

**RESPONSE TO DRAFT REPORT OF THE QLD PRODUCTIVITY COMMISSION INQUIRY
INTO IMPRISONMENT AND RECIDIVISM**
**Response to OPC Information Request: A Victim Focused System – Information
request**

17 April 2019

SUBMISSION

PRISON FELLOWSHIP AUSTRALIA – QUEENSLAND (PFAQ)

Key design features

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Principles that should guide the residual public interest test

General approach

1. In an ordinary sentencing exercise, a court will have in mind a general sentencing range of imprisonment that might usually be imposed for an offence of the type being sentenced. However, among the factors a court considers in determining the level of imprisonment to be imposed in the particular case, is the degree to which the particular offender has shown remorse, co-operated with authorities, participated in rehabilitation programs and/or made restitution to their victim. Where those features are present, a court will take them into account and reduce the level of imprisonment (within the ordinary sentence range) that is in fact imposed.
2. A similar approach could be taken in determining whether there is a 'residual public interest' in imposing a term of imprisonment on an offender who has entered into an agreement with their victim, and if so, what level of imprisonment that should be, taking into account both the subjective value of the agreement to the victim and the objective value of the offender's contribution to the victim in the agreement, judged objectively by ordinary community standards to ensure parity in sentencing.

Subjective and objective value of the agreement

3. Given the nature of a victim-focused sentencing regime, the subjective value to the victim of any agreement reached between the victim and the offender should be a factor taken into account by a court in determining whether there is a residual public interest in imposing a term of imprisonment in addition to the agreement that has been reached and the level any such term. For example, an offender may take particular steps that are very meaningful to their victim, which make a significant contribution to the restoration of the victim.
4. However, even where a particular agreement may have significant value for the victim, it should also be assessed objectively, according to ordinary community standards. Factors such as the time, cost, and effort required on the part of the offender should be objectively assessed in determining whether a term of imprisonment in addition to the agreement should be imposed on the offender and what that term should be.

The degree to which the offence was uniquely directed at the victim (greater weight placed on the agreement) as opposed to a random act which may have affected any member of the public (more likely for there to be a residual public interest in imposing a higher additional [redacted] onment)

5. Consideration could be given to whether the offence was one committed in the context of a particular relationship between the offender and the victim, or one which may have been committed on any member of the public. For example, family and domestic violence and stealing as a servant, are offences that arise in the context of a longstanding relationship and the risk of offence to the general public is not as high. Therefore, it could be argued that there is less residual public interest in imposing a higher term of imprisonment.
6. Whereas for offences committed in public, or randomly, such as offences of violence in a mall, licensed premises, or where houses or vehicles are randomly targeted, there may be a residual public interest to impose a greater term of imprisonment, since the public at large has a greater stake in the offence.
7. This is not to diminish the concern and interest that the public has in offences such as domestic violence, or stealing as a servant, it is merely to recognise that in fashioning a sentence, the interests of the victims in this category of offence should carry more weight.

Mechanisms to minimise risk and unnecessary delays

Link to early guilty pleas

8. If restorative justice sentencing agreements (**RJSA**) are reserved only for cases in which the offender has indicated an early plea of guilty, steps can be taken at an early stage to consider whether an agreement can be reached in a case. The agreed facts of the offence form a clear basis for negotiations to begin. Further, the opportunity to participate in RJSA which might reduce the term of imprisonment that might otherwise be imposed is likely to act as an incentive to resolve a matter at an early stage. In Prison Fellowship Australia – Queensland’s (**PFAQ**) view, an RJSA is less likely to be reached where a matter has proceeded to trial, and the parties have had to go through that process and the added trauma that that process entails.

Impose deadlines

9. Further, reasonably strict deadlines by which an RJSA is to be reached should be imposed. PFAQ is of the view that imposing such deadlines will assist the parties to make decisions about whether they will participate in RJ processes and ensures that negotiations don’t simply drag out. It also places a reasonable degree of pressure on an offender to reach an agreement in order to gain the benefit of an RJSA at their sentence.

██████████
██████████ victims of crime where actual victim unable or unwilling to participate in restorative processes

10. PFAQ considers that where an RJSA cannot be reached between the parties because the victim in a particular case is unavailable or unwilling to participate in an RJSA, an offender should be given the opportunity to participate in a RJ process or conference facilitated by an organisation such as PFAQ, (which could also facilitate conferences between the offender and the actual victim also) so that an offender can gain the benefit of such a process primarily in order to facilitate their rehabilitation but also to have the opportunity of a reduced sentence (see PFAQ Sycamore Tree Project paragraphs 11-14 of PFAQ submission).

Processes to address offender non-compliance with agreed obligations

11. PFAQ considers that a regime similar to that employed for the breach of community-based orders could be employed in relation to the breach of RJSAs. Breach proceedings could be initiated upon the complaint of the victim. The relevant prosecution agency would have carriage of the breach proceedings.

Should restoration principles be included as a sentencing purpose in the *Penalties and Sentences Act 1992*?

12. PFAQ is strongly of the view that restoration principles should be included as a sentencing purpose in the *Penalties and Sentences Act* (**'the PS Act'**) since it considers those principles to be essential to an effective and fair sentencing framework.

13. If RJSAs are accepted as one form of sentencing (which PFAQ strongly supports), then the PS Act will need to be amended to reflect the purposes of restorative justice not only in the objectives and purposes of the PS Act (s 3) but also in the guidelines for sentencing (s 9). Further, RJSAs would have to be included as one of the forms of sentencing available under the PS Act along with the other options for sentencing presently available.

How might restitution and restoration best meet the needs of Indigenous communities

14. PFAQ recognises that any restitution and restorative principles would need to be developed in conjunction with Indigenous communities. However, at this juncture, it is premature to do so until the proposed framework is developed to be able to consult with the communities.

Key risks, costs and benefits, including potential unintended consequences

Risks

Perceived to be 'soft on crime'

15. The introduction of RJAs into the sentencing regime in Queensland may be considered to be going 'soft on crime'. For this reason, PFAQ would recommend that any RJA initiative commences as a pilot project and that resources are allocated to document and record its progress. After the pilot has operated for an appropriate period of time, its utility to the criminal justice system can be documented, so that any proposal for the general introduction of RJA to the sentencing regime in Queensland is supported by evidence which is current and relevant to this jurisdiction.

Retraumatizing victims

16. Victims of crime should first be screened by specialised 'trauma informed' counselling services such as: <https://www.blueknot.org.au/>, for suitability to participate in an RJA to ensure their involvement in an RJA does not re-traumatise them. PFAQ has access to such counselling services which it uses to screen participants in its STP program, namely a Memorandum of Understanding in partnership with the Australian Institute of Family Counselling.
17. This screening process would also identify a victim's suitability to participate in any RJ conferencing process. Sometimes, alternative measures (as used in the context of child sex offences) can be used to avoid the stress caused to a victim by face to face meetings with an offender, such as video conferencing or by an offender providing a video recorded apology.

Questions have been raised about the suitability of RJ practices in the context of gender-based domestic violence – further evidence required?

18. In 2009, the Australian Law Reform Commission considered the use of restorative practices might not be appropriate for use in the context of family violence:¹

The Commissions' preliminary view is that the use of restorative justice practices in the context of family violence is fraught with difficulties, and any use of such practices in that context requires extremely careful thought and preparation. These difficulties have, to date, caused family violence to be excluded from the scope of a number of restorative justice practices, or to be subject to additional protocols. If restorative justice practices are to be used in the family violence context, the Commissions' preliminary view is that these should be implemented only after extensive community consultation in the development of protocols by restorative justice professionals, as the Restorative Justice Unit in the ACT is currently doing.

The use of restorative justice practices for sexual offences, however, appears to the Commissions to be inappropriate generally. The dynamics of power in a relationship where sexual offences have been committed make it very difficult to achieve the

https://www.alrc.gov.au/publications/11-alternative-processes/restorative-justice#_ftn13, accessed 21 February 2019 (footnotes omitted).

philosophical and policy aims of restorative justice in that context. The Commissions consider that restorative justice processes carry a high risk of secondary victimisation for victims of sexual offences. Nevertheless, in view of the availability of conferencing for sexual assault in certain jurisdictions, the Commissions are interested in hearing about the experiences of participants. The Commissions are also interested in hearing whether conferencing is appropriate for a limited class of sexual offences or offenders and, if so, what safeguards are necessary or desirable.

The Commissions agree with the recommendations of the VLRC that appropriate models need to be 'based on rigorous research'. Further research was recommended by the VLRC and the Victorian Parliament Law Reform Committee. As well, the Restorative Justice Unit in the ACT is presently exploring the application of restorative justice processes in the context of family violence. Further trials and evaluations were also recommended by the National Council to Reduce Violence Against Women and their Children. In the Commissions' view, in light of these current and proposed developments it is premature to make proposals in this area. This issue should be revisited at a later stage.

Mediators and RJ conference facilitators (if government employees) may be seen as bureaucrats who are not invested in the therapeutic benefits of the RJ program

19. Both the mediator appointed to mediate an RJSA and any facilitator of RJ conferencing program should ideally be independent of government and not a public servant. Although public servants are very well placed to perform roles that require independence and a 'non-commercial' approach to the provision of certain services, it is the experience of PFAQ that victims of crime and offenders tend to regard 'non-government employees' as more 'invested' in the RJ process, performing the role by choice, not as a member of a larger bureaucracy. In particular, PFAQ has found that offenders who participate in PFAQ programs, whether chaplaincy, visitation or the STP are impressed by the fact that PFAQ volunteers are willing to visit with them at largely their own expense or in their own free time, simply because they want to make a difference to their lives. Prisoners and victims are likely to view a referral to an independent mediator or RJ conciliator as a process worth investing in, rather than simply participating in another government process.

Costs

20. A restorative based model is dependent on qualified practitioners who will engage with all participants over an extended period of time. It is by necessity a model that will require face-to-face time and perusal of considerable material, such as briefs of evidence and other supporting documentation. The costs associated with engaging practitioners and support staff will be significant. Until the model and the nature of [redacted] are engaged is known, it would be speculative to estimate the costs. In PFAQ's [redacted] experience, it takes approximately three hours per week over eight weeks (24 hours

of face-to-face time) to work through the necessary issues. While the period of time and hours may vary or be abridged, it is expected that somewhere in this order will be required.

21. PFAQ recommends consideration of the involvement of not for profit organisations to be involved in the delivery of the service. The benefit is that the cost base will be less than commercial costs and the providers will be more responsive and invested in the process. The wider benefit is that the relevant organisations will be perceived better by the participants than commercial or government employees.

Benefits

22. PFAQ has previously addressed the benefits of a restorative approach. It is proposed that pilot programmes are considered to fully evaluate the benefits. Such programmes ought to be considered in areas where there is a concentration of crime, victims, indigenous representation and access to resources. For example, Brisbane, Southport, Townsville and Cairns.

Potential unintended consequences

23. Where victims of crime are given a greater role in the sentencing process through RJSAs, there is the potential for offenders to exert pressure on their victims to reach an RJSA that is more favourable to the offender, as happens at times in the ordinary administration of justice when offenders pressure victims to withdraw a complaint or not report an offence in the first place.

24. PFAQ considers that several measures may be adopted to avoid such pressure being able to be brought against a victim. They might include the following:

- a. ensure that any RJSA must be reviewed by either a prosecution agency or a court and gain their approval (as well as the victim's) so that the victim is not the only 'non-offender' party from whom approval must be sought. That is, where the victim feels pressured into a particular outcome which they do not wish to accept, ultimately, the prosecution agency would also not approve the proposal, but it can be the agency or the court to which the failure to reach an RJSA can be attributed, in order to reduce the risk of reprisals from the offender;
- b. ensure the victim has the opportunity to discuss the terms of any proposed RJSA with their own support persons/family/advisors in the absence of the [REDACTED] offender, to provide the victim with the opportunity to voice any concerns they have about the conduct of the offender in the RJSA process. As noted in

this respect, PFAQ has signed a Memorandum of Understanding in partnership with the Australian Institute of Family Counselling.



Conclusion

25. At the forefront is the universal frustration of victims of crime being traditionally limited in their opportunity to participate in the court process, and when they do, feeling powerless and re-traumatised. Weighed against this is the need for a just and fair process to sentence the offender and maintain community expectations.
26. RJSA principles are best suited to be included in the PS Act to ensure its recourse and availability on sentencing; the involvement of the prosecution agency; guidance as to its effect on sentence, and the consequences for breach/non-compliance of the agreement on sentence.
27. RJSA process is ideally suited for the great majority of offences, especially those which are non-violent and burdening the custodial centres.
28. The RJSA is a low-risk process for the offender and victim to be involved in when appropriately conducted.
29. Each participant in RJSA ought to have the assistance of professional and other support structures to screen their appropriateness and to continue on the journey after the sentencing.
30. Adequate resources will be required to ensure that not only screening and counselling/support is available, but face-to-face time by mediators and/or facilitators over an extended period of time (6 – 8 weeks) to allow the process to work.
31. In the event the victim is unavailable or unwilling to engage in the RJSA process, consideration should be given to the use of ‘surrogate’ victims.
32. The involvement in not-for-profit or non-government organisations ought to be considered, as they are more likely to be invested and responsive in the delivery of RJSA and be *perceived* by both victims and offenders and being impartial.
33. The involvement of a prosecution agency will be required to approve any agreement and ensure that the agreement is not the product of undue pressure by either the victim or offender.
34. Any agreement will need to be reflective in broad terms with the principles of parity in sentencing and community expectations.

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