



Aboriginal Community Justice Reports

Addressing Over-Incarceration

Victorian Aboriginal Legal Service
Discussion Paper

October 2017

For more information contact:

Alister McKeich
Senior Project Officer
03 9418 5999
amckeich@vals.org.au

Reducing Over-incarceration - Innovation is Required

It is clear that Aboriginal and Torres Strait Islander peoples come into contact with the criminal justice system and are incarcerated at far higher rates, and for longer periods of time, than any other cohort in Australia.¹

The reasons for this are complex and varied, and have their roots in the traumas of colonisation. For many, contact with state systems begins at childhood and carries through youth into adulthood.

The Victorian Aboriginal Legal Service (VALS) has had over 40 years' experience in working with Aboriginal communities, and is the peak deliverer of culturally appropriate services, including legal representation, children and youth services, post-release and community justice.

VALS are committed to finding new and innovative ways to address the current crisis of over-incarceration.

We are looking to establish the use of Aboriginal Community Justice Reports (ACJR), which will be a community written court report for use in a variety of justice scenarios, including bail, sentencing, child protection and for young people.

Such reports are modelled on Gladue² reports used in Canada, which are successful in finding therapeutic and culturally relevant sentences for First Nations' offenders,³ with similar reports also being used in Queensland at the Murri Courts.⁴

However, research and further trials will be required to determine how best such reports can be used in Victoria.

¹ In 2015-2016, Aboriginal and Torres Strait Islander people made up 27% of the prison population and 55% of the juvenile detention population. Price Waterhouse Cooper 'Indigenous Incarceration: Unlock the Facts.' (May 2017) www.pwc [accessed 8 June 2017] 4

² R. v. Gladue [1999] 1 S.C.R. 688.

³ '[C]ourts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for [Canadian] Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for [Canadian] Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel.' R. v. Ipeelee 2012 SCC 13, [2012] 1 S.C.R. 433 [60].

⁴ Cultural reports are available for all defendants in the state's 13 Murri courts, run by the Courts Innovation Program in the Justice Department.



Aboriginal Community Justice Reports will be an added tool used to identify the underlying factors in offending and incarceration, and provide a mechanism to assist the offender and reduce incarceration rates.

VALS also proposes that the *Sentencing Act 1991* (Vic) be amended to support the use of Aboriginal Community Justice Reports (ACJRs) and consideration of the courts to the persons' Aboriginal background, as per the *Canadian Criminal Code* s718.2(e).⁵

Fast Facts: Incarceration

- In Victoria, Aboriginal and Torres Strait Islander people are 11 times more likely to be incarcerated than the state's general population, and nationally the figure is 13 times.⁶
- 34% of Australia's adult female prison population are Aboriginal and/or Torres Strait Islander peoples.⁷
- As at October 2014 there were 512 Koori prisoners, compared to 388 in June 2013, with over one third (36 per cent) of the Koori prison population located in two prisons, Port Phillip Prison (maximum security) and Fulham Correctional Centre (medium security) ... Over half the male Koori prisoners received under sentence in 2013-2014 came into prison as a result of their parole being cancelled.⁸
- The fact that Koori people were 10.7 times more likely than all Victorians to be identified as an offender in [public behaviour offences] may indicate there is an over-policing of Kooris in some communities.⁹

Aboriginal Community Justice Reports (ACJRs)

What is VALS proposing?

Aboriginal Community Justice Reports are a pre-sentence, community written report, which aims to gather information about underlying impacts on any Aboriginal offender.

⁵ "All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of [Canadian] aboriginal offenders." *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

⁶ Victoria, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria*, Parl Paper No 94 (2014-15) 74 citing Australian Bureau of Statistics, *Prisoners in Australia*, 2014, December 2014, Table 17.

⁷ Human Rights Law Centre and Change the Record Coalition, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (May 2017) 11.

⁸ Victoria, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria*, Parl Paper No 94 (2014-15) 76 citing Corrections Victoria Information Management and Evaluation Branch, *Review of the Koori Education, Training and Employment Strategy*, January 2015, 10.

⁹ Office of Police Integrity Victoria, 'Talking together - relations between Police and Aboriginal and Torres Strait Islanders in Victoria: a review of the Victoria Police Aboriginal Strategic Plan 2003-2008', 20.



The purpose of preparing such reports is to identify possible underlying drivers of the individual's offending, in particular, those that may relate to the impacts of trauma and colonisation uniquely experienced as an Aboriginal person.

The reports also provide the opportunity for the offender and the community, to spend time to consider and speak about such impacts in a therapeutic and restorative justice manner.

This also provides a further voice to the offender, their family and community, and thus greater involvement in, and engagement with the justice system, akin to the aims of the Koori Courts.¹⁰

Fast Facts: Recidivism

- In Victoria, Aboriginal and Torres Strait Islander people are also more likely than the general prison population to return to prison, with a recidivism rate of 55 per cent, compared to the overall rate of 44.1 per cent.¹¹
- Since 2014-15, the proportion of prisoners released who returned to prison within two years was 59.7 per cent for Aboriginal prison population and 42.6 per cent for non-Aboriginal prisoners.¹²

What is the aim of Aboriginal Community Justice Reports (ACJR)s?

We know that the rates of incarceration are exceedingly higher for Aboriginal and Torres Strait Islander peoples.

The aim of the ACJR is to provide the courts with necessary information to make more appropriate sentencing considerations for Aboriginal and Torres Strait Islander peoples.

¹⁰ In Victoria, the Koori Court was legislated by the Magistrates Court (Koori Court) Act 2002. The aims of the Koori Court include:

- to divert Koori offenders from incarceration;
- increase Aboriginal engagement and administration of the law and the legal processes;
- reduce failure-to-appear rates;
- find alternative sentencing measures, and;
- increase accountability of Koori offenders and their families and communities. Nigel Stobbs and Geraldine Mackenzie, 'Evaluating the Performance of Indigenous Sentencing Courts', *Indigenous L. Rev.* 90 2009 [94].

¹¹ Victoria, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria*, Parl Paper No 94 (2014-15) 6.

¹² State of Victoria, *Victorian Government Aboriginal Affairs Report 2016*, 21.



The reports will contribute to lessening recidivism rates; ensuring offenders can get appropriate support; and provide a therapeutic mechanism via the justice system.

VALS is committed to trialling and implementing ACJRs in order to contribute to combating the high rates of Aboriginal and Torres Strait Islander incarceration.

Fast Facts: Youth Justice

- In 2016, the rate of 9.4 per 1,000 Aboriginal and Torres Strait Islander young people in Youth Justice in Victoria was approximately 13 times greater than the rate of 0.7 per 1,000 non-Indigenous young people.¹³
- 47 Victorian Aboriginal young people received youth residential or youth justice centre order during 2015-2016 compared to 245 non-Aboriginal (16%; 5.2 times)¹⁴

Why implement Aboriginal Community Justice Reports (ACJRs)?

VALS' lawyers are continually asked for more information regarding the background and underlying impacts driving offending for Aboriginal people.

Magistrates and judges have made similar requests, and such reports are being considered by the Australian Law Reform Commission as a tool to help reduce over incarceration.

Aboriginal Community Justice Reports will be prepared to provide the necessary information for magistrates and judges to find more suitable sentencing arrangements that address such underlying impacts.

VALS sees the Aboriginal Community Justice Reports as an extension of, and addition to, the function of the Koori Courts with the aim to implement such reports across a range of courts and justice scenarios, assisting both Koori Courts and the broader court system.

¹³ Sentencing Advisory Council Victoria, *Sentencing Trends: Young Indigenous People in Detention* (30 November 2016) <<https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-statistics/young-indigenous-people-in-detention>> citing Australian Institute of Health and Welfare, *Youth Justice in Australia 2014-15*, Cat. no. AUS 198 (2016), Supplementary table S77b.

¹⁴ *Youth Parole Board Annual Report 2015-16*.



How will ACJRs work?

The Aboriginal Community Justice Reports will be prepared by independent, Aboriginal community writers and researchers.

Leading up to the sentencing date, the ACJR writer will consult with the offender, their family and relevant community members (with permission).

Information gathered in the consultations will be included alongside academic information relevant to the person's experience; for example, inter-generational trauma and the impacts of child removal.

The report will also make recommendations as to sentencing considerations. For example, where applicable, relevant community controlled programs and healing strategies could be recommended as part of a culturally appropriate legal response in a variety of justice scenarios such as Youth Bail Supervision, Intensive Monitoring and Bail Supervision Scheme, Youth Control Order, Community Corrections Order (CCOs) or Bail Conditions.

The report will then be submitted to the courts to be used as a sentencing consideration by the magistrate or judge.

How is an ACJR different from other pre-sentence reports?

Currently, there is little evidence contained in existing pre-sentence reports that relates directly to the unique experiences of Aboriginal people and the impacts of colonisation, particularly from a community perspective.

Case Study 1

Sarah was taken away from her mother as a child, and has ongoing drug and alcohol issues. Sarah has also now lost custody of her own children for two years. She is continuously offending (mostly driving offences) and is now looking at time in custody.

Sarah's partner also died in bed beside her and most likely has PTSD from this, and other experiences, but has yet been assessed.

An Aboriginal Community Justice Report would be useful in examining how intergenerational trauma has affected Sarah.

Not only would the Report make recommendations to the court around addressing specific issues affecting Sarah, the consultative experience would also help Sarah to better understand her own offending behaviour.

Another outcome would be the opportunity to explore and possibly reconnect with family lost via her removal as a child as part of the Stolen Generations.





An ACJR will:

- Assist the courts to determine sentences that address the underlying impacts unique to Aboriginal persons;
- Connect the individual with community programs and responses, with the understanding that a culturally appropriate, community led response will be more effective;
- Be a community written report that aims to provide the offender, their family and community with a greater voice in the court;
- Provide Aboriginal communities with greater involvement in the justice process, achieving more sustainable outcomes and reducing reoffending;
- Be reviewed by an independent person with legal experience to ensure that the offender or other people consulted for the report are not further implicated, and that other legal matters do not arise.

Case Study 2

Joe is an elderly man who has only recently begun a series of alcohol related offenses. The offending behaviour only began when he received his adoption records only to find that his family are Aboriginal – a fact he was previously unaware of.

This life event has triggered a response whereby his alcohol consumption and offending behaviour – breaking and entering commercial premises to obtain more alcohol – is masking a deeper trauma.

An Aboriginal Community Justice Report would be useful in this situation, to further explore the circumstances around his adoption and subsequent offending, and refer Joe to services that can assist him, instead of incarceration.

If properly case managed, Joe would also receive assistance to find out more about his family and cultural heritage which would assist in his healing and wellbeing.

What is the intended outcome of an ACJR?

We know that Aboriginal people in the justice system respond much better to prevention, diversion and other justice programs when they are community led and culturally based; for example, the higher completion of CCOs at Wulgunggo Ngalu Learning Place.¹⁵

Based on the impacts and experiences of the offender that the ACJR seeks to explore, the ACJR will provide recommendations to the court as per therapeutic and culturally appropriate sentences.

¹⁵ 'Wulgunggo Ngalu Learning Place Final Evaluation Report', Clear Horizon Consulting for the Department of Justice - Corrections Victoria (2013).





This may not be applicable in all scenarios; for example, where a term of incarceration is unavoidable. However, an ACJR may be useful to inform the type of program responses a person might require during this period of their life and in to post release.

It is also proposed that – like the Gladue process in Canada – the individual is case managed post-sentence in order to assist and support the person through their sentencing regime.

Do these reports work in other jurisdictions?

Evaluations of Gladue reveal that the reports assist judges in Canada to interpret s718.2(e) and can contribute to lessening reoffending.

While the aim of the Gladue process is of course to reduce over-incarceration, it will take implementation of this and other restorative justice methods before there is a sustained reversal in incarceration rates.

Furthermore, there are other additional benefits to Gladue processes, including:

- the courts acknowledging the impacts of colonisation and thus contributing in a direct way to reconciliation;
- an increased understanding of the impacts of colonisation for the offender, their family and community;
- finding a targeted means to address those impacts and thus directly addressing what is causing the offending, and;
- an increased voice in a colonial legal system that has failed to reflect Indigenous experiences or hear Indigenous voices in any real manner since inception.¹⁶

¹⁶ M.E. Turpel-Lafond, 'Sentencing within a Restorative Justice Paradigm: Procedural Implications of R. v. Gladue', Native Law Centre, *Justice as Healing: A Newsletter on Aboriginal Concepts of Justice*, Vol. 4, No. 3 (Fall 1999).

Case Study 3

Rachel is a 14 year-old Aboriginal young person with escalating contact with the criminal justice system.

Rachel currently lives with family members as her mother is in jail, and her father has alcohol issues. She has also experienced family violence.

Despite these challenges, Rachel does well at school and is proven to be a very capable student.

An Aboriginal Community Justice Report would be able to assist in identifying the underlying issues in her family – such as possible historical child removal – as well as recommending culturally based programs that will help divert her from further criminal justice contact.

The report would also provide a voice for Rachel as a young person, and encourage her to learn more about her Aboriginal community.



In comparison, it is clear that placing people in prison does not address offending or reduce recidivism. In fact, the huge increase in incarceration statistics would demonstrate that in actual fact, incarceration leads to further offending, and thus more victims of criminal behaviour, at great expense to, and impact on, the broader community.¹⁷

Fast Facts: Education

- In 2014-15 the proportion of Aboriginal and Torres Strait Islander people aged 15 years and over who had completed Year 12 or equivalent was only 25.7%. However this was up from 20.4% in 2008 and 16.9% in 2002.¹⁸

Writing Aboriginal Community Justice Reports

What information are we looking for in an ACJR?

It is clear that there are a number of underlying drivers of offending, many of which relate specifically to the unique impacts of colonisation on Aboriginal people.

The ACJR will seek to find out information related to, but not limited to:

- Inter-generational trauma
- History of Stolen Generations
- Loss of connection to culture and identity
- Family connections with traditional lands, missions and reserves
- Experiences with racism
- Experiences with child welfare and youth justice
- Drug and alcohol misuse and abuse
- Impacts of poverty
- Family Violence experience/history
- Previous history of incarceration in the family/community

¹⁷ A recent research paper released by Price Waterhouse Cooper states that the cost of Indigenous incarceration to the Australian economy is nearly 8 billion dollars a year. Price Waterhouse Cooper, *Indigenous Incarceration: Unlock the Facts*, (2017) 7.

¹⁸ Australian Bureau of Statistics, National Aboriginal and Torres Strait Islander Social Survey 2014-15 (28 April 2016) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4714.0>>.



The ACJR does not only focus on negative impacts, but also seeks to explore strengths of the person. This is where interviews with community members may be helpful. For example, the ACJR might find out that the person:

- Has connections to leadership in the community
- Has a talent for art, football, maths or science
- Used to own and run a business
- Has aspirations to study at university
- Is a powerful communicator
- Wants to do the best for their family

The aim of the ACJR is to provide a picture of the offender as a whole person, to find out what is contributing to causing the offending, and to find strengths with which to advocate for sentencing alternatives.

Fast Facts: Employment

- In 2008, the rate of unemployment among Aboriginal Victorians was 15.5 per cent and as of 2016 sits around 16.4 per cent.¹⁹

What recommendations might be made?

The recommendations made will be determined by the nature of the offence(s) and potential sentence.

Due to the community-led and culturally responsive nature of an ACJR, an opportunity is provided for recommendations that directly target the underlying causes of the offending, and also provide community driven responses.

The writers and case workers of the ACJR program would have up to date information on a range of localised, community led and culturally based programs and initiatives.

In the case of sentences of incarceration, the recommendations (NOT the whole report) could be sent to the Aboriginal Wellbeing Officer (AWO) to assist and support the offender while in prison to complete targeted programs and wellbeing supports.

¹⁹ State of Victoria, *Victorian Government Aboriginal Affairs Report 2016*, 18.



However, VALS notes that this aspect will only be successful if the necessary community led, culturally appropriate programs are funded and made available along with any culturally appropriate systems programs.

Fast Facts: Housing

- Aboriginal and Torres Strait Islander women in Australia access crisis accommodation at 15 times the rate of non-Aboriginal women.²⁰
- A study in NSW and Victoria found that of Aboriginal and Torres Strait Islander women surveyed between 2001 and 2003 none lived in stable family housing post-release and half of those still out of prison were homeless at 9 months post-release.²¹
- 23 per cent of Aboriginal and Torres Strait Islander people in Victoria accessed specialist homelessness services in the 2013-2014 financial year.²²

How will the case-management work?

The aim of the case management is to support the person through their CCO or other relevant orders/conditions, to assist in liaising with justice workers (such as corrections and youth officers) and find and refer to relevant and appropriate programs.

In the case of incarcerated persons, the case manager may link up with the AWO and others to ensure the individual has access to the relevant programs, and is supported upon pre-release and post-release.

The case management would work alongside existing program workers, local justice workers, and other existing initiatives.

²⁰ Human Rights Law Centre and Change the Record Coalition, *Over-represented and over-looked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (May 2017) 18 citing Lorana Bartels 'Indigenous Women's Offending Patterns: A literature review' (Research and Public Policy Series No 107, Australian Institute of Criminology, 2010) 28.

²¹ Human Rights Law Centre and Change the Record Coalition, *Over-represented and over-looked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (May 2017) 18 citing Eileen Baldry et al, 'Ex-Prisoners, Homelessness and the State in Australia' (2006) 39(1) *Australian and New Zealand Journal of Criminology* 20, 25-6.

²² Victoria, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria*, Parl Paper No 94 (2014-15) 75 citing Australian Institute of Health and Welfare, *Specialist Homelessness Services 2013-2014*, 2014, page 8.



Fast Facts: Family Violence

- In 2006–07, there were 19 reported Aboriginal family members affected in family violence incidents for every 1000 of the Aboriginal and Torres Strait Islander population in Victoria. This increased to 43 per 1000 in 2013–14, compared to an increase from three to six per 1000 for non-Aboriginal Victorians. This means that an Aboriginal person was 7.3 times more likely than a non-Aboriginal person to be an affected family member in a family violence incident.²³
- Aboriginal Victorians presented at emergency departments for alcohol-related causes at more than four times the rate of non-Aboriginal Victorians during 2014-15.²⁴

Privacy and Procedure

How will the person's privacy be protected?

The information an ACJR seeks to present to the court may be of a highly personal nature, for example, containing reports of childhood sexual abuse, as well as cultural information – this information and the person's privacy will need to be protected.

The report will be made prior to the court date so that the information can be considered by court parties, thus rendering open discussion less of a factor.

It will also be necessary that the privacy of the person is protected by some measures after the court hearing; otherwise, there will be no trust in the process thus rendering it redundant.

It is intended that the report only go to the relevant magistrate and legal counsel, and not distributed elsewhere. This is to protect the privacy of the individual, develop trust in the process and gain the most information required.

Other justice workers – such as Corrections or Court Workers – will receive the recommendations only.

The above privacy regime is utilised in Canada and has proved successful in maintaining the value of the Gladue report process.

²³ Victoria, *Royal Commission into Family Violence* (2016) vol 5, 11, citing Department of Premier and Cabinet, 'Mid-term evaluation of the Indigenous Family Violence 10 Year Plan' (September 2015), iii.

²⁴ State of Victoria, *Victorian Government Aboriginal Affairs Report 2016*, 19.



Can a court order an Aboriginal Community Justice Report to be prepared?

No. The relevant experience in Canada is that either the court or offender can request a report, but one cannot be ordered.

This is due to the fact of time and resource restraints, but also that – akin to the application process at Wulgunggo Ngalu Learning Place and other initiatives – this is only a successful process when the individual volunteers to engage with it.

The information contained in an ACJR will be sensitive, personal and possibly traumatic. As such, the individual must be aware and willing to engage with the process, right through to being case managed.

Having a magistrate or judge order such a report also undermines the community controlled, self-determining nature of the Aboriginal Community Justice Report program.

In what scenarios can an ACJR be requested and/ or utilised?

VALS proposes that ultimately, such reports could be utilised across a range of justice responses.

In particular:

- Offences which will attract a jail sentence
- Youth justice matters
- For use in both Koori Court and mainstream court
- Child welfare and Family Law responses
- Family Violence matters

Why would an application/ request for an ACJR be accepted or rejected?

It may be that the person requesting the ACJR cannot establish their Aboriginality.

The person requesting the ACJR may be determined not to be suitable for the potentially re-traumatising experience due to the information required for an ACJR.

How would an ACJR differ from the current Koori Court?

In the case of use of Koori Court, ACJRs are designed to assist the deliberation and



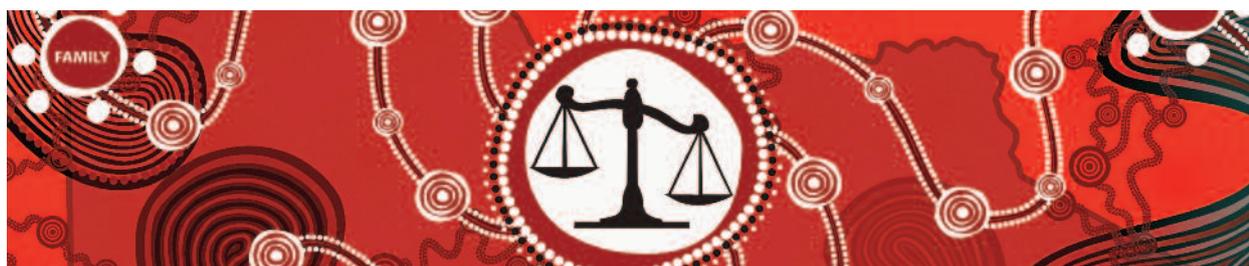
decision making process, by providing a period leading up to the appearance to gain the necessary information and consult further with community.

And ACJR may also assist elders for whom the offender is unknown or from a different community.

It is envisioned however that Aboriginal Community Justice Reports will be used not only in the Koori Courts, but in mainstream courts and in other legal processes.

Fast Facts: Mental Health and Wellbeing

- Of Aboriginal prisoners in Victoria, 92.9% of women and 76% of men found to have a lifetime substance misuse disorder. Most people with mental illnesses had a co-occurring substance misuse disorder.²⁵
- Nearly one in every three Aboriginal and Torres Strait Islander people nationally reported high levels of psychological distress, particularly among victims of violence, discrimination or removal from families.²⁶
- In 2015, 35.8 per cent of Aboriginal Victorians reported experiencing high or very high rates of psychological distress compared to 12.6 per cent of non-Aboriginal Victorians.²⁷
- Of Aboriginal prisoners in Victoria, 71.7% of men and 92.3% of women had received a lifetime diagnosis of mental illness. For both males and females, the most prevalent illnesses included major depressive episodes and post-traumatic stress disorder (PTSD). Almost half (46%) of women, as compared to 14.7% of men, were found to have met the criteria for PTSD at the time of the interview.²⁸



²⁵ James Ogleff et al, *Koori Prisoner Mental Health and Cognitive Function Study* (Victorian Department of Justice, February 2013) 13.

²⁶ Victoria, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria*, Parl Paper No 94 (2014-15) 75 citing Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, Oct 2010, October 2010.

²⁷ State of Victoria, *Victorian Government Aboriginal Affairs Report 2016*, 19.

²⁸ James Ogleff et al, *Koori Prisoner Mental Health and Cognitive Function Study* (Victorian Department of Justice, February 2013) 13.



Proposed Aboriginal Community Justice Report Process

Offender receives a finding of guilt, or could be at point of charge and legal advice as to likely court proceedings, at discretion of lawyer

ACJR requested

ACJR request reviewed and accepted/ rejected

Interview and consultation process 4-6 weeks

Report and recommendations submitted for legal review

Report submitted to the magistrate or judge prior to sentencing date

Report used in sentencing consideration

Sentence handed down

Offender moves into case management process

NB. There will need to be built into this process the relevant Court and Corrections' services. This model is a draft only for consideration.

Notes on the length of time taken to produce an ACJR

Given the time length required to write a comprehensive ACJR, there would need to be some flexibility regarding the request and start point for the report.

This may be as per an order in place pending a full report, as to not keep people on remand or bail any longer than required; or a request to be filed upon the charges and likely sentence; or, a condensed version of a report could be supplied to the court as an interim measure pending full report.

If in the cases of youth and short sentencing turnarounds where there will not be the time to complete a comprehensive ACJR, a condensed version of a report could be supplied pending a more detailed report. Other applications for the process could be including an ACJR as part of bail/ parole/ CCO/ prison sentence.



This would also be with the view to the offender gaining a better understanding of the underlying factors, providing a method of therapeutic healing, as a means to reducing recidivism and providing a strategy forward should they come into contact with the justice system again.

VALS does not see the use of an ACJR limited to sentencing options only, but as a flexible therapeutic practice that could assist Aboriginal people at various stages of contact with the justice system.

Fast Facts: Child Protection

- In Victoria, Aboriginal children are 12.9 times more likely to be in out-of-home care than non-Aboriginal children. This is even higher than national rate of Aboriginal and Torres Strait Islander children which is 9.5 times more likely than non-Aboriginal.²⁹
- In Victoria from 2006-2015 there was a 70% increase of Aboriginal children in out-of-home care (from 42.1 to 71.5 per 1,000 children in the population).³⁰
- Around 19% of Aboriginal children in Victorian are receiving child protection services. This is higher than the national Aboriginal and Torres Strait Islander figure of 14.5%.³¹

Proposed Sentencing Amendment

The Victorian Aboriginal Legal Services also proposes that the introduction of the Aboriginal Community Justice Reports be accompanied by legislative amendment to support the use and judicial consideration of the reports.

As an example, Canada has supporting legislation in the *Canadian Criminal Code* s718.2(e) which mandates that judges to consider factors of the person's Aboriginality during sentencing.³²

Victoria has similar legislation under the *Bail Act 1977* (Vic) s3A,³³ but as yet, not under the *Sentencing Act*.

²⁹ Victoria, *Always Was Always Will Be Koori Children: Systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, Parl Paper No 207 (2016) 22.

³⁰ Victoria, *Always Was Always Will Be Koori Children: Systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, Parl Paper No 207 (2016) 26, citing Australian Institute of Health and Welfare, *Child protection Australia 2005-06, 2006-07, 2007-08, 2008-09, 2009-2010, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15*.

³¹ Victoria, *Always Was Always Will Be Koori Children: Systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, Parl Paper No 207 (2016) 26, citing Australian Institute of Health and Welfare, *Child protection Australia 2005-06, 2006-07, 2007-08, 2008-09, 2009-2010, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15*.

³² *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

³³ *Bail Act 1977* (Vic) s 3A.



VALS proposes an amendment to the *Sentencing Act* Part 5(2) to include a section 5(2)(h) which would state: '(2) In sentencing an offender a court must have regard to - ... (h) circumstances related to the offender's Aboriginal background.'

Provisions are made for government systems to acknowledge the unique Aboriginal cultural rights under the *Victorian Charter of Human Rights and Responsibilities* (2006) s 19.2.³⁴

Furthermore, such an amendment is consistent with the use of 'special measures' as per the *Equal Opportunity Act 2010* (Vic) s 12³⁵, in reducing inequality, of which the rates of incarceration is one of the greatest in current Australian society.³⁶

Fast Facts: Stolen Generations

- The Victorian Government identified that 'a higher proportion of Aboriginal people in Victoria have been directly affected by the Stolen Generations than any other state or territory.'³⁷
- Australian Bureau of Statistics surveys in 1994, 2002 and 2008 all conclude that on average, 10 percent of Aboriginal and Torres Strait Islander people of any age reported being removed as a child.³⁸
- The Royal Commission into Aboriginal Deaths in Custody revealed that, of the 99 deaths that were investigated, 43 had been removed as children.³⁹
- The 2014-2015 National Aboriginal and Torres Strait Islander Social Survey (NATSISS) reported that Aboriginal and Torres Strait Islander people with a mental health condition were more likely to have been removed, or had relatives removed, from their natural family (50%) than those with other long-term health conditions (42%) and those with no long-term health conditions (34%).⁴⁰

³⁴ *Victorian Charter of Human Rights and Responsibilities* (2006) s 19.2

³⁵ *Equal Opportunity Act 2010* (Vic) s 12.

³⁶ 'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.' UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, 195 art 19.

³⁷ Victorian Government's Report, *Victorian Aboriginal Affairs Framework 2013-2018: Building for the Future: A Plan for 'Closing the Gap' in Victoria by 2031*, 7.

³⁸ At the 1994 NATSIS, 10% of Indigenous people aged 25 years or over reported that they had been taken away from their natural family. The same result (10%) was recorded for the closest equivalent age cohort group (35 years or over) in 2002. Both the 1994 and 2002 surveys recorded that 8% of Indigenous people aged 15 years or over at the time of the surveys, had been taken away from their natural family.

³⁹ 'Call for black families inquiry', *The Australian*, 16 September 1994, via <https://www.creativespirits.info/aboriginalculture/politics/stolen-generations-effects-and-consequences#ixzz4r6LIVrqq>.

⁴⁰ Australian Bureau of Statistics (2016) *National Aboriginal and Torres Strait Islander Social Survey, 2014-15*: Table 19. Selected wellbeing indicators, by long-term health conditions [data cube].



Proposed Trial

The Victorian Aboriginal Legal Service proposes to trial Aboriginal Community Justice Reports with a small number of relevant and applicable offenders, in two courts yet to be determined (metro and regional).

The proposed trial would also include an evaluation process.

Training and information would be provided to the community, judiciary and other related court services.

Stakeholders will continue to be consulted in the development of the ACJR process.

The Victorian Aboriginal Legal Service will look to establish a report writing/ case management service.

Notes





© VALS 2017

The information contained in the discussion paper remains intellectual property of the Victorian Aboriginal Legal Service.