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YOUTH RESTORATIVE JUSTICE: LESSONS FROM AUSTRALIA

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EXECUTIVE SUMMARY

This report provides an analysis of the restorative justice processes currently operating in Australia for juvenile offenders. The report aims to provide an overview of the effectiveness of youth conferencing, victim-offender mediation and circle sentencing when a young offender has committed an offence. While the report focuses specifically on juvenile offenders, the applicability of restorative justice for adult offenders is also demonstrated. Further, the report shows the educational training and facilities, and financial requirements needed for restorative justice to operate in Australian jurisdictions. Finally, a framework for possible reform in Australian jurisdictions is suggested, as the present legislative and policy mechanisms that regulate the operation of restorative justice practices in Australia have several shortfalls.

RESTORATIVE JUSTICE

'Restorative justice' refers to a variety of dispute and conflict resolution procedures to address offending, aimed at achieving the reparation of the relationships between the offender, the victim, and the community.¹ Restorative justice practices rely on the participation of the victim.² It involves a collaborative dialogue between victims and offenders in a manner distinct from other methods of dealing with the aftermath of the perpetration of offences. This contrasts against the traditional retributive justice system. The retributive system perceives crime as a violation of the state and accordingly grounds itself on the values of blame and punishment.³ Meanwhile, restorative justice views crime as a violation of people and relationships.⁴ Restorative justice principles include the rehabilitation of offenders, the reintegration of offenders into society, and the reparation of the harm caused to victims.

MODES OF RESTORATIVE JUSTICE

Conferencing

Youth Justice Conferencing is a formalised legal process which provides victims an opportunity to face the offender who has committed a crime against them. This process aims to give the victim a voice to express the harm caused against them, and for the offender to repair the harm they have

¹ Heather Strang, *Restorative Justice Programs in Australia* (Final Report, March 2001) 2.

² *Ibid.*

³ Michael Wenzel et al, 'Retributive and Restorative Justice' (2008) 32 *Law and Human Behaviour* 375, 375.

⁴ *Ibid* 382.

caused, with the support of their families and the community. A conference is run by a conference convenor. General participants include the offender, the victim (who does not have to be present for specific offences), both of their supporters, a police officer and the conference coordinator in attendance.⁵ Following discussions about the offence, the victim, the offender and their support networks attempt to come to a decision concerning an appropriate 'outcome plan' for the offender to complete.⁶ This can include, but is not limited to, an apology, community service, an education program or counselling.⁷

Victim-Offender Mediation

Victim-offender mediation is run by trained mediators, who do not have a direct interest in the victim.⁸ The mediator facilitates the meeting between the victim and the offender, who are usually the only parties present in the process.⁹ In most jurisdictions in Australia, the process involves discussions between the victim and the offender about the offence and its impact, as well as determining how the harm resulting from the offence can be mended.¹⁰ These can include an apology, payment for the harm suffered or an explanation of why the offender acted in the way they did.

Circle Sentencing

Circle sentencing operates in Australia for adult Indigenous offenders in New South Wales and Western Australia.¹¹ Circle sentencing involves individuals coming together and determining a sentence that does not result in incarceration for Indigenous offenders.¹² Generally, the offender and their support groups, Indigenous elders, respected members in the community, the prosecution or police, as well as a magistrate attend a circle. If they consent, victims may also be involved in the

⁵ Kathleen Daly, 'Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects' in Allison Morris and Gabrielle Maxwell (eds), *Restorative Justice For Juveniles: Conferencing, Mediation and Circles* (Hart Publishing, 2001) 59, 66.

⁶ *Youth Justice Act 1992* (QLD); *Young Offenders Act 1997* (NSW).

⁷ Kathleen Daly, 'Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects' in Allison Morris and Gabrielle Maxwell (eds), *Restorative Justice For Juveniles: Conferencing, Mediation and Circles* (Hart Publishing, 2001) 59, 67.

⁸ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 18.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Criminal Procedure Regulation 2005* (NSW) s 19.

¹² J Korff, 'Circle Sentencing', 2019 <<https://www.creativespirits.info/aboriginalculture/law/circle-sentencing>>.

circle.¹³ Circles bring together the thoughts of Aboriginal elders and magistrates, assessing the most appropriate sentence for the offender in light of the offender's circumstances.¹⁴

IMPLEMENTATION OF RESTORATIVE JUSTICE

Education and training

There are several types of facilitators of juvenile restorative justice practices in Australia as each state and territory has individual restorative justice schemes. Juvenile justice conferencing facilitators are typically referred to as conference convenors. Conference convenors are responsible for preparing for the conference, facilitating the face-to-face dialogue, and following up the offender at the completion of the conference.¹⁵ There are no mandatory professional qualifications for conference convenors. However, there are required training courses that provide facilitators with the necessary theoretical understanding and practical skills to be able to successfully convene juvenile justice conferencing.¹⁶ When a juvenile offender is Indigenous, care is taken when implementing these restorative justice processes. A discussion regarding the Northern Territory's 'Ponki' Mediation is included in this section, as this training program is designed to ensure that culturally appropriate measures are taken with Indigenous offenders through a blending of both Indigenous and Western mediation practices.

Finance

Compared to community-based services and detention, conferencing is the cheapest option per child. The figures for real, recurrent government expenditure in Australia are as follows: community-based services are \$103.14 per child; detention-based services cost \$207.74; and, conferencing costs \$20.73.¹⁷ These statistics need to be read in consideration with factors such as increased government funding and other relevant indicators.

¹³ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 17.

¹⁴ Kathleen Daly and Gitana Scifoni-Proietti, 'The Elders Know...The White Man Don't Know: Offenders' Views of the Nowra Circle Court' (2011) 7(24) *Indigenous Law Bulletin* 17.

¹⁵ Masahiro Suzuki and William Wood, 'Restorative Justice Conferencing as a 'Holistic' Process: Convener Perspectives' (2017) 28(3) *Current Issues in Criminal Justice* 277.

¹⁶ Ippei Okazaki, 'The "Ponki" Victim Offender Mediation Program on the Tiwi Is' (Conference Paper, Biennial Conference 2011), <<https://clant.org.au/wp-content/uploads/the-bali-conference/2011/Okazaki-Ippei-Restorative-Justice-with-the-Ponki-Mediators-on-the-Tiwi-Islands.pdf>>; Bronwyn Rossingh, 'Tiwi Islands Skin Group Project: Keeping Culture Strong and Inspiring Youth to Become Community Leaders' (Final Report, 2014) <<http://igld.cdu.edu.au/wp-content/uploads/2016/03/FINAL-REPORT-FOR-THE-TIWI-SKIN-GROUP-PROJECT.pdf>>.

¹⁷ Note that these figures present the cost for one child per day.

THE USE OF RESTORATIVE JUSTICE PROCESSES FOR SPECIFIC CRIMES

Murder

Murder is excluded from the scope of restorative justice where offenders are referred to the restorative justice program pre-sentencing. It is available for youth-commissioned murder offences in a few jurisdictions, only where the referrals occur post-sentencing. Due to the heinous nature and the gravity of murder, Australian practice deems restorative justice appropriate only when it occurs after sentencing; it is inappropriate to use restorative justice as a diversion from incarceration. Data is unavailable for restorative justice practices regarding murder offences, due to the highly sensitive nature of the programs. Hence, the effectiveness of restorative justice in this regard cannot be assessed.

Sexual Assault

In relation to sexual assault offences, the most commonly used form of restorative justice for young offenders is conferencing. The failure of the traditional criminal justice system to address sexual assault crimes has resulted in low conviction rates and a failure to meet victim needs. Consequently, victims of sexual assault crimes are more attracted to restorative justice programs. Empirical research suggests that restorative justice measures for sexual assault offences can create a deterrent for young offenders and reduce recidivism rates, particularly when offenders receive specialised treatment, such as therapy or counselling. Furthermore, restorative justice programs are more effective at meeting the needs of sexual assault victims by empowering their voice, validating their experience and facilitating relationship reparation. Restorative justice programs for sexual assault crimes may be implemented as an alternative to court proceedings or as a complementary mechanism post-sentencing, depending on factors such as the seriousness of the offence, the nature of the relationship between the parties and their willingness to participate in the program.

Assault

An analysis of the data and case studies demonstrates how restorative justice is used mainly for minor assault-related offences pre-sentence and post-sentence, including common assault and assault occasioning bodily harm. Serious assault-related offences are excluded from a number of legislative frameworks in each state and territory. However, if they were not excluded, serious assault-related offences were mostly referred post-sentence.

Drugs/Trafficking

In addressing drug crimes through restorative justice mechanisms, considering the appropriateness of the process as a complete alternative or complementary mechanism alongside traditional criminal justice system is imperative. Restorative justice programs to address drug crimes focus on educating the offenders about drugs and their harm, allowing them to rehabilitate out of their habits and/or addictions. These programs also seek to prosper relationships, which promotes willingness to reconcile. This report analyses the positive impact both conferencing and diversionary drug programs have had on Australian youths, as use and possession of illicit drugs are part of a wider social problem that can only be adequately redressed through withholding tenants of therapeutic justice.

Property Offences

Property offences were the most common offences committed by juvenile offenders in Australia between 2016-17. As restorative justice was initially implemented in Australia to address minor offending, juvenile justice conferencing is used highly in this offence category. Through an analysis of the available data, it was found that conferencing is less effective in reducing re-offending in juvenile offenders who committed minor property offences, and more effective in offences involving violence.¹⁸

Governments, police and courts choose to divert young people from the more formal parts of the criminal justice system because punitive approaches and cautions are not effective in reducing reoffending rates and instead stigmatise the offender. The low effectiveness rates of restorative justice for lesser crimes such as theft and property crime are outweighed by the positive benefits for all parties including victim closure, the ability for parties to share their side of the story and address underlying factors contributing to youth crime. Conferencing provides a safe and supportive environment that helps children reintegrate into society and return to education. It can also help repair the harm done and foster the healing process for the victim. Furthermore, victims can choose not to attend because of fear, anger and belief that conferencing is not useful.

¹⁸ Lawrence Sherman et al, 'Twelve Experiments in Restorative Justice: The Jerry Lee Program of Randomized Trials of Restorative Justice Conferences' (2015) 11(4) *Journal of Experimental Criminology* 501; Lawrence Sherman, Heather Strang, and Daniel Woods, *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments (RISE)* (Report Canberra: Centre for Restorative Justice, Research School of Social Sciences, Australian National University, 2000).

EFFECTIVENESS OF RESTORATIVE JUSTICE IN REDUCING REOFFENDING

Evidence regarding juvenile reoffending rates after restorative justice conferencing remains mixed. Early studies of juvenile restorative justice conferencing suggest that there was a reduction in reoffending rates for restorative justice conference participants when compared to the traditional juvenile court processes.¹⁹ However, later studies have been more critical, particularly when data is analysed in light of different variables such as the range of offences and the specific target groups for restorative justice conferencing.²⁰ Some studies have suggested that restorative justice conferencing is more effective in reducing reoffending for violent crimes where there is a personal victim involved, as opposed to reducing reoffending for minor property crimes.²¹ While evidence relating to the lowering of recidivism rates is somewhat unclear, there is a body of evidence suggesting that restorative justice conferencing does have a positive impact in regards to both offender and victim satisfaction with the criminal justice system.

RESTORATIVE JUSTICE FOR ADULT OFFENDERS

In Australia, restorative justice programs are now widely available for youth offenders in all eight jurisdictions. The use of restorative justice for youth offenders was driven primarily by the belief that such programs provide youth with a 'second-chance' to turn their lives around. Youth offenders are typically considered to be less accountable for their actions than adults, and more amenable to change. However, the implication of this orthodox view is that it is 'too late' for adults, and that restorative justice will be inappropriate or insufficiently punitive for adult offenders. Accordingly, while restorative justice programs are now ubiquitous for youth offenders, the use of such programs for adult offenders has been relatively uncommon, and more restricted. However, while more research should be conducted in this area, the available evidence supports the expansion of restorative justice to adult offender crimes.

¹⁹ Garth Luke and Browyn Lind, 'Reducing Juvenile Crime: Conferencing versus Court' (2002) 69 *Crime and Justice Bulletin* 1; Sumitra Vignaendra and Jacqueline Fitzgerald, 'Reoffending among young people cautioned by police or who participated in a youth justice conference' (2006) 103 *Crime and Justice Bulletin* 1.

²⁰ Nadine Smith and Don Weatherburn, 'Youth Justice Conferences versus Children's Court: A comparison of re-offending' (2012) 160 *Crime and Justice Bulletin* 1.

²¹ Lawrence Sherman et al, 'Twelve Experiments in Restorative Justice: The Jerry Lee Program of Randomized Trials of Restorative Justice Conferences' (2015) 11(4) *Journal of Experimental Criminology* 501; Australian National University and The Australian Institute of Criminology, *Australian Capital Territory Restorative Justice Evaluation: An Observational Outcome Evaluation* (Report of Findings, July 2018).

REFORMS

Based on the analysis conducted in prior sections, this report identifies four areas for reform in Australia and subsequently recommends the following legislative and practice amendments:

Issue: Australia lacks a centralised, streamlined statute or policy regarding restorative justice practices. Each jurisdiction possesses its own legislation. This results in considerable variability in critical areas, including which offences are referable to restorative justice programs, meaning that youths may be denied the option of restorative justice by virtue of belonging to the wrong state or territory. Variability also reduces the credibility of the system.

Recommendation: The adoption of a national consolidated restorative justice framework, as recommended by the Australian Law Reform Commission in 1997.

Issue: Many restorative justice practices (youth justice conferencing and victim-offender mediation) are inappropriate, and therefore ineffective, for Indigenous Australians. The disregard for Indigenous Australians and their distinct cultural differences, combined with police discrimination, has led to indirectly discriminative restorative justice practices which are largely inaccessible to Indigenous youth. This inaccessibility is detrimental to Indigenous young people, who make up 54% of all youth in custody.²²

Recommendation: Implement training and education programs for prosecutors, defence lawyers, judges and restorative justice facilitators to support Indigenous-friendly restorative justice programs.

Issue: There is no mandatory requirement that conferencing facilitators must possess a minimum level of qualification (e.g. accredited psychology or sociology degrees). This is concerning, as conferencing may inevitably give rise to traumatic and sensitive material. Additionally, young offenders often lack the moral maturity and introspective skills required to promote victim satisfaction in the restorative justice process. Further, many young offenders lack the vocabulary, confidence and/or understanding to communicate their remorse.

²² *Youth Detention Population in Australia 2018* (Australian Institute of Health and Welfare Bulletin 145).

Recommendation: Conferencing facilitators should be appropriately trained to deal with vulnerable, sensitive and potentially traumatic information which will often arise in the course of conferencing. Facilitators should also be trained on how to engage with young offenders, including using simple, comprehensible and restorative language during the conferencing process. Additionally, facilitators should engage with the young offender prior to the restorative justice process to explain to the offender the structure and purpose of the conferencing.

Issue: Restorative justice is not available for serious offences (such as sexual assault and murder) in many jurisdictions. The 'Crimes Analysis' section of this report reveals that restorative justice can be effective in serious offending (see: Section 5).

Recommendation: To equip facilitators, police, and lawyers with the training and resources necessary to carry out restorative justice for serious crimes. To repeal statute which explicitly excludes serious offences such as sexual assault and murder from the scope of restorative justice models. However, restorative justice for serious offending should remain as a post-sentence option, supplementing traditional punitive mechanisms such as incarceration; restorative justice may be inappropriate for serious offending if it occurs pre-sentencing as a diversionary method.

PART ONE: INTRODUCTION

I.1 INTRODUCTION

I.1.1 THE TEAM

This project was headed by HAQ: Centre for Child Rights (HAQ), a non-governmental organisation in India, which strongly promotes and protects children's rights. The organisation undertakes research and presents documentation to facilitate public education and advocacy for children's rights, with its main pillars focusing on children, governance, and child protection.²³ This report provides a comprehensive analysis of restorative juvenile justice practices in Australia, as a potential model for implementation in India.

This project was undertaken through HAQ's international partnership with Macquarie University, an Australian university based in Sydney. The Macquarie student team worked with HAQ remotely. This project was co-supervised by Bharti Ali, co-founder and director of HAQ, and Debra Ronan, convenor of the international partnership unit at Macquarie University. The Macquarie student team consists of seven students:

- Shelby Sewak
- Chandla Serret
- Marina Bouchahine
- Adrian Saldarriaga
- Karen Liong
- Josephine Pan
- Eisha Farrukh

I.1.2 PROJECT OBJECTIVE

The primary objective of this report is to present detailed research and findings of the nature of juvenile restorative justice practices in Australia, with reference to statute and case studies across Australian jurisdictions, empirical research, and statistics. The report evaluates the effectiveness of these practices in relation to particular offences of varying degrees of seriousness and discusses the

²³ 'About Us', HAQ Centre for Child Rights (Web Page) <<http://haqcrc.org/about-us/>>.

practical implementation of the restorative justice programs. This project is designed to offer HAQ a potential model and framework for the implementation of restorative justice practices in India, contributing to the organisation's children's rights advocacy work.

I.1.3 SCOPE AND LIMITATIONS

To achieve these objectives, this report will focus on Australia's juvenile restorative justice practices. The report will focus on the effectiveness of these restorative justice practices in relation to five crimes: murder, sexual assault, drugs, assault and property crimes. The effectiveness of these programs will be assessed according to their ability to achieve objectives such as reducing offender recidivism and achieving victim satisfaction.

Furthermore, the report will consider the impact of restorative justice mechanisms in relation to the Australian Indigenous population, particularly regarding circle sentencing. This can potentially be used as a cultural comparator in India. The report will also discuss the practical implementation of restorative justice programs, identifying the associated education, training and financial requirements. A comparison between restorative justice practices for young offenders and adult offenders will also be included. Finally, the report offers recommendations for reform of Australia's current restorative justice practices.

While a comprehensive analysis is provided in this report, the project is limited in two ways. Firstly, the report only considers the available research and statistics in Australia, which is particularly restricted for heinous crimes such as sexual assault and murder due to the lack of practice of addressing such crimes. Secondly, the findings reflect potential selection biases regarding the screening processes which 'filter out' offenders who are ineligible for restorative justice programs, alongside the subjective willingness of victims to participate in the programs.

**PART TWO:
BACKGROUND TO
RESTORATIVE JUSTICE**

2.1 BACKGROUND TO RESTORATIVE JUSTICE

2.1.1 RESTORATIVE JUSTICE

The term 'restorative justice' is used to refer to a variety of dispute and conflict resolution procedures to address offending, aimed at achieving the reparation of the relationships between the offender, the victim, and the community.²⁴ This reparation is achieved through a collaborative process where all parties impacted by the offence engage with one another in a mediated setting to deal with the aftermath of the offence and its consequences.²⁵ Restorative justice programs vary; however, all programs seek to result in the offender taking responsibility for their misconduct against the victim, and holding themselves accountable to the implications of their actions.²⁶

Many restorative justice programs rely on the participation of the victim²⁷. These programs involve a collaborative dialogue between victims and offenders in a manner distinct from other methods of dealing with the aftermath of the perpetration of offences (such as trials and incarceration). In this way, restorative justice practices emphasise the importance of the victim's voice in the decision-making process. Restorative justice places agency and focus upon the victim and therefore assists in the healing and empowerment of victims in a way the traditional retributive system does not. Ultimately, restorative justice seeks to repair the harm suffered by victims whilst also assisting in the reintegration of the offender back into society.²⁸

Simple retribution principles perceive crime as a violation of the state; justice is therefore based on a system of blame, conferring upon the state powers to administer punishment for those violations.²⁹ Contrastingly, restorative justice portrays crime as a violation of people and relationships,³⁰ rather than a rule in the government's lawbook. Restorative justice demonstrates that emphasis should be placed on the values that are violated when one commits a crime; crimes violate the values

²⁴ Heather Strang, *Restorative Justice Programs in Australia* (Final Report, March 2001) 2.

²⁵ *Ibid.*

²⁶ *Ibid.* 6.

²⁷ Heather Strang, *Restorative Justice Programs in Australia* (Final Report, March 2001) 2.

²⁸ Anne Cossins, 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48 *British Journal of Criminology* 359, 360.

²⁹ Michael Wenzel et al, 'Retributive and Restorative Justice' (2008) 32 *Law and Human Behaviour* 375, 375.

³⁰ *Ibid.* 382.

underpinning law, rather than simply violating the law itself.³¹ These violations of obligations owed to other individuals (whether they be personal or impersonal) create harm and suffering which the offender must rectify.³² The offender thus possesses obligations and liabilities as a result of their illegal conduct.³³

This contrast may misrepresent retributive justice and restorative justice as antithetical to one another.³⁴ However, restorative justice encapsulates retributive values, as it seeks to hold offenders accountable for their actions, to acknowledge and denounce their wrongdoing, and to set reparations.³⁵ Essentially, restorative justice seeks to achieve retributive goals in a method that seeks holistic reparation. Hence, restorative justice can be a welcome addition to traditional criminal justice systems.

2.1.2 BACKGROUND TO RESTORATIVE JUSTICE IN AUSTRALIA

Restorative justice programs in Australia were introduced as interventions for juvenile offending.³⁶ There are not as many restorative justice practices offered to adult offenders compared to the number of conferencing options available to juveniles.³⁷ This is largely because restorative justice emerged in Australia as a diversion program for young people. Restorative justice was implemented in Australia following New Zealand's adoption of conferencing in 1989, after decades of dissatisfaction with the treatment of juvenile offenders.³⁸

The first restorative justice program in Australia was in the city of Wagga Wagga in New South Wales (NSW), in 1991.³⁹ This was a police-run restorative justice model which focused heavily on reintegrative shaming,⁴⁰ rather than rehabilitation or reparation. Reintegrative shaming focuses on

³¹ Ibid.

³² Ibid 377.

³³ Ibid.

³⁴ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 35.

³⁵ Ibid 2.

³⁶ Heather Strang, *Restorative Justice Programs in Australia* (Final Report, March 2001) 5.

³⁷ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 8-9.

³⁸ Heather Strang, *Restorative Justice Programs in Australia* (Final Report, March 2001) 4.

³⁹ Ibid 6.

⁴⁰ Kathleen Daly and Hennessey Hayes, 'Restorative Justice and Conferencing in Australia' (2001) 186 *Trends and Issues in Crime and Criminal Justice* 1, 4.

highlighting shame in criminal punishment as a means of deterring reoffending.⁴¹ It also does not place as much regard upon the victim like present restorative justice mechanisms. As such, the Wagga Wagga conferencing model was a controversial process.⁴² Following concerns about the effectiveness of the program's structured reintegrative shaming, the Wagga Wagga conferencing program was succeeded in 1995 by the youth conferencing programs operating in NSW today.⁴³

Youth justice conferencing is presently operating in all states and territories.⁴⁴ Some Australian jurisdictions also offer additional forms of restorative justice, such as victim-offender mediation. It is important to note that Australia lacks a national framework for restorative justice; each state and territory has its own legislation, mode of practice and limitations of restorative justice. However, all of these programs seek to exhibit the restorative justice principles outlined above, rather than values of reintegrative shaming. The structure and procedure of conferencing is detailed in the following Section: 'Modes of Restorative Justice

⁴¹ Ibid.

⁴² Heather Strang, *Restorative Justice Programs in Australia* (Final Report, March 2001) 6.

⁴³ Ibid.

⁴⁴ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 8-9.

**PART THREE:
RESTORATIVE JUSTICE
MODELS**

3.1 RESTORATIVE JUSTICE MODELS

Conferencing, victim-offender mediation ('VOM') and circle sentencing are the most common restorative justice programs operating in the Australian criminal justice system.⁴⁵ Though circle sentencing is used specifically for adult Indigenous offenders,⁴⁶ this section of the report will explore the process of circle sentencing, demonstrating the ways in which Australia accommodates Indigenous offenders. The following section will explain the restorative justice programs operating in Australia, analysing the way in which each program works.

Table 1: Restorative Justice Models in Australia.

Conferencing	<ul style="list-style-type: none"> • Gives the victim (if they consent) an opportunity to face the offender and express the harm caused. • Gives the offender a forum to 'address' and repair the harm they have caused.
Victim-Offender Mediation	<ul style="list-style-type: none"> • Run by train mediators. • Mediator facilitates the meeting between the victim and the offender. • Mostly indictable offences are referred under this model – highly confidential. • Mostly post-sentence.
Circle Sentencing	<ul style="list-style-type: none"> • Adult Indigenous offenders. • Attendees: offender and support group, Indigenous elders/respected members, prosecution or police and magistrate. Victims can be involved (consent). • Elders and magistrates assess appropriate sentence for offender.

⁴⁵ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 1.

⁴⁶ *Criminal Procedure Regulation 2005* (NSW) s 19.

Table 2: Restorative Justice Models in Australia across jurisdictions.⁴⁷

	Youth Conferencing	Victim-Offender Mediation	Circle Sentencing
NSW	X	X	X
VIC	X		
QLD	X	X	
SA	X	X	
WA	X	X	X
NT	X	X	
TAS	X	X	
ACT	X		

3.1.1 CONFERENCING

Youth Justice Conferencing (also known as family conferencing) is a formalised legal process, giving the victim an opportunity to face an offender who has committed a crime against them. The process aims to give the victim an opportunity to express the harm caused against them, and to give the offender a forum to 'address' and repair the harm they have caused against a victim, with the support of their families and the community. The applicability of conferencing for juvenile offenders is determined by assessing differing factors in each state and territory. These include; if the offender has pleaded guilty or been found guilty, the seriousness of the offence, the violence involved in the crime, the consent of the offender and victim, the harm caused toward the victim, the cultural background of the offender, as well as the amount of times the offender has received warnings under

⁴⁷ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 6.

the relevant Act in each state and territory.⁴⁸ Conferences can be referred by courts, the police and juvenile justice agencies pre-sentence, post-conviction or post sentence, depending on the severity of the crime. The offender is assessed against relevant criteria to determine their applicability to attend a conference, such as; their acceptance of responsibility, remorse, emotional feelings toward the victim, alcohol and substance abuse, and cultural factors.⁴⁹

The following list presents an overview of the type of people who can attend a conference in Australia:

- The offender;
- The victim or a victim's representative;
- The convenor of the conference;
- An adult who is responsible for the juvenile offender, as well as someone of the offender's choice;
- The offender's family (including extended family);
- The victim's family and other support;
- The police officer who is investigating the crime, and a specialised police youth officer;
- A legal practitioner who is advising the juvenile offender;
- A cultural consultant or developmental specialist;
- A well-respected member from Indigenous communities. For example, in Queensland, convenors must ask an elder, or other members of the Indigenous community to attend a conference if the offender is an Indigenous juvenile;⁵⁰
- If a juvenile offender is under a court order than the supervising officer can attend;
- If a juvenile attends school, then a school representative; and
- If approved, an observer can also attend.⁵¹

⁴⁸ *Young Offenders Act 1997* (NSW); *Youth Justice Act 1992* (QLD); *Crimes (Restorative Justice) Act 2004* (ACT); *Children, Youth and Families Act 2005* (VIC); *Youth Justice Act 1992* (VIC); *Young Offenders Act 1993* (SA); *Young Offenders Act 1994* (WA); *Youth Justice Act 2005* (NT); *Youth Justice Act 1997* (TAS).

⁴⁹ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 6.

⁵⁰ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 11.

⁵¹ Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 5th ed, 2013) 338; *Youth Justice Act 1992* (QLD); *Young Offenders Act 1997* (NSW) s 47.

Though the structure of conferences varies, they generally take a standard form. The juvenile offender, the victim and both of their supporters, a police officer, and the conference coordinator attend the conference to discuss the impact of the offence.⁵² In some Australian states and territories, the victim does not have to attend a conference. As opposed to the adversarial criminal justice system, communication amongst the participants is facilitated by a conference coordinator and undertaken in an atmosphere of understanding and compassion. A conference convenor can be appointed by a conference administrator, who is satisfied that an offender has been referred for a conference.⁵³ The offender is given an opportunity to discuss the offence and why they were involved, and their parents and supporters discuss how the offence has impacted them. Further, the conference facilitates discussion so that the victim can seek reassurances and ask the offender why they committed the offence against them.⁵⁴ The attending police officer can also explain details of the offence, and advise the offender of the consequences that may arise if they re-offend in the future.⁵⁵ Where offenders are Indigenous, efforts are made to ensure that an influential and well-respected individual from Indigenous communities attend the conference.⁵⁶ This highlights how conferences are facilitated to accommodate cultural difference and to ensure they are culturally appropriate.⁵⁷

Following discussions about the offence, the conference convenor gives the victim an opportunity to propose a way the offender can amend the harm they have caused.⁵⁸ After this, discussions ensue amongst the victim, the offender and their support networks to come to a decision concerning an appropriate 'outcome plan' for the offender to complete.⁵⁹ This can include, but is not limited to, an apology, community service, an education program or counselling.⁶⁰ When the outcome plan is written up, participants are nominated to ensure the juvenile offender completes the plan. In

⁵² Kathleen Daly, 'Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects' in Allison Morris and Gabrielle Maxwell (ed), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart Publishing, 2001) 59, 66.

⁵³ *Young Offenders Act 1997* (NSW) s 42.

⁵⁴ Kathleen Daly, 'Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects' in Allison Morris and Gabrielle Maxwell (ed), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart Publishing, 2001) 59, 67.

⁵⁵ *Ibid* 66.

⁵⁶ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 14.

⁵⁷ *Ibid*.

⁵⁸ *Ibid*.

⁵⁹ *Ibid*.

⁶⁰ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 6.

Australia, specific time periods are stipulated for an offender to complete an outcome plan, however, this varies in each jurisdiction.⁶¹ If an offender does not comply with the outcome plan, they will be processed through the traditional criminal justice system. However, in some jurisdictions there are other legislative ways of dealing with non-compliance, such as cautioning the offender.⁶²

In Western Australia, court conferencing is also available. Though this operates similar to family group conferences, this process was developed for repeat young offenders, as well as those who committed more serious offences.⁶³ To be referred to court conferencing, there must be an identifiable victim, the offender must agree to attend and the court must determine guilt for a juvenile offender.⁶⁴

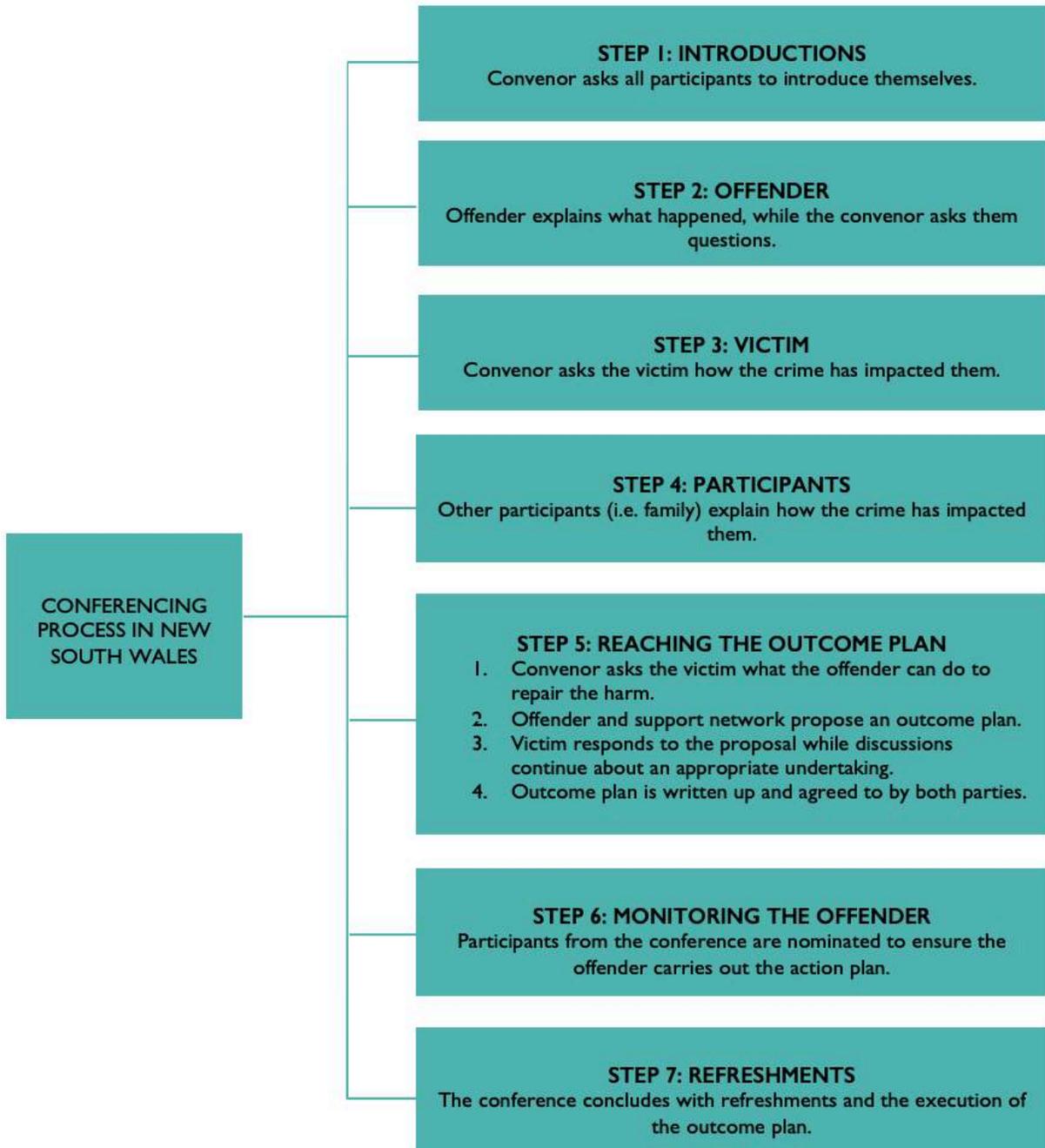
⁶¹ Kathleen Daly, 'Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects' in Allison Morris and Gabrielle Maxwell (ed), *Restorative Justice For Juveniles: Conferencing, Mediation and Circles* (Hart Publishing, 2001) 59, 67.

⁶² Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 6.

⁶³ *Ibid* 12.

⁶⁴ *Ibid*.

Figure 1: Conferencing Process in NSW.⁶⁵



⁶⁵ NSW Department of Juvenile Justice, 'A Guide to Youth Justice Conferencing' (PDF) <http://www.bestforkids.org.au/for-kids/pdf/youth_justice_conferencing.pdf>.

Table 3: Conferencing for youth operating in Australia.⁶⁶

State	Program	Legislation	Participants	Point of Referral
NSW	Youth Justice Conferences	Young Offenders Act 1997	Youth – 10 to 18 years	Police referral and court order Pre-sentence
QLD	Restorative Justice Conferencing	Youth Justice Act 1992	Youth – 10 to 18 years	Police referral and court order Pre-sentence
ACT	Restorative Justice Unit (Conferencing)	Crimes (Restorative Justice) Act 2004	Youth – 10 to 17 years	Available through police referral from time of arrest, as a court-ordered sentence, and post-sentence
VIC	Youth Justice Group Conferencing	Children, Youth and Families Act 2005	Young Adults – 10 to 20 years	Court order Pre-sentence

⁶⁶ Ibid 8-9.

	Youth Justice Conferencing	Youth Justice Act 1992	Youth – 10 to 17	Police referral and court order Pre-sentence
SA	Family Conferencing	Young Offenders Act 1993	Youth – 10 to 18 years	Police referral and court order Pre-sentence
WA	Family Group Conferencing	Young Offenders Act 1994	Youth – 10 to 18 years	Police referral and court order Pre-sentence
NT	Youth Justice Conferencing	Youth Justice Act 2005	Youth – 10 to 18 years	Police referral and court order Pre-sentence
TAS	Community Conference	Youth Justice Act 1997	Youth – 10 to 18 years	Police referral and court order Pre-sentence

3.1.2 VICTIM-OFFENDER MEDIATION

Victim-offender mediation ('VOM') (also known as victim-offender conferencing) is run by trained mediators, who do not have a direct interest in the victim.⁶⁷ The mediator facilitates the meeting between the victim and the offender, who are usually the only parties present in the process (unlike conferencing, which involves more participants).⁶⁸ Oftentimes, VOM is the only process offered to juvenile and adult offenders who are incarcerated.⁶⁹ The applicability of VOM is determined according to the nature of the offence, whether the offender has accepted responsibility for their actions, the physical safety of relevant parties, and the acceptance of both parties to participate. In most jurisdictions in Australia, the process involves discussions between the victim and the offender about the offence and its impact, as well as determining how the harm resulting from the offence can be mended.⁷⁰ These can include; an apology, payment for the harm suffered, or an explanation of why the offender acted in the way they did.

The initiation of VOM is dependent on the relevant Act in each jurisdiction. In most states and territories, it can be initiated by the victim or offender, except in NSW under victim-offender conferencing where there is a sex offender, and in Western Australian under victim-offender dialogue. The table below demonstrates the types of VOM offered in each state and who has the power to initiate a mediation process.

⁶⁷ Government of Western Australia Department of Justice, 'Victim-Offender Mediation', 17 October 2016 <https://www.correctiveservices.wa.gov.au/victim-services/victim-offender-mediation/victim-offender-mediation.aspx?fbclid=IwARlYWtHu8glmo5dIZRTbICiWFFgflXrY2JeEzFMqcAKflA4qyer6a3i_v8>.

⁶⁸ Government of Western Australia Department of Corrective Justice, 'Medication Information for Victims', 17 October 2016 <https://www.correctiveservices.wa.gov.au/_files/victim-services/victim-offender-mediation/reparative-mediation-info-victims.pdf>.

⁶⁹ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 18.

⁷⁰ Government of Western Australia Department of Corrective Justice, 'Medication Information for Victims', 17 October 2016 <https://www.correctiveservices.wa.gov.au/_files/victim-services/victim-offender-mediation/reparative-mediation-info-victims.pdf>.

Table 4: Victim-Offender Mediation in Australia.⁷¹

State	Program	Legislation	Initiated by	Point of Referral
NSW	Victim-Offender Conferencing (Restorative Justice Unit)	No legislation	Victim or offender (there is an exception for sex offenders)	Post-Sentence
WA	Reparative Mediation	Sentencing Act 1995 Young Offenders Act 1994	Victim, offender, magistrate/judge, police prosecutor, lawyers, victim support counsellors or Community Corrections/Youth Justice officers. ⁷²	Post-conviction and pre-sentence
	Victim-Offender Dialogue	No legislation	Victim can only initiate	Post-Sentence
NT	Correctional Centre Conferencing and Ponki Mediation	Community Justice Centre Act 2005	Victim, offender, lawyers, reintegration officers, judges, elders, witness assistance or community members. ⁷³	Post-Sentence

⁷¹ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 19.

⁷² Ibid.

⁷³ Ibid.

TAS	Victim-Offender Mediation		Victim or Offender	Post-Sentence
	Court-Ordered Mediation	Sentencing Act 1997		Pre-Sentence

Mediation and conferencing are distinguished through victim involvement. VOM generally requires victim involvement, however, conferencing can primarily proceed without the victim present.⁷⁴ In most Australian jurisdictions VOM is referred post-sentence, though in Western Australia through reparative mediation and Tasmania through court-ordered mediation, VOM can be referred pre-sentence. VOM is highly confidential, as many serious and indictable offences, such as murder and sexual assault, are dealt with under the process in most states and territories.⁷⁵ Reparative Mediation in Western Australia is the only form of VOM that excludes serious offences.

3.1.3 CIRCLE SENTENCING

Circle sentencing operates in Australia for adult Indigenous offenders in NSW and Western Australia.⁷⁶ While there are other Indigenous courts in Australia which have restorative characteristics,⁷⁷ the Australia Institute of Criminology argues that these courts are not appropriate examples of restorative justice processes.⁷⁸ Therefore, this report will focus on circle sentencing as its objectives are more closely linked to restorative justice objectives.⁷⁹ Circle sentencing stems from an idea of individuals coming together and determining a sentence that does not result in incarceration for Indigenous offenders.⁸⁰ The aims of circle sentencing include; empowering Indigenous communities during sentencing to come to a culturally appropriate resolution, promoting healing for victims and all other affected parties, encouraging the offender to mend the harm they have caused, and promoting community and cultural value.⁸¹ The attendees in circle sentencing

⁷⁴ Ibid 18.

⁷⁵ Ibid.

⁷⁶ *Criminal Procedure Regulation 2005* (NSW) s 19.

⁷⁷ Indigenous courts have been set up in New South Wales, Western Australia, Victoria, Queensland, South Australia, Australian Capital Territory.

⁷⁸ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 15.

⁷⁹ Ibid 16.

⁸⁰ J Korff, 'Circle Sentencing', 2019 <<https://www.creativespirits.info/aboriginalculture/law/circle-sentencing>>.

⁸¹ Kathleen Daly and Gitana Scifoni-Proietti, 'The Elders Know...The White Man Don't Know: Offenders' Views of the Nowra Circle Court' (2011) 7(24) *Indigenous Law Bulletin* 17, 18.

include the offender and their support groups, Indigenous elders, respected members in the community, the prosecution or police, as well as a magistrate. Victims may also be involved in the circle if they consent.⁸² In NSW, circles bring together the thoughts of Aboriginal elders and magistrates, assessing the most appropriate sentence for the offender in light of the offender's circumstances.⁸³ Similarly in Western Australia, the offender, the magistrate, a legal professional and family relations gather at a table with Indigenous elders and other respected Indigenous members in the community to provide cultural advice to a magistrate when sentencing.⁸⁴ Indigenous offenders must satisfy specific criteria to be referred to circle sentencing, including; pleading guilty and admitting responsibility for the offence.⁸⁵ In Western Australia, the court operates similar to the Magistrates court, however, circles cannot hear matters relating to sexual or family violence.⁸⁶

⁸² Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 15.

⁸³ Kathleen Daly and Gitana Scifoni-Proietti, 'The Elders Know...The White Man Don't Know: Offenders' Views of the Nowra Circle Court' (2011) 7(24) *Indigenous Law Bulletin* 17, 18.

⁸⁴ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 17-18.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

**PART FOUR:
IMPLEMENTATION OF
RESTORATIVE JUSTICE**

4.1 EDUCATION AND TRAINING

4.1.1 THE ROLE AND RESPONSIBILITIES OF CONFERENCE CONVENORS

Facilitators of juvenile restorative justice conferences in Australia are often referred to as conference convenors. Conference convenors, and in some jurisdictions support staff such as assistants and monitors, have the role of preparing for the conference, facilitating the face-to-face conference, and following up the offender throughout the completion of their outcome plan.⁸⁷ A useful resource to understand this process can be found on the NSW Department of Juvenile Justice website.⁸⁸ This website contains an online portal of all the policies and procedures relating to the appointment and management of conference convenors, and also contains all the resources relevant to all stages of Youth Justice Conferencing. These resources include a conference script, preparation documents, checklists, and running sheets.

PREPARING FOR THE CONFERENCE:

In preparation for the conference, convenors undertake the following responsibilities:⁸⁹

- Establish contact with the participants;
- arrange the date, time and venue of the conference;
- inform participants of their obligations and legal rights in the conference;
- assess the particulars of the offender's case;
- identify any areas of risk and any criminogenic needs of the juvenile offender;
- identify any issues that the offender may require support for in the process of the conference;
- and
- maintain records of the preparation process and the details of the conference.

⁸⁷ NSW Department of Justice, Youth Justice Conference Policy, (Policy, 12 September 2016)
<http://www.juvenile.justice.nsw.gov.au/Documents/yjc/yjc-policy.pdf>.

⁸⁸ NSW Department of Justice, Youth justice Conference Convenor Portal, (Web Page, 1 April 2019)
<http://www.juvenile.justice.nsw.gov.au/Pages/Juvenile%20Justice/conferencing/youth-justice-conference-convenor.aspx?fbclid=IwAR3vcGADtgRlj8c-O5xOHADcLnZnJTbLI-CWdRBAAbCe9JTP8XIdVEqKLaVI>.

⁸⁹ NSW Department of Justice, Youth Justice Conference Policy, (Policy, 12 September 2016) 7
<<http://www.juvenile.justice.nsw.gov.au/Documents/yjc/yjc-policy.pdf>>.

FACILITATING THE FACE-TO-FACE CONFERENCE

The role of the conference convenor during the face-to-face conference is to facilitate the conference, negotiating with each participant to reach a suitable outcome plan.⁹⁰ When negotiating the outcome plan, the conference convenor must have regard to what the juvenile offender will do to remedy the harms caused by the specific offence, and establish a plan to prevent future reoffending.⁹¹ The conference convenor is obliged to discuss the following throughout the face-to-face conference:⁹²

- The specifics of the offence, including the circumstances and factors of the offence;
- the harm the offence has caused to the victim; and
- they must negotiate an outcome plan.

The conference convenor must also record the conference process and must write a report detailing the specifics of the conference, which may be used by the court when deciding on an appropriate sentence for the juvenile offender.⁹³

FOLLOW-UP PROCESS

The conference convenor, and in some circumstances support workers appointed by the conference convenor such as monitors, assist the juvenile offender throughout the completion of their outcome plan. The conference convenor, or a designated support worker, will supervise the completion of tasks and activities agreed upon in the outcome plan through regular check-ins with the juvenile offender.⁹⁴ Where the outcome plan agreed upon includes the making of reparation to the victim of the crime, the conference convenor will take care to supervise and support this entire process.⁹⁵

⁹⁰ Department of Justice and Community Safety Victoria, Youth Justice Group Conferencing, (Web Page, 30 April 2019) <<https://www.justice.vic.gov.au/justice-system/youth-justice/youth-justice-group-conferencing>>.

⁹¹ Ibid.

⁹² NSW Department of Justice, Youth Justice Conference Policy, (Policy, 12 September 2016) 9 <<http://www.juvenile.justice.nsw.gov.au/Documents/yjc/yjc-policy.pdf>>.

⁹³ Department of Justice and Community Safety Victoria, Youth Justice Group Conferencing, (Web Page, 30 April 2019) <<https://www.justice.vic.gov.au/justice-system/youth-justice/youth-justice-group-conferencing>>.

⁹⁴ NSW Department of Justice, Youth Justice Conference Policy, (Policy, 12 September 2016) 11 <<http://www.juvenile.justice.nsw.gov.au/Documents/yjc/yjc-policy.pdf>>.

⁹⁵ Department of Justice and Community Safety Victoria, Youth Justice Group Conferencing, (Web Page, 30 April 2019) <<https://www.justice.vic.gov.au/justice-system/youth-justice/youth-justice-group-conferencing>>.

In 2017 Suzuki and Wood conducted a study on Victorian youth justice group conference convenors, interviewing 25 conference convenors (30% of total number of convenors in Victoria) finding that convenors valued “adequate preparation, ensuring that the victim’s voice is heard, establishing a realistic outcome plan that reinforces accountability, and follow-up action.”⁹⁶ From the convenor perspectives in this study, the researcher concluded that a ‘holistic’ approach to restorative justice conferencing requires attention to the three phases identified, “preparation, face-to-face dialogue, and follow-up.”⁹⁷ The preparation phase enhances the face-to-face dialogue phase as it encourages participants’ involvement in the conferencing process. Further, the follow-up phases assist in maintaining the positive outcomes of youth justice conferencing, helping juvenile offenders to complete their outcome plan, leading to positive outcomes for the offenders, repairing the harm caused by the offender, and to their reintegration into their communities.⁹⁸

4.1.2 QUALIFICATIONS AND TRAINING

JUVENILE JUSTICE CONFERENCE CONVENORS

As there are separate juvenile restorative justice schemes in each Australian state and territory, the specific training for restorative justice conference convenors differs. However, general observations regarding the specific training requirements of conference convenors can be drawn. Generally, there are no mandatory professional or vocational qualifications needed for the role of conference convenor, however qualifications in the youth justice or community services sectors are highly regarded for these roles.⁹⁹ Further, skills that are required for this role include:

- group facilitation and active listening skills;
 - organisational and time management skills to meet strict deadlines in the conferencing process;
 - an understanding of restorative justice principles;
 - an understanding of the issues affecting both juvenile offenders and victims of juvenile crimes;
- and

⁹⁶ Masahiro Suzuki and William Wood, ‘Restorative Justice Conferencing as a ‘Holistic’ Process: Convenor Perspectives’ (2017) 28(3) *Current Issues in Criminal Justice* 277.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ QLD Department of Child Safety, Youth and Women, *Restorative Justice Convenor*, (20 November 2018) <<https://www.csyw.qld.gov.au/about-us/careers/career-opportunities/youth-justice-careers/restorative-justice-convenor>>.

- an understanding of and the ability to work with community networks.¹⁰⁰

Conference convenors are required to have a Working With Children Check (WWCC) and a National Criminal History Check (NCHC) to be eligible to facilitate these conferences.¹⁰¹ In NSW, to ensure the conferencing process is impartial and independent, conference convenors cannot be employed by the Department of Juvenile Justice who finance and implement these process.¹⁰² Conference convenors are employed on as needed basis, and are required to attend and complete a four day induction training and assessment course.¹⁰³ Eligible community members are encouraged to apply for these position, upholding the philosophical basis of “Youth Justice Conferencing being a community based negotiated response to offending.”¹⁰⁴

In some jurisdictions, conference convenors are required to attend a mandatory training course, usually over the span of four to five days.¹⁰⁵ At the conclusion of this training course, conference convenors are required to demonstrate their competency in the skills taught at the training session, they are then given accreditation to convene juvenile justice conferences.¹⁰⁶ Conference convenors are required to renew their training annually by attending a renewal training session, in some circumstances completing a practical assessment, and they must have conducted a minimum amount of conferences per year.¹⁰⁷ Complimenting this mandatory training is the availability of peer mentoring.¹⁰⁸ This mentoring is available to newly instated convenors to assist in the practical application of the restorative justice theory they are trained in. In jurisdictions where there is no

¹⁰⁰ NSW Juvenile Justice, The Youth Justice Conferencing (YJC) Convenor Information Sheet, (PDF) <<http://files.jobs.nsw.gov.au/pz9qjq>>.

¹⁰¹ National Crime Check, Working With Children Checks in Australia, (Webpage) <https://www.nationalcrimecheck.com.au/resources/working_with_children_checks_in_australia>; NSW Department of Justice, *Youth Justice Conference Policy*, (Policy, 12 September 2016) 11 <<http://www.juvenile.justice.nsw.gov.au/Documents/yjc/yjc-policy.pdf>>.

¹⁰² NSW Department of Justice, *Youth Justice Conference Convenor Management Policy*, (Policy, 16 November 2016) 4 <http://www.juvenile.justice.nsw.gov.au/Documents/yjc/convenor-management-policy.pdf?fbclid=IwAR2vMQlvi7KwbW71q_p6O309YUht2HpByv0J6g9oycb02Kl3SwDTcn55ww8>.

¹⁰³ *Ibid* 4.

¹⁰⁴ Jane Bolitho, ‘Restorative Justice: The ideals and realities of conferencing for Young People’ (2012) 20(1) *Critical Criminology* 61, 65.

¹⁰⁵ In Queensland and NSW training courses run for 4-5 days.

¹⁰⁶ Victorian Parliament Law Reform Committee, *Inquiry into Alternative dispute Resolution and Restorative Justice*, (Report No 18, May 2009), 310. In QLD and NSW these courses are mandatory, however in VIC there is no required training or accreditation for juvenile justice conference convenors.

¹⁰⁷*Ibid*, 310; NSW Department of Justice, *Youth Justice Conference Convenor Management Policy*, (Policy, 16 November 2016) 5-6 <http://www.juvenile.justice.nsw.gov.au/Documents/yjc/convenor-management-policy.pdf?fbclid=IwAR2vMQlvi7KwbW71q_p6O309YUht2HpByv0J6g9oycb02Kl3SwDTcn55ww8>.

¹⁰⁸ *Ibid*, 5.

standard training or accreditation scheme, there have been suggested reforms pushing for these schemes, as they provide a higher standard of professional practice across conference convenors, and allow for high quality and efficient conferencing practices, and more consistent outcomes.¹⁰⁹

Accompanying these general training requirements for conference convenors in Australia, the United Nations has released a report providing a general guide to implementing restorative justice processes in the juvenile criminal justice system.¹¹⁰ In this report they outline the specific aims of training for restorative justice facilitators, highlighting the importance of developing “child-sensitive skills” when facilitating the restorative justice process.¹¹¹ The recommendations in the report stress the importance of training facilitators in all relevant diversionary and non-custodial restorative justice process.¹¹² Further, “guidelines and standard operating procedures” need to be developed for all relevant professionals involved in the restorative justice process.¹¹³

VICTIM-OFFENDER MEDIATORS

Each state and territory have their own system of victim-offender mediation, and therefore training programs for mediators vary. However, general observations can be made. In states and territories where victim-offender mediation is available to juvenile offenders this process is often commenced through a victim contacting victim services in their respective jurisdiction. Victim services are a part of the public service system and are run through government funded offices. These offices facilitate the process of victim-offender mediation from the first stage of contacting the offender, to organising the logistics involved with the mediation, as well as running the mediation session itself.¹¹⁴ Since

¹⁰⁹Victorian Parliament Law Reform Committee, *Inquiry into Alternative dispute Resolution and Restorative Justice*, (Report No 18, May 2009), 310; Victorian Association for Restorative Justice, *Best Practice Standards for Restorative Justice Facilitators Version 1.8*, (Standards of Practice, 2009) 11-18,

<https://www.varj.asn.au/Resources/Documents/VARJ_Best_Practice.pdf>; Victorian Association for Restorative Justice, *Group Conferencing Convenor Accreditation Scheme*, (Web Page) <<https://www.varj.asn.au/Accreditation>>.

¹¹⁰ United Nations Office of the Special Representative of the Secretary-General on Violence Against Children, ‘Promoting Restorative Justice for Children’, (2013), <https://sustainabledevelopment.un.org/content/documents/2599Promoting_restorative_justice.pdf>.

¹¹¹ *Ibid* 40.

¹¹² *Ibid*.

¹¹³ *Ibid*.

¹¹⁴ WA Department of Corrective Services, *Mediation Information for Offenders*, (PDF, 2010)

<https://www.correctiveservices.wa.gov.au/_files/victim-services/victim-offender-mediation/reparative-mediation-info-offenders.pdf>; WA Department of Corrective Services, *Mediation Information for Victim*, (PDF, 2010)

<https://www.correctiveservices.wa.gov.au/_files/victim-services/victim-offender-mediation/reparative-mediation-info-victims.pdf>; WA Department of Corrective Services, *Victim-offender Mediation – Information for Lawyers*, (PDF, 2010)

victim-offender mediation is a process which is a highly sensitive and emotional process, it is highly confidential. Therefore, there is a lack of information available about the specific role of mediators in this process and the training they are required to complete. There are no requirements for mandatory tertiary qualifications for victim-offender mediators, however, tertiary qualifications in the behavioural sciences, such as psychology and sociology, are highly regarded for these positions.¹¹⁵ Further, work experience in correctional services or the justice system is also highly valued, as most victim-offender mediation occurs post-sentence and in conjunction with a custodial sentence. There are also internal training requirements that victim-offender mediators are required to complete, accompanied by on-the-job training, however these training programs are confidential, and the specific details could not be disclosed. Further, in WA, the victim-offender mediation unit requires victim-offender mediators to become nationally accreditator mediators.¹¹⁶ To become a nationally accredited mediator, individuals must:

1. Complete an external training program that teaches the skills, knowledge and ethical understanding required to become an effective mediator.
2. Successfully complete an assessment.
3. Apply to a Recognised Mediator Accreditation Body to gain accreditation.
4. Register their accreditation on the National Register.
5. Must renew their accreditation every 2 years to ensure competency, by completing 25 hours of mediation practice and 25 hours of professional development.¹¹⁷

INDIGENOUS FACILITATORS:

In Queensland, where this is a large indigenous population, experience with and an understanding of the Indigenous community is highly desirable in conference convenors. Further, when indigenous juvenile offenders are referred to conferencing, in most jurisdictions an Elder or a well-respected member of the Indigenous community is encouraged to attend the conference. In victim-offender

<https://www.correctiveservices.wa.gov.au/_files/victim-services/victim-offender-mediation/reparative-mediation-info-lawyers.pdf>.

¹¹⁵ WA Department of Justice, *Victim-offender mediation*, (Web Page) <<https://www.correctiveservices.wa.gov.au/victim-services/victim-offender-mediation/victim-offender-mediation.aspx>>.

¹¹⁶ Mediator Standards Board, *Becoming an Accredited Mediator*, (Web Page, 2019) <<https://msb.org.au/becoming-mediator>>; Australian Mediation Association, *Standards and Mediator Accreditation*, (Web Page) <<https://ama.asn.au/mediator-accreditation/>>.

¹¹⁷ Mediator Standards Board, *Becoming an Accredited Mediator*, (Web Page, 2019) <<https://msb.org.au/becoming-mediator>>.

mediation, there has been an initiative to incorporate cultural mediators into this process, especially for prisoners who have come from remote indigenous communities.

In 2008 a mediation training program was developed in the Northern Territory by the Community Justice Centre (CJC) and the North Australian Aboriginal Justice Agency (NAAJA) which brought together traditional Indigenous practices of mediation with western mediation models.¹¹⁸ This program was specifically focused on providing victim-offender mediation training for individuals living in the remote Indigenous communities of the Tiwi Islands, located 80km north of Darwin in the Northern Territory. The Tiwi Islands has a population of around 2500 people from four 'skin groups', culturally and linguistically diverse communities. This victim-offender mediation program is called 'Ponki' mediation, coming from the traditional Tiwi language meaning 'welcome', 'peace', and 'it's finished'.¹¹⁹ This program is designed for mediation between prisoners in Darwin who have committed serious crimes and the victims of their crimes, and more broadly between the offender and the indigenous community on the Tiwi Islands. The four 'skin group' (the four groups of Indigenous communities on the Tiwi Islands) mediators are present at all mediations, to represent each community in the conflict resolution process. Ponki Mediators are trained in traditional Indigenous mediation rules, culturally appropriate and sensitive processes, and western mediation techniques.¹²⁰ The cross-cultural blending of Indigenous and western mediation methods has worked well in this community, as it helps the successful re-integration of prisoners after they have served custodial sentences, it brings a sense of closure to victims, and it allows the community to have a voice in the harm caused by the offender. The Ponki mediation training program has been extended to members of the Tiwi Island community to provide a framework for them to deal with conflict within the local community, and there is evidence to suggest that these mediation training programs have the potential to resolve conflict on a community level, at times preventing serious offending from occurring.¹²¹

¹¹⁸ Ippei Okazaki, 'The "Ponki" Victim Offender Mediation Program on the Tiwi Is' (Conference Paper, Biennial Conference 2011), <<https://clant.org.au/wp-content/uploads/the-bali-conference/2011/Okazaki-Ippei-Restorative-Justice-with-the-Ponki-Mediators-on-the-Tiwi-Islands.pdf>>; Bronwyn Rossingh, 'Tiwi Islands Skin Group Project: Keeping Culture Strong and Inspiring Youth to Become Community Leaders' (Final Report, 2014) <<http://igld.cdu.edu.au/wp-content/uploads/2016/03/FINAL-REPORT-FOR-THE-TIWI-SKIN-GROUP-PROJECT.pdf>>.

¹¹⁹ Ippei Okazaki, 'The "Ponki" Victim Offender Mediation Program on the Tiwi Is' (Conference Paper, Biennial Conference 2011), <<https://clant.org.au/wp-content/uploads/the-bali-conference/2011/Okazaki-Ippei-Restorative-Justice-with-the-Ponki-Mediators-on-the-Tiwi-Islands.pdf>>, 5.

¹²⁰ Bronwyn Rossingh, 'Tiwi Islands Skin Group Project: Keeping Culture Strong and Inspiring Youth to Become Community Leaders' (Final Report, 2014) <<http://igld.cdu.edu.au/wp-content/uploads/2016/03/FINAL-REPORT-FOR-THE-TIWI-SKIN-GROUP-PROJECT.pdf>>, 27.

¹²¹ Ibid 24.

4.2 FINANCE

For comparison, community-based youth services refer to an alternative to detention where a sentence order or un-sentenced order such as conditional bail is served in the community.¹²² Furthermore, note that the below statistics should be considered with other indicators. For example, low costs could reflect less investment in programs for children offered by the government or less intensive case management for these orders. Costs are also affected by geographic dispersion, and other factors that may limit the ability to reduce overheads through economies of scale.¹²³ Furthermore, it is interesting to note that the daily average costs of supervising young offenders are higher than adult offenders likely because of the more extensive supervisions required, as well as limited opportunity for economies of scale to reduce costs in the smaller youth justice systems.¹²⁴ Table 5 also discusses some of the reasons for increases or decreases in expenditure and these factors should be taken into consideration when interpreting the data. For example, in South Australia, the increase in detention expenditure in the years 2015-2016, was due to infrastructure and security upgrades. Higher expenditure in 2012-2013 was also attributed to an increase in youth training centre.¹²⁵ Please also keep in mind that there are differences in the calculation of government expenditure on youth services across different states and territories (Tables 6 and 7).

Moreover, there are no relevant statistics for cost of training and education of facilitators because Australia does not have a mandatory training scheme. Any training undergone by facilitators and mediators are voluntary and would be specific to the institution they personally chose to carry out their training, whether at university, TAFE or other educational facility. Additionally, there are no recorded statistics on any training undergone through state agencies due to confidentiality reasons (please refer to the education and training section for more information).

*Note that the following statistics are for services provided to 10-17-year-olds.

¹²² Productivity Commission, Australian Government, *Annual Report on Government Services: Chapter 17 Youth Justice Services*, (Report, 2018) 17.30.

¹²³ *Ibid* 17.21.

¹²⁴ *Ibid* 17.21.

¹²⁵ *Ibid* app 17A.8.

4.2.1 METHOD OF CALCULATING COSTS

Community-based Supervision (Table 8)

- Costs per child is calculated by the recurrent expenditure per day divided by the daily average number of youth subject to such supervision.¹²⁶
- Recurrent expenditure per day is calculated as annual recurrent expenditure divided by 365.25 (days in a year).
- Daily average number of young people is calculated by summing the number of days each young person spends under supervision during the year (irrespective of age) and dividing this total by 365.25.¹²⁷

Detention-based Supervision (Table 9)

- Cost per child is calculated by the recurrent expenditure on detention-based supervision per day, divided by the daily number of young people subject to detention-based supervision.
- Recurrent expenditure per day is calculated by dividing the annual recurrent expenditure by 365.25 (days in a year).
- Daily average number of youth is calculated by summing the number of days each young person spends in detention within a year (irrespective of age) and dividing this total by 365.25 (days in a year).¹²⁸

Group Conferencing (Table 10)

- Cost per group conference is calculated by total expenditure on conferencing divided by number of concluded conferences.¹²⁹

Note that data (subject to caveats) is comparable within the same jurisdiction (same state or territory), but not comparable across different jurisdictions. The method of calculation differs across states and territories (Table 7). Here, “real expenditure” refers to expenditure adjusted by inflation.

¹²⁶ Productivity Commission, Australian Government, *Annual Report on Government Services: Chapter 17 Youth Justice Services*, (Report, 2018) 17.22

¹²⁷ *Ibid* 17.22.

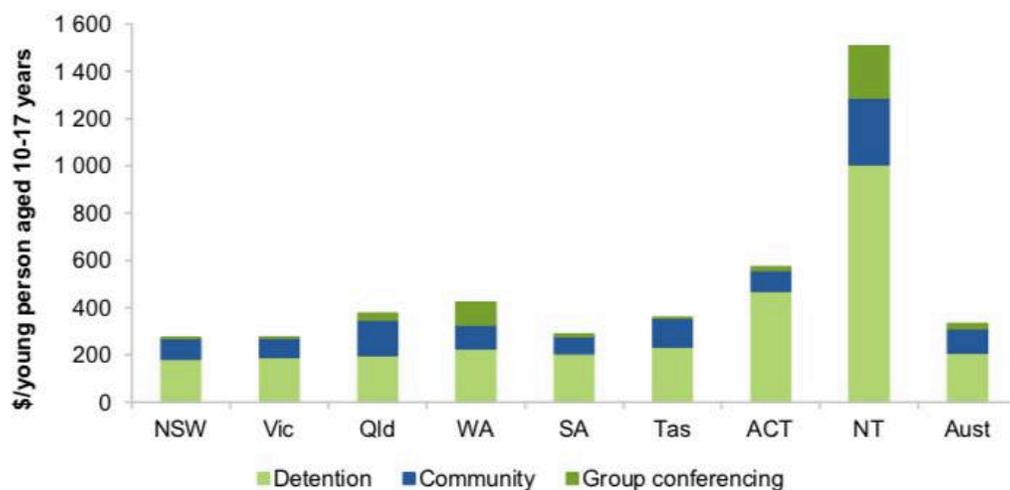
¹²⁸ *Ibid* 17.23.

¹²⁹ *Ibid* 17.24.

For the most recent national data 2016-2017, average costs per day per child for community-based supervision was \$140 (Table 6). The average cost per day per child was \$1482 for those subject to detention-based supervision (Table 9). In comparison, the cost on average per group conference was \$7152 (Figure 3). However, these figures differ depending on the state and territory (Tables 8, 9 and 10). Across Australia, the total expenditure on detention-based supervision, community-based supervision and group conferencing was \$769.5 million in 2016-2017, with detention amounting to 62.6 per cent or \$482.1 million.¹³⁰

According to Table 11, overall costs per child for real recurrent government expenditure (expenditure adjusted by inflation) in Australia for detention-based youth services is \$207.74. This is in comparison to group conferencing costs which are \$20.73 and community-based services which amount to \$103.14.¹³¹ This was the data recorded by individual state agencies. Table 6 explains the amounts attributed to different costs in detention, community services and conferencing. For example, overall total across Australia spent on salary for conferencing was about \$27.5 million. Conferencing is evidently cheaper than detention services but this must be read in light of factors listed in Table 5¹³² Please refer to the appendix for more detailed statistics.

Figure 2: Recurrent expenditure on youth justice services per young person aged 10-17 years in the population (2016-2017)



¹³⁰ Ibid 17.6.

¹³¹ Ibid app 17A.8.

¹³² Ibid app 17A.9.

PART FIVE: CRIME ANALYSIS

5.1 THE USE OF RESTORATIVE JUSTICE FOR CRIMES IN AUSTRALIA

This section of the report will assess how restorative justice has been implemented to address the commission of the following crimes: murder, sexual assault, common assault, drug crimes and property crimes. Each state and territory possess its own criminal statute and restorative justice legislation.¹³³ The distinctions between each jurisdiction's approach to restorative justice will be discussed, where relevant.

The following analyses regarding the use of restorative justice to address each crime will discuss:

- The relationship between the nature of the offence and restorative justice;
- The implementation of the restorative justice process;
- The effectiveness of the process, where data is available; and,
- Relevant case studies, including victim and offender testimonials, where available.

Together, this section provides a comprehensive overview of the effectiveness of Australia's restorative justice practices when applied to crimes of varying degrees of seriousness. For the purpose of this analysis, heinous crimes will include murder and sexual assault. Minor crimes will refer to assault, drug offences and property crimes.

¹³³ *Crimes Act 1900 (NSW); Young Offenders Act 1997 (NSW); Crimes Act 1958 (VIC); Children Youth and Families Act 2005 (VIC); Youth Justice Act 1992 (VIC); Criminal Code 1899 (QLD); Dispute Resolution Centre Act 1990 (QLD); Criminal Law Consolidation Act 1935 (SA); Young Offenders Act 1993 (SA); Criminal Code Act 1924 (TAS); Youth Justice Act 1997 (TAS); Criminal Code Act Compilation Act 1913 (WA); Young Offenders Act 1994 (WA); Youth Justice Act (NT); Crimes Act 1900 (ACT); Crimes (Restorative Justice) Act 2004 (ACT).*

5.2 MURDER

There is little recorded practice of using restorative justice for juvenile, or even adult, offenders who have been charged with murder. This is largely owed to the exclusion of murder from restorative justice legislation and practice, and the confidentiality of restorative justice testimonies where murder is not excluded from practice. Upon analysing the restorative justice laws and practices in each state and territory, it is evident that restorative justice is not used to address the commission of murder where the restorative justice process occurs pre-sentencing. However, restorative justice has expanded to include the offence of murder where the referral of the convicted offender into the restorative justice process occurs post-sentencing.

This section will first outline the offence of murder and its legislated punishments in Australia. This will be followed by a discussion of the nature of murder and the competing views regarding its applicability for restorative justice. Finally, this section will provide an overview of the present restorative justice mechanisms used to address juvenile offenders convicted on murder charges. Note that the literature and research regarding the application of restorative justice in addressing murder offences in Australia is considerably limited, due to the lack of practice. Brief reference has been made to research studies conducted in the United Kingdom and Canada to illustrate both the benefits of applying restorative justice to more serious offending, as well as the hesitations that accompany the inclusion of serious offending.

5.2.1 THE OFFENCE OF MURDER

Murder is a criminal offence across all states and territories in Australia.¹³⁴ The specific legislative definition of murder varies across each state and territory, however murder is ultimately regarded as conduct, resulting in death, which is committed intentionally with reckless indifference to human life.¹³⁵ Legislation generally dictates that the offence of murder may attract a punishment of life

¹³⁴ *Crimes Act 1900 (NSW)* s 18; *Crimes Act 1958 (VIC)* s 3; *Criminal Code 1899 (QLD)* s 302; *Criminal Law Consolidation Act 1935 (SA)* s 12A; *Criminal Code Act 1924 (TAS)* s 158; *Criminal Code Act Compilation Act 1913 (WA)* s 279; *Crimes Act 1900 (ACT)* s 12.

¹³⁵ *Crimes Act 1900 (NSW)* s 18.

imprisonment, or a term deemed appropriate by the Court.¹³⁶ Victorian legislation regards 25 years as a standard sentence for murder.¹³⁷

Western Australia is the only State whose criminal statute explicitly distinguishes between murder committed by adults and murder committed by children. A 'child' is defined as any person below the age of 18 years.¹³⁸ Pursuant to s 279 of the Criminal Code Act Compilation Act 1913 (WA), an adult who is convicted of murder must be sentenced to life imprisonment unless the sentence would be unjust (considering the circumstances of the offence and the offender) and the offender is unlikely to be a threat to the safety of the community.¹³⁹ In this case, the offender is liable to imprisonment for 20 years.¹⁴⁰ However, if the offender is a child, the child is liable to either life imprisonment, or 'detention in a place determined from time to time by the Governor'.¹⁴¹ Presently, this detention is typically located in Western Australia's sole youth detention centre, Banksia Hill Detention Centre.¹⁴² The legislation does not specify the length of detainment in the youth detention centre. The specific period of detainment is determined by the judiciary, with regard to the specific facts and circumstances of each case.

5.2.2 THE RELATIONSHIP BETWEEN RESTORATIVE JUSTICE AND MURDER

Restorative justice in Australia was traditionally implemented to address juvenile offenders who committed minor offences.¹⁴³ The conventional punishment for these offences would often be a minor penalty, such as a police caution.¹⁴⁴ Youth justice conferencing would replace this minor punishment. Indeed, murder falls outside the traditional scope of restorative justice, considering the gravity of the offence. Additionally, the sentence typically imposed upon offenders convicted of murder is imprisonment, as outlined above. While the legislative has failed to outline any justifications as to why restorative justice laws exclude murder, academia addressing the controversial use of

¹³⁶ *Crimes Act 1958* (VIC) s 3(1).

¹³⁷ *Ibid* s 3(2)(b).

¹³⁸ *Criminal Code Act Compilation Act 1913* (WA) s 1.

¹³⁹ *Ibid* s 279(4).

¹⁴⁰ *Ibid* s 279(4)(b).

¹⁴¹ *Ibid* s 279(5).

¹⁴² 'Banksia Hill Detention Centre', Government of Western Australia Department of Justice (Web Page, 21 July 2017) <<https://www.correctiveservices.wa.gov.au/youth-justice/youth-detention/banksia-hill.aspx>>.

¹⁴³ Anne Cossins, 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48 *British Journal of Criminology* 359, 359.

¹⁴⁴ *Ibid*.

restorative justice for heinous offences may explain government hesitation for embracing restorative justice to address such offences.

First, the diversion of offenders away from the criminal justice system may perpetuate perceptions that crimes such as murder are treated less seriously.¹⁴⁵ The fear of exacerbating this perception is a significant factor contributing to the hesitation to include murder, especially where the restorative justice program operates pre-sentencing. Pre-sentence processes involve the court or the police referring the offender to youth justice conferencing instead of, or alongside, incarceration.¹⁴⁶ This may inadvertently contribute to the belief that offenders are being shielded from punitive mechanisms or are receiving lesser sentences. Hence, the exclusion of murder from most restorative justice processes may be attributed to this underlying belief.

Second, families of murder victims may be unwilling or unable to cooperate with the perpetrators of these offences, considering the heinous nature of the offence in question. Although victims (or relatives of victims) are not forced to participate in restorative justice programs such as conferencing, requiring their participation may result in an imbalance of interests.¹⁴⁷ Victims may find themselves playing a passive role in conferencing, serving as an 'educational vehicle'¹⁴⁸ for the benefit of offenders. Requesting people to face the person convicted of murdering their loved one, especially if the conferencing program diverts the offender away from the criminal justice system, may be deemed inappropriate. A United Kingdom study conducted on restorative justice victim satisfaction rates for heinous offending revealed that victim satisfaction was higher when the accused had already been found guilty.¹⁴⁹ Therefore, victim satisfaction may increase where the restorative justice conferencing occurs post-sentencing (or post-conviction, at the very least) as the offender has already been held guilty and received a sentence.

Third, restorative justice conferencing for serious offending requires a degree of moral maturity which young offenders may not necessarily possess. Conferencing requires the offender to admit their guilt,

¹⁴⁵ Ibid 361.

¹⁴⁶ Heather Strang, *Restorative Justice Programs in Australia* (Final Report, March 2001) 49.

¹⁴⁷ Anne Cossins, 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48 *British Journal of Criminology* 359, 363.

¹⁴⁸ Arlene Gaudreault, 'The Limits of Restorative Justice' (2005) *Proceedings of the Symposium of The École Nationale de la Magistrature* 4.

¹⁴⁹ Ibid 368.

take responsibility for their actions and the consequences, and understand the nature of their wrongdoing. However, research demonstrates that young offenders may not possess the cognitive and emotional capabilities for analysing the cause and nature of their offending.¹⁵⁰ Further, young offenders may not be equipped with the capacity to assess how to rectify the situation and bring healing to themselves and the victim(s).¹⁵¹ The practicalities of young offenders' capabilities to effectively participate in the conferencing process may result in the belief that restorative justice may be an unsuitable means of dealing with a heinous offence such as murder.

However, restorative justice practices are broadening to respond to serious offending.¹⁵² While the application of restorative justice to offences resulting in death are limited, the Australian Institute of Criminology has indicated that restorative justice may be more effective in cases where victims experience significant trauma.¹⁵³ This may be due to two reasons. First, victims' desires to receive closure may be higher in the context of more severe cases.¹⁵⁴ A Canadian study conducted on victims of violent crimes revealed that many relatives of homicide victims would be willing to meet with the offender to receive answers to their questions, and communicate their feelings about the offender's actions, if given the opportunity to do so.¹⁵⁵ Second, witnessing the severity of the impact of their actions may be beneficial for the self-reflection and rehabilitation of young offenders.¹⁵⁶ This may translate into decreased risks of reoffending.¹⁵⁷ Hence, applying restorative justice to serious crimes such as murder may achieve the restorative justice goals of: repairing the harm suffered by victims, restoring the relationship between victims and offenders, and reintegrating offenders into the community upon release.¹⁵⁸

¹⁵⁰ Mary Riley and Hennessey Hayes, 'Youth Restorative Justice Conferencing: Facilitator's Language - Help or Hindrance?' (2018) 21 *Contemporary Justice Review* 99, 101.

¹⁵¹ *Ibid.*

¹⁵² Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) viii.

¹⁵³ *Ibid.* 33.

¹⁵⁴ Arlene Gaudreault, 'The Limits of Restorative Justice' (2005) Proceedings of the Symposium of *The École Nationale de la Magistrature* 6.

¹⁵⁵ *Ibid.*

¹⁵⁶ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 33.

¹⁵⁷ *Ibid.*

¹⁵⁸ Anne Cossins, 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48 *British Journal of Criminology* 359, 360.

Furthermore, there has been an increase in juveniles committing acts intended to cause injury, including murder, within the last decade. Since 2001, the proportion of juveniles committing crimes intended to cause injury in Victoria has increased from 30% to 50%.¹⁵⁹ This increase may have prompted the expansion of restorative justice to include murder in some states and territories, in a bid to address the rise of serious youth offending.

5.2.3 RESTORATIVE JUSTICE PRACTICES

Many statutes governing the practice of restorative justice exclude murder from the scope of offences which attract referrals to restorative justice procedures. Pursuant to s 8(2)(c) of the Young Offenders Act 1997 (NSW), youth justice conferences in NSW cannot be held for offences which 'result in the death of any person'.¹⁶⁰ Similarly, murder and attempted murder are excluded from restorative justice practices in Tasmania and the Australian Capital Territory (ACT).¹⁶¹ Further, while there are no express exclusions in Victorian legislation,¹⁶² youth justice group conferencing excludes murder in practice.¹⁶³ South Australian law is similarly restrictive in its restorative justice practices, facilitated through family conferencing, which is limited to 'minor' offences.¹⁶⁴

Notably, the above modes of youth justice conferencing and family conferencing are commenced pre-sentencing. Murder is excluded from the restorative justice practice where the restorative justice process occurs pre-sentencing. However, restorative justice models which occur post-sentencing do not appear to exclude murder from their scope. These models include the Justice Mediation Program in Queensland (note however that this is restricted to adult offenders);¹⁶⁵ Victim-Offender Dialogue in Western Australia (while this program is offered in many states and territories, Western Australia is the only jurisdiction which does not exclude murder from its legislation or practice);¹⁶⁶ and, Correctional Centre Conferences in the Northern Territory.¹⁶⁷ These models will be explored further below.

¹⁵⁹ Penny Armytage, *Youth Justice: Review and Strategy* (Executive Summary, July 2017) 8.

¹⁶⁰ *Young Offenders Act 1997* (NSW) s 8(2)(c).

¹⁶¹ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 9.

¹⁶² *Ibid* 8.

¹⁶³ *Ibid*.

¹⁶⁴ *Ibid*.

¹⁶⁵ *Ibid* 19.

¹⁶⁶ *Ibid*.

¹⁶⁷ *Ibid*.

Table 12: Restorative justice models available to the offence of murder.¹⁶⁸

State	Method	Point of Referral	Can it be used to address murder offences?
NSW	Youth Justice Conferencing	Pre-Sentencing	No: excluded in legislation.
	Youth Justice Group Conferencing	Pre-Sentencing	No: there are no exclusions specified in legislation, however murder is excluded in practice.
VIC	Youth Justice Group Conferencing	Pre-Sentencing	No: there are no exclusions specified in legislation, however murder is excluded in practice.
	Youth Justice Conferencing	Pre-Sentencing	No: there are no exclusions specified in legislation, however murder is excluded in practice.
QLD	Post-Sentence Justice Mediation (Justice Mediation Program)	Post-Sentencing	Yes: note, however, that this program is exclusive to adults (individuals aged 17 years and over).

¹⁶⁸ Ibid 8, 9, 19.

SA	Family Conferencing	Pre-Sentencing	No: no offences are specifically excluded from legislation, however the legislation stipulates family conferencing is only for youth who admit to committing a minor offence. Murder is not considered a 'minor offence'.
WA	Family Group Conferencing	Pre-Sentencing	No: excluded in legislation.
	Reparative Mediation	Post Conviction and Pre-Sentencing	No: excluded in legislation.
	Victim-Offender Dialogue	Post-Sentencing	Yes: any offence type is referable. Murder is commonly referred.
NT	Youth Justice Conferencing	Pre-Sentencing	No: excluded in legislation.
	Correctional Centre Conferencing/Ponki Mediation	Post-Sentencing	Yes: no offences are specifically excluded. Murder and manslaughter are generally referred to this program.

TAS	Community Conference	Community conference is a sentencing option	No: excluded from legislation.
	Victim-Offender Mediation	Post-Sentencing	No offences specifically excluded. However, most offences are indictable offences.
	Court-Ordered Mediation	Pre-sentencing	No offences are specifically excluded. However, most offences are indictable offences.
ACT	Restorative Justice Unit	From Apprehension to Post-Sentence	No.

In Queensland, the Justice Mediation Program (JMP) is facilitated in cases of very serious offending, including murder.¹⁶⁹ The JMP is limited to adult offenders; juvenile offenders cannot be referred to the program.¹⁷⁰ Referrals to the JMP are rare.¹⁷¹ However, the program is available as a post-sentence referral, and is instigated upon request by the victim, the victim's family (in offences resulting in death) or the offender.¹⁷² Any party may indicate they wish to meet the other party after the court process has concluded and the offender is in prison or on parole.¹⁷³ Queensland's placement of the JMP as a post-sentence process, rather than a pre-sentence option, avoids perceptions that restorative justice unfairly shields the offender from the punitive process. Thus, the post-sentence placement of the JMP may justify its appropriateness for a heinous offence like murder.

¹⁶⁹ Ibid 20.
¹⁷⁰ Ibid 19.
¹⁷¹ Ibid 20.
¹⁷² Ibid 19, 20.
¹⁷³ Ibid 20.

Many States and Territories offer a restorative justice model known as 'Victim-Offender Dialogue' (VOD). For the purposes of murder, this section will focus solely on Western Australian practice. While NSW offers victim-offender conferencing, it is restricted to adults.¹⁷⁴ Additionally, while other jurisdictions do not explicitly exclude murder, the Australian Institute of Criminology has indicated that the Western Australian model has actually received referrals regarding murder.¹⁷⁵ This is also a post-sentence process which can only be initiated by a victim upon their request to meet with the offender. Unlike the JMP in Queensland, the VOD is applicable to both juvenile and adult offenders.¹⁷⁶ The goal of VOD is to assist the victim in coping with the trauma caused by the offender.¹⁷⁷ Participation in the process is entirely voluntary.¹⁷⁸ VOD will not proceed if either party is unwilling to participate, or if the Victim-Offender Mediation Unit determines that either party is at risk of being further traumatised.¹⁷⁹ While any offence is referable for VOD, murder offences are common.¹⁸⁰ The VOD is the only restorative justice model in Western Australia which includes murder within its scope. Family group conferencing and reparative mediation are two other restorative justice methods in Western Australia. However, these two methods expressly exclude homicide offences, pursuant to the Young Offenders Act 1994 and the Sentencing Act 1995.¹⁸¹ Both of these methods occur pre-sentencing, further substantiating the notion that the applicability of restorative justice for murder largely depends on when restorative justice is employed in the criminal justice process.

This notion is further supported when considering that the Northern Territory excludes murder, attempted murder and manslaughter from its youth justice conferencing process which occurs pre-sentence through a police or court referral.¹⁸² However, the Northern Territory Community Justice Centre implements a program called Correctional Centre Conferences (CCC) pursuant to the Community Justice Centre Act 2005. This is a reintegration scheme targeted at offenders who are returning to their communities after incarceration.¹⁸³ This is a post-conviction and post-sentencing

¹⁷⁴ Ibid 19.

¹⁷⁵ Ibid 20. This is significant as, even though restorative justice legislation may not exclude murder from its scope, actual referrals based on murder offences may be rare, or non-existent.

¹⁷⁶ Ibid 19.

¹⁷⁷ Ibid 20.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Ibid 8, 19.

¹⁸² Ibid 9.

¹⁸³ Ibid 20.

procedure which is voluntary.¹⁸⁴ Additionally, offenders do not receive reduced sentences.¹⁸⁵ The program simply seeks to assist the reintegration of offenders and reduce recidivism.¹⁸⁶ Victims attend voluntarily and matters have included murder.¹⁸⁷

Outcomes of the JMP, VOD and CCC are confidential due to their highly sensitive nature.¹⁸⁸ Unfortunately, communications are not published or released by authorities.¹⁸⁹ Statistics regarding the rehabilitation of offenders, the reintegration of offenders, victim's experiences and recidivism rates, are unavailable. Consequently, at present, it is not possible to assess the effectiveness of these programs in Queensland, Western Australia and the Northern Territory. However, the Australian Institute of Criminology has acknowledged that research continues to suggest that restorative justice may be more effective for serious offending and more effective post-sentence.¹⁹⁰ This is likely due to the fact that young offenders who commit serious offences witness the trauma and suffering that their actions have inflicted upon the relatives of victims. This would be a confronting experience for many young offenders and could catalyse emotions of remorse and a willingness to reform their behaviour.

5.2.4 CONCLUSION

Converse to traditional notions of the applicability of restorative justice, some areas of Australia have deemed restorative justice an appropriate method to address murder offences. It is imperative to note that the timing of the restorative justice process in the criminal justice system is critical in shaping perceptions of restorative justice; processes which occur pre-sentencing may not be appropriate for offences like murder, which carry heavy gravity and severe implications (psychological and emotional) for victims. Contrastingly, post-sentence restorative justice portrays the wellbeing of victims as a significant goal. Hence, restorative justice laws and practices in Australia suggest that restorative justice for heinous crimes like murder may only be appropriate where it occurs post-sentence.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid, vii.

5.3 SEXUAL ASSAULT

5.3.1 DEFINING SEXUAL ASSAULT

For the purposes of this section, the terms 'rape' and sexual assault' will be separately defined, however both terms will be referred to as 'sexual assault' or 'sexual offences' for the remainder of the topic. Rape and sexual assault are criminal offences across all states and territories within Australia, with the specific legislative definition of these crimes varying across each jurisdiction. Rape is ultimately regarded as sexual penetration of a person, or other sexual intercourse such as oral sex, without their consent and without reasonable belief that consent was provided.¹⁹¹ In all jurisdictions, rape may attract a punishment of life imprisonment, or a term deemed appropriate by the Court. NSW and Victorian legislation regard 25 years as a standard sentence for rape. Sexual assault, or indecent touching, is ultimately regarded as sexual touching of another person without their consent and without reasonable belief that consent was provided.¹⁹² This offence attracts a variable punishment that ranges from 2 years¹⁹³ to 14 years imprisonment.¹⁹⁴

5.3.2 DEBATE SURROUNDING THE USE OF RESTORATIVE JUSTICE

The appropriateness of using restorative justice programs for sexual assault crimes has been widely debated. Due to the orthodox assumption that sex offences are 'too serious' to be dealt with outside of the criminal justice system, few jurisdictions exist in Australia where sexual assault cases are eligible to be referred to restorative justice practices.¹⁹⁵ Many feminists, legal scholars, and victim support organisations have cautioned against the adoption of restorative justice processes for sexual assault, arguing that the conference setting may exacerbate existing power imbalances between victims and

¹⁹¹ *Crimes Act 1958* (VIC) s 38, *Criminal Law Consolidation Act 1935* (SA) s 5.

¹⁹² *Crimes Act 1958* (VIC) s 40.

¹⁹³ *Criminal Code Compilation Act* (WA) s 323.

¹⁹⁴ *Criminal Code Act 1983* (NT) s 192(40).

¹⁹⁵ Kathleen Daly, 'Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases' (2006) 46(2) *British Journal of Criminology* 334, 334.

offenders, jeopardise victim safety, and proliferate the victim-blaming culture that is prevalent in patriarchal society.¹⁹⁶

These concerns arise largely from the fact that sexual assault is a gendered crime, borne from power imbalances where the victims are disproportionately female, and offenders are male.¹⁹⁷ The informal nature of restorative justice practices can result in power imbalances, allowing offenders to manipulate the process to expose victims to further intimidation, abuse, and blame.¹⁹⁸ Accordingly, critics highlight that restorative justice processes could potentially result in re-victimization or re-traumatisation of the victim, particularly where the sexual assault experienced is more severe in nature, or where there is a pre-existing relationship between the victim and offender.¹⁹⁹ In cases where there is a history of abuse, re-victimisation may easily occur as overt or discreet manipulation, coercive control, or intimidation by the offender can spark trauma in the mind of the victim.²⁰⁰

Furthermore, critics have also argued that sexual assault victims may be inadequately prepared to further their own interests in a conference setting, and may feel pressured to agree to outcomes that they are not comfortable with, in the name of achieving reconciliation.²⁰¹ In this way, it has been argued that restorative justice may not be sufficiently punitive compared to the criminal justice system, potentially resulting in outcomes that are 'too soft' relative to the seriousness of the crime.²⁰² Accordingly, critics fear that offenders will gravitate towards restorative justice solely to avoid stricter and more severe penalties found in court prosecution, leading to disingenuous apologies and promises.²⁰³ If approached in this way, restorative justice could carry symbolic implications, diminishing the gravity of sexual assault.²⁰⁴ Thus, feminists fear that shifting to a restorative justice model could

¹⁹⁶ Susan L Miller and LeeAnn Iovanni, 'Using Restorative Justice for Gendered Violence: Success with a Post Conviction Model' (2013) 8(4) *Feminist Criminology* 247, 247.

¹⁹⁷ *Ibid.*

¹⁹⁸ Kathleen Daly, 'Restorative Justice and sexual Assault: An Archival Study of Court and Conference Cases' (2006) 46(2) *British Journal of Criminology* 334, 337.

¹⁹⁹ *Ibid.* 338.

²⁰⁰ Samantha O'Donnell, 'Proceed with Caution: Restorative Justice and Domestic Violence' (2018) 25 *Pandora's Box* 105, 114-115.

²⁰¹ Susan L Miller and LeeAnn Iovanni, 'Using Restorative Justice for Gendered Violence: Success with a Post Conviction Model' (2013) 8(4) *Feminist Criminology* 247, 250.

²⁰² Kathleen Daly, 'Restorative Justice and sexual Assault: An Archival Study of Court and Conference Cases' (2006) 46(2) *British Journal of Criminology* 334, 337.

²⁰³ Susan L Miller and LeeAnn Iovanni, 'Using Restorative Justice for Gendered Violence: Success with a Post Conviction Model' (2013) 8(4) *Feminist Criminology* 247, 249.

²⁰⁴ Kathleen Daly, 'Restorative Justice and sexual Assault: An Archival Study of Court and Conference Cases' (2006) 46(2) *British Journal of Criminology* 334, 338.

undo years of progress made towards moving sexual assault crimes from the private into the public sphere.²⁰⁵

5.3.3 THE BENEFITS OF RESTORATIVE JUSTICE

Despite the aforementioned criticisms of restorative justice's appropriateness in dealing with sexual violence crimes, research has shown that victims of sexual assault are increasingly being drawn to restorative justice practices over the criminal justice system. This is largely due to the ever-present inadequacies of the formal legal process in successfully dealing with sexual assault crimes.²⁰⁶ Despite many legal reforms to improve the court system's handling of sexual violence cases, these crimes continue to have low conviction rates, and are reportedly unable to meet victims' multifaceted needs.²⁰⁷ According to a 2014 report by the Centre for Innovative Justice, victims of sexual assault in Victoria had a mere 1% chance that their case would lead to a successful conviction.²⁰⁸ Similarly, data gathered by the Australian Centre for the Study of Sexual Assault, demonstrated that 88.5 out of 100 Australian victims that report sexual assault to police will not have their case proceeded with by the police or the prosecution, or will be dismissed or acquitted in court.²⁰⁹ In other words, approximately 9 out of 10 victims that do report their assault to police will not receive any formal legal redress.²¹⁰ These results are even more concerning when considering that sexual assault is one of the most underreported crimes, with reporting rates ranging between 5-30% in NSW, and approximately 17% in Victoria.²¹¹ The poor prosecution and conviction rates for sexual assault crimes are largely due to the persistent difficulties that victims of sexual assault face in satisfying legal and evidentiary burdens, as well as the unsuitability of an adversarial legal system in dealing with gendered crimes.²¹² For sexual assault crimes committed by juveniles, even lower prospects of conviction have

²⁰⁵ Ibid.

²⁰⁶ Bronwyn Naylor, 'Effective Justice for Victims of Sexual Assault: Taking up the Debate on Alternative Pathways' (2010) 33 *UNSW Law Journal* 662, 662-663.

²⁰⁷ Ibid.

²⁰⁸ Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending: Pathways to Better Outcomes for Victims, Offenders, and the Community* (Report, 2014) 16.

²⁰⁹ Kathleen Daly, *Conventional and Innovative Justice Responses to Sexual Violence* (ACSSA Issues No 12, September 2011) 4.

²¹⁰ Ibid.

²¹¹ Bronwyn Naylor, 'Effective Justice for Victims of Sexual Assault: Taking up the Debate on Alternative Pathways' (2010) 33 *UNSW Law Journal* 662, 662-663.

²¹² Ibid 662.

been reported.²¹³ This is likely due to the fact that juvenile sex offender cases often lack corroborating and forensic evidence, involve delays in reporting, and result in warnings and directions made during trial that undermine children's credibility and evidence.²¹⁴

Moreover, the trial process itself often works against victims' needs, facilitating dissatisfaction and disillusionment with the criminal justice system. For instance, according to Naylor,²¹⁵ the trial process will only be meaningful for victims if there is an early acknowledgement of guilt by the defendant. However, the nature of an adversarial trial system mitigates the realisation of this essential requirement for victim satisfaction, as defence lawyers will often advise their clients to plead not-guilty if they assess that there is a high probability of acquittal.²¹⁶ According to a report by the ABS on sexual assault, sex offenders are more likely than any other offenders to plead not-guilty, proceed to trial, and be acquitted of the offence.²¹⁷ A not-guilty plea leaves the victim to prove beyond a reasonable doubt that there was a lack of consent, and that the defendant was aware of this lack of consent.²¹⁸ This onerous process requires victims to relive their traumatic experiences as they undergo intrusive cross-examination and questioning, whilst also facing many rape-myths entrenched in patriarchal society.²¹⁹ Accordingly, studies have found that victims who do run rape trials often experience re-traumatisation under the adversarial process, with some victims describing the process as a 'second rape'.²²⁰

Victims of sexual assault also tend to report that lack of information on the progress of their case, delays in the trial, and length of proceedings cause significant distress, hindering their emotional healing.²²¹ Additionally, the change in status from being treated as a victim to being treated as a witness upon the commencement of legal proceedings often results in disempowerment.²²² Even

²¹³ Riddhi Blackley and Lorana Bartels, *Sentencing and Treatment of Juvenile Sex Offenders in Australia* (Trends and Issues in Crime and Criminal Justice No 555, July 2018) 5.

²¹⁴ *Ibid.*

²¹⁵ Bronwyn Naylor, 'Effective Justice for Victims of Sexual Assault: Taking up the Debate on Alternative Pathways' (2010) 33 *UNSW Law Journal* 662, 663.

²¹⁶ *Ibid.*

²¹⁷ ABS, *Sexual Assault in Australia: A Statistical Overview* (Report No 4523, 2004) 14.

²¹⁸ *Crimes Act 1900* (NSW) ss 61HA, 61I.

²¹⁹ Bronwyn Naylor, 'Effective Justice for Victims of Sexual Assault: Taking up the Debate on Alternative Pathways' (2010) 33 *UNSW Law Journal* 662, 664.

²²⁰ Jo Lovett and Linda Regan, *A Gap or a Chasm? Attrition in Reported Rape Cases* (Research Study No 293, February 2005) 73.

²²¹ Kathleen Daly, *Conventional and Innovative Justice Responses to Sexual Violence* (ACSSA Issues No 12, September 2011) 6.

²²² *Ibid.*

where a conviction is reached, a large number of victims report feeling traumatised and dissatisfied by their treatment in court, expressing that they rarely felt believed or taken seriously, and that the trial excessively focused on victim, rather than offender, behaviour.²²³

Given the shortcomings of the traditional criminal justice system, restorative justice has been praised for being more amenable to meeting victims' complex needs, holding a variety of benefits that allow healing to occur.

As mentioned, while the traditional criminal justice system may achieve a sense of justice through convictions and legal sanctions, the system's adversarial nature can cause the victim to feel separated and voiceless, significantly limiting their ability to obtain emotional and psychological healing and closure. Research has identified the needs of victims that are often neglected or subject to oversight by courts. These include the need for social acknowledgement and support, which is limited by a court's public challenge to the victim's credibility; the need to establish a sense of power and control over their lives, which can be restricted by court rules and procedures; the need to have an opportunity to voice their story in a comfortable and personal way, which can be stifled by close-ended questions in court; and the need for control of re-traumatising triggers, that are often perpetuated by the adversarial nature of court proceedings.²²⁴

Accordingly, the primary benefit of restorative justice programs is that it provides the opportunity for victims of sexual assault to participate directly in the justice process, to fully voice their story, and be heard by their offender.²²⁵ Evidence shows that such programs provide a counterpoint to the loss of power and control inherent in sexual assault²²⁶ which can be perpetuated by police and court processes. As offenders are required to firstly admit their wrongdoing, parties will generally spend more time discussing the effects of their behaviour on the victim and devising outcomes to resolve the harm caused, rather than debating the truth of the events that occurred.²²⁷ In this way, restorative

²²³ Ibid 7.

²²⁴ Judith Lewis Herman, 'Justice from the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571, 571-602.

²²⁵ Kathleen Daly, 'Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases' (2006) 46(2) *British Journal of Criminology* 334, 338.

²²⁶ Kathleen Daly, 'What is Restorative Justice? Fresh Answers to a Vexed Question' (2015) 11(1) *Victims & Offenders* 1, 21.

²²⁷ Ibid.

justice programs can provide victims with a sense of validation not found in the trial process, ensuring that their suffering is acknowledged by the perpetrator and by members of their community.²²⁸

The flexible and informal nature of restorative justice also provides a less-threatening environment than court that can be more responsive and easily tailored to victims' differing needs, especially for more vulnerable victims such as children and adolescents.²²⁹ Furthermore, unlike adversarial court proceedings, restorative justice can facilitate relationship reparations and address sexual violence for victims of intra-familial sexual violence who do not wish to terminate their relationships.²³⁰ This can help increase the safety of children and other family members where future or ongoing contact with the offender is unavoidable.²³¹ On the other hand, restorative justice may provide the support necessary to encourage victims to end abusive relationships where they have previously been unable to do so.²³²

5.3.4 THE IMPLEMENTATION OF RESTORATIVE JUSTICE TO ADDRESS SEXUAL ASSAULT OFFENCES

In Australia, the use of restorative justice for sexual assault crimes is rare due to concerns relating to its appropriateness for sexual assault crimes. Where it has been used, conferencing has been the primary mode of restorative justice for sexual assault cases.

South Australia is the only jurisdiction in Australia that has routinely referred cases of sexual assault to restorative justice programs. These programs are primarily used as a diversion from court for juvenile sex offenders who admit to their wrongdoing. However, juvenile offenders have also been referred at the pre-sentencing and post-sentencing stage. South Australia is also the only jurisdiction to use conferencing for adult sex offenders pre-sentencing.

In NSW, adult sex offenders are also eligible to be referred to victim-offender conferencing, however these are available post-sentencing only. The processes are driven by the victim's needs, to attend

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Samantha O'Donnell, 'Proceed with Caution: Restorative Justice and Domestic Violence' (2018) 25 *Pandora's Box* 105, 119.

²³¹ Ibid.

²³² Ibid.

to any trauma and emotional psychological pain caused by the incident. Offender-focused programs have been used in Australia in the NSW Cedar Cottage pre-trial diversion program – however this program has since been discontinued.

5.3.5 CONDITIONS FOR SUCCESS

In a review of restorative justice programs, Bolitho found the following conditions as the most determinative of positive outcomes across all successful programs dealing with sexual assault crimes.²³³

Specialisation

The first key feature of all well-established restorative justice practices for sexual assault victims is the use of facilitators that are specialised and experienced in working with crimes that involve complex power dynamics.²³⁴ Due to the sensitivities of this issue, the level of knowledge and experience required of facilitators working with sexual assault crimes is greater than those working with other crimes.²³⁵ Generally, staff and facilitators should be trained in sexual-assault counselling and the dynamics of violence with high-level skills of trauma-informed care.²³⁶

Screening

Successful programs must also have a thorough screening phase to ensure success.²³⁷ This is because participants that lack suitability or interest will not benefit from restorative justice and are thus, routinely screened out of the process. For instance, according to Bolitho, only 8% of cases referred to conferencing in NSW actually proceeded to a face-to-face conference.²³⁸ A thorough screening process is also critical to ensure victim safety in conferences, which is a determinative factor for

²³³ Jane Bolitho and Karen Freeman, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems Following Child Sexual Abuse or Comparable Harms* (Royal Commission into Institutional Responses to Child Sexual Abuse, 2016) 43-44.

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ Thea Deakin-Greenwood and Jane Bolitho, 'Restorative justice after sexual assault', *Community Legal Centres NSW* (Web Page, 13 February 2019) <<https://www.clcnsw.org.au/restorative-justice-after-sexual-assault>>.

²³⁷ *Ibid.* 44.

²³⁸ Jane Bolitho, 'Putting Justice Needs First: A Case Study of Best Practice, Victim Offender Conferencing in New South Wales Australia' (2015) 3(2) *Restorative Justice: An International Journal* 256, 257.

success, as victims who feel threatened or unsafe will not be able to properly engage with their offender and will be at risk of re-traumatisation.²³⁹

Flexibility and Responsiveness

Timing of the conference, and its flexibility and responsiveness to participants needs is another crucial requirement for success.²⁴⁰ Successful programs prioritised responding to participants needs and circumstances, rather than maximising efficiency, as is usually the case with court processes. Additionally, they were available at different stages of the justice system and included options to choose direct engagement with the offender, or a representative facilitator communicating on behalf of the victim.

Specialist Sex Offender Treatment

Successful restorative justice programs must require completion of specialist sex offender treatment programs, either as a prerequisite of restorative justice participation, or as a condition of the program.²⁴¹ In NSW's Victim Offender Conferencing program, offenders will only be suitable for participation if they have completed a sex offender treatment program.²⁴² Similarly, in South Australia's Family Conferencing Model, more than 50% of offenders undertake sex offender treatment programs as a condition of their outcome plan.²⁴³ These treatments play an important role in restorative justice for sexual assault crimes, as research suggests that they can have a powerful impact on reducing sexual reoffending.²⁴⁴

Other Factors

Some other notable conditions include that the programs be victim-initiated, that participation is completely voluntary and consensual, and that there is thorough victim preparation to ensure

²³⁹ Jane Bolitho and Karen Freeman, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems Following Child Sexual Abuse or Comparable Harms* (Royal Commission into Institutional Responses to Child Sexual Abuse, 2016) 44.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Jane Bolitho, 'Putting Justice Needs First: A Case Study of Best Practice, Victim Offender Conferencing in New South Wales Australia' (2015) 3(2) *Restorative Justice: An International Journal* 256.

²⁴³ Jane Bolitho and Karen Freeman, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems Following Child Sexual Abuse or Comparable Harms* (Royal Commission into Institutional Responses to Child Sexual Abuse, 2016) 44.

²⁴⁴ Ibid 45.

readiness before meetings.²⁴⁵ Additionally, successful programs also use advocates and experts where required, include accountability mechanisms such as regular reporting by offenders, and allow matters to be withdrawn, deferred, or referred to the police at any time.²⁴⁶

5.3.6 OUTCOMES

Overall, empirical research suggests that there is a possibility to safely practise restorative justice programs in response to sexual offences. According to Deakin-Greenwood and Bolitho, 'restorative justice is the primary and best-documented avenue through which victim-survivors and either direct perpetrators or institutional representatives can come together to have difficult, usually emotional conversations about what happened, why, and to what effect.'²⁴⁷ The effectiveness of restorative justice practices in this area will be evaluated in relation to reducing recidivism and achieving victim satisfaction.

RECIDIVISM

Research suggests that restorative justice conferences have greater crime reduction potential compared to court processes, with 'all social processes of expressing disapproval that have the intention or effect of involving remorse' in an offender being a 'more effective deterrent to crime than formal punishment'.²⁴⁸ Such processes can therefore morally educate the offender about what is right and wrong, driven by self and social disapproval in a reintegrative, rather than stigmatising, way. This, in turn, can create a deterrent to recidivism.

Although the capacity for restorative justice to reduce recidivism for sexual assault crimes has been widely debated, research has documented some positive results in reducing sexual reoffending in adult and young offenders. Empirical evaluations on the Cedar Cottage Pre-Trial Diversion Program NSW, which worked exclusively with adult intra-familial sex offenders, have found significantly positive reductions in reoffending

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Thea Deakin-Greenwood and Jane Bolitho, 'Restorative Justice After Sexual Assault', *Community Legal Centres NSW* (Web Page, 13 February 2019) <<https://www.clcsw.org.au/restorative-justice-after-sexual-assault>>.

²⁴⁸ John Braithwaite, 'Reintegrative Shaming, Republicanism, and Policy' in Barlow Hugh, D. (ed) *Crime and Public Policy: Putting Theory to Work* (Westview Press, 1995) 191.

rates.²⁴⁹ According to Butler et al., those who were accepted into the program reoffended significantly less than those who did not participate and instead went through normal court procedures.²⁵⁰ Furthermore, in a notable study comparing court and restorative justice conferencing outcomes for juvenile sex-offenders, Daly found that reoffending rates were much higher for young offenders processed in court (66%) than for those processed in conferences (48%).²⁵¹ Additionally, in a later evaluation focusing on recidivism outcomes, Daly et al. found that conference youth who reoffended were less likely than court youth to commit sexual re-offences (12% compared to 18%).²⁵² Reoffenders who were finalised in court had higher levels of recidivism for all types of offences, being charged for 13.7 new offences compared to conference reoffenders who were charged with 6.1 new offences.²⁵³ However, these differences were largely contingent on the prior offending history of the offender, as those with no prior offending history maintained the lowest recidivism rates.²⁵⁴ Referral to restorative justice conferencing also resulted in longer delays between reoffending, but only for those youth with no prior offending history.²⁵⁵ Additionally, youth offenders that had no prior offending history did not commit any sexual re-offences.²⁵⁶

Nevertheless, restorative justice conferencing does provide a pathway into sex-offender treatment programs and therapy services for the defendant involved, which can play an instrumental role in reducing reoffending.²⁵⁷ According to Daly, reoffending rates were lower for both court and conference-finalised youth offenders that undertook a treatment program.²⁵⁸ Court sentenced youth that did not partake in the sex-offender treatment program had a 75% reoffending rate, compared to a 50% reoffending rate of those that were referred to a sex-offender treatment program.²⁵⁹ Similarly, 53% of conference-finalised youth that did not take part in treatment programs reoffended, compared to 43% of those who did.²⁶⁰ Accordingly, referral to counselling or specialist treatment programs was a strong predictor of reduced

²⁴⁹ Louise Butler, Jane Goodman-Delahunty, and Rohan Lulham, 'Effectiveness of Pretrial Community Based Diversion in Reducing Reoffending By Adult Intrafamilial Child Sex Offenders' (2012) 39(4) *Criminal Justice and Behaviour* 493, 507.

²⁵⁰ *Ibid.*

²⁵¹ Kathleen Daly, 'Restorative Justice and sexual Assault: An Archival Study of Court and Conference Cases' (2006) 46(2) *British Journal of Criminology* 334, 348.

²⁵² Kathleen Daly et al, 'Youth Sex Offending, Recidivism, and Restorative Justice: Comparing Court and Conference Cases' (2013) 46(2) *Australian and New Zealand Journal of Criminology* 241, 250.

²⁵³ *Ibid* 249.

²⁵⁴ *Ibid* 257.

²⁵⁵ *Ibid* 256.

²⁵⁶ *Ibid.*

²⁵⁷ Bronwyn Naylor, 'Effective Justice for Victims of Sexual Assault: Taking up the Debate on Alternative Pathways' (2010) 33 *UNSW Law Journal* 662, 669.

²⁵⁸ Kathleen Daly, 'Restorative Justice and sexual Assault: An Archival Study of Court and Conference Cases' (2006) 46(2) *British Journal of Criminology* 334, 348.

²⁵⁹ *Ibid* 349.

²⁶⁰ *Ibid.*

reoffending, regardless of whether the youth offender was finalised in court or conference.²⁶¹ Nevertheless, Daly et al. found that conferenced juvenile offenders were more likely to be referred to treatment programs than court youth, as 79 conferenced youth were referred to counselling compared to 49 court youth, and 52 were referred to specialist sex-offender treatment programs compared to 37 finalised in court.²⁶² In this sense, restorative justice programs have a greater potential to reduce reoffending than court processes by facilitating greater referrals to treatment programs. At the very least, restorative justice is not worsening reoffending.

However, subsequent findings suggest that referral to specialised treatment programs only significantly reduced the rate of reoffending in youth that had no prior offending history.²⁶³ Youth sex-offenders with no prior offending history offended much sooner if they were not referred to the specialist treatment program (2.7 years vs 4.7 years).²⁶⁴ No significant reduction in reoffending speed was found for youth referred to specialist treatment programs if they had prior offending history.²⁶⁵ Accordingly, these findings suggest that juvenile sex offenders with no prior offence history are likely to be the most responsive to behavioural changes from both referral to conferencing, and referral to specialist treatment programs. Nonetheless, it can be concluded that restorative justice programs can safely be used for youth sex offenders regardless of pre-offending history without any risk of increasing reoffending rates.

VICTIM NEEDS AND SATISFACTION

As mentioned, restorative justice provides a victim-focused mechanism to increase access to justice by empowering and validating the victim's voice, while simultaneously recognising offender accountability. There is strong empirical evidence to suggest that restorative justice practices are significantly effective in meeting victim needs and providing satisfaction in response to youth sexual assault cases.

²⁶¹ Ibid.

²⁶² Ibid 348.

²⁶³ Kathleen Daly et al, 'Youth Sex Offending, Recidivism, and Restorative Justice: Comparing Court and Conference Cases' (2013) 46(2) *Australian and New Zealand Journal of Criminology* 241, 257.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

Evidence from a study on Victim Offender Conferencing in NSW suggested that the specific justice needs identified by both victims and offenders were consistently met throughout their participation in the restorative justice process. This reflected a 95% success rate and included cases involving sexual assault.²⁶⁶ Furthermore, Daly's study of the South Australian Family Conferencing model found that, through conferencing as opposed to courts, victims were more likely to receive a verbal and written apology and more likely to achieve an agreement from the young offender to stay away from them. Furthermore, offenders were more likely to attend counselling, and more specifically specialist sex offender counselling, as a result of conferencing compared to court process. Importantly, Daly emphasises that during family conferencing, a much higher admission of guilt (94%) occurred in comparison to courts where only 51% of cases proved a sexual component.²⁶⁷ This early admission reveals a distinct benefit of restorative justice that provides the victim-survivor with validation of their experience. In addition, Daly's research showed that conference cases were finalised and settled much quicker than court cases, with a median of 2.5 months compared to 5.7 months, respectively.²⁶⁸ These findings suggest that restorative justice processes can successfully meet the needs of victims by providing access to justice that promotes an emotional and psychological healing process, generates closure in a time-efficient manner, achieves offender accountability and ensures the victim receives an agreement or outcome that is satisfactory and reflective of their needs.

Case Study

Furthermore, the effectiveness of restorative justice practices to meet victim needs and achieve satisfaction, alongside recognising offender accountability, is illustrated in a case study produced by the Queensland Government's Department of Child Safety, Youth and Women focusing on restorative youth justice.²⁶⁹ The case concerned a young male, 16 years of age, charged with carnal knowledge of a child under 16 years. The victim sought counselling and suffered emotionally and socially after the offence, losing a close mutual friend. The matter was referred to restorative justice conferencing and required the offender to attend a specialist intervention service prior to the

²⁶⁶ Bolitho, Jane, 'Putting Justice Needs First: A Case Study of Best Practice, Victim Offender Conferencing in New South Wales Australia' (2015) 3(2) *Restorative Justice: An International Journal* 256.

²⁶⁷ Daly, Kathleen, 'Restorative Justice and sexual assault: An Archival Study of Court and Conference Cases' (2006) 46(2) *British Journal of Criminology* 334.

²⁶⁸ *Ibid.*

²⁶⁹ QLD Department of Child Safety, Youth and Women, 'Restorative Justice Case Studies', *Queensland Government Department of Child Safety, Youth and Women* (Report, 2018) 11 <<https://www.csyw.qld.gov.au/resources/dcsyw/youth-justice/conferencing/restorative-justice-case-studies.pdf>>.

conference due to the nature of the offence. The conference was attended by the victim, offender, their parents, counsellors for each party, a representative from a sexual offending support agency, the referring police officer and two convenors. The conference allowed both parties to share their experience and how this affected their lives, with the victim expressing her feelings through her counsellor using a Victim Impact Statement. The offender accepted responsibility for his actions and apologised to the victim, her parents and his own parents. He agreed to stay away from the victim's neighbourhood so she felt safe, to attend therapeutic counselling sessions and to repair the victim's relationship with the mutual friend. Therefore, this case illustrates the ability of restorative justice practices, as an innovative mechanism and alternative to court proceedings, to address the needs of victims of sexual offences²⁷⁰ by providing them with a 'greater degree of justice than the court'.²⁷¹ This case also demonstrates the ability of restorative justice to empower the victim by valuing their voice and facilitating their active participation, ensuring they are not re-victimised or silenced while confronting the offender and seeking justice.

5.3.7 CONCLUSION

Overall, the empirical research and data suggests that restorative justice practices for youth sexual assault crimes can be an effective mechanism for achieving victim satisfaction, recognising offender accountability, repairing relationships and reaching an agreement that suits both parties. However, the appropriateness of restorative justice depends heavily on a number of factors that must be taken into consideration.

Such factors include the seriousness of the offence and the age of the perpetrator and victim. These factors may influence the willingness of parties to engage in restorative justice practices as a mechanism to repair the relationship, reintegrate the offender within society and achieve an appropriate outcome. Furthermore, in deciding whether restorative justice is an appropriate mechanism to repair relationships between victims and offenders, it is important to consider the nature of the relationship. For example, for a friendship or familial relationship, achieving reparation may be a valuable and important goal for both parties. However, once again, this depends on the

²⁷⁰ Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending: Pathways to Better Outcomes for Victims, Offenders, and the Community* (Report, 2014) 7 <<https://cij.org.au/cms/wp-content/uploads/2018/08/innovative-justice-responses-to-sexual-offending.pdf>>.

²⁷¹ Marcia Neave, 'Restorative Justice: When is it Appropriate?' (Speech, Victorian Law Reform Commission: Conference Proceedings, 6 October 2004).

circumstances of the case and the seriousness of the offence, which may influence the willingness of victims to engage in direct confrontation with the offender.

In South Australia, restorative justice practices are generally used pre-sentencing or as a diversionary measure to steer victims and offenders away from traditional court processes. In cases of minor offences this may be a suitable and effective alternative to court proceedings, particularly where reparation of the relationship is a priority for both parties. In cases concerning more serious offences, restorative justice may be suitable to create a deterrent for the offender through the provision of a moral education and accountability for their actions without strict legal actions. Furthermore, implementing restorative justice mechanisms as alternative programs to traditional legal pathways creates opportunities for the victim's voice to be heard and validated, while facilitating their active participation in the justice process. This also provides both parties with the choice and flexibility to reach a mutual agreement and outcome that protects all interests while achieving justice.

However, in more serious cases where a legal sanction is mandated and sought by the victim, restorative justice may be effective as a complementary mechanism for justice post-sentencing. This can empower the victim to voice their feelings to the offender, a voice that may be silenced or overseen by traditional court proceedings. This has the potential to provide the victim with a sense of healing and closure alongside the legal outcome. Furthermore, the conference may contribute as a deterrent to the offender reoffending in the future, as they receive moral and accountability for their actions alongside a legal punishment.

Overall, the appropriateness of restorative justice as a mechanism to act in complementation with traditional court outcomes, or as a complete alternative, significantly depends on the above considerations and the circumstances of the case. While it is arguable that the traditional criminal justice system may be necessary to achieve justice through legal accountability of the offender and through the imposition of legal sanctions, restorative justice can provide a mechanism for emotional healing and relationship reparation that the traditional may neglect. As analysed above, evidence strongly suggests that restorative justice can also provide an effective mechanism to simultaneously reduce the likelihood of recidivism and meet the needs of victims in a more meaningful, practical way.

While the implementation of restorative justice practices in relation to sexual assault crimes in Australia is limited by jurisdiction and other variables that determine its suitability, it is arguable that the practices are effective as both an alternative and complementary dispute resolution mechanism. Due to the subjective nature and variability between cases, it can be speculated as a point of law reform that restorative justice practices should be made available to all victims, therefore providing them with a choice. This can empower victims of sexual assault to choose the legal pathway to achieving justice that suits their individual needs. This notion is strongly supported by Deakin-Greenwood and Bolitho, who argue that 'by expanding our justice processes and reimagining a system that includes a restorative justice framework, victims could be offered choices, options, and to make decisions about what they want, and the terms on which they may want to engage with the person responsible for their harm'.²⁷² Furthermore, restorative justice can act as a powerful deterrent for young offenders, providing them with a strong sense of moral education, creating opportunities for reintegration into society and achieving accountability without serious court-ordered punishment.

²⁷² Thea Deakin-Greenwood and Jane Bolitho, 'Restorative Justice after Sexual Assault', Community Legal Centres NSW (Web Page, 13 February 2019) <<https://www.clcnsw.org.au/restorative-justice-after-sexual-assault>>.

5.4 ASSAULT OFFENCES

Restorative justice is applicable to a range of assault offences in Australia committed by young offenders. However, the use of restorative justice in assault-related offences is greatly dependent on the severity of the assault committed. It is evident, through an analysis of the data and case studies, that restorative justice is used mainly for minor assault offences, including common assault and assault occasioning bodily harm.²⁷³ Restorative justice processes continue to be limited for serious assault-related offences, though recent literature suggests that restorative justice is more effective with serious assaults.²⁷⁴

Due to the availability of data and case studies, this section of the report will focus on 'common assault' and 'assault occasioning bodily harm' in NSW and Queensland. First, a definition will be provided of common assault and assault occasioning bodily harm. As there are a range of assault offences in all states and territories in Australia, a definition will provide an overview of the differing acts perpetrated by an offender that can be dealt with under restorative justice processes. Second, an analysis will be provided of the applicability of restorative justice to minor and serious assault-related offences. Third, an analysis of the differing restorative justice processes used in Australia will be provided, focusing on case-studies from youth justice conferencing in Queensland.

5.4.1 DEFINING ASSAULT

Under Australian law, assault is an intentional act and is recognised as an unlawful offence against an individual, regardless of the severity of the assault.²⁷⁵ There are various charges for acts of assault, depending on the jurisdiction where the assault took place, as well as the severity of the assault. The offence of assault ranges from 'minor assaults' such as common assault, and 'assault occasioning bodily

²⁷³ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 8-9.

²⁷⁴ Lawrence W Sherman and Heather Strang, *Restorative Justice: The Evidence* (The Smith Institute, 2007) 54.

²⁷⁵ *Crimes Act 1900* (NSW); *Crimes Act 1958* (VIC); *Criminal Code 1899* (QLD); *Criminal Law Consolidation Act 1935* (SA); *Criminal Code Act 1924* (TAS); *Criminal Code Act Compilation Act 1913* (WA); *Criminal Code Act 1983* (NT); *Crimes Act 1900* (ACT).

harm', to serious assault offences such as intentionally causing grievous bodily harm and sexual assault.²⁷⁶

In NSW, 'common assault prosecuted by indictment' occurs when an individual intentionally assaults a person without occasioning actual bodily harm.²⁷⁷ The perpetrator of the assault may be subject to imprisonment for two years in NSW if found guilty beyond reasonable doubt.²⁷⁸ While common assault can involve physical contact, this does not have to be present to prove that an assault has occurred.²⁷⁹ For example; attempting to hit someone without striking them, showing a weapon to frighten another person, as well as threats to injure or hurt another person can establish common assault. Further, pushing a person, spitting, slapping, and throwing an object at an individual without causing actual pain are legislatively prohibited and can result in imprisonment in NSW.²⁸⁰ In Queensland common assault occurs where a victim suffers only minor injuries or where a perpetrator has threatened to assault a victim, resulting in maximum imprisonment for up to three years.²⁸¹ Similarly to NSW, this includes attempting to hit or even spitting at an individual.

On the other hand, 'assault occasioning bodily harm' is differentiated from common assault in NSW and Queensland as the victim suffers actual bodily harm.²⁸² A perpetrator may be subject to imprisonment for five years in NSW or seven years in Queensland if found guilty beyond reasonable doubt under this section.²⁸³ For example; actual bodily harm can include scratches and bruises,²⁸⁴ as well as psychological injuries that move beyond temporary emotions and feelings.²⁸⁵

²⁷⁶ *Ibid.*

²⁷⁷ *Crimes Act 1900 (NSW) s 61.*

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ Barwick CJ in *The Queen v Phillips* (1971) 45 ALJR 467, 472

²⁸¹ *Criminal Code 1899 (QLD) s 335.*

²⁸² *Crimes Act 1900 (NSW) s 59; Criminal Code 1900 (NSW) s 339.*

²⁸³ *Ibid.*

²⁸⁴ *McIntyre v R* (2009) 198 A Crim R 549, [44].

²⁸⁵ *Li v R* [2005] NSWCCA 442, [45]

5.4.2 THE RELATIONSHIP BETWEEN RESTORATIVE JUSTICE AND ASSAULT

Restorative justice processes have primarily been used to address minor assaults, rather than more serious assault offences involving young offenders.²⁸⁶ The application of restorative justice to more serious and violent assaults by young offenders continues to be limited, though there continues to be a large body of literature claiming there is positive outcomes.²⁸⁷

The benefits of restorative justice, particularly in juvenile conferencing, for minor assault-related offences is evident for both the victim and their family, the offender, as well as the community.²⁸⁸ Restorative justice allows offenders to communicate their thoughts without using violence or threats, as the process takes into account the age of the offender and their maturity level. Further, the process attempts to ensure the victim is mentally and emotionally prepared to meet the offender who committed an assault against them, allowing them to have a voice and 'regain a sense of meaning and control over their lives'.²⁸⁹ This process is further facilitated when the victim of an assault-related offence has family members participating in the process with them, which is often ignored in the criminal justice system.²⁹⁰ Both victims and perpetrators of an assault who participate in a restorative justice process, participate in a way that accommodates their needs and ensures they feel comfortable. For example; they can participate face-to-face or they can communicate indirectly, such as through Victim Impact Statements which are written or taped recordings of the impact of the crime.²⁹¹

Victim-preparedness is a voluntary and crucial element of restorative justice processes and plays a large role in determining the inapplicability of restorative justice processes to victims of more serious

²⁸⁶ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 8-9.

²⁸⁷ Lawrence W Sherman and Heather Strang, *Restorative Justice: The Evidence* (The Smith Institute, 2007) 54.

²⁸⁸ Restorative Justice Evaluation Team, *Restorative Justice Case Studies* (Final Report for Director-General Endorsement, 20 May 2018) 4 <<https://www.csyw.qld.gov.au/resources/dcsyw/youth-justice/conferencing/restorative-justice-case-studies.pdf>>.

²⁸⁹ *Ibid* 16.

²⁹⁰ Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 5th ed, 2013) 338.

²⁹¹ Restorative Justice Evaluation Team, *Restorative Justice Case Studies* (Final Report for Director-General Endorsement, 20 May 2018) 18 <<https://www.csyw.qld.gov.au/resources/dcsyw/youth-justice/conferencing/restorative-justice-case-studies.pdf>>

violent assaults.²⁹² Young victims experience many negative impacts from assault experiences, including: physical harm, emotional effects (anger, depression, shame) and importantly a sense of disempowerment. The lasting effects of violent assaults can be short term or long term, and in some instances resulting in post-traumatic stress disorder ('PTSD').²⁹³ Thus, while victims may feel satisfaction directly after a process, this satisfaction for some victims lessens over time, especially when they have been subject to a serious crime that creates long-lasting illnesses.²⁹⁴ Thus, restorative justice processes are viewed as more appropriate for minor assault-related offences, as the victim can be more prepared to face an offender who has been convicted of a common assault offence against them.

Further, repeat juvenile offenders who commit serious offences oftentimes cannot be referred to juvenile conferencing in Australia.²⁹⁵ Indigenous people in Australia continue to be disproportionately represented in the criminal justice system, as they enter early into the system, beginning a cycle of incarceration. Thus, Cunneen draws the conclusion that Indigenous offenders are less likely to take part in juvenile conferencing than non-Indigenous youth, and are more likely to have an unsuccessful outcome if they participate in conferencing.²⁹⁶ In the context of assault for Indigenous juveniles this is particularly disheartening, as the most common offence committed between 2017-2018 by Indigenous people in Australia was acts intending to cause injury.²⁹⁷ Therefore, Indigenous offenders continue to be disproportionately impacted by the criminal justice system, which encroaches on their interaction with restorative justice processes.

²⁹² Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 5th ed, 2013) 353-354.

²⁹³ Restorative Justice Evaluation Team, *Restorative Justice Case Studies* (Final Report for Director-General Endorsement, 20 May 2018) 18 <<https://www.csyw.qld.gov.au/resources/dcsyw/youth-justice/conferencing/restorative-justice-case-studies.pdf>>.

²⁹⁴ Chris Cunneen, Rob White and Kelly Richards, *Juvenile justice: Youth and Crime in Australia* (Oxford University Press, 5th ed, 2013) 353.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ Australian Bureau of Statistics, 'Indigenous Status, Selected States and Territories', *Australian Bureau of Statistics* (15 March 2019) <<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4519.0~2017-18~Main%20Features~Indigenous%20status,%20selected%20states%20and%20territories~5>>.

5.4.3 RESTORATIVE JUSTICE PRACTICES

Most youth conferences in Australia can be referred pre-sentence when an offender has committed an offence amounting to common assault or assault occasioning bodily harm. However, Western Australia excludes an offence amounting to 'assault occasioning bodily harm' for 'Family Group Conferencing' by way of the Young Offenders Act 1994 (WA). Further, legislation governing conferencing in states and territories, prohibit the use of specific types of conferencing for serious violent crimes.²⁹⁸ In the context of victim-offender mediation, common assault to more serious assault offences are referable, however, most of these offences can only be referred post-sentence. Interestingly, Reparative Mediation in Western Australia, and Court-Ordered Mediation in Tasmania allow serious assault offences to be referred pre-sentence (except sexual assault for Reparative Mediation in Western Australia).

Table 13: Restorative justice processes for assault offences.

State	Program	Point of Referral	Can it be used for assault offences?
NSW	Youth Justice Conferences. ²⁹⁹	Pre-Sentence	Yes: however, sexual assault is excluded.
VIC	Youth Justice Group Conferencing. ³⁰⁰	Pre-Sentence	Yes: there are no crimes explicitly excluded from restorative justice. However, serious violent crimes are practically excluded. ³⁰¹
	Youth Justice Conferencing. ³⁰²	Pre-Sentence	Yes: no crimes are explicitly excluded.
	Restorative Justice	Police referral and court order	Yes: used for common assault and assault occasioning bodily

²⁹⁸ These include 'Youth Justice Group Conferencing' in Victoria, 'Family Conferencing' in South Australia, 'Family Group Conferencing' in Western Australia, 'Youth Justice Conferencing' in the Northern Territory and 'Restorative Justice Unit' in the Australian Capital Territory.

²⁹⁹ *Young Offenders Act 1997* (NSW).

³⁰⁰ *Children, Youth and Families Act 2005* (VIC).

³⁰¹ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 8.

³⁰² *Youth Justice Act 1992* (VIC).

QLD	Conferencing. ³⁰³	Pre-sentence	harm.
SA	Family Conferencing. ³⁰⁴	Pre-Sentence	Yes: there are no crimes explicitly prohibited. However, legislation says youth who admit they have committed a 'minor' offence are referred. ³⁰⁵
WA	Family Group Conferencing. ³⁰⁶	Pre-Sentence	Yes: restorative justice can be used for common assault. ³⁰⁷ However, cannot be used for any other assault offence. ³⁰⁸
	Reparative Mediation. ³⁰⁹	Post-Conviction and Pre-Sentence	Yes: however, sexual assault is excluded.
	Victim-Offender Dialogue. ³¹⁰	Post-Sentence	Yes: any offence referable.
NT	Youth Justice Conference. ³¹¹	Pre-Sentence	Yes: but restorative justice is excluded for violent offences. ³¹²
	Correctional Centre Conferencing and Ponki Mediation. ³¹³	Post-Sentence	Yes: generally used for more serious offences.

³⁰³ Youth Justice Act 1992 (QLD).

³⁰⁴ *Young Offenders Act 1993 (SA)*.

³⁰⁵ *Ibid.*

³⁰⁶ *Young Offenders Act 1994 (WA)*.

³⁰⁷ *Criminal Code Act Compilation Act 1913 (WA)* s 313.

³⁰⁸ *Ibid* ss 281, 317, 317A(a), 317(A)(b), 318, 323, 324, 393.

³⁰⁹ *Sentencing Act 1995 (WA)*; *Young Offenders Act 1994 (WA)*.

³¹⁰ There is no specific legislation governing this form of restorative justice in Western Australia.

³¹¹ *Youth Justice Act 2005 (NT)*.

³¹² *Ibid.*

³¹³ *Community Justice Centre Act 2005 (NT)*.

TAS	Community Conference. ³¹⁴	Sentencing Option	Yes: however, sexual assault is excluded.
	Victim-Offender Mediation.	Post-Sentence	Yes: there are no crimes explicitly excluded in legislation. However, most mediation processes involve offences which are indictable. ³¹⁵
	Court-Ordered Mediation. ³¹⁶	Pre-Sentence	Yes: there are no crimes explicitly excluded in legislation. However, most mediation processes involve offences which are indictable.
ACT	Restorative Justice Unit. ³¹⁷	From Apprehension to Post Sentence	Young offenders are referred for less serious offences. ³¹⁸ Less serious are defined as offences against a person subject to imprisonment for 10 or less years. For example; 'common assault' and 'assault occasioning actual bodily harm'. ³¹⁹

While it is difficult to assess the limited data exploring the effectiveness of restorative justice in the context of assault offences, an analysis of specific case studies on juvenile offenders in Queensland explores the effectiveness of youth conferencing on a case-by-case basis. The following two case

³¹⁴ *Youth Justice Act 1997 (TAS)*.

³¹⁵ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 19.

³¹⁶ *Sentencing Act 1997 (TAS)*.

³¹⁷ *Crimes (Restorative Justice) Act 2004 (ACT)*.

³¹⁸ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 15.

³¹⁹ *Crimes (Restorative Justice) Act 2004 (ACT)* ss 24, 26.

studies were presented from Queensland to show the processes that are undertaken during youth conferencing, reflecting on the effectiveness arising out of the process. These cases demonstrate how focusing on re-offending outcomes to assess the effectiveness of restorative justice can oftentimes draw attention away from the effectiveness of restorative justice toward victims, families, and the psychological and emotional conditions of an offender.³²⁰

CASE STUDY I:

OFFENCE

A 10-year-old boy threw an item at a victim's head and verbally threatened the victim in a school classroom, stating that he would he would have another individual sexually assault his sister.³²¹ Both the victim and offender had been 'best friends' prior to the offence and their families knew each other. He was charged with common assault, as well as making threats.³²²

PROCESS

- The parents of both of the boys were involved through pre-conference interviews, expressing concerns about the loss of friendship to both the families, and the victim and offender.
- The offender originally claimed his verbal actions 'were a joke'.³²³
- The offender and the victim, their parents, a police officer, as well as the school guidance officer were all in attendance at the conference.
- Important cultural factors were brought up when the offenders father made a speech about his Cook Islander culture, exploring the role of men and the respect that should be shown toward women.³²⁴

EFFECTIVENESS

³²⁰ Masahiro Suzuki and William Wood, 'Restorative Justice' in Antje Deckert and Rick Sarre (ed), *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (Springer International Publishing AG, 2017) 1, 7.

³²¹ Restorative Justice Evaluation Team, *Restorative Justice Case Studies* (Final Report for Director-General Endorsement, 20 May 2018) 4 <<https://www.csyw.qld.gov.au/resources/dcsyw/youth-justice/conferencing/restorative-justice-case-studies.pdf>>.

³²² Ibid.

³²³ Ibid.

³²⁴ Ibid.

The offender began to understand that his behaviour had impacted the victim, apologising to both the victim and the victim's parents. The offender thanked his mother for attending the conference and supporting him during the process. The conference was successful, promoting healing amongst all the parties involved due to the offender's actions. As a result of the conference, the offender and victim restored their friendship, as well as the friendship between their families.³²⁵

REFLECTION

The case study reveals how restorative justice seeks to make an offender understand the impact of their actions, rather than focussing specifically on punishment. The process allowed a platform for the offender's father to express important cultural needs and values, evoking emotion and understanding amongst the participants.³²⁶

CASE STUDY 2:

OFFENCE

Melissa and Jake were both friends and 15 years old. Melissa and other male friends arranged to assault Jake at a train station, believing that he had sexually assaulted someone that they knew. Jake was kicked, punched and hit in the head with broken glass.³²⁷ One of the co-offenders produced a knife, making threats to murder Jake. While the assault was taking place, Melissa walked away, refusing to help Jake.

In court, Melissa was convicted on one charge of assault occasioning bodily harm.³²⁸ She was sentenced to a restorative justice order, having had no interaction with the juvenile justice system.³²⁹

PROCESS

- Jake and his mother attended an interview with a restorative justice convenor, expressing the impacts of the crime on her family and her son.

³²⁵ Ibid.

³²⁶ Ibid.

³²⁷ Ibid 9.

³²⁸ Ibid.

³²⁹ Ibid.

- At first, Jake and his mother did not wish to engage in conferencing, fearing it would expose him to further harm. Further, the victim did not wish to speak about the assault as it had traumatised him.
- The victim's mother decided to attend a conference following a detailed discussion by the convenor about the process, while Jake remained hesitant. He did not attend any support services that were offered to him.
- The conference was held at a community centre a couple of months later.
- Melissa learned that Jake had searched for her after the assault had taken place, thinking she had been injured (he had not realised she was involved in the assault at that time).
- Jake learned more about the assault and Melissa's thoughts since the offence had taken place.
- It came to fruition that the accusation made by Melissa that Jake had sexually assaulted her friend was false.

EFFECTIVENESS

The conference was effective in amending the relationship between the victim and offender, as well as their families. Melissa verbally apologised to Jake, and he accepted the apology. The offender stated that she would be a witness against the co-offenders. Jake stated that he wanted Youth Justice to monitor their agreement, though he trusted Melissa to keep her commitment. Jake's mother was satisfied with the process, stating that the process allowed them to gain closure, allowing her son to move on.³³⁰

REFLECTION

This conference reveals the importance of victim-preparedness. Following a detailed discussion about the restorative justice process by the convenor, the victim's mother felt supported to meet the offender. However, as the victim was still traumatised, the conference was conducted when he was prepared (this was outside of the standard period of six weeks).³³¹

³³⁰ Ibid.

³³¹ Ibid 10.

5.4.4. CONCLUSION

While minor assault-related offences are referred to restorative justice processes, there continues to be debate that serious offences could have positive outcomes. Though there continues to be minimal data assessing the effectiveness of crime specific assault-related offences, the case studies explored reveal promising outcomes for victims, offenders and their families.

5.5 DRUG OFFENCES

5.5.1 DEFINING DRUG OFFENCES

In Australia, the category of illicit drug offences that encompass the dealing and trafficking of illicit drugs are the manufacturing or cultivating of illicit drugs and the possession or use of illicit drugs.³³² According to 2017-18 data published by the Australian Bureau of Statistics (ABS) in 2019,³³³ the number of youth offenders prosecuted for illicit drug offences has decreased for the second year. Despite this, illicit drug offences remain one of the most common types of crimes committed by youth offenders in Australia (second to unlawful entry with intent).³³⁴ Most offenders prosecuted under drug charges are for minor offences of possession or use of drugs rather than the more serious offences of dealing, trafficking, or manufacturing. In the context of the use of juvenile restorative justice in Australia, with exception of NSW, all states and territories allow for restorative justice mechanisms to be utilised when dealing with illicit drug offences, with the nature and seriousness of the offence being taken into account when police or courts are deciding whether these mechanisms are appropriate.

5.5.2 THE PRACTICE OF RESTORATIVE JUSTICE TO ADDRESS DRUGS OFFENCES

The ethos behind using restorative justice practices in dealing with illicit drug crimes centres around the fact that traditional punishments have not affected recidivism rates.³³⁵ If the serve penalties, which have been imposed for serious crimes like drug trafficking, were effective in reducing crime rates and improving community safety, the incidence of crimes would have been reduced decades ago.³³⁶ Crimes of such kind remain common irrespective of the levels of penalty imposed. Victims of crimes committed by drug-dependent offenders can voluntarily become involved in restorative justice

³³² Australian Institute of Health and Welfare, 'Illicit Use of Drugs,' 15 January 2018 < <https://www.aihw.gov.au/reports-data/behaviours-risk-factors/illicit-use-of-drugs/overview>>.

³³³ Australian Bureau of Statistics, Recorded Crimes – Youth Offenders (*Principal Offence*), Australia, 2017-18 (Catalogue No 4519.0, 15 March 2019).

³³⁴ *Ibid.*

³³⁵ Wayne Martin AC, 'Restorative cities – the role of the justice system,' The Sir Ninian Stephen Lecture 2018 University of Newcastle (13 June 2018) 14.

³³⁶ Cary Bennett, 'Drug Law Enforcement: A Study in the Interplay of Power and Resistance,' (2010) 22(1) *Current Issues in Criminal Justice* 117.

programs at various stages in the criminal justice system, whether that be after arrest, while the offender is on bail, or when the sentence is adjourned or deferred.³³⁷

Table 14: Restorative justice processes for drug offences.

State	Program	Victim participation	Point of referral	Eligible offences
VIC	Youth Justice Group Conferencing ³³⁸	Conference can proceed without a victim present	Court order Pre-sentence	Use or possession of illicit drugs
QLD	Restorative Justice Conferencing ³³⁹	Conference can proceed without a victim present	Police referral and Court order Pre-sentence	Unlawful possession of dangerous drugs under Drugs Misuse Act 1986
SA	Family Conferencing ³⁴⁰	Conference can proceed without a victim present	Police referral and Court order Pre-sentence	No explicit exclusions, however in practice used for drug possession and use
WA	Victim-offender dialogue	Initiated by the Victim	Court order Post-sentence	Any offence is referable.
	Reparative Meditation ³⁴¹	Initiated by victim, offender, magistrate/judge, police prosecutor, lawyers, victim	Court order Post-conviction and pre-sentence	Unlawful possession of dangerous drugs with intent to sell/supply, selling/supplying drugs and cultivating

³³⁷ Drug and Specialist Court Review Queensland Courts, Part A *Foundational Principles* (November 2016) 8.

³³⁸ *Children, Youth and Families Act 2005* (VIC).

³³⁹ *Youth Justice Act 1992* (QLD).

³⁴⁰ *Young Offenders Act 1993* (SA).

³⁴¹ *Young Offender's Act 1994* (WA); *Sentencing Act 1995* (WA).

		support counsellors or Community Corrections/Youth Justice officers		prohibited plants under Drugs Misuse Act 1981
NT	Youth Justice Conference ³⁴²	Conference can proceed without a victim present	Police referral and Court order Pre-sentence	Use or possession of illicit drugs under Misuse of Drugs Act 1990
TAS	Community Conference ³⁴³	Conference can proceed without a victim present	Police referral and Court order Pre-sentence	Only for minor offences of use or possession of illicit drugs, however rare ³⁴⁴
	Victim-offender dialogue	Initiated by Victim or Offender	Court order Post-sentence	Only for minor indictable offences of use or possession of illicit drugs
	Court-ordered Mediation ³⁴⁵	N/A	Court order Pre-sentence ³⁴⁵	Only for minor indictable offences of use or possession of illicit drugs
ACT	Restorative Justice Unit ³⁴⁶	Conferences cannot proceed without a victim (or their nominated substitutes) participation	From apprehension to post-sentence	Less serious offences involving a victim

³⁴² *Youth Justice Act 2005* (NT).

³⁴³ *Youth Justice Act 1997* (TAS).

³⁴⁴ Youth Law Australia, 'Drugs,' (Web Page, 18 April 2019) <<https://yla.org.au/tas/topics/teen-issues/drugs/>>.

³⁴⁵ *Sentencing Act 1997* (TAS).

³⁴⁶ *Crimes (Restorative Justice) Act 2004* (ACT) — operating in phase one.

5.5.3 DRUG DIVERSION AND RESTORATIVE JUSTICE

Restorative justice underpins the use of drug diversion programs in Australia. The rise of drug diversion in Australia was in part a response to the growing recognition that traditional criminal sanctions were having little impact on drug and drug-related offenders as mentioned above. In circumstances where an offender's drug use is linked with their offending behaviour, criminal sanctions will have little impact on the reduction of reoffending than diversion into treatment programs.³⁴⁷ Through treating drug use, offending behaviour may also be reduced, removing the impetus for drugs to be used for offending. Since diversion seeks to lower the incidence of crime by changing the motivation of the offender, it supports the theory behind restorative justice; that is, individuals are provided an opportunity for empowerment and increased relevance of outcomes through direct involvement in the system and influence over punishment and sanction options. Further, while many statutes governing the practice of restorative justice exclude drug and trafficking from offences that attract restorative justice for juveniles, there are mechanisms available for drug diversion programs in many jurisdictions.

Table 15: Legislative provisions for police drug diversion from the criminal justice system for youths.

State	Police diversion program	Statutory Provision
NSW	Youth cautioning and conferencing	Young Offenders Act 1997
VIC	Juvenile cautioning	Children and Young Persons Act 1989
	Juvenile justice group conferencing	Children, Youth and Families Act 2005
QLD	Youth cautioning and conferencing	Juvenile Justice Act 1992
WA	Juvenile cautioning and conferencing	Young Offenders Act 1994

³⁴⁷ Jacqueline Joudo Larsen, *Responding to Substance Abuse and Offending in Indigenous Communities: Review of Diversion Programs* (Australian Institute of Criminology Report No 88, 2008).

	Young Person's Opportunity Program	Via the Juvenile Justice Teams which operate under the Young Offenders Act 1994
SA	Cautioning and family conferences	Young Offenders Act 1993
NT	Juvenile Pre-diversion Scheme	Youth Justice Act 2005; Police Administration Act 1978
TAS	Youth Diversion Program	Youth Justice Act 1997

WARNINGS AND CAUTIONS

Warnings or cautions are the least restrictive diversionary option and can be issued instead of a formal charge.³⁴⁸ These forms of diversion are most likely to be used for minor offences, primarily with juvenile offenders. They operate similarly in all jurisdictions. Warnings are intended to be informal and given 'on the street' with no requirement for the person to admit guilt. Where the offences or circumstances surrounding the offence are more serious, officers may choose to issue a caution. This is a more formal procedure that generally takes place once a person has admitted guilt. Cautions are generally issued for summary offences and indictable offences which may be dealt with summarily, but not major offences such as drug trafficking. Police officers possess a great deal of discretion when it comes to deciding whether to issue a caution.³⁴⁹ They must consider the seriousness of the offence, the level of violence involved, the harm caused to the victim, the nature and extent of offending by the person, and the number of previous warnings or cautions issued.³⁵⁰

CONFERENCING

Youth or family conferencing is provided as a diversionary option in all states and territories.³⁵¹ Generally, referral to a conference is for more serious offenders or offences and those with a history of warnings, cautions or offending. If it is deemed inappropriate for a conference to be held (the formal process to reach that decision and how the conferences are conducted has been discussed

³⁴⁸ Ibid 37.
³⁴⁹ Chris Cunneen, 'Changing the Neo-Colonial Impacts of Juvenile Justice,' (2008) 20(1) *Current Issues in Criminal Justice* 43.
³⁵⁰ Ibid.
³⁵¹ Jacqueline Joudo Larsen, *Responding to Substance Abuse and Offending in Indigenous Communities: Review of Diversion Programs* (Australian Institute of Criminology Report No 88, 2008) 40-1.

earlier in this report) the matter is normally dealt with by the Courts.³⁵² The outcome may include making an apology or reparation to the victim, doing community service or an education program, donating to charity, counselling, or working for the victim or their parent.³⁵³ It will also include drug treatment as it is an influence on their offending behaviour.³⁵⁴ By and large, the agreed outcomes must not be more onerous than a court would order. Offenders who do not comply with the outcomes of a conference will reappear in court and may return to the traditional criminal justice system.³⁵⁵

DRUG DIVERSION PROGRAMS

In light of the growing body of research pointing to a connection between drug use and offending, government policy has acknowledged the need to respond with non-traditional options.³⁵⁶ In 1999, the Council of Australian Governments agreed on a nation-wide diversionary scheme aimed at diverting offenders into drug education, assessment and treatment.³⁵⁷ The Illicit Drug Diversion Initiative, has been implemented in all states and territories, with some variation among jurisdictions. All measures funded under the initiative involve the following:

- Offenders are diverted by police into assessment for education or treatment, or directly into drug education program.³⁵⁸
- If an offender completes drug education or treatment, the offence is expiated, but if they do not participate or fail to complete the program, they are referred back to the criminal justice system.³⁵⁹

An example of this can be provided from Queensland's approach to drug diversion. If police make a restorative justice referral and a conference cannot be convened, section 38 of the Youth Justice Act 1992 (Qld) acknowledges that alternative diversion programs under restorative justice, such as

³⁵² Restorative Justice Evaluation Team, *Twelve Month Program Evaluation: Restorative Justice Project* (Final Report for Director-General Endorsement, 20 May 2018).

³⁵³ Jacqueline Joudo Larsen, *Responding to Substance Abuse and Offending in Indigenous Communities: Review of Diversion Programs* (Australian Institute of Criminology Report No 88, 2008) 40-1.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ Jacqueline Joudo Larsen, *Responding to Substance Abuse and Offending in Indigenous Communities: Review of Diversion Programs* (Australian Institute of Criminology Report No 88, 2008) 45-6.

³⁵⁷ Alcohol and other Drugs Council of Australia (2003) *Strategies to Minimise Harm: 2.10 diversion*, Policy positions of the Alcohol and other Drugs Council of Australia.

³⁵⁸ *Ibid.* 5.

³⁵⁹ *Ibid.*

educational programs, can be undertaken.³⁶⁰ These programs must be designed to help the child understand the harm caused by their behaviour,³⁶¹ and allow the child an opportunity to take responsibility for the offence they committed.³⁶² The Act stipulates where a child commits an offence against the Drugs Misuse Act 1986 by unlawfully possessing a dangerous drug, the court can refer the child to education sessions. If this is agreed upon by the chief executive, the child before the matter will proceed to the drug diversion court.³⁶³ If the child is then able to attend the session on the stated date, the proceedings of the offence come to an end and the child is not liable to be further prosecuted for the offence.³⁶⁴ The conviction is also not recorded, despite the child being found guilty.

5.5.4 EFFECTIVENESS OF RESTORATIVE JUSTICE FOR ILLICIT DRUG OFFENCES

The success rates of diversionary options such as drug courts and cautioning programs are assessed largely with regard to their impact on reoffending rates. The research in this field is dated and is not positive in relation to Indigenous reoffending rates. Although research indicates some decline, reoffending among Indigenous participants generally remains higher than that of non-Indigenous offenders. Despite this, the Indigenous Sentinel Study reported in 2003 that there seemed to be positive impacts in reducing drug use and offending among Indigenous participants of select Illicit Drug Diversion Initiative programs, although this was based on 'the very limited information available'.³⁶⁵ For example, an evaluation of the Juvenile Pre-Diversion scheme found that diversion was offered to 61% of youths who were apprehended within the first three years of the Northern Territory agreement. The recidivism rate of the juveniles who were diverted was lower than for juveniles who proceeded through the court system.³⁶⁶

³⁶⁰ *Youth Justice Act 1992 (QLD)* s 38 (1)(c).

³⁶¹ *Ibid* s 38 (2)(a).

³⁶² *Ibid* s 38 (2)(b).

³⁶³ *Youth Justice Act 1992 (QLD)* s 172 (2).

³⁶⁴ The Queensland Law Handbook, 'Police Diversion of Child Offenders from the Court System,' 8 January 2018 <<https://queenslandlawhandbook.org.au/the-queensland-law-handbook/offenders-and-victims/children-and-the-criminal-law/police-diversion-of-child-offenders-from-the-court-system/>>.

³⁶⁵ Urbis Keys Young, *Indigenous Sentinel Study for the COAG Illicit Drug Diversion Initiative* (Canberra: Department of Health and Ageing, 2003) 51.

³⁶⁶ Urbis Keys Young, *Evaluation of the Northern Territory Agreement: Final Report* (Sydney: Urbis Keys Young, 2003).

Approximately 21% of agreements in Queensland during 2016-17 involved young people completing counselling or educational programs through victims and/or family members requesting that juveniles participate in counselling or drug rehabilitation programs as part of their conference agreement.³⁶⁷ A growing body of literature has revealed that early intervention and therapeutic programs can be very effective in achieving significant reductions in crime.³⁶⁸ Given that restorative justice is associated with high levels of compliance in the completion of agreements, orders, and other programs,³⁶⁹ it offers an excellent opportunity to promote 'therapeutic justice'³⁷⁰ and more sophisticated and holistic responses to offending for young people with multiple, complex needs.³⁷¹

A survey of the available research demonstrates that the use of restorative justice to address the offence of drug possession does not have a great impact on recidivism for non-victim offences. Victim offences have a higher success rate and impact on reducing recidivism than non-victim offences. Braithwaite in *Crime, Shame and Reintegration*,³⁷² points to the positive benefits of shame under the context of family conferencing involving users of illicit drugs. This process of reintegrative shaming attempts to reintegrate the offender back into the community of law-abiding citizens by shaming the crime, not the criminal.³⁷³ When the victim is a family member, the chances of reoffending are lower.³⁷⁴

³⁶⁷ Restorative Justice Evaluation Team, *Twelve Month Program Evaluation: Restorative Justice Project* (Final Report for Director-General Endorsement, 20 May 2018) 43.

³⁶⁸ Charlotte Gill, 'Community Interventions', in David Weisburd, David Farrington & Charlotte Gill (eds), *What Works in Crime Prevention and Rehabilitation* (New York: Springer Science, 2016); Matthew Manning, Ross Homel and Christine Smith, 'A meta-analysis of the effects of early developmental prevention programs in at-risk populations on non-health outcomes in adolescence,' (2010) 32 *Children and Youth Services Review*, 506–519; Ross Homel, 'Developmental Crime Prevention,' in Tilley N (ed), *Handbook of Crime Prevention and Community Safety* (Cullompton UK: William Publishing, 2005).

³⁶⁹ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014).

³⁷⁰ Some policy considerations in relation to this approach include (i) the voluntary nature of community support services versus the statutory requirement to complete conference agreements; (ii) the option of providing assisted referrals for 'at risk' young people versus including therapeutic interventions as part of a conference agreement; and (iii) the capacity of the service system to meet the needs of young people. The Youth Justice Supply Analysis (June 2016) found gaps in the service system, including a lack of tailored services that are able to meet the needs of the Youth Justice Cohort. Some services also have a limited geographic spread across the state.

³⁷¹ Marcia Neave, 'Restorative Justice: When is it Appropriate?' Victorian Law Reform Commission: Conference Proceedings, *NSW Government 2017*.

³⁷² John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989) 54.

³⁷³ Clare Cappa, 'The Social, Political & Theoretical Context of Drug Courts,' (2006) 32 (1) *Monash University Law Review* 145, 166.

³⁷⁴ John Braithwaite, 'Restorative Justice and a New Criminal Law of Substance Abuse', (2001) 33(2) *Youth and Society* 227.

Substance abusers routinely steal from family and friends who protect offenders by refusing to report their crimes. Substance abusers often feel guilt associated with placing their loved ones in such a conflicting and compromising position. However, restorative justice programs can provide an opportunity for healing. Through the process of confronting the pain felt by familiar victims and acknowledging the shame both parties feel in association with the crime, the offender may be more motivated to commit to a rehabilitation program; meetings with more unfamiliar victims may not be able to evoke the same feelings of remorse and motivation to reform.³⁷⁵ Hence, restorative justice offers the prospect of shaking the substance abuser out of what Braithwaite describes as “drift” – where the person drifts in and out of the habit and the criminal justice system, rather than confronting their substance problem.³⁷⁶ Under the context of family conferencing, it provides family members of a juvenile substance abuser with the opportunity to cry out for help. The juvenile must sit and listen to the concerns and suffering of their family, whilst facilitators criminalise the harm rather than the abuse.³⁷⁷

Overall, the appropriateness of restorative justice as either a complete alternative or complementary mechanism alongside traditional criminal justice system is imperative for this type of crime as it focuses on educating the offenders about drugs and their harm, allows them to rehabilitate out of their habit and prospers relationships which promotes willingness to reconcile.

5.5.5 CONCLUSION

Due to the lack of quantitative, qualitative and anecdotal evidence which would provide a thorough and accurate assessment of the impact restorative justice practices have had on youth committing illicit drug offences in Australia, limited conclusions can be made. It is undeniable, however, that no other process within the criminal justice system is better suited to treating this offence; traditional methods err in providing youths with an opportunity to heal from cases of addiction and witness the impact that their behaviour has had on those around them and their victims. It is important to note that juvenile crime is not just a legal problem – it is also a social problem with social causes and effects such as substance misuse, disengagement from education or training, employment difficulties,

³⁷⁵ Ibid 228, 232, 244.

³⁷⁶ Ibid 231.

³⁷⁷ Ibid 240.

lack of income, neuro-developmental delays, homelessness and social exclusion.³⁷⁸ For drug and trafficking offences, factors such as family drug abuse, witnessing peers taking drugs, the availability of drugs in their community contribute to increasing the likelihood of young people offending.³⁷⁹ If implemented effectively, restorative justice practices in regards to illicit drug offences have the potential to transform a youth's life and positively influence their future decisions.

³⁷⁸ Caitlin Grover, 'Research Paper: Youth Justice in Victoria', *Parliamentary Library & Information Service, Parliament of Victoria* (No. 2 April 2017).

³⁷⁹ Chris Campbell, Minister for Community Services (2000) *A Balanced Approach to Juvenile Justice in Victoria*, Ministerial Statement, 3.

5.6. PROPERTY CRIMES

5.6.1 DEFINING PROPERTY OFFENCES

Property offences are a broad category of crimes which include, but are not limited to, theft, robbery, criminal trespass, arson, wilful property damage, shoplifting, and graffiti offences.³⁸⁰ The seriousness of the offence varies from violent property offences such as aggravated robbery, to minor property offences such as shoplifting or trespass. In the context of the use of juvenile restorative justice in Australia, all states and territories allow for restorative justice mechanisms to be utilised when dealing with non-violent property offences. Referrals to restorative justice programs are made by police or the court, who take into consideration the nature and seriousness of the offence to determine restorative justice mechanisms are appropriate.

5.6.2 RESTORATIVE JUSTICE PRACTICES

Property offences are one of the most common crimes dealt with through restorative justice mechanisms in all Australian states and territories.³⁸¹ Statistically, property crimes are the most common offence committed by juvenile offenders in Australia. In 2016-17 theft was the most common offence committed by people aged between 10 and 17 years, totalling 36%.³⁸² Non-violent property offences are one of the most common offences dealt with through restorative justice mechanisms as they constitute minor offences and are therefore viewed as lower risk crimes. All Australian jurisdictions allow for juvenile restorative justice mechanisms to be used for non-violent property offences. However, the severity of the property offence and the individual criminal history of the offender can impact whether or not restorative justice mechanisms are used in each individual case. Further, the stage at which a restorative justice mechanism is initiated for property offences is most often pre-sentence. However, victim-offender mediation can be used post-sentence in the case of more serious crimes such as aggravated robbery offences, where a victim is identified and desires

³⁸⁰ Restorative Justice Evaluation Team, *Twelve Month Program Evaluation: Restorative Justice Project* (Final Report for Director-General Endorsement, 20 May 2018) 30.

³⁸¹ *Ibid*, 8, 60% of 2016-2017 offences dealt with through conferencing in QLD were property offences.

³⁸² Australian Institute of Health and Welfare, *Youth Justice in Australia 2016-17* (Report, 2018) 34
<<https://www.aihw.gov.au/getmedia/19707990-1719-4600-8fce-f0af9d61331c/aihw-juv-116.pdf.aspx?inline=true>>.

an apology or payment to compensate the stolen property.³⁸³ There are multiple avenues for restorative justice mechanisms to be initiated, through police referrals and by court order, as either a sentence or as a means to reach an appropriate sentence for the juvenile offender. Restorative justice processes for property crimes can operate as an alternative to traditional criminal justice processes, as many minor property crime offenders are diverted away from the court process by police to juvenile justice conferencing. However, restorative justice also runs parallel to the criminal justice process, as conferencing can be used as a sentence, and victim-offender mediation operates post-sentence.

The dominant mode of restorative justice employed in each jurisdiction for juvenile property offences is youth conferencing. There are additional programs which are available to young offenders in some jurisdictions, such as victim-offender mediation which is often employed post-sentence for serious property offences involving violence, where a personal victim can be identified. The following table provides an overview of the programs available for juvenile offenders in all Australian states and territories, displaying which property offences are eligible for conferencing and mediation.

Table 16: Restorative justice processes for property offences.

State	Program	Point of Referral	Eligible offences
NSW	Youth Justice Conferences ³⁸⁴	Police referral and court order Pre-sentence	Property offences – ranging from minor to serious offences.
QLD	Restorative Justice Conferencing ³⁸⁵	Police referral and court order Pre-sentence	Property offences – ranging from minor to serious offences.

³⁸³ District Court of Western Australia, *Victim Offender Mediation* (Web Page, 2014) <https://www.districtcourt.wa.gov.au/V/victim_offender_mediation.aspx?uid=4586-1086-1671-3197&fbclid=IwAR2Pxq7tKiKM44K5uD9M-ArzXjflLuFUXc79c4fgmkzIPBYbbonUU2hsxILY>.

³⁸⁴ Young Offenders Act 1997 (NSW).

³⁸⁵ *Youth Justice Act 1992* (QLD).

ACT	Restorative Justice Unit (Conferencing) ³⁸⁶	Available through police referral from time of arrest, as a court-ordered sentence, and post-sentence	Non-violent property offences. Excludes serious property offences which carry an imprisonment term of over 14 years.
VIC	Youth Justice Group Conferencing ³⁸⁷	Court order Pre-sentence	Property offences – ranging from minor to serious. In practice violent crimes are excluded.
	Youth Justice Conferencing ³⁸⁸	Police referral and court order Pre-sentence	Property offences – ranging from minor to serious.
SA	Family Conferencing ³⁸⁹	Police referral and court order Pre-sentence	No explicit exclusions, however in practice used for minor non-violent property offences.
WA	Family Group Conferencing ³⁹⁰	Police referral and court order Pre-sentence	Minor property offences. Excludes arson offences.
	Reparative Mediation ³⁹¹	Court order Post-conviction and pre-sentence	Serious property offences.

³⁸⁶ *Crimes (Restorative Justice) Act 2004 (ACT)*.

³⁸⁷ *Children, Youth and Families Act 2005 (Vic)*.

³⁸⁸ *Youth Justice Act 1992 (Vic)*.

³⁸⁹ *Young Offenders Act 1993 (SA)*.

³⁹⁰ *Young Offenders Act 1994 (WA)*.

³⁹¹ *Sentencing Act 1995 (WA); Young Offender's Act 1994 (WA)*.

	Victim-offender Dialogue ³⁹²	Court order Post-sentence	Serious property offences.
NT	Youth Justice Conferencing ³⁹³	Police referral and court order Pre-sentence	Non-violent property offences. Excludes violent property offences such as aggravated robbery.
	Correctional Centre Conferencing and Ponki Mediation ³⁹⁴	Court order Post-sentence	Serious property offences.
TAS	Community Conference ³⁹⁵	Police referral and court order Pre-sentence	Non-violent property offences. Excludes violent property offences such as aggravated robbery.
	Victim-offender Mediation ³⁹⁶	Court order Post-sentence	Serious property offences (indictable offences).
	Court-ordered Mediation ³⁹⁷	Court order Post-sentence	Serious property offences (indictable offences).

³⁹² Not governed by specific legislation.

³⁹³ *Youth Justice Act 2005* (NT).

³⁹⁴ *Community Justice Centre Act 2005* (NT).

³⁹⁵ *Youth Justice Act 1997* (Tas).

³⁹⁶ Not governed by specific legislation.

³⁹⁷ *Sentencing Act 1997* (Tas).

5.6.3 RELATIONSHIP BETWEEN PROPERTY OFFENCES AND RESTORATIVE JUSTICE

In 2016-2017, the most frequently referred offence to restorative justice conferences was property offences which attributed to 60% or 4242 of 7092 offences referred. Theft was also one of the other major offences diverted to conferencing.³⁹⁸ The Australian Government has therefore attempted to divert young offenders away from the formal aspects of the criminal justice system to ensure that they are able to grow and develop in a social, positive and supportive environment. Cautions and detentions have been two methods employed by the police and courts in an attempt to minimise reoffending, but these have proven to be ineffective. For property and theft crimes, there is a focus on restorative justice to repair the harm done to the victims through mutually constructed agreements that focus on repairing property damage or returning the stolen good. These beneficial aspects of restorative justice to repair the harm done and to address the underlying causes of offending are not present in a mere custodial sentence.³⁹⁹ Victims are attracted to the process of conferencing because it helps them share their side of the story in a safe environment.⁴⁰⁰ Police and courts require the attendance of offenders to give them an environment which can facilitate their reintegration into society and return to education.⁴⁰¹

However, victims can choose not to attend conferencing and the reasons for non-attendance are varied. Some victims believe that conferencing is not useful whilst others do not want to re-hash the experience.⁴⁰² Other reasons for non-attendance include being fearful of the process, being too enraged to face their offender and believing that no real harm has been done.⁴⁰³ This is often the reason why conferences take place weeks or months after the crime has taken place, whether this becomes a diversionary (police-referral) or pre-sentencing (court-referral) method. Corporate victims were also less likely to attend conferences than individual victims although, the main reason for this is because corporate victims sent letters in place of physical attendance. Moreover, since

³⁹⁸ Restorative Justice Evaluation Team, *Twelve Month Program Evaluation: Restorative Justice Project* (Final Report for Director-General Endorsement, 20 May 2018) 8.

³⁹⁹ *Ibid* 60-61.

⁴⁰⁰ Jane Bolitho, 'Restorative Justice: The Ideals and Realities of Conferencing for young people' (2012) 20 *Critical Criminology* 61, 67-70.

⁴⁰¹ Restorative Justice Evaluation Team, *Restorative Justice Case Studies* (Final Report for Director-General Endorsement, 20 May 2018) 2.

⁴⁰² Jane Bolitho, 'Restorative Justice: The Ideals and Realities of Conferencing for young people' (2012) 20 *Critical Criminology* 61, 70 -71.

⁴⁰³ *Ibid* 70-71.

youth offending was so common, to attend all youth conferences would take too much time from an employee's day.⁴⁰⁴ Nonetheless, principles for restorative justice indicate that offenders have an obligation or a liability to make things right and repair the harm that they have caused.⁴⁰⁵ For example, conferences have led to agreements whereby people return items that they have stolen or clean up the property damage and vandalism they have caused.⁴⁰⁶ As part of this healing process, the victims' needs for information, restitution, validation, safety and support are achieved through the conferencing process. Restorative justice maximises participation, dialogue and mutual agreements between the victim and offender, thereby striving to ensure that all parties are satisfied with the outcome of conferencing.⁴⁰⁷

Victims also often attend the conferences because they seek closure. After a crime, victims can face physical and emotional injuries, suffer from stress, anger and depression and may feel unsafe.⁴⁰⁸ Victims noted that being able to share the impact of the crime, seeing the offender show remorse and having a say in the agreement formed in the conference, assisted them in managing the effects of the crime.⁴⁰⁹ Table 17 also indicates the positive attributes of young offenders understanding the harm they caused and agreeing to make things right.⁴¹⁰

The objective of the courts and police in referring young offenders to restorative justice processes is to divert them from further progression into the criminal youth justice system.⁴¹¹ This is because the sooner young offenders come into contact with the formal aspects of the system, the greater the likelihood is that they will reoffend and re-enter the system.⁴¹² Furthermore, restorative justice can help reduce the tendency for violence, help children return to education and ultimately improve

⁴⁰⁴ Ibid 70-71.

⁴⁰⁵ Howard Zehr and Harry Mika, 'Fundamental Concepts of Restorative Justice' (1998) 1 *Contemporary Justice Review* 47, 47-55.

⁴⁰⁶ Jacqueline Joudo Larsen, Australian Institute of Criminology, *Restorative Justice in the Australian Criminal Justice System* (Research and Public Policy Series Report No 127, 2014) 4, 20.

⁴⁰⁷ Howard Zehr and Harry Mika, 'Fundamental concepts of restorative justice' (1998) 1 *Contemporary Justice Review* 47, 47-55.

⁴⁰⁸ Nadine Smith and Don Weatherburn, 'Youth Justice Conferences versus Children's Court: A comparison of re-offending (2012) 160 *Contemporary Issues in Crime and Justice Bulletin* 1, 16-17.

⁴⁰⁹ Restorative Justice Evaluation Team, *Twelve Month Program Evaluation: Restorative Justice Project* (Final Report for Director-General Endorsement, 20 May 2018) 56.

⁴¹⁰ Ibid 56.

⁴¹¹ Productivity Commission, Australian Government, *Annual Report on Government Services: Chapter 17 Youth Justice Services*, (Report, 2018) 17.10.

⁴¹² Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 5th ed, 2015) 352.

their career prospects.⁴¹³ These beneficial outcomes are achieved in programs such as conferencing, which provide the opportunity for victims, offenders and their families to explain the impact of the offence.⁴¹⁴ Counsellors and police officers also explain the impact on society and bring in an educative aspect to the conferencing experience.⁴¹⁵ As Figure 3 indicates, in 2016-2017, 91.1% of conferences successfully led to an agreement between the parties. This figure was 89.8% for Aboriginal and Torres Strait Islander young offenders.⁴¹⁶ Furthermore, conferencing can help promote apologies. Research indicates that offenders who apologised were three times less likely to be reconvicted within four years than those who did not apologise.⁴¹⁷ Although there are young people who can feel pressured to apologise, conferencing provides the opportunity for those who genuinely want to apologise to do so. Providing this opportunity which is not available in the court system can thus benefit both the victim and offender.⁴¹⁸

Moreover, a study conducted by the University of Canberra indicated that restorative justice shifted the offenders' perception of the justice process.⁴¹⁹ The study involved assessing the views across a range of crimes from property offences to more violent crimes for children all the way up to the age of 29. Greater procedural justice was experienced through a more fair and respectful treatment in the conference than in court. Offenders also valued the greater opportunity to repair the harm caused as opposed to a court proceeding and showed increased respect for the police and the law.⁴²⁰ Data collected by the Department of Justice in Queensland also noted that 98% of 351 offenders, parents and victims said that the restorative process was fair and up to 99% were satisfied with the agreement that was reached in the conference.⁴²¹ Similar results were found in Western Australia.⁴²² In South Australia, conferencing also correlated with increasing positive attitudes towards the

⁴¹³ Office of the Special Representative of the Secretary-General on Violence Against Children, *Promoting Restorative Justice for Children* (Report, 2016) 28.

⁴¹⁴ Productivity Commission, Australian Government, *Annual Report on Government Services: Chapter 17 Youth Justice Services*, (Report, 2018) 17.11.

⁴¹⁵ Restorative Justice Evaluation Team, *Restorative Justice Case Studies* (Final Report for Director-General Endorsement, 20 May 2018) 2.

⁴¹⁶ Productivity Commission, Australian Government, *Annual Report on Government Services: Chapter 17 Youth Justice Services*, (Report, 2018) 17.11.

⁴¹⁷ Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 5th ed, 2015) 355.

⁴¹⁸ *Ibid* 355.

⁴¹⁹ Office of the Special Representative of the Secretary-General on Violence Against Children, *Promoting Restorative Justice for Children* (Report, 2016) 27-28.

⁴²⁰ *Ibid* 27-28.

⁴²¹ *Ibid* 31-32.

⁴²² *Ibid* 31-32.

offender over time. Moreover, victim fears of further emotional and physical harm have reduced following conferences.⁴²³ Restorative justice has also contributed to more efficient court processes as appropriate cases are diverted to conferencing, leading to less backlog in courts.⁴²⁴ Without an alternative to the court process, the outcome of a formal trial is likely to have resulted in costly and intensive outcomes such as supervised orders or detention.⁴²⁵ The involvement of family members and the community in conferencing is beneficial to the offender as it can help reduce feelings of isolation and shame whilst providing support.⁴²⁶ Table 18 indicates the benefits of restorative justice processes for the victims and offender including the safety they felt at conferences and the fairness.⁴²⁷ However, some young people did find it difficult to talk to their victim or offender (Table 19).

Furthermore, punitive approaches to addressing property offences are largely ineffective. A NSW Review stated that empirical studies conducted in Australia, the United States, Europe and New Zealand showed that juvenile incarceration, trying children in adult courts, boot camps and other punitive methods are ineffective in reducing juvenile crime.⁴²⁸ Rather, punitive approaches are a costlier means of dealing with young offenders. Not only do these methods stigmatise the offender, incarceration also reinforces criminal behaviour rather than providing the young person with a positive environment and role model.⁴²⁹ Moreover, incarceration fails to address underlying factors contributing to youth offending including mental health and family issues.⁴³⁰ Rather, during detention, some young offenders are subject to injury as a result of assault. Detention can also create an environment for self-harm. Tables 20, 21 and 22 indicate that 206 young people were injured in detention and recorded 176 incidents of self-harm. These issues are unlikely to occur if children are diverted from the courts and from a custodial sentence.⁴³¹

⁴²³ Ibid 12.

⁴²⁴ Restorative Justice Evaluation Team, *Twelve Month Program Evaluation: Restorative Justice Project* (Final Report for Director-General Endorsement, 20 May 2018) 8.

⁴²⁵ Ibid 8-9.

⁴²⁶ Ibid 17.

⁴²⁷ Restorative Justice Evaluation Team, *Twelve Month Program Evaluation: Restorative Justice Project* (Final Report for Director-General Endorsement, 20 May 2018) 55.

⁴²⁸ North Australian Aboriginal Justice Agency, Submission No 2 to Youth Justice Review Panel, *A Review of the Northern Territory Youth Justice System* (July 2011) 17.

⁴²⁹ Ibid 17.

⁴³⁰ Ibid 17.

⁴³¹ Productivity Commission, Australian Government, *Annual Report on Government Services: Chapter 17 Youth Justice Services*, (Report, 2018) 17.17-17.21.

Additionally, courts may reinforce the deviant identity of young offenders by stigmatising the offender themselves. Conferences, on the other hand, stigmatise the criminal behaviour rather than the offender and can foster social integration through restitution and opportunities to apologise.⁴³² Detention and cautions for young people are therefore ineffective and harmful for the future growth of the offender. An Australian study conducted in 2006 indicated that cautions for property and theft were ineffective in keeping young offenders from out of the formal criminal justice system and from reoffending. Theft contributed to 57.6% of all cautioned crimes and 10.5% was attributed to property crimes.⁴³³ Of these young offenders, male offenders 16 years of age or older and offenders who were cautioned for property crimes were more likely to reoffend.⁴³⁴ In the five years after their caution, male offenders, the youngest offenders (aged 10-13) and offenders who were cautioned for theft offences were more likely than other age, sex and offence groups to receive a custodial penalty.⁴³⁵ However, it is important to note that only a small proportion of each group that is more likely to receive a custodial sentence, under 10%, actually receives a custodial sentence. Additionally, the study noted that offenders cautioned for property damage had more court appearances than theft and other offences.⁴³⁶

CASE STUDY I: TYRONE⁴³⁷

Background Information

Tyrone, a 14-year-old was charged with property and theft offences. He stole two cartons of alcohol from a bottle shop and wallets, handbags and cigarettes from unlocked motor vehicles. Tyrone knew many of the victims. Tyrone's criminal history includes two prior court appearances for which he was sentenced to unsupervised youth justice orders.

⁴³² John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989) 18.

⁴³³ Sumitra Vignaendra and Jacqueline Fitzgerald, 'Reoffending among young people cautioned by police or who participated in a youth justice conference (2006)' 103 *Contemporary Issues in Crime and Justice Bulletin* 1, 3.

⁴³⁴ *Ibid* 5.

⁴³⁵ *Ibid* 5-6.

⁴³⁶ *Ibid* 1-15.

⁴³⁷ Restorative Justice Evaluation Team, *Restorative Justice Case Studies* (Final Report for Director-General Endorsement, 20 May 2018) 2-3.

Restorative Justice Process

The youth conference was held four months after the offences were committed. Four adult victims, who were still upset at Tyrone, attended to understand why their properties were targeted. Tyrone and his mother were fearful of the victims, believing they would be rude and angry towards him. The police officer also noted that he did not believe in restorative justice.

During the conference, Tyrone was able to speak honestly and openly. He showed remorse and demonstrated he understood how his victims felt whilst also engaging in discussions. The community representative and police officer explained the impact of Tyrone's offending on the community and the resources that went into investigating the crimes.

Outcome

Tyrone offered a verbal apology to the victims at the conference. He also agreed to complete voluntary work at the local school and agreed to write apology letters and statements of intent where he would promise to attend school each day, not to steal from others and to help his younger siblings stay out of trouble with the law. These tasks aimed to repair the harm that Tyrone did and restore community relations. Tyrone completed all the tasks that were assigned to him during the conference within one week.

Victims' Experiences

- One victim said that being able to speak with Tyrone put her at ease.
- All victims commented on the high level of respect during the conference.
- All victims commended Tyrone on owning up to his actions and behaviour.

Offender's Experience

- His fears about how the victims would act were unwarranted. The convenor reassured him that the conference meeting is a safe place in which Tyrone can share his story

CASE STUDY 2: JOSEPH⁴³⁸

Background Information

Joseph, a 15-year-old, committed several property and fraud offences. Joseph was intermittently living on the streets and not attending school. Joseph was sentenced to a court ordered restorative justice order. One month later, he was sentenced to a court diversion referral. A co-convenor model was chosen due to the seriousness and complexity of the offences.

Restorative Justice Process

The youth conference was held six months after the offences were committed. Joseph's father, a member of the Rotary Club where Joseph committed the property offence, a police officer, and Drug and Alcohol Counsellors attended. Two convenors were also assigned for the process. Joseph's father was able to discuss the impact of his offending on the family, Joseph's mental health and theft committed by other young offenders to their family home.

The Rotary Club member was able to speak about the difficulties in cleaning up after the vandalism and property damage that Joseph did as well as all the time spent by volunteers doing so.

The police officer spoke about the implications of the damage to motor vehicles and property offences on the community.

Outcome

- Joseph agreed to undertake two sessions of volunteer work at the Rotary Club.
- Joseph has not reoffended in the three months since the conference.
- He no longer associates with the co-offenders and has full-time employment.

Victims' Experience

- One victim declined to attend the conference for fear of ongoing harassment from Joseph

⁴³⁸ Ibid 7-8.

- One of the victims commented on how enthusiastic Joseph was during the conferencing process, and how proud the victim was of the volunteer work that Joseph has agreed to do.
- One of the victims said that Joseph enthusiastically completed his volunteer work. The victim was so amazed that he indicated he would invite Joseph back to the property he damaged once everything was complete.

Offender's Experience

- Joseph spoke in a defensive manner about why he was caught with drugs.
- Joseph was enthusiastic about his volunteer work and has distanced himself from other co-offenders.

CASE STUDY 3: BRODIE AND RANDAL⁴³⁹

Background information

Brodie and Randal, two 15-year-olds, were referred by police to a restorative justice conference two months after attempting a robbery. The victim was of similar age to the offenders. The victim was also assaulted in the process of the robbery. Prior to this incident, Brodie and Randal had never been in trouble with the law.

Restorative Justice Process

The youth conference was held six weeks after the referral. The conference was attended by the referring police officer, the two offenders and their parents, a legal representative for the offender, two restorative justice convenors and a representative from a victim support agency. Participants displayed high levels of emotions including sadness, embarrassment and anger.

The convenors ensured that all parties were silent when a participant was telling their stories. This helped maintain a level of composure in the room whilst allowing participants to be heard. The

⁴³⁹ Ibid 15-16.

victim's parents were able to explain how distraught they were after the incident as they received numerous phone calls and were subject to social media attention. They also explained the impact of the crime on the victim's siblings.

Outcome

Both offenders gave the victim a verbal apology and all participants were able to move forward. The victim and offender later met in the shopping centre by coincidence and showed that they had put aside the past incidence by shaking hands and acknowledging that everything was settled between them.

Victim's Experience

- Victim said the conference helped him "move on".
- The victim said that he no longer feared retribution from the offender.

Offenders' Experiences

- The conference was able to guide the offenders to an understanding of the impact of their crime on the victim.

CASE STUDY 4: UNNAMED YOUNG OFFENDER⁴⁴⁰

Background Information

A 15-year-old boy who maliciously damaged property with fire, which resulted in damage to a function centre.

Restorative Justice Process

The young offender met the victim at the conference. The conference was also attended by a representative from the Fire Brigade and the Queensland Police. The young person had mental

⁴⁴⁰ Judge Mark Marien SC, 'Juvenile Justice and community-based sentencing for juveniles in NSW' (Speech, China-Australia Human Rights Technical Cooperation Program - Seminar on Sentencing and Related Issues in Judicial Practice, May 2011) 12.

health issues and was accompanied by their counsellor. The conference focused on the offence and the underlying issues contributing to it.

Outcome

An outcome plan was developed which required the completion of work hours, the attendance at a local Police Youth Centre and counselling. The offender successfully completed the agreement.

Victim's Experience

- The victim reported a high degree of satisfaction with the process.

Offender's Experience

- The offender was satisfied with the process and as a result willingly completed the outcome plan agreement.

CASE STUDY REFLECTIONS

Conferencing is not a soft option for young offenders, as it is difficult for young offenders to own up to their actions and face their victims.⁴⁴¹ Underlying issues and reasons for reoffending are addressed during the conference as the family of the offender have the opportunity to speak about the issues the young person is facing.⁴⁴² Community members can also discuss how the crime has impacted the community and all participants are able to contribute in forming a mutually agreed upon settlement.⁴⁴³ Conferencing also focuses on the future potential of the youth rather than merely punishing him for his offence. For example, agreements have led to volunteering to repair property damage and promising to attend school every day.⁴⁴⁴ Victims also benefit in meeting their offender, stating a reduction in fear and an increase in their perceptions of safety, as evidenced in Tyrone's conferencing.⁴⁴⁵ For Joseph, the conference was able to help him re-connect with his family and his local community.⁴⁴⁶ Moreover, the above case studies indicate that police participation is essential in

⁴⁴¹ Restorative Justice Evaluation Team, *Restorative Justice Case Studies* (Final Report for Director-General Endorsement, 20 May 2018) 2-3.

⁴⁴² *Ibid* 7-8.

⁴⁴³ *Ibid* 2-3.

⁴⁴⁴ *Ibid* 2-3.

⁴⁴⁵ *Ibid* 3.

⁴⁴⁶ *Ibid* 7-8.

helping the young person fully understand the impacts of their actions.⁴⁴⁷ Furthermore, giving the victims a voice in the justice process can help heal the harm and trauma they have experienced. Having friends, family and other support persons for both the victim and offender can also help facilitate the process of healing by providing a supportive and positive environment for discussion.⁴⁴⁸

CONCLUSION

Restorative Justice for lesser crimes such as property offences and theft provide various social and emotional benefits for both the victim and offender. For the victim, there is a renewed sense of belief in the criminal justice system, closure and reduction in both fear and anger. The offender on the other hand, is able to make amends and reintegrate into society and education. Conferencing provides the offender with the opportunity to repair the harm done and address underlying factors that contribute to youth crime. The process and agreements made in conferences often help repair relationships. The alternative approach of cautions and detention are also largely ineffective, and children can face issues such as assault and self-harm. These other methods also stigmatise the offender. Evidently, despite less result with reoffending rates for lesser crimes, the social and emotional benefits for all parties are undeniable.

⁴⁴⁷ Ibid 8.

⁴⁴⁸ Ibid 2-3, 7-8, 15-16.

**PART SIX:
EFFECTIVENESS OF
CONFERENCING –
REOFFENDING RATES**

6.1 EFFECTIVENESS OF CONFERENCING – AN ANALYSIS OF REOFFENDING RATES

Evidence regarding juvenile reoffending rates after restorative justice conferencing remains mixed. Early studies of juvenile restorative justice conferencing suggest that there was a reduction in reoffending rates for restorative justice conference participants when compared to the traditional juvenile court processes.⁴⁴⁹ However, later studies have been more critical, particularly when data is analysed in light of different variables such as the range of offences and the specific target groups for restorative justice conferencing.⁴⁵⁰ Some studies have suggested that restorative justice conferencing is more effective in reducing reoffending for violent crimes where there is a personal victim involved, as opposed to reducing reoffending for minor property crimes.⁴⁵¹ While evidence relating to the lowering of recidivism rates is somewhat unclear, there is a body of evidence suggesting that restorative justice conferencing does have a positive impact in regards to both offender and victim satisfaction with the criminal justice system.⁴⁵²

As each Australian jurisdiction has its own individual juvenile restorative justice scheme, there is no national evidence available to demonstrate the effect of restorative justice practices on recidivism rates. Further, much of the research conducted on recidivism rates for restorative justice mechanisms in Australia does not differentiate between offences. Therefore, it is difficult to quantify whether these measures are more effective for minor offences, such as minor property, assault, and drug offences, than for more serious offences. In light of the ad hoc evidence available, this section of the report will focus on analysing the body of evidence available in regard to the NSW youth justice

⁴⁴⁹ Garth Luke and Browyn Lind, 'Reducing Juvenile Crime: Conferencing versus Court' (2002) 69 *Crime and Justice Bulletin* 1; Sumitra Vignaendra and Jacqueline Fitzgerald, 'Reoffending Among Young People Cautioned by Police or Who Participated in a Youth Justice Conference' (2006) 103 *Crime and Justice Bulletin* 1.

⁴⁵⁰ Nadine Smith and Don Weatherburn, 'Youth Justice Conferences versus Children's Court: A comparison of re-offending' (2012) 160 *Crime and Justice Bulletin* 1.

⁴⁵¹ Lawrence Sherman et al, 'Twelve Experiments in Restorative Justice: The Jerry Lee Program of Randomized Trials of Restorative Justice Conferences' (2015) 11(4) *Journal of Experimental Criminology* 501; Australian National University and The Australian Institute of Criminology, *Australian Capital Territory Restorative Justice Evaluation: An Observational Outcome Evaluation* (Report of Findings, July 2018).

⁴⁵² Bianca Blanch, Elizabeth Moore, and Paul Wagland, 'Participant satisfaction with youth justice conferencing' (2013) 170 *Crime and Justice Bulletin* 1; Lily Trimboli, *An Evaluation of the NSW Youth Justice Conferencing Scheme* (Report published by the NSW Bureau of Crime Statistics and Research, 2000).

conferencing, and expand on the more recent evidence flowing from reports assessing Queensland's and ACT's juvenile restorative justice schemes.

6.1.1 REOFFENDING IN NSW – CONFERENCING VS COURT

Since the enactment of the NSW youth justice conferencing system, a large body of statistical analysis has been conducted to compare the recidivism rates of juvenile offenders whose matters were resolved through youth justice conferencing against offenders whose matters were resolved through the Children's Court.

In 2002, Luke and Lind conducted a study analysing the reoffending patterns of young offenders referred to youth justice conferences under the newly initiated NSW scheme in its first year of operation (1998-1999). Through this study, they analysed 590 first time juvenile offenders who were referred to conferencing, with 3,830 juvenile offenders who were referred to the Children's Court. They compared the reoffending patterns on two measures: 'the number of days to first reappearance (at court or at a conference)' and 'the number of reappearances per year during the follow-up period.'⁴⁵³ They found that there was a moderate drop in reoffending rates for the conferencing group – approximately, a 15-20% reduction in reoffending for all offenders involved in conferencing, as opposed to offenders processed through the court.⁴⁵⁴ Offenders involved in conferencing took longer to re-appear in the criminal justice system by a significant margin.

This early study has been criticised on two accounts.⁴⁵⁵ First, Luke and Lind failed to acknowledge that a significant number of juvenile offenders referred to conferencing were low-risk offenders, and that their status as a low-risk offender would invariably affect the results for reoffending rates. Second, Luke and Lind had limited control factors on participants such as Indigenous status, which is proven to have a significant impact on recidivism rates long-term. However, while Luke and Lind's study has its limitations, their results remain worthy of note, as their study fits within broader findings of reductions in recidivism rates when restorative justice practices are employed in the context of juvenile offenders.

⁴⁵³ Garth Luke and Browyn Lind, 'Reducing Juvenile Crime: Conferencing versus Court' (2002) 69 *Crime and Justice Bulletin* 1, 3.

⁴⁵⁴ *Ibid.*, 13.

⁴⁵⁵ Nadine Smith and Don Weatherburn, 'Youth Justice Conferences versus Children's Court: A comparison of re-offending' (2012) 160 *Crime and Justice Bulletin* 1, 3.

In 2012, Smith and Weatherburn examined past research and the available data on NSW Youth Justice Conferencing and the NSW Children's Court, to compare the recidivism rates between the two systems.⁴⁵⁶ Employing propensity score methods in their analysis of the available data, they attempted to overcome the selection bias limitations of previous studies. They conducted the analysis on a 2007 sample of 918 juvenile offenders referred to conferencing and 918 juvenile offenders processed through the court. The results of their study concluded that there was no significant difference in the re-offending between conferencing and the court process.⁴⁵⁷ Smith and Weatherburn caveated the results of their study by acknowledging that the sample size of their study was only large enough to detect substantial differences, not small effects of 5% or less. Smith and Weatherburn further acknowledged that reducing re-offending is not the only aim of the Australian criminal justice system; one of the aims of the system is also to 'do justice' to both the victim and the offender.⁴⁵⁸ There is evidence to suggest that the court process is stigmatising for juvenile offenders, and that this stigmatisation in the context of juvenile offenders can increase the risk of re-offending.⁴⁵⁹ A restorative justice conferencing model presents an alternative to this stigma that goes along with court process. In this sense it may prove effective in reducing re-offending, however this was not proved in Smith and Weatherburn's study.

In 2013, a study conducted by Wan, Moore and Moffatt on the impact of the Young Offenders Act 1997 (NSW) on the imposition of custodial sentences upon juvenile offenders, found that alternative modes of justice such as youth justice conferences and the use of cautions have been effective in diverting both Indigenous and non-indigenous juveniles from custodial sentences.⁴⁶⁰ This study demonstrates the effectiveness of the diversionary mechanism of youth justice conferencing employed in NSW, as it shows the positive impacts a specific juvenile program with the aim of reducing incarceration rates for juvenile offenders can have.

⁴⁵⁶ Ibid.

⁴⁵⁷ Ibid, 16.

⁴⁵⁸ Ibid, 16.

⁴⁵⁹ Andrew McGrath, 'Offenders Perceptions of the Sentencing Process: A Study of Deterrence and Stigmatisation in New South Wales Children's Court' (2009) 42(1) *Australia & New Zealand Journal of Criminology* 24.

⁴⁶⁰ Wai-Tin Wan, Elizabeth Moore, and Steve Moffatt, 'The Impact of the NSW Young Offenders Act (1997) on the Likelihood of custodial order' (2013) 166 *Crime and Justice Bulletin* 1, 8.

6.1.2 REOFFENDING IN QLD AND THE ACT – RECENT DEVELOPMENTS

In Queensland in 2016, the Youth Justice Act 1992 (QLD) was amended to broaden the court referral pathways for restorative justice conferencing for juvenile offenders. Following these amendments, the Queensland Government has undertaken an evaluation of the effectiveness of the Restorative Justice Project, analysing its effectiveness in regards to re-offending rates, victim and offender satisfaction, and the program's ability to respond to demands of juvenile offenders in Queensland's criminal justice system.⁴⁶¹ The program aimed to increase the availability of restorative justice processes to young offenders, to increase Indigenous participation in these processes, to increase community and victim participation in these processes, and to increase the use of restorative justice conferencing for serious offences committed by juveniles.⁴⁶² The evaluation report found that the increase in the use of restorative justice practices in QLD did have a positive effect on reoffending rates in the first year, also noting the further reparative benefits of these practices on the participants, the victims, and the wider community, noting that there was a high rate of compliance in the completion of conferencing agreements.⁴⁶³

The findings of this evaluation report in regards to reoffending rates over the first year of implementation were as follows:

- 59% of juvenile offenders who completed a conference from July 2016 to December 2016 did not reoffend within six months of their conference;
- 7% of juvenile offenders who attended a conference showed a substantial decrease in the frequency and seriousness in their reoffending;
- 11% of juvenile offenders who attended a conference showed a slight decrease in the frequency and seriousness of their reoffending; and
- In total, 77% of juvenile offenders either did not reoffend or showed a decrease in the magnitude of their reoffending.⁴⁶⁴

⁴⁶¹ Restorative Justice Evaluation Team, *Twelve Month Program Evaluation: Restorative Justice Project* (Final Report for Director-General Endorsement, 20 May 2018).

⁴⁶² *Ibid*, p. 5.

⁴⁶³ *Ibid*, 8, 96% of agreements were completed between 2016-17.

⁴⁶⁴ *Ibid*, 8.

Accompanying these overall findings, the evaluation report further analysed the effectiveness of restorative justice conferencing on reoffending rates by different cohorts of juvenile offenders. The key findings were as follows:

- Reoffending rates were lower by 28% for young people who did not have extensive criminal histories;
- Reoffending rates were higher for those who had a history of supervised orders (74%), and for juvenile offenders who had already participated in conferencing previously (52%).⁴⁶⁵

From this data, an inference can be drawn that restorative justice conferencing has had a positive impact on re-offending rates. However, the effectiveness of restorative justice programs varies when different variables are considered, particularly the criminal history of a participant. While the data presented in this evaluation report demonstrates the effectiveness of restorative justice conferencing for juvenile offenders, it does not differentiate reoffending rates between offence classes or across the varying seriousness of offences.

Complimenting this research from Queensland, in 2018 the Australian National University (ANU) and Australian Institute of Criminology (AIC) conducted an impact evaluation study on the restorative justice conferencing program in the ACT.⁴⁶⁶ The authors attempted to overcome past criticisms of measuring recidivism rates for juvenile restorative justice processes, using improved methods of measuring recidivism.⁴⁶⁷ They found that the nature of the cohort chosen for conferencing in the ACT may have an impact on the rates of recidivism, as they found that on average, restorative justice participants were at higher risk of reoffending in general.⁴⁶⁸ The cohort participants were more likely to be male, with criminal histories, and charged with violent or property offences.⁴⁶⁹ However, when adjustments to the data were made through a multivariate model, the authors of the report found that restorative justice participants were less likely to reoffend (20%) than non-restorative justice participants (29%). Long term estimates on reoffending also found that participants of restorative justice were less likely to reoffend in a five-year period (47%) than non-

⁴⁶⁵ Ibid, 48.

⁴⁶⁶ Australian National University and The Australian Institute of Criminology, *Australian Capital Territory Restorative Justice Evaluation: An Observational Outcome Evaluation* (Report of Findings, July 2018).

⁴⁶⁷ Ibid, 3.

⁴⁶⁸ Ibid, 4.

⁴⁶⁹ Ibid, 11.

restorative justice participants (57%). In a 10-year period, these trends in reoffending were also confirmed as reoffending rates were less for restorative justice participants (54%) than non-restorative justice participants (64%).⁴⁷⁰

This report further analysed recidivism rates on a number of different variables. The authors found that for property offences, juvenile offenders with a prior record who participated in conferencing had a significantly lower risk of reoffending than those who participated in non-restorative justice process. However, this trend did not extend to first time property offenders, where conferencing did not reduce the risk of reoffending. Further, the reverse was the case for crimes involving violence. Restorative justice processes were more effective in reducing recidivism for first time offenders of violent crimes, and less effective on recidivism rates for offenders with prior criminal history.⁴⁷¹

Further, in their study of the ACT's restorative justice programs, Sherman, Strang and Woods found that recidivism rates were lowered when restorative justice practices were used for violent offences where a personal victim is impacted, with restorative justice processes being less effective at reducing reoffending for minor property offences such as shoplifting.⁴⁷² These findings have also been confirmed in their more recent study in 2015, comparing data on the effectiveness of restorative justice programs over the past two decades from the Australian system and the United Kingdom.⁴⁷³ Their overall findings on recidivism rates further support the findings of their earlier study. Moderate effects on the recidivism of restorative justice participants in both Australia and the United Kingdom were found. However, it was revealed that restorative justice failed to reduce recidivism rates for property crimes, effectively reduced recidivism for violent crimes.⁴⁷⁴

⁴⁷⁰ Ibid, 3.

⁴⁷¹ Ibid, 20.

⁴⁷² Lawrence Sherman, Heather Strang, and Daniel Woods, *Recidivism patterns in the Canberra reintegrative shaming experiments* (RISE) (Report Canberra: Centre for Restorative Justice, Research School of Social Sciences, Australian National University, 2000).

⁴⁷³ Lawrence Sherman et al, 'Twelve Experiments in Restorative Justice: The Jerry Lee Program of Randomized Trials of Restorative Justice Conferences' (2015) 11(4) *Journal of Experimental Criminology* 501.

⁴⁷⁴ Ibid, 503; Heather Strang (ANU) *Restorative Justice Research in the United Kingdom and Australia: What Do We Know?* (Powerpoint presentation) <https://www.bocsar.nsw.gov.au/Documents/heather_strang_nsw_cpd26feb10.pdf>.

6.1.3 CONCLUSION

As found by Smith and Weatherburn, there are many limitations to providing accurate recidivism rates in the context of juvenile restorative justice conferencing.⁴⁷⁵ However, though the conclusion of their study was that there was no significant reduction in reoffending rates for juvenile offenders referred to restorative justice conferencing, they acknowledged that this evidence does not prove that conferencing models do not work effectively when assessed against victim and offender satisfaction.⁴⁷⁶ Through recent reviews of both Queensland's and the ACT's current restorative justice schemes, there is positive evidence to suggest that restorative justice conferencing can have a positive impact on certain groups of juvenile offenders.⁴⁷⁷ Further, there is evidence to suggest that restorative justice practices are effective in reducing reoffending rates in offenders committing crimes involving violence and where there is a personal victim to the crime, rather than property offences.

⁴⁷⁵ Nadine Smith and Don Weatherburn, 'Youth Justice Conferences versus Children's Court: A comparison of re-offending' (2012) 160 *Crime and Justice Bulletin* 1, 6.

⁴⁷⁶ *Ibid.*, 6.

⁴⁷⁷ Australian National University and The Australian Institute of Criminology, *Australian Capital Territory Restorative Justice Evaluation: An Observational Outcome Evaluation* (Report of Findings, July 2018); Restorative Justice Evaluation Team, *Twelve Month Program Evaluation: Restorative Justice Project* (Final Report for Director-General Endorsement, 20 May 2018).

**PART SEVEN:
RESTORATIVE JUSTICE AND
ADULT OFFENDERS**

7.1 RESTORATIVE JUSTICE AND ADULT OFFENDERS

The development of restorative justice programs has occurred largely within the area of juvenile justice.⁴⁷⁸ In Australia, restorative justice programs are now widely available for youth offenders in all eight jurisdictions.⁴⁷⁹ The use of restorative justice for youth offenders was driven primarily by the belief that such programs provide youth with a 'second-chance' to turn their lives around.⁴⁸⁰ Youth offenders are typically considered to be less accountable for their actions than adults, and more amenable to change.⁴⁸¹ However, the implication of this orthodox view is that it is 'too late' for adults, and that restorative justice will be inappropriate or insufficiently punitive for adult offenders.⁴⁸² Accordingly, while restorative justice programs are now ubiquitous for youth offenders, the use of such programs for adult offenders has been relatively uncommon, and more restricted. This section provides an overview of the current availability of adult restorative justice programs in Australia and explores whether restorative justice is an appropriate and effective response for adult-offender crimes.

7.1.1 OVERVIEW OF RESTORATIVE JUSTICE FOR ADULT OFFENDERS IN AUSTRALIA

While restorative justice has focused predominantly on youth offenders, the availability of programs dealing with adult offenders has grown in recent years:

⁴⁷⁸ Jane Bolitho, 'Restorative Justice for Adults: Should We Do More?' in Jane Bolitho, Jasmine Bruce, and Gail Mason (eds), *Restorative Justice: Adults and Emerging Practice* (Institute of Criminology Press, 2012) 17, 17.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ Meredith Rossner, 'Emotion Across the Lifecourse: The Case for Restorative Justice with Adults' in Jane Bolitho, J Bruce, and G Mason (eds) *Restorative Justice: Adults and Emerging Practice* (Institute of Criminology Press, 2012) 214, 218.

⁴⁸¹ Masahiro Suzuki and William R Wood, 'Is Restorative Justice Conferencing Appropriate for Youth Offenders?' (2018) 18(4) *Criminology and Criminal Justice* 450, 452.

⁴⁸² Meredith Rossner, 'Emotion Across the Lifecourse: The Case for Restorative Justice with Adults' in Jane Bolitho, J Bruce, and G Mason (eds) *Restorative Justice: Adults and Emerging Practice* (Institute of Criminology Press, 2012) 214, 218.

Conferences

Adult conferencing programs have been piloted in numerous jurisdictions over the years, but are currently only available in NSW, South Australia and Queensland for all adults, as well as Victoria for young adults (up to 20 years of age only).⁴⁸³ While conferencing has been used for youth offenders at a variety of stages of the criminal justice system, they are typically only available for adult offenders at the pre-sentencing or post-conviction stage.⁴⁸⁴ Additionally, parties are generally referred to adult conferencing following a guilty plea or a finding of guilt.⁴⁸⁵ Despite this difference in timing, the format and process of adult conferences are almost identical to youth justice conferences.⁴⁸⁶

Victim-Offender Mediation

While conferencing is not widely available for adult offenders, victim-offender mediations are available for youth and adults in all jurisdictions except Victoria and ACT.⁴⁸⁷ These differ from conferencing mainly in that they require the victim to be present and are usually only available post-sentencing and post-conviction. For both youth and adult commissioned offences, victim-offender mediations will only be used where the offender accepts responsibility and where both parties voluntarily participate. As with conferences, victim-offender mediations with adult offenders usually follow the same process and procedure as when used with youth offenders.⁴⁸⁸

Circle Sentencing

Circle sentencing is a unique mode of restorative justice that focuses strictly on Indigenous adult offenders, available only in NSW and Western Australia.⁴⁸⁹ The process is designed to be more culturally appropriate and responsive to Indigenous Australians than traditional court systems.⁴⁹⁰ The main motivation is to reduce indigenous reoffending and provide greater satisfaction to participants.⁴⁹¹ It is important however, to distinguish circle sentencing from typical restorative justice programs, as

⁴⁸³ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 6.

⁴⁸⁴ *Ibid* 8.

⁴⁸⁵ *Ibid* 13.

⁴⁸⁶ *Ibid* 33.

⁴⁸⁷ *Ibid* 19.

⁴⁸⁸ *Ibid* 18.

⁴⁸⁹ *Ibid* 6.

⁴⁹⁰ Ivan Potas et al, *Circle Sentencing in New South Wales: A Review and Evaluation* (Judicial Commission of New South Wales, 2003) 1-2.

⁴⁹¹ *Ibid* iv.

they are less victim-centric, focusing mostly on offender-rehabilitation.⁴⁹² Nonetheless, they still embrace many key restorative justice values, as they engage parties affected by crime in a dialogue outside the formal court system.⁴⁹³

7.1.2 DIFFERENCES BETWEEN YOUTH AND ADULT OFFENDERS

Criminology Professors Chris Cunneen and Rob White found that while juvenile crimes are usually less serious and less costly in economic terms than adult crimes, juvenile offenders often need more intensive and more costly interventions than adult offenders,⁴⁹⁴ for the following reasons:

Juvenile offenders have complex needs

Although many of the problems faced by juvenile offenders, such as substance abuse, mental illness and/or cognitive disability are also present in adult criminal justice populations, they can cause greater problems among young people, who are more susceptible—physically, emotionally and socially—to them.⁴⁹⁵ Adding to the complexity of juvenile offenders is the compounding of these problems due to their psychosocial immaturity.⁴⁹⁶

Intellectual disability and mental illness

Intellectual disabilities are prevalent among young people who come into contact with the juvenile justice system. Intellectual disabilities are also substantially more common for young people entering custody than young people in the general population, adults within the criminal justice system and the general Australian population.⁴⁹⁷ A 2008 study conducted by Professors Matt Frize, Dianna Kenny

⁴⁹²Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 15.

⁴⁹³ *Ibid.*

⁴⁹⁴ Chris Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia* (South Melbourne: Oxford University Press, 3rd ed, 2007).

⁴⁹⁵ Kelly Richards, *What Makes Juvenile Offenders Different from Adult Offenders? Trends & Issues in Crime and Criminal Justice* (Australian Institute of Criminology, Report No. 409, 2011).

⁴⁹⁶ *Ibid.*

⁴⁹⁷ Linda Teplin, Karen Abram, Gary McClelland, Amy Mericle, Mina Dulcan, and Jason Washburn, 'Psychiatric disorders of youth in detention' in Carol Kessler and Louis Kraus (eds) *The Mental Health Needs of Young Offenders: Forging Paths toward Reintegration and Rehabilitation* (Cambridge: Cambridge University Press, 2007) 7–47; Linda Teplin, Leah Welty, Karen Abram, Mina Dulcan, Jason Washburn and Kathleen McCoy, 'Psychiatric Disorders in Youth After Detention,' *Juvenile Justice Bulletin: Office of Juvenile Justice and Delinquency Prevention* (Washington, DC: U.S. Department of Justice, Office of Justice Programs, 2015).

and CJ Lennings examined 800 young offenders on community-based orders in NSW. This study found that over-representation of intellectual disabilities was particularly high among Indigenous juveniles and that juveniles with an intellectual disability are at a significantly higher risk of recidivism than other juveniles.⁴⁹⁸ Mental illness is also over-represented among juveniles in detention compared with those in the community. The Young People in Custody Health Survey, conducted in New South Wales in 2015, found that 83.3 percent of young people in custody reported symptoms consistent with a mild, moderate or severe psychological disorder.⁴⁹⁹

Juvenile offenders require a higher duty of care

Juvenile offenders require a higher duty of care than adult offenders. In Australia, juveniles in detention are classified as legal minors. Accordingly, the state provides in loco parentis supervision, a common law principle which enables other persons standing in a parental role either on a permanent or temporary basis (such as teachers, adult siblings, grandparents and carers) to make decisions on behalf of a child or young person lacking capacity.⁵⁰⁰ Incarcerated juveniles of school age are required to participate in schooling and staff-to-offender ratios are much higher in juvenile than adult custodial facilities, to enable more intensive supervision and care of juveniles. For these reasons, research at the New Economics Foundation in 2010 found that juvenile justice supervision could be highly resource-intensive.⁵⁰¹

Juveniles have a higher chance of growing out of crime

Many juveniles grow out of crime and adopt law-abiding lifestyles as young adults. Hence, many juveniles who have contact with the criminal justice system will not continue offending over their lifetime.⁵⁰² As juveniles are not yet fully entrenched within the criminal justice system, juvenile justice interventions can help to foster juveniles' desistance from crime. Conversely, the potential exists for

⁴⁹⁸ Matt Frize, Dianna Theadora Kenny and CJ Lennings, 'The relationship between intellectual disability, Indigenous status and risk of reoffending in juvenile offenders on community orders,' (2008) 52(6) *Journal of Intellectual Disability Research* 510, 512.

⁴⁹⁹ Young People in Custody Health Survey, *Full Report Justice Health & Forensic Mental Health Network and Juvenile Justice NSW* (2015) 65-71
<<https://www.justicehealth.nsw.gov.au/publications/2015YPICHSReportwebreadyversion.PDF>>.

⁵⁰⁰ Australian Law Reform Commission, 'Decision Making by and for Individuals Under the Age of 18,' *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108, 2008).

⁵⁰¹ New Economics Foundation, *Punishing costs: how locking up children is making Britain less safe* (London: 2010)
<http://www.neweconomics.org/sites/neweconomics.org/files/Punishing_Costs.pdf>.

⁵⁰² Kelly Richards, *What Makes Juvenile Offenders Different from Adult Offenders? Trends & Issues in Crime and Criminal Justice* (Australian Institute of Criminology, Report No. 409, 2011).

a great deal of harm to be done to juveniles if juvenile justice authorities apply ineffective or unsuitable interventions.⁵⁰³

Juveniles as victims of crimes

Youths are disproportionately the perpetrators and victims of crime. As Kelly Richards conceptualises:

Young people aged 15 to 24 years are at a higher risk of assault than any other age group in Australia and males aged 15 to 19 years are more than twice as likely to become a victim of robbery as males aged 25 or older, and all females.⁵⁰⁴ Statistics also show that juveniles comprise substantial proportions of victims of sexual offences. In 2007, the highest rate of recorded sexual assault in Australia was for 10 to 14 year old females, at 544 per 100,000 population.⁵⁰⁵ For males, rates were also highest among juveniles, with 95 per 100,000 population 10 to 14 year olds reporting a sexual assault.⁵⁰⁶

Kathleen Daly's research demonstrated that the boundary between juvenile offenders and juvenile victims can easily become blurred as it is important to recognise that juveniles are frequently the victims of offences committed by other juveniles.⁵⁰⁷ This was demonstrated through the finding that between 1989–90 and 2007–08, almost one-third of homicide victims aged 15 to 17 years were killed by another juvenile.⁵⁰⁸ As such, juvenile victims and juvenile offenders are unlikely to be entirely discrete and research consistently shows that these phenomena are interlinked. Thus, the high rate of victimisation of juveniles is a critical differentiation between the way restorative justice practices are conducted for youth as it is widely acknowledged that victimisation is a pathway into offending behaviour for some young people.⁵⁰⁹

⁵⁰³ Ibid.

⁵⁰⁴ *Australian crime: facts and figures 2009* (Australian Institute of Criminology, 2010) <<https://aic.gov.au/publications/facts/2009>>.

⁵⁰⁵ *Australian crime: facts and figures 2007* (Australian Institute of Criminology, 2008) <<https://aic.gov.au/publications/facts/2007>>.

⁵⁰⁶ Ibid.

⁵⁰⁷ Kathleen Daly, 'Girls, peer violence, and restorative justice,' (2008) 41(1) *Australian and New Zealand Journal of Criminology* 109, 123.

⁵⁰⁸ Kelly Richards, *Police-Referred Restorative Justice for Juveniles in Australia: Trends & Issues in Crime and Criminal Justice* (Australian Institute of Criminology, Report No. 398, 2010); Kelly Richards, *Juveniles' Contact with the Criminal Justice system in Australia* (Australian Institute of Criminology, Report No. 7a, 2009).

⁵⁰⁹ Kelly Richards, *What Makes Juvenile Offenders Different from Adult Offenders? Trends & Issues in Crime and Criminal Justice* (Australian Institute of Criminology, Report No. 409, 2011).

7.1.3 OUTCOMES OF RESTORATIVE JUSTICE FOR ADULT OFFENDERS

Although there have not yet been any Australian studies directly comparing restorative justice outcomes between youth and adult offenders, it can be inferred from the available research that restorative justice produces similar outcomes when used for both juveniles and adults.

Recidivism

Empirical evaluations of adult restorative justice programs conducted in Australia have produced mixed and inconclusive results on their capacity to reduce reoffending rates. In an early study on the impact of circle sentencing programs in NSW, Potas et al. found positive reductions in reoffending for adult offender participants.⁵¹⁰ However, a follow up study by Fitzgerald found no significant impact on the frequency and seriousness of reoffending, or time taken to reoffend.⁵¹¹ In this study, 46% of adults who were circle sentenced committed at least one offence in the 15 months post-circle sentencing, compared to 38% of those who were court sentenced.⁵¹² In the 15 months post-sentencing, both groups committed the same number of proven offences, with an average of 1.5 proven offences committed within 15 months post-sentence.⁵¹³ While 78% of the offenders that were circle sentenced committed fewer offences in the 15 months post-sentencing than the 15 months pre-sentencing, these results were directly comparable with 77% of the control group who were court sentenced.⁵¹⁴ Moreover, the time taken to reoffend was not affected by circle sentencing when all variables were accounted for, including prior offence history, age, sex, and offence type.⁵¹⁵ The researchers also found no statistically significant difference in terms of seriousness of re-offences following circle sentencing, as 56% of the circle sentence group that reoffended committed a less serious crime, compared to 45% of the control group.⁵¹⁶ A study by Jones on NSW Forum Sentencing for adult offenders corroborated these results, finding that participation in this restorative

⁵¹⁰ Ivan Potas et al, *Circle Sentencing in New South Wales: A Review and Evaluation* (Judicial Commission of New South Wales, 2003) 52.

⁵¹¹ Jacqueline Fitzgerald, 'Does Circle Sentencing Reduce Aboriginal Offending?' (2008) 115 *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 1,1.

⁵¹² *Ibid* 4.

⁵¹³ *Ibid*.

⁵¹⁴ *Ibid*.

⁵¹⁵ *Ibid* 7.

⁵¹⁶ *Ibid* 6.

justice program had no significant impact on the likelihood, frequency, or seriousness of reoffending for adult offenders.⁵¹⁷

While the above findings paint a poor picture of the capacity for restorative justice to reduce reoffending for adult participants, it is possible that weak outcomes were found simply due to the inherent limitations in the design of the above studies.⁵¹⁸ For instance, Larsen highlights how these results may have been skewed by the fact that researchers did not impose adequate restrictions on eligibility for the control group to match those in the circle sentenced group, and did not use appropriate techniques to minimise selection-bias.⁵¹⁹ Additionally, results were limited by the short follow-up periods utilised in both studies.⁵²⁰ Despite this, it is important to note that these results are comparable to recidivism outcomes for young offenders, with evaluations producing similarly mixed results. For instance, in a review of a wide range of youth restorative justice programs, Smith and Weatherburn found that there was no significant difference between youth processed in court or conference in terms of frequency of reoffending, time taken to reoffend, and the seriousness of any re-offences.⁵²¹

As reoffending outcomes for both juvenile and adult offenders are mixed, it can be inferred that the capacity for restorative justice to affect recidivism is not necessarily affected by the age of the offender, and is instead dependent on an array of complex factors and variables. In fact, there is persuasive international research finding that restorative justice can successfully reduce reoffending for both adult and youth offenders, particularly for serious and violent crimes with direct victims.⁵²² Thus, more rigorous research is required in this area to acquire clearer and more conclusive results. Nevertheless, it is important to recognise that focusing solely on reoffending outcomes ignores the other areas in which restorative justice can have positive impacts, including victim satisfaction and

⁵¹⁷ Craig Jones, 'Does Forum Sentencing Reduce Re-Offending?' (2009) 129 *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 1, 12.

⁵¹⁸ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 15.

⁵¹⁹ *Ibid.*

⁵²⁰ *Ibid.*

⁵²¹ Nadine Smith and Don Weatherburn, 'Youth Justice Conferences Versus Children's Court: A Comparison of Re-Offending' (2012) 160 *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 1, 6.

⁵²² Joanna Shapland et al, *Does Restorative Justice Affect Reconviction? Fourth Report from the Evaluation of Three Schemes* (London Ministry of Justice, 2008); New Zealand Ministry of Justice, *Reoffending Analysis for Restorative Justice Cases: 2008 and 2009* (Ministry of Justice, 2011).

offender accountability, compliance with orders, and attitudinal change.⁵²³ The main takeaway of these findings is that, at the very least, restorative justice produces similar reoffending outcomes as court-based processes, and does not increase reoffending rates in any way for adult and youth offenders.⁵²⁴

Victim Needs and Satisfaction

Although evidence on reoffending has produced mixed and unclear results, research on the effectiveness of restorative justice's capacity to meet victims' needs and ensure satisfaction in cases involving adult offenders has proven more promising. An empirical study by People and Trimboli found that victims experienced a high level of satisfaction and a strong sense of due process with NSW's Community Conferencing for Young Adults Program.⁵²⁵ Approximately 58-74% of participants felt they received substantial information about the conference and what was expected of them, and 97% reported that they understood what was happening.⁵²⁶ Additionally, 73-85% of participants believed that the process was fair to the offender, 61-76% believed it was fair for victims, 96% strongly agreed that they were able to express their views, and 93% felt the process treated them well and respected their rights.⁵²⁷ In this sense, victims and offenders were able to receive procedural justice, and were empowered to engage in the process. Moreover, 91% of participants were highly satisfied with their outcome plan, with the majority viewing it as fair to the victim and offender.⁵²⁸ Satisfaction levels did not change when victimless and direct-victim crimes were compared, suggesting that restorative justice should also be effective for crimes with differing degrees of seriousness committed by adult offenders.⁵²⁹ Additionally, results suggested that restorative justice can help facilitate offender attitudinal change, as a majority of adult offenders in the NSW adult program believed that the offence they committed was wrong, and understood the consequences that their actions had for victims.⁵³⁰

⁵²³ Jacqueline Joudo Larsen, *Restorative Justice in the Australian Criminal Justice System* (Australian Institute of Criminology Report No 127, 2014) 28.

⁵²⁴ *Ibid.*

⁵²⁵ Julie People and Lily Trimboli, *An Evaluation of the NSW Community Conferencing for Young Adults Pilot Program* (NSW Bureau of Crime Statistics and Research, 2007).

⁵²⁶ *Ibid.* viii.

⁵²⁷ *Ibid.*

⁵²⁸ *Ibid.*

⁵²⁹ *Ibid.* 54.

⁵³⁰ *Ibid.*

Furthermore, in an evaluation of circle sentencing outcomes, victims reported high levels of satisfaction with the process, as they were well supported and empowered to speak openly and confront their offender.⁵³¹ Offenders also reported that the process had a positive impact on them, leading to attitudinal change and a willingness to accept responsibility for their actions.⁵³² Similarly, in an evaluative study of South Australia's Adult Conferencing Pilot Program, Goldsmith, Halsey, and Bamford found that the majority of victims reported high levels of satisfaction with the process, and offenders showed genuine acceptance of their wrongdoing, and readiness to make apologies.⁵³³ Participants in the program also believed that adults were better able to express and communicate their feelings of remorse to victims than young offenders, potentially leading to better outcomes and attitudinal change.⁵³⁴ Rossner has made similar note of the potential for adult restorative justice programs to produce better outcomes than youth offender programs, highlighting how adults are generally more mature and better able to emotionally engage with victims.⁵³⁵ In this way, adults are more likely to understand the impact and consequences of their actions, and more willing to make amends.⁵³⁶

Nevertheless, the above results are comparable to those from evaluations of youth justice conferences, suggesting that restorative justice is no less effective when utilised for adult offenders.⁵³⁷ For instance, in an earlier evaluation of youth justice conferences, Trimboli similarly found that victims reported high rates of satisfaction with the conferencing process, and that offenders were highly likely to accept responsibility for their actions and make apologies – thus facilitating victim healing.⁵³⁸ International studies have also corroborated the findings that adult and youth programs yield similar results. In an early international study on victim offender mediations, Umbreit found that victim satisfaction with the program, and with the justice system, remained the same across victims of both

⁵³¹ Ivan Potas et al, *Circle Sentencing in New South Wales: A Review and Evaluation* (Judicial Commission of New South Wales, 2003) 47-48.

⁵³² *Ibid* 48.

⁵³³ Andrew Goldsmith, Mark J Halsey, and David N Bamford, *Adult Restorative Justice Conferencing Pilot: An Evaluation* (South Australian Courts Administration Authority, 2005) 3.

⁵³⁴ *Ibid*.

⁵³⁵ Meredith Rossner, 'Emotion across the lifecourse: The Case for Restorative Justice with Adults' in Jane Bolitho, J Bruce, and G Mason (eds) *Restorative Justice: Adults and Emerging Practice* (Institute of Criminology Press, 2012) 214, 218.

⁵³⁶ *Ibid*.

⁵³⁷ Julie People and Lily Trimboli, *An Evaluation of the NSW Community Conferencing for Young Adults Pilot Program* (NSW Bureau of Crime Statistics and Research, 2007) 54.

⁵³⁸ Lily Trimboli, *An Evaluation of the NSW Youth Justice Conferencing Scheme* (NSW Bureau of Crime Statistics and Research, 2000) 4.

adult and youth offender crimes.⁵³⁹ These findings suggest that victims will be highly satisfied with victim offender mediations regardless of the age of the offender. Additionally, following a review of both domestic and international literature, Bolitho concluded that restorative justice for victims of both youth and adult crimes leads to high levels of satisfaction, provides due process, and can facilitate victim healing and reconciliation.⁵⁴⁰

7.1.4 CONCLUSION

Based on the above research, it is clear that adult restorative justice programs are just as successful in meeting victims needs and producing high levels of satisfaction as their youth program counterparts. While more research should be conducted in this area, the available evidence supports the expansion of restorative justice to adult offender crimes.

⁵³⁹ Mark S Umbreit and William Bradshaw, 'Victim Experience of Meeting Adult vs Juvenile Offenders: A Cross-National Comparison' (1997) 61(4) *Federal Probation* 33, 37.

⁵⁴⁰ Jane Bolitho, 'Restorative Justice for Adults: Should We Do More?' in Jane Bolitho, Jasmine Bruce, and Gail Mason (eds), *Restorative Justice: Adults and Emerging Practice* (Institute of Criminology Press, 2012) 17, 24.

**PART EIGHT:
REFORMS MOVING
FOWARD**

8.1 REFORMING RESTORATIVE JUSTICE IN AUSTRALIA: MOVING FORWARD

8.1.1 CONSOLIDATION OF RESTORATIVE JUSTICE LEGISLATION AND PRACTICE

While all states and territories in Australia implement restorative justice programs, there is considerable variability between the jurisdictions regarding the legislation and the procedures involved in the different restorative justice practices. Although the move to encourage restorative justice practices for juvenile offenders is promising, each jurisdiction regulates youth conferencing and mediation in different ways. An important reform recommendation put forth by the Australian Law Reform Commission in 1997 which continues to remain relevant is the consolidation of national standards for juvenile conferencing.⁵⁴¹ The commission established guidelines that should be introduced nationally when reforming youth conferencing, including:

1. The implementation of restorative justice programs by groups or individuals independent of law-enforcement bodies. Specifically, the Australian Law Reform Commission suggests the involvement of youth workers or lawyers who were heavily involved with the community where restorative justice is being practiced.
2. Methods to monitor the agreed outcome plans and undertakings in a conference, ensuring that penalties are not punitive compared with what a court would order in an adversarial context.
3. Methods to ensure that juvenile offenders do not gain criminal records if they have participated in juvenile conferencing.
4. Ensuring that restorative justice programs do not create power imbalances and operate in an oppressive way against the young offender.
5. Ensuring that juvenile offenders have access to an Australian legal practitioner before entering into an agreement to participate in a conference.

⁵⁴¹ Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 5th ed, 2013) 356.

6. Determining whether schemes should be regulated legislatively, to ensure there is accountability during the process and that the process is 'less ad hoc'.⁵⁴²
7. Assessing and monitoring the effectiveness of youth conferencing to ensure it does not create a cycle of re-offending and that it does not draw more youth into the criminal justice system.⁵⁴³

As demonstrated throughout the report, the differences in conferencing and dialogue practices in each state and territory continues to attract well-founded criticism towards restorative justice programs. The present lack of a national Act statutorily entrenching the above guidelines decreases the credibility of Australia's restorative justice practices; many of these recommendations seek to increase accountability and transparency. Furthermore, the variable availability of restorative justice program across each jurisdiction means that some juveniles (and adults) miss out on the opportunity to access restorative justice if their jurisdiction does not make it available to them. Ultimately, the absence of a consolidated set of restorative justice policies may reduce public faith in the system. Having a national Restorative Justice Act in Australia will ensure that the regulations of restorative justice practices are streamlined.

8.1.2 APPROPRIATENESS AND EFFECTIVENESS OF RESTORATIVE JUSTICE FOR INDIGENOUS COMMUNITIES

CRITICISMS OF PRESENT RESTORATIVE JUSTICE PROGRAMS

Restorative justice programs have faced repeated criticisms regarding their appropriateness and effectiveness in Indigenous communities.⁵⁴⁴ To date, restorative justice has been criticised for:

1. Failing to negotiate and consult with Indigenous communities and Indigenous organisations to ensure restorative justice accommodates for Indigenous values and culture.
2. Discriminating against Indigenous Australians, as police refuse to refer Indigenous youth to restorative justice programs. This criticism is exacerbated by the turbulent relationship

⁵⁴² Ibid 357.

⁵⁴³ Ibid.

⁵⁴⁴ Ibid.

between Indigenous youth and law enforcement, as Indigenous youth have been regulated by colonial laws that are often in stark contrast to Indigenous customary law.

3. Disregarding the cultural differences between Indigenous Australians and non-Indigenous persons. Present modes of restorative justice (with the exception of circle sentencing, which is currently restricted to adults) do not accommodate for Indigenous cultural values, including recognising the relationship dynamics between Indigenous youth and elders.

The necessity for reform to provide restorative justice practices which support Indigenous youth is apparent when considering the high rates of Indigenous youth incarceration. In June 2018, the Australian Institute of Health and Welfare (AIHW) reported that 980 juveniles were in detention on an average night throughout Australia.⁵⁴⁵ Of these 980 juveniles, 54% were Aboriginal or Torres Strait Islander.⁵⁴⁶ Only 3.3% of the total Australian population identifies as Indigenous (note that this figure encapsulates both Indigenous adults and Indigenous youth).⁵⁴⁷ Evidently, Indigenous juveniles are incarcerated at a rate proportionate to their percentage of the population.

The present lack of restorative justice models which accommodate for the cultural distinctions within Indigenous communities can be detrimental. The sentencing and subsequent detention of Indigenous youth (especially with regard to minor offences such as theft) can be detrimental to their well-being and livelihood. The lack of appropriate restorative justice programs increases Indigenous contact with the incarceration system; this in turn contributes to the risks of Indigenous maltreatment and death in custody.⁵⁴⁸ Once Indigenous youth come into contact with the criminal justice system and obtain a criminal record, they are effectively 'trapped' in the cycle due to stigma and unnecessary arrests based on prior offending.⁵⁴⁹ As restorative justice is a means to divert offenders away from the criminal system, intentionally opening restorative justice for Indigenous youth can have significant positive ramifications for their livelihood and wellbeing as it can assist in their rehabilitation. Finally, restorative justice can acknowledge the systematic generational oppression and abuse suffered by Indigenous people at the hands of the Australian government, which may exacerbate their

⁵⁴⁵ *Youth Detention Population in Australia 2018* (Australian Institute of Health and Welfare Bulletin 145). Note that this figure encapsulates only an average night, not the total number of youth in detention on one specific date.

⁵⁴⁶ *Ibid.*

⁵⁴⁷ Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016* (Catalogue No 3238.0.55.001, 31 August 2018).

⁵⁴⁸ *Royal Commission into Aboriginal Deaths in Custody* (Final Report, April 1991) vol 5 [79].

⁵⁴⁹ *Ibid.*

susceptibility to criminal behaviour. It offers a form of reparation to assist Indigenous young people to break free from the cycle of entrenched-offending and incarceration, and reform their lives.

Thus, this report advocates for the development of Indigenous-friendly restorative justice programs. This includes, for example, extending circle sentencing in NSW and Western Australia to juveniles rather than limiting the program to adults. It must be emphasised that, when developing these programs, lawmakers and policymakers are communicating and collaborating with members of Indigenous communities and Indigenous rights organisations. This will ensure that these programs are culturally sensitive and appropriate for Indigenous communities.

REFORM

A crucial reform in this area is encouraging education and training efforts to support restorative justice programs for Indigenous youth.⁵⁵⁰ Training programs and education are central to advising justice agencies about their role in shaping restorative justice practices, specifically for Indigenous youth. Individuals in Australia only interact with restorative justice models if they are participating directly in the process. However, justice agencies should focus on training and educating prosecutors, defence lawyers, judges and restorative justice facilitators to better understand restorative justice practices.⁵⁵¹ While the legal profession may tend to be resistant to restorative justice processes, persons involved in the profession are heavily involved in youth conferencing. Hence, educating legal professionals, law enforcement and facilitators on the importance of Indigenous restorative justice programs can minimise the discriminatory attitudes persisting among other stakeholders in the implementation of these procedures.

8.1.3 FACILITATOR QUALIFICATIONS AND OFFENDER PREPAREDNESS

OFFENDER GENUITY AND MATURITY

A common critique of restorative justice, particularly in regards to more serious offending, is that restorative justice operates on the assumption that both parties (victim and offender) possess 'a

⁵⁵⁰ Sarah Xin Yi Chua and Tony Foley, 'Implementing Restorative Justice to Address Indigenous Youth Recidivism and Over-Incarceration in the Act: Navigating Law Reform Dynamics' (2015) 18 *Australian Indigenous Law Review* 138, 147.

⁵⁵¹ *Ibid* 148.

generous, empathetic, supportive and rational human spirit'⁵⁵² and a 'degree of moral maturity and empathetic concern'.⁵⁵³ Many outcome plans require the offender to express an apology to a victim as a means of reparation. Incorporating an apology may also lead to lower rates of recidivism, as research suggests that when an offender makes a sincere apology, they are less likely to reoffend than those who do not wish to apologise.⁵⁵⁴ However, a study conducted by Daly in 2003 reported that 53% of offenders in her restorative justice research were more concerned about restoring their name and reputation than offering genuine apologies and repairing the harm caused to the victim.⁵⁵⁵ Additionally, depending on the maturity level of the offender and their interpersonal skills, offenders can feel pressured to apologise, without feeling remorseful towards the victim they have harmed.⁵⁵⁶ Consequently, victims may leave the restorative justice program still feeling distressed and dissatisfied.

REFORM

The lack of maturity typically present in young offenders has been described as an 'inherent limitation' of restorative justice, rather than a gap which can be filled or reformed.⁵⁵⁷ However, this report suggests that it is possible to aid young offenders in developing maturity and understanding, to engage effectively within the restorative justice process. Riley and Hayes' 2017 study found that most young offenders did not understand the entirety of the conferencing process; they did not understand what the conference facilitators were asking them, they struggled to grasp the seriousness of what they had done, and they were unable to articulate their remorse.⁵⁵⁸

A major downfall of restorative justice in Australia is the lack of minimum mandatory qualifications for conferencing facilitators.⁵⁵⁹ This is concerning, considering that young offenders may require significant guidance and assistance during the conferencing process. Furthermore, conferencing

⁵⁵² Anne Cossins, 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48 *British Journal of Criminology* 359, 363.

⁵⁵³ *Ibid.*

⁵⁵⁴ Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 5th ed, 2013) 355.

⁵⁵⁵ Anne Cossins, 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48 *British Journal of Criminology* 359, 362.

⁵⁵⁶ Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 5th ed, 2013) 355.

⁵⁵⁷ Anne Cossins, 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48 *British Journal of Criminology* 359, 363.

⁵⁵⁸ Mary Riley and Hennessey Hayes, 'Youth Restorative Justice Conferencing: Facilitator's Language - Help or Hindrance?' (2018) 21 *Contemporary Justice Review* 99, 100.

⁵⁵⁹ See Section 4: Implementation of Restorative Justice.

facilitators must be equipped to navigate potentially traumatic situations. Any restorative justice system must sufficiently train restorative justice facilitators and ensure that facilitators are qualified for their roles, considering the vulnerable and sensitive nature of conferencing, especially for serious offences.

Additionally, it is critical to sufficiently train facilitators to use simple, comprehensible and restorative language during the conferencing process. Facilitators should also engage with the young offender prior to the restorative justice process to explain to the offender the structure and purpose of the conferencing. This may help destress the offender, as stressful situations may exacerbate their verbal or oral limitations and result in the offender suppressing their emotions out of fear or anxiety.⁵⁶⁰ This training also ensure that the dialogue meets the oral competency of the young offenders involved. When the offender is able to understand the proceedings, including the trauma the victim suffered, and when the offender is able to communicate their own remorse and regret for their conduct, both victim and offender satisfaction can increase. This is especially important where restorative justice is practiced in Indigenous or ethnic communities, as offenders may not necessarily possess English as their first language.

8.1.4 MAINSTREAM EXTENSION OF RESTORATIVE JUSTICE FOR SERIOUS CRIMES

CURRENT PRACTICE

The practice of restorative justice is generally restricted to the commission of minor offences, with few exceptions in some States and Territories. The Crimes Analysis Section of this report (see: Section 5) revealed that restorative justice can be effective in serious offending such as sexual assault, particularly in assisting in victim healing from trauma, victim satisfaction, and reducing recidivism. However, South Australia is presently the only jurisdiction which routinely offers restorative justice for sexual offences.

⁵⁶⁰ Mary Riley and Hennessey Hayes, 'Youth Restorative Justice Conferencing: Facilitator's Language - Help or Hindrance?' (2018) 21 *Contemporary Justice Review* 99, 101.

REFORM

Accordingly, this paper advocates for present restorative justice legislation and practice to adopt the following reforms:

1. To equip facilitators, police and lawyers with the training and resources necessary to carry out restorative justice for serious crimes.
2. To repeal statute which explicitly excludes serious offences such as sexual assault and murder from the scope of restorative justice models.⁵⁶¹
3. That, in accordance with the analysis conducted on serious crimes in this report, the point of referral to restorative justice for serious crimes like murder and sexual assault should be restricted to post-sentencing.

Note that post-sentencing referrals to promote the use of restorative justice for serious crimes may be beneficial in three notable ways:

1. The conviction and sentencing of the offender coupled with the use of restorative justice programs may assist in victim healing. The completion of the trial system may allow the victim to feel that they have received justice (as opposed to a pre-sentencing referral which may perpetuate the perception that the offender is evading justice) while the restorative justice program will cater to the victim's needs for closure and healing.
2. The restorative justice program may assist the offender in dealing with their crimes and the consequences of their actions in a way that incarceration alone is unable to. Specifically, restorative justice may help the offender on an emotional and psychological level. This in turn may reduce recidivism and assist in their reintegration into society.
3. Assisting in the offender's reintegration into society is particularly significant where the offender is serving a lengthy sentence (as is often the case in more serious crimes), and therefore may ordinarily face difficulties adapting to life after imprisonment

⁵⁶¹ Note that this report merely seeks to include serious offences within the scope of restorative justice practices; this report is not suggesting that serious offenders must be referred to restorative justice at every instance.

PART NINE: CONCLUSION

9. CONCLUSION

Restorative justice processes provide an alternative method of justice for juvenile offenders in Australia. They are a welcome addition to any existing criminal justice system, as they offer potential benefits for victims, offenders and the community. Restorative justice allows the victim and offender to address the harm caused and express the way in which the offence has impacted their lives. While restorative justice has been used in various jurisdictions in Australia for differing crimes, the statistics and case studies discussed in this report present mixed views on the effectiveness of the process. Australia has traditionally only referred offenders to restorative justice models when they have committed a minor offence, such as assault, property and drug offences. Through the process of victim-offender mediation, some heinous crimes, including murder and sexual assault, can be referred to restorative justice processes post-sentence. However, the nature of the crime, the extent of harm caused, victim-preparedness and offender maturity levels continue to affect the availability of restorative justice for offenders. Nonetheless, the research that has been conducted into restorative justice reveals that it may be as effective as the criminal justice system in reducing reoffending, rehabilitating and reintegrating offenders, and assisting in healing victim trauma.

This report reveals that restorative justice processes can be used as an alternative to the traditional processes of criminal justice or as a complementary mechanism. Notably, this report has demonstrated the potential for restorative justice to address serious, as well as minor, offending. The expansion into serious offences must be carefully considered with regard to the point of referral in the criminal justice system, as well as the level of training required for conferencing facilitators.

Australia's restorative justice system would benefit from considerable improvements. A national, consolidated framework for restorative justice should be implemented to ensure that access to the restorative justice system is not dependent on the jurisdiction the offender presides in. Restorative justice systems must be reformed to be suitable and accessible to Indigenous communities. Facilitators should be required to meet minimum qualification standards. Finally, restorative justice legislation should not explicitly exclude serious offending. While these flaws cannot be ignored and

must be reformed, Australia's restorative justice practices may provide an informative framework for the future development of restorative justice in other jurisdictions.

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APPENDICES

Appendix A: Tables

Table 5: State and Territory Government Real Recurrent Expenditure on Youth Justice Services (2016-2017) Expenditure Factors for Consideration.

<i>Unit</i>	<i>2012-13</i>	<i>2013-14</i>	<i>2014-15</i>	<i>2015-16</i>	<i>2016-17</i>
(a)	See table 17A.10 for further information on the comparability of these data.				
(b)	In NSW, the increase in expenditure on community-based supervision between 2015-16 and 2016-17 is due to the Youth on track program. Further, in 2016-17, youth justice conferencing moved to community programs, and data are no longer recorded separately.				
(c)	In Queensland, there was an increase in user cost of capital for 2013-14 as a result of the completion of the Cleveland Youth Detention Centre Stage 1. The 2012-13 financial year was the first period where youth justice services had a dedicated budget. Therefore, data from 2012-13 onwards are not comparable with data in earlier reports.				
(d)	In WA, following an incident at Banksia Hill youth justice detention centre in January 2013, young offenders were detained at an adult facility to the end of the financial year 2012-13. The additional costs incurred by the adult facility have not been included in these data.				
(e)	In SA, there was an increase in detention-based expenditure for 2015-16 associated with infrastructure and security upgrades. For 2013-14 there was a decrease in all community-based expenditure due to the Metropolitan Aboriginal Youth Family Services program relocating to another division and the realignment of some services. Higher expenditure incurred in SA in 2012-13 was associated with commissioning a new youth training centre, increasing population capacity in the training centres from 82 to 96 young people and an increase in umbrella or other government department expenses as a result of new sustainment funding.				
(f)	In Tasmania, following significant internal restructuring of the Department in 2015-16, the calculation methodology for allocation of umbrella costs changed. The total departmental overhead allocated to Children and Youth Services decreased in 2014-15 and further decreased in 2015-16. This led to a decrease in reported umbrella costs. Maintenance expenditure was also less following a facility upgrade program in the prior year. In 2013-14, salary expenses increased due to additional funds being provided for health services at Ashley Youth Detention Centre. Payroll tax ceased in October 2012.				
(g)	In ACT, community-based expenditure for 2015-16 are not comparable with previous years due to the integration of child protection and youth justice to a single case management system in July 2015, and the subsequent changes to expenditure reporting for 2015-16.				
(h)	In the NT, Territory Families performed an asset revaluation in 2016-17 which resulted in a decrease in detention-based expenditure. Youth justice services was transitioned from Department of Correctional Services to Territory Families in 2016-17, however Group Conferencing remained with Police, Fire and Emergency Services. The increase in community-based youth justice services was due to an increase in FTE for youth outreach and re-engagement teams, apportioning umbrella costs methodology and expanded programs in the non-government/specialist service providers. The increase in 2015-16 was due to the relocation to the Berrimah site and introduction of the high security unit. In 2013-14 the Department of Corporate and Information Services Free of Charge detention-based services expenditure decreased significantly compared to 2012-13 as a result of NT Corrections being split from Department of Justice (now Department of Attorney General and Justice), and is now a standalone department. The costs incurred by other departments also decreased significantly compared with 2012-13. A review of NT expenditure data was undertaken during 2013-14. The review showed that Group Conferencing Program funding (administered by NT Department of Correctional Services for the first time in the 2012-13 financial year) delivered in partnership with NT Police was previously reported under Community Corrections funding, and have has now been revised accordingly. The number of FTE positions associated with Group Conferencing has reduced in 2013-14 so group conferencing expenditure has decreased since 2012-13. Some of these positions have been incorporated into other non NT Police programs. Some expenditure information (for example, utilities and maintenance costs) is included for the first time in 2012-13. These costs were able to be separately identified for youth justice services following machinery of government changes in August 2012, whereby the Department of Correctional Services was established. The Youth Justice Division moved from within the Department of Justice to within the Department of Correctional Services.				

Table 6: State and Territory Government Recurrent Expenditure on Youth Justice (2016-2017)

	<i>Unit</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>	<i>Aust</i>
Expenditure on detention-based supervision										
Recurrent expenditure										
Salary expenses and expenses in the nature of salary (e.g., superannuation and FBT)	\$'000	74 452	52 169	46 206	33 841	18 206	7 923	7 906	12 001	252 704
Payroll tax (where subject to payroll tax)	\$'000	3 607	1 953	–	na	850	–	na	603	7 013
Administrative expenditure	\$'000	14 208	10 388	5 473	8 699	420	1 403	146	1 404	42 140
Client costs	\$'000	3 659	4 448	1 948	1 309	823	271	125	474	13 056
Other operating expenses (e.g., utilities, maintenance etc.)	\$'000	5 001	7 512	4 223	6 032	2 041	812	2 271	2 294	30 186
Debt servicing fees	\$'000	–	–	–	na	–	–	na	–	–
Annual depreciation	\$'000	11 064	3 634	9 325	582	2 639	244	989	2 842	31 320
Total	\$'000	111 993	80 104	67 175	50 463	24 797	10 653	11 436	19 618	376 239
Expenditure by umbrella or other government department(s)										
Total expenditure by umbrella or other government departments	\$'000	na	10 830	10 257	147	1 856	433	2 198	4 048	29 769
Grants to non-government/specialist service providers										
Grants to non-government/specialist service providers	\$'000	442	671	na	210	–	–	na	na	1 323
Capital grants to non-government/specialist service providers	\$'000	–	–	na	na	–	–	na	na	–
Total	\$'000	442	671	na	210	–	–	na	na	1 323
Operating revenues from ordinary activities										
Total operating revenues	\$'000	3 186	–	285	496	70	–	–	61	4 098
<hr/>										
Total expenditure (youth justice agency expenditure and umbrella/other department expenditure), less revenues and payroll tax (where applicable)										
Total expenditure	\$'000	105 641	89 652	77 146	50 325	25 733	11 086	13 634	23 002	396 220
Value of capital assets used in the provision of youth justice services										
Land	\$'000	48 363	113 587	13 079	7 660	9 900	454	3 493	6 200	202 735
Buildings	\$'000	295 370	119 751	239 534	60 461	75 287	8 706	38 347	22 821	860 277
Plant and equipment	\$'000	4 524	611	2 096	338	2 573	28	19	192	10 381
Total	\$'000	348 258	233 949	254 709	68 459	87 760	9 188	41 858	29 213	1 073 393
User cost of capital (based on 8 per cent of total value of capital assets)										
Notional user cost of capital	\$'000	27 861	18 716	20 377	5 477	7 021	735	3 349	2 337	85 872
Total expenditure, including notional user cost of capital	\$'000	133 502	108 368	97 523	55 802	32 754	11 821	16 983	25 339	482 092
<hr/>										
Expenditure on community-based supervision										
Recurrent expenditure										
Salary expenses and expenses in the nature of salary (e.g., superannuation and FBT)	\$'000	36 222	18 322	37 596	15 441	9 336	2 117	2 243	2 877	124 154
Payroll tax (where subject to payroll tax)	\$'000	1 707	839	–	na	450	–	na	152	3 149
Administrative expenditure	\$'000	7 978	2 700	5 425	5 260	437	1 445	407	700	24 351
Client costs	\$'000	125	576	565	249	45	16	na	na	1 577
Other operating expenses (e.g., utilities, maintenance etc.)	\$'000	6 093	1 147	18 316	3 159	677	168	na	475	30 035
Debt servicing fees	\$'000	–	–	–	–	–	–	na	na	–
Annual depreciation	\$'000	1 215	721	1 277	669	105	–	na	–	3 987
Total	\$'000	53 340	24 305	63 180	24 778	11 051	3 746	2 649	4 204	187 253

	<i>Unit</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>	<i>Aust</i>
Expenditure by umbrella or other government department(s)										
Total expenditure by umbrella or other government departments	\$'000	na	4 923	9 601	65	–	220	441	1 065	16 315
Grants to non-government/specialist service providers										
Grants to non-government/specialist service providers	\$'000	13 746	19 147	na	6	49	2 162	na	3 047	38 157
Capital grants to non-government/specialist service providers	\$'000	na	–	na	na	–	–	na	na	–
Total	\$'000	13 746	19 147	na	6	49	2 162	na	3 047	38 157
Operating revenues from ordinary activities										
Total operating revenues	\$'000	1 490	–	585	157	1	–	na	–	2 232
Total expenditure (youth justice agency expenditure and umbrella/other department expenditure), less revenues and payroll tax (where applicable)										
Total expenditure	\$'000	63 889	47 536	72 196	24 692	10 648	6 128	3 090	7 099	235 279
Value of capital assets used in the provision of youth justice services										
Land	\$'000	na	–	5 170	6 660	280	–	na	na	12 110
Buildings	\$'000	na	–	21 380	–	395	–	na	na	21 775
Plant and equipment	\$'000	2 341	–	6 061	20	5	–	na	na	8 427
Total	\$'000	2 341	–	32 610	6 680	680	–	na	na	42 311
User cost of capital (based on 8 per cent of total value of capital assets)										
Notional user cost of capital	\$'000	187	–	2 609	534	734	–	na	na	4 065
Total expenditure, including notional user cost of capital										
Total	\$'000	64 077	47 536	74 805	25 226	11 383	6 128	3 090	7 099	239 344

	<i>Unit</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>	<i>Aust</i>
Expenditure on group conferencing										
Recurrent expenditure										
Salary expenses and expenses in the nature of salary (e.g., superannuation and FBT)	\$'000	954	19	9 087	14 588	1 099	na	na	1 764	27 510
Payroll tax (where subject to payroll tax)	\$'000	40	1	–	na	54	na	na	101	196
Administrative expenditure	\$'000	–	2	1 110	3 646	67	na	na	581	5 406
Client costs	\$'000	–	–	75	200	1	88	na	na	364
Other operating expenses (e.g., utilities, maintenance etc.)	\$'000	–	–	1 443	3 500	89	na	na	na	5 032
Debt servicing fees	\$'000	–	–	–	–	–	na	na	na	–
Annual depreciation	\$'000	–	–	62	1 600	111	na	na	na	1 772
Total	\$'000	994	22	11 776	23 534	1 420	88	na	2 446	40 280
Expenditure by umbrella or other government department(s)										
Total expenditure by umbrella or other government departments	\$'000	na	–	1 773	49	na	na	605	na	2 427
Grants to non-government/specialist service providers										
Grants to non-government/specialist service providers	\$'000	na	2 310	na	6	na	na	na	2 919	5 235
Capital grants to non-government/specialist service providers	\$'000	na	–	na	na	na	na	na	na	–
Total	\$'000	na	2 310	na	6	na	na	na	2 919	5 235
Operating revenues from ordinary activities										
Total operating revenues	\$'000	–	–	–	313	na	na	na	na	313

	Unit	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust
Total expenditure (youth justice agency expenditure and umbrella/other department expenditure), less revenues and payroll tax (where applicable)										
Total expenditure	\$'000	994	2 331	13 549	23 276	1 366	na	605	5 365	47 486
Value of capital assets used in the provision of youth justice services										
Land	\$'000	–	–	–	900	1 606	na	na	124	2 630
Buildings	\$'000	–	–	–	–	1 702	na	na	1 870	3 572
Plant and equipment	\$'000	–	–	176	3	4	na	na	311	493
Total	\$'000	–	–	176	903	3 311	na	na	2 305	6 695
User cost of capital (based on 8 per cent of total value of capital assets)										
Notional user cost of capital	\$'000	–	–	14	72	265	na	na	184	536
Total expenditure, including notional user cost of capital										
Total	\$'000	994	2 331	13 563	23 348	1 631	88	605	5 549	48 109

(a) Data are not comparable across jurisdictions and should be interpreted with caution. See table 17A.10 for further information on the comparability of these data.

(b) In Victoria, departmental umbrella expenditure cannot be readily attributed to a specific program or group of clients.

na Not available. – Nil or rounded to zero.

Source: State and Territory governments (unpublished).

Table 7: Comparability of Government Recurrent Expenditure 2016-2017

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Salary expenses & expenses in the nature of salary								
Included	✓	✓	✓	✓	✓	✓	✓	✓
Method	Accrual	na	na	Accrual	Accrual	Funding	Accrual	na
Administrative expenditure								
Included	✓	✓	✓	✓	✓	✓	✓	✓
Method	Other	na	na	Accrual	Accrual	Actual	Accrual	na
Client costs								
Included	✓	✓	✓	✓	✓	✓	✓	✓
Other operating expenses (e.g., utilities, maintenance)								
Included	✓	✓	✓	✓	✓	✓	✓	✓
Debt servicing fees								
Included	..	✓	✓	na	na	✓	na	✓
Annual depreciation								
Included	✓	✓	✓	✓	✓	✓	✓	✓
Method	Straight line	na	Straight line	Actual	Straight line	Straight line	Straight line	Straight line
Umbrella department costs								
Included	na	✓	✓	na	✓	✓	✓	✓
Method	na	na	Departmental formula	na	Other	Departmental formula	FTE employees	Departmental formula

na Not available. .. Not applicable. ✓ Item included.

Source: State and Territory governments (unpublished).

Table 8: Cost Per Young Person Subject to Community-based Supervision (2016-2017 dollars)

	<i>Unit</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>	<i>Aust</i>
2016-17										
Average daily number of young people subject to community-based supervision	no.	1 272.0	840.0	1 254.0	679.8	275.0	127.8	71.0	146.0	4 665.6
Total recurrent expenditure on community-based supervision	\$'000	64 077	47 536	74 805	25 226	11 383	6 128	3 090	7 099	239 344
Cost per day, per young people subject to community-based supervision on an average day	\$	137.92	154.94	163.32	101.60	113.33	131.28	119.17	133.12	140.45
2015-16										
Average daily number of young people subject to community-based supervision	no.	1 352.0	912.0	1 294.0	615.0	280.0	135.8	69.0	132.0	4 789.8
Total recurrent expenditure on community-based supervision	\$'000	55 497	50 113	66 897	24 711	10 537	4 540	3 249	4 229	219 773
Cost per day, per young people subject to community-based supervision on an average day	\$	112.38	150.44	141.54	110.01	103.03	91.53	128.93	87.72	125.62
2014-15										
Average daily number of young people subject to community-based supervision	no.	1 290.0	1 026.0	1 393.0	635.3	332.0	142.3	73.0	148.0	5 039.6
Total recurrent expenditure on community-based supervision	\$'000	60 275	47 604	66 633	24 921	10 252	4 185	3 010	3 644	220 524
Cost per day, per young people subject to community-based supervision on an average day	\$	127.93	127.03	130.96	107.40	84.54	80.52	112.87	67.41	119.80
2013-14										
Average daily number of young people subject to community-based supervision	no.	1 439.0	1 076.0	1 412.0	723.2	393.0	195.5	83.0	175.0	5 496.7

	<i>Unit</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>	<i>Aust</i>
Total recurrent expenditure on community-based supervision	\$'000	59 601	48 355	66 771	25 278	11 101	4 419	2 825	3 650	222 000
Cost per day, per young people subject to community-based supervision on an average day	\$	113.40	123.04	129.47	95.70	77.34	61.89	93.18	57.10	110.58

- (a) The number of young people under community-based supervision on an average day is calculated by summing the number of days each young person spends under supervision during the year (irrespective of age) and dividing this total by the number of days in the financial year. To derive the average daily cost per young person under community-based supervision on an average day, total recurrent expenditure on community-based supervision is divided by 365.25. This figure is then divided by the average daily number subject to community-based supervision.
- (b) Data reported for this indicator are not comparable and need to be interpreted with caution.
- (c) Unit costs presented in this Report are not necessarily comparable to local unit costs reported in jurisdiction-specific annual reports due to different methods of calculation.
- (d) Time series financial data are adjusted to 2016-17 dollars using the General Government Final Consumption Expenditure (GGFCE) chain price deflator (2016-17 = 100). See chapter 2 for details

Source: State and Territory governments (unpublished); table 2A.49.

Table 9: Cost Per Young Person Subject to Detention-based Supervision (2016-2017 dollars)

	<i>Unit</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA (e)</i>	<i>Tas</i>	<i>ACT (f)</i>	<i>NT</i>	<i>Aust</i>
Average daily number of young people subject to detention-based supervision	no.	314.0	145.0	180.0	155.5	57.6	11.6	16.0	48.0	927.7
Total recurrent expenditure on detention-based supervision	\$'000	156 505	71 451	88 066	51 222	22 227	14 499	18 356	11 366	433 692
Cost per day, per young people subject to detention-based supervision on an average day	\$	1 364.61	1 349.12	1 339.51	901.97	1 056.49	3 431.01	3 140.92	648.30	1 279.99

(a) The number of young people under detention-based supervision on an average day is calculated by summing the number of days each young person spends under supervision during the year (irrespective of age) and dividing this total by the number of days in the financial year. To derive the average daily cost per young person under detention-based supervision on an average day, total recurrent expenditure on detention-based supervision is divided by 365.25. This figure is then divided by the average daily number subject to detention-based supervision.

(b) Data reported for this indicator are not comparable and need to be interpreted with caution.

(c) Unit costs presented in this Report are not necessarily comparable to local unit costs reported in jurisdiction-specific annual reports due to different methods of calculation.

(d) Time series financial data are adjusted to 2016-17 dollars using the General Government Final Consumption Expenditure (GGFCE) chain price deflator (2016-17 = 100). See chapter 2 for details.

(e) For SA, data for 2015-16 onwards are not directly comparable to prior years as capital costs were previously unavailable.

(f) The Blueprint for Youth Justice in the ACT 2012-22 has introduced a number of initiatives to reduce youth involvement in the justice system, decreasing the number in the ACT's single detention centre.

Source: State and Territory governments (unpublished); table 2A.49.

Table 10: Cost Per Group Conference (2016-2017 dollars)

	<i>Unit</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>WA</i>	<i>SA</i>	<i>Tas</i>	<i>ACT</i>	<i>NT</i>	<i>Aust</i>
2016-17										
Number of concluded group conferences	no.	1 022.0	216.0	1 230.0	2 302.0	1 399.0	133.0	81.0	344.0	6 727.0
Total recurrent expenditure on group conferences	\$'000	994	2 331	13 563	23 348	1 631	88	605	5 549	48 109
Cost per concluded group conference	\$	972.32	10 791.67	11 026.91	10 142.58	1 165.82	661.65	7 469.14	16 131.98	7 151.69
2015-16										
Number of concluded group conferences	no.	1 209.0	246.0	664.0	2 179.0	1 245.0	182.0	96.0	443.0	6 264.0
Total recurrent expenditure on group conferences	\$'000	1 651	2 066	7 486	28 746	1 829	137	670	4 961	47 545
Cost per concluded group conference	\$	1 365.58	8 398.33	11 273.56	13 192.08	1 469.19	753.05	6 979.70	11 197.58	7 590.19
2014-15										
Number of concluded group conferences	no.	1 169.0	228.0	677.0	2 140.0	1 374.0	182.0	114.0	305.0	6 189.0
Total recurrent expenditure on group conferences	\$'000	4 509	2 025	5 487	34 593	1 810	116	864	5 065	54 468
Cost per concluded group conference	\$	3 857.06	8 881.46	8 105.00	16 164.90	1 317.24	634.64	7 576.17	16 605.93	8 800.73
2013-14										
Number of concluded group conferences	no.	1 304.0	253.0	720.0	2 070.0	1 735.0	243.0	98.0	375.0	6 798.0
Total recurrent expenditure on group conferences	\$'000	5 926	1 956	5 909	36 801	1 979	152	667	5 067	58 456
Cost per concluded group conference	\$	4 544.62	7 729.84	8 206.71	17 778.29	1 140.56	625.76	6 803.63	13 511.48	8 599.03

Table 11: State and Territory Government Real Recurrent Expenditure on Youth Justice

	<i>Unit</i>	<i>2012-13</i>	<i>2013-14</i>	<i>2014-15</i>	<i>2015-16</i>	<i>2016-17</i>
Total government expenditure on youth justice services						
Total government expenditure on detention-based youth justice services						
NSW	\$'000	156 959	156 505	162 528	144 429	133 502
Vic	\$'000	73 607	71 451	78 061	92 792	108 368
Qld	\$'000	81 912	88 066	92 828	98 087	97 523
WA	\$'000	51 241	51 222	54 352	52 981	55 802
SA	\$'000	22 072	22 227	21 765	30 337	32 754
Tas	\$'000	14 651	14 499	13 933	11 396	11 821
ACT	\$'000	17 406	18 356	18 651	17 736	16 983
NT	\$'000	13 396	11 366	15 583	27 977	25 339
Australia	\$'000	431 242	433 692	457 700	475 736	482 092
Total government expenditure on community-based youth justice services						
NSW	\$'000	58 369	59 601	60 275	55 497	64 077
Vic	\$'000	48 790	48 355	47 604	50 113	47 536
Qld	\$'000	61 133	66 771	66 633	66 897	74 805
WA	\$'000	24 217	25 278	24 921	24 711	25 226
SA	\$'000	12 858	11 101	10 252	10 537	11 383
Tas	\$'000	4 367	4 419	4 185	4 540	6 128
ACT	\$'000	2 432	2 825	3 010	3 249	3 090
NT	\$'000	3 414	3 650	3 644	4 229	7 099
Australia	\$'000	215 580	222 000	220 524	219 773	239 344
Total government expenditure on group conferencing						
NSW	\$'000	6 013	5 926	4 509	1 651	994
Vic	\$'000	1 936	1 956	2 025	2 066	2 331
Qld	\$'000	11 239	5 909	5 487	7 486	13 563
WA	\$'000	35 290	36 801	34 593	28 746	23 348
SA	\$'000	1 851	1 979	1 810	1 829	1 631
Tas	\$'000	186	152	116	137	88
ACT	\$'000	796	667	864	670	605
NT	\$'000	6 536	5 067	5 065	4 961	5 549
Australia	\$'000	63 847	58 456	54 468	47 545	48 109
Total government expenditure (detention, community and group conferencing)						
NSW	\$'000	221 340	222 032	227 312	201 577	198 572
Vic	\$'000	124 333	121 762	127 689	144 971	158 235
Qld	\$'000	154 284	160 746	164 948	172 469	185 891
WA	\$'000	110 748	113 302	113 866	106 438	104 376
SA	\$'000	36 781	35 307	33 826	42 703	45 768
Tas	\$'000	19 204	19 071	18 233	16 073	18 037
ACT	\$'000	20 633	21 847	22 524	21 655	20 678
NT	\$'000	23 345	20 083	24 292	37 167	37 987
Australia	\$'000	710 669	714 149	732 691	743 054	769 545

Services (2016-2017 dollars)

	<i>Unit</i>	<i>2012-13</i>	<i>2013-14</i>	<i>2014-15</i>	<i>2015-16</i>	<i>2016-17</i>
Real government expenditure per child aged 10-17 years in the population						
Total government expenditure on detention-based youth justice services						
NSW	\$	217.97	216.90	224.04	199.38	181.71
Vic	\$	136.49	131.83	142.63	165.38	189.37
Qld	\$	170.65	182.45	190.96	201.54	196.84
WA	\$	208.32	206.22	218.21	216.47	225.57
SA	\$	138.55	140.14	137.63	191.79	206.26
Tas	\$	278.64	280.04	271.49	227.37	234.78
ACT	\$	505.66	529.31	536.28	496.06	470.56
NT	\$	502.18	427.14	587.61	1 112.68	1 005.84
Australia	\$	190.93	191.34	200.84	208.08	207.74
Total government expenditure on community-based youth justice services						
NSW	\$	81.06	82.60	83.09	76.61	87.21
Vic	\$	90.47	89.22	86.98	89.31	83.07
Qld	\$	127.36	138.33	137.08	137.45	150.99
WA	\$	98.45	101.77	100.05	100.96	101.98
SA	\$	80.71	69.99	64.82	66.62	71.68
Tas	\$	83.05	85.35	81.55	90.58	121.71
ACT	\$	70.65	81.46	86.54	90.88	85.62
NT	\$	127.97	137.16	137.41	168.21	281.80
Australia	\$	95.45	97.94	96.77	96.12	103.14
Total government expenditure on group conferencing						
NSW	\$	8.35	8.21	6.22	2.28	1.35
Vic	\$	3.59	3.61	3.70	3.68	4.07
Qld	\$	23.41	12.24	11.29	15.38	27.38
WA	\$	143.47	148.16	138.88	117.45	94.38
SA	\$	11.62	12.48	11.44	11.56	10.27
Tas	\$	3.54	2.94	2.25	2.73	1.75
ACT	\$	23.12	19.23	24.83	18.74	16.76
NT	\$	245.03	190.41	190.98	197.28	220.28
Australia	\$	28.27	25.79	23.90	20.80	20.73
Total government expenditure (detention, community and group conferencing)						
NSW	\$	307.38	307.71	313.34	278.28	270.27
Vic	\$	230.55	224.66	233.31	258.38	276.51
Qld	\$	321.43	333.02	339.33	354.37	375.21
WA	\$	450.24	456.14	457.15	434.88	421.93
SA	\$	230.88	222.61	213.90	269.97	288.21
Tas	\$	365.24	368.33	355.30	320.69	358.23
ACT	\$	599.42	630.00	647.65	605.68	572.95
NT	\$	875.18	754.71	916.00	1 478.18	1 507.92
Australia	\$	314.65	315.08	321.50	325.00	331.61

Table 17: Young Person’s Understanding of Harm and Sense of Accountability

	Strongly agree or agree	Neither	Strongly disagree or disagree	Missing values	Total
What I did hurt someone	77%	7%	5%	11%	100%
I take responsibility for what I did	89%	1%	1%	10%	100%
I am willing to stay out of trouble	86%	2%	2%	10%	100%
I am less likely to offend like this again	84%	4%	3%	10%	100%
Going to a conference changed the way I think about what I do	84%	44%	2%	10%	100%

Note: Positive responses count those respondents who answered ‘agreed’ or ‘strongly agreed’ with the question. Negative responses count those respondents who answered ‘disagreed’ or ‘strongly disagreed’.

Source: Restorative Justice Evaluation Survey Database.

Table 18: Participant Responses to Satisfaction Survey 2016-2017

	Young people (N = 300)		Victims (N = 191)	
	N	%	N	%
Conference process				
I was treated fairly at the conference	279	93%	180	94%
I felt safe at conference	276	92%	179	94%
I understand what I agreed to at the conference	273	91%	180	94%
I am satisfied with the agreement	276	92%	175	92%
I had a genuine say in what went into the agreement	268	89%	177	93%
I think the agreement was fair	278	93%	175	92%
Conference outcomes				
I am satisfied with the outcome of the conference	256	85%	169	89%

Table 19: Listening and Talking to Others

	Young people (N = 300)		Victims (N = 191)	
	N	%	N	%
I listened to what the victim/offender had to say				
Positive response	222	74%	175	92%
I was able to talk to the victim/offender about what happened				
Positive response	185	62%	177	93%
The Convenor listened to me				
Positive response	269	90%	183	96%
Proportion of agreements completed	300	100%	191	100%

Note: Positive responses count those respondents who answered 'agreed' or 'strongly agreed'.

Source: Restorative Justice Evaluation Survey Database.

Table 20: Young People Injured as a Result of a Serious Assault by Indigenous Status (2016-2017)

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Number of young people injured as a result of a serious assault								
Aboriginal and Torres Strait Islander	1	–	–	1	–	–	–	2
Non-Indigenous	5	2	–	1	–	–	–	–
Total	6	2	–	2	–	–	–	2
Rate per 10 000 custody nights								
Aboriginal and Torres Strait Islander	0.2	–	–	0.3	–	–	–	1.6
Non-Indigenous	1.1	0.3	–	0.7	–	–	–	–
Total	0.6	0.3	–	0.4	–	–	–	1.5

^a See box 17.11 and table 17A.16 for detailed definitions, footnotes and caveats. – Nil or rounded to zero.

Source: State and Territory governments (unpublished); tables 17A.16 and 17A.18.

Table 21: Young People Injured as a Result of an Assault (Excludes Serious Assaults), by Indigenous Status (2016-2017)

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Number of young people injured as a result of an assault								
Aboriginal and Torres Strait Islander	27	4	14	na	8	4	–	23
Non-Indigenous	46	40	5	na	5	12	2	2
Total	75	44	19	na	13	16	2	25
Rate per 10 000 custody nights								
Aboriginal and Torres Strait Islander	5.1	3.5	3.0	na	7.1	44.3	–	17.9
Non-Indigenous	10.0	6.9	2.6	na	7.6	39.8	6.6	25.2
Total	7.5	6.3	2.9	na	7.3	40.9	5.1	18.3

^a See box 17.11 and table 17A.17 for detailed definitions, footnotes and caveats. ^b The total for NSW includes two young people of unknown Indigenous status. **na** Not available. – Nil or rounded to zero.

Source: State and Territory governments (unpublished); 17A.17 and 17A.18.

Table 22: Incidents of Self-Harm or Attempted Suicide in Custody Requiring Hospitalisation, by Indigenous Status (2016-2017)

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Number of incidents of self-harm or attempted suicide in custody requiring hospitalisation								
Aboriginal and Torres Strait Islander	6	–	1	na	–	–	–	5
Non-Indigenous	5	1	–	na	–	–	–	1
Total	11	1	1	na	–	–	–	6
Rate per 10 000 custody nights								
Aboriginal and Torres Strait Islander	1.1	–	0.2	na	–	–	–	3.9
Non-Indigenous	1.1	0.2	–	na	–	–	–	12.6
Total	1.1	0.1	0.2	na	–	–	–	4.4

^a See box 17.12 and table 17A.19 for detailed definitions, footnotes and caveats. **na** Not available. – Nil or rounded to zero.

Source: State and Territory governments (unpublished); tables 17A.18–19.

Appendix B: Figures

Figure 2: Cost Per Concluded Group Conference (2016-2017 dollars)

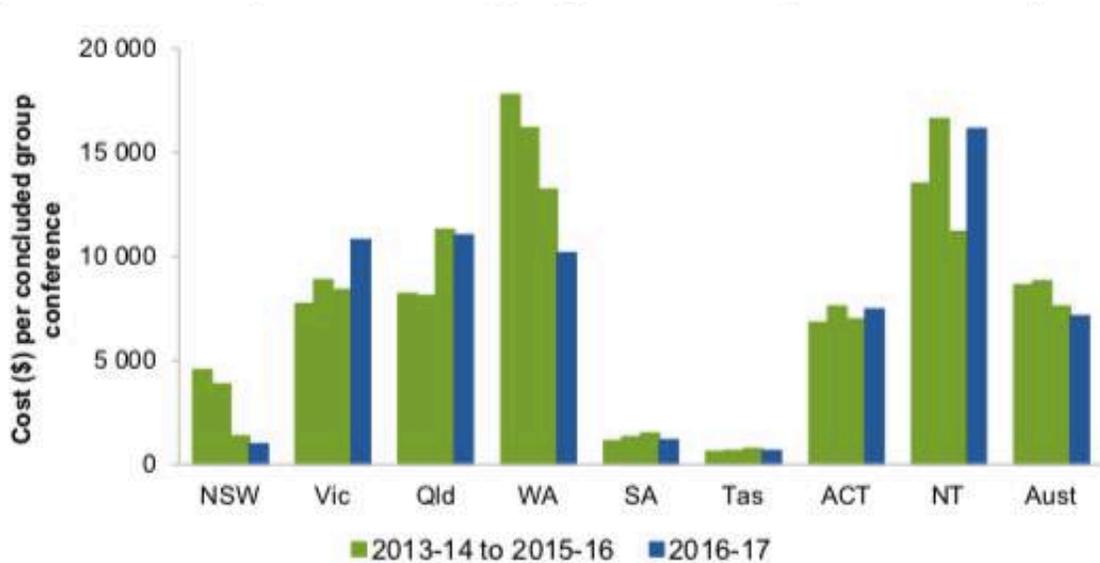


Figure 3: Proportion of Young People Who Receive Group Conferencing and Reach an Agreement, by Indigenous Status (2016-2017)

