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***Our collective challenge:
bringing restorative justice from the periphery to the mainstream.***

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Abstract:

For too long restorative justice has existed on the periphery of justice systems around Australia, confining most victims of crime and other wrongs to the limited outcomes available through the adversarial system. Over time we have come to understand the shortcomings of our traditional adversarial system, in particular its failure to engage fully with the human impact of criminal and wrongful conduct, but also its tendency to exacerbate the original harm. More recently, we have seen the benefits and tracked the successes of restorative justice initiatives that offer fundamentally different kinds of outcomes to victims, outcomes that are generally unachievable through the adversarial system. We now know enough about both approaches to understand that our collective challenge must be to work towards bringing these alternative options into the core of the mainstream justice system.

This paper will outline a vision for a justice system in which victims are provided with a suite of justice options at different points of the legal process, and across a range of jurisdictions. Drawing on international and recent Australian examples, Rob Hulls, a former State Attorney-General and successful law reformer, will explore opportunities for expanding the availability of restorative justice programs, and will identify the key policy and political considerations that must align in order to realise this vision.

Introduction and acknowledgments:

Before I begin I want to acknowledge the traditional owners of the land on which we meet and to pay my respects to their Elders, past and present. I also want to thank the conference organisers for inviting me to contribute today.

The longer I am connected with the justice system - whether as a state Attorney-General, or in my new role in tertiary education - the more I am convinced that it can be a positive intervention in the lives of its users. I am convinced of this because of the difference that this intervention can make to the individuals involved. I am also convinced, however, because of the difference it can make to our collective social and economic wellbeing.

Too often, of course, the adversarial response still favoured in the mainstream compounds the original wrong - failing to engage with the underlying issues; relying on technicalities; and removing all control from those with the greatest stake in the case and its results. In the case of serious criminal wrong, this leaves participants in the process with their sense of trust further undermined, eroded not only by their experience of crime but by the system's failure to respond.

Through concerted efforts, of course, our justice system has begun to focus on what should always have been its primary objective: to repair harm, deliver justice, and represent our collective ambitions for a safer and fairer society. This system now includes informal tribunals; improved evidence provisions; victim impact statements; problem-solving courts; and, in the civil jurisdiction, more emphasis on resolution

of disputes by agreement – all measures which aim to curb the adversarial culture in which our legal processes are trapped.

Despite these important developments, however, our justice system's response to sexual assault and abuse, in particular, remains dismally inadequate. In fact, estimates suggest that less than one per cent of all incidents of sexual assault result in a successful prosecution in my home state of Victoria.

What's more, harsher punitive measures - including sex offender registers - are contributing to an increase in those contesting allegations, amplifying the existing challenges of bringing a successful prosecution in the first place.

Accounts unfolding over the past twelve months at the Royal Commission into Institutional Responses to Child Abuse, meanwhile, reveal the limitations involved in seeking redress outside the criminal justice process, whether through internal institutional mechanisms or mechanisms in the civil justice context.

In fact, as the Royal Commission has heard, the vast majority of sexual assault complainants have been met with an array of adversarial tactics which hold accountability at bay – from denial and legalistic defences which trivialise the complaint and cast doubt on the character of the complainant; to responses framed only in terms of compensation, or settlements which prevent victims from speaking out.

This means that the needs of the majority of these victims remain unmet – their offender and those who failed to protect them from harm unaccountable, yes, but the victims also left without any formal

acknowledgment, let alone an admission, apology, or assurance that the crime will not occur again.

Making the leap, or going out on a limb?

The question for Australia, of course, is how we start to meet these needs in a more effective way – how we start to tread more constructive and reparative paths which, for others, are such familiar ground.

As this conference will hear in detail, for example, New Zealand has embraced restorative justice practices on a considered and concerted basis. Starting in the mid-1980s, New Zealand was the first legal system to establish a form of restorative justice conferencing for juvenile offenders. Now it runs programs for a wide range of offenders all around the country; legislation provides that RJ is the default option for cases pre-sentencing; and standards for its provision have been carefully promulgated by government

In the UK as well, RJ is being implemented right around the country - supported by Ministry of Justice funding and a Restorative Justice Council with the infrastructure to ensure quality and promote its benefits to the wider population. The UK Government has in fact earmarked £29 million over three years to boost RJ provision, meaning that something which emerged on a piecemeal basis as it has in Australia, is now being embedded in the criminal justice system.

On a recent visit to Belfast, meanwhile, I heard how prison officers are trained as RJ facilitators and conduct pre-release conferencing between offenders and victims. I met with a woman, in fact, whose daughter had

been killed and for whom an RJ experience offered a capacity to imagine a future beyond her grief.

In Australia, however, we are sadly lagging behind. Discrete programs exist in various jurisdictions, of course, but the ACT is the only jurisdiction to have a considered RJ strategy. The RJ sector, meanwhile, may be driven by fantastic organisations such as our hosts here today, but government support is only really provided on a program by program basis, with no overall government strategy for capacity building, awareness raising, standards or accreditation – whether through government, or an independent body such as in the UK.

In other words, RJ remains on the periphery in Australia, while in other jurisdictions it firmly part of the mainstream. What is it, then, that is holding us back? Are Australian governments just too conservative? Too timid? Is the timing simply not right? Many who work in progressive or contentious fields often despair at apparent government inertia. As a former politician, however – and a voracious reformer at that – I'd encourage any advocates of RJ to make it as easy as possible for governments to embrace alternatives.

This is particularly the case in the current political climate. Unfortunately, Australia seems caught in an especially punitive law and order cycle at the moment. This means that, while even the most conservative states in the US, for example, are embracing 'justice reinvestment' - an approach that channels investment into community development and rehabilitation, rather than retribution - many Australian jurisdictions have been heading the other way.

Most recently in my home state of Victoria, a grim four years saw the former conservative government spend more money on prison beds than hospital beds – a very stark indication of where that administration (perhaps mistakenly) thought that their support lay.

More surprisingly, an anxiety about embracing alternatives or ‘soft options’ can be just as acute for governments on the progressive side of politics. When ‘law and order’ is perceived as a government’s weakness, it can be risky to play to type. This means that timing is everything, with even the most robust politician sometimes deciding to keep alternatives up his or her sleeve when an election is in the wind, in the hope that a return to office will enable a valuable program to actually get off the ground.

In other words – and as I’m sure I don’t need to tell this audience – governments want to know that they are not going out on too much of a limb. As much as many advocates might lament the glacial pace at which Australian governments are embracing RJ, then, there are certain things we can do to give them the best possible chance to take this step.

Building the case

To build a better case on which governments can act, first and foremost, we need to measure the value of RJ. As this conference reveals, there is an increasingly sizeable body of evidence to which we can point. However, we need to make sure that we present it in a useable way, keeping up momentum, conducting useful evaluations and employing sensible measures of success.

That said, we also need to make sure that these measures are not just confined to conventional ones. The benefits of RJ, after all, are not just about reductions in recidivism, although according to government research, it has provided a 14% reduction in offending in cases in the UK (compared with those who went through the criminal justice system but weren't offered RJ); and an 85 per cent 'victim satisfaction' rate, compared with 30 per cent in the traditional system.

Beyond this, however, we need to get better at explaining that RJ can meet people's needs that are not otherwise being met and therefore not always measured. To this end, I note that Len Roberts-Smith, the former chair of the Defence Abuse Response Taskforce which I will highlight later and is being spoken about in other sessions at this conference, has spoken of how its restorative engagement program is 'resolving the unresolvable' - those cases that don't lend themselves to civil or criminal action for a variety of reasons.¹

Second, we need to personalise RJ – giving politicians and members of the community the opportunity, for example, to hear about, or preferably meet, individuals who have gone through an RJ experience: the elderly woman whose car was stolen, the mother who is now terrified after a break and enter, the young man assaulted in the street – all of whom have met with the offender, gained answers to specific questions, and regained a sense of ownership and control. Here I note that the Restorative Justice Council in the UK is particularly good at this, using case studies to reach out beyond the usual suspects and raise awareness of the value of RJ programs and practices.

¹ Defence Abuse Response Taskforce Report, <http://www.defenceabusetaskforce.gov.au/reports/Documents/ReportonabuseinDefence.PDF>:

While individual cases further afield can obviously be powerful, however, sometimes programs run at the local level can be the most effective in terms of engaging members of Parliament, with local representatives becoming some of the best advocates for programs run on their home turf.

Third, we need to promote it. As much as those here might see RJ as a likely candidate for the spotlight, a recent survey in the UK – a jurisdiction which, as I said earlier, has had RJ established for some time – indicated that most people have never heard of restorative justice, or didn't know what it meant.

While 'restorative justice' may seem pretty obvious to those of us in the know, then, it may be time to start looking at language that makes clear from the outset what we really mean, particularly when the varied practices that are referred to as 'RJ' are very different things.

More specifically, we also need to engage proactively with victims and associated organisations who are frequently dissatisfied with current outcomes - about opportunities for achieving better results and in a more meaningful way. Similarly, we need to have that broader conversation about what people might want done for themselves or a loved one if they were harmed by crime – given that we know that this often differs markedly from the community's detached views about what should be 'done with' an offender.

Fourth, we need to cost it. Certainly, as Attorney-General many of the programs for which I advocated found Cabinet support not just because they were the right thing to do, but because colleagues saw that savings

from my proposal might free up more resources for their own portfolio. While, RJ can be time and resource intensive, therefore, we need to highlight the savings it may represent in terms of interrupting the cycle of reoffending and preventing the escalation of other disputes. Equally, we need to get better at articulating the savings we achieve by reducing the demand that victims may need to place on other sectors where they have not been given an opportunity to begin to recover from the harm.

Fifth, we need to account for RJ. This means urging governments to support robust training and accreditation programs – developing the sector, getting the building blocks right, putting oversight in place so that infrastructure is there. Currently, even in the UK, let alone Australia, service provision is somewhat patchy. While pilots are incredibly useful and often essential, therefore, we have to present and promote a long term and consistent plan.

Finally – and this sometimes gets overlooked - we need to map our proposals, giving governments a ‘how to’ guide, not necessarily expecting that they will embrace every idea in its entirety, but providing a tangible point at which to start.

This means having proposals to take to government about new opportunities; about the expansion of existing initiatives, or considering their application in new and contentious spheres. It also means being adaptable and having the capacity to deliver programs in a range of settings and stages of the justice process, from the community referral level, right through to the sentencing process and pre-release from prison.

In other words, it means showing governments that RJ is not just a warm and fuzzy theory, that it is possible to answer the difficult questions, to put real and tangible programs in place and to start to bring it in from the periphery to the core.

CIJ Report

It was with this final point in mind that, just last year, the Centre for Innovative Justice released its report, *Innovative Justice Responses to Sexual Offending – pathways to better outcomes for victims, offenders and the community*. Firmly believing that the public interest in prosecuting and convicting offenders must be preserved, our objective was not to dispense with the conventional justice system, but instead to identify a suite of responses that could exist *alongside* it, with the primary focus being restorative justice conferencing.

We wanted to adopt a highly victim-centred approach while also retaining those elements of the prosecution process that protect the rights of the accused. Too often, of course, people assume that these objectives are polar opposites - that we must be as adversarial in our approach to reform as the system we are trying to change. The CIJ believes, however, that it is possible to do both – that giving victims additional options can bolster the relevance of the underlying system.

Ultimately, then, the model that we recommended is flexible, but retains significant checks and balances. It can be used as both an alternative or as an addition to prosecution and can apply at any stage in the criminal justice process.

This includes at the post-charge stage, but only when prosecution is deemed not to be viable. It is also not confined to any category of victim, offender or offence, as we considered that this would limit the options for victims. Instead we have recommended comprehensive safeguards, a coordinated, properly resourced system, and phased implementation.

Basic eligibility and suitability criteria are suggested to assess whether a victim is adequately prepared and an offender legitimately willing to participate. Legislative support and structural oversight are recommended, as is the participation of highly skilled, specialist personnel and an expert Assessment Panel. Pathways into and out of conferencing are laid out and gatekeepers, such as judges, nominated to ensure that a conference is not pursued when prosecution would be more appropriate. Links to appropriate sexual offender treatment programs are also addressed.

Clearly, this process will not be the best option in every case. The CIJ believes strongly in the value of formal prosecution and, as many victims will not want to confront their offender or may view prosecution as their primary need, they should be free to pursue this path. However, it is precisely the personal nature of a restorative justice encounter that can offer the redress that other victims seek.

Answers to specific questions, an agreement about future contact or disclosure to family – outcomes such as this are intensely personal, with restorative conferencing far more likely to deliver them than the adversarial approach currently on the table.

That said, many have understandable qualms about extending the reach of restorative justice to sexual assault. They worry that sexual assault will retreat again to the private sphere; and that participants may be re-victimised in the process. These are all legitimate concerns which the CIJ addresses with care in its

Report. Reformers around Australia, however, can no longer claim that the conventional system is working. This means that we must overcome our hesitations, our contingencies, and our reluctance to commit.

Institutional abuse

Though abuse perpetrated in an institutional setting was not the primary focus of our report, the need to map more flexible and meaningful legal responses is just as great in this as any other context involving sexual assault. The limited parameters of our formal civil and criminal justice processes, however, are ill equipped to address the complexity of victims' experiences in these cases. That's why we need to design entirely new regimes - ones which throw off the constraints of legalism and denial and instead offer a framework that facilitates the restoration of lives and the prevention of future harm.

Certainly, the framework implemented by the Defence Response Abuse Taskforce to respond to cases of sexual and other abuse within the Defence Forces signals an innovative way forward, with complainants whose cases have been assessed as 'plausible' offered a range of possible outcomes, none of which is mutually exclusive. Available options include reparation payments of up to \$50,000, counselling, and referral of matters to police or military justice authorities for investigation and possible prosecution.

Perhaps most powerfully, the Taskforce's Restorative Engagement Program provides a separate and dedicated forum in which complainants can regain a sense of control – telling their story in a structured and supported environment; doing so to a senior representative of a leadership overtly committed to change; and shifting their status from someone victimised to someone recognised and valued by the institution.

Outside Defence, the Royal Commission means that we also have a strong chance of formulating and implementing an entirely new approach. Many would be aware that the Commission has now released a comprehensive discussion paper on redress schemes and civil litigation, with a view to releasing a final paper later this year. In what is a complex set of issues, the Commission has identified some key principles for such schemes, being:

- That any scheme must be **survivor-focused**, rather than about protecting the institution);
- That there should be **no wrong door** through which to enter any scheme or schemes;
- That all redress should be offered, assessed and provided having appropriate regard to what is known about the **nature and impact of child sexual abuse** and to the cultural needs of survivors; and
- That it should be **tailored to the needs** of survivors, obtained with minimal difficulty and cost and with appropriate support or facilitation if required.

The Commission's paper also promotes 'fairness', in the sense of equal access and equal treatment of survivors. It explains that the type or amount of redress should not depend on:

- The state or territory in which the abuse occurred;
- Whether the institution was a government or non-government institution;
- Whether the abuse occurred in more than one institution;
- The nature or type of institution;
- Whether the institution still exists; or
- The assets available to the institution.

I believe that the Commission has asked the right questions and set out the complexity of the issues. It has provided detailed guidance for institutions against which to review their own practices, as well as a very clear message that they don't need to wait for the final report before they begin to act.

In doing so, I expect that, whatever the final recommendations, they will be uncontroversial in the context of the horrific systemic abuse that has occurred and the intractable challenge of finding resolution - in part, I think, because the community accepts some form of collective responsibility for this kind of harm.

Making it core business, reframing the debate

Where harm has not been committed in the context of an institutional setting, however – where the perpetrators are assumed to be aberrant

individuals that can instead just be locked away – the leap appears to be a greater one. This means that we need to work harder to emphasise the benefits to victims of restorative approaches, and start to shift the parameters of our discussions.

As long as politicians bang the law and order drum, constructive interventions will remain on the margins - regardless of their potential to tackle the underlying causes or harm of crime. Perceiving issues in terms of ‘hard’ or ‘soft’ on crime - of victims’ versus offenders’ rights - gets us nowhere. If tough, rather than smart, is our only option, we are bound to a system that leaves more victims in its wake.

To shed these bounds, we must also shed the assumption that there are only two sides to the discussion – those who support or criticise RJ, for example; or those who are appalled by crime and those perceived to support offenders’ rights. The reality is, of course, far more complex than that. Until we move it past the customary division, this debate will continue to prevent us from embracing more useful approaches. More than anything, it will create more victims. We must discard it, then, and collaborate in something better – not just for the sake of offenders or victims, but for the sake of a safer, well-functioning community.

Whether it be restorative justice mechanisms in the criminal or civil justice sphere; whether it be in institutional settings; or in the way that we approach the law and order debate – we must find a way of repairing the damage caused by sexual offending and other wrongdoing and preventing it from happening again.

There are myriad ways in which this can be done, but they all need to share a common goal of 'no more victims'. No more victims, in fact, needs to be core government business – a mainstream agenda rather than just a bonus on the side. With this as our guide we can not only make the processes as meaningful as the results, but those results more meaningful for us all.