminal justice system and understanding of the role of restorative justice principles in its processes.

21. Conferencing Venue

21.1 Section 46 of the New South Wales *Young Offenders Act 1997* stipulates that a conference is not to be held at a police station, courthouse or the Juvenile Justice Department. The intention is to offer a neutral venue for both the offender and the victim.

21.2 ACT Policing advised the Sub-committee that victims felt positive about the ACT practice of conferencing occurring at a police station. The victim has a sense of security from police involvement including being escorted to his/her vehicle by a police officer.

21.3 Some Sub-committee members questioned the neutrality of a facilitator in a police station, in terms of wearing a uniform and having a certain amount of authority in that situation. The issue of indigenous sensitivities in participating in conferencing at a police station was also raised by the AJAC representative on the Sub-committee.

21.4 The Sub-committee recommends that venue suitability criteria not be prescriptive, but that the selection of venue be determined by guidelines informed by such factors as safety and cultural appropriateness for the victim and offender.

22. Conference Outcomes Agreement

22.1 Outcomes agreements may involve financial reparation, an apology, a commitment to a workplan by the offender(s) that benefits the victim directly (for example, mowing their lawns at regular intervals for a set period of time) or involve performing a service for a community organisation, with combinations of such elements being most likely.

22.2 Performance of the agreed outcomes needs to have the capacity to be adjustable over time to take account of possible changes in circumstances or unexpected contingencies, which a mechanism for performance monitoring would assist. This could be as simple as a pro forma with signoff blocks for both offender and victim. In the event of a dispute the convenor may have a casting vote.

22.3 The Sub-committee recognises there is a need to incorporate safeguards against demeaning or unreasonable punishments by providing a power to override unsound agreements, especially if court ratification is not required.

22.4 The agreement process needs to foreshadow the post-conference risks for the offender of stigmatisation and blame, and communicate this to all supporters (and

any parties affected by the agreement such as the offender's family, school community, workplace, etc). This is to ensure that the benefits of the process flow through unimpeded, rather than being undermined in the conference's aftermath. There are a similar set of post-conference impacts for the victim. The issue of supports for both offender and victim, pre- and post conference, need to be carefully considered in the management of the restorative process.

22.5 The Sub-committee recommends that for a conference to be considered a success, an agreement is needed.

22.6 The Sub-committee recommends a written agreement to effect outcome arrangements be required, signoff for which must be obtained from the victim, the offender and the conference convenor as a minimum requirement (with the possible exception of the parole stage, where victim involvement may be optional).

22.7 Agreement terms must be fair and credible with outcome timeframes not to exceed six months maximum.

22.8 The Sub-committee recommends that the monitoring and review of agreements needs to be mindful of reconciling any changing circumstances with the original intention of the agreement.

22.9 The Sub-committee recommends that the conference convenor communicate to the victim that they can have the opportunity to provide input on changes to an agreement if and as they occur.

22.10 The Sub-committee recommends that no agreement may include punishment that exceeds that permissible to the court.

22.11 The Sub-committee recommends that if the court is the referring agency then it must take into account the fact that a restorative justice conference was attempted or took place, and it must take into account the conference outcomes when sentencing.

23. Conference Breakdown

23.1 When a conference is incapable for whatever reason of proceeding to agreement by at least the victim, offender and facilitator the matter needs to return to the referral agency for consideration. The options available at this point vary amongst different agencies and likewise implications of breakdown would vary. For instance, failure of a conference referred by the parole officer would not necessarily result in breach of parole.

23.2 The Sub-committee recommends that all conferences which have broken down should be returned to the referral point. There the matter should be dealt with in the normal way but taking into account the fact it has been conferenced.

23.3 The Sub-committee recommends that a case sent back to the referral agency must be concluded within a maximum timeframe of six months.

24. Monitoring and review of agreement performance

24.1 Monitoring and review of agreements are vital to ensure equity and accountability in the process. This oversighting needs to recognise that circumstances may change over the course of an agreement's performance period. Any renegotiation needs to have as its top priority the intention of the original agreement.

24.2 The Sub-committee recommends that all agreements be monitored and reviewed.

24.3 The Sub-committee recommends the referral agency always receive a report on the performance of the conference agreement.

PART D: PROPOSED RESTORATIVE JUSTICE ADMINISTRATIVE FRAMEWORK FOR CONFERENCING IN THE ACT

25. Who Administers?

25.1 In Australia the trend in restorative justice conferencing models favours non-police operated conferencing, even though the first conferencing scheme in Australia was administered by Wagga Wagga police. This non-police operated trend is mirrored in New Zealand. By contrast, other parts of the world such as the US and England favour the police-run model.³³

25.2 Braithwaite explores the debate of whether police should or should not facilitate conferences and the concern over whether the police investigator should also act as prosecutor and jury. He maintains that each model may exclude a gifted person from acting as a facilitator – be it a police or non-police person. There is little data to support either side of the debate with Braithwaite’s personal suspicion being that “... success is 70 percent driven by attention to getting implementation detail right and only 30 percent by getting institutional infrastructure right”.³⁴

25.3 Braithwaite warns against precluding police from any restorative justice program. As the gatekeepers to the criminal justice system, without police cooperation, restorative justice programs are likely to fail.³⁵

25.4 One of the Sub-committee’s deliberations was on the extent of police involvement in conferencing. While the Sub-committee supported referral points to conferencing occurring along the entire criminal justice continuum, the Sub-committee had difficulty determining where the decision-making/administrative arm of conferencing should rest.

25.5 The Sub-committee heard that ACT Policing is keen to retain its current coordination responsibility for police diversion programs, especially conferencing, maintaining that the integral involvement of police in facilitating conferencing lends authority to the process as well as being reassuring to victims and their supporters regarding their safety.

26. Possible Options

26.1 Irrespective of location, the capacity of the referring agency to adequately assess victim suitability is a vital issue and requires staff selection processes, protocols and training standards informed by principles of best practice in this regard.

26.2 The decision-making power on suitability for conferencing and the convenor role varies considerably across jurisdictions (see matrix at Appendix C). Conferencing underpinned by a legislative framework in other Australian jurisdictions is for young offenders. While some jurisdictions are conferencing adult offenders under

³³ Daly K and Hayes H op.cit. 2001 p. 2

³⁴ Braithwaite J, op.cit. 2002 p. 162

³⁵ Ibid. p. 163

administrative arrangements with police (for example, Queensland) no Australian jurisdiction has a legislative framework for conferencing adult offenders. The administrative framework in other jurisdictions centres on conferencing young offenders.

26.3 With the Sub-committee proposing a restorative justice conferencing model for both adult and juvenile offenders, an administrative framework for the ACT would need to be able to address conferencing for adult and juvenile offenders. With this in mind, the following options for a restorative justice administrative framework for conferencing in the ACT were discussed by the Sub-committee:

OPTION 1

While each agency would act as a referral point, a single agency would be tasked with the decision-making role of assessing suitability for conferencing and the facilitator/convenor role.

(A) Conferencing suitability/convenor role rests with the Courts

26.4 An option is for the decision-making arm in the ACT to rest with the courts. The courts would have responsibility for assessing conferencing suitability, and acting as the convenor/facilitator. The convenor/facilitator role could be either undertaken in-house or outsourced. To an extent, this model is similar to South Australia in which the courts, via youth justice coordinators, have the decision-making/convenor role for police and court referrals as a diversion from court; or Victoria in which the Young Persons Court decides on conferencing suitability.

(B) Conferencing suitability/convenor role rests with another single agency

26.5 A variation to the above model is a multi-agency unit or team, located within an agency other than the Courts, comprising personnel from relevant criminal justice agencies. The unit/team would take on the role of decision-making for conferencing suitability and the convenor role.

26.5 In New South Wales, the Juvenile Justice Department deals with police and court referrals as a diversion from court or as a sentencing option through a (police) specialist youth officer and conference administrator from juvenile justice. In Western Australia, Juvenile Justice Teams have been established within the Ministry of Justice to act as the administrative/decision-making arm for police, prosecution and court referrals to conferencing as a diversion from court. The teams comprise a Ministry of Justice officer appointed as the team coordinator. In turn, the coordinator appoints a police officer, a person from the education sector and a person from an ethnic or other minority group, if practicable. The team may also include other members as considered appropriate by the coordinator.

26.6 A similar collaborative approach could be adopted in the ACT comprising a team/unit staffed by an “independent” coordinator, ACT Policing, ACT Corrective Services and Youth Services (and possibly other agencies determined on a case-by-case basis), located within one agency.

26.7 Figure 1(p.25) illustrates the option of a single agency administrative framework for conferencing within the ACT criminal justice system.

OPTION 2

Retain conferencing operated by ACT Policing whereby police act as a referral point, assess suitability to conferencing and retain the role of facilitator/convenor.

26.9 There were differing views in the Sub-committee on this option. While there was no dispute over ACT Policing continuing to act as a referral point for pre-court conferencing, some members were concerned about the investigative arm also being the facilitating arm. While the Sub-committee believed that this currently worked well, some members felt this arrangement would need to be reviewed if conferencing is extended along the entire criminal justice continuum, and particularly if new offences are included.

26.10 Some Sub-committee members thought that in a small jurisdiction such as the ACT the accumulated expertise and critical mass of an independent unit for all conferences (along the lines described in Option 1(B)), would outweigh other concerns and be superior.

OPTION 3

Retain pre-court conferencing operated by ACT Policing, with the addition of each criminal justice agency also taking on a similar role, depending on the point of referral. Each agency would operate unilaterally and independently. For example, if a parolee was considered eligible for a restorative justice conference, ACT Corrective Services would assess eligibility, suitability and act as the facilitator/convenor.

26.11 This option allows each agency to act as a referral point, to be the decision-maker on suitability for conferencing, and also undertake the facilitator/convenor role.

26.12 Concerns similar to those for Option 2 were expressed by some Sub-committee members regarding the potential for conflict when the referral arm also acts as the decision-making/facilitating arm. The question of accountability and transparency of this approach was also raised by some Sub-committee members, although the Sub-committee noted that these latter issues could be addressed through legislation and adequate training of personnel.

26.13 This option's advantage allows agencies such as Corrective Services and Youth Services to build programs around conferencing so that conferencing outcomes would not stand alone. For example, outcome agreements could include community service of so many hours and a set timeframe to complete, as well as formal/informal apologies.

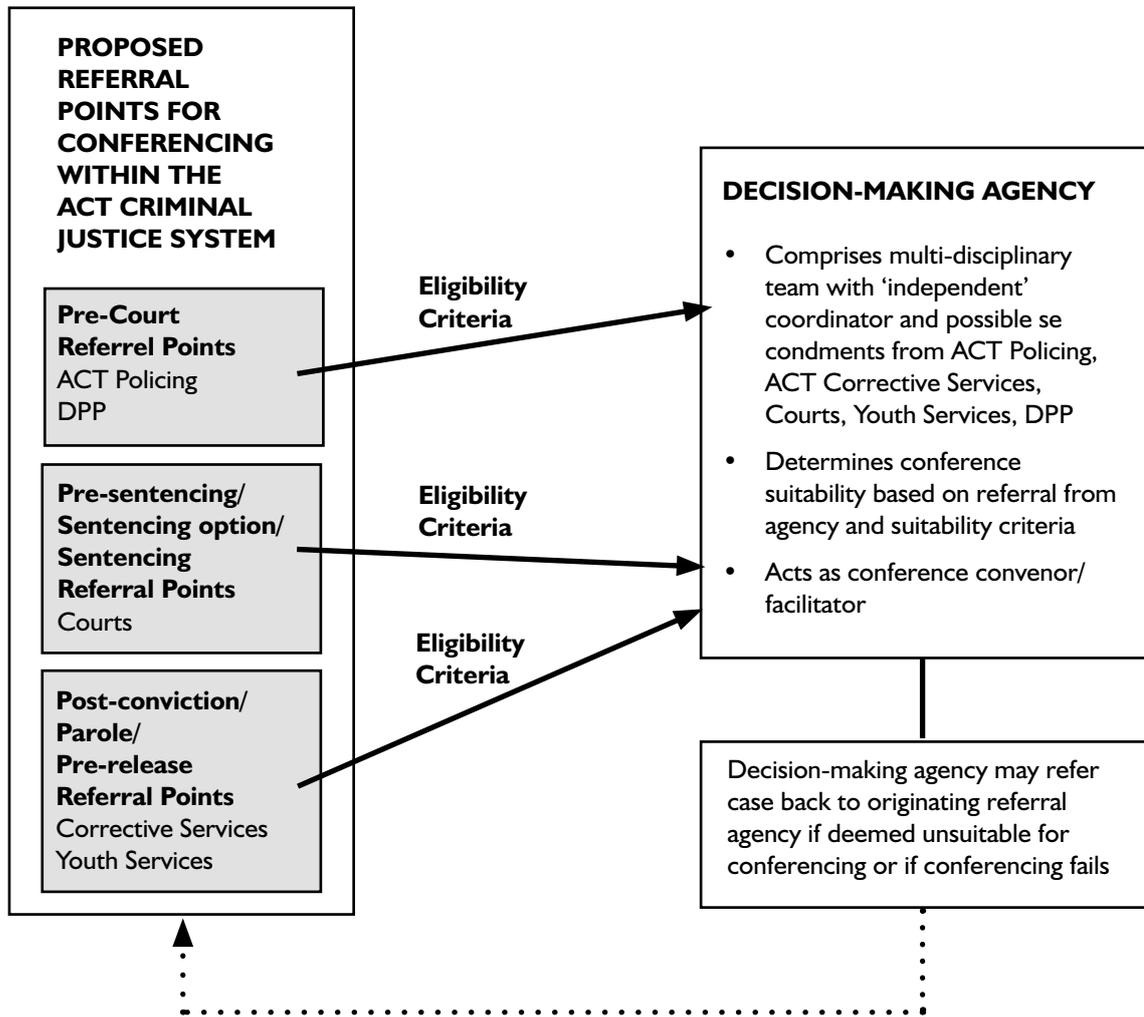
Option 4

A combination of

- (a) allowing ACT Policing to continue to run its Diversionary Conferencing program independently, based on the rationale that it is a pre-court diversion with the decision-making authority vested in the discretionary powers of police; and**
- (b) augmenting this with an additional multi-disciplinary agency as in Option 1 (B), with the capacity for the decision-making role of assessing suitability for conferencing and undertaking the facilitator/convenor role.**

26.14 As in Option 1(B), referrals to the multi-disciplinary unit could be made at various points along the criminal justice continuum.

FIGURE 1: SINGLE AGENCY ADMINISTRATIVE FRAMEWORK



RESTORATIVE JUSTICE SUB-COMMITTEE

TERMS OF REFERENCE

- I. As part of the ACT Sentencing Review, the Restorative Justice Sub-Committee has been established to examine restorative justice issues.

The Sub-Committee will:

- (a) review the range of restorative justice models available in Australia and overseas including:
 - at what stage of the justice process is restorative justice used;
 - for which offences/offenders;
 - which agency is given responsibility for managing restorative justice programs; and
 - what evaluations have been undertaken on restorative justice models.
 - (b) inquire into the legislative framework to support restorative justice models;
 - (c) analyse the resource implications applicable to various models; and
 - (d) recommend appropriate restorative justice models for the ACT.
2. In undertaking the above, the Sub-Committee will also be informed by the ACT Sentencing Review's public consultation process.
 3. The Restorative Justice Sub-Committee will report its findings to the ACT Sentencing Review Committee.

SUBMISSIONS RECEIVED

This Issues Paper was informed by submissions to the ACT Sentencing Review Committee received from the following:

ACT Council of Social Services

ACT Department of Corrective Services

ACT Policing

Dr Patricia Easteal

Family and Friends for Drug Law Reform

Law Society of the ACT

Brendan Smyth, Leader of the Opposition in the Legislative Assembly

Victims of Crime Coordinator

Youth Coalition of the ACT

CONFERENCING IN AUSTRALIA

JURISDICTION/ AREA COVERED	STATUTORY BASIS, EXCLUDED OFFENCES	AGENCY RESPONSIBILITY & WHO CONFERENCED	REFERRAL POINTS FOR CONFERENCING	DECISION-MAKER ON SUITABILITY TO CONFERENCING	EVALUATIONS UNDERTAKEN & FINDINGS
ACT (state-wide)	None. Offences excluded- serious violent offences, sexual offences, weapons offences, drug offences, drink driving offences and family violence offences.	ACT Policing For juvenile and adult offenders	Police refer as diversion from court	ACT Policing, Diversionary Conferencing Team.	RISE evaluation comparing conferencing with normal court process of young property offenders and violent offenders and drink drivers: Higher rates of reoffending in conferenced drink drivers; No significant difference between conferenced and court juvenile property offenders; Lower rate of reoffending for conferenced young violent offenders (Sherman et al 2000). Conferencing more satisfying for victims and both victims and offenders see conferencing as fairer than court (Sherman et al 1998, Strang et al 1999).
NSW (state-wide)	Young Offenders Act 1997. Offences excluded- sexual offences, offences causing death, certain drug offences, AVO offences and some traffic offences.	Dept of Juvenile Justice. Only juvenile offenders.	Police and Court referral as diversion from court or as sentencing option.	Specialist Youth Officer (Police) and Conference Administrator (Juvenile Justice) NB: if no agreement referred to DPP	High levels of satisfaction with conferencing for victims, offenders and offender supporters. (Trimboli, 2000) Opportunity to express views and treated with respect for both victim and offender (90%) Satisfied with how case was handled (79%).

JURISDICTION/ AREA COVERED	STATUTORY BASIS, EXCLUDED OFFENCES	AGENCY RESPONSIBILITY & WHO CONFERENCED	REFERRAL POINTS FOR CONFERENCING	DECISION-MAKER ON SUITABILITY TO CONFERENCING	EVALUATIONS UNDERTAKEN & FINDINGS
Northern Territory (state-wide)	Juvenile Justice Act 1997; Police Administration Act, Part VII. Offences excluded- sexual offences, serious violence and domestic violence	Dept of Corrections (post-court) and NT Police (diversionary conferencing). Only juvenile offenders.	Court referral upon conviction of juvenile repeat property offender subject to mandatory sentence (15-17yo); Police referral to diversionary conferencing (10-17yo).	Corrections (post-court conferencing for juveniles); Police (for pre-court conferencing).	No evaluation at 2001.
Queensland (not State-wide – Brisbane metro, SE Qld and Carins)	Juvenile Justice Act 1992. No offences excluded.	Dept of Families, Youth and Community Care. For juvenile offenders and for adults under administrative arrangements with police.	Police and court referral as diversion from court. Court referrals for pre-sentencing. NB: Also formal cautioning tier involving victim.	Deptal Conference Convenor (approved by chief exec. and independent of offence).	Approx \$200-\$900 per case for pilots. Police process and court appearances may turn out cheaper but at a higher social cost for victim-offender reconciliation and community development. Success based on considerable preparation work done by convenors. Participation satisfaction levels considerably high (Hayes et al 1998, Palk et al 1998).
South Australia (state-wide)	Young Offenders Act 1983. No offences excluded (although some police guidelines on some offences).	Courts Administration Authority. Only juvenile offenders.	Police and Court referral as diversion from court.	Courts via youth justice coordinators.	Indigenous offenders more likely not to attend or agree to outcome plan; offences against the person just as successfully conferred as property offences; non-attendance by victims high (fewer than half attended) but those who did very satisfied; only 10% attendance of victim supporters (Wundersitz 1996). Most victims and offenders rated conference fair, victims satisfied (Daly et al 1998)

JURISDICTION/ AREA COVERED	STATUTORY BASIS, EXCLUDED OFFENCES	AGENCY RESPONSIBILITY & WHO CONFERENCED	REFERRAL POINTS FOR CONFERENCING	DECISION-MAKER ON SUITABILITY TO CONFERENCING	EVALUATIONS UNDERTAKEN & FINDINGS
Tasmania (state-wide)	Youth Justice Act 1997. Offences excluded- traffic offences, serious violence, sexual offences and dangerous weapons offences.	In transition from Police to Dept of Health & Human Services. Only juvenile offenders.	Police referral as diversion from court, Court referral for sentencing.	In transition with both police conferences (old program) and facilitator conferences (new program). *However, police program still operating now and mostly used for conferencing (Goodwin email 2003)	Evaluation undertaken by University of Tasmania Law School – no report available yet.
Victoria (not state-wide, Melbourne and metropolitan area)	None. Offences excluded- drink driving offences	Angicare, Police, Dept of Human Service, Dept of Justice and Vic Legal Aid. Only juvenile offenders. (Under review by Bracks govt)	Court referral only as alternative to a supervised order, conferences for offenders with prior court appearances (not minor offences)	Young Persons Court	3 pilot program evaluations Just over 50% of outcome plans completed (Markiewicz 1997a) Little difference in outcomes on reoffending between conference and probation groups (Markiewicz 1997b) Recidivism rates between conference and probation group similar and costs the same (approx \$3000 per case) Positive benefits for young people, families and victims (Success Works 1999)
Western Australia (state-wide)	Young Offenders Act 1994. Offences excluded – driving offences and most serious violent and sexual offences.	Ministry of Justice Only juvenile offenders. *pilot project for adult males by courts	Police and court referral as diversion from court.	Juvenile Justice Teams comprising coordinators, police and Education.	95% of offenders successfully completed agreed outcomes. Very high rates of satisfaction for offenders, offenders' parents and victims. However, some offences minor enough to have been dealt with cautions or some cases to conferencing instead of Children's Court. Low referral rates of indigenous offenders (Cant & Downey 1998)

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Queensland

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Western Australia

Young Offenders Act 1994 (Part 5 – Dealing with young offenders without taking court proceedings)

Tasmania

Youth Justice Act 1997

Northern Territory

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New Zealand

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