



Submission to the Victorian Law Reform Commission Project:
Improving the Response of the Justice System to Sexual Offences

MARCH 2021



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Contact Andreea Lachsz - Head of Policy, Communications and Strategy
alachsz@vals.org.au



BACKGROUND TO THE VICTORIAN ABORIGINAL LEGAL SERVICE

The Victorian Aboriginal Legal Service (VALS) is an Aboriginal community-controlled organisation (ACCO), which was established in 1973 to provide culturally safe legal and community justice services to Aboriginal and/or Torres Strait Islander people across Victorians.¹ Our vision is to ensure that Aboriginal people are treated equally before the law, our human rights are respected, and we have the choice to live a life of the quality we wish.

Legal Services

Our legal practice operates in the areas of criminal, family and civil law. We represent women, men and children who come to us for assistance, and are only hindered in doing this where there is a legal conflict of interest. If this is the case, we provide warm referrals to other suitable legal representatives. Our 24-hour criminal law service is backed up by the strong community-based role of our Client Service Officers play, who are the first point of contact when an Aboriginal person is taken into custody, through to the finalisation of legal proceedings.

Our Criminal Law Practice provides legal assistance and represent Aboriginal people in immediate court dealing such as bail applications, defending or pleading to charges and sentencing. This includes matters in both the mainstream and Koori Court.² Many of our clients come from backgrounds where they may have been exposed to family violence, poor mental health, homelessness and poverty. We try to understand the underlying reasons that have led to the offending behaviour and ensure that prosecutors, magistrates and legal officers are aware of this. We support our clients to access support that can help to address underlying reasons for offending and reduce the risk of recidivism.

Our Civil and Human Rights Practice provides advice and casework to Aboriginal people in relation to a range of civil law issues, including: infringements, tenancy, victims of crime, discrimination and human rights, Personal Safety Intervention Orders (PSIVO) matters, Coronial Inquests, consumer law issues and Working With Children Check suspension or cancellation.

Our Aboriginal Families Practice provides legal advice and represents families in family law and child protection matters, where we advocate for support to ensure that families can remain together, and for compliance with the Aboriginal Child Placement Principle wherever children are removed from their parents' care.

Our Specialist Legal and Litigation Practice (Wirraway) focuses specifically on police, corrections and government accountability through litigation. It provides legal advice and representation in civil litigation matters against government authorities, including for claims involving excessive force or unlawful detention, police complaints, prisoners' rights issues, and Coronial Inquests (including in relation to deaths in custody).

¹ The term "Aboriginal" is used throughout this submission to refer to Aboriginal and/or Torres Strait Islander peoples.

² In 2017-2018, VALS provided legal services in relation to 1367 criminal law matters, and in 2018-2019, VALS provided legal services in relation to 1,253 criminal law matters.



Community Justice Programs

VALS run a Custody Notification System (CNS) which requires Victoria Police to notify VALS within 1 hour every time an Aboriginal person in Victoria is taken into police custody.³ Since October 2019, this requirement is legislated under the *Crimes Act 1958*.⁴ Once a notification is received, VALS will contact the relevant police station to carry out a welfare check and provide legal advice if required.

The Community Justice Team also run the following programs:

- Family Violence Client Support Program⁵
- Community Legal Education
- Victoria Police Electronic Referral System (V-PeR)⁶
- Regional Client Service Officers
- Baggarrook Women's Transitional Housing program.⁷

Policy, Research and Advocacy

VALS operates in various strategic forums which help inform and drive initiatives to support Aboriginal people in their engagement with the legal system in Victoria. VALS works closely with the Aboriginal Justice Caucus and ACCOs in Victoria, as well as other key stakeholders within the legal sector.

ACKNOWLEDGEMENTS

VALS pays our deepest respect to traditional owners across Victoria, in particular, to all Elders past, present and emerging. We also acknowledge all Aboriginal and Torres Strait Islander people in Victoria and pay respect to the knowledge, cultures and continued history of all Aboriginal and Torres Strait Islander Nations.

We also acknowledge the following staff members who collaborated to prepare this submission:

- Andreea Lachs, Head of Policy, Communications and Strategy
- Kin Leong, Principal Managing Lawyer, Criminal Law Practice
- Alex Walters, Principal Managing Lawyer, Civil Law and Human Rights Practice
- Rachel Gleeson, former Lawyer, Civil Law and Human Rights Practice
- Lee-Anne Carter, Statewide Community Justice Programs Leader

³ In 2017-2018, VALS received and responded to 11,104 notifications through the CNS and in 2018-2019, we received 12,293.

⁴ Ss. 464AAB and 464FA, *Crimes Act 1958* (Vic).

⁵ VALS has three Family Violence Client Support Officers (FVCSOs) who support clients throughout their family law or civil law matter, providing holistic support to limit re-traumatisation to the client and provide appropriate referrals to access local community support programs and emergency relief monies.

⁶ The Victoria Police Electronic Referral (V-PeR) program involves a partnership between VALS and Victoria Police to support Aboriginal people across Victoria to access culturally appropriate services. Individuals are referred to VALS once they are in contact with police, and VALS provides support to that person to access appropriate services, including in relation to drug and alcohol, housing and homelessness, disability support, mental health support.

⁷ The Baggarrook Women's Transitional Housing program provides post-release support and culturally safe housing for six Aboriginal women to support their transition back to the community. The program is a partnership between VALS, Aboriginal Housing Victoria and Corrections Victoria.



EXECUTIVE SUMMARY

VALS welcomes the opportunity to make a submission to the Victorian Law Reform Commission's Project, *Improving the Response of the Justice System to Sexual Offences*. With the wide scope of the Project, VALS has chosen to focus on a few key areas.

- Culturally-Appropriate Community Legal Education
- Sentencing – Aboriginal Community Justice Reports Project
- Barriers to Rehabilitation and Reintegration (Post-Release Housing; Spent Convictions; Sex Offender Register; Working With Children Checks)
- Restorative and Alternative Justice Models

SUMMARY OF RECOMMENDATIONS

Recommendation 1: The Victorian Government should significantly increase funding for VALS' Community Legal Education. Funding should be provided for both staffing and creation of resources (using different media, to be disseminated on different platforms, to ensure the legal messages are accessible to and understandable for everyone in the Aboriginal community).

Increased funding would enable VALS to deliver community legal education to children, young people and adults on respectful relationships, domestic and sexual violence, sexting, consent and the criminal process in a culturally appropriate, trauma-informed, age-appropriate and gender-sensitive manner.

Recommendation 2: The Victorian Government should support self-determined initiatives to improve sentencing outcomes for Aboriginal people, including by directing dedicated funding from *Burra Lotjpa Dungaludja* to the project currently being carried out by VALS and its partners on Aboriginal Community Justice Reports, as well as providing ongoing funding beyond the pilot Project.

Recommendation 3: The Victorian Government should invest further in culturally-appropriate transitional housing programs run by Aboriginal Community Controlled Organisations, such as VALS' Baggarook program, to support men and women leaving prison.

Recommendation 4: VALS does not support the exclusion of certain categories of offending from a spent convictions scheme, including a blanket exclusion in a legislated scheme (for example, for sexual offences). In our view, any such blanket exemption would be arbitrary and has the potential to undermine the rehabilitative intent of the scheme.

Recommendation 5: The definition of conviction in the Bill should align with Section 7 of the *Sentencing Act 1991 (Vic)*, whereby a finding of guilt without recording a conviction is not considered to be a conviction. The proposed definition of a conviction as a 'finding of guilt' does not accord with sentencing principles, or the ordinary meaning of a conviction as understood by the community.

Recommendation 6: The waiting period under the spent convictions scheme should be graduated by reference to the length of the sentence imposed, the severity of the offence and the person's age, as opposed



to introducing arbitrary waiting periods. If the Government nevertheless proposes to proceed with strict, prescribed time limits, we suggest the conviction periods under the Spent Convictions Scheme should be:

- 10 years for an indictable offence;
- 5 years for summary offences and findings of guilt without recording a conviction when the offender is ordered to pay a fine; and
- 3 years for children, including for findings of guilt where a conviction is not recorded and the child is ordered to pay a fine or give an undertaking, or the court places the child on probation or a youth supervision order.

Recommendation 7: VALS is supportive of recommencement of waiting periods only occurring in cases where a conviction is recorded, not only a finding of guilt (and waiting periods should commence from the date of conviction, not from the end of the sentence (custodial or otherwise)).

Recommendation 8: Applications to have convictions become spent on the basis of special circumstances should be heard by Victorian Civil and Administrative Tribunal (VCAT).

Recommendation 9: VALS supports the recommendation made by Victoria Legal Aid, that ‘a legislative presumption be created against placing children on the Sex Offender Register, unless exceptional circumstances exist.’⁸

Recommendation 10: Consideration should be given as to whether the Working With Children Act 2005 (WWCC Act) ought to be amended to allow certain Category A offenders (such as those convicted of child sex offences in circumstances similar to those outlined in “James” case study) to be able to apply to have DHHS consider their application on a risk assessment basis under s13(2) of the WWCC Act, as opposed to being precluded from obtaining a WWCC.

Recommendation 11: VALS supports the recommendation of the Aboriginal Justice Caucus - ‘There is evidence to support Restorative Justice processes can be effective in responding to sexual offending. However, design, development and implementation of these justice responses will take time, and must be community led. Responses must be aligned with Aboriginal Community values, victim-centred and responsive to the community in which it is developed.’

⁸ Victoria Legal Aid, *Embedding therapeutic and restorative responses for victims and perpetrators of sexual harm: Submission to the VLRC Sexual Offences Review* (23 December 2020) 48



DETAILED SUBMISSIONS

Culturally-Appropriate Community Legal Education

Issues Paper A - Working Together to Respond to Sexual Offences: Systems

What would make it easier for people who have been sexually harmed to get the supports and services they need, so they can decide whether to report the sexual harm? You might think about:

- how and what information is given to people about how the criminal justice system works, including changes that have improved the system...
- any programs or pilots we can learn from.

Is there a role for early intervention or diversion programs for adults responsible for sexual harm? Why or why not? If you support early intervention or diversion programs for adults responsible for sexual harm, what should be the features of the program? You might think about:

- if these programs make it more likely a person will take responsibility for their behaviour or reduce sexual offending
- the models or programs that are most effective.

Issues Paper F - People Who Have Committed Sexual Offences

Do responses to sexual offending sufficiently address the diverse needs of different people who have committed sexual offences? If not, what more is needed? You might think about:

- any gaps in interventions
- any programs or pilots we can learn from.

VALS' COVID-19 Recovery Plan, *Building Back Better*, outlined the benefits of properly funding an Aboriginal legal service to deliver culturally appropriate community legal education.

Community Legal Education (CLE) can... play a crucial role in the prevention space – preventing people from becoming involved in the legal system to begin with, which is, of course, the ideal outcome. CLE can prompt individuals to recognise that they have existing legal issues, with which VALS can assist. This empowers individuals with the knowledge that they have rights, and that they can access culturally competent legal assistance in realising and protecting those rights. CLE can assist individuals already caught up in these legal systems to navigate their way with more confidence, taking proactive steps to mitigate risks and achieve better outcomes...

CLE can play an important role in improving VALS' practice, as well as informing policy and law reform. CLE provides an opportunity for the Victorian Aboriginal community to highlight the legal issues which are particularly impacting on them, and their views on current laws or practices. This information can, in turn, be shared with VALS lawyers and the policy team, facilitating a better understanding of Aboriginal people's experiences within the legal systems... (including how laws and policies are actually impacting people on the ground), their priorities, gaps in service provision, and opportunities for collaboration between Aboriginal Community Controlled Organisations (ACCOs).

CLE is thus a mechanism by which Article 18 of the *UN Declaration on the Rights of Indigenous Peoples* can be realised: 'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures.' If people do not understand their rights and responsibilities, they are disempowered, and their ability to work towards achieving a truly just legal system for Aboriginal people is compromised. VALS is committed to representing the interests of the Aboriginal community in Victoria, and CLE assists VALS to achieve this goal.⁹

⁹ Victorian Aboriginal Legal Service, *COVID-19 Recovery Plan: Building Back Better* (February 2021) 55-57, available at <https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf>



Proper funding for CLE would enable VALS to deliver community legal education on respectful relationships, domestic and sexual violence, sexting, consent and the criminal process in a culturally appropriate, trauma-informed, age-appropriate and gender-sensitive manner to adults and children, and to create culturally appropriate resources. CLE could be delivered widely, including to children at schools, youth centres and youth detention facilities, to women at women’s refuges, and to men and women on remand or serving sentences in custodial settings. Resources could be co-created with community members and used, in turn, in the delivery of CLE to other community members (see, for example, the North Australian Aboriginal Justice Agency and Indigenous Hip Hop Projects legal education music videos *Ripple Effect*¹⁰ and *One Mob*¹¹).

Recommendation 1: The Victorian Government should significantly increase funding for VALS’ Community Legal Education. Funding should be provided for both staffing and creation of resources (using different media, to be disseminated on different platforms, to ensure the legal messages are accessible to and understandable for everyone in the Aboriginal community).

Increased funding would enable VALS to deliver community legal education to children, young people and adults on respectful relationships, domestic and sexual violence, sexting, consent and the criminal process in a culturally appropriate, trauma-informed, age-appropriate and gender-sensitive manner.

Sentencing – Aboriginal Community Justice Reports Project

Issues Paper E - Sexual Offences: The Trial Process

The paper does not discuss every aspect of the criminal trial. For example, it does not discuss... sentencing. However, you can address any of these in your answer to the final question.

- What are other issues with the trial process for sexual offences, and how should they be addressed?

The Project

On 10th March 2020, VALS is launching its Aboriginal Community Justice Reports Project.¹² The Project aims to reduce the overincarceration of Aboriginal and Torres Strait Islander people and improve sentencing processes and outcomes for Aboriginal and/or Torres Strait Islander defendants. Information in the Reports will include a more holistic account of individual circumstances, including as they relate to a person’s community, culture and strengths and community-based options.

The Victorian Aboriginal Legal Service is undertaking this Project, funded with an Australian Research Council grant, in partnership with the Australasian Institute of Judicial Administration, University of Technology

¹⁰ ‘IHHP and NAAJA worked with both old and young people to explore legal themes such as respectful relationships and the ripple effect of domestic violence on the community, including people going to jail. Keeping families strong and safe is also explored, to support families to make right decisions in accordance with child protection laws. The concept of consent is also touched on briefly. Through the chorus, "Gurrutu Raypirri", the community is encouraged to embrace Law and Respect as the foundations on which to build a strong community.’

¹¹ ‘IHHP and NAAJA worked with both old and young people to explore legal themes such as respectful relationships, interacting well with police, domestic violence, resisting peer pressure and joint criminal enterprise.’

¹² *Aboriginal Community Justice Reports Project: Improving sentencing outcomes and reducing overincarceration of Aboriginal people*, available at <https://www.vals.org.au/unlocking-victorian-justice/>



Sydney and Griffith University. The Reports are modelled on Canada's Gladue Reports, and adapted for the Victorian context. In Victoria, 20 Aboriginal Community Justice Reports will be produced as part of this pilot. A case worker will be made available to each person who participates in order to provide support and care.

To be considered for an Aboriginal Community Justice Report, the following eligibility criteria must be met:

- The person must be Aboriginal and/or Torres Strait Islander;
- The matter must be listed for
 - plea hearing (matters that are listed for sentence appeal will not automatically be excluded from eligibility for the Project, but given the pilot will be producing only 20 reports, suitability for a report for a sentence appeal will be assessed on a case-by-case basis);
 - In the County Koori Court division or in the general list before a Judge who is eligible to sit in the Koori Court division;
 - at Melbourne or La Trobe Valley.
- The person must voluntarily consent to participating. The person whose matter is before the court should also be willing to participate in an interview after sentencing, for the purpose of researching the outcomes of the Report.

Suitability is assessed by Aboriginal Community Justice Report Project staff, situated in VALS' Community Justice Programs section. To enable assessment of suitability for an Aboriginal Community Justice Report:

- The lawyer must have an initial meeting with Aboriginal Community Justice Report Project staff;
- The person whose matter is before the court must have an initial meeting with Aboriginal Community Justice Report Project staff;
- There must be sufficient notice provided, to enable Aboriginal Community Justice Report Project staff to draft the report (at least 8 weeks). It is recommended that lawyers make a referral at the committal mention stage.

Background

In 2017, VALS released its discussion paper, *Aboriginal Community Justice Reports: Addressing Over-Incarceration*. In this paper, VALS proposed trialling 'Aboriginal Community Justice Reports... a pre-sentence, community written report, which aims to gather information about underlying impacts on any Aboriginal offender... 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... [it] also provides a further voice to the offender, their family and community, and thus greater involvement in, and engagement with the justice system.'¹³

In 2018, the Victorian Government and the Aboriginal Justice Caucus committed to piloting Aboriginal Community Justice Reports over the five-year period of *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4*, to '[t]rial Aboriginal Community Justice Reports modelled on Canada's Gladue reports to provide information to judicial officers about an Aboriginal person's life experience and history that

¹³ Victorian Aboriginal Legal Service, *Aboriginal Community Justice Reports Addressing Over-Incarceration* (October 2017) 3-4, available at <https://www.vals.org.au/wp-content/uploads/2021/03/Aboriginal-Community-Justice-Reports-Addressing-Overincarceration-2017-Discussion-Paper.pdf>

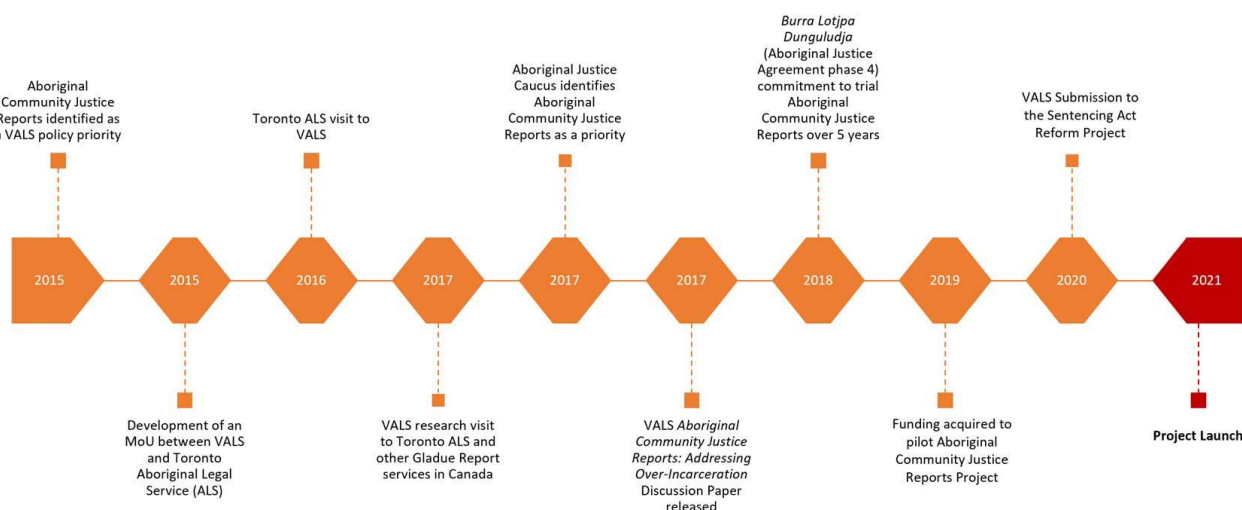


impacts their offending; and to identify more suitable sentencing arrangements to address these underlying factors.’¹⁴

VALS’ 2020 *Submission to the Sentencing Act Reform Project* recommended that the Government ‘[s]upport self-determined initiatives to improve sentencing outcomes for Aboriginal people, including by directing dedicated funding from *Burra Lotjpa Dunguludja* to the project currently being carried out by VALS and its partners on Aboriginal Community Justice Reports.’¹⁵

Additionally, in 2017, the Australian Law Reform Commission’s report, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* recommended that ‘State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that would facilitate the preparation of ‘Indigenous Experience Reports’ for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts.’¹⁶

The below timeline outlines the development of the Aboriginal Community Justice Reports Project in Victoria:



Recommendation 2: The Victorian Government should support self-determined initiatives to improve sentencing outcomes for Aboriginal people, including by directing dedicated funding from *Burra Lotjpa Dunguludja* to the project currently being carried out by VALS and its partners on Aboriginal Community Justice Reports, as well as providing ongoing funding beyond the pilot Project.

¹⁴ *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4*, 39, available at <https://files.aboriginaljustice.vic.gov.au/2021-02/Victorian%20Aboriginal%20Justice%20Agreement%20Phase%204.pdf>

¹⁵ Victorian Aboriginal Legal Service, *Submission to the Sentencing Act Reform Project* (2020) 12, available at <https://www.vals.org.au/wp-content/uploads/2021/03/Sentencing-Act-Reform-Project-VALS-submission-FINAL1.pdf>

¹⁶ Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2017) 214, available at https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf



Barriers to Rehabilitation and Reintegration

Issues Paper F - People Who Have Committed Sexual Offences

How well are rehabilitation or reintegration measures for people who have committed sexual offences working? How can they be improved? You might think about:

- barriers to successful reintegration
- how well these measures respond to complex needs.

Post-Release Housing

Last week, the *Final Report of the Legal and Social Issues Committee Inquiry into homelessness in Victoria* was released. VALS highlights the following from the report:

- ‘The Committee was... made aware of other barriers to entering the private rental market, including stigma within the rental sector against people experiencing issues such as homelessness, family violence, mental ill health, *having a criminal record* and young people with no rental history on lower incomes; *as well as discrimination towards certain groups such as Aboriginal Victorians* and culturally and linguistically diverse communities’¹⁷ (emphasis added).
- ‘The submission from the Council to Homeless Persons explained that *50% of prison leavers use a homelessness service in the year following their release: As Victoria’s incarceration rate has rapidly grown in recent years, the number of prisoner exits directly into homelessness has also grown; increasing by 317 per cent since 2011–12. Now 50 per cent of prison leavers use a homelessness service in the year following their release*’¹⁸ (emphasis added).
- ‘The Committee heard evidence from the Victorian Association for the Care and Resettlement of Offenders (VACRO), who are Victoria’s only specialist criminal justice reintegration service. Mr Marius Smith, CEO of VACRO described the organisation’s ReConnect program, which assists disadvantaged people leaving prison in Western Victoria. He said that in the last financial year, 30% of participants were released into primary homelessness (without conventional housing, such as those sleeping rough) and 54% into secondary homelessness (living in temporary housing, such as shelters).’¹⁹

As stated in VALS’ COVID-19 Recovery Plan, Building Back Better:


Aboriginal Housing Victoria’s 2020 report noted that ‘Aboriginal people are often detained within the custodial justice system unable to access bail, parole or a corrections order due to their inability to demonstrate access to secure housing.’ The report identified ‘secure affordable housing as the foundation for breaking cycles of disadvantage and homelessness,’ and that those who are high risk such as people in ‘contact with and leaving the justice system’ should have ‘[i]ntensive, culturally appropriate structured case managed approaches... intensive housing, community support and pathways’...

VALS’ Baggarrook program demonstrates how stable and safe accommodation and case management can support drug and alcohol rehabilitation, family reunification and employment opportunities, which can

¹⁷ Victorian Legal and Social Issues Committee, *Final Report of the Inquiry into Homelessness in Victoria* (March 2021) 23, available at https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Homelessness_in_Victoria/Report/LCLSIC_59-06_Homelessness_in_Vic_Final_report.pdf

¹⁸ Ibid 177.

¹⁹ Ibid .



decrease recidivism. However, Baggarook’s capacity is only six clients at any one time and does not cater for men or children and young people.

VALS welcomed the Government’s commitment to invest \$500 million in social housing, including an investment in Aboriginal housing, and encourages the Government to continue to invest in housing outcomes for Aboriginal communities in Victoria, including for justice housing projects such as VALS’ culturally appropriate Baggarook program, supporting women being released from prison. This would accord with the principle of Aboriginal self-determination, whereby ‘housing responses are designed for and delivered by Aboriginal people [and] Aboriginal people are the arbiters of good practice.’ Funding VALS and other ACCOs to provide justice housing would be preferable to housing such as the Maribyrnong Community Residential Facility, which is a highly institutionalised environment.’²⁰

Recommendation 3: The Victorian Government should invest further in culturally-appropriate transitional housing programs run by Aboriginal Community Controlled Organisations, such as VALS’ Baggarook program, to support men and women leaving prison.

Spent Convictions

VALS congratulated the Victorian Government upon its introduction of the *Spent Convictions Bill 2020*, ‘not[ing] that there is still further legislative and policy reform required, and urg[ing] the Government to continue along this positive path. Reforms it should consider include amending the *Equal Opportunity Act 2010* to include irrelevant criminal record as an attribute, and revisiting the 5 year waiting period for children and 10 year waiting period for adults, as these periods under the scheme are too long and do not reflect contemporary approaches to criminal justice and rehabilitation. The 12-month review established by the Bill should be used to address these issues.’²¹

Nerita Waight, CEO of VALS, stated that:

Aboriginal and Torres Strait Islander peoples are overrepresented in the criminal legal system and are disproportionately impacted by the stigma and discrimination associated with having a criminal record. It is crucial for people who have been involved in the criminal legal system to be afforded the opportunity to gain access to employment and housing. Consigning people to a life of poverty and exclusion due to a criminal record perpetuates cycles of offending, entrenches disadvantage and will only contribute to the shameful overincarceration of Aboriginal people. This legislation is a positive step in reforming the criminal legal system, and VALS encourages the Government to consider further legislative and policy reforms in relation to criminal records.’²²

VALS makes a number of recommendations with regard to the *Spent Convictions Bill (the Bill)*, by reference to our 2019 *Submission to the Legal and Social Issues Committee Inquiry Into A Legislated Spent Convictions Scheme*.

²⁰ Victorian Aboriginal Legal Service, *COVID-19 Recovery Plan: Building Back Better* (February 2021) 57-58, available at <https://www.vals.org.au/wp-content/uploads/2021/02/Building-Back-Better-Victorian-Aboriginal-Legal-Service-COVID-19-Recovery-Plan-February-2021-FOR-DISTRIBUTION.pdf>

²¹ Victorian Aboriginal Legal Service and RMIT University Centre for Innovative Justice, Joint Media Release: *Supporting Rehabilitation – An Important Step to Address the Stigma and Discrimination of Having a Criminal Record* (5 November 2020), available at <https://www.vals.org.au/supporting-rehabilitation/>

²² Ibid.



Particularly, VALS highlights again the case study set out below, which demonstrates the disproportionate impact that blanket exclusions for certain types of offences from a spent convictions regime could lead to.

Case study: “James”

James had consensual sex on two occasions at the age of 17 with his girlfriend Shania, then aged 15. After James turned 18, they had consensual sex on two further occasions while Shania was still 15 years old. The relationship ended amicably, and they went their separate ways and did not see each other for many years. James struggled with mental health and alcohol abuse in his early adulthood. In their mid-thirties, Shania and James reunited briefly. One evening James visited Shania whilst intoxicated. They were both drinking and talking, and both became intoxicated. James asked Shania to have sex with him. Shania refused and an altercation occurred, with assaults on both sides. Shania later reported this incident to the Police, and also reported the details of their consensual sexual relationship in their teenage years.

James was charged in relation to the recent incidents, as well as with a historical charge of sexual penetration of a child under the age of 16 years. He pleaded guilty and was convicted of the charges, and sentenced to seven months imprisonment for the sexual penetration of a child under 16 years. As a result of the historical charge, James was placed on the Sex Offenders Registry for a period of 15 years.


Shortly after being placed on the Sex Offenders Registry, James’ young daughter was placed into his care by the Family Court. Because of his registration as a Sex Offender, James is unable to participate in the school and extracurricular activities with his daughter and her peers. He has struggled to find work and often chooses not to apply for jobs because of the shame of having to disclose his conviction.²³

Recommendation 4: VALS does not support the exclusion of certain categories of offending from a spent convictions scheme, including a blanket exclusion in a legislated scheme (for example, for sexual offences). In our view, any such blanket exemption would be arbitrary and has the potential to undermine the rehabilitative intent of the scheme.

The conviction periods in the Bill do not align with those proposed by VALS in our submission to the Legal and Social Issues Committee Inquiry. The Bill sets it at 5 years for children and 10 years for adults. VALS has previously proposed:

- ‘10 years for an indictable offence;
- 5 years for summary offences and findings of guilt without recording a conviction when the offender is ordered to pay a fine; and

²³ Victorian Aboriginal Legal Service, *Submission to the Legal and Social Issues Committee Inquiry Into A Legislated Spent Convictions Scheme* (17 July 2019) 9-10. Case studies are de-identified and are provided with the consent of our clients, who are eager to see reforms that could lead to significant positive outcomes for their wellbeing, livelihoods, families and communities.

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- 3 years for children, including for findings of guilt where a conviction is not recorded and the child is ordered to pay a fine or give an undertaking, or the court places the child on probation or a youth supervision order.²⁴

A waiting period of 5 years for young offenders, and 10 years for adult offenders, is arbitrary and onerous. The Scheme should adopt a graduated model, whereby the waiting period is determined with reference to the length of the sentence imposed and the person's age. 5- and 10-year periods are not supported by an evidence base linked to the likelihood of reoffending:

- 'Data indicates that offending behaviour is most likely to occur between the ages of 16 and 17. Waiting three or five years at this age can have a significant impact on future education and/or employment opportunities, as young people are particularly vulnerable to stigma and discrimination in employment settings and are also at a high risk of reoffending and becoming trapped in a cycle of offending behaviour.'²⁵
- 'Research suggests that after being "crime-free" for six to seven years, the risk of future offending is relatively equal to a person with no criminal history. We are also concerned that these periods are too long and do not reflect contemporary approaches to criminal justice and rehabilitation. This is particularly the case for Aboriginal people, given that life expectancy is significantly shorter for both male and female Aboriginal and Torres Strait Islander peoples.'²⁶

Recommendation 5: The definition of conviction in the Bill should align with Section 7 of the Sentencing Act 1991 (Vic), whereby a finding of guilt without recording a conviction is not considered to be a conviction. The proposed definition of a conviction as a 'finding of guilt' does not accord with sentencing principles, or the ordinary meaning of a conviction as understood by the community.

Recommendation 6: The waiting period under the spent convictions scheme should be graduated by reference to the length of the sentence imposed, the severity of the offence and the person's age, as opposed to introducing arbitrary waiting periods. If the Government nevertheless proposes to proceed with strict, prescribed time limits, we suggest the conviction periods under the Spent Convictions Scheme should be:

- 10 years for an indictable offence;
- 5 years for summary offences and findings of guilt without recording a conviction when the offender is ordered to pay a fine; and
- 3 years for children, including for findings of guilt where a conviction is not recorded and the child is ordered to pay a fine or give an undertaking, or the court places the child on probation or a youth supervision order.

Recommendation 7: VALS is supportive of recommencement of waiting periods only occurring in cases where a conviction is recorded, not only a finding of guilt (and waiting periods should commence from the date of conviction, not from the end of the sentence (custodial or otherwise)).

²⁴ Victorian Aboriginal Legal Service, *Submission to the Legal and Social Issues Committee Inquiry Into A Legislated Spent Convictions Scheme* (17 July 2019) 14.

²⁵ Ibid 15.

²⁶ Ibid.



VALS is of the view that applications for a spent convictions should not, as proposed in the Bill, be made to the Magistrate's Court. Applications should instead be made to VCAT for the following reasons:

- 'VCAT is a low-cost forum where parties do not need to be legally represented. Many applicants seeking to have their convictions spent will be doing so because they find it difficult to find employment with a criminal record. It is important that any process to have convictions spent is accessible and affordable.
- VCAT is a less formal forum than the... Court. The forms and paperwork in VCAT processes can generally be completed without the assistance of a legal professional. VCAT staff are trained to provide assistance to unrepresented parties.
- VCAT already has jurisdiction to hear appeals of negative assessment notices issued to applicants under the *Working With Children Act 2005 (Vic)*...
- VCAT has more discretion in granting anonymisation orders or proceeding suppression orders than the... Courts. Given the purpose of a Spent Convictions Scheme is to limit the disclosure of convictions, it is appropriate that applicants seeking to have their convictions spent are also able to make applications to have their personal identifying information kept confidential. Under the *Open Courts Act 2013 (Vic)*, VCAT may make a proceeding suppression order for any reason in the 'interests of justice', a discretion which is much broader than the criteria for other courts of the state.'²⁷

Recommendation 8: Applications to have convictions become spent on the basis of special circumstances should be heard by Victorian Civil and Administrative Tribunal (VCAT).

Sex Offender Register

Recommendation 9: VALS supports the recommendation made by Victoria Legal Aid, that 'a legislative presumption be created against placing children on the Sex Offender Register, unless exceptional circumstances exist.'²⁸

Working With Children Checks

In addition to the Sex Offender Register (**SOR**) regime, for which the longer-term consequences are often more significant than the custodial sentence imposed, the Working With Children Check (**WWCC**) regime contains a blanket prohibition against granting a WWCC for those with Category A offences, including in the circumstances identified in James's case study.

To provide more a more therapeutic and nuanced response to child sexual offending, VALS recommends that in addition to proposed changes to the SOR process, the WWCC regime ought to provide a carve out for a very narrow category of child sex offences. One option might be modelled on s11A of the *Sex Offender Registration Act 2004*,²⁹ to allow a certain category of offenders to apply for a "Class A exemption order," for

²⁷ Ibid 12-13.

²⁸ Victoria Legal Aid, *Embedding therapeutic and restorative responses for victims and perpetrators of sexual harm: Submission to the VLRC Sexual Offences Review* (23 December 2020) 48

²⁹ s11A Application for registration exemption order



circumstances such as those identified in James' matter. A successful application might have the effect of seeing the offence recharacterised as a Category B offence under Schedule 2 of the *Working With Children Act 2005*. This would still mean the applicant would be subject to a risk-based assessment under s13(2) of the *Working With Children Act 2005*, but this would move away from the current approach of a blanket ban from applying for a WWCC, even where the facts of the case are demonstrative that the applicant represents no community risk.

Recommendation 10: Consideration should be given as to whether the *Working With Children Act 2005* (**WWCC Act**) ought to be amended to allow certain Category A offenders (such as those convicted of child sex offences in circumstances similar to those outlined in "James'" case study) to be able to apply to have DHHS consider their application on a risk assessment basis under s13(2) of the WWCC Act, as opposed to being precluded from obtaining a WWCC.

Restorative and Alternative Justice Models

Issues Paper G Sexual Offences: Restorative and Alternative Justice Models

Do you support adopting a restorative justice model for sexual offences? Why or why not? You might want to think about:

- the value of these processes
- the challenges involved in ensuring the safety of those who participate
- cases where restorative justice would or would not be of value.

If a restorative justice model is adopted, what should its features be? You might think about:

- when restorative justice can occur (for example, before, during or after a criminal prosecution; or at any stage in the criminal justice process)
- who should run it (for example, an independent Commission, a government department, or another agency)
- what best practice principles should apply
- how data on restorative justice outcomes should be collected to improve our understanding of sexual offending
- how referral processes should work (for example, should people harmed be able to request restorative justice? Should the police, the prosecution, or the courts be required to consider referring cases for restorative justice?).

Are there Aboriginal justice models that you think should be considered for sexual offences? If so, what are their strengths and weaknesses? You might think about:

- programs or pilots that work well
- how to improve support or recognition for Aboriginal justice models
- any lessons from such models that could apply in other contexts
- what else is needed to respond effectively to sexual harm against Aboriginal people.

(1) Subject to this section, a person who has been found guilty by a court of a registrable offence that is a specified offence may apply for a registration exemption order in respect of the offence if the person—

(a) at any time during the commission of the offence, was 18 or 19 years of age; and
(b) at all times during the commission of the offence, was not more than 19 years of age.



Robust Consultations with Aboriginal Communities, Representative Bodies and Organisations Must be Conducted to Ascertain Whether there is Support for Restorative Justice Approaches to Sexual Offending

VALS supports the recommendation of the Aboriginal Justice Caucus in its Submission to the VLRC:

There is evidence to support Restorative Justice processes can be effective in responding to sexual offending. However, design, development and implementation of these justice responses will take time, and must be community led. Responses must be aligned with Aboriginal Community values, victim-centred and responsive to the community in which it is developed.³⁰

VALS also highlights the following from Djirra’s submission:

[A model] require[s] intensive work engaging with Aboriginal communities to test the likely uptake of these models (which must not be mandated) and co-design the program with those communities to ensure accessibility and safety by Aboriginal women and other victims/survivors. Priority must be given to the perspectives and experiences of Aboriginal people, and women in particular, with lived experiences of sexual assault and other sexual harms, whether these harms occurred as children or as adults. Funding must be available to provide culturally safe counselling to the women involved, both during the co-design process and as follow up afterwards.³¹

It is also vital to learn from other jurisdictions and specialists with experience in restorative justice models, including lessons from scenarios where risks to women’s safety have been identified and effectively addressed. It is also important to recognise that our Koori community in Victoria is made up of 38 original clans that have been here for thousands of years, and also incorporates Aboriginal people from all over Australia and the Torres Strait Islands. A one size fits all approach is not appropriate and community led consultation must determine the most appropriate model of restorative justice for each community.³²

Recommendation 11: VALS supports the recommendation of the Aboriginal Justice Caucus - ‘There is evidence to support Restorative Justice processes can be effective in responding to sexual offending. However, design, development and implementation of these justice responses will take time, and must be community led. Responses must be aligned with Aboriginal Community values, victim-centred and responsive to the community in which it is developed.’

VALS notes also the recommendation of Victoria Legal Aid:

That the VLRC consult closely with the Aboriginal community and Aboriginal-led organisations to co-create an alternative justice model that can deliver a response to sexual offending that is culturally appropriate and safe for any Aboriginal people involved.³³

³⁰ Aboriginal Justice Caucus, *Submission on Improving the Response of the Justice System to Sexual Offences to the Victorian Law Reform Commission* (2021) 4.

³¹ Djirra, *Submission to the Victorian Law Reform Commission Inquiry Improving the Response of the Justice System to Sexual Offences* (December 2020) 15.

³² *Ibid* 18-19.

³³ Victoria Legal Aid, *Embedding therapeutic and restorative responses for victims and perpetrators of sexual harm: Submission to the VLRC Sexual Offences Review* (23 December 2020) 48.



The Benefits of Restorative Justice Processes for Sexual Offending, for Victim-Survivors and People who Have Offended

Benefits for Victim-Survivors

The UN Office on Drugs and Crime *Handbook on Restorative Justice Programs (the UN Handbook)* identifies the following benefits of restorative justice:

the formal justice process is not designed to allow victims to describe the nature and consequences of the crime, let alone to ask questions of the offender. The restorative justice model can support a process where the victims' views and interests count, where they can participate and be treated fairly and respectfully and receive restoration and redress. By participating in the decision-making, victims have a say in determining what would be an acceptable outcome for the process and are able to take steps toward closure.³⁴

In *Doing Restorative Justice in Cases of Sexual Violence: A Practice Guide (the Guide)*, it was highlighted that victim-survivors of sexual offending, similar to victim-survivors of other types of offending, 'seek an acknowledgement of the harm caused to them,' and that studies have shown that victim-survivors benefit from restorative justice processes.³⁵ Benefits include survivor-victims being able to change 'the self-narrative of the effects of the rape event in their lives,' and addressing 'relational dilemmas' in circumstances where the victim-survivors and offender have a past, present or future relationship.³⁶

The New Zealand Ministry of Justice's *Restorative Justice Standards for Sexual Offending (the Standards)* note that '[f]or the victim/survivor, the experience of justice and healing occurs primarily through the provision of a safe and supported environment in which: they can talk about the harm caused to themselves and their community; they receive genuine apology; they negotiate for actions or behaviours that they would find restorative.'³⁷

Of note, the Standards identify that restorative justice interventions are 'only one step in the process of change,' and that without the involvement of family, whānau and community, and treatment and programs, violent or abusive relationships are less likely to change.³⁸

Benefits for the Community and the Person who has Offended

The Guide has identified benefits that include the rehabilitation of offenders and reduced recidivism.³⁹

³⁴ UN Office on Drugs and Crime, *Handbook on Restorative Justice Programs* (2006) 10.

³⁵ Leuven Institute of Criminology (LINC), University of Leuven (KU Leuven), *Doing Restorative Justice in Cases of Sexual Violence: A Practice Guide* (2011) 11.

³⁶ Ibid 12.

³⁷ New Zealand Ministry of Justice, *Restorative Justice Standards for Sexual Offending Cases* (June 2013) 20.

³⁸ Ibid 18.

³⁹ Leuven Institute of Criminology (LINC), University of Leuven (KU Leuven), *Doing Restorative Justice in Cases of Sexual Violence: A Practice Guide* (2011) 12.



Support Among Services and Representative Bodies for Victim-Survivors in Other Australian Jurisdictions

Domestic Violence NSW, in its submission to the NSW Law Reform Commission's review of consent in relation to sexual assault offences, took the position that a restorative model 'could improve the quality of justice, lessen trauma and better support victims of sexual assault, and supported restorative justice models particularly for communities where there is a mistrust of interventions by authorities.'⁴⁰

The Elizabeth Evatt Community Legal Centre's (EELC) submission highlighted that in:

victim-focused restorative justice, emphasis is placed on the victim identifying all the components of harm (be they physical, social, emotional, material, symbolic or spiritual) before considering what restorative justice options could address all, some or none of these harms. Evidence indicates that the combination of these restorative justice processes, while not a complete solution to the recovery process, does provide victims with a counterpoint to the loss of power and control inherent in sexual assault.⁴¹

The solicitors at EELC 'heard from many women that they would like a process where they can express their experience and be heard. A process where the offender is held to account, not with the result being a prison sentence, but rather with an acknowledgement of the harm that the offender has caused the victim. This is particularly so in Aboriginal communities where the high rates of Indigenous incarceration are a barrier to reporting violence of any nature.'⁴²

The Risks of Restorative Justice Processes for Sexual Offending

The UN Handbook identifies power imbalances as a particular issue for restorative justice approaches in relation to both domestic and sexual violence, and the risk of re-traumatisation through the restorative justice process. It recommends 'extensive preparatory work', 'giving attention to the number and identity of persons invited to participate in the session,'⁴³ and that 'facilitators receive extensive training, not only on the principles and practice of restorative justice, but also on the dynamics of violence, domination and power.'⁴⁴

The Guide highlights some of the risks involved in the use of restorative justice for sex offending, including restorative risks - factors which could harm either party.⁴⁵ Risks to the victim-survivor could include re-traumatisation (as opposed to experiencing emotions such as anxiety or distress), which may require that they engage with a trauma therapist in preparation.⁴⁶ Of note, the victim-survivor may have also been re-traumatised by the police interview and forensic processes.⁴⁷

⁴⁰ Domestic Violence NSW, *NSW Law Reform Commission's Review of Consent in Relation to Sexual Assault Offences* (February 2019).

⁴¹ Elizabeth Evatt Community Legal Centre, *Submission to the NSW Law Reform Commission's Inquiry into Consent in Relation to Sexual Offences* (February 2019).

⁴² *Ibid.*

⁴³ UN Office on Drugs and Crime, *Handbook on Restorative Justice Programs* (2006) 70.

⁴⁴ *Ibid.*

⁴⁵ Leuven Institute of Criminology (LINC), University of Leuven (KU Leuven), *Doing restorative justice in cases of sexual violence: A Practice Guide* (2011) 13.

⁴⁶ *Ibid.* 14.

⁴⁷ *Ibid.* 24.



The victim-survivor's family may not approve of the restorative justice approach, which may leave victim-survivors feeling isolated.⁴⁸ Rape myths can result in victim-survivors blaming themselves.⁴⁹ Sexual offending often occurs where the victim-survivor and offender are known to each other, bringing up issues of betrayal of trust, and a ripple effect of the offending on families and communities,⁵⁰ or families either 'dramatising or trivialising the assault.'⁵¹ There are concerns that power imbalances 'may be perpetuated or made worse and patterns of abuse may be reinforced,'⁵² that offenders may 'minimise or diminish their responsibility for the offence or indeed trivialise the abuse or shift the blame to the victim,'⁵³ that victim-survivors may feel pressured to accept certain outcomes, and that conflicting loyalties among family members may leave the victim-survivor vulnerable to manipulation.⁵⁴

The Guide does warn against making assumptions that there is a 'standard victim', noting there should be 'no expected or normal level of vulnerability', and that there are many types of sexual offending. As a result, there is considerable variation in victim-survivors' experiences.⁵⁵

Best Practice for Restorative Justice Processes for Sexual Offending

While VALS is not in a position to make detailed recommendations regarding what a restorative justice model could look like in Victoria, as further consultations with Aboriginal communities, their representatives and representative bodies, and Aboriginal Community Controlled Organisations is crucial, VALS does bring to the attention of the Victorian Law Reform Commission best practice guidelines that have been developed internationally and in other jurisdictions.

Both Parties Must Freely and Voluntarily Consent

The UN *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (**the UN Basic Principles**) state that '[r]estorative processes should be used only with the free and voluntary consent of the parties. The parties should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily by the parties and contain only reasonable and proportionate obligations.'⁵⁶ 'Neither the victim nor the offender should be induced by unfair means to participate in restorative processes or outcomes.'⁵⁷

The Standards' principles include that the 'process is victim/survivor driven. It respects the right of the victim/survivor to hold the offender accountable. It recognises re-balancing of power between the victim/survivor and the offender as a key to victim healing,'⁵⁸ and that '[p]rocesses are designed to maximise

⁴⁸ Ibid 15.

⁴⁹ Ibid 15.

⁵⁰ Ibid 16.

⁵¹ Ibid 24.

⁵² Ibid 17.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid 23.

⁵⁶ UN *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (2000) Principle 7.

⁵⁷ Ibid Principle 12(c).

⁵⁸ New Zealand Ministry of Justice, *Restorative Justice Standards for Sexual Offending Cases* (June 2013) 20.



both the opportunity to experience a sense of justice and the chances for healing, and to minimise chances for harm.’⁵⁹

Further, the Standards state that a ‘victim/survivor driven process is one followed due to victim/survivor motivation, rather than in response to pressures external to the victim/survivor, such as the justice system, families, or communities. This does not mean that the process cannot be initiated by another party or system.’⁶⁰ Similarly, the Guide also recommends allowing referrals from both victim-survivors and offenders, with the former being able to refuse consent.⁶¹

Both Parties Must Have Legal Advice and Representation, and Support People

The UN Basic Principles state that ‘[f]undamental procedural safeguards should be applied to restorative justice programmes and in particular to restorative processes... The parties should have the right to legal advice before and after the restorative process and, where necessary, to translation and/or interpretation. Minors should, in addition, have the right to parental assistance.’⁶² They require that, ‘[b]efore agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision.’⁶³

The Standards require that, in New Zealand there must be at least one support person for the victim-survivor and for the offender.⁶⁴ They also highlight the impact on families, when the nature and impact of the offending is disclosed during the restorative justice process, and the importance of providing assistance to family members as well.⁶⁵ The Guide similarly recommends ensuring the right supporters are involved in the process.⁶⁶

There Must Be a Rigorous Process for Assessing Suitability

The Guide recommends properly assessing a matter for suitability for restorative justice, ‘through a process of formal assessment which may include specialist multi-agency panels composed of forensic staff, offender and victim specialists and of course the voice and desires of the victims themselves.’⁶⁷ The Standards provide guidance in relation to screening and assessment of the offender, the role of a specialist in sexual offending for preparation, conference support and follow-up support,⁶⁸ and specialist support for the victim-survivor to ensure ‘expectations are realistic and that the service is at an appropriate point in the healing process to enable constructive participation.’⁶⁹

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Leuven Institute of Criminology (LINC), University of Leuven (KU Leuven), *Doing Restorative Justice in Cases of Sexual Violence: A Practice Guide* (2011) 21-22.

⁶² UN *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (2000), Principle 12(a).

⁶³ Ibid Principle 12(b).

⁶⁴ New Zealand Ministry of Justice, *Restorative justice standards for sexual offending cases* (June 2013) 22.

⁶⁵ Ibid.

⁶⁶ Leuven Institute of Criminology (LINC), University of Leuven (KU Leuven), *Doing restorative justice in cases of sexual violence: A Practice Guide* (2011) 50.

⁶⁷ Ibid 20.

⁶⁸ New Zealand Ministry of Justice, *Restorative Justice Standards for Sexual Offending Cases* (June 2013) 23.

⁶⁹ Ibid 24.



In terms of service design, the Standards state that '[w]hen working with sexual violence clients the dynamics of the offending and prior relationships require in-depth assessment and follow up. Often the conference is the shortest piece of the service.'⁷⁰

The Timing of the Restorative Justice Process Must Be Carefully Considered

The Guide recommends carefully considering the timing for the process.⁷¹ For example, Project Restore in New Zealand requires offenders to first complete a therapy program, with the offender to accept responsibility, as well as demonstrating remorse and empathy.⁷² The Standards state that 'the timing and pacing needs to be driven by victim/survivor capacity and offender capacity; each process needs to be tailored to the needs, capacities and resiliency of all parties.'⁷³

The Motivation for Participation in the Process Must Be Properly Considered

The Guide recommends consideration of the motivation of both the victim-survivor and the offender.⁷⁴ For example, ensuring that the motivation, where there is a relationship, is 'not characterised by a desire to continue or extend patterns of harm,'⁷⁵ or that the motivation is not merely to secure better outcomes in the criminal legal system.⁷⁶

Power Imbalances Must Be Properly Considered and Addressed

The UN Basic Principles state that '[o]bvious disparities with respect to factors such as power imbalances and the parties' age, maturity or intellectual capacity should be taken into consideration in referring a case to and in conducting a restorative process.'⁷⁷

The Person Who Has Offended Must Accept Responsibility for Their Actions

The Guide recommends that 'acceptance of responsibility for the offence by the offender [be] a prerequisite for' restorative justice.⁷⁸ It does note, however, that for some victim-survivors it is more important for them to 'have their say' and 'get an explanation of what happened' rather than the offender take responsibility (although the latter is critical for other victim-survivors).⁷⁹

⁷⁰ Ibid 21.

⁷¹ Leuven Institute of Criminology (LINC), University of Leuven (KU Leuven), *Doing Restorative Justice in Cases of Sexual Violence: A Practice Guide* (2011) 21-22.

⁷² Ibid 32.

⁷³ New Zealand Ministry of Justice, *Restorative Justice Standards for Sexual Offending Cases* (June 2013) 21.

⁷⁴ Leuven Institute of Criminology (LINC), University of Leuven (KU Leuven), *Doing Restorative Justice in Cases of Sexual Violence: A Practice Guide* (2011) 27-28.

⁷⁵ Ibid 29.

⁷⁶ Ibid 29-30.

⁷⁷ UN *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (2000), Principle 9.

⁷⁸ Leuven Institute of Criminology (LINC), University of Leuven (KU Leuven), *Doing restorative justice in cases of sexual violence: A Practice Guide* (2011) 25.

⁷⁹ Ibid 25-26.



By the same token, the Guide recommends having a process which allows those who have offended to express the shame they feel regarding the harm they have caused in a ‘non-stigmatising way.’⁸⁰

The Facts Must Be Agreed to

The UN Basic Principles state that ‘[a]ll parties should normally acknowledge the basic facts of a case as a basis for participation in a restorative process.’⁸¹ Additionally, the Guide recommends giving the victim-survivor more control over how the harm is presented during the process (the facts constituting the sexual offence), than for other types of offending.⁸²

Confidentiality Must Be Maintained

The UN Basic Principles state that ‘[d]iscussions in restorative processes should be confidential and should not be disclosed subsequently, except with the agreement of the parties.’⁸³

Facilitators Must Have the Requisite Expertise and Experience

The Guide recommends that facilitators have knowledge of sexual violence and trauma, and offender and victim-survivor specialists should be involved in the process.⁸⁴ The Standards also recommend regular professional supervision, in recognition of the fact that ‘[b]eliefs about gender and culture and the individuals’ own knowledge and analysis of sexual offending will shape responses to each situation.’⁸⁵

Compliance With the Agreement Reached at the Restorative Justice Conference(s)

The Guide recommends considering having follow-up meetings. For example, in the American Restore Program, there can be a follow-up meeting in which the offender demonstrates to the victim-survivor their compliance with the agreement that had been reached during the restorative justice process.⁸⁶

Participation Must Not Be Used as Evidence of Guilt

The UN Basic Principles state that ‘[p]articipation should not be used as evidence of admission of guilt in subsequent legal proceedings.’⁸⁷

⁸⁰ Ibid 28.

⁸¹ UN *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (2000), Principle 8.

⁸² Leuven Institute of Criminology (LINC), University of Leuven (KU Leuven), *Doing Restorative Justice in Cases of Sexual Violence: A Practice Guide* (2011) 16.

⁸³ UN *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (2000), Principle 13.

⁸⁴ Leuven Institute of Criminology (LINC), University of Leuven (KU Leuven), *Doing Restorative Justice in Cases of Sexual Violence: A Practice Guide* (2011) 44.

⁸⁵ New Zealand Ministry of Justice, *Restorative justice standards for sexual offending cases* (June 2013) 22.

⁸⁶ Leuven Institute of Criminology (LINC), University of Leuven (KU Leuven), *Doing Restorative Justice in Cases of Sexual Violence: A Practice Guide* (2011) 51.

⁸⁷ UN *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (2000), Principle 8.



Participation in an Unsuccessful Restorative Justice Process Must Not be Used to Justify a More Severe Sentence

The UN Basic Principles state that:

- ‘Where no agreement can be made between the parties, the case should be referred back to the criminal justice authorities and a decision as to how to proceed should be taken without delay. Lack of agreement may not be used as justification for a more severe sentence in subsequent criminal justice proceedings.’⁸⁸
- ‘Failure to implement an agreement made in the course of a restorative process should be referred back to the restorative programme or to the criminal justice authorities and a decision as to how to proceed should be taken without delay. Failure to implement the agreement may not be used as justification for a more severe sentence in subsequent criminal justice proceedings.’⁸⁹

Models/Programs for Restorative Justice for Sexual Offending in Australia

Australian Capital Territory

Since November 2018, victim-survivors of sexual assault have been able to participate in restorative justice processes, as had been envisaged by the Restorative Justice Sub-Committee in 2003. Under the ACT model, referring agencies are not responsible for assessing an offender’s ability to agree to participate in the scheme prior to making a referral (a response to ‘the ACT Supreme Court in the 2016 case of *The Queen and Forrest*, where then Justice Refshauge identified that referring entities had to draw indirect inferences about a person when that person was not present before them’); Restorative Justice Unit staff assess suitability instead.⁹⁰

The ACT *Crimes (Restorative Justice) Act 2004* applies to ‘less serious family violence offence or a *less serious sexual offence committed by a young offender or an adult offender*’, if the offender is charged with the offence and they either plead guilty or are found guilty of the offence, whether or not they are convicted or sentenced for the offence.⁹¹ Referrals can be made by the DPP where they have consulted with the victim(s)/their parents,⁹² and by the court on the application of the DPP or defence (where the DPP and the defence lawyer agree and the court considers it appropriate). In the case of a less serious sexual offence by a young or adult offender, the court may make a court referral order ‘before the offender pleads guilty to the offence or is found guilty of the offence, only if it considers that exceptional circumstances exist to justify the referral.’⁹³ ‘Compared to other Australian jurisdictions, the ACT’s youth conferences are unusual in that they cannot go forward without the agreement of a victim. Likewise in New Zealand, with some exceptions such as when a facilitator cannot locate a victim, an adult pre-sentence conference cannot go forward without the agreement of a victim.’⁹⁴

⁸⁸ Ibid, Principle 15.

⁸⁹ Ibid, Principle 16.

⁹⁰ Burgess, K, From November, *Survivors of Sex Crimes Can Access Restorative Justice* (19 September 2018).

⁹¹ *Crimes (Restorative Justice) Act 2004*, s16. Noting that under s12, ‘less serious sexual offence means an offence under the *Crimes Act 1900*, part 3 that is punishable by a term of imprisonment of 10 years or less.’

⁹² *Crimes (Restorative Justice) Act 2004*, s26.

⁹³ *Crimes (Restorative Justice) Act 2004*, s27.

⁹⁴ Daly, K, *Conventional and Innovative Justice Responses to Sexual Violence* (2011) 10.



The ACT Justice and Community Safety Directorate website describes the role of Indigenous Guidance Partners:

The Restorative Justice Unit provides support and guidance to Aboriginal Torres Strait Islanders referred to and involved in restorative justice. The Indigenous Guidance Partner is a dedicated position that supports Aboriginal and Torres Strait Islander victims and those responsible for an offence and their supporters to understand the restorative justice process. This is to help them decide whether they will participate and also to support compliance with any agreements made as part of participating in the process... Where a person responsible has agreed to be part of a restorative justice process, the Indigenous Guidance Partner attends all interviews undertaken by the convenor to determine suitability for participation in restorative justice and prepare the person for the conference. The Indigenous Guidance Partner also attends the conference and provides support and guidance to the person in fulfilling their outcome agreements. This support may be in the form of providing transport to placements or appointments resulting from the restorative justice agreement or by supervising or being present at a placement with a responsible person. Regular contact by the Indigenous Guidance Partner with the person about how they are going and what assistance and support they may require during the post conference period is also provided by the Indigenous Guidance Partner.⁹⁵

South Australia

Youth Jurisdiction

'In Australia, conferences are principally used as diversion from court for admitted youth; and in one jurisdiction (South Australia), they are used routinely in youth sex offence cases.'⁹⁶

Daly describes the evaluation of the South Australian model:

The most developed body of research on conferencing and court-conference responses to sexual violence is a series of studies carried out in South Australia. They include the Sexual Assault Archival Study (SAAS) of 385 youth cases disposed from 1995 to 2001 in South Australia—in which comparisons were made between court and conference case processes, outcomes, and re-offending... and the In-Depth Study of 14 conference cases of sexual and family violence... In addition, South Australian youth court judges' sentencing remarks in sex offence cases were analysed... which gave insight into what judges say to youth on the day of sentencing... Youth sex offending was more likely to be admitted to, and more likely to be disposed of by a conference, for intra-familial rather than extrafamilial cases...

the conclusion is that conferences are better than court from a victim's perspective because *some type of justice response occurred*: victims (or family members) were able to explain the impact of the offence to an admitted offender, and to check and challenge denials or excuses for offending. *By comparison, in half of court cases, there was no justice response that validated victims because these cases were dismissed*⁹⁷ (emphasis added).

⁹⁵ ACT Justice and Community Safety Directorate, *Indigenous Support* (accessed 1 February 2021), available at <https://justice.act.gov.au/standard-page/indigenous-support>

⁹⁶ Daly, K, *Conventional and Innovative Justice Responses to Sexual Violence* (2011) 10.

⁹⁷ *Ibid* 18.



Adult Jurisdiction

Daly also describes the pilot in the adult jurisdiction:

In South Australia, adult pre-sentence conferencing was piloted in 2004–05. Twelve conferences were carried out, two of which were for sexual assault. Goldsmith, Halsey, and Banfield (2005) found that the facilitation of communication in a supportive and safe environment was achieved for most victims.⁹⁸

Models/Programs for Restorative Justice for Sexual Offending in Other Countries

New Zealand

‘In New Zealand, where conferences were first legislated for youth in 1989, they are now used in both the youth and adult jurisdictions.’⁹⁹ ‘There is no restriction on restorative justice being used in sexual violence cases... Where used in sexual violence cases, restorative justice conferences must be tailored to that context and take account of the unique dynamics of sexual violence. This means that the conferences may be lengthier and require more preparation time. [In 2015], four restorative justice providers in New Zealand had accredited facilitators.’¹⁰⁰ ‘If a *restorative justice conference is undertaken and results in an outcome* provided for in section 10 of the Sentencing Act 2002 (for example, if the perpetrator and the victim reach an agreement as to how the perpetrator will remedy the wrong), *this must be taken into account by the court when the case returns for sentencing*’¹⁰¹ (emphasis added).

The New Zealand Law Commission describes the work of Project Restore:

Project Restore is an Auckland-based restorative justice provider that operates specifically in the area of sexual violence. It emerged in 2005 as a pilot in response to the frustrations victims experienced with the conventional justice system and is now funded by the Ministry of Justice. Project Restore provides two kinds of restorative justice services: court-referred services (cases that have been referred from the courts under the Sentencing Act 2002); and community referrals (cases that are self-referred or referred from community organisations).¹⁰²

It also outlines the outcomes of Project Restore, and particularly the increase in referrals subsequent to legislative change:

In 2014, there were 128 sexual violence restorative justice referrals. 116 of these were to Project Restore and 12 were to other providers (and of those 128 referrals, 92 went to pre-conference stage and 38 continued to a restorative justice conference). Following the introduction of section 24A of the *Sentencing Act 2002*, this figure increased, so that there were 105 sexual violence referrals (all to Project Restore) in the first three months of 2015 alone. Section 24A of the Sentencing Act 2002 requires an adjournment of a sentencing hearing in designated circumstances to allow pre-sentence restorative justice conferencing to be considered.¹⁰³

⁹⁸ Ibid 19.

⁹⁹ Ibid 10.

¹⁰⁰ New Zealand Law Commission, *The Justice Response to Victims of Sexual Violence – Criminal Trials and Alternative Processes* (December 2015) 58

¹⁰¹ Ibid.

¹⁰² Ibid 132.

¹⁰³ Ibid.



USA

Daly describes the US model, including some of the challenges the project faced:

RESTORE was developed in Arizona under the leadership of Mary Koss and ran from March 2004 to September 2007, when project funding ended. It aimed to bring together the needs of sexual assault victim/survivors and the principles of restorative justice... After a prosecutorial referral, a victim/survivor was contacted to see if she consented to the process; only after that was an offender contacted. Upon an offender's successful completion of the program, the case was dismissed. Stubbs (2009) suggested that RESTORE combines ideas of restorative justice and therapeutic jurisprudence because offenders are required to undergo an intensive regime of treatment, ongoing monitoring, and monthly reviews for 12 months. Although great care was put into program planning, supports for victims, and agency protocols, RESTORE faced a pipeline problem: prosecutors referred few cases, and typically just those that "were not good cases"... that is, cases the prosecutors assumed would not succeed in court.¹⁰⁴

Canada

BC Association of Specialized Victim Assistance and Counselling Programs (**the Association**) describes the legislative basis for restorative justice approaches in Canada:

The primary legal foundation for the current use of restorative justice was laid with legislative changes occurring in 1996, with Bill C-41. The legislation introduced by Bill C-41 was intended to provide more alternatives to incarceration for more serious offenders than previous regimes of restitution and community service orders. It has significantly changed sentencing in Canada in ways that previous legislation was not intended, or was unable to do.¹⁰⁵

The Association describes the restorative justice model that is an alternative to the criminal justice system:

Section 717 of the Criminal Code allows for Alternative Measures. This is defined as "...measures other than judicial proceedings..." and can include programs designed and administered by the province, or by other organizations, or First Nations. Restrictions in the Criminal Code, and British Columbia's administration of justice policies do not prevent domestic and sexual violence from being dealt with under these provisions, in some cases. Many of the administrative provisions under this regime allow for records to be 'erased' or kept from public scrutiny, as programs are designed to function outside of the judicial process.¹⁰⁶

Under these provisions police may choose not to lay charges at all, but to divert the offender with no threat of judicial penalties, even in the event of a failure to comply with the program. No record of the criminal offence is then retained. His next abuse charge can be seen as his 'first'. If the offender successfully completes the program the charges (if laid) are dismissed, effectively making his next abuse charge his 'first'. If charges are laid, and the offender completes a portion of the program the judge may, in her discretion, dismiss the charges, erasing the record.¹⁰⁷

The Association describes restorative justice approaches that exist by virtue of negotiated protocols:


A number of restorative justice projects exist today by virtue of specially negotiated protocols between First Nations and the federal and provincial governments. Although they differ, these protocols usually allow for immediate and complete diversion of offenders into a specialized, structured program designed and

¹⁰⁴ Daly. K, *Conventional and Innovative Justice Responses to Sexual Violence* (2011) 20.

¹⁰⁵ BC Association of Specialized Victim Assistance and Counselling Programs, *Restorative Justice, Domestic Violence and Sexual Assault in Canada: A Summary of Critical Perspectives from British Columbia* (May 2020) 4

¹⁰⁶ Ibid 12.

¹⁰⁷ Ibid 12-13.



administered by the First Nation in question. They deal extensively with domestic abuse and sexual assault. One of the first and best-known examples is the Hollow Water Project.¹⁰⁸

Belgium

Daly notes that '[i]n Belgium, family group conferences have been used in selected youth offence cases (mainly intrafamilial). It is a pre-sentence option, with referral made by a youth court judge.'¹⁰⁹

England

Daly describes the approach in England, with referrals typically post-sentence:

In the Greater Manchester area in England, Mercer (2009) applied family group conferencing to children and youth who displayed sexually harmful behaviour and victims of their behaviour... [and] developed a restorative justice assessment framework to determine if cases (mainly sibling and intra-familial) are appropriate. These are mainly post-sentence (and therefore may not be entirely within a legal process), although some have been pre-sentence. The AIM project's justice-therapeutic practice blends a victim, offender, and family focus... As of 2009, a total of 25 referrals had been made to the program, with 10 moving to a direct meeting.¹¹⁰

Restorative Justice Models Must be Culturally Appropriate for Aboriginal and Torres Strait Islander People

The UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* states that '[i]nformal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or [I]ndigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.'¹¹¹ However, while it is recognised that in some Indigenous communities, restorative practices have traditionally been employed, any development of an Aboriginal restorative justice model in Victoria should be acquiesced to and supported by the Aboriginal community, be driven by a co-design process, with implementation involving Aboriginal people and organisations. For example, the UN Basic Principles state that '[f]acilitators should be recruited from all sections of society and should generally possess good understanding of local cultures and communities. They should be able to demonstrate sound judgement and interpersonal skills necessary to conducting restorative processes.'¹¹²

As the UN Handbook highlights, 'with programmes such as circle sentencing, the needs of the community, however that notion is defined, are also to be considered.'¹¹³ For example, in the New Zealand context, the worldview of Māori people recognises sexual offending as impacting not only the individual, but on the whānau. The New Zealand Law Commission's report discusses the demand for services for Māori

that allow for participation of whānau and hapū... In the Māori world view, sexual violence impacts not only on the mana of a whānau member who is the victim, but on the whole whānau. A possible model could emphasise the collective... To fit within the alternative process model, there would still need to be an election by the victim to a collective approach as well as consent by the perpetrator (and the involvement of specialist facilitators/providers in the process) but, in our view, as long as the relevant processes comply with the key

¹⁰⁸ Ibid 4.


¹⁰⁹ Daly, K, *Conventional and Innovative Justice Responses to Sexual Violence* (2011) 19.

¹¹⁰ Ibid.

¹¹¹ UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985), Principle 7.

¹¹² UN *Basic Principles On the Use of Restorative Justice Programmes in Criminal Matters* (2000), Principle 17.

¹¹³ UN Office on Drugs and Crime, *Handbook on Restorative Justice Programs* (2006) 70.



values and accreditation standards, there would be room for creative approaches towards development of the programmes themselves. Such a model may also be appropriate amongst other cultures which emphasise the impact of harm on the individual and also on the individual's community and wider family.¹¹⁴

Risks Involved in the Development of Culturally Appropriate Restorative Justice Models for Indigenous Peoples

The Association identified some of the risks, in the Canadian context, of appropriation and homogenisation of Indigenous restorative justice processes, and the imposition of culturally inappropriate processes:

- 'In Western Restorative justice models Aboriginal spirituality and traditions are often homogenized and appropriated to support a Christian agenda of forgiveness and reconciliation.'¹¹⁵ 'Forgiveness and reconciliation should not be the primary objectives in cases of domestic violence and sexual assault, the safety and autonomy of the women and children involved must be paramount.'¹¹⁶
- 'Many First Nations were formerly matriarchal. Most of those in positions of power within restorative justice initiatives are men. Often they are white.'¹¹⁷
- 'Homogenized models of 'traditional justice' may be imposed upon communities. In many cases 'traditional' models of restorative justice (such as the sentencing circle) are imposed upon a particular First Nation by white judges and lawyers, when historically that First Nation used another model of justice. The Inuit, for instance, did not historically use sentencing circles, yet they are regularly imposed upon Inuit communities.'¹¹⁸

Hewitt also discusses the fact that funding for programs often focuses on the volume of matters, rather than the principles of restorative justice and Indigenous knowledge focused on healing. He refers to the example of Biidaaban in Canada, which was defunded, despite having a recidivism rate of 5%, as opposed to the criminal justice system's 27%.¹¹⁹

Community healing is restorative justice, but it takes time and effort. For example, Biidaaban was established around the core tenet that healing must happen not solely between the offender and victim but the whole of the community. To this end, participation in Biidaaban's process is open for community members... healing is complicated and takes time. Biidaaban does not adopt a criminal justice model but rather is rooted in Anishinabe legal traditions of restoration with a focus on community healing. To participate, both the offender and the victims must provide their consent. If those who have been harmed do not participate, Biidaaban is typically unavailable because the process of healing needs to be engaged by all parties.¹²⁰

¹¹⁴ New Zealand Law Commission, *The Justice Response to Victims of Sexual Violence – Criminal Trials and Alternative Processes* (December 2015) 155-156.

¹¹⁵ BC Association of Specialized Victim Assistance and Counselling Programs, *Restorative Justice, Domestic Violence and Sexual Assault in Canada: A Summary of Critical Perspectives from British Columbia* (May 2020) 6.

¹¹⁶ *Ibid* 7.

¹¹⁷ *Ibid* 6.

¹¹⁸ *Ibid*.

¹¹⁹ Hewitt, J. G, *Indigenous Restorative Justice: Approaches, Meaning & Possibilities* (2016) *University of New Brunswick Law Journal* 318-319.

¹²⁰ *Ibid* 319.