ODPP
New South Wales

Improving the wellbeing and safety of First Nations complainants and witnesses in the criminal justice system

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Contents

The artwork on the cover-page is 'Holistic Journey of Life' by Luke Penrith. Luke has ancestral connections to the Wiradjuri, Wotjobaluk, Yuin & Gumbaynggirr people.

Introduction

1. This report has been prepared to canvass the various issues faced by First Nations witnesses and complainants during their interactions with the criminal justice system. In this regard, it is primarily concerned with First Nations 'victims of crime', hereafter referred to as victims. Whilst not all witnesses are victims, the issues discussed below—as well as any lessons discernible from them—are generally applicable to non-victimised witnesses. The dominant use of 'victim/victims' throughout this report is not intended to exclude this class of witnesses.
2. The first section of this introduction will provide a brief overview of First Nations victimisation in Australia. This will include a discussion of the identified gap within the law reform and advocacy sectors relating to the rights and experiences of First Nations victims. The second section will then introduce cultural concepts of safety, wellbeing and trauma, all of which have been adopted from the *Significance of Culture to Wellbeing, Healing and Rehabilitation* report.[1] The third section will provide an overview of the structure of the report.

[1] Vanessa Edwige & Dr Paul Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation* (Report) < Significance of Culture to Wellbeing, Healing and Rehabilitation (nsw.gov.au)> ('*Significance of Culture Report*').

The victimisation of First Nations people

3. The ongoing effects of colonisation, dispossession and the Stolen Generations have inflicted significant disadvantage on First Nations Australians. This disadvantage has manifested in various forms and to varying degrees,[2] though is nowhere more evident than in the criminal justice system. There is a significant relationship between colonisation and First Nations hyper-incarceration, which has been discussed by various governmental inquiries.[3] Proportionately, First Nations people are the most incarcerated ethnic group in the world,[4] and First Nations children are removed from their families at nearly 10 times the rate of non-First Nations children.[5] The dimensions of this crisis were a key pillar of the *Uluru Statement from the Heart*, which called for structural constitutional and social reforms to empower First Nations communities.
4. Some meaningful progress has been made to address the disproportionate rates of First Nations criminalisation. The Walama List in the District Court of NSW and the Youth Koori Court in the Childrens' Court are positive steps forward in breaking cycles of disadvantage, whilst incorporating culturally specific, therapeutic, and holistic approaches. The *Bugmy Bar Book,* published by the NSW Public Defenders, also illustrates how a co-ordinated multi-disciplinary approach is improving the way First Nations offenders are dealt with during sentencing proceedings.

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[2] See the Australian Government's *Information Repository* on Closing the Gap <Dashboard | Closing the Gap Information Repository - Productivity Commission (pc.gov.au)>.
[3] *Royal Commission into Aboriginal Deaths in Custody* (Final Report, April 1991); *Bringing them home – Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Final Report, 1997); *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Final Report, November 2017); Steering Committee for the Review of Government Service Provision, *Review of the Overcoming Indigenous Disadvantage: Key Indicators Report* (Report, June 2012).
[4] International Work Group for Indigenous Affairs, "Aboriginal people in Australia: the most imprisoned people on Earth" (Online article, 22 April 2021) < Aboriginal people in Australia: the most imprisoned people on Earth - IWGIA - International Work Group for Indigenous Affairs>.
[5] Lorena Allam, "'Alarming rate': removal of Australia's Indigenous children escalating, report warns", *The Guardian* (Online article, 16 Nov 2020) < 'Alarming rate': removal of Australia's Indigenous children escalating, report warns | Indigenous Australians | The Guardian>.

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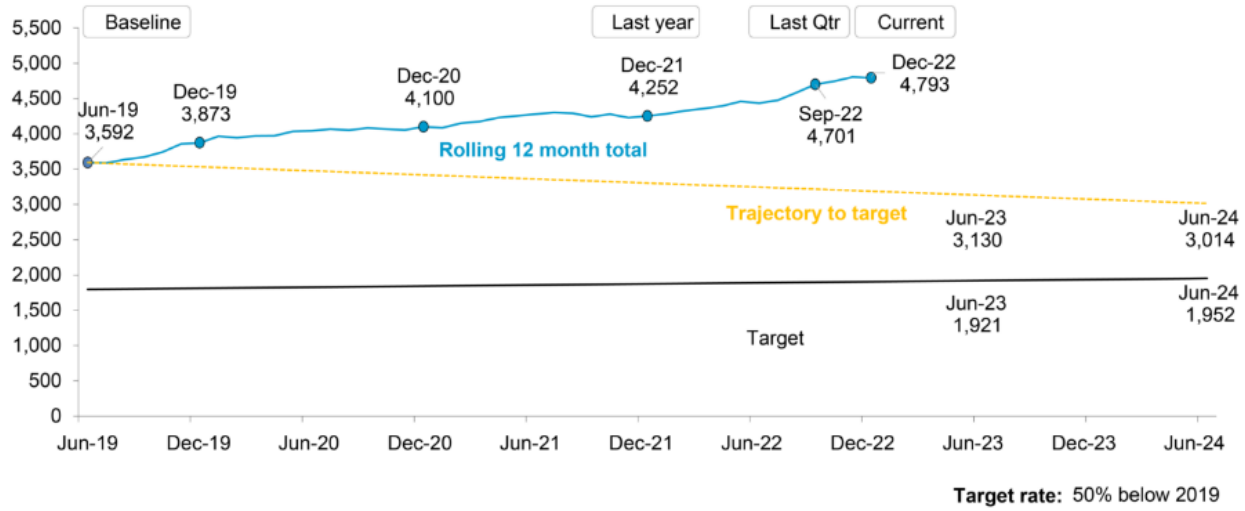
5. Whilst substantial attention has been directed towards the incarceration crisis facing First Nations people, the plight of First Nations victims has received far less attention. This is not because First Nations people are not victims of crime. Indeed, First Nations people are significantly more likely to experience crime than their non-First Nations counterparts.
6. Based on instances of crime reported to NSW Police, the Australian Bureau of Statistics' national Victims Statistics register identified that in NSW in 2022, First Nations people experienced assault at 3.1 times the rate of non-First Nations people, and sexual assault at 2.5 times the rate of non- First Nations people.[6] The Australian Institute of Criminology has identified that between 2005 and 2020, the murder rate for First Nations women ranged from three to 12 times the non-First Nations rate, with an average rate eight times higher than non-First Nations women.[7] Furthermore, the national Closing the Gap strategy has set a target for the 50% reduction of all forms of family violence and abuse against Aboriginal and Torres Strait

[6] Australian Bureau of Statistics, "Recorded Crime – Victims" (Webpage, published 29 June 2023) < Recorded Crime - Victims, 2022 | Australian Bureau of Statistics (abs.gov.au)>.
[7] Evidence to Senate Legal and Constitutional Affairs Reference Committee, Australian Senate, Canberra, 5 October 2022, 16 (Senator Scarr).

Islander women and children by 2031.[8] Currently, Australia is not on track to meet this target, with rates of family violence and abuse having steadily increased each year:

Target 13: Aboriginal female and young victims of violence*

By 2031, the rate of all forms of family violence and abuse against Aboriginal and Torres Strait Islander women and children is reduced at least by 50%, as progress towards zero.



Target rate: 50% below 2019

7. Despite these extreme rates of victimisation, the criminal justice system currently offers very limited (if any) culturally sensitive and trauma-informed approaches which recognise the unique history, culture and needs of First Nations victims. This lacuna speaks to the historical powerlessness of First Nations communities generally, as well as the limited resources available within the law reform and human rights sectors. Whilst many FN-controlled legal (and legal-adjacent) organisations exist in NSW, they are generally dedicated to representing First Nations defendants, rehabilitating First Nations offenders, assisting in civil matters, and promoting connection to culture, rather than advocating for the particular needs of First Nations victims of crime.
8. A further reason for this absence relates to the general historical neglect of victims by the core institutions of the criminal justice system. Modern socio-political developments such as the *Bringing Them Home Report* and *Royal Commission into*

[8] NSW Bureau of Crime Statistics and Research, "Closing the Gap" (Webpage) <Closing the Gap (nsw.gov.au)>.

Institutional Responses to Child Sexual Abuse have gone some way to rectifying this situation, primarily by increasing awareness about the plight of victims and the legal issues associated with victimisation. Recent reforms, including the expansion of the Child Sexual Offence Evidence Program across NSW, have indicated a growing awareness of trauma-informed practice.

9. Given the function that the ODPP serves in relation to all victims of crime, it is uniquely placed to respond to the complexities associated with First Nations victimisation, including by advocating for a greater emphasis on culturally safe judicial practices.

Concepts of trauma, health and wellbeing

10. Attempts to address the needs of First Nations victims must be grounded by an appreciation of the ways in which culture will impact health and wellbeing. Legal understandings of this relationship vary, though have benefited from the recent publication of Vanessa Edwige and Dr Paul Gray's report, *Significance of Culture to Wellbeing, Healing and Rehabilitation* ('the Significance of Culture Report'), commissioned by the Bugmy Bar Book. Whilst the Significance of Culture Report has primarily been used by defence advocates in sentencing hearings, it offers a useful framework for considering the issues experienced by First Nations victims. Much of the literature on First Nations offenders is applicable to First Nations victims, primarily because criminalisation and victimisation are equally the sequelae of structural disadvantage. The commonality of experience between victims and offenders illustrates that advocating for improvement to the experience of First Nations victims should not be viewed as inconsistent with advocating for the improved experiences of offenders. To this extent, adopting the language and concepts used by defence practitioners illustrates the benefits to be reaped when culture is placed at the forefront of all processes within the justice system.

11. The Significance of Culture Report found that wellbeing is intrinsically tied to culture.[9] It summarised that "…[FN] *perspectives of wellbeing and healing reflect holistic worldviews that consider connections between physical, social and emotional wellbeing, individual and collective wellbeing, and the impact of social, political and historical factors*".[10] The Significance of Culture Report further noted that for self-determination to be practised, responses to the justice-related issues experienced by First Nations people must be community designed and led.[11]
12. The Significance of Culture Report's exploration of the various modalities of wellbeing is highly relevant to understanding the issues that may arise for First Nations victims when they encounter the justice system. Specifically, the report notes that promoting the social and emotional wellbeing of First Nations people requires consideration of the ways in which their developmental context and lived experience is affected by broader social, economic, political, and historic circumstances.[12] The transmission of intergenerational trauma is one such circumstance. This has been explored by Wesley-Esquimaux and Smolewski, who argue that the intergenerational transmission of trauma occurs through biological, cultural, social and psychological mechanisms: *"Trauma memories are passed to next generations through different channels, including biological (in hereditary predispositions to post-traumatic stress disorder), cultural (through storytelling, culturally sanctioned behaviours), social (through inadequate parenting, lateral violence, acting out of abuse), and psychological (through memory processes) channels*".[13]

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[9] *Significance of Culture Report* [12].
[10] Ibid.
[11] Ibid [14]-[15].
[12] Ibid [16].
[13] Cynthia C Wesley-Esquimaux and Magdalena Smolewski, *Historic Trauma and Aboriginal Healing* (Report, Aboriginal Healing Foundation, 2004), 76.

13. The ongoing effects of intergenerational trauma reflect the legacies of colonialism that continue to shape the experiences of First Nations people, particularly during their interactions with the justice system. A clear example of this is provided by the barriers affecting the disclosure of crime by First Nations victims. As outlined below, First Nations victims are significantly less likely to report crime than non-First Nations victims. This difference is owed, among many factors, to a heightened perception amongst First Nations victims that they will not be believed by police, and that responses to their complaints will not be culturally sensitive.[14] Accordingly, recognising the interplay between a First Nations victim's wellbeing and their broader social, historical, political and cultural circumstances must therefore be central to any attempt to enhance the experiences of victims within the criminal justice system.

Report Structure

14. The remainder of this report will address three topics: evidentiary matters; the provision of cultural support; and international experiences. "Evidentiary matters" will explore barriers to disclosure for First Nations victims, the giving of evidence by these victims, and issues and opportunities that arise from the admission of expert evidence. "Cultural support" will focus on the provision of cultural support during proceedings, and how court processes may be improved to increase cultural safety. "International experiences" will consider what lessons can be learnt from overseas jurisdictions.

[14] Matthew Willis, "Non-disclosure of violence in Australian Indigenous communities" *Trends and issues in crime and criminal justice* (2011) no 405, 3-5.

Evidentiary Matters

Barriers to disclosure

15. First Nations victims of crime face a range of barriers to disclosing instances of crime perpetrated against them. It has been estimated that up to 90 percent of incidents of violence perpetrated against First Nations women go unreported.[15] Furthermore, the NSW Aboriginal Child Sexual Assault Taskforce found that *most cases* of child sexual abuse ('CSO') are not disclosed.[16] This is consistent with the findings of government inquiries in Western Australia[17] and the Northern Territory.[18]
16. Whilst there are several specific barriers to disclosure that disproportionately affect First Nations victims, these victims are also impacted by the kinds of barriers that affect the community at large. These include, amongst other barriers, perceptions that the crime was too 'trivial' to report to police, or that the police would not believe them; shame about the crime; and a desire to protect the offender, the victim's relationship with the offender, or their children.[19]

Fear of repercussions

17. A fear of repercussions or lateral violence has been identified as a pervasive barrier to disclosure in First Nations communities.[20] This is particularly significant where these communities are 'small, interconnected and isolated', as anonymity for victims cannot

[15] Australia's National Research Organisation for Women's Safety (ANROWS), "Improving family violence legal and support services for Aboriginal and Torres Strait Islander peoples: Key findings and future directions" (Report, 2020), 2.
[16] Aboriginal Child Sexual Assault Taskforce 2006, "Breaking the silence: Creating the future: Addressing child sexual assault in Aboriginal communities in NSW" (Report, 2006); Willis, "Non-disclosure of violence", 1.
[17] Gordon S, Hallahan K & Henry D, "Putting the picture together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities" (Report, 2002).
[18] Wild R & Anderson P, "Ampe Akeleyername Meke Mekarle 'Little children are sacred' - Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse" (Final report, 2007).
[19] Willis, "Non-disclosure of violence", 2-3.
[20] Ibid, 4-5.

be maintained.[21] A 2010 study by the Australian Institute of Criminology found that a fear of further violence and payback, or culturally related violent retribution, were the most commonly cited reasons for not reporting violent victimisation.[22] First Nations survivors of sexual assault have also identified fears about an escalation of violence as a barrier to disclosure.[23]

18. The fear of repercussions is not limited to a fear of violent retribution. An investigation led by Professor Marcia Langton found that for the First Nations communities of Albury-Wodonga, the primary barriers to disclosure included:
    - a dominant fear of child removal;
    - the real and immediate threat of homelessness, as there was often a reliance on their violent partner to provide financial support to the household; and
    - the fear of isolation from family and community.[24]
19. The conclusions of Langton's investigation—which was facilitated by Australia's National Research Organisation for Women's Safety—mirrored the findings of a 2015 study by the Judicial Council on Cultural Diversity (JCCD).[25] This consultation-based study also found that past experiences of racism and discrimination impacted the decision by First Nations victims not to disclose.[26]

Distrust of the justice system

[21] Ibid, 4.
[22] Matthew Willis, "Community Safety in Australian Indigenous communities: Service Provider's Perceptions" *Research and public policy series* (2010) no 110.
[23] Aboriginal Family Violence Prevention Legal Service Victoria, "Strengthening law and justice outcomes for Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault and women and children: National policy issues – a Victorian perspective" (2010, report).
[24] ANROWS, "Improving family violence", 5.
[25] Judicial Council on Cultural Diversity, "The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts" (Report, 2016), 18.
[26] Ibid, 7.

20. An entrenched distrust of the police and the criminal justice system serves as a further barrier to disclosure for First Nations victims. Numerous studies have identified a general perception amongst First Nations women that police responses to their complaints would likely be culturally and sexually insensitive.[27] Memories of the Stolen Generations and other interventionist government policies have led to distrust in other justice institutions, including the courts.[28]
21. Whilst in many communities the practical consequences of having a partner or relative imprisoned may cause a victim not to report, Willis has identified that this "*…takes on extra dimensions in Indigenous communities who experience the impacts of Indigenous over-representation in the justice system*".[29] Alarmingly, he notes that "*…some victims may feel they have to protect the perpetrator from imprisonment and a possible death in custody, while in Cape York communities, a death in custody may be regarded as the victim's fault*".[30] These examples clearly reflect the social and political determinants of wellbeing, demonstrating that for First Nations victims, 'whole-of-system' reforms may be just as important as specific 'victim-tailored' measures. This also suggests that cooperation amongst the core institutions of the justice system will provide the greatest opportunity to meaningfully address these issues.

[27] Willis, "non-disclosure of violence", 5.
[28] Ibid, 5-6.
[29] Ibid, 6.
[30] Ibid.

Cultural issues

22. Disclosures by First Nations victims of crime may also be complicated by specific cultural issues. Whilst the diversity of First Nations in Australia means that cultural issues cannot be generalised,[31] several recurrent themes have emerged.
23. The first issue arises where crimes have been perpetrated by Elders in the community. Elders often occupy positions of leadership, trust and respect in First Nations communities. If a crime is committed by a respected Elder, the perceived costs of disclosure to the victim may be aggravated. This was illustrated in the case of *R v AD (Decision Restricted)* (NSWDC, 2017/00354022, commenced 12 August 2019).

> *R v AD* (NSWDC, 2017/00354022, commenced 12 August 2019)
>
> The matter of *R v AD* was a historical child sexual offence case. The offender was an Elder in the community. He was the uncle of five of the victims and the cousin of three of the victims – males and females all aged between six and 14 years old.
>
> The trial took place in 2019, however the allegations dated back to the late 1970s and 1980s. Many of the witnesses were asked questions regarding the lengthy delay in complaint, and each gave illuminating evidence about the cultural complexities leading to barriers to disclosure.
>
> In the context of a lack of complaint and continued contact with the offender for quite some time, one of the complainants said in evidence, *"…spiritually, in my culture, we, from day dot, we're taught to respect our elders. It's a, you know, they're treated like God to us, and we just, yeah, we just, we've got a, it's just about respect when it comes to elders in our tradition"*.

[31] *The Culture Report* [14].

24. A second issue arises from 'men's/women's business'. The customary delineation of roles and practices by sex has had some bearing on the willingness of victims to make disclosures when sexually assaulted by members of the opposite sex. A female complainant in *R v AD* gave evidence to this effect: *"…talking about stuff like that [referring to the sexual offences] it's not right; it's not right. You don't talk to men about that…My husband doesn't even know the full details. It's shameful."*
25. Feelings of shame are closely related with victimisation. These may also be amplified by cultural factors. A male complainant in *R v AD* gave evidence about his difficulties disclosing due to the senior role he now holds in his community: *"I'm looked upon as a leader and for me to talk about stuff like that, it's, it's hard. I don't want people looking at me differently."* These specific cultural issues complicate the capacity of the ODPP to respond to crime and the needs/interests of victims. They also demonstrate the utmost importance of First Nations victim support officers and educational campaigns within communities about the cultural support available from these officers.

Summary

26. Even before criminal proceedings are commenced, it is clear that there is a range of social, historical, economic and cultural factors that may complicate or prevent disclosures by First Nations victims. These factors are interdependent and prevent the proper operation of the core functions of the criminal justice system. However, many of these issues arise outside the scope of the ODPP's statutory functions, which are generally only engaged upon charges being laid by the NSW Police. Accordingly, this speaks to the need for community education programs designed to promote relationships between First Nations communities, police and other justice services. Correspondingly, the core institutions of the criminal justice system—particularly the ODPP and the police—need to ensure that their practice is worthy of the trust being asked of First Nations communities.

Giving evidence

27. There are a range of cultural considerations that may impact upon the capacity of a First Nations victim to give evidence. As outlined above, customary practices regarding men's/women's business may serve as a barrier to disclosure. These practices may also influence the willingness of First Nations victims, accused people and non-victimised witnesses to give evidence, as doing so could either be in violation of cultural practices, or expose victims to cultural shame and isolation within their communities.
28. Some of the evidentiary complexities associated with these customary practices were described in *Lacey (a pseudonym) v Attorney General for New South Wales* [2021] NSWCA 27.

Lacey (a pseudonym) v Attorney General for New South Wales [2021] NSWCA 27 ('*Lacey*')

Lacey concerned a young Aboriginal female offender who had been charged with four offences of assaulting officers in the execution of their duties. The Crown intended to rely on footage of Lacey being strip searched at the police station.[32] Due to concepts of shame and gendered business, Lacey sought orders, inter alia, that the matter be heard by a female magistrate, and that no men be present for the playing of the footage.[33]

In support of this claim, counsel for Lacey produced affidavits from both her mother and an ALS field officer. These affidavits explained that if the footage of Lacey being

[32] *Lacey (a pseudonym) v Attorney General for New South Wales* [2021] NSWCA 27 [3] ('*Lacey*').
[33] Ibid.

strip-searched was shown in front of males, she would likely experience enduring cultural shame.[34]

McCallum J summarised the cultural complications in the following manner: *"The applicant is naturally distressed at the prospect of the footage being seen by any male person. More significantly for present purposes, there is evidence that, in Aboriginal cultures, the showing of a woman's sensitive parts is considered women's business; that women's business must only be conducted in the presence of women, never to be observed by males; and that the division of men's and women's business is lore to Aboriginal people that has been practised for thousands of years".*[35]

The Court of Appeal rejected Lacey's appeal on several technical grounds, however ruled that the Children's Court has the power, in an appropriate case, to order that a matter be heard by a magistrate of a particular sex.[36] It also ruled that the Children's Court has the power to order that certain evidence not be viewed by persons of a particular sex.[37]

29. Whilst *Lacey* concerned a First Nations accused person, the cultural factors it considered are equally relevant to First Nations victims. Regarding the power of the court to order that a magistrate of a certain sex preside over the matter, McCallum J concluded that, *"…the imposition of a condition of a stay that a matter be heard by a magistrate of a particular sex, provided such a condition is necessary for the effective*

[34] Ibid [59].
[35] Ibid [52].
[36] Ibid [25]-[26], [45], [117]-[119].
[37] Ibid [29], [31], [85].

exercise of the court's statutory powers, does not derogate from the Children's Court's institutional authority".[38] This conclusion—relating to the powers of the court *generally*—leaves open the possibility for the Crown to make similar applications in the future where it would respect cultural norms and promote the wellbeing of a First Nations victim.

Language & directions

30. The language used by First Nations people when giving evidence may present further complexities. Professor Diana Eades has argued that ways of speaking English for First Nations people will depend on their "*…fabric of socialisation, both primary and secondary, and patterns of social networking, interaction and residence*".[39] Eades has distinguished between the structural features of Aboriginal English—such as grammatical patterns, word choice and meaning—and the pragmatic features of language use, 'including patterns of discourse and conversation'.[40] Well known examples of these pragmatic features include silence as a productive form of communication,[41] the avoidance of eye contact,[42] and the phenomenon of 'gratuitous concurrence'; that is, "*… the act of saying yes to a question, regardless of whether the speaker agrees with the proposition being questioned, or even understands it*".[43] In pre-trial interviews and judicial proceedings, these pragmatic and structural features of Aboriginal English may result in miscommunication, particularly where police officers,

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[38] Ibid [119].
[39] Dr Diana Eades, "Judicial understandings of Aboriginality and language use" (2016) 12 *The Judicial Review*, 475 ('*Judicial understandings*').
[40] Ibid, 476.
[41] Ibid.
[42] Judicial Commission of NSW, "Section 2 – First Nations People", *Equality before the Law Bench Book*, 2.3.3.3 <Section 2 - First Nations people (nsw.gov.au)>.
[43] Eades, *Judicial understandings,* 476.

judges and jurors have not been trained in the cultural nuances of First Nations communication.

31. As explored by Eades, this potential for miscommunication is aggravated during cross-examination. When a First Nations victim or accused person is asked leading questions, gratuitous concurrence may mean that they will agree with the propositions put to them, potentially with dire consequences.[44] Some Australian jurisdictions have responded to the sociolinguistic needs of First Nations witnesses through developing jury directions about their methods of communicating. These have come to be known as 'Mildren Directions', named after the former Justice of the Supreme Court of the Northern Territory, Dean Mildren KC. Mildren Directions have been given formally in courts across the Northern Territory and Western Australia,[45] and informally in Queensland,[46] and are designed to assist juries in appraising First Nations witnesses by directing them to "*…the possibility that sociolinguistic features of an Aboriginal witness's evidence may lead to misunderstandings*".[47] Furthermore, in the Northern Territory and Western Australia, some judges have prohibited leading questions for First Nations witnesses where evidence of their suggestibility is adduced.[48]
32. NSW has not formally adopted Mildren Directions. These directions were considered in *R v Hart*, which concerned the murder of three Aboriginal children in Bowraville.

R v Hart (NSWSC, 2005/857SCRM, commencing 6 February 2006)[49]

[44] Ibid.
[45] Ibid, 482.
[46] Ibid.
[47] Ibid, 481.
[48] Ibid, 483.
[49] Information on this case has primarily been provided by Diana Eades' anecdotal account, detailed in *Judicial Understandings* (n 39).

> In *R v Hart,* the prosecution intended to call 50 Aboriginal witnesses. A sociolinguistic report was requested from Dr Diana Eades. Dr Eades' report identified several ways that the Aboriginal witnesses giving evidence might differ in communication style to non-First Nations witnesses. Furthermore, she recommended that Mildren style directions be given to the jury.
>
> The call for Mildren directions was opposed by the Defence on the ground that they would introduce 'a whole range of assumptions' about the Aboriginal witnesses 'that may or may not be appropriate'. The argument for the directions was not pressed by the Crown, and Hulme J only made a limited direction to the jury that they should *"…bear in mind their apparent level of education or any other attributes"*.

33. Whilst equivalent directions have been discussed in NSW's Equal Treatment Benchbook,[50] evidence of their use in NSW—or of directions like them—is minimal, and strictly anecdotal. This is the product of several different forces, including the lack of a formal foundation for their use (in case-law, legislation, practice note or Judicial bench book); misconceptions that such directions should only apply to Aboriginal witnesses from remote communities; and the adversarial nature of criminal proceedings, which, unfortunately, may militate against cooperation between the Crown and defence on issues such as directions.
34. Another distinction between First Nations and non-First Nations forms of communication revolves around conceptions of time. First Nations people may not conceive of time as linear, nor regard exact appraisals of time with the degree of

[50] Judicial Commission, "Equality before the Law Bench Book – Section 2 – First Nations people" (Webpage, updated 23 June 2023) <Section 2 - First Nations people (nsw.gov.au)>.

importance that it frequently has in criminal proceedings. This was illustrated in *R v AD*. In that case, a First Nations witness gave evidence that the complaint was made to them "*…a few years prior to 2009…*," however the allegations dated back to the late 1970s and early 1980s. In re-examination, the witness explained that the expression 'a few years ago', 'could mean a number of years:' "*…it could be 10, 20 years, two years…It's a cultural thing, like a lot of us do it, we just say you know a couple of years ago, which could mean 20 years ago, it could mean yesterday*."

Narrative evidence

35. A further barrier to culturally safe proceedings arises from the challenges associated with giving evidence in narrative form. The sharing of story, history and customary law via oral narrative is an essential element of many First Nations cultures.[51] This process is epitomised by the passing of Dreaming stories between generations,[52] but also has a truth-telling function in post-colonial Australia.[53] Truth-telling provides an opportunity for First Nations people to record evidence and share stories about their culture, heritage and history with the broader Australian community.[54] On a civic level, this process is designed to increase the non-First Nations community's awareness of colonisation, including its historical and contemporary consequences for First Nations people. Alice Pepper, a member of Victoria's First Peoples' Assembly, has succinctly described the importance of truth-telling for both First Nations and non-First Nations people: "*…In order to know where you're going you must know where you've come*

[51] See, for example, Lynore Geia et al, "Yarning/Aboriginal storytelling: Towards an understanding of an Indigenous perspective and its implications for research practice" (2013, 46:1) *Contemporary Nurse*, 13; Patricia Gwatkin-Higson, "What is the role of oral history and testimony in building our understanding of the past?" (2018) *NEW: Emerging Scholars in Australian Indigenous Studies*, 39-44.
[52] Kingsley Palmer, *Australian Native Title Anthropology* (2018, ANU Press), 110.
[53] See, for example, Gemma Pol, "Truth-Telling" *Common Ground* (web page, May 27 2021) Truth-Telling | Common Ground.
[54] Ibid.

from. Even if it's in your face or hard to swallow, people need to know the true history in order to move forward".[55]

36. As suggested by Pepper, truth-telling—and story-telling more broadly—has a healing function. This was noted in the Significance of Culture Report, which accepted the views of Milroy, Dudgeon and Walker that:

"…[To] *redress the generational and current levels of loss and grief it is necessary to strengthen connections to culture, community, family and spirituality. Importantly, reclaiming the history of the group and creating an ancestral and community story of connection to family and country, will help to restore a sense of cultural continuity*."[56]

37. Opportunities for healing also exist on an individual level. Indeed, for victims of crime, telling one's story—and having others listen to that story—can be therapeutic and vindicating.[57] For First Nations victims, giving one's testimony in court should provide some opportunity for healing. This may be facilitated by s 29(2) of the *Evidence Act 1995* (NSW), which provides that a party may apply to have a particular witness's evidence heard in narrative form. However, healing outcomes rarely eventuate within the demands of the adversarial trial. Under cross-examination, a victim's narrative may be continually interrupted, distorted, and challenged. Their credibility may also be scrutinised, frequently by reference to evidence that is not relevant for any other purpose.[58] For all victims of crime who take the stand, it is common knowledge that this process can be re-victimising, further entrenching the trauma of the initial crime

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[55] First Peoples Assembly of Victoria, "Report to the Yoo-rrook Justice Commission from the First Peoples' Assembly of Victoria" (Report, June 2021), 3 <Tyerri-Yoo-rrook-Seed-of-truth-Report-2021_Final-1.pdf (yoorrookjusticecommission.org.au)>.

[56] Helen Milroy, Pat Dudgeon and Roz Walker, 'Community Life and Development Programs – Pathways to Healing' in Pat Dudgeon, Helen Milroy and Roz Walker (eds) *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (Commonwealth of Australia, 2nd ed, 2014), 426.

[57] Antony Pemberton, Pauline Aarten and Eva Mudler, "Stories as property: narrative ownership as a key concept in victims' experiences with criminal justice" (2019) 19(4) *Criminology and Criminal Justice*, 406.

[58] *Evidence Act 1995* (NSW) Part 3.7.

perpetrated against them.[59] The emotional and psychological costs of giving evidence have in part motivated the developing restorative justice movement.[60]

38. Such adverse outcomes are particularly grievous for First Nations victims, as there is an additional cultural imperative to seek healing through story-telling. As outlined on pp 10-11, the failure of the criminal justice system to promote cultural safety is one barrier to the disclosure of crime. Even if a complaint has been made, ODPP Witness Assistance Service ("WAS") officers have identified that the failure of courts to respect cultural story-telling practices provides a further disincentive to continuing proceedings. Where First Nations complainants have communicated their fears about cultural safety within court proceedings to the allocated WAS officer or prosecutor, this may serve as a basis for the discontinuance of such proceedings. Outcomes of this nature deny First Nations victims the opportunity to seek justice via conventional means.

39. WAS officers have also noted that concerns about culturally unsafe court proceedings are particularly pressing where a First Nations complainant's family, or other First Nations community members, have been called as witnesses. As identified in the Significance of Culture Report, this is because wellbeing may be collective for First Nations people.[61] Accordingly, First Nations complainants may be unwilling to continue court proceedings where they know that this may involve the re-traumatisation of family or community members.

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[59] Australian Centre for the Study of Sexual Assault, "Supporting victims though the legal process" (Online practice note, 2010) < ACSSA Wrap- Supporting victims through the legal process: The role of sexual assault service providers (aifs.gov.au)>.

[60] See, for example, Australian Law Reform Commission, "Restorative Justice" (Webpage, July 2010) < Restorative justice | ALRC>; Open Circle, "What is restorative justice?" (Webpage) < What is restorative justice? | RMIT Centre for Innovative Justice (cij.org.au)>.

[61] *Significance of Culture Report* [11]-[12].

Summary

40. In sum, complex issues may arise when First Nations people are called to give evidence. These issues may relate to the nature of the evidence to be given, or to the procedural incapacity of the court to accommodate the cultural needs of First Nations victims.
41. Cultural concerns around men's/women's business may mean that certain topics are inappropriate to speak about. Giving evidence in these circumstances may cause substantial harm to the victim, impacting their spiritual, social and emotional wellbeing. However, as demonstrated, there are positive steps courts can take to address these complexities, including by directing that magistrates/judges of a certain sex hear the matter.
42. Furthermore, the language used by First Nations victims may also have a significant bearing on their court experience. If the court is not directed to the sociolinguistic nuances that characterise Aboriginal English, these cultural differences may cause confusion or misunderstanding. At its most extreme, this could result in the evidence being misconstrued by the bench, judge, and jury. Less serious outcomes—such as being repeatedly cross-examined where the victim miscomprehends a question or proposition—are still likely to compound the trauma associated with giving evidence.
43. Finally, the relative inflexibility of the courts to accommodate evidence in narrative form poses a further impediment to culturally safe proceedings. As outlined above, story-telling is a central component of many First Nations cultures, and may have the capacity to help fstheal aggrieved communities and individuals. However, under the strictures of an adversarial trial, there are few opportunities for evidence to be given in such a healing way. For First Nations victims, this disincentivises reporting crime and participating in proceedings. With a view to the welfare of the First Nations victim,

the unavailability of culturally safe proceedings may serve as a legitimate discretionary ground for the ODPP to discontinue prosecutions.

Expert evidence

44. As discussed, the evidentiary demands of court proceedings can be antithetical to the cultural needs of First Nations victims and may lead to an array of adverse consequences. This is particularly clear during cross-examination, where First Nations victim's evidence may not only be continually interrupted and scrutinised in a confrontational manner, but the specific features of their speech and vocabulary may be distorted by opposing counsel. One example of this is provided by the inference that a failure by a First Nations victim to maintain eye contact has a bearing on their credibility.[62] Such damaging and misleading inferences are equally applicable to First Nations accused people. As previously argued, judicial directions offer one partial remedy to this issue.

Expert evidence on First Nations language patterns

45. Another remedy relates to expert evidence. In appropriate cases, expert evidence on First Nations culture may be admitted during proceedings to improve the experience of First Nations victims. For expert evidence to be admissible, it must be relevant per s 55 Evidence Act 1995 (NSW) (EA), and also satisfy the two-part test in s 79(1):

    (1) Does the expert have specialised knowledge based on their training, study or experience, and

    (2) Is their opinion wholly or substantially based on that knowledge?

    Section 79(1) does not apply if the opinion sought is to be given by "*...a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group*".[63]

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[62] Queensland Health, *Communicating effectively with Aboriginal and Torres Strait Islander people* (Fact sheet), Communicating effectively with Aboriginal and Torres Strait Islander people (health.qld.gov.au).
[63] *Evidence Act 1995* (NSW) s 78A.

46. Experts might educate the court on how a First Nations witness may give their evidence, and why this is given in a particular manner, thereby allowing the court to receive the evidence in a culturally informed way. This is largely analogous to expert evidence given in sexual assault matters.[64] In both circumstances, the purpose of adducing the evidence is to displace any incorrect and damaging assumptions that the judge or jury may have about the witness and the nature of their testimony.
47. Issues most frequently arise in adducing expert evidence on the sociolinguistic tendencies of First Nations witnesses where either the expert has not interviewed the witnesses personally, or is seeking to adduce evidence of a general nature to apply to specific witnesses. As demonstrated in *R v AD*, these issues are frequently related:

R v AD (NSWDC, 2017/00354022, commenced 12 August 2019)

In *R v AD*, the Crown sought to adduce the expert evidence of Dr Diana Eades and Dr Susan Pulman. Dr Eades prepared an expert report on the sociolinguistic tendencies of First Nations witnesses, including:

a. The key differences between Aboriginal English in the Bowraville region and non-Aboriginal English, including in the giving, non-giving and seeking of information;
b. The relevance of Aboriginal English to legal contexts;
c. Factors affecting Aboriginal communication about child sexual abuse within a family and/or to police;
d. Risks of misunderstandings as a result of these communicative differences in police interviews and in a courtroom setting; and

[64] See, for example, Jacqueline Horan and Jane Goodman-Delahunty, "Expert evidence to counteract jury misconceptions about consent in sexual assault cases: failures and lessons learned" (2020) 43(2) *UNSW Law Journal*, 707-737.

e. Recommendations for effectively addressing these communicative differences in a court setting.

Dr Eades' specialised knowledge about the Bowraville region was the result of her involvement in *R v Hart* 13 years earlier, during which she had extensively interviewed Aboriginal witnesses and prepared an expert report for the Crown case. Additionally, Dr Eades has lived in the northern NSW region for over 30 years and has been an eminent scholar of Aboriginal English since the 1980s. In *R v AD,* Dr Eades gave evidence on the voir dire, and recommended that:

a. A Mildren-style direction be given about silence for First Nations witnesses, gratuitous concurrence, and the likelihood of a lack of eye-contact, and;
b. The First Nations witnesses be allowed to give evidence in narrative form.

The Crown pressed for these recommendations, alongside a ruling on the admissibility of Dr Eades' evidence about shame in First Nations communities. Each of these applications was opposed by counsel for the accused, who submitted that:

a. Dr Eades' evidence was general in nature, and was not based on interviews with the specific witnesses;
b. Evidence in narrative form may result in the divulging of prejudicial and/or inadmissible information;
c. An immediate Mildren-style ruling was pre-emptive, and may cause confusion (conceding that, if such a ruling was needed, it would be supported); and
d. Evidence was not adduced to demonstrate the additional cultural elements of shame. A jury would be aware that shame attends to experiences of sexual abuse.

The judge ruled that the shame evidence was inadmissible on relevance grounds, and determined to 'play it by ear' with reference to Dr Eades' other recommendations. Judge Flannery ultimately excluded Dr Eades' evidence.

Dr Pulman was called to give evidence on a variety of issues affecting the disclosure of child sexual abuse, including within Aboriginal communities. These included:

a. Reasons for delays in disclosure, including a sense of shame;
b. The impact of a perpetrator's intrafamilial status on disclosures of abuse;
c. Whether Aboriginality may affect disclosure in cases of intrafamilial child sexual abuse;
d. Whether the behaviour of an adult victim of child sexual abuse towards the perpetrator vary widely and include 'counterintuitive behaviour', such as the victim allowing a perpetrator stay in their home; and
e. Whether Aboriginality, in cases of intrafamilial child sexual abuse, influences the behaviours of victims towards the perpetrator, including counter-intuitive behaviours, either as children or adults.

Following the voir dire, the defence objected to a portion of Dr Pulman's evidence relating to child sexual assault in Aboriginal families, particularly concerning a heightened conception of shame that may inhibit disclosures. It was submitted that some of Dr Pulman's conclusions, as well as certain statistics, related to evidence gathered in remote communities, and were thus 'not directly apposite' to the witnesses from Bowraville. The defence further submitted, and Judge Flannery concurred, that the effect of the evidence about shame and respect for elders gave 'a bit more emphasis than is really warranted', particularly as the various Aboriginal witnesses had explained the concepts of shame and respect in the way that 'we understand elders'. Whilst the Crown submitted that Dr Pulman's evidence of the distinct conception of shame for Aboriginal victims of CSA was relevant and persuasive, this submission was rejected by the judge.

48. The successful objections to Dr Eades' evidence and parts of Dr Pulman's evidence in *R v AD* highlight the challenges involved with calling expert evidence on First Nations cultural matters. Despite the academic acceptance that there are certain common features to Aboriginal English use and patterns of communication, expert opinions based on these common features may be ruled to be inadmissible. This is particularly so where, as in *R v AD*, the expert has only read the First Nations witness's written statements, and/or there is some geographical distinction between the witnesses being called and the subjects of any academic studies referred to by the expert.

Cultural support

Cultural support during proceedings

49. It is imperative that First Nations victims are provided with adequate cultural support during proceedings. As outlined above, there are a plethora of cultural factors that may impact a First Nations victim's court experience. These could range from past experiences of racism or discrimination within the justice system, to concerns about culturally inappropriate questioning during proceedings. Dedicated First Nations support workers are in the best position to respond to these complexities and offer cultural support.

Witness Assistance Service (WAS)

50. ODPP WAS officers can assist with providing information, identifying special needs of victims and witnesses, referring victims for counselling and support, providing court preparation, and coordinating court support. The ODPP maintains a team of dedicated First Nations WAS officers, who may provide cultural support in addition to the above duties.
51. Prosecution Guideline 5.7 mandates that the solicitor with carriage of a matter refer it to a WAS officer as early as possible in the prosecution process if it involves:
    a. Death;
    b. Sexual assault;
    c. Domestic violence;
    d. A child victim or witness, and;
    e. A victim or witness with special needs.[65]

[65] Office of the Director of Public Prosecutions, *Prosecution Guidelines (March 2021)* <Prosecution Guidelines (March 2021) (nsw.gov.au)>.

52. Failure to adhere to the above guideline may have significant consequences for the matter and the involved parties. This was illustrated in *RC v R* [2022] NSWCCA 281, where a failure by the ODPP to respond to the cultural needs of an incarcerated First Nations complainant had significant legal ramifications.

RC v R [2022] NSWCCA 281

RC was a case involving an Aboriginal complainant in a child sexual assault trial. The complainant was in custody and refused to give evidence about the offences when called. The Crown tendered her statement and relied on s 65 of the Evidence Act (maker unavailable) to avoid the operation of the rule against hearsay. On appeal, the question was whether the complainant was "unavailable" within the meaning of s65 of the Evidence Act.

Importantly for present purposes, in relation to whether "all reasonable steps" had been taken to obtain the attendance of the witness, as required by s 65, the Court held at [119]:

"There was no evidence that [the complainant] had been provided with an opportunity to speak to a Witness Assistance Officer from the Office of the Director of Public Prosecutions Witness Assistance Service (WAS). Guideline 5.7 of the Office of the Director of Public Prosecution Guidelines provides that the solicitor with carriage of a matter must ensure it has been referred to the WAS as early as possible in the prosecution process if it involves, amongst other offences, sexual assault. The role of the WAS is to provide support in appropriate cases to victims and witnesses during the criminal justice process. WAS can assist with providing information, identifying special needs of victims and witnesses, referring victims and witnesses for counselling and support, providing court preparation, and coordinating court support."

The appeal was allowed, and the convictions (involving all three complainants) were quashed, with a new trial being ordered.

53. First Nations WAS officers have historically indicated that problems most frequently eventuate when ODPP lawyers overlook the need for cultural support, and do not refer matters to the WAS when a First Nations victim is involved. These officers have opined that this issue has arisen because of an institutional ignorance of the specific cultural needs of First Nations victims, as well as the cultural support that can be provided by First Nations WAS officers. The ODPP has responded to this issue by mandating cultural awareness training for all staff. We are also currently developing standard operating procedures to govern the referral process to WAS for cultural assessments of First Nations victims.

Court processes

54. A range of court processes that could be used to support First Nations witnesses have already been discussed. These include:
    a. Mildren-style directions regarding the sociolinguistic features of First Nations witnesses;
    b. The listing of matters before a magistrate or judge of a certain sex; and
    c. Orders that particular witnesses be prohibited from inspecting certain exhibits, or from hearing certain evidence.
55. This list is not exhaustive, and other applications may be made within courts to recognise the cultural needs of First Nations communities. One such avenue was illustrated in *R v Knight (No 1)* [2023] NSWSC 195.

R v Knight (No 1) [2023] NSWSC 195

R v Knight concerned a First Nations offender who pleaded guilty to murdering his First Nations partner. The Crown opposed an application that the offender be sentenced via AVL. The reasons for this opposition were summarised by Yehia J at [16]:

"The Crown opposes the application, relying upon the affidavit evidence of Mr Jonathan May, solicitor at the Office of the Director of Public Prosecutions. Importantly, the Crown relies upon representations made to Mr May by the deceased's sisters that the applicant should attend his sentencing proceedings in-person and on country. The Crown emphasised the importance of recognising Indigenous cultural values and principles in the criminal law. In support of that submission, the Crown referenced R v Fernando (1992) 76 A Crim R 58; Bugmy v The Queen (1013) [2013] HCA 37; 249 CLR 571; the Bugmy Bar Book; and the NSW District Court Walama List."

Whilst Justice Yehia acknowledged that the "*importance of recognising Indigenous cultural values and principles is increasingly accepted in the criminal law in New South Wales*", her Honour distinguished between the restorative justice environment of the Walama List and the sentencing hearing under consideration. Furthermore, her Honour noted at [22] that "*…the Crown does not rely upon the Bugmy Bar Book in support of the contention that there is a cultural imperative for the applicant to appear in-person for his sentence*".

Yehia J dismissed the Crown's opposition in the present circumstances at [23]-[24]:
"…I acknowledge the strong view of the deceased's sisters that the applicant should attend his sentence in-person and on country. However, I am not persuaded that it is in the "interests of the administration of justice" that the applicant attends in-person, given that the sentencing proceedings will be conducted in the usual way, rather than pursuant to a restorative justice model. The proceedings will be conducted in the local area where the offence took place and will allow family and community members to attend and observe the proceedings. The applicant will be present, albeit virtually."

However, her Honour commended the Crown's submissions at [27]: "*The Crown is to be commended for highlighting the importance of recognising Indigenous cultural values and principles in the criminal law. In an appropriate case where there is sufficient evidence, it may be wholly appropriate that cultural values and principles would dictate that a direction is made for an offender to appear in-person at sentencing proceedings.*"

56. Yehia J's conclusion at [27] speaks to the increasing willingness of courts to entertain submissions and make orders consistent with cultural considerations. This reinforces the importance of expert evidence being available for the Crown to adduce when the

need arises, as well as the collation of peer-reviewed materials on First Nations culture and language to support the kinds of submissions suggested by Yehia J at [22].

International approaches

Canada

57. Like Australia, Canada experiences a drastic over-representation of Indigenous accused people and victims within its criminal justice system. Whilst Indigenous people constitute only 5% of Canada's population, they account for 31% of its provincial and territorial prison population, and 33% of its federal prison population.[66] Further, Indigenous youth represented 50% of youth admissions to custody in 2020 – 2021.[67] Violence against Indigenous children is three times more likely to be reported to police than violence against non-Indigenous children.[68] Furthermore, 26% of Indigenous women have experienced sexual violence by an adult during their childhood, compared with 9.2% of non-Indigenous women, 5.8% of Indigenous men and 2.8% of non-Indigenous men.[69]

Approaches towards accused people

58. Canada has adopted several strategies to address these issues. Notably, s 718.2(e) of the federal Criminal Code requires sentencing courts to consider "*…all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders*". This provision allowed for the development of "Gladue Reports" within Canadian law, so named after the Supreme Court decision of *R v Gladue* [1999] 1 SCR 688. In *Gladue*,

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[66] Statistics provided by the Public Prosecution Service of Canada.
[67] Ibid.
[68] Samuel Perreault, "Victimization of First Nations people, Metis and Inuit in Canada" (Webpage, 19 July 2022) *Canadian Centre for Justice and Community Safety Statistics* <Victimization of First Nations people, Métis and Inuit in Canada (statcan.gc.ca)>.
[69] Ibid.

the Supreme Court held that s 718.2(e) applies to 'all aboriginal persons wherever they reside, whether on or off-reserve, in a large city or a rural area'.[70] The Court additionally held that the sentencing judge must consider:

a) The unique systemic or background factors which may have played a part in bringing the particular Indigenous offender before the courts; and
b) The types of sentencing and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Indigenous heritage or connection.[71]

59. Subsequently, sentencing courts in Canada began to require the preparation of pre-sentence reports for Indigenous offenders that addressed the requirements of s 718.2(e). In *R v Ipeelee* [2012] SCC 13, the Supreme Court held that there is no requirement to prove a causal connection between an offender's background of disadvantage and their offending, and that Gladue principles should not be discounted in matters involving serious violence.
60. Of interest, in *Bugmy v The Queen* [2013] HCA 37; 249 CLR 571, the High Court of Australia held that disadvantage is a relevant factor in the sentencing exercise for any offender, but rejected the Canadian approach; that is, the default position being to recognise the systemic disadvantage of First Nations people in every sentencing decision. Instead, in Australia, an offender seeking to rely on 'Bugmy factors' must always adduce evidence of their disadvantage;[72] courts will not have regard to it automatically in the way prescribed by *Gladue*.
61. Canadian prosecution services have also attempted to address the systemic disadvantage experienced by Indigenous people. The Public Prosecution Service of

[70] *R v Gladue* [1999] 1 SCR 688 [91].
[71] Ibid [93].
[72] *Bugmy v The Queen* [2013] HCA 37; 249 CLR 571 [36].

Canada (PPSC) recently updated its guidelines regarding the decision to prosecute. The new guidelines require prosecutors to:

a. Challenge their unconscious bias in relation to the accused;
b. Consider the background of the accused, including any systemic factors that may have 'played a role in the commission of the crime;'
c. Familiarise themselves with the concerns and needs of the relevant communities, including information on whether the community is over-policed;
d. Rebut the presumption of non-prosecution where evidence of state-misconduct (including racial profiling) has been identified; and
e. Consult with colleagues, where reasonable, about the decision to prosecute.[73]

Approaches towards victims

62. Relative to the resources directed towards Indigenous accused people, as in Australia, in Canada there appears to be less of a focus on the experiences of Indigenous victims. Whilst Canada promotes mechanisms to represent the voices of victims—such as through victim impact statements, and funding witness assistance officers—these are not specifically tailored to First Nations victims.
63. One difference to the Australian approach is provided within Canada's Criminal Code. The Criminal Code requires sentencing courts to have specific regard to Aboriginal female victims of crime. S 718.04 provides that where an offence involves "*…the abuse of a person who is vulnerable because of personal circumstances—including because the person is Aboriginal and female—the court shall give primary consideration to the objectives of denunciation and deterrence*".[74] Whilst this provides greater recognition

[73] Information provided by the Public Prosecution Service of Canada.
[74] *Criminal Code* (R.S.C., 1985, c. C-46) s 718.04.

of Aboriginal women and girls at sentencing, as discussed above, many of the issues associated with First Nations victimisation arise before this stage in proceedings.

Aotearoa/New Zealand (NZ)

64. NZ experiences a similar over-representation of Māori within its criminal justice system. The Ministry of Justice has found that 38% of Māori were victims of crime within a 12-month period, compared with 30% in the non-Māori population.[75] Further, although Māori constitute 30% of NZ's population, they make up 51% of the prison population.[76] In spite of this, NZ has made significant advances in recognise the cultural complexities that attach to Māori victimisation and criminalisation.

Tikanga Māori & Te Ao Mārama

65. Tikanga Māori encompasses Māori law, but also includes ritual, custom, and spiritual and socio-political elements that go well beyond the legal domain.[77] It has been recognised as one of the elements of the common law in NZ, and has recently been used for a series of innovative legal purposes.[78] The general acceptance of Tikanga Māori within NZ's legal system allows both the Crown and the accused to call upon customary principles to promote cultural safety where needed. This has been identified as one reason for the lack of formal mechanisms within NZ to promote the rights, concerns and experiences of Māori victims and accused people.

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[75] New Zealand Ministry of Justice, "Māori victimisation in Aotearoa New Zealand" (Report, April 2021) < Maori-victimisation-report-v2.02-20220214-fin.pdf (justice.govt.nz)>.
[76] Jarrod Gilbert, "Maori incarceration rates are an issue for us all" *New Zealand Herald* (Online, 27 April 2016) <Jarrod Gilbert: Maori incarceration rates are an issue for us all - NZ Herald>.
[77] Nā Carwyn Jones, "Tikanga Maori in NZ Common Law" (Online blog post, 15 September 2020) *New Zealand Law Society – Lawtalk* <NZLS | Tikanga Māori in NZ Common Law (lawsociety.org.nz)>.
[78] Pete McKenzie, 'Explosion of ideas': how Maori concepts are being incorporated into New Zealand law" (Online, 17 October 2021) *The Guardian* <'Explosion of ideas': how Māori concepts are being incorporated into New Zealand law | New Zealand | The Guardian>.

66. A further strategy to improve the wellbeing of Māori victims and accused people is the Te Ao Mārama – Enhancing Justice for All initiative. This is being developed in the NZ District Court "*…for the benefit of all people who are affected by the business of the court, including defendants, witnesses, victims, parties to proceedings and whānau (wider families)*".[79] The Te Ao Mārama initiative seeks to emphasise restoration, rehabilitation and healing. It also seeks to implement judicial best practices from the existing Specialist Courts, which include:
    a. Using plain language to improve understanding;
    b. Reducing formalities in court to improve understanding and participation;
    c. Incorporating tikanga Māori processes or other appropriate cultural processes that may be relevant to the parties;
    d. Improving the quality of information available to judicial officers to make well-informed decisions;
    e. Inviting community, iwi and whānau (tribe and family) into the courtroom; and
    f. Identifying and addressing underlying issues and barriers to participation.[80]
67. The whole-of-system approach to recognising Tikanga Māori within NZ should serve as an aspiration for the Australian legal system. However, the relative homogeneity of the Māori ethnic group and the widespread use of te reo Māori language distinguishes the experience of First Nations New Zealanders from First Nations Australians. This distinction suggests that incremental, targeted reforms such as those being pursued in the Te Ao Mārama initiative might better serve Australian jurisdictions.

[79] District Court of New Zealand, "About the Te Ao Mārama – Enhancing Justice for All initiative" (Webpage) <About the Te Ao Mārama – Enhancing Justice for All initiative | The District Court of New Zealand (districtcourts.govt.nz)>.
[80] Ibid.