Aboriginal Justice Caucus submission to Sentencing Act Reform Project

The Aboriginal Justice Caucus (AJC) is a self-determining body that works in partnership with the Victorian Government to improve Aboriginal justice outcomes, family and community safety, and reduce over-representation in the criminal justice system. Its members are the Chairs of the Regional Aboriginal Justice Advisory Committees, Aboriginal community leaders, and representatives from Aboriginal peak bodies and Aboriginal Community Controlled Organisations. The AJC are signatories to *Burra Lotjpa Dunguludja* (Aboriginal Justice Agreement phase 4).

The AJC is a conduit between the Aboriginal community and justice system in order to provide leadership, advocacy and spur change to address the drivers of offending, and to amend policy and systemic reform within the criminal justice system.

April 2020

Aboriginal
Justice Caucus

Executive Summary and Recommendations

Aboriginal people make contact with the criminal justice system at higher rates than non-Aboriginal people and are grossly overrepresented in the prison system of Victoria. The justice system exerts a lot of control over the lives of Aboriginal people through policy and legislation yet it seldom includes the voices of Aboriginal people in decision-making processes. Sentencing is a key point at which the problem of overrepresentation can be addressed by utilising culturally appropriate services, including restorative group conferencing as a sentencing support mechanism. The Aboriginal Justice Caucus (AJC) submits that the Victorian Government should invest a greater proportion of its resources into diversion, prevention and early intervention programs. However, for those in our community who face sentencing, Aboriginality ought to be of key consideration in sentencing decision-making. As the Victorian Government commits to *Sentencing Act (1991)* reforms, the AJC wishes to highlight its views for the reform process. It is important that reforms made to the *Sentencing Act (1991)* promote community confidence in sentencing and offer a range of sentencing options that aim to meet the unique needs of the Aboriginal people and communities in Victoria. The AJC support the following reforms to the *Sentencing Act (1991)* and wider sentencing processes:

- Incorporate an Aboriginal specific sentencing principle that requires Judges and Magistrates to take into account Aboriginality for the purposes of sentencing.

- Implement Aboriginal Community Justice Reports into the sentencing process with the dedicated funding from *Burra Lotjpa Dunguludja* – the Aboriginal Justice Agreement phase 4.

- Reintroduce suspended sentences and a range of sentencing options, with incarceration as a last resort.

- Reform the Bail Act in order to reduce the number of Aboriginal people on remand in Victoria.

- Amend the Sentencing Act so that judicial decision-makers are required to take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.

- Support self-determined initiatives to improve sentencing outcomes for Aboriginal people, including by directing dedicated funding from *Burra Lotjpa Dunguludja* to improve sentencing outcomes for Aboriginal people.

- Better utilisation of Section 83 of the *Sentencing Act*. This 2010 amendment already authorises Victorian Magistrates to use a restorative group conferencing process as a sentencing mechanism in adult cases "*for any* […] *purpose that the court considers appropriate having regard to the offender and the circumstances of the case*."

- Utilise culturally specific and responsive group conferencing as an aid to sentencing across a wider range of matters, and that related administrative arrangements provide for skilled facilitators to whom Magistrates can actually refer cases.

- Amend the *Sentencing Act* so that furthering Aboriginal self-determination in sentencing is included as a key purpose of the Act.

To support these recommendations this paper will outline a succinct overview of why these recommendations ought to be implemented for Victoria. The AJC hope to see reforms made to the Sentencing Act work towards decreasing the overrepresentation of Aboriginal people in the criminal justice system and support their self-determination and strengthen the Aboriginal communities across Victoria.

Background and Context

Aboriginal people are overrepresented at all stages of the criminal justice system of Victoria. The overrepresentation of Aboriginal people in Victorian prisons is significant. For example, Victorian Aboriginal people comprise 9 per cent of those incarcerated yet comprise just 0.8 per cent of the population.[1] Between 2008 and 2018 Victoria's Aboriginal imprisonment rate almost doubled, and in 2018 the imprisonment rate for Aboriginal Victorians was 2,051.1 per 100,000 adults yet was 152.3 per 100,000 adults for all Victorians.[2]

Aboriginal women are the fastest growing prison population, whereby nationally Aboriginal and Torres Strait Islander women are currently imprisoned at 21 times the rate of non-Indigenous women.[3] From 2000 to 2016, their imprisonment rate increased at over double the rate of Aboriginal and Torres Strait Islander men, whereby Aboriginal women enter the criminal justice system at an earlier age and are almost twice as likely to return to prison after release compared to non-Indigenous women.[4] In Victoria, Aboriginal women are 13.2 times more likely than non-Indigenous women to be incarcerated.[5]

It is widely agreed that the overrepresentation of Aboriginal people is an intractable and complex challenge of the justice system that is the outcome of multiple, interrelated causes.

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) was established in response to growing concerns about the number of Aboriginal deaths in custody with its 1991 Final Report determining that these deaths were the result of extraordinarily high levels of

[1] Gearin, M. and Michie, F. (2019), Victoria moves to decriminalise public drunkenness on eve of Tanya Day inquest, updated 22 August 2019

[2] Sentencing Advisory Council (2018) 'Victoria's Indigenous Imprisonment Rates', accessed 11th March 2020 from https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/victoria-indigenous-imprisonment-rate

[3] Sentencing Advisory Council (2018) 'Victoria's Indigenous Imprisonment Rates', accessed 11th March 2020 from https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/victoria-indigenous-imprisonment-rate

[3] Australian Bureau of Statistics (ABS), Prisoners in Australia, 2016 (8 December 2016)

[4] Australian Bureau of Statistics (ABS), Prisoners in Australia, 2016 (8 December 2016)

[5] Australian Bureau of Statistics, Prisoners in Australia, 2016, Cat No 4517.0 (2016) table 20, cited here https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/3-incidence/over-representation/

Aboriginal people coming into contact with the criminal justice system.[6] Significantly, the RCIADIC Final Report contained 339 recommendations for criminal justice system reform and to address the historical, social, cultural, economic and political factors that contribute to the likelihood of Aboriginal people making contact with the criminal justice system.[7] Yet, only two thirds of these recommendations have been fully implemented despite Aboriginal people continuing to be overrepresented in the criminal justice system.

The RCIADIC was a key document highlighting the need for Australian policy makers and courts to both recognise and compensate for the marginalisation of Aboriginal people. The RCIADIC recognised that *"the powers and decisions of sentencing courts presents considerable opportunity for reducing the number of Aboriginal people in custody"*. Recommendation 92 of the RCIADIC suggested that governments should legislate to enforce the principle that imprisonment should be a sentence of last resort for Aboriginal people. Recommendation 96, 100 and 104 of the RCIADIC suggest that criminal courts should provide a more culturally appropriate sentencing environment.[8]

Although sentencing outcomes may not be directly attributed to direct racial discrimination they may be connected to racially discriminatory policies that have unquestionably contributed to the chronic disadvantage that is associated with Aboriginal involvement with the criminal justice system.[9] The enduring impacts of colonisation and legacy of historical dispossession continue to harmfully impact Aboriginal people. The *Bringing Them Home Report* highlighted the insidious and intergeneration impacts of child removal on cultural links, family and communities.[10] The *Bringing Them Home Report* recommends implementation of the recommendations made in the RCIADIC final report, which aim to address underlying issues of social disadvantage that leads to contact with the criminal justice system.

A central finding of the RCIADIC is that both historical and contemporary factors impact on Aboriginal people to be seriously overrepresented in custody.[11] In our contemporary society, Aboriginal people experience higher rates of drug misuse, homelessness, poverty, child removal, and other social issues than the non-Aboriginal population. Many studies have indicated that after initial contact with the justice system, Aboriginal people are more likely than non-Aboriginal people to have additional contact, and for shorter periods of time before additional contact.[12]

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[6] Commonwealth of Australia, Royal Commission into Deaths in Custody, 1991, Vol. 1, p. 1.7.1.
[7] Jeffries, S and Stenning, P (2014) 'Sentencing Aboriginal Offenders: Law. Policy, and Practice in Three Countries', *School of Criminology and Criminal Justice*, Griffith University.
[8] Ibid
[9] Sentencing Advisory Council (2013) *'Comparing Sentencing Outcomes for Koori and Non-Koori Adult Offenders in the Magistrates' Court of Victoria'*, April 2013 accessed 21 March 2020 from https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/resources/files/comparing-sentencing-outcomes-for-koori-and-non-koori-adult-offenders-in-the-magistrates%25e2%2580%2599-court-of-victoria.pdf
[10] Human Rights and Equal Opportunity Commission (1997) *Bringing Them Home: report of the national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families,* HREOC Canberra.
[11] Cunneen, C. (2006) 'Racism, Discrimination and the Over-representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues', *Current Issues in Criminal Justice* vol. (17) no. (3)
[12] Allard, T (2010) 'Understanding and Preventing Indigenous Offending', *Indigenous Justice Clearing House* accessed 20th March 2020

It is clear that prison does not address offending, nor does it reduce recidivism.[13] Aboriginal people are more likely to be on remand, with up to 30 per cent of the Aboriginal prisoner population being held on remand nationally. Aboriginal people are also more likely to be serving a shorter sentence, which often leaves them ineligible for programs designed to meet their criminogenic needs.[14] Since the RCIADIC prison rates have increased, Aboriginal overrepresentation is increasing, with Aboriginal women being the fastest growing prison cohort.

The vast majority of Aboriginal women in prison are sitting on remand for long periods of time. In Victoria, the number of women entering prison on remand has increased 155 per cent from 2012 to 2017.[15] Almost 9 out of every ten women entering prison have not been convicted of an offence, and two thirds of women whose period of remand ended were released from prison without having served any time under sentence, whereby they are granted bail or a non-custodial sentence.[16]

Sentencing, Social Disadvantage and Justice

Sentencing can influence broader structural and systemic processes that contribute to the overrepresentation of Aboriginal people in the criminal justice system. The impact of legislative reforms to the *Sentencing Act* and other legislative acts has a disproportionate impact on the Aboriginal population. This impact can be tracked by looking at how statistics peak after reforms have taken place and how changes contribute to overrepresentation.

Legislative and policy changes made in recent times have seen growth in the number of Victorians under justice supervision, including community corrections, on remand and serving prison sentences. Such legislative changes include the *Sentencing Amendment Act* (Abolition of Suspended Sentences), *Corrections Amendment* (Further Parole Reform) Act, and *Bail Amendment Act 2016*.[17] These changes have seen an increase in Aboriginal people's involvement in the justice system in Victoria, with this occurring at a greater rate than the non-Aboriginal population.

Punitive amendments made under the *Bail Amendment Act 2016* have resulted in conservative sentencing decisions. For example, over the last six years the number of Aboriginal adults in prison increased by 70 per cent and the number of Aboriginal adults under community based

[13] McKiech, A (2017) 'Aboriginal Community Justice Reports- Addressing Over Incarceration' *Victorian Aboriginal Legal Service Discussion Paper,* October 2017.
[14] Australian Law Reform Commission (2018) Pathways to Justice – Inquiry into the incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133), modified 9 January 2018 accessed 18 March 2020
[15] Corrections Victoria, *Women in the Victorian Prison System,*
January 2019, available at: https://www.corrections.vic.gov.au/publications-manuals-and-statistics/women-in-the-victorian-prison-system
[16] Corrections Victoria, *Women in the Victorian Prison System,*
January 2019, available at: https://www.corrections.vic.gov.au/publications-manuals-and-statistics/women-in-the-victorian-prison-system
[17] *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4 (A partnership between the Victorian Government and the Aboriginal community,* 2018

supervisions increased by 64 per cent.[18] This trend peaked in 2017, with the change to legislation likely impacting the number of Aboriginal adults under justice supervision that may be attributed to legislative reform around sentencing appearing to have the greatest impact on community based correction numbers and bail reforms having the greatest impact on prison numbers. The consequences of the *Bail Act* reform further and disproportionately impede upon Aboriginal people because, when remanded in custody, Aboriginal offenders do not have the opportunity to benefit from access to programs.

Aboriginality and Sentencing

The AJC identified decolonising the justice system and restoring power balance as a key innovation to furthering self-determination in the justice system.[19] Article 19 of *The United Nations Declaration on the Rights of Indigenous Peoples* asserts Aboriginal people have the right to participate in decision-making in matters that affect their rights, through representatives selected by themselves in accordance with their own procedures, as well as to develop their own decision-making institutions.[20] System change to reduce overrepresentation must encompass prevention.

Incarceration itself has a compounding effect on disadvantage. *Sentencing Act* reform therefore must look at how the sentencing stage of the criminal justice system can provide a mechanism for readdressing some of the legacies of colonisation and to promote social justice.[21] Aboriginality has relevance to sentencing. It provides the opportunity to focus on underlying historical, social and structural processes that contribute to the overrepresentation of Aboriginal people in the criminal justice system. It also provides the opportunity to consider alternatives to incarceration that have the potential to strengthen connections to family, community and culture. A crucial distinction needs to be made between what decisions are made, and how those decisions are made. A restorative group conference can be used as part of the sentencing process. It enables the court to engage members of a person's social network, to address short, medium, and longer term questions about repairing harm, preventing further harm and promoting wellbeing.

Aboriginal people are more likely to have prior convictions and to have served a term of imprisonment than non-Aboriginal offenders. Aboriginal people are more likely to have experienced trauma that is unique to their Aboriginality. This may include impacts of stolen generation, loss of culture, and displacement, that has led to distrust in the law, police and

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[18] *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4 (A partnership between the Victorian Government and the Aboriginal community,* 2018

[19] Coombes, L., Cunneen, C., and Allison, F. (Facilitators), Furthering Aboriginal Self-Determination in the Youth Justice System Report, Joint Workshop with the Aboriginal Justice Caucus, Aboriginal Youth Justice Strategy Steering Committee/ Youth Collaborative Working Group and Youth Justice Divisino, DJCS, May 2019

[20] UN General Assembly, *United Nations on the Rights of Indigenous Peoples: resolution /adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: https://www.refworld.org/docid/471355a82.html accessed 20 March 2020

[21] Adjin-Tettey, E (2007) 'Sentencing Aboriginal Offenders: Balancing Offenders' Needs, the Interest of Victims and Society, and the Decolonization of Aboriginal Peoples' accessed 11th March 2020 from https://dspace.library.uvic.ca/bitstream/handle/1828/5883/Adjin-Tettey_Elizabeth_CJWL_2007.pdf;sequence=1

government agencies.[22] Currently, pre-sentence reports do not adequately consider the unique experiences and background of Aboriginal people.[23]

The AJC advocate that the *Sentencing Act (1991)* be amended to support the use of Aboriginal Community Justice Reports and considerations of the courts to a person's Aboriginal background.

Modelled on the Canadian Gladue Report model, Aboriginal Community Justice Reports are pre-sentence reports that aim to gather information about underlying impacts of the Aboriginal offender[24] in a manner that are different to pre-sentencing reports. The purposes of preparing these reports is to identify 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.[25] According to Program Director of Aboriginal Legal Services in Toronto, Jonathan Rudin, Gladue reports are written to include the offender's story and their voice to put their particular situation into an Aboriginal context so the judge may come to a decision that is unique to the cultural context of that person, with an emphasis on healing.[26] The context may include an examination of complex issues that are both unique to and prevalent in Aboriginal communities including intergeneration trauma, alcohol and drug misuse, family violence, and institutionalisation. Gladue reports promote a better understanding of the underlying causes of offending behaviour, including historic and cultural context of the person. These factors may, when combined with a presentence report, work towards addressing the overrepresentation of Aboriginal people in prison.

Sentencing must encompass interventions for casual factors of offending in order to reduce the likelihood of reoffending and thus improve community safety. Providing the dual purpose of holding the offender accountable for their actions and at the same time promoting community cohesion ought to be an overarching goal. Accountability and cohesion are important aspirational outcomes. Using culturally appropriate and effective decision-making mechanisms may increase the likelihood of achieving both individual accountability and community accountability.

From 2020-2022, the Victorian Aboriginal Legal Service (VALS) is leading a project in Victoria to pilot Aboriginal Community Justice Reports. The project ultimately seeks to improve sentencing processes and outcomes for Aboriginal and/or Torres Strait Islander defendants by providing courts with reports that address the personal and community circumstances of Aboriginal

[22] Australian Law Reform Commission (2018) Pathways to Justice – Inquiry into the incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133), modified 9 January 2018 accessed 18 March 2020

[23] Anthony, T., Marchetti, E., Behrendt, L., & Longman, C. (2017). Individualised Justice through Indigenous Community Reports in Sentencing. *Journal of Judicial Administration*, *26*(3), 121–140

[24] McKiech, A (2017) 'Aboriginal Community Justice Reports- Addressing Over Incarceration' *Victorian Aboriginal Legal Service Discussion Paper,* October 2017.

[25] McKiech, A (2017) 'Aboriginal Community Justice Reports- Addressing Over Incarceration' *Victorian Aboriginal Legal Service Discussion Paper,* October 2017.

[26] Australian Law Reform Commission (2018) Pathways to Justice – Inquiry into the incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133), modified 9 January 2018 accessed 18 March 2020

people. They will provide relevant sentencing options that are accompanied with appropriate supports.[27]

The pilot will involve the establishment of a report writing service at VALS to develop 20 reports for Aboriginal women with matters before the Koori Court. The project is funded by the Australian Research Council and involves four other partners, which are the University of Technology Sydney, Griffith University, Australasian Institute for Judicial Administration and Fie Bridges Aboriginal and Torres Strait Islander Organisations. In parallel, work will also be undertaken to strengthen Narrative Reports in Murri Courts in Queensland. In 2022, the two research partners will engage a participatory action research model to assess the impact of these reports in criminal sentencing practices and outcomes. Under the AJA, the AJC and the Victorian government have also committed to trial 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 impacts their offending, and to identify more suitable sentencing arrangements to address these underlying factors.[28]

The ALRC Recommendation 6-1 sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander offenders, courts should take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.[29] There is strong support for Australian jurisdictions to introduce a provision requiring sentencing courts to take into account the unique systemic and background factors affecting Aboriginal people. The current approach that takes subjective disadvantage into account is considered to be an insufficient response due to the unique experiences that many Aboriginal people face.

Incarceration has a compounding effect on disadvantages, which can lead to a cycle of incarceration, for both prisoners and their families. The incarceration of women can lead to entry of children into the child protection system. Australian Lawyers for Human Rights submitted that the *'incarceration of women, even for short periods on remand, may result in the removal of their children and their exposure to neglect and abuse, contributing to the cycle of disadvantage'*.[30] Under section 5(3) of the *Sentencing Act (1991)*, a court must not impose a sentence that is more severe than necessary to achieve the purpose or purposes for which the sentence is imposed, which is the principle of parsimony.

To achieve fewer Aboriginal people progressing through the criminal justice system, it is vital to establish and support existing culturally appropriate bail support, early intervention programs and diversion programs so that police and magistrates have viable alternatives to incarceration prior to sentencing.

Aboriginal youth are more likely to be victims of crime before any criminal charges are laid against them. Where there are clear casual factors underlying offending behaviour, sentences

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[27] McKiech, A (2017) 'Aboriginal Community Justice Reports- Addressing Over Incarceration' *Victorian Aboriginal Legal Service Discussion Paper,* October 2017.

[28] *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4 (A partnership between the Victorian Government and the Aboriginal community,* 2018

[29] Australian Law Reform Commission (2018) Pathways to Justice – Inquiry into the incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133), modified 9 January 2018 accessed 18 March 2020

[30] Australian Law Reform Commission (2018) Pathways to Justice – Inquiry into the incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133), modified 9 January 2018 accessed 18 March 2020

should not be imposed without comprehensive intervention supports put in place. It is important that adequate victim supports are utilised.

Self-Determination in Sentencing

Given the overrepresentation of Aboriginal people across all areas of the criminal justice system, including disproportionate rates of Aboriginal people in prisons and on community-based sentences, measures to further self-determination in the sentencing process are essential.

The AJC hope to see a commitment to self-determination in the *Sentencing Act (1991)* reform process. In view of the Victorian Government's commitment to Aboriginal self-determination and the ongoing work of Victorian Aboriginal communities to build a self-determined Aboriginal justice system, it is critical that all relevant Victorian laws include a commitment to Aboriginal self-determination in the justice system. Therefore, amending the *Sentencing Act (1991)* ought to include an overarching commitment to further Aboriginal self-determination through sentencing processes and applications. This is consistent with the Victorian Government's commitments under *Burra Lotpja Dunguludja,* and adheres to obligations under international law to respect and promote the rights of Aboriginal people to self-determination solutions.[31]

Healing and Social and Emotional Wellbeing

The overrepresentation of Aboriginal people in the criminal justice system means that sustainable reforms must be made to the *Sentencing Act (1991)* in order to address this overrepresentation.

Social and emotional wellbeing needs to be considered in sentencing provisions. This approach aims to strengthen community and building capacity to enable crime and justice to be related issues to be addressed in local communities. Focus on increasing protective factors and decreasing risk factors for further offending through programs and services to build resilience and protects against poor mental health.

Providing the capacity within the *Sentencing Act (1991)* to look at rehabilitation interventions with restorative justice accountability attached would be a vastly lower cost response. Such responses also invest in the social and emotional wellbeing and the healing of the person, families, and communities. Alongside this, Governments must invest in culturally safe early intervention and prevention programs that strengthen and build resilience.

The Victorian Government has funded a Restorative Justice Pilot Project under the AJA4, overseen by the Eastern Metropolitan and Hume RAJACS. This is one of the first Place-Based Local Community-Led Projects to commence under *Burra Lotpja Dunguludja*. It is developing a

[31] UN General Assembly, *United Nations on the Rights of Indigenous Peoples: resolution /adopted by the General Assembly*, 2 October 2007

pilot program of culturally specific and responsive restorative justice and group conferencing for young Aboriginal people (up to 25 years of age) who come into contact with the justice system.

Restorative processes are guided by three foundational principles. They are: do no further harm; work with people; and, set relations right. Group conferencing has been shown to provide healing for offenders, victims and others affected by offending. An international meta-study of program evaluations has shown that the process reduces rates of reoffending for comparable cases.[32] Engaging in a well-facilitated restorative group conference can help set relations right: within individuals, as well as with others, and strengthen connections to family, community and culture. The group conferencing process can also help a group to better understand and address the underlying causes for the harm, and to identify practical and culturally appropriate justice and healing outcomes. These processes enable individuals, with the support of their communities and of state agencies, to increase accountability and generate mutual support and cohesion. Over time, a series of constructive engagements can build or renew trust in state agencies such as police, court and departments.

Programs using the group conferencing process have been implemented outside the justice system, with significant success in schools, workplaces, and residential communities. The process is also being piloted in Australia for work with families affected by adolescent family violence. These initiatives include the first civil-based restorative program at the Melbourne Children's Court, which commenced in August 2018, and the ACT Restorative Justice Unit provision of group conferencing to address adolescent family violence, family violence and sexual assault matters. This ACT program commenced to November 2018.

However, in Victoria, group conferencing is currently only used systemically, as a mechanism for sentencing support, in the criminal division of the Children's Court where it has been found to be both very effective and still underutilised. Victoria does not yet operate a formal program of group conferencing for post-sentence restoration, nor for pre-release planning, unlike in other jurisdictions such as New South Wales, Queensland and the Australian Capital Territory. However, group conferencing has been used successfully post-sentence for a small number of individual cases in Victoria at the direct request of individual victims of crime.

Importantly, following a recommendation of Victoria's Sentencing Advisory Council, the state government has amended the *Sentencing Act* to extend the use of group conferencing to the adult justice system. Section 83a of the *Sentencing Act* authorises Victorian Magistrates to use group conferencing as a sentencing mechanism in adult cases. This 2010 amendment allows that, just as in the Children's Court, a Magistrate may refer a case to a community conference "*for any* […] *purpose that the court considers appropriate having regard to the offender and the circumstances of the case*." As in Children's Court application, the facilitator would then return

[32] Sherman, L.W., Strang, H., Mayo-Wilson, E., Woods, D.J., & Ariel, B. 'Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review', *Journal of Quantitative Criminology v*olume 31, pages1–24(2015)

to the Court the outcome plan developed by the group, which informs the Magistrate's sentencing disposition. In effect, Victorian Magistrates are already permitted to refer most cases involving an adult offender to a community conference. However, the statewide network of Non-Government Organisations that provide youth justice group conferencing are not currently funded to provide group conferencing for cases involving adult offenders. A decade after the *Sentencing Act* was amended, Victorian Magistrates have yet to refer to a group conference any cases involving adult offenders.

In the Australian Capital Territory, in contrast, adult cases are now routinely referred to the Territory's Restorative Justice Unit, enabling the community of people affected by the case to participate in a restorative group conference. The experience of the ACT offers three lessons relevant to Victoria. One involves community understanding and support. The ACT *Crimes (Restorative Justice) Act 2004* envisaged, from the outset, three phases of implementation. Phase 2 extended group conferencing beyond youth justice to adult justice in 2016, and Phase 3 extended it to the full range of offences in 2018, with little controversy. A second lesson involves program support. ACT Magistrates can refer cases to the Restorative Justice Unit (RJU), located within the Directorate of Justice and Community Services. RJU facilitators work across youth and adult programs, and deliver group conferencing for diversion, sentencing support, post-sentence restoration, and pre-release planning. With good governance, and a culture of reflective practice, these facilitators have continued to increase their individual and collective skills. Lastly, the ACT RJU upholds cultural safety, whereby Aboriginal officers can facilitate group conferences and are able to provide support to Aboriginal community members.

The AJC advocate that the *Sentencing Act* (1991) be amended to further support the use of culturally specific and responsive group conferencing as an aid to sentencing across a wider range of matters, and that related administrative arrangements provide for skilled facilitators to whom Magistrates can actually refer cases.

Final Remarks and Recommendations

Changes made to the *Sentencing Act* (1991) have impacted our communities. Sentencing reform can shift broader structural and systemic processes that contribute the overrepresentation of Aboriginal people in the criminal justice system. The review of the *Sentencing Act* needs to wind back restrictions that have spectacular impact on low-level crime in the magistrates' court. More flexibility for magistrates would allow a for a restorative justice approach to influence sentencing outcomes.

The AJC propose a number of reforms be made the *Sentencing Act* (1991) (Vic) and wider sentencing processes. These reforms are:

- Incorporate an Aboriginal specific sentencing principle that requires Judges and Magistrates to take into account Aboriginality for the purposes of sentencing, with guidelines to provide articulated operationalized examples of how this would be effective, to ensure consistency in application.

- Implement Aboriginal Community Justice Reports into the sentencing process with the dedicated funding from the *Burra Lotjpa Dunguludja*.

- Reintroduce suspended sentences and a range of sentencing options, with incarceration as a last resort.

- Utilise restorative justice practices, and in particular group conferencing, across a wider range of matters where possible particularly those that relate to Aboriginal community values. In doing so, sentencing practices may be aligned more closely with community expectations.

- Reform the *Bail Act* in order to reduce the number of Aboriginal people on remand in Victoria.

- Amend the *Sentencing Act* (1991) so that judicial decision-makers are required to take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.

- 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.

- Governments must invest in culturally safe early intervention and prevention community based programs that strengthen culture and build resilience.

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