



Government of **Western Australia**
Department of **Justice**
Office of the Commissioner for Victims of Crime

Alternatives to criminal justice responses

DISCUSSION PAPER 4

Improving experiences for
victim-survivors:

Review of criminal justice
system responses to
sexual offending

Alternatives to criminal justice responses

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This discussion paper talks about some examples of alternative justice responses that could be used by victim-survivors of sexual offending, including restorative justice models and Aboriginal justice models.

We want to know what you think about alternative justice responses.

The Department of Justice respectfully acknowledges the traditional custodians of the land being the first peoples of this country.

We embrace the vast Aboriginal cultural diversity throughout Western Australia and recognise their continuing connection to country, water and sky. We pay our respects to Elders past, present and emerging.

The Department is committed to fostering respectful partnerships with our Aboriginal colleagues, clients and those in our care.

Support

Reading about sexual violence can be upsetting, particularly for victim-survivors. You may want to read this paper with a support person or check in with someone about how you are feeling afterwards. If reading this discussion paper is upsetting, please ask for support from a person you trust or contact one of the support services below.

1800 RESPECT 1800 737 732

Women's Domestic Violence Helpline (WA) 1800 007 339

Men's Domestic Violence Helpline (WA) 1800 000 599

Crisis Care 1800 199 008

Mensline Australia 1300 789 978

Lifeline Australia 13 11 14

Our focus

The Attorney General has asked the Office of the Commissioner for Victims of Crime to look at the experiences of victim-survivors who have experienced sexual offending in the criminal justice system in Western Australia (WA) (the Review) to see what is working well, what can be improved and to recommend options for reform. In particular, the Attorney-General has asked us to look at:

- the experience of adult victim-survivors (regardless of their age when the relevant sexual offending occurred) with the criminal justice system
- factors which contribute to under-reporting of sexual offences, and why people report but do not continue with the formal legal process
- alternative and innovative processes or procedures for receiving, investigating and resolving (through prosecution or otherwise) sexual offence complaints that are consistent with victim-survivors' interests and the interests of justice – for example, restorative justice processes.

A big part of the Review is consulting with the public to hear their views on what works well now and what can be improved.

Who can make a submission

Any person or organisation is welcome to make a submission to the Review. We are interested in hearing from sexual offending victim-survivors as well as their families and loved ones.

We are also interested in hearing from people who work with sexual offending victim-survivors and/or who work in the criminal justice system.

The Discussion Papers

We have written four Discussion Papers that focus on different parts of the criminal justice system. We summarise the content of each discussion paper below.

Discussion Papers 2, 3 and 4 ask questions that you may want to answer when you submit your response (see how to make a submission on page 5). You can answer as many or as few questions as you like. You can also write your submission in your own words, without responding to the specific questions in the Discussion Papers.

The Discussion Papers contain information that is relevant to the questions we are asking. The final report will contain a more detailed discussion, including research and the outcomes of public consultation.

Discussion Paper 1 Overview

Discussion Paper 1 includes background information that may help you think about the issues involved and answer the questions in Discussion Paper 2, 3 and 4. There are no questions in Discussion Paper 1.

Discussion Paper 2 Reporting sexual offences

Discussion Paper 2 looks at why some people choose not to report their experience of sexual offending, the police reporting process and some options for improving the reporting process.

Discussion Paper 3 Journey through the criminal justice system

Discussion Paper 3 looks at sexual violence victim-survivors' journeys through the criminal justice system – from the time of reporting to the police, to the time an offender is released from prison. This paper includes questions about each stage of this process, and asks what went well, what did not go well, and how things could be improved.

Discussion Paper 4 Alternatives to the criminal justice system

Discussion paper 4 looks at processes outside the criminal justice system, which may help victim-survivors to heal after a sexual offence as well as holding perpetrators accountable. This paper includes some examples of alternative models used in other places. We ask for your opinion on what models could work in WA.

How to make a submission

You can make a submission by:

Online:	https://consultations.justice.wa.gov.au/
Email:	experiences@justice.wa.gov.au
Mail:	Improving experiences review consultation Office of the Commissioner for Victims of Crime GPO Box F317 Perth, WA 6000
Phone:	08 9264 9877

Please contact us if you would like to talk about different options for making a submission or participating in the consultation process.

We acknowledge there have been other inquiries and reviews related to sexual violence and violence against women and children. If you do not have time to respond to this Review, you can send us any relevant submission you have made before.

Language used in the discussion papers

In the Discussion Papers we use the term 'sexual offences' or 'sexual offending' to refer to sexual violence that is a crime.

In the Discussion Papers we use the term 'victim-survivor' to refer to people who have experienced sexual offending to recognise both victimisation and resilience. We have used this term because it is familiar. We also use the term complainant to refer to a person who has made a report to police.

We use the term 'perpetrator' to refer to people who have sexually offended against another person. We use the term 'accused' to refer to the person who is alleged to have committed the sexual offence. We use the term 'offender' to refer to people who have been convicted of sexual offences.

We have used the term 'Aboriginal' in recognition that Aboriginal peoples are the original inhabitants of Western Australia.

We acknowledge that not all people prefer or use the terms and acronyms used in the Discussion Papers.

Other terms and acronyms used in the Discussion Papers include:

ALRC	Australian Law Reform Commission
ARO	Alternative Reporting Option
CALD	Culturally and linguistically diverse
MIST	Multiagency Investigation and Support Team
ODPP	Office of the Director of Public Prosecutions
PFK	Preliminary Forensic Kit procedure
PRB	Prisoners Review Board
SARC	Sexual Assault Resource Centre
UK	United Kingdom
VLRC	Victorian Law Reform Commission
VMU	Victim-Offender Mediation Unit
VNR	Victim Notification Register
WA	Western Australia
WA Police	Western Australia Police Force
WALRC	Western Australian Law Reform Commission
WSJT	Women's Safety and Justice Taskforce (Queensland)

Alternative justice responses

Alternative justice responses provide options for victim-survivors outside of the standard processes of the criminal justice system. The criminal justice system is designed to enforce the criminal law. Someone who has been accused of a crime may face serious consequences (e.g. going to prison). Because of this, many criminal justice system processes focus on making sure the person who has been accused of a crime is treated fairly. This is important, but it means that victim-survivors may feel that their voice is lost, and that their needs aren't met.

Victim-survivors have justice needs that are not always met by criminal justice processes, including participation, voice, validation, vindication, and offender accountability.¹

For example, people who experience sexual offending may want to:

- join in criminal justice processes
- speak about their experiences
- share their feelings and opinions and be understood
- be told it was not their fault
- see the person who has used violence take responsibility for the sexual offending behaviour.

'Victims need more choice in their pursuit of justice...options that provide them with the opportunity to tell their story, to have the harm acknowledged, to participate in the process and to have a say in the outcome.'²

Alternative justice responses do not replace criminal legal processes. They are victim-centred approaches that provide different ways for victim-survivors to be part of processes that support healing from the harm caused by sexual offending. Alternative justice responses aim to meet victim-survivors' justice needs that are not met by criminal justice processes.

Restorative justice

What is restorative justice

Restorative justice is a justice process that involves the victim in addressing crime, disputes, and sometimes community conflict.³ A restorative justice process generally involves a meeting (or more than one meeting) between the people affected by the crime, dispute, or conflict. The meeting is guided by one or more independent people.

What can restorative justice achieve

For people who have experienced sexual violence, a restorative justice process provides a way to address the needs of victim-survivors and help them heal from the harm caused by sexual offending.⁴ Restorative justice 'allows people who have experienced sexual violence to speak and be heard.'⁵ It gives victim-survivors space to say how the sexual offending has impacted their life. It also gives people responsible for sexual violence a chance to understand the consequences of their actions, take responsibility for the harm caused, and apologise.

Restorative justice can acknowledge that sexual offending harms people, relationships, and the community.⁶ In criminal legal processes, the parties are the state (the police/prosecutions) and the defendant (person accused of sexual violence), so the victim-survivor isn't a central part of the process. Restorative justice is between the victim-survivor and the person accused of sexual violence, so the victim-survivor is involved in the process.

Restorative justice processes do not replace criminal legal processes, and are generally used during or after criminal legal processes. Restorative justice could also be used in some circumstances where criminal legal processes are not suitable because the behaviour does not meet the threshold for a criminal offence, but there is an impact on the family or community.

Examples of restorative justice processes

Restorative justice processes may look different depending on the situation and what the parties want to do.

Some examples include:⁷

What is it called?	What does it look like?
Victim-offender dialogue	The victim-survivor and the perpetrator write letters to each other. The victim-survivor agrees to receive a letter from the perpetrator.
Victim-offender mediation	A meeting between the victim-survivor and the perpetrator (including a facilitator and support people). This is a structured meeting run by a trained person. It looks like a facilitated conversation between the victim-survivor and the perpetrator.
Restorative justice conferencing	A meeting between the victim-survivor and the perpetrator (including a facilitator and support people). The meeting can also include family members or community members This is a structured meeting run by a trained person.
Reparative boards	A group of community members who talk to an offender about the consequences of their crimes. The group of community members may include people who have been victims of crime, but not necessarily victims of the particular offender.
Victim impact panels	A panel of victims tell a group of offenders about the impact of crime on their lives, as well as their family, friends, and community. Victims do not speak to groups including the person who harmed them.

Reparative mediation through the Victim-offender Mediation Unit (VMU) in Western Australia

The VMU is part of the Office of the Commissioner for Victims of Crime in Western Australia. The VMU offers reparative mediation based on principles of restorative justice. Reparative mediation can be initiated by a victim, offender, or the court. It occurs after someone has been convicted but before they are sentenced. The outcome of a reparative mediation is taken into account by the court at sentencing. Victims are able to question the offender and talk about what happened. Reparative mediation is not currently available for sexual offending.

Reparative mediation works differently for different types of offending. It is easier to quantify the harm caused by some types of offending than others. For example, where there is an offence such as 'stealing as a servant' it is generally possible to calculate the value in dollars of the offending (how much money has been stolen). However, it is not possible to calculate the value in dollars of the harm caused by sexual offending and what dollar amount is equivalent to the victim-survivor's healing.

Risks of restorative justice processes

Safety for victim-survivors is the key concern that has been raised about restorative justice processes for people who have experienced sexual violence.

It is important that restorative justice processes do not:

- retraumatise the victim-survivor
- repeat the power imbalance or power dynamics of the sexual violence offending
- reinforce harmful attitudes that minimise sexual violence as not something to be addressed by the criminal justice system.

These concerns can be addressed through safety planning and providing carefully planned, trauma-informed processes run by trained facilitators. The person who has experienced sexual violence will always have the choice to engage (or not engage) in restorative justice processes.

QUESTIONS

Should WA introduce a restorative justice model for sexual offending?

You might want to think about:

- What restorative justice processes should be used in Western Australia?
- Should Western Australia have an overarching framework or set of principles to guide the use of restorative justice practices? If so, what should they include?
- Should restorative justice only be available for some sexual offences, or all sexual offences?
- What supports should someone have when participating in a restorative justice process?
- What is best practice to make a restorative justice process safe?
- Should restorative justice processes produce specific outcomes? For example, this could be an outcome agreement including:
 - referrals to programs and services
 - a formal apology
 - an agreement to pay restitution.

Aboriginal justice models

People who experience sexual violence face many barriers in reporting their experiences and in seeking justice through criminal legal processes. Aboriginal people who experience sexual violence face additional barriers. These may include mistrust of police, courts, and government institutions; social exclusion; English as a second language; poor knowledge of rights; lack of access to Aboriginal legal professionals; lack of access to qualified interpreters; and remoteness.⁸ We talk about this more in Discussion Paper 1.

It is also important to consider what ‘justice’ looks like for Aboriginal people.

In an ANROWS report about innovative models in addressing violence against Indigenous women, the authors state that ‘research calls for a paradigm shift that moves attention away from a simple criminal justice model towards collective processes of community healing grounded in Indigenous knowledge.’⁹

In the *Aboriginal Family Safety Strategy 2022-2032*, which was developed to address family violence impacting Aboriginal families and communities, there is a focus on healing, culturally capable services, and Aboriginal-led intervention. Focus area 1 in the strategy is Healing: ‘ensure healing is what guides prevention and the delivery of family violence services and practice’. The strategy says that ‘family violence does not sit in isolation from other societal and community dynamics...effective responses must be informed by holistic perspectives to achieve the best possible outcomes.’¹⁰

The approach in the *Aboriginal Family Safety Strategy* is to emphasise Aboriginal family safety. Just as we are shifting our approach to supporting people who experience family violence, it may be necessary to consider how to shift our approach to supporting people who experience sexual violence. What does safety look like for Aboriginal people who experience sexual violence? What does justice look like for Aboriginal people who experience sexual violence?

QUESTIONS

Should WA introduce Aboriginal justice models that would work for victim-survivors of sexual violence?

You might want to think about:

- What does ‘safety’, ‘justice’, and ‘healing’ look like for Aboriginal people who experience sexual offending?
- How important are these principles when thinking about criminal justice system responses to sexual offending?
- What are guiding principles for developing culturally appropriate responses to sexual offending for Aboriginal victim-survivors?
- What do culturally appropriate responses to sexual offending for Aboriginal victim-survivors look like?

Other legal responses

Civil legal responses

People who experience sexual violence may use civil legal responses as well as, or instead of, criminal legal responses. This may include accessing criminal injuries compensation or seeking compensation through civil litigation.

The Office of Criminal Injuries Compensation is a specialist tribunal that assesses applications for compensation by victims of crime in WA. To support victims and try to avoid re-traumatisation, applications are decided mostly by looking at the documents victim-survivors provide, rather than through a hearing.

Any person who is the victim of an offence in Western Australia and is injured or experiences financial loss as a result of the injury can apply for criminal injuries compensation—this includes people who have experienced sexual violence. A person who has experienced sexual violence can apply for criminal injuries compensation in these situations:

- The person who uses violence is found guilty in court.
- The person who uses violence is charged with an offence but found not guilty.
- The person who uses violence is charged with an offence but the charge is withdrawn or dismissed.
- Nobody is charged with an offence.

It can take a long time for criminal injuries compensation applications to be decided. An applicant can get an interim payment to help with treatment, report and travel expenses. This means a small payment while they wait for the application process to be finished. When the final decision is made, it can include money put aside for future treatment expenses. This must be used within 10 years.

The Office of Criminal Injuries is a tribunal; it is not a support service, so does not directly provide support to people who make an application. They may refer people who have experienced sexual violence to other support services, such as the Victim Support Service. People who need help with the application forms can get help from a community legal service, Legal Aid Western Australia, or a private lawyer.

If someone has experienced sexual violence they also have the option to make a compensation claim through a civil court. This applies to people who have experienced sexual violence and want to make an abuse claim against both individuals and institutions. The option of a civil claim is available even if a criminal court says that someone is not guilty of a sexual offence. People who need help with civil abuse claims can get help from a private lawyer.

Inquisitorial model for sexual offending

Australia has an adversarial legal system for sexual offending matters, where the prosecution and defence argue their case before an impartial judge (and in some cases a jury). The judge ensures that the trial process is fair and that criminal procedure rules are followed. The judge and/or the jury can only make a decision based on the arguments and evidence presented by the prosecution and the defence; they cannot make other enquiries. Other countries that use adversarial systems include England, Wales, Canada, New Zealand, and the United States of America.

In contrast, some countries use an inquisitorial system for sexual offending matters, where the judge has a more active role and may make inquiries, examine witnesses, and determine what matters the court will decide. There are some important differences between the two systems, including criminal process, burden and standard of proof, and evidence rules.

This review is not considering whether an inquisitorial model should be introduced for sexual offending trials because this review is only looking at the experience of victim-survivors of sexual offending, and we can only have one system of criminal justice processes for all types of offending. However, the review is considering whether certain elements of inquisitorial systems could be used to improve the experience of victim-survivors, such as introducing victim representatives.

QUESTIONS

What supports should be available to people who have experienced sexual violence and are seeking criminal injuries compensation?

What supports should be available to people who have experienced sexual violence and are seeking compensation through civil litigation?

Are there elements of the inquisitorial model that we should consider in WA, and if so what elements?

Endnotes

- 1 Daly, K. (2017), 'Sexual violence and victims' justice interests', in Restorative responses to sexual violence https://www.griffith.edu.au/__data/assets/pdf_file/0018/223407/2017-Daly-SV-and-VJI-revised-23-Oct-2013.pdf; McGlynn, C. & Westmarland, N. (2019), 'Kaleidoscopic justice: Sexual violence and victim-survivors' perceptions of justice', *Social & Legal Studies* (28.2, 179-201), 186-191 <https://journals.sagepub.com/doi/full/>
- 2 Centre for Innovative Justice RMIT, (2014), Innovative justice responses to sexual offending: pathways to better outcomes for victims, offenders and the community, p6 <https://cij.org.au/cms/wp-content/uploads/2018/08/innovative-justice-responses-to-sexual-offending.pdf>
- 3 Daly, K. (2015) 'What is restorative justice? Fresh answers to a vexed question' in *Victims & Offenders* p20 https://www.researchgate.net/publication/286401012_What_Is_Restorative_Justice_Fresh_Answers_to_a_Vexed_Question
- 4 Hadar, N., & Gal, T. (2023), 'Survivors' paths towards forgiveness in restorative justice following sexual violence', *Criminal justice and behaviour* <https://doi.org/10.1177/00938548231162108>
- 5 Victorian Law Reform Commission, (2021), Improving the justice system response to sexual offences: Report at 9.5 <https://www.lawreform.vic.gov.au/publication/improving-the-justice-system-response-to-sexual-offences-report/9-restorative-justice-for-sexual-offences/>
- 6 Larsen, J. Australian Institute of Criminology, (2014), Restorative justice in the Australian criminal justice system, p1
- 7 Maryfield, B., Przybylski, R., & Myrent, M. (2020), Research on restorative justice practices. Justice Research and Statistics Association [jrsa-research-brief-restorative-justice.pdf](https://www.jrsa-research-brief-restorative-justice.pdf)
- 8 Wei, Z., McDonald, H., Coumarelos, C. (2015), 'Indigenous people, multiple disadvantage and response to legal problems', *Updating Justice* (No. 48, August 2015) p2; Stobbs, N. (2007), 'An adversarial quagmire – The continued inability of the Queensland criminal justice system to cater for Indigenous witnesses and complainants', *Indigenous Law Bulletin*, (2007), 6(30) p15 <https://search.informit.org/doi/epdf/10.3316/ielapa.200912433>
- 9 Department of Communities, WA, Aboriginal Family Safety Strategy 2022-2032, p13, <https://www.wa.gov.au/system/files/2022-12/Aboriginal-Family-Safety-Strategy.pdf>
- 10 Department of Communities, WA, Aboriginal Family Safety Strategy 2022-2032, p13, <https://www.wa.gov.au/system/files/2022-12/Aboriginal-Family-Safety-Strategy.pdf>

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