



A Coalition of Youth, Legal and Welfare Workers

29 June 2011

Executive Officer of the Secretariat  
Standing Committee of Attorneys General  
NSW Department of Justice and Attorney General  
GPO Box 6  
SYDNEY NSW 2001

Via email: [natalie\\_marsic@agd.nsw.gov.au](mailto:natalie_marsic@agd.nsw.gov.au)

Dear Ms Marsic

**The Youth Justice Coalition's Submission on National Guidelines or Principles for Restorative Justice Programs & Processes for Criminal Matters**

The Youth Justice Coalition (YJC) welcomes the opportunity to make a submission in relation to the questions presented in the Discussion Paper issued in March 2011. The YJC's submission focuses on restorative justice relating specifically to young people, with particular reference to youth justice conferencing under the *Young Offenders Act 1997* (NSW).

Please find attached our submission. We look forward to your comments. If you have any questions in relation to this submission, please do not hesitate to contact the YJC on ph. 9559 2899 or at [yjc@clc.net.au](mailto:yjc@clc.net.au).

Yours faithfully

A handwritten signature in black ink, appearing to read 'Emily Muir', is written above the printed name.

Emily Muir  
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# **Submission**

## **National Guidelines or Principles for Restorative Justice Programs & Processes for Criminal Matters**

29 June 2011





### **About the Youth Justice Coalition**

The Youth Justice Coalition (**YJC**) is a network of youth workers, children's lawyers, policy workers and academics working to promote the rights of children and young people in New South Wales.

The YJC's aims are to promote appropriate and effective initiatives in areas of law affecting children and young people; and to ensure that children's and young people's views, interests and rights are taken into account in law reform and policy debate.

### **How the Youth Justice Coalition was formed**

The YJC was formed in early 1987 under the auspices of NCOSS to work around the children's criminal, care and protection legislation introduced in that year. The YJC has been active since 1987 advocating for young people, particularly those involved in the criminal justice or welfare systems.

### **Membership of the YJC**

- Barnardos Belmore (incorporating the Reconnect program, Streetwork program and Post Release Options Program)
- Bondi Outreach Project
- Catholic Care Sydney
- Central Illawarra Youth Services
- Council of Social Service of New South Wales (NCOSS)
- Crime and Justice Research Network
- Dr Dorothy Bottrell, Lecturer and Convenor, University of Sydney Network for Childhood and Youth Research
- Elaine Fishwick
- Dr Evelyne Tadros, Mission Australia
- Illawarra Legal Centre
- Inner West Community Development Organisation
- Justice Action
- Liverpool Youth Accommodation Assistance Company
- Jenny Barga, Adjunct Lecturer, Sydney Law School
- Macarthur Legal Centre

- Marrickville Legal Centre
- Marrickville Youth Interagency
- Marrickville Youth Resource Centre
- National Children's and Youth Law Centre
- Professor Chris Cunneen, New South Global Chair in Criminology, Faculty of Law, University of New South Wales
- Public Interest Advocacy Centre
- Redfern Legal Centre
- Rosemount Youth and Family Services
- Shire Wide Youth Services
- Shopfront Youth Legal Centre
- The Crossing, Mission Australia
- Uniting Care Burnside
- Weave Youth Family Community (formerly South Sydney Youth Services)
- Western NSW Community Legal Centre
- YFoundations
- Youth Action and Policy Association (YAPA)

## BACKGROUND TO THIS SUBMISSION

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The YJC aims to ensure that children's and young people's views, interests and rights are taken into account in law reform and policy debate.

In considering the value and possible content of national guidelines or principles for restorative justice programs and processes for criminal matters, the YJC has drawn on the experiences of children and young people in existing restorative justice programs. In particular, this submission reflects on youth justice conferencing, established by Part 5 of the *Young Offenders Act* 1997 (NSW) (***Young Offenders Act***), as the primary example of restorative justice in the juvenile justice sphere in New South Wales.

### **Acknowledgements**

The YJC wishes to acknowledge the contribution of Jenny Bargaen, Evelyne Tadros, Brenda Bailey, Jamie Alford and Emily Muir in the drafting of this submission.



## **SUBMISSION OF THE YOUTH JUSTICE COALITION**

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**Question 1: Is there a need for national guidelines for restorative justice programs and processes that operate under restorative justice principles for criminal matters?**

### **Defining 'Restorative Justice'**

In assessing whether there is a need for national restorative justice guidelines, it is critical to firstly consider the type and extent of restorative justice programs and processes for criminal matters in Australia. We reiterate the observations made in Part 1 of the Discussion Paper; there is no universally agreed definition or understanding of restorative justice. Rather, the notion has given rise to many different practices and programs, broadly labeled as restorative. These vary in approach from one community to another and from case to case. Complex individual, interpersonal, familial, social, economic and cultural factors will impact on the implementation of any restorative justice program.

### **'Umbrella Guidelines'**

On the above basis, national guidelines or principles for restorative justice programs and processes would need to be broad enough in order to be flexibly applied to local realities. This is critical given that the work of putting restorative justice into practice takes place at the local level and involves a variety of local stakeholders. 'Umbrella guidelines' would allow for restorative justice innovation without imposing on the decision-making capacity of participants.

### **Value of National Guidelines**

State governments are presently responsible for all aspects of restorative justice practice and regulation where restorative justice processes are operating as part of or in tandem with more formal criminal (most commonly juvenile) justice responses to offending behaviour. National restorative justice guidelines could act as a reference point to underpin the relevant legislation of the various states and territories.

National guidelines could also be used as the foundation for the establishment of a national accreditation body for restorative justice practitioners (further discussed in response to question 4).

### **Guidelines Specific to Children and Young People**

On the understanding that children and young people are different from adults and should be treated differently at law, it is important to consider whether there is a need for specific guidelines (either within a set of national guidelines, or a separate set of guidelines entirely) for restorative justice

processes involving children and young people as both offenders and victims.<sup>1</sup>

Rehabilitation and diversion underpin children and young people's contact with the criminal justice system. The principle of detention as a last resort for juveniles is evident in a number of international instruments, including the United Nations Convention on the Rights of the Child (1989) (**CROC**) (Article 37(b)). CROC provides that wherever appropriate and desirable, measures should be taken to help young people without resorting to judicial proceedings, provided that human rights and legal safeguards are fully respected (Article 40(3)).

Any national restorative justice guidelines should uphold these principles and accord with Australia's international obligations concerning children and young people. The YJC is of the view that the emphasis on diversion and detention as a last resort could sufficiently be addressed *within* a set of national restorative justice guidelines as additional principles applicable to children and young people.

**Question 2: What, if any, aspects relating to the process of restorative justice should be included in any national guidelines?**

State and Territory legislation establishing restorative justice schemes generally have specific provisions dealing with 'process'. For example, Part 5 of the *Young Offenders Act* and the *Young Offenders Regulation 2010* governs the processes for youth justice conferences in NSW, including the purpose of, participation in, preparation for, location and conduct of the youth justice conferences, and the recruitment and status, as independent statutory appointees of the Director General of Juvenile Justice, of youth justice conference convenors.

However, there are perhaps overarching principles of due process, which could be said to be applicable to all restorative justice programs. These can be broadly grouped under the following headings:

1. Eligibility to participate in a restorative justice process;
2. Role of legal practitioners; and
3. Confidentiality and privilege.

Adherence to key due process principles in national guidelines could increase levels of satisfaction with restorative justice programs. From a youth justice conferencing perspective, if parties are satisfied with processes, young people feel supported and understand what is happening, families and other participants feel respected and involved, and victims are able to express their views in a safe environment.

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<sup>1</sup> We note that the vast majority of victims of assaults by young people are also young people – see ABS Victims of Crime Surveys.



## **Eligibility to participate in restorative justice**

Restorative justice processes should be able to be employed at any stage of the criminal justice process, including the sentencing stage. Restorative justice processes can and often are used as a diversion from court, as part of or an alternative to the sentencing process, and after sentencing as a voluntary option for offenders and victims. The latter option is generally not subject to any legislation and any agreements made in the restorative justice process have no impact on sentence or parole decisions.

Secondly, it is commonly accepted that restorative justice processes such as youth justice conferences are not fact-finding forums. In order to participate, the offender must accept responsibility for the offence and the victim and the offender must accept the essential facts of the offence as true.

Thirdly, the prosecution must have sufficient evidence in order to proceed with the charge at law, if required. The prosecution of the offence should be in no way barred from proceeding.

## **Role of legal practitioners**

All parties to a restorative justice process should be informed about their rights, the nature of the process and the consequences of participating, or not participating. For example, if children and young people deny allegations put to them, they should be informed that the *Young Offenders Act* gives them the right to enter a plea of not guilty and proceed to trial.<sup>2</sup>

National guidelines should recognise the right of each party to seek legal advice before and at all stages of a restorative justice process. This does not extend to a right to legal representation as part of a restorative justice scheme because restorative justice is about responding to criminal behaviour by balancing the needs of the community, victims and offenders. Whilst it may at times be appropriate for a lawyer to be directly involved, either generally or subject to conditions, there is no accepted right of representation that would form part of any general principles applicable to restorative justice processes.

## **Confidentiality and privilege**

All communications that form part of a restorative justice process should remain confidential, unless the parties agree otherwise or disclosure is legally required. Evidence from restorative justice schemes should not be able to be used in any subsequent legal proceedings.

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<sup>2</sup> s44(1) *Young Offenders Act* 1997 (NSW)



**Question 3: What, if any, issues relating to victim participation in restorative justice should be included in any national guidelines?**

We note that each state and territory government has taken action to give effect to the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (adopted by the General Assembly in 1985) either in the form of legislation or administrative guidelines. Accordingly, victims of crime are currently afforded a range of rights. In New South Wales, a Charter of Victims Rights is set out in Part 2 of the *Victims Rights Act 1996* (NSW). The Charter aims to promote and protect the rights of victims of crime and describes how government departments should treat and assist victims.

Each jurisdiction should be consulted in the development of national guidelines concerning victim participation in order to ensure that they accord with existing legislation or administrative guidelines.

National restorative justice guidelines ought to address the fundamental principle that the participation of a victim, whether an individual or an organisation, should be based on free, voluntary and informed consent. Further, consent to participate should be recognised as an ongoing issue, and should be able to be withdrawn at any stage.

If a victim does not wish to participate, a victim should be able to refuse, or alternatively be able to elect someone to represent their views and experience as a victim of the offence for which the restorative justice process is held.

Victims who participate in restorative justice processes need to feel confident that their concerns will be addressed in ways that provide answers and satisfaction with the process. The responsibility for ensuring that a victim's rights and needs are respected lies initially with the convenor or facilitator (**restorative justice practitioner**). Training programs should therefore cover the safeguarding of victim's rights and interests (see response to question 4 for further discussion regarding required competencies, training and development of restorative justice practitioners).

**Question 4: What, if any, issues relating to the organisational or program guidelines should be included in any national guidelines?**

**Government/NGO run**

Both the government and the community have roles to play in restorative justice. Government plays a critical role in developing legislation, policies and guidelines as well as funding and administrative support for restorative justice schemes. However, collaborative relationships should be maintained between government and community and justice stakeholders given that the schemes generally operate at the community level.

Ensuring that restorative justice schemes are accountable and transparent is one of the key challenges facing Government. If responsibility for operating

restorative justice schemes is outsourced to a non-governmental organisation, standards would need to be established and monitored by an independent body.

### **National accreditation body**

State and territory governments are currently responsible for regulating the practice of restorative justice. Standards for recruitment, training and ongoing support for restorative justice practitioners have developed in an ad hoc way across states and territories. In order to develop Australia-wide standards, national guidelines for restorative justice could be used as the basis for the establishment of a national accreditation body to act as a centralised regulatory authority for recruitment, training and accreditation of restorative justice practitioners.

A national accreditation body would need to identify core competencies (knowledge and skills) in the form of a 'Code of Practice' that could then be applied into training and accreditation systems. All jurisdictions that include restorative justice schemes in juvenile justice responses have now established their own requirements for core facilitator/convenor competencies, and their own training and support regimes. Any national accreditation body should consult with each state and territory and build on the work already undertaken in these areas.

### **Competency-based standards in a 'Code of Practice'**

Restorative justice practitioners should be selected using competency-based standards rather than formal qualifications in order to avoid the establishment of a professional boundary that might limit participation. These competency-based standards could be consolidated in a 'Code of Practice'.

Key competencies might include:

- Working knowledge of the criminal justice system;
- Conflict resolution skills;
- Understanding victims and dynamics of victimisation;
- An ability to work effectively with offenders;
- Cultural awareness; and
- Administrative and management skills.

Restorative justice practitioners should be recruited from all sectors of society and should possess an understanding of the local cultures and communities in which they are working. Like national guidelines, a Code of Practice would need to be able to be flexibly applied.

### **Ongoing training and development of restorative justice practitioners**

Restorative justice practitioners should consistently receive both formal and informal training (accredited by a national accreditation body) in leading restorative justice processes.



## Evaluation of restorative justice schemes and processes

The goals of each restorative justice scheme should be known and understood by staff, volunteers and restorative justice practitioners and each scheme should have an evaluation framework. A strong commitment to ongoing monitoring and regular evaluation allows the merits and limitations of any process to inform future developments.

### **Question 5: What, if any, issues relating to safety and security should be included in any national guidelines?**

Safety and security is critical to effective restorative justice and should be addressed in any national guidelines. Victims should never be forced to meet an admitted offender in a restorative justice process (see discussion regarding the principle of voluntary participation, addressed in question 2). The rights of the accused should also be respected, in particular to state their innocence and to have a fair trial. Issues regarding safety and security are also pertinent to restorative justice practitioners whose work often involves engaging with victims, offenders and other participants in tense and challenging circumstances, in a range of environments including private homes and community settings. Accordingly, there is a need for flexible and secure processes to ensure the safety of restorative justice practitioners.

Restorative justice schemes should have the capacity to support all participants throughout the process. From a youth justice conferencing perspective, the safety and security of the convenor and of all participants should be a priority before, during and after the conference.

The YJC supports and endorses the Canadian's principle regarding safety and security contained in the Canadian Department of Justice *Basic Principles and Procedural Safeguards relating to the Use of Restorative Justice*, which states:

6. Referrals to and conduct of a restorative justice process must take account of the safety and security of the parties and any power imbalances between victim and offender, with respect to either person's age, maturity, race, gender, intellectual capacity, position in the community or other factors. In particular, implied or explicit threats to the safety of *any participant*<sup>3</sup>, and whether there is a continuing relationship between the parties must be of paramount concern.

A restorative justice practitioner is essentially responsible for establishing and maintaining a safe, respectful environment, which is sensitive to vulnerabilities. Their ability to do this depends largely on their core competencies and ongoing training (outlined further in response to question 4).

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<sup>3</sup> In place of 'either participant'

**Question 6: What, if any, issues relating to agreements and outcomes should be included in any national guidelines?**

It is an accepted principle of restorative justice schemes that agreements and outcomes are made voluntarily.

Further, participants in restorative justice processes should be expressly prohibited from agreeing to an outcome that includes any obligation on the offender that exceeds the maximum punishment that the courts would impose for a similar offence in similar circumstances.

The right of appeal should be safeguarded on the understanding that restorative justice is a complement to more formal criminal justice processes.

**Question 7: Are there any other issues that should be included in any national guidelines? If yes, please outline what these issues are.**

**Mental health and intellectual disability - barriers to participation in restorative justice**

National restorative justice guidelines or a supplementary 'Code of Practice' should address capacity to participate and possible barriers to effective participation such as intellectual disability and mental health issues. Detection of such barriers is complex. For example, NSW police or a NSW court may refer a young person to a youth justice conference without identifying any relevant intellectual disability or mental health issues. It then falls on the conference convenor to identify possible capacity issues and if identified, to deal with them either by making suitable arrangements for effective participation, or by making a decision that it is not appropriate for a particular individual to participate. Where participation with suitable arrangements is deemed to be appropriate, special consideration should be given to the inclusion of a suitably qualified or experienced support person.

**Question 8: Should there be separate or additional guidelines relating to restorative justice programs and processes that address sexual assault and family violence offences? If yes, please outline what issues should be included.**

A large number of existing schemes that fall under the umbrella of restorative justice have specific exclusions, either by way of legislation or guidelines, for sexual assault and domestic violence related offences. For example, the *Young Offenders Act* excludes the possibility of a youth justice conference when dealing with offences such as sexual intercourse with a child between 10 and 16 years, breaches of protection orders, stalking and intimidation as



well as a range of other offences that are included in specific domestic violence legislation.<sup>4</sup>

Given current restorative practices differ widely in their application to sexual assault and domestic violence offences, any proposed national guidelines should be non-prescriptive on this issue. In cases of chronic domestic violence and abuse, serious consideration should be given to the appropriateness of the proposed restorative justice scheme on a case-by-case basis. There are often genuine concerns about re-traumatisation of victims of personal violence, especially where the offender holds power or influence over the victim in some way. Despite this, restorative justice processes may be appropriate in some circumstances and access to restorative justice should not definitively be refused to willing participants.

Key principles of voluntary participation as well as safety and security should act as a safeguard in such situations. In preparation stages, the restorative justice practitioner should spend time with participants and ensure that the victim makes a fully informed and independent decision about whether or not they wish to meet with the offender.

Again, the responsibility largely rests with the restorative justice practitioners who need to be highly skilled in the dynamics of personal and domestic violence, including risk assessment, in order to recognise in advance potential re-traumatisation, the warning signs of further violence and any subtle or implicit duress that a victim may be under to participate from the offender or other parties.

**Question 9: Are there any other types of offences that may require specific considerations in national guidelines? If yes, please outline what these offences and the special considerations are.**

We do not consider that any other types of offences should require specific consideration in national guidelines on the basis that abovementioned guidelines regarding safety and voluntary participation should provide sufficient safeguards.

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<sup>4</sup> ss35 and 8, *Young Offenders Act 1997* (NSW)