



31 May 11

P18, 76.20

Mr Bill Grant
Secretary-General
The Law Council of Australia
GPO Box 1989
ADELAIDE SA 5001

Dear Bill

Discussion Paper: National Guidelines or Principles for Restorative Justice Programs and Processes in Criminal Matters

I refer to your memorandum of 11 April 2011 in which you invited comments on the above Discussion Paper for consideration for inclusion in the LCA's response to the Discussion Paper.

We provide the following comments in relation to the questions posed in the Paper, which we trust will be of assistance.

Question 1

National guidelines for restorative justice programs and processes would be of benefit as part of a national approach to harmonisation of criminal justice issues including victims' rights, practices and procedures in respect of criminal proceedings concerning children and a recognition that restorative justice can be utilised in appropriate cases because flexibility and sensitivity in criminal justice can then be introduced. That will also then recognise restorative justice in respect to Australia's indigenous population and their specific circumstances.

Question 2

National guidelines should promote the implementation of statutory recognition of restorative justice generally, in the context of sentencing in criminal proceedings and in the context of the court's powers to implement an appropriate restorative justice program.

The national guidelines should also acknowledge existing processes and identify what processes require further investigation, analysis, assessment and implementation.

For instance, in South Australia there are a number of existing restorative justice programs that are statutorily recognised and are implemented in any event, such as

- South Australia has its own Centre for Restorative Justice.
- South Australia has restorative justice in the context of diversion of young offenders pursuant to sections 6 to 12 of the *Young Offenders Act 1993*.

- South Australia has utilised restorative justice in the course of sentencing in the superior courts and in the lower courts depending on the nature of the matter and the disposition of the parties concerned. Such can be done informally or in a more formal setting.
- South Australia has introduced diversion courts which have an element of restorative justice about them.
- South Australia has had the Nunga courts for a number of years which have a significant restorative justice component specific to the aboriginal community and aboriginal offenders.
- South Australia has recognised restorative justice as an approach to sentencing of aboriginal offenders by virtue of section 9C of the Criminal Law (Sentencing) Act 1988.

It is well known that there are other methods, practices, procedures and philosophies concerning restorative justice. The national guidelines should identify and recognise the existence of other programs and initiatives and seek to promote their investigation and implementation.

The national guidelines should recognise that restorative justice is a sound, proper, practical and humane approach to criminal justice which has significant implications in terms of resolution, providing alternatives to the ordinary dictates and approaches of criminal justice concerning punishment and incarceration; has significant cost saving implications; and is a recognised method of implementing victims' rights and interests.

Victims and victim support groups and victims' rights have an interest, desire and need for restorative justice. The national guidelines should recognise that.

The national guidelines should promote better informing and educating the community about restorative justice; educating and facilitating and informing participants in criminal justice whether at the charging/investigation/prosecution/sentencing and plea bargaining stages.

The national guidelines should also set out an encouragement for educating and informing judicial officers and those concerned with the identification, design and implementation of such programs.

Question 3

The national guidelines should recognise the Declaration of Victims' Rights.

The issues relating to victim participation include issues as to privacy, security protection and implementing the general design of a program tailored to the specific needs of an individual victim.

The national guidelines should identify the need to broadly inform, educate and make available the option of restorative justice programs.

The national guidelines should recognise expressly that the participation of a victim in restorative justice is significant and should thereby identify what persons can be said to be a victim of a crime for the purposes of such participation.

In that respect too, the community can be said to be a victim of some types of crime and have an interest in being represented in a restorative justice program, even if not directly identified by virtue of an individual suffering particular consequences. Therefore, a community may nominate a representative to

articulate the rights and interests of the community as an identifiable victim of a specific crime or type of criminal activity for the purposes of such restorative justice programs.

National guidelines should recognise the benefits and consequences to victims of restorative justice and restorative justice programs.

An aspect of restorative justice is compensation and restitution to victims and the national guidelines might better identify practices, procedures and mechanisms for greater use of compensation and restitution as an aspect of restorative justice.

The national guidelines should identify that restorative justice is viable, beneficial, valuable and desirable and that whilst it does involve confrontation and reconciliation and can therefore cause or exacerbate suffering on the part of an individual victim that there should be identification of the need to counsel in and around a restorative justice program for victims.

The national guidelines could also identify that victims need to be better informed about the circumstances of an offender for the purposes of restorative justice.

Question 4

The national guidelines should make it plain that it is desirable that criminal justice at the State and Federal level should promulgate guidelines underpinning restorative justice as a philosophy, as a practice and then in turn in respect of specific programs.

Question 5

Issues relating to safety and security will depend on the setting and who is responsible for coordinating the particular session. In some cases it will be the parents of an offender. In some cases there are police officers present. In appropriate cases there will need to be security - which can usually be organised in a court if it is in the context of a court setting with a Sheriff's Officer etc.

Question 6

The national guidelines may not need to identify outcomes and agreements but if there are outcomes and agreements they need to be recorded both for the purposes of the session itself and for the purposes of what use may be deployed afterwards in the context of any further process or outcome. That will depend too on mechanisms that exist in respect of restorative justice as to enforcement of agreements, bonds, recognizances or undertakings. These are formal contractual or binding agreements rather than merely promises and give authoritative imprimatur to a restorative justice session in particular where it is modified by the courts or an appropriate statutory authority.

Informal arrangements and undertakings can be recorded as well but with less formality and less binding effect.

Question 7

National guidelines will also need to suggest that an appropriate organisation such as the Australian Institute of Criminology maintain a periodic review and research in respect of restorative justice programs and their outcomes.

Question 8

Particular types of offences do require particular types of guidelines and particular types of programs. The design of the programs and the design of guidelines should be sensitive to these types of offences. Sexual assault matters have a particular sensitivity. Family violence matters have a particular sensitivity. There are very particular victims with very particular consequences and so the design of programs and the design of guidelines should recognise those sensitivities.

Question 9

Other types of offences that may require specific considerations in national guidelines include offences committed by children; offences committed by indigenous people; offences committed by people with particular cultural beliefs; offences committed by intellectually or mentally disabled person.

Other Comments

We have attached the following reports

- 1 *"Smart Justice: Building Safer Communities, Increasing Access to the Courts, and Elevating Trust and Confidence in the Justice System"*, which contains a number of recommendations that are currently the subject of consultation by the Attorney-General (SA). The report was prepared by the Hon. Peggy Fulton Hora, Judge of the Superior Court of California (Ret) who was an Adelaide Thinker in Residence in 2009–2010. Therapeutic jurisprudence is Judge Hora's area of specialty.
- 2 *"Restorative justice, the criminal courts and remote aboriginal communities"*. This paper was presented at the 2007 Australian Institute of Judicial Administration Conference in 2007, by Christopher Charles, General Counsel for the Aboriginal Legal Rights Movement (SA) and also Chair of the Society's Aboriginal Issues Committee.

We look forward to receiving the LCA's submission in due course.

Yours sincerely



Ralph Bönig
PRESIDENT