



SUBMISSION TO THE REVIEW OF CRIMINAL PROCEDURE IN QUEENSLAND'S MAGISTRATES COURTS

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Submission by:

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Introduction

Clark & Associates Mediation Services Pty Ltd is a private mediation law firm specialising in providing tailored dispute resolution services across several areas. Legal Director, Kate Clark, is a Nationally Accredited Mediator, Family Dispute Resolution Practitioner and Trauma-Informed Practitioner. Ms Clark has a Bachelor of Laws and Bachelor of Behavioural Science (Psychology) and is a practising lawyer with a background in criminal defence and family law and is passionate about and believes in the benefits of restorative practice and restorative justice in criminal law matters. Ms Clark is relevantly a member of the Queensland Law Society, Resolution Institute, Australian Association for Restorative Justice, Restorative Practices International and the Blue Knot Foundation.

Clark & Associates commenced in 2017 with a view to providing specialist high quality restorative justice services to private and legal aided clients. Our services provide survivors/victims, offenders/defendants and other affected/impacted people a genuine opportunity to discuss criminal matters in a way that informs and empowers parties. Our service is voluntary and has a focus on parties self-determining their outcomes. We provide a facilitative, trauma-informed, structured approach.

Restorative Justice is defined by the UK Victims Code as:

"a process that brings those harmed by crime, and those responsible for the harm, into communication. It enables everyone affected by a particular incident to play a part in repairing the harm which can be valuable in finding a positive way forward."





Tony F. Marshall (1996) defined Restorative Justice as:

“a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”

Restorative Justice provides many benefits to participants and can be of assistance at various stages in the criminal law process from pre-charge, through pre-sentence, post-sentence and during incarceration.

Clark & Associates are passionate about Restorative Justice and welcomes the Review of Criminal Procedure and how it relates to Restorative Justice in Queensland’s Magistrates Courts.

This document will address:

CONSULTATION QUESTION 32:

Are the existing criminal procedure laws about mediation of matters in the Magistrates Court working effectively? If not, why? Should there be any changes?

The Terms of Reference in the Review outline the Scope of the reviewer. In particular, the scope includes that the reviewer should consider:

- Alternative ways to deal with matters;
- Explore options to improve existing procedures; and
- Consider more efficient and effective methods to deal with matters including ways to reduce court operational costs and procedural delays.

The below submission will address the consultation question while keeping in mind the above considerations as the primary objective.





EFFECTIVENESS OF EXISTING CRIMINAL PROCEDURE LAWS ABOUT MEDIATION OF MATTERS

Referral to Restorative Justice

1. The first step in the criminal process sees the offender and the victim in contact with the Queensland Police Service with both investigating officers and police prosecutors. Officers and prosecutors rely on the Queensland Police Service Operations Manual ("OPM") when making a determination as to whether a matter is suitable for dispute resolution procedures. Chapter 3.3 - Adult Restorative Justice Conferencing ("ARJC") includes procedures relating to referral, suitability of, and finalisation of ARJC.
2. In practice, we have experienced significant resistance by the Police Prosecution Corps around the use of Restorative Justice processes, especially the use of private services. This is likely due to the OPM containing the words, "Officers and prosecutors are only to refer matters to the DRB or local Community Justice Groups (as relevant). The Service does not have agreements with private mediators or any other entities to provide this service" at Page 10 of OPM (Issue 88 Public Edition - Effective 3 June 2022). The OPM also lists nine courts at which the ARJC may be utilised, in four offices throughout Queensland.
3. Police referrals can be made to the ARJC prior to commencing proceedings. Once proceedings have commenced, referral may only be made by the Prosecutor.

Submission:

That the OPM exclusion criteria and list of courts participating in the ARJC program is limiting and the exclusion of private restorative justice services is an ineffective and inefficient method of dealing with matters before the Magistrates Court and therefore should be considered as part of this review. Expanding the ARJC program to include the use of private services with appropriate qualifications and experience would allow participants in all regional areas of Queensland to access services and not be limited to the 'catchment' areas currently outlined in the OPM.



Screening for Suitability

4. Prosecutors are to discuss with the investigating officer regarding suitability of the matter for referral prior to referring to ARJC. Suitability at 3.3.1 of OPM outlines specific exclusion criteria which may result in many matters being screened as unsuitable by the Police or Prosecutor prior to reaching a qualified mediator screening process. The OPM does, however, state that the OIC may authorise the referral despite the suitability criteria. The suitability criteria in OPM 3.3.1 put limits on eligibility for parties' participation. Often parties will not be given the option to proceed to mediation despite their wish to attend, while others will not be adequately informed of the access to Restorative Justice services. For example, the presence of Domestic Violence should not be an automatic exclusion criterion but should be determined through an experienced mediator screening process.

Nationally Accredited Mediators undertake a thorough screening process before embarking on the mediation between parties. This process involves interview-style communication where the mediator explores and addresses various aspects of the individual circumstances of each party to determine whether the parties have the ability to negotiate freely, appropriately adhere to ground rules and participate fully in the process. The mediator uses the screening process to check and assess that each parties' participation is, in fact, voluntary. Where factors exist which may inhibit the parties' effective participation in the process, the mediator may determine the matter is unsuitable for mediation or adapt the process to ensure safe and appropriate participation. It is the role of the mediator during the screening process to collaborate with participants to ensure safety plans are in place if necessary. An experienced mediator is less likely to use strict exclusion criteria.

In practice, victims and offenders have expressed their feelings of the screening process in the current ARJC program as prohibitive. Many of those who may wish to participate in mediation of their matter have been rejected on factors such as:

- The type of matter
- Previous offences and criminal history
- Prior mediation attempts between the parties
- Their responsiveness to contact
- Their participation during screening





Many participants report that screening is a harmful process. Victims report inappropriate questions, while defendants report unfair and prejudicial treatment. Parties are also emotionally impacted by the rejection of their matter through the screening process. Often parties are screened out with no rationale given leaving them with feelings of rejection and dreading the court process to follow. Equally, Prosecutors have expressed feeling limited by the suitability factors set out in the OPM. Those Prosecutors who make a decision to advance the matter to mediation are often left frustrated at the matters then being screened out by the ARJC mediators when there is a possibility for resolution through the mediation process.

5. The Director's Guidelines for Prosecutors in Queensland includes that victims should be provided with access and information about victim-offender conferencing, however this is at the discretion of the prosecution and not a requirement (Directors Guidelines for ODPP Page 32 'Information for Victims' (b)). Prosecution seemingly then use the exclusion criteria in the OPM to determine whether it is 'appropriate' to inform a victim, and provide access to, Restorative Justice processes.

While Restorative Justice remains a voluntary process, all parties should be able to make an informed decision about their willingness to participate in the process of Restorative Justice, at any stage of the criminal law process.

Submission:

That suitability for Restorative Justice mediation services should be at the discretion of the appropriately qualified mediator and not left to the Police or Prosecution to determine. The restrictions do not allow victims the opportunity to make an informed decision about whether mediation is an appropriate avenue for their individual circumstances, and prevents the victim from accessing a process which could assist to repair harms experienced. Referrals should be made for any matter where the parties provide fully-informed consent and screened out only by a qualified Restorative Justice practitioner. Victims should be given information about the potential benefits of the restorative justice mediation process at all stages of the criminal law process, so they may make an informed decision. Further, victims should be given the choice of the public ARJC program or a private Restorative Justice service so they may find a suitably qualified practitioner who is experienced in the area relating to their individual matter.





Access to ARJC

6. The existing ARJC system is currently overwhelmed. Parties are left to seek out private mediation as a last resort after the ARJC program is full, rather than being given the option to explore private services in the first instance.

Submission: Inclusion of external, private and appropriately qualified Restorative Justice services as part of the Restorative Justice process would alleviate the burden on the public system and allow parties more options to pursue a restorative justice pathway.

Limitations of current ARJC program

7. The current ARJC program may not train mediators in trauma-informed practice and this can have serious consequences for participants during the process. Failure to consider the trauma of participants can be harmful and may worsen symptoms. Anecdotal evidence in practice suggests that the ARJC process sometimes leaves participants feeling they were treated poorly during screening.

For example, rather than deeming a matter unsuitable because the offender failed to acknowledge their wrongdoing in the appropriate way during standard screening questions, the mediator should use their skills to explore with the offender layers of accountability and decision-making, the impact of their actions on others, especially the victim, and assist the offender to identify, verbalise and analyse their choices, behaviour, accountability and wrongdoing, and further explore the underlying causes and context of their offending. If mediators are not suitably qualified, experienced, or willing to undertake a thorough screening process, participants can be left feeling rejected, and this can have impacts on the rehabilitative and deterrent features of the restorative justice mediation process.

8. Not all mediators are trained in restorative justice techniques, or have the appropriate background qualification or experience to take on complex matters. Mediators should be required to meet criteria to apply for and maintain registration as a Restorative Justice Practitioner, in a similar way that Family Dispute Resolution Practitioners are appropriately qualified and registered to facilitate family law matters. Currently, the Australian Defence Force framework provides a suitable model for minimum





requirements of facilitators, which could be used as a basis for registration of Restorative Justice Practitioners, including:

- Degree in law, social science or similar
- Nationally accredited mediator under the NMAS
- Undertaken formal training in trauma
- Experience in mediating complex matters
- Understanding and proven skills in facilitating Restorative processes

Practitioners could undertake further training or show experience in criminal law, restorative facilitation, or similar, to attain and maintain registration. This registration should also be required by those mediators tasked with facilitating matters through the current ARJC services.

9. Mediators have been engaging in alternative delivery of dispute resolution services for many years through the use of telephone or video conferencing technology. This type of delivery has increased significantly since 2020, with parties more willing to attend via alternative means. This societal change due to the COVID-19 pandemic has meant that more people in remote locations have had access to mediation services where it may not have been possible in-person. The current access to ARJC from only 4 locations in Queensland as listed in the OPM, limits access to Restorative Justice for those in regional, rural and remote communities. The expansion of alternative delivery systems in mediation generally should be extended to the Restorative Justice program in the criminal law process.

Submission: That training of ARJC mediators should be reviewed to ensure that they possess the necessary skills to adequately facilitate mediations between parties. That inclusion of private mediators who are trauma-informed and adequately trained should be seen as a welcome addition to the Restorative Justice process. That a register of appropriately qualified practitioners be kept. That services should be expanded to include those in regional, rural and remote areas of Queensland.





Cost-effectiveness

10. While funding is not being specifically addressed by this review, it is worth noting that:
- The defendant is usually responsible for the cost of private mediation
 - Legal aid funding may be available in some circumstances for private mediation

Submission: That where Restorative Justice is more readily available for parties, the costs to the courts and to Legal Aid in funding lengthy court proceedings can be reduced resulting in a more cost-effective criminal law process.

PROPOSED CHANGES TO EXISTING CRIMINAL PROCEDURE LAWS

PROPOSAL 1

All victims should be given the opportunity to participate in restorative justice mediation.

- A. The reviewer examines the UK *Code of Practice for Victims of Crime in England and Wales* as a basis for review of our criminal law procedures. Specifically, Clauses 3, 4 and 11 deal with informing victims of crime of their rights of access to Restorative Justice Services.
- Under Clause 3 of the Code, victims, within 5 working days of reporting a crime, have the right to be provided with information as to the options available for Restorative Justice. They then have a right to be informed of the benefits of Restorative Justice at any stage of the criminal justice process by all service providers.
 - Under Clause 4, victims have rights to be referred to services that support victims, including Restorative Justice services, within 2 days of reporting a crime to police.
 - Similarly, Clause 11 provides for a right to Restorative Justice in Youth Offending.
- B. The Department of Justice and Attorney-General Directors Guidelines - 'Information for Victims' (Page 32) should be amended to remove the words 'where appropriate'. Alternatively, the first dot point in (b) 'victim-offender conferencing services' should be included in (a) so as to require prosecutors to provide information to victims regarding their options for Restorative Justice mediation in all matters.



- C. The exclusion criteria for referral to ARJC in the OPM at 3.3.1 be reviewed, or removed, to allow all matters to be referred to AJRC or Restorative Justice mediators on the request of the victim, where the victim has been fully informed of the process and its benefits. This will remove the onus of assessing suitability and eligibility from Police and Prosecutors and redirect that role to suitably qualified mediators experienced in the assessment process.

PROPOSAL 2

Expansion of Restorative Justice Services to include appropriately qualified private mediators

- A. The OPM remove obstacles to referral to private mediators at the point of Police or Prosecutor referral. Specifically, removal of the words at 3.3 of the OPM:

“Officers and prosecutors are only to refer matters to the DRB or local Community Justice Groups (as relevant). The Service does not have agreements with private mediators or any other entities to provide this service”.

- B. The list of courts where ARJC is available, at 3.3 of the OPM be removed or expanded to include Restorative Justice being available to all courts in Queensland, through the use of private mediators engaged to deliver services remotely where necessary.
- C. Section 53A(1) of the *Justice Act 1886* (Qld) be amended to include private mediators. The amended section to read:

53A Power, after summons issued, to order mediation

(1) If a summons has been issued under [section 53](#), a magistrate or the clerk of the court for the place where the defendant is required to appear may order the complainant to submit the matter to mediation under the [Dispute Resolution Centres Act 1990](#) **or to an appropriately qualified restorative justice practitioner**

(an **order to mediate**).



Where **'appropriately qualified restorative justice practitioner'** is defined as:

- a) Private mediators registered as Restorative Justice Practitioners with the Queensland Department of Justice and the Attorney-General; and
 - b) That the Queensland Department of Justice and the Attorney-General maintain a register to that effect.
- D. The Queensland Department of Justice and the Attorney-General commence and maintain a register of appropriately qualified Restorative Justice Practitioners to whom a criminal matter could be referred for Restorative Justice mediation at any stage of the criminal law process.

The reviewer should consider the qualifications required of Restorative Engagement Facilitators in current Australian Defence Force Restorative Engagement Program Framework issued by the Commonwealth Ombudsman Office as a model for appropriateness of qualifications for Restorative Justice Practitioners included on such a register.

Conclusion

There are innumerable benefits of using private mediators in addition to the current ARJC system, including:

- o Reducing the burden on the ARJC program
- o Reducing the burden on the court system
- o Assisting parties to resolve their matters
- o Provide high quality restorative justice services to people often impacted by serious crime
- o Provide benefits to the wider community
- o The experience of private mediators in dealing with complex matters
- o The experience of private mediators in legal matters
- o The experience of private mediators in social sciences such as psychology and social work
- o The experience of private mediators in determining suitability of matters and the impacts on the parties both positive and negative of proceeding where complex issues are involved
- o Trauma training of private mediators



Clark & Associates Mediation Services

Family Dispute Resolution | Property Settlement | Restorative Justice

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The use of private mediators in criminal law procedures in Queensland as outlined in the submissions and proposals above would assist to meet the objectives of the criminal law procedures review and assist the reviewer to provide:

- Alternative ways to deal with matters;
- Options to improve existing procedures; and
- More efficient and effective methods to deal with matters including reducing court operational costs and procedural delays.

We thank you for the opportunity to provide submissions and look forward to the outcomes of this review.

