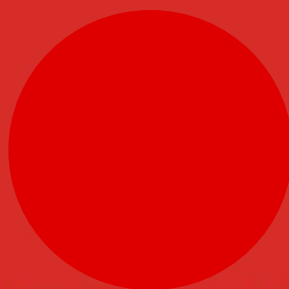




Aboriginal Community Justice Reports Program Preliminary Findings

November 2023



This Preliminary Report reflects the state of the Aboriginal Community Justice Report Program as at 14 November 2023.

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Executive Summary

The Aboriginal Community Justice Report (ACJR) Program is a uniquely Aboriginal-designed and controlled project in Victoria. It was initiated by the Victorian Aboriginal Legal Service (VALS) in 2017 and endorsed by the Victorian Aboriginal Justice Agreement. The ACJR program commenced operation in late 2021 as part of a VALS trial of 20 reports for the County Court. The report writers are located in VALS where they work in an independent ACJR unit that is separate from legal staff. ACJR writers also provide casework support for Aboriginal participants.

The ACJR program seeks to provide sentencing courts with holistic information on an Aboriginal participant's life story, community, culture, experience of the systemic impacts of colonisation and attitude to past actions and future plans. They also provide the court with options for appropriate and individualised community-based sentence orders. ACJRs are an opportunity for Aboriginal people sentenced in Victoria to share their story in a culturally safe environment that is with Aboriginal workers and within an Aboriginal Legal Service.

This preliminary report examines the first phase of the ACJR trial. It identifies widespread acceptance of ACJRs within the legal profession and the judiciary and among Elders and Aboriginal participants. It finds that the process of preparing the report for the individual contributes to their insight into their circumstances, actions and needs. It recognises that the accompanying case work by the ACJR writer helps to strengthen the person's connections to their culture and provide relevant referrals to organisations and services. Finally, it ascertains that ACJRs contribute to more appropriate sentence orders, including culturally relevant community-based sentences.

This report recommends that the Department of Justice and Community Safety provide urgent funding for VALS to sustain and expand the ACJR Program. Without government funding, it will not be possible to continue this crucial Aboriginal justice initiative beyond the trial of 20 reports, which is expected to be completed in 2024.



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Background

The more information that the courts have on the individual's history, and their family, cultural, social and economic environment will be an asset for decision making. That is what lacks in the vague information in the other reports that don't tell us about their whole environment. The ACJR raises issues of loss of identity, their culture and how they are socially isolated. It tells us about how their finances are not viable and what support they need to get self-sustained and confident. The writers walk with them to support them.

- Elder in the Koori County Court

The ACJR Program is an initiative of the Victorian Aboriginal Legal Service (VALS) in partnership with the University of Technology Sydney (UTS) (Jumbunna Institute of Education and Research and the Faculty of Law), Australasian Institute of Judicial Administration (AIJA) and Griffith University. The implementation of the ACJR pilot program is enabled by funding from the Australian Research Council and support and resources from VALS and UTS.

By providing individualised information on Aboriginal and/or Torres Strait Islander people before sentencing courts, ACJRs endeavour to improve sentencing procedures and outcomes to better reflect historical and contemporary circumstances, including structural and direct racism, that relevant to the individual. They are also strengths-based by identifying the individuals' interests, relationships, talents, skills, contributions (including to family, community and culture) and aspirations.

Without appropriate information on the Aboriginal and/or Torres Strait Islander person's background, sentencing contributes to hyperincarceration of Aboriginal and/or Torres Strait Islander people in Victoria. This in turn has detrimental consequences for the wellbeing of Aboriginal families, children, communities and cultures. Between 2012 and 2022, the Aboriginal and Torres Strait Islander prison



population in Victoria increased by 42.1%.¹ At 30 June 2022, 10.6% of people in Victorian prisons were Aboriginal and/or Torres Strait Islander people.² Aboriginal and/or Torres Strait Islander people are over 13 times more likely to be imprisoned than non-Aboriginal people and one-quarter are imprisoned to less than one year.³ Shepherd et al found that imprisoning Aboriginal people was the single greatest contributor to the poor outcomes across all Closing the Gap indicators.⁴

ACJRs are a form of truth telling. They convey the truths of the impact of colonisation on the person's community, its devastation on the person's culture and its ongoing manifestations in structural impediments confronting the individual. They also convey the truths of the person's and their community's cultural resilience. ACJRs rely on the voices of the individual and their Aboriginal and/or Torres Strait Island family and support network. They also refer to documented and oral histories of Aboriginal cultures and the impacts of colonisation, especially from Aboriginal sources, that illustrate the inter-generational effects, including on the individual.

The ACJR program draws on important lessons from Gladue Reports, prepared for Aboriginal people in Canada for over 20 years. The Aboriginal Legal Service (ALS) Toronto, which initiated Gladue Reports, supported the establishment of the Victorian ACJR Program. Appendix 1 details the stakeholder group consulted in the formation of the ACJR Program, including Jonathan Rudin from ALS Toronto, former judicial officers, defence lawyers, prosecutors, Koori Court Officers, the Koori Justice Unit and representatives from the Department of Justice and Community Safety.

As a result of sustained advocacy from VALS on ACJRs, the Burra Lotjpa Dunguludja Aboriginal Justice Agreement Phase 4 expresses a commitment to ACJRs.⁵ A pilot of

¹ Imprisonment Rates for Aboriginal and Torres Strait Islander People in Victoria | Sentencing Council
<https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/victorias-indigenous-imprisonment-rates>.

² Annual Prisons Stats profile 2012 to 2022.xlsx (live.com)
https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Ffiles.corrections.vic.gov.au%2F2023-04%2FAnnual_Prisons_Stats_profile_2012_to_2022.xlsx&wdOrigin=BROWSELINK, Table 1.3

³ Ibid, Tables 1.3, 1.4.

⁴ Closing the (incarceration) gap: assessing the socio-economic and clinical indicators of indigenous males by lifetime incarceration status | BMC Public Health | Full Text (biomedcentral.com).

⁵ See: The Victorian Aboriginal Justice Agreement Phase 4, 2018-2023, p. 39.



ACJRs over a five-year period is supported by the Victorian Government and Aboriginal Justice Caucus, but resources to support the project have not been forthcoming. This pilot has been trailblazed by VALS in partnership with the AIJA, UTS and Griffith University. In 2023, the Yoorrook Justice Commission recognised the important role of ACJRs⁶ and recommended the use of Aboriginal reports in sentencing that ‘take into account the unique systemic and background factors affecting First Peoples’.⁷

Because we work within the Victorian Aboriginal Legal Service, families talk to us and provide information for the Aboriginal Community Justice Report. They trust us because we are with VALS, which is a well-known Aboriginal justice organisation in community, and they want to help their family member.

- ACJR Writer

The ACJR pilot program began in 2021 and will produce 20 reports by 2024. It is located in a specialist ACJR unit of VALS and has direct oversight by VALS CEO Nerita Waight. This reflects the high priority placed on the ACJRs by VALS. As will be stressed in this preliminary report, there is no ongoing funding for the ACJR Program when the trial concludes in 2024, yet the outcomes have been transformative.

Originally, two Aboriginal report writers and one Aboriginal case worker were employed on a casual basis to prepare the reports and provide case work to clients. They were able to create a culturally safe and trusting space for Aboriginal participants to share their story. They provided support to the participant during and after the ACJR interviews. In September 2023, a full-time ACJR manager, writer and case worker was employed to reflect the expanding demand for ACJRs and to support the completion of the 20 reports for the ACJR trial in 2024.

⁶ Yoorrook Justice Commission, Report into Victoria's Child Protection and Criminal Justice Systems, August 2023, p. 346

⁷ Ibid, Recommendation 37.



A number of Aboriginal people we talk with look forward to our meeting every week, especially if they are in prison. We are a touchpoint.

- ACJR Report Writer

To date, eight ACJRs have been submitted to the County Court since the pilot began, and three reports are currently in train. Two of the ACJRs for the County Court have also submitted to Magistrates' Court plea hearings. There are six published decisions that refer to the significance of the ACJR in understanding the person's background and needs.⁸ Due to constrained capacity in the early stage of the pilot, not all referrals from lawyers have resulted in the production of an ACJR.

VALS are the lead legal firm in Victoria and ... they need the right support to fund this report initiative. Funding the reports will be an asset not just to the individual, family and community but also to the government because it will be more financial in the end to keep people out of the system.

- Koori Court Elder

Across Australia, Aboriginal organisations and Justice departments are looking to the Victorian ACJR Program to understand its potential for improving sentencing and sentence outcomes with a view to reducing incarceration. There are similar but more embryonic initiatives emerging across Australia, including in NSW (*Bugmy Justice Reports* auspiced by Aboriginal community justice organisation, Deadly Connections) and the Northern Territory (*Indigenous Experience Reports* prepared by Aboriginal Law and Justice Groups). In Queensland, UTS and Griffith University are working with Five Bridges to expand their well-established Aboriginal and Torres Strait Islander Narrative Reports in Murri courts.

⁸ *DPP v Morgan* [2021] VCC 1860; *DPP v Jones* [2022] VCC 1939; *DPP v Tirris* [2022] VCC 1575; *DPP v Rotumah* [2022] VCC 1532; *DPP v Muir* [2023] VCC 611; *DPP v Austin & Anor* [2023] VCC 995.



The ACJR Program is the first evaluated Aboriginal report initiative in Australia. This preliminary report constitutes the initial phase of the evaluation in order to build on the lessons and strengths established over its first two years.



Objectives of ACJR Program

The ACJR Program aims to reduce the hyperincarceration of Aboriginal and/or Torres Strait Islander people and improve sentencing processes and outcomes for Aboriginal and Torres Strait Islander defendants. Information in the ACJR provides a more holistic account of individual circumstances, including as they relate to a person's community, culture and strengths. It addresses the impact of colonisation on the person's community and life experiences, including ongoing racism and structural barriers. Finally, the ACJR identifies community-based, culturally safe and relevant sentence options.

The rationale of the ACJR Program is that too often sentencing replicates discriminatory assumptions about Aboriginal people due to inadequate information on individual circumstances relevant to the Aboriginal person.⁹ Courts rely on risk-based approaches that are imbued in Pre-Sentence Reports, which pay limited attention to prosocial cultural and community factors.¹⁰ Research shows that courts widely invoke deficit frameworks when referring to Aboriginal people, including in relation to poor parenting, alcohol and other drugs and Aboriginal community dysfunction.¹¹ Aboriginal women in prison who participated in research in 2019 shared that they do not have a voice in the sentencing process to correct any misconceptions about them.¹²

The justice report is certainly needed ... it sheds a lot of light on where the person's from and who their people are. It also importantly helps me understand what the person needs. I don't read too much on the psych reports but this report has everything in it.

- Koori Court Elder

⁹ Chris Cunneen, 'Judicial Racism' (1996) 1(58) Aboriginal Law Bulletin 44; Larissa Behrendt, 'Aboriginal Women and the Criminal Justice System' (2002) 14(6) Judicial Officers' Bulletin 41;

¹⁰ Stephane Shepherd and Thalia Anthony 'Popping the cultural bubble of violence risk assessment tools' (2018) *The Journal of Forensic Psychiatry & Psychology* 29(2): 211–220; Darcy Coulter et al. Pre-sentence reports for Aboriginal and Torres Strait Islander people: An analysis of language and sentiment. *Trends & issues in crime and criminal justice*, November 2022, no. 659. Canberra: Australian Institute of Criminology.

¹¹ Thalia Anthony, Indigenous People, Crime and Punishment (Routledge, 2013).

¹² Thalia Anthony, Gemma Sentence and Larissa Behrendt, "We're Not Being Treated Like Mothers": Listening to the Stories of First Nations Mothers in Prison' (2021) 10 *Laws*, 74, 7.2.



The ACJR is one mechanism to remedy deficit approaches in sentencing that contribute to higher rates of imprisonment for Aboriginal and/or Torres Strait Islander people. Aboriginal writers produce a narrative of the person's family's history, connection to culture, experiences with systemic racism, strengths and plans for the future. To substantiate this narrative, they draw on the accounts of the Aboriginal person, their family, support people, Elders, documented Aboriginal histories and other empirical material.

Aboriginal Community Justice Reports or ACJRs provide a wider lens that brings perspective on the collective experiences of the individual, family and community, as well as a relevant history of colonisation and its impacts, as well as an outline of contemporary interventions, circumstances, policies and laws that have impacted Aboriginal people and communities. ... This report also provides a greater opportunity for you and your loved ones, those close to you, to tell your story yourselves, rather than have others tell it.

- *DPP v Rotumah*, (n. 10), [39]

Background information on Aboriginal defendants, including with regard to their community, culture and history, is relevant to sentencing principles such as moral culpability, deterrence and rehabilitation. The High Court of Australia *Bugmy*¹³ held that evidence of a background of disadvantage or deprivation can reduce moral culpability. Where an Aboriginal person's 'background of deprivation [is relied on] in mitigation of sentence, it is necessary to point to material tending to establish that background', according to the High Court.¹⁴ ACJRs provide the material to establish such a background. In addition, the ACJRs paint a picture of the person's strengths, cultural connections and community supports that indicate protective factors. These

¹³ *Bugmy v The Queen* (2013) 249 CLR 571, [28].

¹⁴ *Ibid*, [41].



strengths also inform community-based and culturally-relevant sentence options in the ACJR, which recognise the importance of culture in rehabilitation and healing.¹⁵

The impetus for the ACJR program is a more individualised and culturally sound sentencing process that can promote more appropriate outcomes. Sentencing is the most significant contributor to the imprisonment of adults and the hyperincarceration of Aboriginal people. Following the Royal Commission into Aboriginal Deaths in Custody in 1991, which made recommendations to changes in sentencing practices, the rate of Aboriginal and Torres Strait Islander people in prison has doubled.¹⁶ A circuit breaker to growing incarceration is needed through initiatives of Aboriginal organisations, such as the VALS-led ACJR program, to buck the “more of the same” approach to doing business.

¹⁵ Vanessa Edwige and Dr Paul Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation* (Bugmy Bar Book, 2021).

¹⁶ T. Anthony, K. Jordan, T. Walsh, F. Markham & M. Williams, M. 30 years on: Royal Commission into Aboriginal Deaths in Custody recommendations remain unimplemented (Working Paper No. 140/2021), Centre for Aboriginal Economic Policy Research, Australian National University.



Procedure for preparation of reports

Aboriginal Community Justice Reports are prepared by Aboriginal staff within the ACJR Program unit of VALS. The ACJR trial program is open to all Aboriginal adults who have matters before the Victorian County Court a Koori Court-trained judge, whether or not that judge is sitting in the Koori Court. The trial has been targeted at the Melbourne and La Trobe Valley County Courts, and most referrals have been for clients in the Melbourne County Koori Court. Staff receive referrals from defence lawyers but only deem an Aboriginal and/or Torres Strait Islander person eligible when consent of the person is received. Consent is an essential prerequisite for establishing the necessary trust to prepare the report. ACJR writers have discretion to decline or cease the preparation of the report due to, *inter alia*, issues with engaging the client, proof of Aboriginal identity, a conflict of interest or insufficient capacity.

The preparation of each ACJR takes approximately 50 hours to prepare (including interviews, research and writing) and 20 hours of case work, including to make referrals that are relevant for the sentence options identified in the ACJR.

At our first meeting, the Aboriginal person gets to know us as report writers and we find connections and common values. Sometimes this takes a couple of meetings... Once we built trust, we can start diving deeper. But we also back off when people don't want to dig deeper. This helps to build trust. We do research on family background to understand intergenerational cycles. Then we ask them to think about the future, always taking a strengths-based approach. Our priority is to build a positive relationship through providing support and understanding.

- ACJR Writer

Report writers engage with clients on approximately ten occasions. Each meeting is about 1 hour. Report writers also interview family members, Elders, friends, support people and case workers to acquire further insight into the circumstances and needs of the individual. Report writers tend to adopt a yarning method to build trust and a



shared understanding.¹⁷ This makes the information shared by the client unique to what is disclosed to other professionals. Yarning proceeds on the basis that the individual determines the priorities and focal points in their life story, rather than responding to a predetermined set of questions. The Aboriginal person is invited to talk about what is important to them in their life, family, community and culture.

Throughout the preparation of the ACJR, the participant is supported with case work to help identify relevant supports, programs, facilities, services (including housing) and education or employment opportunities within the community. The case worker also assists to identify relevant programs and courses in prison and access to Aboriginal Wellbeing Officers, telephone support (e.g. Brother to Brother crisis line) and art supplies.

We try to find supports for the client that are culturally safe, such as men's groups, behavioural change programs and healing supports in Aboriginal organisations and AOD rehabilitation places that are specifically for Aboriginal men. We also contact housing services if they are homeless or for when they are released from prison.
- ACJR case worker

Report writers undertake desktop research on the person's Aboriginal background and history based on Aboriginal sources (e.g. oral histories, films, literature and academic publications) and non-Aboriginal sources (e.g. maps, archaeological recordings and academic publications). Writers rely on interdisciplinary fields of research (history, archaeology, health etc) to depict the person's culture and their community's experience of colonisation and make connections between the person's community and cultural background and their current circumstances. Professor Thalia Anthony reviews all reports to ensure the research is of the highest standard for the courts and to ensure their independence. This is consistent with the review process in Canadian Aboriginal legal services.

¹⁷ Dawn Bessarab and Bridget Ng'andu, 'Yarning About Yarning as a Legitimate Method in Indigenous Research' (2010) 3(1) *International Journal of Critical Indigenous Studies* 37, 47.



The ACJR is submitted to the County Court at least one week in advance of the sentence hearing. It is sent simultaneously to the Judge, the prosecution, the defence counsel, and in the case of the Koori County Court, the Koori Court officer. This ensures the independence of the report and avoids bias because no party has early access or can influence its outcome.

[The ACJR] is an independent report in the sense that neither party have had access to it, or control of it, prior to it being filed with the Court. It is not an expert report in the sense that it does not contain expert opinion – rather it provides a more in depth and supported means of providing the Court with information about you and the factors that have shaped you.

- DPP v Tirris, (n.10), [115] (Johns J)

The report is confidential and there is clear marking on the ACJR prohibiting its dissemination within the organisations of parties or to third parties, including Corrections. Access to the ACJR requires the free, prior and informed consent of the client. This is to protect the individual from unforeseen consequences and to retain the trust of the Aboriginal person. During the first phase of the ACJR trial, two clients have consented to their report being submitted for their matters in the Magistrates' Court.

It is crucial the report is confidential and only people in the court can read it. The Aboriginal person and their families want to know that certain parts won't be read out loud in court. The courts have respected that the person won't be retraumatised.

- ACJR Writer

ACJR report writers and case workers have been known to sit in the court or appear on the court livestream to support the Aboriginal person and be available to answer any questions about the report. However, they do not seek to intervene in the court hearing or advocate for the client.



Content of Aboriginal Community Justice Reports

An ACJR is structured according to the life story and experiences of the Aboriginal participant. Each report will focus on issues individual to the person, their culture and their community's history before and since colonisation. ACJRs link the individual's circumstances to systemic factors and cultural strengths. The ACJR includes a Family Tree that maps family relations who are relevant to the person's life and culture.

Family life

The introductory section outlines the person's life history, including, where relevant, the following matters: childhood, early and ongoing connections to culture, home life, out-of-home care, schooling, higher education or training, family and community responsibilities, employment, experiences of policing and racism and interests and strengths growing-up. This section primarily draws on interviews with the Aboriginal participant and their family.

We start the report by providing early childhood information that shows what was going on for the family. We shed light on the strengths and interests that the person had when they were young. We also show what hopes the family had for the person. We write about how the person experienced life growing up and how it affects them. Sometimes clients only share personal information after several meetings when they know that they won't be judged. So information in the report is rarely available to other professionals.

- ACJR Writer

Community history

This life history section is followed by a historical overview of the person's Aboriginal culture and Country, the impacts of colonisation and continued cultural resilience. It privileges Aboriginal sources as authority on community and culture. The history section starts with the earliest evidence of the person's Aboriginal culture, often tens of thousands of years ago, and the strengths that enabled it to survive continuously. The ACJR can include maps of the Aboriginal Country, cultural stories and artwork of



the Aboriginal participant that reflects their engagement with and contribution culture. This section proceeds to discuss the impact of colonisation on the person's culture and Country, including to the landscape through environmental violation and to the people, through massacres, missions, enforced labour and the Stolen Generations. It links these impacts to ongoing harms, traumas and racism, especially as they effect the Aboriginal participant.

Significant factors

The ACJR then identifies the significance of discrete circumstances in the person's life. These may include the person's experiences of parental incarceration, over-policing, racism at school, homelessness, poverty, addiction, out-of-home care, sexual abuse or family violence. This section locates these experiences within the broader colonialism and structural discrimination. It draws on research that provides an empirical basis for the link between particular life circumstances and manifestations of trauma, behaviour change and needs in relation to healing and support.

There are many histories of trauma and inter-generational trauma that come before the Courts. There is, however, a unique quality to the experience of First Nations peoples in this jurisdiction due to the historic, systemic and official factors referred to in the ACJR and elsewhere.

- *DPP v Tirris*, (n. 10), [157] (Johns J)

Attitude

The ACJR will then typically outline the person's attitude towards the matter before the court and their plans for building their strengths and connections to family, culture and community, where relevant. This section considers what has worked for the person as well as why programs have not worked for the person, including where the person has not been engaged in a culturally safe way. This section refers to the perspectives of family, Elders, support people and case workers that identify what has been effective for addressing the person's needs.



The report is something the person can take with them throughout their life and use it to put some of their goals into practice. It helps them make a plan and feel confident and supported to go through with it.

- ACJR writer

ACJR Considerations

The last substantive section addresses how the ACJR process has been useful for the person in coming to terms with their life and planning for the future. It outlines the significance of this person in their culture and the support offered by those interviewed as part of the ACJR process.

Options

Finally, the ACJR sets out a summary of proposed options based on the needs identified in the report. These are individualised interventions and prioritise cultural safety and building the person's strengths. In preparing these suggestions, the ACJR case worker will contact services and programs to ensure the person is eligible and there are places available. The options also include meaningful training, employment, business and cultural engagement opportunities and access to healing programs and redress schemes.



Methodology and Scope of Preliminary Evaluation

A mixed-methods approach was used to evaluate the first phase of the ACJR Program for the purpose of this preliminary report. First, we examined the eight reports submitted between October 2020 and November 2023. Second, we observed five sentence hearings, including the sentencing conversation with Elders, and analysed all sentencing remarks. Third, we interviewed parties involved with the ACJRs and the sentence. This included the Aboriginal participants (no 5), judicial officers (no 2), Koori Court Elders and staff (no 3), ACJR writers and case workers (no 2) and defence lawyers (defence and prosecutors) (no 9). Interviews endeavoured to ascertain the impact of the ACJR and its process on the Aboriginal participant, on the sentencing hearing, on sentencing considerations and on the sentence outcome. We also sought to gauge potential improvements, including ones that can be implemented in the remainder of the trial.

Range of ACJRs and demographics of Aboriginal participants

Of the eight reports, six reports have been submitted to the Melbourne Koori County Court, one to the Melbourne County Court and one to La Trobe Valley Koori County Court. The Magistrates' Court has received two of these reports where the individual had outstanding matters in that jurisdiction.

Seven reports have been prepared for Aboriginal adult males and one report has been prepared for an Aboriginal and Torres Strait Islander female. The participants faced a range of charges, including breach of justice orders, armed robbery, violent and sexual offences, possessing prohibited weapons and drug offences. One defendant appeared in the County Court due to appealing his sentence from the Magistrates' Court. Five of the participants have connections to First Nations within Victoria, three have connections to First Nations in New South Wales and the Northern Territory and one has connections to the Torres Strait. Most of the participants have connections to more than one First Nation.

The ages of the participants ranged from 25 to 52 years' old. Except for one, all of the participants had a strong sense of cultural identity. Most of the participants had



experienced homelessness, interrupted schooling and sexual abuse as a child or young person. They all faced barriers to obtaining an education, appropriate health care and therapeutic support.

Analysis of research responses

The responses to the interviews were analysed based on a thematic content analysis, following Creswell's structure of reading data; classification and interpretation; and representation.¹⁸ Coding was grounded in the project aims: to assess the utility of ACJRs with respect to client engagement, sentencing hearing and outcomes. Findings across the three research methodologies (review of ACJRs; analysis of sentencing remarks and hearings; and examination of interviews) were triangulated to identify convergence and dissonance.¹⁹ Overall, there was a tendency towards convergence on most themes, which informed the conclusions drawn in this report. Where there were differences, these are identified in the thematic analysis.

¹⁸ J.W. Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (2009, Thousand Oaks: Sage).

¹⁹ Ibid.



Findings

1. Value in participant's engagement in ACJR process

Aboriginal participants were asked to reflect on the impact of engaging with the writers and case worker in the preparation of the ACJR. Lawyers were also asked about what they observed with their clients' responses to the process.

Perspectives of Aboriginal participants

Aboriginal participants reported positive experiences when engaging with the ACJR writers and case workers. Four participants mentioned that they felt they could bring up issues that they had not discussed for a long time or at all. One stated, 'the writers dug up things I had suppressed ... I was in tears because it was full on. I was in tears. It was unbelievable'. They attributed this to the fact that they felt that they could speak without judgement and felt heard by the report writers. Participants noted that the Aboriginal writers made them feel culturally safe.

[The Aboriginal report writer] gets it because she's lived it too. So, it's easy to share life stories. The report writers help Black men come out with their truths rather than remaining silent.

- Aboriginal participant

Unlike forensic reports, the ACJR was perceived by participants as more thorough because, as one person put it, the writers 'listened to my whole story'. They went on to say, 'I told them [the ACJR writers] my whole life, which I'd never told before. No psych ever came close'. One person said that the ACJR helped to 'put everything in their life together'. Participants commented that having a writer who would check-in after each session and follow-up on their needs 'created trust and connection'.



The report writers made me feel safe and understood. I was able to go places that I wasn't able to speak about before.
- Aboriginal participant

While participants regarded the process of sharing their story as 'exhausting' and 'hard', they described it as 'healing' and a 'form of counselling where I can release things on my mind and get feedback'.

The women report writers made me feel that I could say anything to them. Once we got talking I could tell that I didn't need to have my mask on. It helped that they were working within a unit of VALS because you know that they are trying to help and are not working within system.
- Aboriginal participant

One participant remarked, 'I remember through the process thinking that every time I spoke to the writers I felt better off afterwards. It was therapeutic'.

The reports just make sense. It's amazing that they didn't already exist when we started. The reports allow someone's story to be told to the court and to receive the continuous care at the same time. It's very therapeutic for people.
- ACJR writer

Another said that despite the effort, he was 'all in' because of the importance of 'getting my story out'. Another participant said that he was in tears throughout the yarns with the writers. This was because the ACJR dealt with 'sensitive stuff' that was hard to bring up, according to the participant, but it 'needed to be said for context'. Having the report was especially useful for quieter participants who would not normally talk much to their lawyers or in court, including Koori Court.



It was a good thing to have [report writers] that are there to help us, because some of us hardly talk As I got to know [the report writers] a little bit, I started to open up a bit. It was a big thing at the time. But the report shows what I'd gone through. It shows the other side of the story of our life.

- Aboriginal participant

Aboriginal participants appreciated the support they received to set out their plans and to take steps towards realising them. One person said that from the ACJR process, they 'learnt to be less judgemental on myself and give myself more of a break'. They said that they were able to understand how they used drugs to cope with what happened as a child, and appreciate how they 'strayed when I'm not involved in culture' and the need to reconnect to culture to 'stay strong'. Another said that it made him realise he wanted to 'go through law' and have a deeper 'connection to culture' because being disconnected made him feel 'lost'.

The interviews were a forum for things to come together. It was a big thing to face ... going through each stage of my life with the report writers gave me a better understanding of the situation. I didn't know what got me there. It enabled me to pinpoint where my behaviour originated from and what led me to this. It was freeing to know where I've got to concentrate on now because there was a lot of years when I blamed myself and had shame and it allowed me to actually pinpoint where I need to work on and what services to use. The report writers gave great advice on services and pointed me in the right direction.

- Aboriginal participant

In addition, the ACJR writers conveyed the importance they placed on creating a safe relationship and identifying their shared standpoints with the Aboriginal participants that would build trust.



We can provide a sense of safety and familiarity and comfort because we draw on sister/brother roles and the same knowledge that they got. We are able to tell them that we see what's going on as part of a bigger, wider system of colonisation and it's not random that it's happening to them, because it's happening to all of us.

- ACJR writer

Perspectives of lawyers

Defence lawyers commented that they saw their client become more invested in the sentencing process because of the ACJR. One said that the ACJR made their client 'feel better going forward with the court process'. This was because their client had the opportunity to 'reflect back on a lot of things' and had 'a sense of empowerment' over the process. Another lawyer remarked, 'because of the ACJR, the client had ownership over what was occurring in the lead up to sentencing and felt respected in the process. This affects attitudinal changes. This is good for them and good for the judge to see'.

Most lawyers observed that their client was able to open up more candidly with the Aboriginal report writer compared to other professionals, including psychologists and their lawyers. One lawyer pointed out that the ACJR enabled their client to connect with their cultural and understand their 'inter-generational trauma'.

Lawyers also observed that their clients were more committed to their rehabilitation because of the ACJR. Their client felt that they were fortunate to have an ACJR and did not want to 'jeopardise' others receiving a report, so they put everything into ensuring that they reached out to services recommended by the ACJR case worker and maintained their strength.



Perspectives of Koori Court Elders and staff

Koori Court staff noted that because the writer was Aboriginal and used a story telling mode, the person could confront their past and not feel judged.

The reports build trust because there is an Aboriginal writer, rather than a non-Aboriginal psych. Aboriginal people can be more frank about their traumas and lay them on the table because they are in a culturally safe space, rather than a clinical space.

- Koori Court staff

One Elder pointed out that the ACJR writers and case workers ‘walk with them [the Aboriginal person] to support them’. They understand what the person needs. The Elder contrasted this with ‘psych reports’ that ‘often talk jargon’ and don’t use ‘layman’s language’. Unlike the ACJR writer, they only make assessments about intelligence and brain injuries, rather than working out ‘how to fix it’ by ‘addressing their needs’. Another Elder said, ‘I’m a simple man and the justice report is written in a way that I understand’. This Elder commented that the ‘reports are well planned out, well set out and well presented’ so everyone in the court, including the Aboriginal defendant and non-Aboriginal people, can all be on the same page.

2. Impact of report on sentencing hearing and Koori Court conversation

Participants were asked about what value they perceived that the ACJR brought to the sentencing process.

Perspectives of Aboriginal participants

Aboriginal participants variously noted the importance of the report in making them feel ‘humanised’. They felt humanised in front of the Koori Court Elders, the judge and their families attending the court. One person noted that everyone was ‘fighting back



tears' because of the content of the ACJR. Another said, the Elders 'were in tears; they were blown away' by what was written in the report. A participant reported that the ACJR made the Koori Court sentencing conversation 'more emotional' because the people in the court room 'could understand what I went through'.

I was happy with how the report writers told my story. It made me feel stronger in court.

- Aboriginal participant

Many participants emphasised the significance of their family hearing their story through their ACJR. Aboriginal people said that the ACJR made them feel understood by their family and, in turn, made them closer to one another. This, then, made it easier to get the support they needed. They contrasted this with other proceedings that are focused on the offence with no context of the struggles and needs of the individual. This made the Aboriginal person feel alienated from their family.

The report helped me put a couple of things together. Now I'm getting closer to my mum and family. I'm ringing them up a little bit more. My mum's the queen in my life and I've got to make sure she's all right and that.

- Aboriginal participant

Aboriginal people said that having the ACJR kept them 'calm in court', whereas they would otherwise feel 'petrified'. One person said, 'the report made me feel that in my eyes I was going to be humanised and that I was more than one simple act'. This person went on to explain that because of the ACJR, they felt that the court and lawyers changed their 'tone' towards him and shifted their 'treatment' of him because he was seen.



When I heard it read in court I'd seen my Nan and my Auntie. They were on the TV screen and Nan there broke down crying. My Auntie too. They heard it all. Because I only told them a few things before I got locked up, like what's been happening and all that when I was running around on the drugs and that. I kept it really dark and stuck to myself, really. And plus, when I was on it I didn't really go around to their house as much because I didn't want to bring trouble. But now they can hear my story.

- Aboriginal participant

Moreover, one participant commented that the 'judge respected it' because the ACJR was well-written and academic so it 'had some significance'. They also commented that while psych reports were 'more about the negatives' and usually only involved one session, 'the ACJR was more rigorous and more whole'.

The [Aboriginal Community Justice Report] is a bit different to the psych report and better at the same time, because the other psychs don't really understand because they're not Indigenous. I can talk with the [ACJR] writers and let it all out.

- Aboriginal participant

Perspectives of Koori Court staff and Elders

Koori Court staff that the ACJR improved the sentencing conversation: 'The ACJR made the Koori Court conversation more meatier and the Elders could ask better questions about the upbringing and what happened to a particular time in his life. It also brought the family in more and opened up a conversation about how his family felt growing up, and then it could become a healing process. The report meant that there was a lot of mending of the fractures and traumas that the family had experienced.' They explained that the reports are more accessible to them than other professional reports. It also has the effect of making the Aboriginal person more open and less guarded in court because, according to the Koori Court staff, 'the trauma has started to be unpacked through the report'.



Because of the report, the picture of the person's life becomes more colourful in the sentencing conversation and allows a free-flowing discussion. It's more clam and you sort of forget you're in court. You are sort of just having a conversation with aunty and uncle.

- Koori Court staff

In one sentencing conversation, a Koori Court Elder asserted, 'because of this report I now know who you are'. Another Elder said, 'This justice report is very informative and says everything about you'. Elders told a Koori Court judge that the report was written in a way that 'it had an authentic Aboriginal voice'.²⁰

Perspectives of defence lawyers

Lawyers commented that the ACJR 'links in nicely to the [Koori Court] sentencing conversation because the themes in the report are borne out in the way the Elders speak' to the Aboriginal person. Lawyers repeatedly mentioned that by the person sharing their story in the ACJR, they did not have to repeat their trauma in the sentencing conversation. Instead, they could have a conversation that assumed a lot of the circumstances.

Lawyers further remarked that where the Aboriginal person may feel they do not have a voice in sentencing or cannot express things in front of the court, 'the report gives them a voice'. This is important where the 'client is very quiet' in court and with other professionals. Another said, 'the reports allow a discussion' and for the court to hear the person's story. Moreover, lawyers noted that there was value in the ACJR writer attending the plea hearing because it 'showed an investment in the process'.

²⁰ *DPP v Rotumah* (n. 10), [28]



Perspectives of judicial officers

The judicial officers stated that the ACJR was useful for ‘fast tracking’ the relationship between the Aboriginal participant and the Elders because it provided Elders with a ‘depth of understanding’. The ACJR also created a safer space in court, according to one judge, because we did not need to rehash ‘traumatic issues in open court, which made the person feel a lot more comfortable’.

The report provided all the background needed for sentencing conversation so discussion could move to areas of importance more quickly within the limited time available – it got to important topics for both the client and the things the Elders wanted to talk about.

- Barrister

3. Impact on advocacy

Defence lawyers and prosecutors referred to the ACJR in written and oral submissions. Although defence lawyers especially found the ACJR useful for shaping their arguments, prosecutors also raised issues from the ACJR in the hearing and regarded them as important for the judge to determine an appropriate sentence.

Perspectives of defence lawyers

Lawyers stated that the ACJR played a critical role in framing factors relating to moral culpability and was a basis for ‘pushing for community-based options’. It was important, as another lawyer explained, ‘in supporting submissions relating to *Bugmy* and *Verdins* principles and gave judges facts to hang their hat on’. A further lawyer said that the ACJR helped to formulate written submissions for the defendant and gave grounds to argue exceptional circumstances to avoid imprisonment: ‘the ACJR helped the client get over the threshold of exceptional circumstances by linking the client’s own trauma to the inter-generational trauma of his community’.



The ACJR was pivotal. Before the ACJR ... we had prepared for a term of imprisonment... And what the ACJR did was give me an arguable basis in law to depart from that kind of disposition. So yes, it was a game changer for us.

- Barrister

Lawyers relied on the options section at the end of the ACJR to provide an objective basis for non-community and relevant orders.

We were able to lift parts of the 'recommendations' section ... as an independent source on what is relevant and useful for the accused. Because this was not obtained by defence, the independence of the ACJR gave the community-based options legitimacy.

- Barrister

'What shone through in the ACJR', according to another lawyer, 'was how Aboriginally can be a really significant source of rehabilitative strength ... which I hadn't really appreciated or emphasised in plea making before. ... The rehabilitative options were a good reason why he shouldn't be sent to jail, because he would be missing out on those'.

Perspectives of prosecutors

Prosecutors remarked in interviews and in the sentencing hearing that the ACJR was useful in shedding light on the circumstances of the individual and the role that culture played in their identity. One prosecutor noted that the ACJR 'emboldened me to make submissions ... that said it's clear colonialism, systemic and structural racism and the Stolen Generations have played a part in affected his life outcomes that is evidenced in the report'. This prosecutor went on to say that these factors went to mitigation and without the ACJR it would have been difficult to make these associations that were highly relevant to the defendant.



Prosecutors also recognised the value of the person participating in the ACJR process. They identified in submissions the person had to do a lot of self-work in the preparation of the ACJR.

The report was useful in applying Honeysett and Kennedy because I could argue, in the same way that participation in a sentencing conversation is relevant, participation in the report is relevant because it is an onerous process that is worthy of mitigation.

- Barrister

4. Impact on sentence considerations and outcomes

While it is not possible to calculate how much each ACJR reduced the length of a custodial sentence or the degree to which it resulted in a community-based order, sentencing remarks and interviews indicate that the ACJR was an important consideration in sentencing. Of the seven ACJRs submitted to the County Court where a sentence has been handed down, two received a community-based order, one was further imprisoned for less than one-month, and four were sentenced to longer periods of imprisonment.

Our analysis of County Court and Magistrates' Court sentencing hearings and remarks identify that the ACJR reduced a sentence in three respects:

- (i) The personal and community background factors raised in the ACJR reduced the person's moral culpability and enabled a reduced reliance on principles of deterrence and protection of the community
- (ii) The culturally-relevant community options alongside the strengths of the person's connection to culture helped inform community-based sentences
- (iii) The person's engagement in the ACJR process and its significance with helping the person come to terms with their past and plan for their future was a stand-alone basis for mitigation (similar to engagement in the Koori Court sentencing conversation).



The ACJR considerations were often referred to in order to enliven the *Bugmy* principle (regarding deprived background) in a general or specific sense, and explain the *Verdins*²¹ consideration (on mental health). The engagement in the ACJR process gave weight to the considerations in *Honeysett*²² that values participation in Koori Court.

Perspectives of Aboriginal participants

Those who did not receive a prison sentence, or subsequent prison sentence, felt that the report was the decisive factor. This included people on serious drug convictions, including facing mandatory imprisonment. Some went so far as to say that ‘the report saved my life’ because they would not cope returning to gaol, leaving their family alone, and being treated like a number. For those who returned to prison, they felt that they received a fairer sentence because of the ACJR. A number of Aboriginal people stated that before they had the ACJR the lawyer indicated a much longer sentence and they believed that the lower sentence was due to the strength of the ACJR.

The court definitely took [the ACJR] into account. Because it was something that was put directly to the court, and did not come from the lawyers, it had its own gravity. I really do think it made a difference to the outcome. The judge quoted things written at it and took them on board.

- Aboriginal participant

Perspectives of defence lawyers

Lawyers consistently referred to the circumstances outlined in the report as reducing moral culpability, demonstrating the person’s commitment to learn and grow through the ACJR process, and providing the basis for community-based options. One lawyer stated that the ‘ACJR program exposes yourself to scrutiny’ and as a result of *Honeysett* this can operate in mitigation. In addition, lawyers commented that

²¹ *R v Verdins* (2007) 16 VR 269.

²² *Honeysett v The Queen* [2018] VSCA 214.



engagement in the ACJR process reflects that the Aboriginal participant takes the sentencing process serious, which is recognised by the judge in the sentence order.

Also raised by lawyers was that the ACJR makes the judge more compassionate towards the person such that the judge is able to appreciate their whole life and what their family has endured with colonisation. One said that the ACJR's 'holistic approach' meant the judge could 'see him as a whole person'. It also clarified the impacts of systemic disadvantage and was backed up with 'academic rigour' and 'an external academic reviewer' which meant the ACJR was treated as an objective document by the court. In turn, the judge had confidence that the person is more likely to 'heal in the community', which is enforced by the ACJR options that point to community programs and services that 'reflect the client's needs'.

[The ACJR] sets out how intergenerational harms have impacted you in your life.

... I commend the report writers for their rigorous academic approach to the preparation of the report. It is a thorough report and well expressed.

- DPP v Rotumah, (n. 10) [49]

Shame and remorse, according to lawyers, were able to be explained in a 'deeper way' in the ACJR. Rather than the person simply saying to the court, 'I'm remorseful', the ACJR 'gave context to their attitudes to the offence and the impact it had on their life'. Expressions of shame and remorse in the ACJR were more poignant than in psych reports, for one lawyer, because the psych is not in a position to understand the gravity of how it affects the person's standing in their community. Another lawyer pointed out that Aboriginal report writers have a greater understanding of concepts of shame in family and community that they were able to effectively translate in the ACJR. As a result, judge is more likely to afford the person mitigation for demonstrating remorse because the claim has credibility.



*The tendered Aboriginal Community Justice Report raises a cultural interplay
between remorse, and for an Aboriginal person, shame.*

- DPP v Morgan, (n. 10) [27]

Sentence moderation was also attributed to the ACJR for explaining ‘the reasons for the change of behaviour’. This lawyer pointed out that the court was able to understand how that behaviour will be sustained. They said that this was more powerful than the diagnostic reports of psychologists alone because it addressed relevant structural, cultural and support factors for the change. Overall, lawyers expressed that the ‘formulaic’ nature of many psychologist or psychiatric (‘psych’) reports meant they did not provide the ‘whole picture’ like the ACJRs. Psych reports did not come to terms with ‘the broader context very well ... including the person’s difficulties with cultural identity’. While the ‘psych reports focus on risk ... the ACJR has a forward-looking approach’, in the words of one lawyer. Lawyers repeatedly noted that the ACJR provided ‘a sense of hope’, including in relation to their ‘prospects for rehabilitation’ and the ‘positive’ contribution of the person.

However, lawyers also commented that the ACJR complemented the psych report and reinforced the *Verdins* (mental health) considerations by ‘explaining the factors that contributed to the diagnosis’. As such, the two reports ‘enhanced each other’. For instance, PTSD could be better understood with reference to Aboriginal trauma identified in the ACJR. The ACJR could also explain why past experiences with rehabilitation but that the person could succeed in a rehabilitation setting that was ‘more culturally appropriate’.

In the main, lawyers referred to the ACJR as a turning point in the sentencing. One said that before they received the ACJR, their client was in ‘dire straits’. This was because the client had not opened up to other professionals so there was no other evidence on the factors relating to moral culpability and their strengths. Another mentioned that the sentence appeal relied heavily on the ACJR and made all the difference for a reduced sentence.



Perspectives of prosecutors

Prosecutors regarded the ACJR as reducing moral culpability because it ‘goes much deeper into history and background’ compared to defence submissions. One prosecutor said that the ACJR enabled the court ‘to make a correlation between the Stolen Generations and trauma and how it affected the person’s behaviours and involvement in the criminal justice system. Psych reports won’t make that link’. This prosecutor also said that Pre-Sentence Reports lack a cultural context in their narrow assessment, whereas the ACJR places culture at the centre of the person’s experience and strengths.

The prosecution acknowledges the contents of the ACJR and accepts that structural and systemic racism and colonisation influenced Mr Rotumah's personal circumstances and outcomes in life thus far.

- Prosecution Submission, quoted in *DPP v Rotumah*, (n 10) [50]

Perspectives of judicial officers

Judicial officers commented in interviews that the ACJR contributed to a ‘more informed and more appropriate’ sentence. One judicial officer noted that the sentence was reduced ‘because it gave me a richer understanding of *Bugmy* principles’. Or as one judge put it, ‘the ACJR breathed life into *Bugmy*’. This reduced the moral culpability of the defendant and gave the judicial officer a deeper understanding of the person’s needs. One judicial officer stated that the report gave them ‘more confidence in their decision’ and ‘clarified the path with regard to that decision’.

Whereas forensic reports are based on ‘brief consultations’ and provide ‘medical and psychological frameworks for understanding a person’s arrival at the sentencing table’, the ACJR draws on extended meetings and demonstrates the ‘history of trauma’ and the ‘person’s cultural strengths and how they traced back 60,000 years’, according to a judicial officer. The ACJR gave ‘much more information about the environment that the accused had come from and where he would be going back to and his personal motivations’. This judicial officer went on to state that before receiving the ACJR, they had an ‘incomplete understanding’ of the person’s culture and ‘history of



dispossession'. For this judge, this understanding was important for linking the Aboriginal person's current circumstances of homelessness to 'generations of dispossession'. In *Jones*, Todd J remarked,

The forensic report writing process is unable and unauthorised to investigate the broader, generational, historical context of an Aboriginal person's circumstances. ...

In this case, however, I received an Aboriginal Community Justice Report which confronts this problem.²³ ...

Having regard to the content of the report, I have a much more informed appreciation of the matters personal to you, and I also have evidence of the profound and structural disadvantages you have endured, and which inform your responses to the world around you.²⁴

I too [with the prosecution] accept that structural and systemic racism and the continuing impacts of colonisation have shaped you and your life circumstances thus far. The ACJR helps demonstrate how your life circumstances sits in that continuum and trauma.

- DPP v Rotumah, [52] (Johns J)

The ACJR was also important for judicial officers' appreciation of 'the family supports available and the strengths within those relationships'. It also informed them of relevant services and programs. In *Muir*, the court held that the report provides 'a much broader and in-depth understanding of you as an individual and the sorts of services

The ACJR also provides useful information upon which I rely as to the relevance of your Aboriginality to your rehabilitation. It has been demonstrated thus far in your case. You have reconnected to your culture and you are passing that culture on to your son.

- DPP v Tirris, (n. 10), [140]

²³ *DPP v Jones*, (n. 10), [46]-[47].

²⁴ *DPP v Jones*, (n. 10), [57].



that are available and will benefit you in your ongoing rehabilitation'.²⁵ This includes because it provided 'a far deeper insight into your past, your strengths, your resilience and the positive features of your personality than I would otherwise have'.²⁶ In that case, the judge quoted in full the options of the ACJR in terms of the community-based programs that are relevant and culturally safe for the defendant²⁷ and depended on them in making recommendations for a community-based order.²⁸ Similar approaches have been taken in other cases.

Judges in sentencing remarks referred to moderating the sentence to recognise the person's engagement in the ACJR writing process. One judge said, participation demonstrated a 'willing cooperation' and commitment on the part of the person.

Your participation in the ACJR process is to your credit and something I take into account in a similar way to your participation in the Koori Court sentencing conversation.

- *DPP v Rotumah*, (n. 10) [53] (Johns J)

5. Need for amendment to *Sentencing Act*

Interviewees were asked about whether there was a need for legislative reform to add weight to the ACJR. Among interviewees, there was a strong view that the *Sentencing Act 1991* (Vic), specific common law principles relating to Aboriginal people (e.g. *Bugmy*, *Herrmann* and *Drake*²⁹) and the general common law sentencing principle of individualised justice, provided a sufficient basis for judicial discretion to accept the relevance of ACJR.

²⁵ *DPP v Muir* (n. 10), [31]

²⁶ *DPP v Muir* (n. 10), [32]

²⁷ *DPP v Muir* (n. 10), [43]

²⁸ *DPP v Muir* (n. 10), [44]

²⁹ *DPP v Drake* [2019] VSCA 293



Section 4G of the County Court Act 1958 (Vic) provides that this Court can inform itself in any way it sees fit – including reports such as the ACJR – and oral statements or submissions from those participating in the conversation.

- *DPP v Tirris*, (n. 10), [108]

However, most interviewees believed that legislative reform that recognises the over-incarceration of Aboriginal and Torres Strait Islander people and promotes non-custodial sentences would be an appropriate remedy for this problem and provide a further basis for ACJRs. Many interviewees suggested a provision similar to Canadian *Criminal Code* s. 718.2(e) (that imprisonment should be a sentence of last resort, especially for Aboriginal people). In addition, there was support for a new provision in the *Sentencing Act* that is similar to *Bail Act 1977* (Vic) s 3A (that requires consideration of an Aboriginal person's 'cultural background', 'ties to extended family and place' and cultural obligations).

The overwhelming sentiment was that a specific provision in relation to ACJRs could be unnecessarily prescriptive. This would remove the autonomy of Aboriginal participants and the ability of defence lawyers to weigh up whether a referral will be 'beneficial to the client'.

There is an expectation with ACJRs that the Aboriginal participant can opt-in or opt-out because this is self-determination. Reports are built on trust with Aboriginal report writers and they require time. If courts required ACJRs, they would not be based on trust and would create a backlog in the courts.

- *Koori Court staff*

A small portion of interviewees conceded that such a provision could be useful where it provided guidance rather than mandated reports. As one lawyer expressed, 'it's good to have something enshrined but not prescriptive'. The perceived benefits of a specific



provision were that it would create a stronger basis for courts to accept ACJRs, overcome the reluctance of some lawyers to refer clients, and guarantee funding.

All interviewees agreed that legislation that mandated reports would undermine the self-determination of the Aboriginal participant over their story with courts, and should be categorically avoided.

Perspectives of lawyers

Among lawyers, there was support for a generic statement on the principle to be inserted into the *Sentencing Act*. Several lawyers made analogies with the *Bail Act*, stating that the *Sentencing Act* would benefit from a similar provision and ‘make people more aware of the ACJR process’. It would ensure that ‘more conservative judges’ would ‘take into account background factors’. One lawyer stated,

I think legislation would help in the sense that if you’re doing a bail application for an Aboriginal person, the court must take into account Aboriginal circumstances. A similar section in the *Sentencing Act* will ensure that the background of an Aboriginal person, including factors in the ACJR, is taken into account.

Lawyers expressed concerns about there being specific legislation on ACJRs. They reasoned that it could mean that ACJRs become court-ordered reports. This would mean that the Aboriginal participant would regard the ACJR as part of the courts and ‘the system’, rather than owned and controlled by an Aboriginal Community Controlled Organisation. They would lose confidence and trust in the process and ‘would be treated as another Pre-Sentence Report’. It would also remove their control over the process. One lawyer said that if the ACJRs were forced on Aboriginal people, they would not necessarily ‘be in the right space to do the work that the report requires’. If they were not in the right space, it could also ‘create more harm’.

Some lawyers noted that a specific legislative provision on ACJRs could be worded in a way that did not mandate ACJRs, but required the court to take them into account where they were submitted. Some stated that this was important in the absence of precedent from the Victorian Supreme Court that created a strong basis in law to



accept the reports. A prosecutor suggested that a legislative provision could be worded as follows: 'Participation in the Aboriginal Community Justice program is a relevant sentencing consideration'.

However, lawyers were adamant that court-ordered reports would be detrimental for the ACJR Program and Aboriginal participants. Lawyers expressed concerns that giving the power to the courts to order the report would threaten the cultural safety of the process in the eyes of their clients.

Finally, one barrister noted that instead of legislation structuring ACJR Reports, it would be useful to have a section inserted in the County Court of Victoria Criminal Division Practice Note, similar to the mental health section, that provides a process for accepting ACJRs and adds to the credibility of ACJRs in courts.

Perspectives of judicial officers

Judicial officers were of the view the broad Canadian principle in the Criminal Code would help because it recognises 'excessive imprisonment rates and greater risks [for Aboriginal people] such as deaths in custody'. They stated, however, that legislation is not needed for a judicial officer to consider the ACJR: 'once the report is in front of you, it's a relevant consideration and you cannot ignore it'. One stated, 'The reports change everything'. Another judge specifically referred to the Koori Court in commenting, 'we can have regard to wide information and evidence' so we do not need to determine relevance.

6. Other impacts and considerations

Truth telling

Interviewees repeatedly noted the 'general education' function of the reports – for lawyers, OPP and the judge. They perceived the ACJR as not only useful for the Aboriginal participant, but also for informing courts of the issues that broadly affect Aboriginal people before them. This may in turn result in judges asking different types of questions and avoiding stereotypes based on deficit. One lawyer commented, 'the reports are really valuable for both educating the profession as well as judiciary'. A



judicial officer stated that after receiving an ACJR, they developed a different perspective on all Aboriginal people who subsequently came before them in court: 'The ACJR extended my understanding that I will take into other Koori Court hearings'. Another officer said, 'while the ACJR had immediate relevance, it also had a strong educative and cumulative role in continuing learning'.

I think they [the ACJRs] have a political purpose. It's about truth telling and making courts confront colonial history and present.

- Lawyer

The Koori Court staff regarded the ACJR as a vehicle for resetting the terms in which government engages with Aboriginal people. The Koori Court with an ACJR submitted shows, according to Koori Court staff, the strengths of Aboriginal community and their articulate voices in telling their stories.

The ACJR is a prime example of conversation that needs to happen with government. If government wants to walk the talk then they have to come into Koori Court and actually watch how Koori Court is run with an ACJR attached to it. ... This is what is needed for a conversation about colonisation and why there needs to be a Voice.

- Koori Court staff

Others recognised the contribution of ACJRs in reducing incarceration. They felt that the ACJR played a vital policy role. Aboriginal participants especially noted that the ACJR Program needed to be extended to more thoroughly address the systemic nature of incarceration.

It's going to be a big injustice to a lot of people if the ACJR Program folds. We need more reports for bail, sentencing and parole. It helps a lot because it might be able to help blackfellas get out of prison.

- Aboriginal participant



Funding, limitations and expansion

Interviewees unanimously agreed that VALS should be funded to build the capacity of the ACJR program. Overwhelmingly, interviewees felt that the ACJR program was invaluable and it was run professionally and with a high level of cultural safety. One Aboriginal participant said, 'Don't touch it. You can't improve on the model.' Elders also commented that VALS needs to keep doing these reports because 'they go a long way in helping the defendant' by explaining to the court 'where they come from' and their 'horrific circumstances' and needs.

Given that the ACJR trial was confined to the County Court, rather than the Magistrates' Court where the vast majority of Aboriginal people are sentenced, it has limited the number of Aboriginal people who can access to access the program. Most interviewees encouraged that the ACJR program broaden its reach to sentencing matters in other courts, namely the Magistrates' Court, Supreme Court and County Courts without Koori Court trained judges. Legal respondents also suggested that it should be available for bail and parole applications. A number of interviewees noted the value of expanding the ACJR project to the Children's Court, including sentencing matters for Aboriginal young people and child protection proceedings to provide a better understanding of the circumstances and strengths of Aboriginal parents and grandparents. VALS will require adequate funding to make ACJRs more widely available to Aboriginal people across these courts and processes.

In order to expand the referrals to the ACJR program, further work needs to be done to engage private lawyers and explain the purpose of ACJRs. While the first ACJR participant was represented by a private lawyer, all subsequent referrals have come from Legal Aid and VALS. It is likely that expanding the availability of reports to Magistrates' Courts will increase overall awareness of the ACJR program. This would be further supported by a County Court (Criminal Division) Practice Note and Magistrates' Court Practice Direction proposed in the set of recommendations below.

Finally, several interviewees commented that while the ACJRs are 'powerful' and set down 'culturally safe care', if the person is sent back to prison they will be denied this



care. They regarded the real value of the ACJR is for the ACJR case worker to continue to support the person in the community. An ACJR writer noted that prison prevents access to cultural programs and broader systemic change needs to occur to ensure that Aboriginal people are supported in the community. Other interviewees commented that the ACJR is one part of the change, but there needed to be a legislative overhaul to reduce Aboriginal imprisonment.



Observations

The ACJRs have played an important role in contributing to more appropriate sentences. The ACJRs have helped inform sentencing factors relating to the Aboriginal person's moral culpability, specific deterrence and capacity for rehabilitation. The ACJRs have also provided useful information on appropriate community-based supports. They have identified options that are culturally relevant and provided explanations as to why other rehabilitation measures had not been effective, including because they were not culturally safe. They have also detailed Aboriginal participants' strengths and the role of the Aboriginal person's culture as a protective factor and strength.

However, the value of the ACJR is not limited to the sentence outcome. Across participant cohorts, it was accepted that the ACJRs are valuable in terms of the process of engaging the Aboriginal participant to reflect on their past, their role in community and culture, and to make plans for their future. Aboriginal participants reported feeling supported and safe in the process of sharing their story with ACJR writers. Importantly, Aboriginal participants felt a sense of pride in the report and how their story was shared. This in turn made them more engaged in the court process and committed to their rehabilitation.

There is wide acceptance and understanding of ACJRs among participants from the legal profession – including judicial officers, defence lawyers and prosecutors. They recognise their relevance for sentencing and the role they play in the Aboriginal participant's rehabilitation. The ACJR trial involved Koori Court-trained judges, which on first blush could explain their capacity to understand the significance of the ACJR. However, ACJRs were submitted to two Magistrates, where the Aboriginal person had outstanding matters in the Magistrates' Court, and they equally shared an understanding of the significance of the ACJR. No doubt this is partly due to the advocacy of lawyers and the helpful sentencing remarks in the County Court as well as the content of the report.



In published sentencing remarks, judicial officers discussed the relevance of the ACJR for the plea hearing or sentencing conversation and sentence considerations. In interviews and in sentencing remarks, judicial officers referred to the reports as fulfilling the functions of the *Sentencing Act* and the common law. In particular, they regarded the principles in *Bugmy*, *Drake* and *Herrmann* as enlivened by the information provided in the ACJRs. The ACJR advanced a connection between colonial dispossession of the person's Aboriginal community and their current circumstances of deprivation and disadvantage. In some cases, the ACJRs also shed light on the *Verdins* principles, because the context of colonisation and inter-generational trauma enhanced an understanding of mental health issues and appropriate cultural responses for healing. In addition, sentencing remarks referred to the strengths of the Aboriginal participant that helped inform appropriate community-based sentences.

Defence lawyers commented that because of the ACJR, they gained a deeper insight into their client and felt more assured in advocating for community-based sanctions. This confidence stemmed from the facts that the ACJR was grounded in expertise of the Aboriginal report writer, based on extensive discussions with the Aboriginal participant and their family, friends and support workers, and drew on empirical and historical research.

In addition, legal professionals regarded ACJRs as encapsulating a truth telling and educational function. By virtue of reading an ACJR, judicial officers not only learnt about the culture and community of the individual person, but they had also extended their understanding of the significance of cultural identity and heritage for all Aboriginal defendants. They also reported an increased appreciation of the devastating impact of colonisation, including how it has a material impact on Aboriginal people in court. As Judge Johns quoted in his sentencing remarks, 'The past is never dead. It's not even past. All of us labour in webs spun long before we were born'.³⁰ Repeatedly, judges commented that because of the ACJR they could understand how the

³⁰ Quoted in *DPP v Muir*, (n.10), [34].



individual is a product of colonial practices, but also the significance of the person to the continuation of their culture.

Overall, interviewees did not regard a legislative amendment as necessary for the submission and consideration of ACJRs in sentencing courts. There was, nonetheless, a view that legislation should:

- (i) recognise the role of courts in over-incarceration of Aboriginal and Torres Strait Islander people and promote non-custodial sentences; and
- (ii) identify Aboriginal background as a relevant sentencing consideration. Interviewees regarded that such amendments would moderate the risk of systemic discrimination that contributes to the hyperincarceration of Aboriginal people in Victorian prisons.

Specific suggestions for reform were: insert in the *Sentencing Act* an equivalent provision to s 3A of the *Bail Act* (that culture be taken into account), or an equivalent to the Canadian Criminal Code s 718.2(e) (that prison is a last resort, especially for Aboriginal people). There was strong caution against legislating the ACJRs because they may become court-ordered reports and Aboriginal people will lose trust in their control over the process of telling their story. However, there was support for direction in a practise note on how report is to be considered, in the same way that forensic reports are included in the practice note.

Interviewees felt that the current ACJRs were fulfilling the function of providing holistic information on Aboriginal participants to courts as well as creating a culturally safe process for the person to share their story. Therefore, legislation was not the key concern of interviewees. What was raised as a greater issue and critical for the ongoing success of the ACJR Program was continued and expanded funding to enable growth across the court system. Funding would allow more referrals to be met and ACJRs to be provided in a timely manner. As of September 2023, an ACJR Manager has been employed who reports directly to the VALS CEO, reflecting the



importance that VALS places on this program. However, without government funding the ACJR Program will cease to exist after 2024.

Aboriginal people who received reports stressed the life-saving role of the reports and the importance of keeping their production within VALS. They unanimously felt that the process was culturally safe and meaningful. Many learnt things about themselves and their culture through the ACJR. For some, the ACJR process strengthened their connections to culture and feel seen in a system that had treated them as a number. Participants felt that because of the ACJR they did not experience the same racism in sentencing and instead were afforded dignity.



Recommendations

1. Urgent and long-term funding for VALS to ensure the availability of ACJRs beyond the trial and to broaden their reach. Funding should be committed to enable the availability of ACJRs in other regional County Courts, in the Supreme Court and in the Magistrates' Court. VALS should also be funded to explore avenues to expand the program into the Children's Court and in bail applications.
2. VALS should continue to expand awareness of ACJRs across the legal profession and among the judiciary court throughout the remainder of the trial. There should be a focus on County Court judges, prosecutors, private lawyers, regional lawyers, Aboriginal people on remand and Koori Court Elders.
3. There should be legislative reform to the *Sentencing Act 1991* (Vic) that inserts a similar provision to the Canadian *Criminal Code* s 718.2(e) and the *Bail Act* s 3A. A new section could read as follows:

All reasonable sentence options other than imprisonment should be prioritised, with particular attention to promoting sentencing options that account for the over-imprisonment, systemic deprivation and cultural strengths of Aboriginal and/or Torres Strait people.

4. There should be an amendment to the County Court of Victoria Criminal Division Practice Note to include a section on the Aboriginal Community Justice Reports. The section could read as follows:

Aboriginal background

If the defendant is an Aboriginal and/or Torres Strait Islander person,

- (a) At the initial directions hearing, defence counsel will be asked by the Court if an Aboriginal Community Justice Report is being obtained.



- (b) At the initial directions hearing, where an Aboriginal Community Justice Report is to be obtained, the Court will set a date for the filing of the Aboriginal Community Justice Report and provide a reasonable adjournment for the preparation of the report as required.
- (c) If the issue of an Aboriginal Community Justice Report arises at any time after the initial directions hearing, the Court may make orders regarding the date to file of the report and adjourn the matter to provide reasonable time for the preparation of the report.

A similar Practice Direction should be considered for the Magistrates' Court of Victoria to facilitate their submission in that jurisdiction.



Appendix 1: Process of ACJR Implementation

ACJR Program establishment process

In 2017, VALS prepared a Discussion Paper on Aboriginal Community Justice Reports that explored Gladue Reports that are prepared by the Toronto Aboriginal Legal Service in Canadian sentencing and bail applications, and identified their need in Victoria.³¹ Other drivers for the reports were the recommendations for Indigenous Experience Reports in sentencing by the Australian Law Reform Commission (ALRC).³² In its 2018 report on the Incarceration Rate of Aboriginal and Torres Strait Islander People, the ALRC regarded such reports as important for addressing over-incarceration. It recommended that priority for these reports be in the intermediate courts.

The first year of the implementation of the ACJR Program entailed awareness raising among defence lawyers (with a targeted focus on VALS and Legal Aid metropolitan and regional officers), prosecutors and sitting County Court Judges, Aboriginal Elders and officers in Koori County Courts, Koori Programs and Initiatives in Jurisdiction Services of Victorian Courts, Victorian County Court Services, the Koori Justice Unit of the Department of Justice and Community Safety, Justice Policy and Data Reform in the Department of Justice and Community Safety and the Victorian Sentencing Advisory Council.

ACJR Stakeholder meeting

The first stakeholder meeting was held in January 2020 and included representatives from the foregoing organisations as well as staff from the Koori Court in the Victorian Magistrates' Court, Djirra, Five Bridges Community Justice Group, former Victorian County Court judges and the RMIT Centre for Innovative Justice. The stakeholder

³¹ See: Victorian Aboriginal Legal Service, *Aboriginal Community Justice Reports: Addressing Over-Incarceration*, VALS Discussion Paper, October 2017.

³² Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC 2018, No. 133), pp. 214- 225.



meeting gave important guidance on the need for confidentiality and independence in the preparation of reports. This was accounted for in the design of the ACJR program.

Jonathan Rudin from the Toronto Aboriginal Legal Service (ALS) addressed the ACJR stakeholder meeting on the initiation and operation of Gladue Reports in Canada. Toronto ALS established the Gladue Report program in 2004 with a view to give effect to: s. 718.2(e) of the Criminal Code to reduce Indigenous incarceration, and the Supreme Court of Canada's decision in *Gladue*³³ that Indigenous background and marginalisation arising from colonisation are relevant to sentencing considerations. A subsequent Supreme Court decision in *Ipeelee*³⁴ recognised Gladue Reports as an 'indispensable' sentencing tool because it provides 'context' for understanding the individual circumstances of the Aboriginal person before the Court.³⁵ Mr Rudin spoke to the importance of the Gladue Report program being trusted by Aboriginal people who have otherwise had adverse interactions with the justice system. For this reason, Mr Rudin stressed that it is necessary for report programs to be located in an Aboriginal justice and legal organisation that is independent of government and the courts.

Ethics approval

In 2020, ethics approval was acquired from Corrections Victoria, the Department of Justice and Community Safety and the University of Technology Sydney to allow UTS researchers to conduct research in relation to the ACJR pilot. Implementation was delayed due to COVID-19 lockdowns, including restrictive prison lockdowns.

Launch of ACJRs

On 10 March 2021, VALS launched the ACJR Program with a panel that included Judge Lawson (former Judge in Charge of the County Koori Court), Nerita Weight (VALS CEO), Distinguished Professor Larissa Behrendt (Jumbunna, UTS), Professor Thalia Anthony (Law, UTS), Jonathan Rudin (Program Director, ALS Toronto) and Lyne St Louis (Founder and Director of Taiga Vision in Quebec). The recording of the

³³ R. v. Gladue [1999] 1 SCR 688.

³⁴ R. v. Ipeelee [2012] 1 SCR 433

³⁵ Ibid, [60].



launch remains a resource for the legal profession to understand the purpose and scope of the reports.³⁶

³⁶ Victorian Aboriginal Legal Service, Unlocking Victorian Justice: Aboriginal Community Justice Reports Project, YouTube, 17 March 2021.



