THE MAGNOLIA PROJECT IN PARTNERSHIP WITH THE ABORIGINAL LEGAL RIGHTS MOVEMENT (SA)

PRACTICE GUIDE FOR PREPARING MENTAL HEALTH PRE-SENTENCE REPORTS WITH ABORIGINAL PEOPLE IN THE SOUTH AUSTRALIAN CRIMINAL JUSTICE SYSTEM

The artwork on the cover of this Practice Guide is by Roger Williams who is a Wirangu man from Far West Coast. We thank Roger and staff at the Port Augusta Prison Aboriginal Accommodation Unit for their permission to use this beautiful painting as our cover. Roger's art is vibrant and alive and resonates with our choice of the Magnolia as the symbol for our work.

Magnolia flowers represent many qualities, but especially endurance and perseverance and how important this is for everyone who lives and works in the criminal justice system. Magnolias also symbolise beauty, purity, love, and joy and—in Victorian floriography—embody dignity and pride. These are all qualities that shine through in this painting.

In choosing this artwork for our cover, we acknowledge Roger, his community and Country, and honour the culture and creativity in the painting.

The views expressed in this Guide do not necessarily reflect those of any individual or organisation.

The authors have attempted to ensure that all information in this Practice Guide is accurate at the time of publication but note that any document of this type can only ever provide and incomplete understanding of relevant issues. We strongly recommend that this Guide is used to provide only general recommendations for how assessments are conducted and reported and that decisions about the relevance or otherwise of cultural information should be made only by those directly involved in providing services to the courts.

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Created by the Magnolia Project (https://magnoliaproject.com.au) in partnership with the Aboriginal Legal Rights Movement South Australia (https://www.alrm.org.au)

Adelaide, Kaurna country, July 2023.

About Us

The Magnolia Project *is a social enterprise focused on compassionate justice. The Magnolia Project is committed to supporting a range of new initiatives and programs to promote trauma-informed and compassionate criminal justice policies and practices. The Magnolia Project offers a platform to promote and disseminate resources and provide practical support to improve outcomes across the justice system. This Practice Guide has been written to facilitate discussion about the most appropriate and effective ways of sentencing defendants (respondents) who identify as Aboriginal and/or Torres Strait Islander people in South Australian courts. Specifically, it considers the legal relevance of cultural trauma and the importance of presenting evidence to legal decision-makers about the presence and/or significance of cultural trauma so that appropriate and effective sentences can be handed down. As such it is an example of the way in which the Magnolia Project aims to support efforts to move towards more compassionate, ethical, and effective justice.*

Aboriginal Legal Rights Movement (ALRM) *is a not-for-profit charity and a company limited by guarantee that operates as a law practice throughout South Australia. ALRM is an Aboriginal community organisation which is also a law practice. ALRM provides a free legal aid service to Aboriginal people in criminal law, child protection, family law, and in all aspects of non-commercial civil law, with an emphasis on coronial inquests and compensation claims. ALRM is also the lead organisation in South Australia for advocacy on legal and policy questions which affect Aboriginal people. It is independent of government, accountable to the Aboriginal communities of the State and provides frank and fearless advice.*

This Guide was written by Dr Andrew Day and Dr Katherine McLachlan (the Magnolia Project) with Chris Charles, Amanda Lambden, and Kate Bulling (Aboriginal Legal Rights Movement, South Australia). We would like to acknowledge the following people who have contributed to the thinking described in this Practice Guide (in alphabetical order): Dr Jane Anderson, Professor Thalia Anthony, Dr Luke Butcher, Dr Darcy Coulter, Dr Greg Dear, Professor Simone Dennis, Dr Edjoni Blackledge, Professor Lynore Geia, Dr Loraine Lim, Ms Elise McMahon, and Dr Yilma Woldgabreal. There are, of course, many others who have also assisted.

This acknowledgement does not imply endorsement of the content of this Guide, only our thanks for the time and generosity shown in sharing their ideas and their work.

Terminology

Recent years have also seen a move away from the use of language that may be perceived as either stigmatising or labelling those in receipt of criminal justice services. We acknowledge the importance of this and, where possible, have adopted person-first language when referring to justice-involved people.[i]

In this Guide, the term *Aboriginal* refers to a person of Aboriginal descent who identifies as Aboriginal and is accepted as such by the community in which they live.[ii]

The term *Indigenous* refers to First Nations people in a global context, as well as to Aboriginal and Torres Strait Islander people in Australia. Indigenous peoples are those who "self-identify as indigenous peoples at the individual level and are accepted by the community as their member, have a historical continuity with pre-colonial and/or pre-settler societies, strong link to territories and surrounding natural resources, distinct social, economic or political systems, distinct language, culture, and beliefs, form non-dominant groups of society, resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities".[iii]

The term *First Nations* is increasingly preferred in Australia as it respectfully encompasses the diversity of Aboriginal and Torres Strait Islander cultures and identities. In this Guide, the term First Nations is adopted wherever possible, although Aboriginal is also commonly used, given that South Australia is the home of many Aboriginal communities.[iv]

We also draw attention to a guide to writing and speaking about Indigenous People in Australia prepared by Macquarie University.[v]

Foreword

This guide is a significant document. It shows what can be done when there is a close collaboration between an Aboriginal and Torres Strait Islander Legal Service and skilled and dedicated professional psychologists and criminologists.

It is about lifting the standards of professional report writing for criminal courts in cases involving Aboriginal people. It is about South Australia because it is about the specifics of South Australian Aboriginal cultures and societies. But there are generalisations made. Report writers need to understand the cultural and social and economic position of the Aboriginal people they are dealing with. Intergenerational trauma and its consequences, depressed social and economic life conditions, the effects of racism, all need to be understood in the specific context of an individual's, a family's and a community's history of dispossession and distress. That is the matrix within which the professional's assessments and judgements about an individual must be made.

Professional written reports must be meaningful and useful, both for the criminal courts and for the Aboriginal person concerned. It is also the context of respect and sympathetic understanding within which the report writer must work *with* Aboriginal people, their families, and communities.

The guide discusses judicial pronouncements about the sentencing of Aboriginal people; that will also inform the report writer's understanding of how their writing must be relevant to the things that judges consider. There is also discussion of the role of the expert witness and the nature of expert testimony.

But the essential point of the Guide is that it informs the report writer of the enormity of the challenge of writing professional reports properly, so as to do justice both to the report writer's profession and to the individual Aboriginal person.

The legal profession will benefit from the Guide because it shows the way in which improved standards of advocacy will arise from collaboration with well-informed professional report writers.

ALRM has no hesitation in recommending the Guide.

Christopher Charles
Principal Legal Officer ALRM
17 July 2023

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Executive Summary

A Practice Guide offers general advice relating to standards of professional practice and the knowledge upon which such practice is based. It can help to explain the general approach and purpose of the work and set out a clear commitment to ethical decision-making. It can also reinforce an agreed set of practice methods and approaches, while facilitating access to the research, practice, and disciplinary knowledge that underpins good decision-making. And finally, the very existence of a Practice Guide should invite reflexivity, offering a basis for both professional supervision and quality assurance. It is not a template or a decision-making tree for professional practice.

This Guide starts with a description of the values, principles, and ethical basis for the work before introducing an evidenced informed knowledge base for forensic work. It concludes with a discussion of theoretical and methodological approaches, skills, and the importance of practitioner self-awareness in forensic mental health report-writing. What follows was inspired by the Australian Indigenous Psychology Education Project[vi] which was set up to develop frameworks, guidelines, and strategies to increase the capability of psychology graduates to work effectively with First Nations peoples, including to provide guidance on professional development. This work emerged in response to a lack of culturally appropriate resources to educate and assist mental health professionals to work with people experiencing social and emotional wellbeing issues and mental health conditions.

There has been no similar comparable program work carried out relating to forensic psychology and forensic psychiatry, with this Practice Guide written specifically to help address this issue and in response to a perceived need to support and strengthen the cultural

content of expert mental health professional reports submitted to South Australian courts.

This Guide has been written for those who prepare expert witness psychological and psychiatric reports relevant to judicial decision-making at the point of sentencing. These reports help the court to better understand the nature of the relationship between the offending and individual factors relating to culture, mental health, and wellbeing, such that the most appropriate and effective sentences can be handed down. It is important to note, however, that the expert opinion is not the only type of legitimate knowledge in relation to good judicial decision making about First Nations defendants.

We invite those who act as expert witnesses in pre-sentencing matters to consider how the information we present in this Guide might be used to strengthen the quality and usefulness of their reports, as well as encouraging them to reflect on the many ways that cultural knowledge (and an openness to consultation and engagement when this is lacking) can contribute to the development of culturally safer practice. Some example questions that lawyers might ask are included in Appendix 1.

In summary, this document represents our attempt to map out an approach that might be considered relevant to the preparation of mental health expert testimony report for pre-sentencing hearings in South Australian courts. Our aim here is simple—to ensure that cultural content is routinely considered directly relevant to good mental health professional practice and to good judicial decision-making. Clearly there is a need for investment in both training, auditing, and the further developing of the ideas contained in this Practice Guide. An important piece of work remains—to present community context information in a way that can help the courts to

better understand the context in which the defendant lives. This is work that complements this Practice Guide and have much broader application. An important next step will also be to develop new methods from which to assess the quality and cultural appropriateness of mental health expert reports submitted to South Australian courts in sentencing hearings and to establish the degree to which such evidence is valued by legal decision makers and, ultimately, leads to better justice outcomes for First Nations people and communities.

The Guidelines

To assist mental health experts to quickly determine the usefulness of this Practice Guide for their current assessment methodology, a set of specific guidelines have been developed. Each of these is described in relation to a rating of the strength of the statement made.

A *recommendation* indicates a high level of confidence that adopting this approach will increase the quality of evidence given in pre-sentence hearings.

A *suggestion* indicates greater uncertainty, as clinical judgement may be required.[vii] These 20 guidelines are grouped according to the five different sections of this document.

We would welcome feedback or advice about how this Practice Guide might be strengthened over time.

RECOMMENDATIONS

An Evidenced Informed Knowledge Base

1. Expert witnesses to demonstrate awareness of the different Aboriginal communities of South Australia and take steps to be cognisant of the unique context and structure of each community.
2. Expert witnesses to explicitly consider the relevance of social, as well as emotional, wellbeing to their opinions. This will include consideration of social, political and community level influences on personal behaviour.
3. Expert witnesses to routinely assess for the presence of trauma and that this extends beyond Post-Traumatic Stress Disorder to the consideration of complex, historical, and intergenerational trauma and how this may be relevant to sentencing and the understanding of risk.
4. Expert witnesses to consider the way in which gender, gender role identity, and gendered pathways to offending are relevant to forming an opinion.
5. Expert witnesses to routinely consider cultural aspects of the experience of anger and its expression through violence, including the way in which anger may be provoked or triggered in different ways.
6. Expert witnesses to have knowledge of primary, secondary, and tertiary prevention programs and the characteristics of those that are considered appropriate culturally.
7. Expert witnesses to have knowledge of legal decision making, specifically the need to establish the extent to which any impairment could be said to have influenced or caused the offence and/or to have affected the defendants's capacity to appreciate the wrongfulness and gravity of the behaviour, including the importance of assessing moral culpability, personal deterrence, rehabilitation, and any hardships that might be association with sentencing.
8. Expert witnesses to be reasonably familiar with both national and South Australia case law relevant to the sentencing of First Nations defendants.
9. Expert witnesses to be reasonably familiar with case law relevant to mental impairment.

Recommendations

(Continued)

An Agreed Set of Theoretical and Methodological Approaches

10. Expert witness reports to adopt a decision-making approach to writing pre-sentence reports.

An Agreed Set of Skills

11. Expert witnesses are critical in the way they use and report psychometric test data to the court, attending to issues of validity and reliability with First Nations defendants.

12. Expert witness reports routinely include content about the personal, community, and cultural context in which the matter arose.

Practitioner Self-awareness

13. Expert witnesses should routinely reflect on the nature of their personal and professional engagement with First Nations issues, seeking advice from cultural consultants when appropriate.

SUGGESTIONS

A Value Base, Principles, and Ethical Basis for the Work

14. Expert witnesses to consider how the trauma-informed principles of safety, trustworthiness, choice, empowerment, collaboration, and respect for diversity are enacted in the way in which they conduct their assessments and report their opinions.

15. Expert witnesses adopt a position of cultural humility, accepting the responsibility to respond to cultural difference and to conduct an assessment that is deemed safe by the recipient of the service.

An Agreed Set of Theoretical and Methodological Approaches

16. Expert witnesses ensure that, in the absence of cultural reports being available for South Australian defendants, information about the relelvance of culture is typically included is covered in their assessments.

An Agreed Set of Skills

17. Expert witnesses ensure that they are familiar with clinical practice advice about the assessment and treatment of complex trauma, and practice in way that is likely to be experienced as culturally safe.

18. Expert witness reports provide an opinion to the court about the nature of the association between culture, trauma, and risk and how this might apply to the matter under consideration.

19. Expert witness reports provide a formulation of the presenting matter that is not limited to an understanding of problematic behaviour, but the broader context in which it arises and with reference to the Verdins Principles.

20. Expert witness reports provide advice about available community services and sentencing options and provide advice about both scenario- and safety-planning to the court.

Background

This Practice Guide has been written in response to a perceived need to support and strengthen the cultural content of expert mental health professional reports submitted to South Australian courts. Our starting point was to reflect on the work of First Nations scholars who have long argued that situating social problems and solutions within the historical context of communities is critical to achieving progress towards social justice—rather than simply assuming that they are only caused by individual dysfunction.[viii] In an important sense then, we suggest that the most appropriate responses to criminal behaviour will be embedded in a deep understanding of the social, political, and ecological context of local communities.

> The mere possession of generic professional [psychology] qualifications cannot be claimed to give evidence of the necessary and sufficient skills to perform competently [as a forensic psychologist] (Haas, 1993, p.253)

It follows that a more holistic approach to evidence and sentencing is required, which creates challenges for mental health professionals whose training and primary expertise relates to the understanding of individual pathology rather than social determinants of health.

The Guide has been written in response to a perceived need to support and strengthen the cultural content of expert mental health professional reports submitted to South Australian courts. It has not been written as a guide to understanding 'culture'. However, an appreciation of the communities and cultural connections of those

who appear before courts in South Australia is clearly important to good sentencing. Accordingly, some basic information about Aboriginal South Australia is included. However, it is important to note that this is only an introduction, with work currently underway locally to curate information about local communities and the context in which offences occur and to which people will return after sentencing.[ix]

We are firmly of the view that cultural reports should be prepared for *all* Aboriginal defendants at the pre-sentence stage of criminal proceedings and that these should sit alongside—or in parallel with—the evidence of mental health experts. At the same time, mental health professionals also have a responsibility to work in ways that are culturally safe, to have some level of familiarity with the cultural backgrounds of those whom they assess, and to be able to speak to the relevance of culture in the opinions that they form.

We acknowledge the significance of the apologies of professional bodies representing both psychologists and psychiatrists across Australia. These draw attention to the importance of a wide range of factors when interactions occur between criminal justice agencies and those who identify as from Aboriginal and/or Torres Strait Islander cultures and communities (hereafter referred to as First Nations peoples) in South Australia. Our hope is that this Guide offers some starting points that mental health professionals who work with the South Australian criminal justice system can use to reflect on cultural aspects of their work and to develop ways of working that reflect these apologies:

- On 15 September 2016, the Australian Psychological Society issued a formal apology to Aboriginal and Torres Strait Islander People.[x] The apology acknowledged that psychologists in Australia have, for many years, been responsible for

developing and applying treatments that have dismissed the importance of culture in their professional practice. A commitment was made to "listen more and talk less" to "follow more and steer less", and to "collaborate more and command less". In short, the apology set the agenda for the development of a new approach to practice which is based upon the right of Aboriginal and Torres Strait Islander peoples to have control over the psychological services that they receive.

- The Royal Australian and New Zealand College of Psychiatrists has apologised to Aboriginal and Torres Strait Islander people for their failure as a group of doctors and psychiatrists to act early and effectively to prevent and reverse the disastrous practices of the Stolen Generations.[xi] The apology states that past practices of state-sanctioned abduction of children from parents and their culture are cruel and wrong and acknowledges how the psychological trauma involved has life-long mental health consequences and significant inter-generational effects. As a result of this practice, the College notes that many Indigenous Australians suffer severe emotional distress, including continuing disruption of family relationships and secondary social, psychological, and psychiatric problems have arisen from the disruption of culture and community.

The need to strengthen cross-cultural practice is now widely accepted across the professions,[xii] and it is increasingly expected that they can demonstrate both awareness and knowledge.

For example, psychologists are expected to show an appreciation of:

- The significant impact of trauma and loss across generations of Aboriginal and Torres Strait Islander peoples, and the skills to appropriately assess and work within a trauma-informed approach
- The historical and ongoing removal policies resulting in the Stolen Generations, and the inter-generational impact on health, wellbeing, cultural connection and identity
- Healing models of care developed specifically to address the harms caused by removal policies (for example, Stolen Generations). [xiii]

And that their knowledge of the discipline of psychology includes:

- Foundational awareness and understanding of Australian colonisation history and the link between colonisation and Aboriginal and Torres Strait Islander health and wellbeing
- The cultural and historical context in which the discipline of psychology and its associated theories are constructed and awareness of limitations and alternative views and perspectives
- The meaning of cultural safety and cultural responsiveness, and how to work towards these objectives at a personal, professional and institutional level
- Knowledge of reports from major public inquiries and initiatives on matters concerning Aboriginal and Torres Strait Islander health, mental health and psychological wellbeing including *Closing the Gap*, *Bringing them Home, The Elders' Report into Preventing Indigenous Self-harm and Youth Suicide*, and *Working Together.* [xiv]

We also acknowledge the Reconcilation Statement of the Courts Administration Authority and Judiciary of South Australia, and their commitment to a develop a more culturally responsive court system and to join with First Nations people in the spirit of reconciliation to:

- Recognise the unique history, culture and diversity of Aboriginal and Torres Strait Islander people
- Include, respect and respond to Aboriginal and Torres Strait Islander people in our practices, processes and programs
- Acknowledge, respect and value our Aboriginal and Torres Strait Islander Elders for providing their wisdom and wealth of knowledge about cultural, family and community issues concerning Aboriginal people
- Acknowledge, respect and value our Aboriginal and Torres Strait Islander staff for providing their understanding of Aboriginal people, communities and culture, and the specific issues facing Aboriginal people before the courts
- Provide access to court services that are culturally sensitive within the South Australian jurisdiction and encourage all staff and judiciary to participate in Aboriginal cultural awareness programs
- Strengthen relationships between the Court Administration Authority and Aboriginal and Torres Strait Islander organisations and build the confidence of Aboriginal and Torres Strait Islander communities in court processes
- Uphold the spirit and intent of the recommendations of the *Royal Commission into Aboriginal Deaths in Custody* (1991).[xv]

Understanding Pre-Sentence Reports

Pre-sentence reports "provide information to the courts about a person's engagement with programs and rehabilitative services, their family and housing arrangements, and their social, educational, health and employment history, and link this information to past offending, predictors of future offending and prospects for rehabilitation in the community".[xvi] In fact, pre-sentence reports can be prepared by a number of different professional groups, and are often routinely prepared by correctional staff (see *Sentencing Act (2017) SA* s 17) when a guilty plea is entered and a Magistrate is considering the appropriateness of a sentence of imprisonment.[xvii]

Expert Mental Health Evidence in Pres-Sentencing Matters

"Judicial officers in Australia want pre-sentence reports to: (a) reflect sound methodology, (b) have content that is thorough in addressing the issues pertinent to the case, and (c) have content that is relevant to the sentencing process. Furthermore, they want the report to be concise yet comprehensive, and easy to understand. The judicial officers in our study indicated that psychologists do not consistently deliver this to the court."

Bycroft, D., Dear, G. E., & Drake, D. (2021). A decision-making model for pre-sentence evaluations for juveniles. *Psychiatry, Psychology and Law,* 28, 1-26.

These reports provide the Court with information on the physical or mental condition of the defendant and the personal circumstances and history of the defendant but are not the same as the *expert witness pre-sentence reports* prepared by either psychiatrists or psychologists. This Practice Guide is written specifically

for these mental health professions for use in preparing expert witness reports, although some of the content may also be of interest to Correctional Services staff who also assist the Courts in sentencing matters. Psychological and psychiatric reports are more detailed and are only requested when there is a specific concern about the defendant's mental health and/or psychological functioning.

Many pre-sentence reports are based on a Risk-Need-Responsivity (RNR) model of forensic practice that draws primarily on the assessment of individual risk rather than any substantive consideration of culture or perhaps the importance of strengths, resilience, and survival.[xviii] However, when considering the recommendation of the Australian Law Reform Commission that "courts consider unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples" when sentencing[xix] we believe that there is a place for mental health experts to engage more fully with culturally informed conceptualisations of presenting issues and to explain the relevance of these to the opinions presented in court.

Much has been written about the preferred structure and content for expert witness court reports (e.g., it is widely recommended, for example, that essential components of any report should include resources used in the preparation of the report, relevant client background history, assessment findings, and finally, the expert's opinion(s) on issues relevant to the legal matter [xx]). We suggest that by also including specific opinion about cultural matters, mental health expert testimony will assist the Court to become more culturally aware and to better comply with the recommendation[xxi] that judicial officers should be informed about:

- Background information regarding the historical and ongoing impact of colonisation on First Nations people

- An explanation of intergenerational trauma
- Contemporary issues such as daily exposure to racism
- Cultural competency information about modes of communication, body language, the need for and use of interpreters, and related issues aimed at improving cultural safety in court
- Information about culturally appropriate programs and services that support First Nations people who are on bail, community-based sentences, or parole.[xxii]

What is Expert Testimony?

In normal court proceedings witnesses are not permitted to offer opinions; they are only able to provide evidence about factual matters. Witnesses of fact must limit their evidence to what they have observed, and a mental health professional may sometimes be called to give evidence as a witness of fact rather than as an expert witness. This would occur, for example, when the professional is the defendant's treating clinician, in which case, evidence may be submitted as to when and how often appointments were offered—along with details about the clinical diagnosis, treatment, and prognosis. In such circumstances, the mental health professional should not, however, necessarily able to offer an opinion to the Court that may be related to the psycho-legal issues being considered.[xxiii]

For many mental health professionals this distinction will seem unfair, but it is intended to ensure that experts work within their field of expertise and are aware of the legal matters being addressed. In fact, a common reason that psychologists and psychiatrists are reported to registration bodies or professional ethics committees is for breaches

of ethical codes where inappropriate evidence is presented in the court either during oral examination or from a court report.

An expert witness is a witness who is recognised by the court as a person who can give an opinion in a specific area of knowledge that the Court determines is outside the understanding of the common person.[xxiv] In Australia, the court has determined, for example, that psychology is a scientific discipline about which the common person may not have adequate understanding. Psychologists can thus act as an expert witness when the Court acknowledges that they have the relevant qualifications, training, and experience. The psychologist's status as an expert must be determined before they can offer an opinion, and this may be contested (especially in situations where the report writer has limited experience).

To establish expertise, the mental health professional will usually present the court with a Curriculum Vitae containing details about academic qualifications, registration details, professional affiliations, employment background, academic appointments, clinical appointments, experience as an expert, and a listing of relevant publications, scientific papers, presentations, and workshops. It will then be the decision of the Court as to whether the person is accepted as an expert.

A key point here is that all mental health experts have an ethical responsibility to be "reasonably familiar"

Expert Evidence Guidelines

The presentation of expert evidence must meet minimum standards if evidence is to be accepted by the Court. These are expressed in the Joint Criminal Rules (2022) which set out at Part 11 and Expert Code of Conduct and the requirements for the content of expert reports.

with the Court rules governing their participation.[xxv]

But what exactly is a Practice Guide?

When we use the term Practice Guide, we are referring both to general advice relating to standards of professional practice and to the knowledge upon which practice is based. A Guide can serve several different functions. It can help to explain the general approach and purpose of the work and set out a clear commitment to ethical decision-making. It can also reinforce an agreed set of practice methods and approaches, while facilitating access to the research, practice, and disciplinary knowledge that underpins good decision-making. And finally, the very existence of a Practice Guide should invite reflexivity; offering a basis for both professional supervision and quality assurance.[xxvi] Accordingly this Practice Guide comprises five different sections:

1. A value base, principles, and ethical basis for the work
2. An evidenced informed knowledge base
3. An agreed set of theoretical and methodological approaches
4. An agreed set of skills
5. Practitioner self-awareness. [xxvii]

It is important for us to state very clearly from the outset that we do not believe that there is any such thing as 'best practice'. Rather *effective* and *safe* practice should be determined, in part, by the specific work being undertaken and, in part, by the setting or context in which it occurs.

This Practice Guide aims to identify just some (of what are many) considerations relevant to determining what might be expected of practitioners and expert witnesses who provide assessment services for justice-involved First Nations people across South Australia.

Professional practice in any criminal justice setting is already both proscribed and prescribed in a range of ways that are specific to the workplace. It may, for example, be determined by local *legislation* and by national and international *standards* relevant to the setting or, at times, by the need to comply with a range of *organisational policies*. In addition, guidance is sometimes also available for those who are members of the various disciplines that prepare pre-sentence reports through their respective professional societies and associations. And beyond these regulatory, professional, and administrative expectations, individual employers will inevitably shape practice in a variety of less formal ways, such as through their management structures and mandates and by providing access to certain types of training and supports (e.g., access to cultural consultants). Individual practitioners will, of course, also bring their own professional knowledge to their work, as well as personal experience, attitudes and values, cultures, and backgrounds.

What this means is that no single practice framework will ever provide sufficient advice about how to approach the wide range of scenarios that inevitably arise when preparing expert testimony in relation to

sentencing matters.[xxviii] Nonetheless, it is very clear that underpinning all of this work is cultural knowledge (and an openness to learning where this is lacking), and an understanding of some of the values and principles that underpin culturally safe practice. This includes the importance of family, connectedness, and the holistic nature of self-identity for First Nations defendants.

Who is this Practice Guide For?

This Practice Guide has a narrow focus. It has been specifically written to support those who help the court to better understand the nature of the relationship between the offending and individual factors relating to culture, mental health, and wellbeing, such that the most appropriate and effective sentences can be handed down. This evidence is highly valued by legal decision-makers in South Australia.[xxix]

This Guide does not address specific issues relating to other types of court work (such as mental impairment and competency, or civil, youth court, or family court matters), nor is it intended to replace mainstream psychological and psychiatric assessment methodologies.

Our focus on evidence relating to the mental health of defendants is intentional. This is based on our understanding that the social and emotional wellbeing of First Nations peoples in South Australia is a key driver of disproportionate incarceration and that policies, programs, and practices that promote wellbeing are central to efforts to effectively mitigate further risk of offending.[xxx] More specific is the idea that the trauma often experienced by First Nations peoples, both direct and indirect, contributes significantly to the disproportionate exposure to a range of social and economic factors that only serve to exacerbate risk.[xxxi] As a result, strengthening trauma-informed

sentencing practice becomes critical to disrupting the intergenerational transmission of trauma caused by incarceration and to promoting the healing of First Nations children, families, and communities. As such it is important that the courts can rely on the expert testimony of mental health professionals to inform their decision-making.

Part 1: Values, Principles and an Ethical Basis for the Work

Trauma Informed?

Trauma-informed practice is best thought of as a broad philosophy or set of values that can be applied to improve the quality of criminal justice services.[xxxii] The term was introduced to explain how the trauma sequalae of adverse life events are relevant to efforts to strengthen the quality of mental health services—or to explain this in simpler terms "how experiences of trauma can become central to an individual's life course and life outcomes, having a profound negative effect on social outcomes, emotional wellbeing, mental and physical health, along with health-relevant behaviour".[xxxiii] At its most basic level then, trauma-informed practice is concerned with adopting practices that improve the perceived physical, psychological, and cultural safety of services.

Trauma informed practice is guided by four key assumptions (*realisation* about trauma and how it can affect people and groups, *recognising* the signs of trauma, having a system which can *respond* to trauma, and *resisting* re-traumatisation).[xxxiv] Trauma-informed sentencing thus requires that courts realise the presence of trauma, recognise its relevance, respond in a way that is informed by trauma and act to avoid re-traumatisation.[xxxv] It draws on six foundational principles for practice which may be applied to the sentencing process,[xxxvi] such that:

- *Safety* is present when the courts ensure that defendants feel included, able to participate and be heard

- *Trustworthiness* and transparency are demonstrated when judicial officers ensure that defendants understand both the court process and the implications of the sentencing decision (peer support may be achieved through Aboriginal Conferences, where Elders, community and family members can participate in the sentencing process and express their views)
- *Choice* requires that Courts recognise defendants' rights, such as when judicial officers discuss conditions of a bond with a defendant to ensure the individual understands and can comply [xxxvii]
- *Empowerment* is best demonstrated when rehabilitation is prioritised by the Courts, as well as through statements that recognise the importance of individual strengths and characteristics
- *Collaboration* with defendants is important - even though shared decision-making is not always possible in mainstream Courts, defence counsel is able to present to the court individual factors that the defendant believes are relevant to sentencing and the defendant's preferred outcome
- *Respect for diversity* relates to the need to give regard, a defendant's culture, history, and gender in sentencing when discussing the individual factors that impacted offending behaviour.

These principles can also be used to guide both the process and content of a pre-sentence report. They focus attention on the need to understand trauma and its impact on individuals, families, and communal groups, prioritise the need for defendants to feel safe and in control, to share power and governance, integrate care, support relationship building, and to enable recovery.[xxxviii]

Suggestion: Expert witnesses to consider how the trauma-informed principles of safety, trustworthiness, choice, empowerment, collaboration, and respect for diversity are enacted in the way in which they conduct their assessments and report their opinions.

Culturally Safe?

Cultural safety is endorsed by all State and Territory governments as a core component for the progression of First Nations health issues [xxxix] and can be used to underpin the processes of engagement and service development with all justice-involved people. Inherent in the enactment of cultural safety is a process of change through reflective practice that acknowledges the differences in people's lives. The process through which professionals come to understand the uniqueness of another person's culture and how their own cultural values impact others, focusses attention on the underlying values and principles that shape their practice. Cultural safety is thus best understood as a way of addressing power relationships between the service provider and those who use the service.[xl]

To work in a culturally safe way (noting the overlap with other terminologies, such as cultural awareness, sensitivity, responsiveness, capability, security), the mental health practitioner is *required* to step "into the cultural value system"[xli] of the person receiving the service. This involves suspending belief in cultural superiority and adopting a position of cultural humility (that is based on reflection about one's own cultural positioning). The onus then, is placed firmly on the professional to respond to cultural difference and to provide a

nuanced service in a manner that is deemed safe by the recipient of the service. In this way culturally safe practice requires an acceptance of the general principle that good practices are those that are shaped by the service user and their community, rather than by the organisation or the profession. This is a challenge for many forensic practitioners who have been trained work from a position of professional expertise.

The diversity that exists both within and between different cultural groups makes it almost impossible to develop any advice that is specific enough to guide everyday decision making. It is, however, still entirely possible to enact values and principles that are informed by cultural knowledge, even though a stepped process may be required. This might commence with working with cross-cultural liaison staff and then engage with the cultural knowledge of other stakeholders, whether they be internal or external to the practitioner's organisation. When faced with specific scenarios, culturally informed 'consultants' will be well placed to consider the available options/interventions/actions that are proportional to level of success associated with each possible response.

Cultural Safety

Cultural safety is determined by Aboriginal and Torres Strait Islander individuals, families, and communities. Culturally safe practice is the ongoing critical reflection of health practitioner knowledge, skills, attitudes, practising behaviours and power differentials in delivering safe, accessible, and responsive healthcare free of racism (Edwige & Gray, 2021).

Cultural sensitivity and responsiveness are widely considered to be a prerequisite for cultural safety, as reflected in what is sometimes referred to as cultural competence; a core component of the ethical and professional standards of several different professional groups[xlii] (even though the concept remains poorly defined in most curricula and questions about how a practitioner's cultural competency might best be assessed remain largely unanswered).

> "Cultural awareness requires practitioners to take responsibilities for their own biases, stereotypes, values, and assumptions about human behaviour generally, and recognise that they may differ from those held by other cultural groups. Importantly, they need to develop appropriate practices and intervention strategies that take into account their client's historical, cultural and environmental context" (Roe,

The general principle of cultural safety can help the practitioner to approach the assessment in a more sensitive and engaging way, as well as how to communicate the importance of cultural identity to the Courts. We suggest that this involves recognition that the maintenance and cultivation of cultural identity occurs through strong bonds to country, family, connection to Elders, kinship obligations, participating in cultural practices, self-determination principles and community governance. Closely related to the practice of culture for First Nations peoples is participation in the design and delivery of policies and services (i.e., the right to self-determination). When people are empowered to exercise control in these areas, the approaches will better reflect the cultural values and beliefs of the communities they

serve and, as a result, are thought to be more likely to achieve valued outcomes.[xliii]

The establishment of the Aboriginal community courts (e.g., the Nunga Court) in South Australia represented an attempt to improve the cultural safety of the legal process. These were set up to address concerns that First Nations people had limited input into the judicial process and sentencing decisions and that the courts were perceived as alienating, isolating, and unwelcoming,

A notable feature of the Nunga Court is that extensive use is made of pre-sentence information (including information gained in less formal avenues, such as through discussion with families and elders) to improve the court's understanding of the defendant and draw attention to the resources available in the community to provide ongoing support and risk management. A key aim is to involve families and the community in the sentencing process to reduce repeat offending.[xliv] A panel of Elders and/or Respected Community Members sit with the Magistrate at the bench to provide the link with culture for the defendants and to assist the Magistrate to understand the cultural background and family circumstances of each defendant.[xlv]

Suggestion: Expert witnesses to adopt a position of cultural humility, accepting the responsibility to respond to cultural difference and to conduct an assessment that is deemed safe by the recipient of the service.

Part 2: A Knowledge Base

In this section we outline different sources of knowledge that we have identified as important for any person who is preparing expert testimony. This includes foundational knowledge about the broad circumstances facing First Nations peoples and their contact with criminal justice agencies. First, is knowledge about local Aboriginal communities, and an appreciation of the diversity that exists both within and between different groups. Second, is understanding social and emotional wellbeing, the experience of different types of trauma, and the association with crime and what this might mean for the management of risk. And finally, there is knowledge of the law and the ways in which judicial decision-makers can use this knowledge to inform judgements. The expert will, ultimately, be expected to arrive at a judgement about the relevance of this knowledge to their opinion.

A) Local Knowledge

The National Closing the Gap reform calls for a "structural transformation of mainstream government organisations" to improve accountability and respond to the needs of First Nations people.[xlvi] This is based on an expectation that both public and non-Aboriginal organisations will spend time in Aboriginal communities to better understand their unique historical, social, and political contexts before developing any policy or practice. It is through this process of engagement that the community's cultural knowledge, cultural authority, governance structures, and decision-making protocols can be better understood, and genuine partnerships formed that recognise community self-determination, and Aboriginal heterogeneity.[xlvii] Crucially, it is through this process of engagement

that the perspectives, priorities, and knowledge of communities can be recognised as legitimate and valuable. By itself, this is expected to result in significant innovation and reform in areas such as justice that are widely regarded as having failed to meet the needs of First Nations communities.[xlviii]

Providing opportunities for First Nations voices to be heard is relatively uncommon in the criminal justice arena,[xlix] and there is considerable uncertainty about how this might occur in a manner that does not co-opt or assimilate cultural knowledge. And so, the identification of methods for engaging with First Nations knowledge holders and community members to identify contextualised evidence becomes key. The very first step here is to have some awareness of the different Aboriginal communities of South Australia given that information about where and how the defendant lives, and their home communities, is of particular importance to any assessment. Here, the professional will need to be cognisant of the unique context and structure of each community, rather than simply importing population level information from other parts of the State, country, or even other parts of the world. In fact, it has been suggested that policies and programs in Aboriginal communities should always be based on evidence that is "localised, grounded, and specific" given that "everything cannot work everywhere". [l] And so in this Guide we include some basic information about the different cultural groups of South Australia, while recognising that we consider this insufficient to develop a cultural context statement about the community from which a person identifies or lives. Rather this type of information should be accessed separately through community context reports (see below). We do, however, consider it important that the assessing

practitioner is familiar with, and considers the specific cultural background of every person who they work with.

The Use of Cultural Reports in Victoria

The County Court of Victoria, as well as its Koori Court division, are currently piloting the use of reports… [which] are prepared by Aboriginal report writers within the Community Justice Program of the Victorian Aboriginal Legal Service. The writers provide a culturally safe space where the person can share their story over six to eight weeks. Like Gladue reports in Canada, they provide a deeper discussion of a person's background and the life circumstances that exist due to their Aboriginal and/or Torres Strait Islander identity. They also canvass systemic issues affecting the individual and their criminalisation, including the role of over-policing; colonial legacies in institutions involving the person and their family and community; the person's experiences of racism in the penal, health, housing, and education systems; and the impacts of child removals on the person. They highlight the person's strengths and options for community-based supports that are culturally safe and, preferably, Aboriginal controlled. (See Coulter et al., 2022).

Knowing Community

There are over 20 different cultural groups and communities on the land that is now known as South Australia. [li] It is important to know which community the defendant is from, identifies with, and is currently connected with. Note here that some people will not have a strong awareness of their current heritage, and that services such as

Link-Up[lii] exist to help those who are interested identify connections. An interactive map of Indigenous Australia can be found on the AISTSIS website and is a useful resource to explore the different communities that exist both in South Australia and nationally.

See https://aiatsis.gov.au/explore/map-indigenous-australia

The First Nations of SA Aboriginal Corporation is the peak body for First Nations across South Australia and another important source of information.[liii] It is made up of representatives of Prescribed Bodies Corporate and native title groups across the State and has an authoritative voice on issues relating to South Australian Aboriginal people's heritage and well-being.

First Nations people themselves are often the best source for family history. Families, friends, and communities are invaluable sources of information. Approaching Aboriginal organisations is also a useful way to start. Specific information regarding families can sometimes require broad research but useful information can be located at the State Library, which also holds brief histories of the missions at Poonindie, Point McLeay (Raukkan), Point Pearce, Koonibba, Oodnadatta, Colebrook Home, Swan Reach and Gerard, Nepabunna, Ooldea, Yalata, Umeewarra (Davenport) and Ernabella.[liv] Please refer to Appendix 3 for additional information about the experiences of some of the children who grew up in these missions, as well as in the *Bringing them Home* report.[lv]

In South Australia, most people would be familiar with Kaurna country or the Adelaide Plains metropolitan area. The Kaurna are the original people of Adelaide and the Adelaide Plains. The area now occupied by the city and parklands—called by the Kaurna *Tarntanya* (red kangaroo place)—was the heart of Kaurna country. Before 1836, it was an open grassy plain with patches of trees and shrubs, the result of hundreds of generations of skilful land management. Kaurna country encompassed the plains which stretched north and south from Tarntanya and the wooded foothills of the range which borders them to the east.[lvi] They may also have some familiarity with Ngarrindjeri country, an Aboriginal nation of 18 language groups who occupied, and still inhabit, the Lower Murray, Coorong and Lakes area of South

Australia. Their lands and waters extended 30km up the Murray from Lake Alexandrina, the length of the Coorong and the coastal area to Encounter Bay. Today this Aboriginal group is still very strong, with a large community of people based in the Lower Murray and Coorong area.[lvii]

The *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) remains unprecedented in Australian lands rights history. Initially called the *Pitjantjatjara Land Rights Act*, it gave traditional owners inalienable freehold title to their land in the far north-west of South Australia. This is an area that covers approximately 100,000 km^2, approximately 3,000 people, and several discrete and remote communities (Amata, Iwantja [Indulkana], Kalka, Kaltjiti [Fregon], Mimili, Nyapari/Kanpi [Murpatja], Pipalyatjara, Pukatja [Ernabella], Umuwa, Watarru, Homelands) in the north-west of South Australia.[lviii] For people from many of these communities, English may be a second or third language and the services of an interpreter may be required. It is strongly recommended that any mental health professional who is asked to provide evidence in relation to any person from these communities, engage the services of a cultural consultant.[lix]

An important consideration is that only one of the cultural groups, Kaurna people, are originally from the metropolitan area of Adelaide. The other cultural groups of South Australia (Andyamathanha; Antakarinja; Arabana; Arrernte; Banggarla; Buandug; Binjali; Dangalli; Dhirari; Dieri; Karangura; Karuwali; Kokatha; Kuyani; Mayangaba; Meru; Mirning; Nakako; Nawu; Ngadjuri; Ngalea; Ngamini; Ngarara; Ngarrindjeri; Peramangk; Pitjanjatara; Wadigali; Wangkangurru; Wiljali; Wirnangu; Yandrawanda; Yankuntkatjara; Yarawawarka; Yarluyandi) are all rural or remote communities. Three different types of small towns have been described in rural Australia[lx]: Aboriginal settlements, specialist centres; and open service towns. Aboriginal

settlements are those that are characterised as having a strong cultural foundation, but which lack basic services, and possess little industry apart from public funding. Specialist centres are mining towns, where services are provided by the mining companies operating in the areas. Open service towns, or "hubs" provide services and resources (such as groceries, postal services, goods, and services) to stations and properties nearby.[lxi] Knowing this is important as national data clearly show that First Nations people who live in rural communities are overrepresented in the justice system, and further, that Aboriginal defendants are more likely to come from rural areas, despite most Aboriginal people living in cities.[lxii] In light of this, a significant gap in knowledge emerges when one considers that the bulk of psychological and criminological theory and research is based on data collected from metropolitan areas rather than examining the particular factors associated with rural crime and offending. It has been established, however, that people who live in rural communities are more likely to report higher rates of substance use, child abuse, poorer mental health, and domestic violence than their urban peers, which all are shown to be associated with criminal behaviour. [lxiii]

Although the focus in this section of the Guide is on knowledge of cultural groups and communities in South Australia, it is important to remember that First Nations people in South Australian courts come from different nations across Australia and sometimes from multiple nations. As such it may not be sufficient to rely only on an understanding of the First Nations of South Australia and it is important to always ask about close connections with different sets of Traditional Owners or language/clan groups.

The key aim here, however, is to understand how the known structural properties of life in an area or community come to bear on the person. To do this, the expert will inevitably need to draw on a significant and

existing anthropological repository of knowledge that may have been used and recognised in other legal or formal contexts. This presents some challenges, given that, currently, no repository of this type exists (or information about the status and veracity of cultural information).

Suggestion: Expert witnesses to demonstrate awareness of the different Aboriginal communities of South Australia and take steps to be cognisant of the unique context and structure of each community.

B) Foundational Knowledge

The Royal Commission into Aboriginal Deaths in Custody drew national attention to the acute disparity between Aboriginal and Torres Strait Islander and non-Indigenous rates of imprisonment. However, in the 30 years since the Royal Commission's National Report.[lxiv] was tabled, the overrepresentation of Aboriginal and Torres Strait Islander people incarcerated in Australia has grown, while many of the key recommendations made by the Royal Commission (and subsequent reports, such as the Australian Law Reform Commission's Pathways to Justice report) remain unimplemented.

The 1997 *Bringing Them Home* report presented the findings of the first major national inquiry into the removals of Aboriginal and Torres Strait Islander children from their families and communities. *Bringing Them Home* "described the extent of harm created for, and the burden suffered by, both those individuals who were removed, and their families and descendants". The legacy of the Stolen Generation is widely acknowledged to have placed a considerable load of grief, loss, and unresolved trauma on the Aboriginal and Torres Strait Islander

population and to have directly contributed to a range of poor psychosocial outcomes. This is in a context in which First Nations people continue to face disproportionately high levels of social exclusion, poverty and homelessness, racism, and substance abuse.[lxv] For example, in one study of 41,700 children and young people in Queensland, found that Aboriginal and Torres Strait Islander children were more likely to have experienced child abuse and neglect, particularly chronic child abuse and neglect, and were four times more likely than their non-Indigenous peers to offend.[lxvi] The impact of multiple and recurring trauma are known to be cumulative and has been identified as directly associated to risk of offending behaviour through "a self-destructive cycle of loss of identity and purpose that fuels anger and trauma behaviours, such as acts of violence and alcohol and drug misuse".[lxvii] Therefore, the notion of grief and loss invites a whole-of-life perspective that requires an individual to assess all their life and view Aboriginal and Torres Strait Islander health as being grounded in cultural wellbeing.[lxviii]

Social and Emotional Wellbeing

The *National Strategic Framework for Aboriginal and Torres Strait Islander Peoples' Mental Health and Social and Emotional Wellbeing 2017-2023* describes social and emotional wellbeing as a holistic concept which results from a network of relationships between individuals, family, kin, and community. There are nine guiding principles in the national strategic framework,[lxix] which collectively describe how First Nations health should be viewed in a holistic context, that encompasses mental, physical, cultural, and spiritual health. As such connection to land, culture, spirituality, and ancestry, and how these affect the individual, are critical considerations in service development. It has been reported, for example, that a strong

sense of cultural identity is integral to good health and wellbeing and improves both physical and mental health outcomes, at least in young people.[lxx] Cultural identity may be threatened by a weakened or lost connection to family, country, and culture.[lxxi]

While First Nations peoples constitute only 3.3 per cent of the Australian national population, there is evidence that, as a group, they experience a markedly higher burden of disease than the wider community. Current indicators suggest, for example, that psychological distress is experienced at a rate that is 2.6 times higher than that found in the general Australian population.[lxxii] Factors identified as directly resulting in poor mental health, high levels of vulnerability, and a high risk of self-harm and suicide in First Nations peoples include (but are not limited to): historical and intergenerational trauma associated with cultural dislocation and the associated loss of identity and cultural practices, direct interpersonal trauma (e.g., physical and/or sexual assault/abuse; within-community violence, and past government practices of removal from family.

Importantly, social and structural factors are also often implicated, including poverty, unemployment, inadequate housing, and harmful substance use.[lxxiii] Some of the macro, or social structural conditions that might be particularly influential are:

- Culture (norms and values, social cohesion, racism, sexism, competition/cooperation, individualism/collectivism)
- Socioeconomic factors (relations of production, inequality, discrimination, conflict, labour market structure, poverty)
- Politics (laws, public policy, differential political enfranchisement/ participation, political culture)
- Social change (urbanisation, war/civil unrest, economic depression).

These factors are thought to interact to influence both the structure and size of social networks that are available to an individual, which, in turn, determine the amount and type of social support that can be accessed. In turn, social influence constrains or enables health related behaviour, levels of social engagement, personal contact, and access to other resources such as health care or housing.

The term Social and Emotional Wellbeing (SEWB) refers to the idea that mental health is a state of wellbeing that is defined by a person's awareness of his or her ability to cope with everyday stressors, work productively, and make positive contributions to the community.[lxxiv]

What weakens SEWB?

- Physical illness
- Child development problems
- Alcohol or other drug problems
- Family violence
- Incarceration
- Family breakdown
- Cultural dislocation
- Social disadvantage
- Racism and discrimination
- Trauma and abuse
- Unresolved grief and loss

(Roe, 2023)

In Australia, SEWB is regarded as a culturally appropriate construct in so far as it reflects the holistic philosophy that many Aboriginal and Torres Strait Islander people have towards health and acknowledges how wellbeing can be influenced by a wide range of experiences and life events. These include, for example, emotional, physical, and sexual abuse, neglect, stress, social exclusion, grief and trauma, removal from

family, substance abuse, family breakdowns, cultural disconnection, racism, discrimination, domestic violence, and social disadvantage.[lxxv]

Recommendation: Expert witnesses to explicitly consider the relevance of social, as well as emotional, wellbeing to their opinions. This will include consideration of social, political and community level influences on personal behaviour.

Trauma

A particularly important component of social and emotional wellbeing is the personal and collective experience of trauma. There is no universally accepted definition or understanding of trauma and, in fact, "it remains contentious among mental health professionals as to whether 'trauma' relates to a single event or series of events, an environment, to the process of experiencing the event or environment, or to the psychological, emotional, and somatic effects of that experience".[lxxvi] Nonetheless, it is reasonable to apply a definition that states that individual trauma "results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual well-being".[lxxvii]

From a cultural perspective, it is important to note that trauma is inevitably association with both the experience of loss and the feeling of grief. First Nations psychologists have described how the losses associated with colonisation have impacted deeply on people across Australia.

These include:

- Loss of land
- Loss of hunting grounds
- Loss of culture and language
- Forced relocations onto missions and reserves
- Loss of freedom
- Denial of citizenship and human rights
- Loss of cultural and legal traditions
- Forced removal of children
- Loss of family and history
- Social fragmentation.[lxxviii]

First Nations practitioners also suggest that grief is by far the most intense, enduring, and distressing psychological disturbance that is experienced by Indigenous peoples.[lxxix] They suggest that the grieving process can be expressed as both an individual and as a group loss. In terms of intergenerational effects, aspects of grief theory that may be relevant to understanding the experience of First Nations peoples include dependent grief, forbidden mourning, forbidden action, and inexpressible rage.

High levels of loss, premature mortality, and family break-up are thought to contribute to the present high levels of stress experienced by First Nations peoples, with an Aboriginal child health study undertaken in Western Australia reporting that 22 per cent of children had experienced seven or more severe life events in the previous 12 months (i.e., on average one event every few weeks). These were described as often traumatic, leading to higher levels of mental health

problems, in particular depression and symptoms of post-traumatic stress.[lxxx]

The suggestion here, then, is that for some people at least, intergenerational grief and loss is experienced as pervasive, generalised anger that is passed on to each generation based on collective memories and experiences and that, fundamentally, have no legitimate outlet. Combining this internal experience with alcohol abuse and/or a series of other stressors such as financial problems, interpersonal conflict, or feelings of jealousy may therefore create a direct pathway to violence that is often disproportionate to the triggering event and contribute to involvement in the criminal justice system.

Trauma and grief have been identified as particularly significant issues for First Nations individuals, families, and communities. When considering the range of historical trauma experienced, three main themes emerge that cover the nature of the trauma that occurred over many generations and continues to be felt in the present:

- Extreme sense of powerlessness
- Loss of control, and a profound sense of loss
- Grief and disconnection.[lxxxi]

The Aboriginal and Torres Strait Healing Foundation define trauma as an emotional response to a deeply distressing or disturbing event or series of events which can occur at a personal level and at a collective level. They argue that trauma affects a person's physical or emotional safety and is often accompanied by feelings of intense fear, helplessness, and horror that can affect a person for many decades and in different ways.

Post-traumatic Stress Disorder (PTSD)

The most familiar presentation for most mental health professionals will be post-traumatic stress disorder (PTSD).[lxxxii] As with any psychiatric diagnosis, PTSD requires the presence of a specific and defined constellation of symptoms. PTSD is unusual, however, in that the precipitating event is part of the diagnostic criteria, with Criterion A requiring that the person "was exposed to death, threatened death, actual or threatened serious injury, or actual or threatened sexual violence". The event must involve threat to life or physical integrity, providing an important distinction from other types of stressful life events. PTSD is routinely associated with high levels of social and occupational impairment. It has a profound effect on relationships, with the person's ability to relate to loved ones and friends adversely affected. It interferes with the person's ability to carry out their normal role.[lxxxiii]

PTSD has been conceptualised in terms of psychosocial structures that provide adaptive 'pillars' in life (safety and felt security, bonds and social networks, stable roles and identities, justice, and world views and belief systems) that can be variously threatened by situations of extreme danger and violence. It is considered particularly relevant for populations exposed to periods of prolonged threat, displacement, and social upheaval.

DSM-5 Criteria for PTSD

Criterion A (one required):
The person was exposed to and perceived: death, threatened death, actual or threatened serious injury, or actual or threatened sexual violence, in the following way(s): direct exposure, witnessing the trauma, learning that a rela tive or close friend was exposed to a trauma; Indirect exposure to aversive details of the trauma, usually in the course of professional duties (e.g., first responders, medics)

Criterion B (one required):
The traumatic event is persistently re-experienced in the following way(s): Unwanted upsetting memories; Nightmares; Flashbacks; Emotional distress after exposure to traumatic reminders; Physical reactivity after exposure to traumatic reminders

Criterion C (one required):
Avoidance of trauma-related stimuli after the trauma in the following way(s): Trauma-related thoughts or feelings; Trauma-related reminders

Criterion D (two required):
Negative thoughts or feelings that began or worsened after the trauma, in the following way(s): Inability to recall key features of the trauma; Overly negative thoughts and assumptions about oneself or the world; Exaggerated blame of self or others for causing the trauma; Negative affect; Decreased interest in activities; Feeling isolated; Difficulty experiencing positive affect

Criterion E (two required):
Trauma-related arousal and reactivity that began or worsened after the trauma, in the following way(s): Irritability or aggression; Risky or destructive behavior; Hypervigilance; Heightened startle reaction; Difficulty concentrating; Difficulty sleeping

Criterion F (required):
Symptoms last for more than 1 month.

Criterion G (required):
Symptoms create distress or functional impairment (e.g., social, occupational).

Criterion H (required):
Symptoms are not due to medication, substance use, or other illness.

It follows that mainstream diagnoses such as PTSD are unable to conceptually capture the levels of chronic ongoing stress that Indigenous people experience in their everyday lives. The sources of this stress are argued to be multiple, repeated, and of great severity; and the levels of this stress are argued to be unacceptably high and compounded by:

- The inability to identify and overcome a single source of stress
- The presence of cumulative stressors
- The realisation that many of these stressors are inflicted by people well known to the victims.[lxxxiv]

There has also been particular interest in how intergenerational and chronic personal experiences of trauma can lead to specific symptoms that fall outside the core post-traumatic stress disorder criteria. The concept of 'complex trauma' suggests that exposure to prolonged interpersonal trauma leads to a complex array of symptoms, including personality changes, depression, suicidality, and substance abuse, in addition to the core features of post-traumatic stress disorder.

COMPLEX TRAUMA is an ICD-11 diagnosis that is understood to be the cumulative or compounded impact of multiple and/or prolonged traumatic stressors, leading to underlying dysfunction across a person's life.[lxxxv] It may include—but is not limited to—the impact of adverse childhood experiences (ACEs), that is, psychological abuse, physical abuse, sexual abuse, household substance abuse, household mental illness, domestic abuse, incarceration of a household member, emotional or physical neglect, or parental separation/divorce.[lxxxvi] When developmental trauma remains unresolved, it can be entrenched or exacerbated by traumatic experiences later in life and lead to coping mechanisms that may have been protective in the short

term but are maladaptive in adulthood, such as hypersensitivity to triggers and perceived threats.[lxxxvii]

Intergenerational Trauma Complex trauma (particularly developmental trauma) experienced by Aboriginal people is often exacerbated by—and a product of—intergenerational trauma, (i.e., trauma "across familial generations").[lxxxviii] Intergenerational trauma is known to be prevalent in families where children were forcibly removed from their families and communities ("the Stolen Generations"). Several mechanisms for understanding transgenerational trauma have been identified including those related to the impact of attachment relationships with caregivers, parenting, and family functioning; any association with parental physical and mental illness; and disconnection and alienation from extended family, culture, and society. These processes are thought to be compounded by exposure to high levels of current stress. [lxxxix]

Collective Trauma is a term sometimes used to describe trauma that is caused by "structural, social, economic, and political" disadvantages experienced by Aboriginal people. [xc]

Historical Trauma "flows from systematically inflicted and sustained trauma on a "subjugated population", [xci] and continues to impact Aboriginal people, after years of being denied access to their languages, laws (and lore), traditions, cultures, lands and sacred places, and ways of life. Since colonisation, the Australian Government's systematic dismantling of cultural links and destruction of identity and a sense of belonging has resulted in Aboriginal people experiencing "social disintegration (i.e., identity confusion between dominant and original culture) and social disadvantage".[xcii]

The Relationship between Trauma and Risk

There is now evidence that the experience of trauma is often associated with increased risk of offending. Not only are trauma reactions often a catalyst for involvement in the criminal justice system, but they can also act to increase the risk of offending and re-offending.

Trauma and Risk

There is considerable theoretical interest in understanding the developmental pathways that result in offending. One possibility here is that the emotional numbing and feeling of detachment often results from trauma that leads to callousness and a lack of concern for victims. Another is that exposure to traumatic stressors compromises secure attachment with primary caregivers, which results in the self-regulatory deficits that then facilitate offending. Or perhaps it is the degree to which maltreatment represents a 'betrayal' of trust that then mediates the way in which abuse-related information is processed and remembered and triggers antisocial behaviour. Another consideration is the way systemic interventions mitigate or exacerbate trauma systems, such as the placement of children who have experienced maltreatment into out-of-home care. It has been demonstrated, for example, that placement in residential care homes or facilities can exacerbate trauma symptoms and associated behavioural problems which, in turn, leads to an increased risk of contact with the justice system.

Put simply, the key presentations of trauma (e.g., impulsivity, risk-taking, and low self-control) represent important criminogenic needs, and should thus form important intervention targets for any efforts to reduce re-offending. It follows that the most logical service response is not to 'punish' justice-involved people and implement measures that deter them and others from offending, but to offer a more therapeutically aligned approach that helps them to feel safe and to gain control over intense reactions, destructive thoughts, and impulsive behaviours.

Recommendation: Expert witnesses to routinely assess for the presence of trauma and that this extends beyond Post-Traumatic Stress Disorder to the consideration of complex, historical, and intergenerational trauma and how this may be relevant to sentencing and the understanding of risk.

Family Violence and Anger

The term *family violence* is often used to encapsulate both the extended nature of First Nations families and the kinship relationships within which a range of forms of violence frequently occur. The term is preferred over the more widely used *domestic violence*, as it more accurately describes how violence reverberates through the entire family unit, and includes all victims of abuse, including spouses, children, and extended family members. Family violence encapsulates: spouse assault, homicide, rape and sexual assault, child violence, suicide, self-injury, same-sex one-on-one adult fighting, inter-group violence, psychological abuse, economic abuse, cyclic violence, and what they refer to as "dysfunctional community syndrome".[xciii] Family violence has thus been understood as focused around a wide range of physical, emotional, sexual, social, spiritual, cultural, psychological, and economic abuses that occur within families, intimate relationships, extended families, kinship networks, and communities (the Victorian Indigenous Family Violence Taskforce, 2003). It extends to one-on-one fighting and abuse of Indigenous community workers, as well as self-harm, injury, and suicide.

> "…it's this dog eat dog, that whoever's on the bottom 'I don't want to be on the bottom so I'm putting you on the bottom', within our own"
>
> (McGlynn p. 88 reporting the views of the then Aboriginal and Torres Strait Islander Social Justice Commissioner).

The idea of *lateral violence*, which can be understood as a form of overt and covert dissatisfaction and disruption amid members of

oppressed groups, is important in any Indigenous conceptualisation of violence. Lateral violence includes not only overt physical violence, but covert behaviours such as bullying and harassment, along with the stripping away of Aboriginal identity[xciv] and has been associated with feelings of powerlessness and dependency. In contrast, having a sense of control over one's life has been linked to better health and life outcomes, wellbeing, and prosperity in many areas of Aboriginal life.[xcv] The causes of lateral violence to unresolved grief and multiple traumas that cross generations. Some of these layers of trauma include colonial aggression, genocide, racism, alienation from tribal lands, loss of spirituality and languages, removal of rights and responsibilities, labour exploitation, and large-scale removal of Aboriginal children from their families. It has been theorised that lateral violence can be best understood as how the colonised became the colonisers as they "attempted to mimic the oppressor and took on the values and behaviours of the oppressors, and in turn adopted the violent behaviours amongst members of their own group".[xcvi] With reference to the Indigenous nations of Canada, three main characteristics of lateral violence have been identified:[xcvii]

- That First Nations people can repeat the original oppression they experienced by oppressing those around them
- There is a focus on the negative in another First Nations person or group
- The use of collective cooperation to attack or undermine another person or group is common.

There is a small body of empirical research that supports the idea that culture-specific conceptualisations of violence are needed. One study of South Australian Aboriginal men's perceptions of anger articulates some of the connections that may exist between past experience

(including historical) and present violent behaviour.[xcviii] This identified four general triggers to anger and violence: anger at their own situation; anger at family and others; anger at historical treatment; and anger at perceived injustice. These general conditions appeared to 'wrap around' the more immediate or specific triggers for anger reported by men, such as: specific family problems; alcohol and other drugs; direct experiences of loss; and direct experiences of perceived discrimination. Contextual triggers were also identified by the men, and consistently fell into four categories:

- Growing up with disrupted family lives, defined as at least one (and often more) of the following experiences: removal from families, institutionalisation, foster care, juvenile detention, moving back and forth between institutions, foster care and/or families, living apart from siblings or one or both parents which resulted in intermittent, complicated, or unresolved, or ambivalent relationships between family members

- Growing up experiencing or witnessing anger and/or violence, and being exposed to pervasive and sustained historical and contemporary anger across individuals, families, and communities. The men described a sense of being surrounded by anger and violence in institutions, families, and communities, within and beyond their own generation. They tended to respond with anger and violence almost automatically to other people's behaviour, external events, or perceived provocation, and had

"I can't feel. I can't talk about it—if I did get mad. I'd go really mad and kill someone" (from Atkinson, 2002, p. 146).

little access to other ways of dealing with it. Avoiding the conditions or stressors that trigger their anger and violence would appear to be almost impossible for most men in their daily lives

- Drug and alcohol abuse: Using alcohol appeared to be associated with blocking out pain, coping with life, and socialising. Its disinhibiting effects were seen as providing an outlet or a form of release through violence, including deliberately inciting violence as a form of self-harm. Giving up alcohol and/or drugs appeared to be a condition of managing anger more appropriately
- Impacts of government policy/intervention and racism/discrimination—historical and ongoing: The men who participated in this study reported feelings of powerlessness on a daily basis, and a range of associated emotions leading to anger and violence, including frustration, being overwhelmed, being trapped, feeling threatened, feeling intimidated, loss of control, and fear of loss of control. There was recognition that their capacity to act in their own interests has historically been subject to quite oppressive constraints, and their resulting socio-political powerlessness was seen to have had very real effects on their social and emotional wellbeing.

These stories of anger were essentially stories of violence, either observed or perpetrated. Angry experience was synonymous with violent experience and was described as acts of verbal and physical aggression. More significantly, the stories relayed were commonly of extremely violent acts, usually occurring within the family or close community. For many of the men, anger was understood as family violence.

Common themes were that:

- **Violence is an inevitable consequence of anger arousal.** The men described a feeling of emotional pressure building up, which they experienced as potentially overwhelming. They described violence as a way of releasing that emotional pressure as a form of emotional protection that was seen as essential in sustaining some degree of mental stability. They spoke of anger as a way of "*letting it all out*" and "*releasing emotion*" and described times when a violent response was required to "*feel better*". This way of dealing with angry emotion was not, however, without cost. On one hand, anger expression in the form of violence was experienced as a relief to emotional distress, a coping mechanism that protected the men from becoming overwhelmed. Consequently, however, anger was experienced as unpredictable in its outcome and therefore frightening. For many, this lack of control was experienced as an irrational process, beyond conscious awareness. Many of the participants recounted stories of angry or violent episodes that "*just happened*" "*without knowing*". The stories were imbued with accounts of experiencing irrationality as a kind of dream state: "*You go completely off your head without having control over what you're doing and the end result is you either wake up in the cells or you wake up in hospital*". The men seemed to experience this irrationality as disturbing and often "*shut down*" further to cope.
- **The experience of profound powerlessness is pervasive.** There was some indication that this was experienced on both the personal and cultural level. On a personal level, powerlessness was experienced because of early family trauma and witnessing violence at an early age. Although many stories recounted personal experiences, they spoke of

dislocation and discrimination on a broader social scale. One participant recalls an incident when he and his brother were forcibly taken by police into welfare at the age of 8. He attributes much of his mistrust to his early encounters with authority and White society: "*Cause of what they [White fellas] have done you know what I mean? Yeah, and ever since then that's stuck in my head of what they could do and what they are willing to do, you know?*". This is an example of the politicisation of anger that is specific to the experience of some First Nations peoples.

- **Externalising the cause is one way to deal with the intensity of the emotion.** Politicised anger, experienced here as fatalism, becomes an alternative to violence in the face of provocations. "*But I had to keep my composure and say look I mean we're powerless. We can do nothing, know what I mean*". This powerless experience is substantiated and justified by further systemic abuse that is recalled by this respondent. The implications of this form of anger experience may be for increasing personal agency by channeling anger into positive action, rather than fatalism or violence, through the reinterpretation of abusive experiences in historical and cultural terms and the politicization of response. For instance, these positive experiences might take the form of involvement with culturally based and arts-based activities and/or political activities that offer a vehicle for both reframing experience and expressing affect.
- **Undifferentiated Emotion Is Experienced as Anger.** Throughout these stories, it was evident that a variety of emotions were largely undifferentiated, and anger was often confounded with experiences of sadness, fear, or love. For several participants, anger was associated with fear: "*I start shaking… If I get scared, I'll get angry*". Often the physical

experience was the only point of awareness: "*Oh it's like that funny feeling that you get in your veins and it just shivers*". Accompanying the fear was a sense of personal powerlessness. Anger seemed to be a response to feeling trapped: "*If I feel like I'm being backed into a corner I hate it, I hate getting angry*".

- **Anger is Intergenerational.** Anger was experienced not only largely within families but also intergenerationally. It was seen as something that could be passed down from one generation to the next. For example, one participant said, "*It's anger now that I feel come from her is going straight to my kids… I don't want that for my generation that I saw a lot when I was a kid*". There was an appreciation of the way in which angry expression and violence was often learned within families: "*Seeing your parents fighting and that, you probably think it's all right to do the same*". Another stated: "*Like it just teaches you that or that's all you know cause you've seen it*". In addition, one said, "*You grow up with some families where violence is accepted and like then when you grow up around that, you know you can do it and you know stuff like that. And you think, oh, people think it's OK to be violent, against man or women*". That anger is seen to be not only learned but intergenerational in nature and enables some of the men to frame anger in terms of an historical and therefore political view of the position of Indigenous people in Australia. There was some understanding of anger within the reflection group as being historically located and intergenerationally compounded by systemic discrimination: It's an ongoing thing that's happened from generations over generations of Indigenous people being dispossessed of their land, not having equal access to resources that are out in the communities and plus the forced policies of assimilation, separation that stems from the early mission days.

Recommendation: Expert witnesses to routinely consider cultural aspects of the experience of anger and its expression through violence, including the way in which anger may be provoked or triggered in different ways.

Gender Considerations

The need for gender-specific and gender-responsive service delivery across criminal justice has been well documented.[xcix] In relation to the understanding of trauma, it is now well established that for justice-involved women trauma is often related to the experience of childhood sexual abuse, with repeated exposure to sexual and violent abuse commonplace. PTSD is considered more likely following exposure to violence in adulthood, along with externalised self-harm, eating disorders, addiction, and avoidance. For men, trauma may often be more associated with witnessing violence, or exposure to violence from strangers and those outside the family. This increases the likelihood of violence, along with the risk of substance abuse.

There has been little research "that has directly asked Aboriginal people about the types of roles and responsibilities that they think are important for men and women, or how their gender influences their experiences or opportunities"[c] One South Australian community consultation reported there are clear cultural roles for women and men around family and community responsibilities and maintaining culture, with some roles considered gender specific. This work concluded that an understanding of gender was important to understand why some men might feel disconnected to their communities and culture, as well as different ways for women and men need support to strengthen their connection to culture.[ci]

Resources are also now available for working with those First Nations people who identify as LGBTQIASB+.[cii]

Recommendation: Expert witnesses to consider the way in which gender, gender role identity, and gendered pathways to offending are relevant to forming an opinion.

Interventions and Healing Programs

It will always be difficult to formulate effective responses in the absence of sound scientific knowledge about the causes, correlates, and pathways of First Nations offending. Nonetheless, awareness of the types of interventions, programs and services that might be available to the courts is foundational to the formulation of an expert opinion. Current knowledge is probably insufficient to inform the development, implementation, and evaluation of prevention efforts and interventions and it is premature to commit to specific service responses. A broad public health approach is nonetheless useful as it provides a structure for grouping those initiatives and programs that are likely to be required:

- *Primary prevention* initiatives target whole populations or specific places and aim to prevent a given problem from developing or occurring in the first place
- *Secondary prevention* targets at-risk individuals, groups, or places, and aims to prevent or slow the transition from risk to manifest problem
- *Tertiary prevention* targets those individuals or places identified as having already developed a given problem, and

aims to ameliorate associated harms and prevent repeat behaviour.[ciii]

The call to deliver primary and secondary prevention programs to minimise exposure to adversity and maltreatment is clearly warranted. However, given that many First Nations people will experience disadvantage and trauma and those who appear before the courts are disproportionately exposed, it is also important to consider what the courts can do to reduce further involvement in the criminal justice system. Culturally, and given the socio-political context in which adversity and maltreatment has arisen, it becomes important to adopt a healing or strengths-focussed approach to sentencing. This is what is meant by trauma-informed sentencing.

Prevention is essentially the conceptual framework used to develop services to prevent adolescent sexually abusive behaviour in Queensland.[civ] It can be used to position their efforts within a broader approach to the prevention of violence, such as those described by Australian violence prevention experts.[cv] (*Table 1*). These recommendations illustrate just how important it is that any concerted effort to prevent violence not only target the individual offender, but also victims, the situations in which offending occurs, and the communities that are affected. In this way, effective service delivery for sex offenders should not be limited to change within the individual (i.e., the management of psychological risk), but also linked to restricting future opportunities for offending (managing situational risk) and working with potential victims and communities to ensure that risk-related behaviour is closely monitored and addressed.

Table 1: Violence Prevention Strategies as Identified by Australian Experts.

Targets	*Primary prevention*	*Secondary prevention*	*Tertiary prevention*
People who offend	Activities that promote greater emotional understanding and pro-social behaviour in schools. Parenting support and family interventions. Restrict early age alcohol use. Communities That Care Friendly Schools & Families Bullying prevention programs. Legal prosecution.	Use reliable and valid assessment methods to help identify and manage violence risk. Intervene to de-escalate/resolve interpersonal conflict. Develop the least restrictive interventions to contain aggression in institutional settings. Mental health clinics for those at risk. Strengthening Families Big Brothers/Big Sisters Mentoring programs. Cross-cultural counselling/anger man.	Strengthen legal and policing responses. Specialist mental health services for those who have acted violently. Behaviour change programs for offenders (including post-release support for prisoners). Education and awareness on working with difference. Use risk assessment tools to determine offenders most appropriate for intervention and the types of intervention required.
Victims	Childhood education about aggression and violence. Family support programs. Public education about violence. Friendly Schools & Families Bullying prevention programs. Validation of experiences through the law	Victims' rights, including procedural justice. Emotional and practical support for those at risk of school bullying. Shelters and accommodation for victims of violence and their dependents.	Provision of medical, psychological, financial, and practical assistance. Legal counsel and redress for victims. Support, treatment, and advocacy services.

Targets	*Primary prevention*	*Secondary prevention*	*Tertiary prevention*
		Family support using Home Visitors. Counselling and support for trauma.	Accommodation support. Empower victims to seek their rights and voice their issues. Victim safety planning
Situations	Create and maintain social and institutional environments that discourage or restrain negative peer interactions. Reduce family conflict and improve parenting skills. Education about alcohol-related violence. Reduce early and heavy youth alcohol use. Alcohol sales monitoring.	Early intervention programs for adolescents at risk. Early intervention, advocacy, and safety planning for those at risk of intimate partner violence. Alcohol entertainment precinct interventions. Addressing trauma and safety issues arising in specific situations. Immediate crisis management.	Provide school/hospital/ workplace interventions when violence is identified. Address education, programmatic, legislative policy shortcomings.
Communities	Address community inequality and disadvantage. Social cohesion programs. Strengthen legal responses to racially motivated violence. Nurture social and cultural capital in Indigenous communities. Develop complaints procedures for managing disagreement and proactive processes for conflict resolution. Reduce media portrayals of racism.	Restrict the availability and supply of alcohol. Nurture social and cultural capital in Indigenous communities. Trial Pathways to Prevention. Broad education and awareness programs that build tolerance and acceptance at community level.	Integrated and multi-agency responses to violence. Strengthen legal responses to violence. Develop community-based institutions to provide ongoing support at local levels.

Targets	*Primary prevention*	*Secondary prevention*	*Tertiary prevention*
	Change community attitudes about violence considered to be socially acceptable.		

A key consideration in the provision of tertiary prevention programs for those in court is evidence that providing support and healing will help to achieve the goals of sentencing. It is encouraging to note recent research with young justice-involved people which has shown the experience of positive life events is associated with a substantially reduced risk recidivism among those with extensive exposure to adversity, and who are also already involved in the justice system.[cvi] Positive life events, in this context, refers to things such as positive work experiences such as encouragement, supportive relationships and family environments or mentoring, and involvement in structured activities like sports, or club and hobby groups. This includes engagement with cultural activities. And these can be provided or facilitated by both professional staff and family/kin and community groups through a legal mandate as a means of mitigating future risk of offending. These activities and programs can complement more specific social and emotional wellbeing (or trauma treatment) programs provided by mental health services. In other words, it may often be possible to manage risk effectively in the community and this is key information for the court to consider. The available evidence suggests that when communities can provide positive cultural experiences to those with histories of trauma exposure, the return on investment with respect to public safety, reducing future victims, and minimising the intergenerational transmission of disadvantage and maltreatment may be substantial. And realising this depends on recognising the importance of First Nations led, culturally safe,

strength-based approaches, built on truth-telling, shared identity, and connection to a therapeutic web of cultural support.

Engagement with communities about crime-prevention more generally, also reveals unanimous agreement that more community-based intervention programs are required that targeted key risk factors associated with reoffending (e.g., family and relationship issues, education and employment, health, social and emotional well-being, individual and cultural identity, and accommodation). For example, access to a family violence program (for both victims and perpetrators) has been identified as a priority, as is dedicated employment programs.[cvii]

In relation to mental health service delivery, there is a need for culturally safe treatment. Recent years have seen a growing realisation that the mono-cultural nature of professional training in both counselling and psychotherapy, coupled with increasing cultural diversification, often results in sub-optimal outcomes when traditional therapeutic approaches are used with minority populations.[cviii] In fact, two meta-analytic reviews by have now been published that evaluate the outcomes of culturally adapted mental health treatments for people of colour in the United States and Canada. Both report a moderately strong effect for culturally adapted treatment, with their measure of practitioner cultural competence correlating strongly with treatment outcome.[cix] And so there is now general evidence that cultural adaptations to mainstream interventions are often more effective than treatment as usual (at least with clients of colour in North America) and thus provide relevant knowledge upon which guidelines for practice might draw.[cx] In addition, a recent systematic review of interventions, programs and activities known to be successful in improving the wellbeing of Australian First Nations men

identified two prominent themes—strengthening identity, and increasing social connection.[cxi]

Some writers have also emphasised the importance of adopting an Aboriginal psychological approach to forensic treatment as a means of legitimising Aboriginal cultural knowledge and moving the emphasis from psychological deficits to cultural strengths.[cxii] Programs designed and delivered by appropriately experienced First Nations organisations, take a strengths-based approach that is grounded in culture, builds resilience, and reduces vulnerability, include a focus on building self-esteem and wellbeing, and strengthen community connections have also been identified as most effective.[cxiii] Such programs are typically trauma-informed, include content to address offending behaviour, builds basic skills, and practical assistance required for reintegration with the community (including accessing housing, education and employment supports), and case management throughout the transition from custody to reintegration into the community.[cxiv]

Healing programs for First Nations peoples "operate both at the community and individual level, restoring community governance and centring community worldviews, and strengthening interpersonal relationships and community connections, contextualising the individual's experience and motivating personal healing: "healing programs must create an environment where individuals can situate their behaviour within the context of colonial and family history, understand (be responsible for) their own historic trauma informed behaviours, as well as create the desire to make amends and move forward on their own long-term healing journey".[cxv]

The importance of three key domains to programs to support healing outcomes and cultural connection have also been described:

- Quality healing programs and initiatives led by communities and developed to address the local impacts of trauma
- Healing networks, champions, and organisations to promote healing at a national and community level, including trauma awareness and the importance of truth telling
- A supportive policy environment where policy makers and influencers understand and advocate the benefits of Aboriginal and Torres Strait Islander healing and its long-term nature. [cxvi]

Such approaches are considered necessary to interrupt circumstances of risk and vulnerabilities that will otherwise persist across the life course, and across generations.[cxvii] They are consistent with the basic idea that all people have a strong need to participate in processes and decisions affecting their lives—or what is called *voice*. A lack of voice renders individuals angry and frustrated, with a great sense of injustice. Cultural programs work, in part, by providing participants with an opportunity to have a voice about their future.[cxviii] Programs, practices, and policies aimed at making people feel that they matter contribute to both citizenship and wellbeing. The Nargneit Birrang Framework has been developed in response to the Victorian Government's intent to develop an Aboriginal-led and co-designed statewide family violence holistic healing approach for Aboriginal communities across the State and offers useful information about how these ideas might be implemented.[cxix]

In response to the report of the *Advisory Commission into the Incarceration Rates of Aboriginal Peoples in South Australia* (2023), the State government has allocated around $25 million over four years to deliver several new programs across different agencies, with the aim of reducing incarceration rates. *Yalakiana Tappa: Reducing Aboriginal*

Incarceration measures for Aboriginal community led initiatives include:

- **Community Support Program:** A cultural reintegration, tenancy, and rehabilitation support program to assist incarcerated people to apply for bail, successfully comply with bail conditions, and address their treatment needs
- **Accommodation and Support Program:** A 12-week supported housing, tenancy, and rehabilitation program for Aboriginal people who do not have access to culturally safe accommodation
- **Cultural Residential Drug and Alcohol Treatment Facility:** a 12-week residential therapeutic community program for Aboriginal people who need intensive drug and alcohol treatment to support successful compliance with bail conditions
- **Aboriginal Justice Agreement:** to develop and implement a formal undertaking between government and Aboriginal communities to develop and implement a collaborative approach to improve justice outcomes
- **Port Augusta Community Corrections Centre:** to secure and fitout a new Port Augusta Community Corrections Centre and support access to culturally appropriate rehabilitation and reintegration spaces for Aboriginal offenders
- **Work Ready Release Ready Plus:** to extend the Work Ready Release Ready Program by increasing access to the program for more participants. The program will be available at the Port Augusta Prison, Adelaide Women's Prison, Adelaide Pre-release Centre, Cadel Training Centre, Mobilong Prison, Port Lincoln Prison and Mount Gambier Prison

- **Child Diversion Program:** a program to divert Aboriginal children aged between 10 and 13 years, who have been charged with a minor offence, away from a custodial environment with appropriate supports. This program also provides short-term accommodation where no other suitable bail option has been identified and allows the young person to be placed back with family/kin with wrap around case management services
- **Youth Aboriginal Community Court—Adelaide:** A two-year trial of a specialist court for Aboriginal children and young people, to be known as YACCA, with a culturally-responsive program that aims to disrupt escalation points in a young person's offending, address trauma and criminogenic needs, implement protective factors and divert young people from further offending.[cxx]

Recommendation: Expert witnesses to have knowledge of primary, secondary, and tertiary prevention programs and the characteristics of those that are considered appropriate culturally.

C) Legal Knowledge

Given that a defendant's legal representative may request that a report addresses specific issues relevant to sentencing, it is important to have basic legal knowledge. We would encourage mental health professionals providing sentencing reports to the court to pay particular attention to how the defendant's mental state can be related to factors that courts have identified as legally relevant.

The importance of each topic may depend on the case at hand, and the focus given to various considerations may be refined based on a letter of instruction or discussion with defence counsel. However, appellate courts have identified certain ways that mental impairment can be relevant in sentencing. To best assist the court, experts preparing sentencing reports for a defendant may need to elaborate on matters such as those identified by Justice Doyle in *R v Monks* [2019] SASCFC 47 [35]:

- The nature and severity of the impairment
- The extent to which the impairment was operating on the offender's mental functioning at the time of the offending and hence can be said to have influenced or caused the offender to commit the offence and/or to have affected the offender's capacity to appreciate the wrongfulness and gravity of the offending
- Whether the impairment was the product of an underlying mental illness or disability, self-induced intoxication, or some combination of such factors
- If the product of self-induced intoxication, whether it reflected an addiction, and if so the circumstances of that addiction
- The ability of the offender to reduce or overcome the significance of any underlying condition or addiction, and the steps taken or able to be taken by the offender in that regard.

More specifically, opinion might be sought on matters concerning:

- **Moral Culpability**
    - Is there a connection between the impairment and the offending? If so, how? (e.g., did it impair the offender's ability to exercise appropriate judgment, to maintain self-control and resist impulsive behaviour,

to think and reason clearly, and to make calm and rational choices. It may influence or cause the offender to act in a disinhibited or aggressive manner. It may obscure the offender's intent to commit the offence or negate any suggestion of deliberation or premeditation. It may impair the offender's ability to appreciate the wrongfulness, gravity, and implications of their offending).

- **Specific/Personal Deterrence** (i.e., the extent to which deterrence of the individual defendant forms the rationale for the sentence)
    - Is the defendant impaired in their ability to make a rational analysis comparing the likely gains from the crime against the prospect, and likely severity, of punishment? Would the defendant have had the capacity to learn from previous sentencing exercises? For instance, defendants with cognitive impairments or conditions markedly affecting impulsivity may lack this capacity.
- **Rehabilitation and Risk Assessment**
    - What treatments or supports could lessen the future risk of reoffending?
- **Hardship of Sentence**
    - Does the defendant's mental condition mean that they will suffer hardship of a sentence more than someone without that condition. For instance, is there a risk of imprisonment having a significant adverse effect on the offender's mental health? Does the defendant's mental condition warrant the sentence to be served in a particular way? Are there particular

conditions that should be included (or not included) in a supervised order, considering a defendant's mental condition?

Recommendation: Expert witnesses to have knowledge of legal decision making, specifically the need to establish the extent to which any impairment could be said to have influenced or caused the offence and/or to have affected the defendant's capacity to appreciate the wrongfulness and gravity of the behaviour, including the importance of assessing moral culpability, personal deterrence, rehabilitation, and any hardships that might be association with sentencing.

Sentencing

The following section explains the legal context for the legal request to offer an opinion on these questions. We would also refer readers to the Nunga Court Bench Book and Magistrate Bennett's book on sentencing Aboriginal offenders.[cxxi]

The sentencing calculus comprises sentencing purposes, principles, individual factors, and non-legal considerations. It is important to note that the term 'sentencing' may refer to both the court process and the outcome. In Australia, the sentencing calculus is applied through 'instinctive synthesis', explained by the High Court in *Wong v The Queen* as follows:

> *[T]he task of the sentencer is to take account of all of the relevant factors and to arrive at a single result which takes due*

> *account of them all. That is what is meant by saying that the task is to arrive at an 'instinctive synthesis'. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features.*[cxxii]

In Australia—like the UK, Canada, and NZ—sentencing exists on a continuum underpinned by both utilitarian and retributivist theories and is based on individual justice and consistency. Individualised sentencing as it not formulaic; it is tailored to the individual. The judge uses the *Wong* approach to apply the sentencing calculus to arrive at a sentence which "balances many and different and conflicting features".

Eight sentencing purposes (or objectives) are common to legislation across Australian jurisdictions. These are both backward-looking (e.g., punishment, accountability, denunciation) and future-focused (e.g., community safety, deterrence, rehabilitation). Because the sentencing purposes most cited by Judges—deterrence, incapacitation, and rehabilitation—are a mix of utilitarian and retributivist purposes, they are not necessarily complementary. In South Australia, the *Sentencing Act 2017* provides at s3 that the 'primary purpose' for sentencing a defendant for an offence is to protect the safety of the community (whether as individuals or in general). Punishment, denunciation, deterrence, and rehabilitation are referred to at s4 as 'secondary purposes', although the weight given to personal and general deterrence is elevated in some circumstances (see e.g., Serious Repeat Offender provisions at s54).

Because sentencing purposes are not always informed by empirical evidence, sanctions designed to achieve specific sentencing purposes

may not increase community safety. For example, incarceration may be imposed to achieve general and personal deterrence and punishment, but prison may delay or undermine opportunities for rehabilitation.

> *Since the Final Report of the Royal Commission in 1991, a number of reports from Government authorities, Parliamentary inquiries and Commissions has been published which have extensively chronicled and surveyed, when examining aspects of the criminal justice system, historical and socio-economic issues that are intrinsically and intimately connected to the criminal justice system and its impact upon Aboriginal people generally and in individual instances.*[cxxiii]

> *The evidence from these sources provide compelling evidence of the fact that the vast majority of Aboriginal people coming before the courts are individually the 'product' of policies, social and economic forces, social attitudes, physical and mental disabilities and/or other conditions, usually beyond their control, that have either contributed to the offending directly or indirectly or provide a proper context for understanding why crimes are committed and even (on occasions) how they can be prevented from occurring in the future.*[cxxiv]

See Thalia Anthony's work for a summary of sentencing considerations for First Nations defendants.[cxxv]

The following case law has been identified as core legal knowledge.[cxxvi] It speaks to the legal relevance of 'systemic deprivation' to the circumstances of individual First Nations offenders and, on occasions individual offending. As was noted in the *Final Report of the Royal Commission into Aboriginal Deaths in Custody* (RCIADIC):

> *It is important that we understand the legacy of Australia's history, as it helps to explain the deep sense of injustice felt by*

> *Aboriginal people, their disadvantaged status today and their current attitudes towards non-Aboriginal people and society. In this way, it is one of the most important underlying issues that assists us to understand the disproportionate detention rates of Aboriginal people.* [cxxvii]

Munda v Western Australia and *Bugmy v the Queen* were cases that both confirmed the continuing fundamental importance of Brennan J's 1981 observations in *Neal v The Queen* that:

> *The same sentencing principles are to be applied … in every case, irrespective of the identity of a particular defendant or their membership of an ethnic or other group. But in imposing sentences, courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group.*[cxxviii]

Then, in 1992, the year after the release of the RCIADIC final recommendations, Justice Wood of the NSW Supreme Court (as he then was), in *R v Fernando* [cxxix] made several observations, some general in character but pertinent to the individual case, when sentencing a man from 'remote' New South Wales for a serious act of violence against another man from his community. This authority has been applied in other States and Territories.[cxxx] Its reasoning and application in subsequent decisions culminating in *Bugmy* was very much at the heart of that decision, and to a lesser extent in *Munda*.

The High Court Case of Bugmy

Mr Bugmy was born and raised in Wilcannia NSW in a household where alcohol abuse and violence were commonplace. He had little formal education and was illiterate. He started drinking and taking drugs at 13 years, at 15 years he was reported to have witnessed his father stabbing his mother 15 times. His juvenile offending commenced at 12 years, and he was 29 years old at the time of the offences giving rise to the appeal. Much of his adult life had been spent in prison. The offences giving rise to the appeal was the result of an altercation in the Broken Hill Correctional Centre. Mr Bugmy had thrown some pool balls at a prison officer, one of which had hit his left eye causing the officer to lose the sight of that eye – it was a serious offence.

In *Bugmy v The Queen 249 CLR 571*, the High Court considered but rejected the conclusion of the New South Wales Court of Appeal that the weight of *Fernando* 'principles' set out by Wood J diminish over time particularly when the offender has acquired a substantial and/or serious criminal history.

In *R v Fernando,* his Honour, Wood J observed that problems of alcohol abuse and violence within communities that contribute to offending, require "more subtle remedies than the criminal law can provide by way of imprisonment", and "a lengthy period of imprisonment may be 'unduly harsh' when served in a foreign environment. His Honour set out several 'principles' to be considered in particular cases involving Aboriginal offenders, particularly from disadvantaged or remote communities charged with acts of alcohol related violence".[cxxxi]

In *Bugmy,* the High Court reconsidered a finding by the NSW Court of Appeal in relation to Mr Bugmy that the weight of the *Fernando*

‘principles’ set out by Wood J diminish over time particularly when the offender has acquired a substantial and/or serious criminal history. The Court stated**:**

> *The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.*

Judge Norrish comments:

> *Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision. However, this is not to suggest … that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.” (citing Gleeson CJ in Engert v The Queen).*[cxxxii]

It is that countervailing consideration of community protection, which was most prominent in the case of *Munda* - a decision of the High Court - which was argued and judgement handed down at the same time as Bugmy. The two decisions vividly illustrated the dichotomous and opposed considerations which are always relevant to the law of sentencing.

In *Munda*, the High Court was fully appraised of the appalling disadvantage, distress and effects of intergenerational alcohol abuse which affected the appellant, but his appeal was not successful:

> *A just sentence must accord due recognition to the human dignity of the victim of domestic violence and the legitimate interest of the general community in the denunciation and punishment of a brutal, alcohol-fuelled destruction of a woman by her partner. A failure on the part of the state to mete out a just punishment of violent offending may be seen as a failure by the state to vindicate the human dignity of the victim; and to impose a lesser punishment by reason of the identity of the victim is to create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law.*[cxxxiii]

The High Court Case of Munda

In Munda, the High Court was fully appraised of the appalling disadvantage, distress, and effects of inter-generational alcohol abuse which affected the appellant, but his appeal was not successful and, in that case, the High Court emphasised the need for protection of Aboriginal women from violence by their partners.

Canadian Decisions

The Canadian jurisprudence included the recent decision of the Supreme Court of Canada in *R v Ipeelee*.[cxxxiv] That majority judgment invoked Canadian courts to consider "the unique circumstances of Aboriginal offenders, that bear (up)on the sentencing process, as relevant to the moral blame worthiness of the individual, as an aspect of the principle of proportionality in sentencing".[cxxxv] Pursuant to statutory obligations in Canada requiring special attention to 'Aboriginality' in sentencing, in *Ipeelee* the majority held that "… a just sanction is one that reflects both perspectives (the gravity of the offence and the moral blame worthiness of the individual) of proportionality and does not elevate one at the expense of the other".[cxxxvi] In this case, the majority of the Court stated that courts *must* take judicial notice of such matters as: "…the history of colonialism, displacement (social and family dislocation) and how that history translates into lower incomes, higher unemployment, higher rates of substance abuse and suicide and, of course, higher rates of incarceration of Aboriginal offenders… [the] parity principle requires that any disparity be justified".[cxxxvii]

The Canadian Supreme Court in *Gladue* had earlier held that the relevant provisions of the Canadian Criminal Code, concerned with the special attention required to be given to 'Aboriginality', *mandatorily* required sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of Aboriginal offenders. As the provision was 'remedial' in nature and its purpose is to 'ameliorate' the serious problem of 'over representation of Aboriginal people in prisons', and "to encourage sentencing judges to have recourse to a restorative approach to sentencing, there was a judicial duty to give the

provision's remedial purpose *real force* (emphasis added)". [cxxxviii] These Canadian decisions specifically address the need for 'equal justice' in the treatment of Aboriginal defendants.

In considering the relevance of Canadian cases to the Australian context, their Honours in *Bugmy* noted:

> *One evident point of distinction between the legislative principles governing the sentencing of offenders in Canada and those that apply in New South Wales is that s 5(1) (Crimes (Sentencing Procedure) Act 1999) does not direct courts to give particular attention to the circumstances of Aboriginal offenders. The power of the Parliament of New South Wales to enact a direction of that kind does not arise for consideration in this appeal. Another point of distinction is the differing statements of the purposes of punishment under the Canadian and New South Wales statutes. There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender. Were this a consideration, the sentencing of Aboriginal offenders would cease to involve individualised justice… An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence.* [cxxxix]

Their Honours also said:

> *The propositions stated in Fernando are largely directed to the significance of the circumstance that the offender was intoxicated at the time of the offence. As Wood J explained, drunkenness does not usually operate by way of excuse or to mitigate an offender's conduct. However, his Honour recognised*

> *that there are Aboriginal communities in which alcohol abuse and alcohol-related violence go hand in hand.*

His Honour considered that where abuse of alcohol reflects the environment in which the defendant was raised it should be considered as a mitigating factor. To do so, he said, is to acknowledge the endemic presence of alcohol in Aboriginal communities and:

> *The grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.* [cxl]

The Bugmy Bar Book

The Bugmy Bar Book is a free resource hosted on the website of the NSW Public Defenders[cxli] that has been written to assist criminal lawyers in the preparation and presentation of evidence to establish the application of the sentencing principles espoused by the High Court of Australia in the case of *Bugmy v The Queen*. The Bar Book collates published research, government reports and inquiries, and academic commentary in relation to Aboriginal and Torres Strait Islander Stolen Generations and descendants, and the effects this may have on a person's behaviour; development; physical, mental, and social well-being; and links to contact with the criminal justice system. Accordingly, the Bar Book publishes accessible summaries of key research to provide an evidence base to support submissions made to courts and other decision-makers, and to promote improved understanding of the lived experiences of people encountering the legal system within the legal profession. Each chapter is accompanied by a summary of case law from around Australia in which the relevant

issues have been considered by sentencing courts. Of particular note, for mental health professionals is the report *Significance of Culture to Wellbeing, Healing and Rehabilitation* (2021) which was written to promote greater understanding of the strength and significance of connection to culture and community for Aboriginal and Torres Strait Islander people. This is a key resource to support practice in legal contexts.

Key South Australian Case Law

R v Grose (2014) SASC FC 42

As was indicated in *Bugmy,* generally these factors relevant to sentencing which arise by reason of the defendant's Aboriginal social and cultural identity, relate to acute social and economic disadvantage compared with the rest of the population. Indeed, in *Grose,*[cxlii] Gray J spent some time examining Aboriginal cultural disadvantage in historical terms. Reference was also made to the *Bringing Them Home* report of the Human Rights Commission of 1997 and the Commissioner's concerns about the effects of intergenerational trauma upon Aboriginal families and societies. "While Aboriginality per se was not seen always to be relevant to sentencing, Gray J made the uncommon step of acknowledging the intergenerational impact of Aboriginal people being removed from their families and communities."[cxliii] Experiences common to Aboriginal people, such as deprived childhoods and exposure to intergenerational alcohol abuse "amongst traditionally oriented Aboriginal people not living on-country" are now viewed as relevant in sentencing.

R v Pennington [2015] SASCFC 98

R v Pennington[cxliv] was a sentencing appeal taken to the Court of Criminal Appeal from a sentence imposed by a judge of the District

Court of South Australia. Mr Pennington had been found guilty by jury verdict of the offence of recklessly causing serious harm upon his domestic partner, the offence having taken place at Yalata community.[cxlv] The majority judgements of Sulan J and Gray J reduced his sentence on appeal to a five-year head sentence with a three-year non-parole period. Mr Pennington is an Aboriginal man whose mother left the family home when he was two. His father was violent and often drunk. On appeal, the majority of the SA Full Court of the Supreme Court held "the [trial] Judge erred in failing to have regard to the particular disadvantages faced by the appellant *as a consequence of his Aboriginality*" (para 46). They found the trial judge had "failed to identify the link between the intergenerational alcohol abuse, the circumstances of the defendant, a traditional Aboriginal man not living on-country, and his offending conduct" (para 35).

Mr Pennington was described as having an itinerant childhood with limited schooling, poor literacy, and numeracy. Both his mother and first wife died from alcohol-related medical conditions. Mr Pennington had an extensive criminal history involving convictions for rape, domestic abuse and dangerous driving causing grievous bodily harm, but was reportedly "law-abiding for some eight years" prior to the wounding offence. The court accepted that the effects of intergenerational alcohol abuse upon the defendant had not been properly considered by the sentencing judge, in accordance with the principles laid down in *Bugmy*. In addition, the Court of Criminal Appeal took particular account of dicta of Gray J in *Grose* when the court observed that:

> *While in Bugmy the Court's focus was upon factors of social and economic disadvantage and their relevance to sentence, those aspects are not exhaustive of matters to which a court sentencing an Aboriginal person may need to be alive. Underlying the decisions of Fernando, Bugmy and Munda is the*

> *fundamental principle of individualised justice and the relevance of personal factors to the sentencing exercise. In addition to factors of social and economic disadvantage that may be present, the court may need to consider cultural factors or the unique history and treatment of a particular ethnic group. Such factors may be relevant to the court's assessment of the gravity of the offending and the defendant's blameworthiness. This may impact the choice of penalty and purposes of punishment*. [cxlvi]

As a consequence of the courts accepting the particular disadvantage arising from particular circumstances of particular Aboriginal communities, the Court of Criminal Appeal referred favourably to previous decisions of the South Australian Supreme Court, which touched upon Yalata community. "It was further submitted that the problems associated with the Yalata community were known and well-established to the South Australian Courts. Further, that the unique history of the Aboriginal people removed from the western desert to Yalata, Cundeelee, and Coonana, was a matter to be taken into account as the unique history and treatment of a particular ethnic group. It was said that the factors identified in *Grose*, and this unique history, were relevant to the Court's assessment of the gravity of the defendant's offending and his blameworthiness."[cxlvii] Attention was drawn to *R v Fuller-Cust*, where Eames J observed:

> *To ignore factors personal to the applicant, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of his Aboriginality, would be to sentence him as someone other than himself. Not only would that offend principles of individual sentencing which apply to all offenders but in this case it would fail to identify the reasons for his offending and, in turn, the issues which have to be addressed if rehabilitation efforts are to successfully be adopted so as to*

> *ensure that he does not re-offend and, in turn, to ensure the long-term safety of the public.* [cxlviii]

Recommendation: Expert witnesses to be reasonably familiar with both national and South Australia case law relevant to the sentencing of First Nations defendants.

The Relevance of Trauma in SA Sentencing Matters

Trauma, we argue, is always a mitigating factor for First Nations defendants; however, it does not always receive a clearly articulated response in sentencing. In *R v Nelson* [2017] SASCFC 40, the court referred to the 'cultural disadvantage' experienced by Mr Nelson. Mr Nelson had grown up on the Anangu Pitjantjatjara Yankunytjatjara (APY) lands and had an acquired brain injury likely due to petrol sniffing (from age 9 to 16 years) and alcohol abuse. The defence argued:

> *The social complexities of indigenous drug use, together with other criminogenic factors affecting Aboriginal people, may, on occasion, require modification or amelioration of otherwise harsh policies of deterrence. In that context it was observed that it was likely that the defendant had been affected by petrol sniffing from a relatively young age and also by alcohol and drug abuse. At best he was of low average intelligence and there was some suggestion that he suffered from executive dysfunction and social and intellectual disability (para 32).*

The court allowed the prosecution's appeal on the grounds of the manifest inadequacy of the sentence. While the court recognised the relevance of the disadvantage associated with Aboriginality, it also weighed the mitigating nature of trauma against the risk to the

community of serious, repeated criminal behaviour. In Nelson, the courts recognised Aboriginal peoples often experience trauma associated with their Aboriginality. This disadvantage is not limited to violent Aboriginal men but also Aboriginal women, who are often the targets of "ongoing violence, degradation and humiliation". This decision highlights the difficulty for the courts in finding the balance between recognising the rights and experiences of victims and the trauma histories of both victims and perpetrators.

Decisions involving violent crimes committed by Aboriginal defendants, especially family violence offences, highlight the lack of nuanced responses available to courts. The High Court and the South Australian Supreme Court have both recognised the challenge of balancing community safety with the mitigating effects of trauma and adversity for Aboriginal people who commit offences of violence. This reflects what has been previously discussed in the High Court decision in *Munda.*

The SASCFC decision of *R v Hughes; R v Rigney-Brown* [cxlix] did not specifically refer to *Bugmy*. However, Kourakis CJ provided a summary of the relevance of complex trauma in sentencing.

> *… The factual circumstances of the respondents' offending, and their antecedents acutely raises the tension between the competing sentencing purposes which judges must balance when punishing offenders for crimes borne out of great social, educational and financial impoverishment. The respondents were born into communities of entrenched social disadvantage. They were subject to parental neglect and abuse. They subsequently became homeless and addicted to drugs. These factors denied them meaningful social engagement and the development of adult moral responsibility which comes with it. On the other hand, those very circumstances remain*

criminogenic factors which call for community protection and deterrence.

… There are additional principle-based reasons which support the relatively low non-parole periods fixed by the Judge. First, through no fault of their own, the respondents did not develop adult insights, values and responsibility because of their social deprivation and marginalisation. For that reason, their moral culpability is relatively less. Secondly, the non-parole periods were significantly longer, particularly in the case of Ethram Hughes, than any earlier imposed periods of imprisonment or detention. The law of sentencing recognises that in the case of a youth incremental increases may sufficiently serve the purposes of personal deterrence. Thirdly, supervision on parole is more intensely and strongly managed than any other corrections order. The respondents have not yet had the opportunity to reform themselves through a period on parole.

… The Director [of Public Prosecutions] has failed to show that the circumstances of the offending and the respondents' poor antecedents require that this Court increase the non-parole period despite the countervailing considerations I have mentioned. Permission to appeal should be refused. [cl]

While both defendants were Aboriginal and his Honour relied on cases with Aboriginal defendants in his decision, Kourakis CJ did not cite Aboriginality per se as relevant to his sentencing decision. Rather, he paraphrased several decisions which had discussed exposure to chronic adversity and the resulting factors which might collectively be regarded as complex trauma.

Current Judicial Practice in the Recognition of Complex Trauma

Current judicial practice is often informed by trauma, even in the absence of an intentional, trauma-informed framework. Judges are, of course, bound under law to give regard to individual sentencing

factors, including the "defendant's general background" (*Sentencing Act 2017* (SA) s 11(1)(d)). Generally, however, sentencing remarks do not acknowledge a defendant's cultural heritage, even though Judicial officers are aware of the over-representation of First Nations people in the criminal justice system and sentencing decisions may still have been influenced by an understanding of intergenerational and historical trauma, even when no overt reference is made in the remarks.[cli] Further, when sentencing a traumatised defendant who is identified as Aboriginal, judicial officers typically avoid overtly attributing trauma to any cultural, historical, or intergenerational trauma known to be associated with Aboriginality. Judges made a link between trauma and criminal behaviour in only one in three SA sentencing remarks in McLachlan's analysis.[clii]

Even when judicial officers realised that trauma is present in the lives of many Aboriginal defendants, they did not always overtly recognise a link between trauma and criminal behaviour and are unlikely to refer to a defendant's trauma history. In addition, they only recognised direct trauma experiences, such as the deaths of loved ones, child abuse and neglect, and parental absence and abandonment—no examples of collective or intergenerational trauma associated with the defendants' Aboriginality were identified.[cliii] While judicial officers are bound by legal precedent that diminishes the relevance of cultural trauma,[cliv] cases are nonetheless emerging where Australian judges have acknowledged the potential relevance of historical and intergenerational trauma experienced by First Nations defendants.[clv] *Grose* and *Pennington*, discussed above, are obvious examples.

The Relevance of Aboriginal Identity

Arguments that Aboriginality is relevant, are not always accepted by the courts. In *Talbot v The Queen (No 2)* [2019] SASCFC 113, Mr Talbot

had been convicted of murder. His appeal, arguing the sentencing court had not given regard to his Aboriginality and as a result that his sentence was manifestly excessive, was rejected by the Court. However, to say that Aboriginality per se is not really a mitigating factor borders, upon being a trivial observation. Of course, there will be Aboriginal people to whom the kinds of disadvantages discussed in these cases do not apply. And yet all the discussion in this section of the Guide has dealt with aspects of disadvantage and complex intergenerational trauma which relate specifically and uniquely to Aboriginal people.

These criteria have always been accepted—and will continue to be. Nevertheless, over time it seems the courts are increasingly recognising trauma associated with Aboriginality is relevant in sentencing. In *R v Nelson*, the South Australian Court of Appeal acknowledged that the relevance of Aboriginality in sentencing decisions as more than simply a mitigating factor. This harks back to the *National Report of the Royal Commission into Aboriginal Deaths in Custody* and the urgent need for alternatives to imprisonment as sentencing options for Aboriginal people. Even under the consideration that imprisonment should be a last resort, the reality is that in many sentencing cases involving First Nations people, it is not.

Proper recognition of individualised justice, rather than consideration of collective distress, is what concerned Gray J who said in *Grose*:

> *… Risk factors associated with criminal offending such as unemployment, lack of education and poor health, which inhibit full participation in community life, are far more prevalent in relation to Aboriginal people. While these statistical facts say nothing about an individual before a sentencing court, the fact that they are a relatively common experience of Aboriginal defendants suggests a need for a sentencing court to be alive to*

> *the likelihood of their existence, to explore whether they are present, and, if they are, to explore their relevance to the offence and offender. The need to achieve individualised justice requires as much. Doing so may require that the court adopt a proactive approach. Again, that is not to single out Aboriginal defendants for special treatment. The same sort of approach could be required in myriad circumstances involving defendants of different ethnicities and backgrounds.* [clvi]

Gray J, in these remarks, is following the strict criteria of *Bugmy* regarding individualised justice but points out that—because the individual factors are common to so many Aboriginal defendants—the sentencing exercise may involve specifying to an individual's case the general experience of Aboriginal people from their particular and disadvantaged community. It is for that reason that, for example, affidavits by anthropologists setting out common experience of Aboriginal people from particular communities, or the collective experience of particular groups of Aboriginal people are important. They set out a framework, within which particular Aboriginal peoples circumstances may be considered in just the way that Gray J had anticipated. This also mirrors his approval of the line of authority arising from Yalata community which he and Sulan J had discussed in *Pennington*. And that includes the effects of intergenerational and complex trauma. In addition, referring to what his Honour said in *Grose*:

> *In addition to factors of social and economic disadvantage that may be present, the court may need to consider cultural factors or the unique history and treatment of a particular ethnic group. Such factors may be relevant to the court's assessment of the gravity of the offending and the defendant's blameworthiness. This may impact the choice of penalty and purposes of punishment.* [clvii]

It may be argued that such factors go beyond the merely subjective factors generally considered in sentencing. A note of caution is warranted here. Professor Simone Dennis commented to the Magnolia group as follows:

> *One cannot have a kind of matrix of cultural practice and then Velcro a particular individual to it. There would have to be a complex tracery of relation running, mobius-like, between individual and group. In this scenario, it is possible to describe the particular cultural complex that contextualises an individual's actions. The traceries of relations between particular people and the individual is important here… and the use of stories as interconnective webbing is absolutely crucial to the process I am envisaging.* [clviii]

Case Law on the Relevance of Mental Impairment in Sentencing

Psychologists and psychiatrists who are preparing expert reports should be familiar with the principles as set out in *Monks* and *Verdins*. In *R v Monks* [2019] SASCFC 47 Peek J set out the potential relevance of an offender's mental impairment to sentencing. His Honour's summary broadly accorded with similar summaries provided by interstate courts, for instance the Victorian Court of Appeal in *R v Verdins* [2007] 16 VR 269.

His Honour stated that "while general and non-exhaustive, such summaries assist in providing a framework for considering the potential relevance of an offender's mental condition to the sentencing exercise".[clix] The appellant in *Monks* was suffering from acute methamphetamine intoxication, or methylamphetamine-induced psychosis, at the time of his offending which directly impaired his mental functioning and was considered causative of his offending.

The existence of some form of mental impairment may affect the offender's degree of *moral culpability* for their offending, as opposed

to their legal responsibility for that offending. It may do so by impairing the ability to exercise appropriate judgment, to maintain self-control and resist impulsive behaviour, to think and reason clearly, and to make calm and rational choices. It may, for example, impair the ability to appreciate the wrongfulness, gravity, and implications of offending. When a 'causal link' is established between the impairment and the offending, this may reduce moral culpability or blameworthiness and reduce the need for denunciation and punishment in the sentence to be imposed (and the length or severity of the sentence).

R v Monks [2019] SASCFC 47

[33] Both at common law, and under s 11(1)(f) of the *Sentencing Act 2017* (SA), the mental condition of an offender is a relevant consideration in the sentencing process. Indeed, the fact that an offender was suffering from some form of mental impairment or disorder at the time of the offending may be relevant to the sentencing process at various stages and in various ways, depending upon the nature of the condition and the circumstances of the case more generally.

[34] A relevant mental condition may involve an intellectual disability, or it may involve some form of mental illness or disorder. Insofar as it involves some form of mental illness or disorder, it need not be attributable to a recognised psychiatric condition. What matters in any given case is not the label to be applied to the condition, but whether and to what extent the condition can be shown to have impaired the offender's mental functioning at the time of the offending. Further, the condition or impairment need not be permanent or long-standing; it may be temporary in nature. Indeed, while it raises some different considerations, the impairment may be the product of intoxication by reason of alcohol or drugs, either in isolation or in combination with some underlying mental illness or disorder.

[35] In determining the relevance of the impairment of an offender's mental functioning in a particular case it will be necessary to consider matters including (i) the nature and severity of the impairment; (ii) the extent to which the impairment was operating on the offender's mental functioning at the time of the offending and hence can be said to have influenced or caused the offender to commit the offence and/or to have affected the offender's capacity to appreciate the wrongfulness and gravity of the offending; (iii) whether the impairment was the product of an underlying mental illness or disability, self-induced intoxication, or some combination of such factors; (iv) if the product of self-induced intoxication, whether it reflected an addiction, and if so the circumstances of that addiction; and (v) the ability of the offender to reduce or overcome the significance of any underlying condition or addiction, and the steps taken or able to be taken by the offender in that regard.

The Court in *R v Tsiaras* [1996] 1 VR 398 and *R v Verdins* (2007) 16 VR 269 "… recognised that sometimes as a consequence of the contribution made to the commission of an offence by a mental disorder from which a perpetrator was suffering at the time, it would be unjust to attribute to the offender a full measure of personal responsibility".[clx]

The Verdins Principles

The judgement in *R v Verdins*, handed down in 2007 by the Victorian Court of Appeal is an important one. The Verdins principles apply when the person is shown to have been suffering at the time of the offence (and/or to be suffering at the time of sentencing) from a mental disorder or abnormality or an impairment of mental function, whether or not the condition in question would properly be described as a (serious) mental illness. The condition does not need to be permanent.

This is now a precedent for this in South Australia following *R v Guode* and provides the mental health expert with grounds to formally consider the different ways in which impaired mental functioning are relevant to sentencing:

- By reducing moral culpability
- By influencing the kind of sentence to be imposed
- By moderating or eliminating the need for general deterrence
- By moderating or eliminating the need for specific deterrence
- By making a sentence weigh more heavily on the defendant than on a person in normal health
- By creating a serious risk of imprisonment having a significant adverse effect on the offender's mental health.

Secondly, the existence of an impairment of the offender's mental functioning may also affect the sentencing judge's consideration of *general deterrence.* It is well recognised that offenders whose offending reflects some underlying mental illness or disability may be an inappropriate medium for achieving general deterrence. Lush J explained the reason for this in *R v Mooney*:

> *[The] significance [of general deterrence] in a particular case will, however, at least usually be related to the kindred concept of retribution or punishment in which is involved an element of instinctive appreciation of the appropriateness of the sentence to the case. A sentence imposed with deterrence in view will not be acceptable if its retributive effect on the offender is felt to be inappropriate to his situation and the needs of the community.*[clxi]

While mental illness or disability may thus result in the need for general deterrence being 'sensibly moderated', it will not generally eliminate the need for general deterrence. Indeed, in cases in which the offending is particularly grave, or the impairment is not particularly significant or did not impair the offender's understanding of the gravity of their conduct, the need for general deterrence may not be much diminished.

Thirdly, the existence of an impairment may be relevant to the sentencing court's consideration of *personal deterrence*, and the related considerations of the offender's character and prospects of rehabilitation. The rationale for a potentially reduced concern with personal deterrence in cases of mental impairment was explained by Maxwell P in *Green v The Queen*:

> *The principle of specific deterrence is premised on the assumption that an appropriate punishment will operate to deter an offender from repeating the same or similar conduct in the future. Whether and to what extent that assumption is*

> *applicable to a person whose mental functioning was impaired at the time of the offending will depend on the circumstances.*[clxii]

As Steytler J explained in *Payne v The Queen* [2002] WASCA 186 at [43]:

> *In a case in which the mental illness contributed to the commission of the offence, the importance of personal deterrence may, depending upon the nature and effect of the illness, be lessened. The whole notion of personal deterrence assumes some rational analysis or reasoning in the course of comparing the likely gains from the crime against the prospect, and likely severity, of punishment. Where the illness affects the person's ability to make that very analysis, there is no justification for affording the consideration of personal deterrence the measure of significance as it might have in the case of a well person, although there may then be a greater need to protect the public.*

Similarly, in other cases of mental impairment attributable to ongoing conditions (particularly those not susceptible to treatment), this may adversely impact upon the offender's prospects of rehabilitation. Indeed, it may result in a greater need to ensure that the sentence imposed adequately protects the safety of the community.

Fourthly, the existence of an impairment that reflects some underlying mental condition may also, depending on the nature and circumstances of that condition and its treatment, affect *the hardship of a given sentence of imprisonment*. The mental condition may result in a sentence of imprisonment being a greater burden or having a significant adverse effect. This may in turn affect the sentence that it is appropriate to impose, including not only the length of the sentence but also the form and conditions of the sentence.

Guode v the Queen [2020] HCA

The condition may reduce the moral culpability of the offending conduct as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances, and denunciation is less likely to be a relevant sentencing objective. The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.

Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.

Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.

The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health. Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment.

These considerations were re-iterated in South Australia in cases (recent as of time of writing) *R v Perry* [2022] SASCA 127 and *R v Nguyen* [2022] SASCA 23. In *Nguyen*, the appellant suffered from an intellectual disability as well as various mental impairments including PTSD and a personality disorder. In upholding his appeal on sentence, the Court of Appeal reiterated how important it is for a sentencing judge to grapple with how a defendant's intellectual disability and/or mental impairments may affect personal and general deterrence, and how the sentence might weigh more heavily on a defendant with a mental impairment.

In *Brown v The Queen* [2020] VSCA 212, the Victorian Court of Appeal broadened the potential for impaired mental functioning to include personality disorders as relevant to moral culpability. The court had the benefit of extensive expert evidence called from both parties about the current state of psychological science concerning personality disorders. This strategic litigation was done at the suggestion of the initial sentencing Judge who was constrained by previous authority. The appellate court found that a blanket ban on personality disorders as grounds for enlivening Verdins principles could not be sustained and that an offender diagnosed with a personality disorder should be treated as in no different position from any other offender who seeks to rely on an impairment of mental functioning as mitigating sentence in one or other of the ways identified in Verdins. The questions are still whether and to what extent the offender's mental functioning is (or was) relevantly impaired, and that should be determined based on expert evidence rigorously scrutinised by the sentencing court. The focus is on the impairment and its effects, not the diagnostic label.

This decision underlines the importance of psychological experts assisting the court with cogent expert evidence. It does not appear

that an exclusion of personality disorders from principles concerning mental impairment in sentencing has been articulated *as such* in South Australia. However, as with any mental impairment, sentencing considerations may pull in competing directions when a personality disorder is at the root of mental impairment. Careful opinions on topics such as the treatability of a condition and its effect on behaviour will be relevant for the court to engage with.

Recommendation: Expert witnesses to be reasonably familiar with case law relevant to mental impairment.

Part 3: An Agreed Set of Theoretical and Methodological Approaches

In this section of the Practice Guide the focus is on the ways in which mental health experts approach the task of reporting. Specifically, it considers the development of cultural reports in other jurisdictions and how these might be used to augment or support expert mental health professional evidence. It is noted that work is currently underway, in partnership with the development of this Practice Guide, to develop the expertise and knowledge required to provide cultural context statements to the South Australian courts.

Cultural Reports

Currently, the Australian Capital Territory (ACT) is the only jurisdiction to legislate that Community Corrections Officers who prepare reports for pre-sentence matters include consideration of "cultural background"[clxiii] and while in SA, s 17 of the *Sentencing Act 2017* (SA), does not prohibit cultural information from being included (pre-sentence reports may include "any other matter that would assist the court in determining sentence" as per s 17(1)c), this is not currently a requirement or even an expectation. There are however examples from around the country of where cultural advice is sought in sentencing matters.[clxiv]

There are indications that courts are recognising the need for cultural advice and are beginning to request *Indigenous Experience Reports.*[clxv] to better understand the role that compound trauma plays in the offending behaviour defendants.[clxvi]

These are based on the premise that:

- Expert evidence pertaining to the mental health and wellbeing of defendants is often considered useful in helping to understand the context and origins of offending behaviour and identify appropriate and effective penalties and conditions to reduce risk
- Expert evidence about the presence and relevance of trauma in Aboriginal defendants appearing before the courts is relatively rare and often limited to a diagnosis of PTSD and overlooking cultural trauma
- Requesting and presenting evidence about cultural trauma might be helpful to legal decision making.

It is important to note that in Victoria, the County Court have provided mitigation for those defendants who have engaged in the report writing process.[clxvii] There is currently no accepted protocol for the provision of this type of evidence in South Australian courts. However, methodologies for this have been developed in other parts of the country and internationally - as described below.

Canadian Gladue Reports

Unlike Australia, Canada has legislation that specifically refers to Aboriginality as a sentencing factor. Section 718.2(e) of the Canadian *Criminal Code* states "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". In practice:

> *The provision is not simply a codification of existing jurisprudence. It is remedial in nature and is designed to*

> *ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force. (R v Gladue [1999] 1 SCR 688, p. 690)*

In the case of *R v Gladue*, the interpretation and application of s 718.2(e) were reviewed by the Canadian Supreme Court. The defendant was a 19-year-old Aboriginal woman who stabbed her de-facto husband to death, while under the influence of alcohol. She pleaded guilty to manslaughter. While the sentencing judge took several individual factors into account, he found that Aboriginality was not relevant as the defendant lived "off-reserve" and "not within the Aboriginal community" (p. 701).

The Supreme Court in Gladue disagreed with the trial judge; stating that the legislation applied to all Aboriginal defendants. The Court argued that "[t]here is no discretion as to whether to consider the unique situation of the aboriginal (sic) offender; the only discretion concerns the determination of a just and appropriate sentence" (p. 731, [82]). The Supreme Court suggested that courts should consider:

> *How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these circumstances? (p. 730 [80])*

The Court reiterated that while individual factors must be considered in sentencing, s718.2(e) changed the weighting, such that Aboriginality was to be regarded as a key consideration when determining the most appropriate sanction "because those circumstances are unique" and

may make imprisonment "a less appropriate or less useful sanction" (p. 708 [37]). Aboriginality, in *Gladue*, effectively referred to:

- The unique systemic or background factors which may have played a part in bringing the particular Aboriginal (sic) offender before the courts
- The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (p. 724 [66]).

A *Gladue Report* is a "specialised pre-sentence report prepared for the court by a nominated report writer that contains 'case-specific information… tailored to the specific circumstances of Aboriginal offenders".[clxviii] A *Gladue Report* provides the court information about an Indigenous person's unique systemic or background factors. It also provides viable information about sentencing options, such as alternatives to incarceration and/or restorative justice including options that may be culturally appropriate".[clxix] *Gladue Reports* thus "describe how issues resulting from colonialism, such as lower education attainment, lower income, higher unemployment, higher likelihood of suffering from substance abuse or attempting suicide, and higher rates of incarceration of Aboriginal peoples, have manifested in the individual offender's case".[clxx]

While the Supreme Court of Canada has not provided specific direction about the preferred content, structure, and approach of reports, some reasonably clear direction has been provided by the lower courts and the appellate courts.

For example, the sentencing judge may not be able to sentence in accordance with the *Gladue* principles (which constitutes a reviewable error), where the courts are not provided with sufficient:

- Contextual information (i.e., "the unique systemic or background factors that played a role in bringing this offender before the courts" *R v. Legere*, 2016 PECA 7, [21])
- Personal information (i.e., relating to individual background)
- Sentencing outcome (i.e., information about options that may be available as alternatives to incarceration, such as services and/or restorative justice programs that may also be culturally appropriate).

In the judgement of Lebel J in *R v Ipeelee* [2012] 1 SCR 433, it was made clear that cultural background was useful information, but it also needed to be applied specifically to the individual. In that case, the judge stated:

> *To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered. In current practice, it appears that case-specific information is often brought before the court by way of a Gladue report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such*

> *information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(e) of the Criminal Code. (Lebel J in R v Ipeelee [2012] 1 SCR 433, [60])*

The relevance of culturally appropriate sanctions was also examined and explained in *Ipeelee*. "First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means. The second set of circumstances—the types of sanctions which may be appropriate—bears not on the degree of culpability of the offender, but on the effectiveness of the sentence itself. The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognise that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community" (Lebel J in *R v Ipeelee* [2012] 1 SCR 433, [72]-[74]).

Aotearoa New Zealand Section 27 Reports

In Aotearoa New Zealand the *Sentencing Act 2002* makes provision for the defendant to request that information about their personal, family, whanau (extended family), community, and cultural background is presented. [clxxi] A nominated person can speak to:

- The personal, family, whanau, community, and cultural background of the person

- The way in which that background may have related to the commission of the offence
- Any processes that have been tried to resolve, or that are available to resolve, issues relating to the offence, involving the defendant and his or her family, whanau, or community and the victim or victims of the offence
- How support from the family, whanau, or community may be available to help prevent further offending by the defendant
- How the defendant's background, or family, whanau, or community support may be relevant in respect of possible sentences.[clxxii]

For more information and a review and analysis of Section 27 reports please refer to Oakley (2020). [clxxiii]

Australian Aboriginal Community Justice Reports

Since 2015 the Victorian Aboriginal Legal Service (VALS) has prioritised the introduction and use of Aboriginal Community Justice Reports. An ARC Linkage Grant between the University of Technology Sydney, Griffith University, VALS and others (e.g., the Australasian Institute of Judicial Administration and Five Bridges) has enabled community justice reports to be trialled in Victoria and Queensland.[clxxiv] This project has been informed by Canadian practitioners who have helped to build credibility with legal practitioners as well as develop the skills in narrative-based therapy for Victorian report writers. The project has been trialled in the County Court (equivalent to the SA District Court) and has benefitted from judicial officers who are keen to trial it in their courtroom.

By locating the service within an Aboriginal Legal Service, the Aboriginal Community Justice Report Program gains credibility from

the established and respected service, as well as a referral pathway for defendants who want to use the service. Two report writers (casually employed and independent from VALS) and one case worker prepare reports that broadly aim to humanise the defendant. They are not psychological or psychiatric reports and are not written from a template, but generally seek to cover the following issues:

- **The circumstances of the individual**
    - First five years of life; strengths as a child
    - Significant people and their role as a significant person in others' lives
    - School, work, alcohol and other drugs (addressed or not)
    - Strengths and challenges
- **Key issues, trauma, and structural racism they have experienced**
    - Whether racism was a barrier to accessing education, work, alcohol and other drug treatment, housing etc.
    - Responses to trauma
- **Connection and identity to culture**
    - Overview of their Mob
    - Family memories which are cross-referenced with the memories of family and community members
    - Experiences of displacement (e.g., on missions and as members of the Stolen Generations)
    - Intergenerational trauma for the mob and the role of colonisation

    - Specific connections of Country to the individual
- **Sanction options regarding community-based sentences**
    - Services lined up if they are released
    - Exceptional circumstances.
    - Indicate the client's current responsivity.

Each report begins before the person was born and tells the story of their people before colonisation. This is considered important to the understanding intergenerational strengths and traumas. It then narrates the whole life story, including the person's experiences with policing which may shed light on their involvement in the law enforcement and criminal justice systems. The reports are typically lengthy (25 to 38 pages in Victoria) and are intended to tell the defendant's story without comment or opinion. The report writer meets with the defendant six to eight times and meets with family and community members. All participation is voluntary. The reports are sealed, not circulated any wider and are not available to the Parole Authority (although the client may choose to table it).[clxxv]

In WA, *the Noongar Cultural Report* is an initiative and outcome of the Aboriginal Restorative Rehabilitation Program delivered in the Bunbury Regional Prison.[clxxvi] These have been developed for Noongar prisoners who are either preparing court reports or preparing parole plans and provide information about the community the person is from, if family were members of the Stolen Generation, connection to your Mob (and causes of any disconnection), and possibilities for maintaining connection or, if not, about access to other sources of support.

Cultural Reports in South Australia

Generally, this work describes a means by which the relevance and prevalence of intergenerational trauma experienced First Nations peoples can be presented to the judiciary such that strategies to mitigate its impact may be incorporated into sentencing decisions. It describes mechanisms for receiving expert cultural advice and reports regarding First Nations defendants. In the absence of any system for preparing cultural reports in SA, it becomes incumbent on the expert mental health professional to draw attention to the relevance of cultural information in pre-sentence reports.

Advisory Commission into the Incarceration Rates of Aboriginal Peoples in South Australia (2023): Recommendation 32

- That the Government of South Australia legislate the requirement for the court to take into account the unique systemic and background factors affecting Aboriginal defendants when determining appropriate sentencing options.
- Cultural reports, similar to Gladue reports, should be introduced to support the implementation of this recommendation, and adequate funding provided to enable the compilation of these reports by Aboriginal Community Controlled Organisations.

The structure used by the Cultural Writing Unit of VALS in Victoria offers a way to incorporate some of the cultural knowledge described throughout this Practice Guide into reports:

- The circumstances of the individual
- Key issues, trauma, and structural racism
- Connection and identity to culture
- Sanction options regarding community-based sentences.

It is important to note that the purpose of these reports in to understand the context of the person, including their culture, family, communities, history – and that this requires time (and usually meetings with other family members to fully appreciate the context) and space for trust to develop. While there are competing pressures of waiting lists and funding constraints to consider here, it is particularly important that the preparation of cultural reports is not rushed as that there is a danger that the mental health professional will revert to pathological models, stereotyping and/or one-dimensional accounts.

We recommend that cultural reports are prepared for all First Nations defendants in sentencing matters, thereby echoing the recommendation of the Advisory Commission into the Incarceration Rates of Aboriginal Peoples in South Australia (2023). [clxxvii]

Suggestion: Expert witnesses ensure that, in the absence of cultural reports being available for South Australian defendants, information that is typically included is covered in their assessments.

Part 4: An Agreed Set of Skills

Although the courts rely on expert evidence to understand mental health and trauma, most expert witness reports offer no robust account of the relevance of cultural presentations of trauma. This is mainly because the diagnostic approaches that are used to inform expert opinion tend to focus mainly on the identification of PTSD, rather than the impacts of cumulative, historical, and intergenerational experiences of trauma that are often more relevant for defendants from First Nations cultural backgrounds. Key mechanisms involved in the colonisation process include "violence involving force, conquest invasion and occupation of territory, political exclusion, economic exploitation, sexual exploitation, control of culture (including language, art, stereotyping, othering), denial of voice, and fragmentation of community and division".[clxxviii] In addition, although (increasingly) there is guidance available for mental health practitioners around the need to consider the importance of culture in both assessment and treatment, this type of case conceptualisation is rarely evident in expert witness reports.

Things to consider… (from Roe, 2023)

The impacts of:

- Colonisation and Unfinished Business
- Trauma and Loss
- Racism
- Alcohol use
- Spirituality, Culture, and Psychosis
- The National Apology
- NAIDOC

Two specific sets of skills are required to practice effectively in this area, relating to the key principles we identified earlier in this Guide. The first is a set of skills around trauma-informed practice; the second

relate to culturally safe practice (creating an environment that is safe for First Nations people, and where there is no challenge or denial of identity and experience).

Trauma-Informed Practice

There are now several guides and practice support materials available to support practitioners who are interested in developing skills in the treatment of trauma and the development of trauma-informed services and organisations.[clxxix] The mental health expert should be familiar with these, including evidence around the treatment of complex trauma. It is sufficient, however, for the purposes of this Guide to note that generic skills in responding to trauma are always likely to be helpful.[clxxx] These include advice on the use of language in reports. For example, from this perspective, rather than write 'he is putting himself at risk', a trauma-informed report-writer might say 'his behaviour may indicate that he feels unsafe in his environment'. Or, instead of saying that 'she refuses to engage…' they might say 'she does not feel able to engage right now and we have not yet identified a way that feels safe for her'. Or perhaps, rather than writing 'he refuses to trust anyone', it might be better to say, 'independence and self-reliance have been important strategies for his safety, so we need to be patient as he learns to trust'.

It is often useful to talk to the person being assessed about stories told in family about massacres or significant Aboriginal movements. The massacre map is a useful resource and gathering knowledge about local land rights movements can also add value here. [clxxxi]

Cultural Safety

We would like to draw particular attention to a study involving interviews with non-Indigenous psychologists who work with First Nations clients, in which the described how they might "do things differently", including when, where, and how long sessions lasted. For example, some described meeting with clients outside of formal sessions, allowing more time to develop the relationship, and seeing them for shorter sessions but over longer periods than would be normally associated with cognitive-behavioral practice.[clxxxii]

Table 2: Therapeutic Process Issues.

Characteristics of abusive relationships	Logical therapeutic response (from Middleton, 2012).
Absence of boundaries	Sound boundaries modelled
Double bind communications	Non-blaming communication
Rejection	Acceptance
Chronic Uncertainty	Stability and predictability
Lack of safety	Emphasis on safety
Lack of trustworthy individuals	Modelled trustworthiness
Lack of respect	Emphasis on respectful dealings
Maintenance of family secrets	Focus on truth and openness
Use of threats/intimidation	Even-handedness and gentleness
Sexualised behaviours	Non-sexualised/professional
Exploitation	Non-exploitative
Never experiences apologies	Apologies appropriately given

The most obvious consideration in any attempt to develop culturally safe practice is to ensure that the circumstances are conducive to engaging the person in the assessment process. Some simple acts can help here. This includes placing a plaque in the waiting area to

acknowledge the traditional owners of the land, have Australian, Aboriginal and Torres Strait Island flags, display the art of local artists, and acknowledge days of significance to the local population.[clxxxiii]

The need for non-Indigenous professionals to develop a range of specific skills and strategies to work effectively with First Nations clients is widely acknowledged. [clxxxiv] Skills required include an understanding of local community issues, cultural protocols, and histories (being 'clued in'), demonstrating a commitment to developing long-term relationships with clients and the communities in which they live, and using self-disclosure. Many clients will need to find out who a person is, and where they're from, suggesting that an effective, culturally safe way of building trust is allowing yourself to become known for "who you are," not "what you are/what you know." Reciprocity, or the sharing of information, is identified as central to establishing rapport. In one project to improve the cultural responsiveness of a mainstream psychological treatment, the importance of what was called "deep listening" was highlighted.[clxxxv] This contrasts with how many health professionals work from models of "professional distance, or feel required to maintain prescribed therapeutic relationships, but can be seen as one-dimensional, alienating, culturally unsafe, and ultimately ineffective. Finally, it has been suggested that many First Nations people have a propensity to say 'yes' to people in authority. [clxxxvi] and this is something that is important to be aware of.

Suggestion: Expert witnesses ensure that they are familiar with clinical practice advice about the assessment and treatment of complex trauma, and practice in way that is likely to be experienced as culturally safe.

Practice Tips

- Knowing the history of Indigenous peoples is critical in implementing best practices.
- Given the significant trauma, PTSD should be high on your differential diagnosis, which is often missed or misdiagnosed as depression or borderline personality.
- Acknowledge the "intergeneration trauma" including the loss of sacred lands, forced assimilation, and family ruptures. Emphasise and validate the strength of the survivors.
- As a psychiatrist, remember the importance of a receptive environment that is inviting and welcoming.
- Engage patients with support and facilitate completion of forms in a receptive environment.
- Be mindful that there has been mistrust of clinics run by the federal government, which have a history of ulterior motives.
- Allow the patient to tell their story and encourage them to share their cultural identity.
- The cultural formulation interview is very helpful in addressing these issues and approaching the patients from where they are coming from.
- A transition from evaluation to therapy and treatment should be a soft hand off to the therapist and psychiatrist.

Adapted from Roessel (2016).

The Assessment of Mental Disorder

It is important that the mental health professional completes an assessment of current mental state and identifies any possible diagnoses and treatment options. This is typically the expertise that the professional brings to the court.

Language, one of the central features of any culture, may also influence how problems are defined in the development of assessment tools.

To illustrate, one of the most widely used anger inventories, the STAXI-2, was developed from Lakoff's psycholinguistic analysis of English metaphors for anger as a conceptual basis for developing the "anger-in" control scale.

The STAXI-2 used Lakoff's distinction between "keeping it bottled up and not letting it escape" and "reducing the intensity of suppressed anger by cooling down inside" to develop separate scales to assess controlling the expression of anger in aggressive behavior and reducing the intensity of suppressed anger by calming down inside.

These are clearly culturally defined terms that draw on traditional Freudian notions of strangulated affect, invoking a hydraulic metaphor whereby angry feelings are kept in check until the pressure exceeds the capacity of the person's psychological resources to resist.

Anger is thus conceptualised as being expressed in conditions of extreme arousal when existing psychological defences break down, and this may be a cultural construction. It is not clear whether similar concepts exist in the many different traditional languages.

(Davey & Day, 2012).

Diagnostic Criteria

Skills in applying the specific criteria, that nosological systems (such as DSM-5) provide, are often considered necessary to provide an expert opinion to the court. Nonetheless considerable concerns exist about the use of diagnosis and the application of Western definitions of mental health and illness to First Nations peoples (in terms of the validity, reliability, and cultural appropriateness of psychiatric diagnostic tools). Psychiatry, in particular, has attracted long and sustained criticism for the assumptions underlying its processes of classification and diagnosis across cultures.[clxxxvii]

Psychiatric diagnoses have been criticised for failing to adequately understand the origins and maintenance of distress from a trauma-informed approach, with advocates of the Power Threat Meaning framework. [clxxxviii] replacing the question 'what is wrong with you?', by asking 'What has happened to you? (How has *Power* operated in your life?), how did it affect you? (What kind of *Threats* does this pose?), What sense did you make of it? (What is the *Meaning* of these situations and experiences to you?). What did you have to do to survive? (What kinds of *Threat Response* are you using?). This approach has "attracted interest in the forensic field as a way of helping others understand why individuals engage in incomprehensible behaviours, as well as supporting the individuals themselves to better understand their own behaviours and construct a different narrative of their experiences".[clxxxix]

There are also disagreements and conflicting constructions – for instance, naïve 'psychology' that pathologises Indigenous cultural expressions; similarly naïve 'anthropology' that relativises pathology as 'cultural;' professional investments that reject the 'medical model frame of reference;' and political agendas (well-intentioned or not)

that result either in the medicalisation of social problems or the subordination of fundamental mental health needs to wider social agendas. It has also been noted that Aboriginal people may have cultural beliefs that are not shared by others, such as believing that they are being sung or have had the bone pointed at you. These experiences and beliefs are different to those in psychotic disorders, the advice of First Nations psychologists here is to check what normal behaviour is in the person's community.[cxc] It is generally suggested that the mental health professional acquire skills in conducting the DSM-5 Cultural Formulation Interview (CFI) and Informant Version (IV), as well as specialist suicide risk factors assessment, such as the AISRAP STARS tool which considers potentially culturally appropriate factors of sense of belonging and cultural identity.

Psychometric Testing

Psychometric testing is particularly important in the forensic context, where data can be used to support clinical opinion and the results of an assessment can have a profound influence on a person's future trajectory. Tests are often used by psychologists to compare a person's level of functioning with those of the general community or specific subgroups. Norms for psychometric measures are, however, rarely available for specific cultural groups and most assessment tools have not been validated for use with cultural minority groups. They may not consider culture-specific forms of mental illness such as those relating to "spiritual sickness" or complex presentations involving trauma, grief, and intergenerational factors. As such the interpretation of test results requires a high degree of skill and cultural knowledge.[cxci]

The Australian Indigenous Psychology Education Project Workforce Capabilities Framework advises that "the capacity to use psychological assessment and measurement *must* include an understanding of the cultural and historical context within which such tools are developed and the associated limitations of their use and interpretation. This should also include an understanding of the implications for individuals and communities of inappropriate testing".

Factors associated with cultural bias that can impact test reliability and validity for First Nations peoples

1. The normative populations are predominantly Caucasian Americans; the relevance of those norms are questionable, raising the possibility of misdiagnosis
2. The testee's emotional, spiritual and behavioural presentation may be driven by a cultural context often not incorporated in the construction of psychometric tests.
3. Test performance may not represent everyday life knowledge and ability, particularly in terms of cultural value; including the the level of suspiciousness held by many people of 'mental tests'
4. Test instruments may not have been translated for people who often have English as a second language.

Statement by Dr Tracy Westerman to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.

Furthermore, “psychologists must have the capacity to implement assessments and measurements in a culturally appropriate way and demonstrate an awareness of tools specifically validated with Aboriginal and Torres Strait Islander peoples. Where culturally specific or validated tools are not available multiple sources of information should be used and any necessary limitations on the interpretation of test results should be recorded”.[cxcii]

The use of psychometric assessment tools is illustrated in a recent study of the relationships between trauma exposure, child removal from natural family, experiences of racism, gender, and trauma symptom severity in a group of people attending an Aboriginal community-controlled counselling service in Melbourne.[cxciii] This study used:

- **The Australian Aboriginal Version of the Harvard Trauma Questionnaire (AAVHTQ)** is a 47-item measure that comprises two subscales designed to assess individual levels of trauma exposure and posttraumatic symptomology. The first asked if respondents have ever witnessed or experienced 17 potentially traumatic events, where they believed that they or someone else could have been killed or seriously harmed, or where they experienced feelings of intense helplessness, fear or horror when it happened. The second subscale contains 30 items, 16 of which correspond to the PTSD symptom criteria in the Diagnostic and Statistical Manual of Mental Disorders III-R (DSM-III-R), and 14 cultural idioms of distress, identified by C. Atkinson that lie outside the DSM-III-TR PTSD criteria
- **The Negative Life Events Scale** asks respondents if any of16 negative life events have been a worry for you or anyone else living in this house during the last year?”. This scale was used as it has been shown to demonstrate adequate discriminant validity and internal consistency in two samples of Aboriginal

participants living in remote communities of the Northern Territory

- **The Aboriginal Resilience and Recovery Questionnaire (ARRQ)** is a 60-item questionnaire designed to assess strengths and resources associated with resilience, healing, and recovery among First Nations help-seeking populations. It utilises a 5-point Likert scale response format and includes a number of resilience constructs such as community connection, community opportunity, cultural identity, self-worth, emotion regulation, positive emotions, strong relationships, safety, social support, a personal sense of mastery, spirituality as a source of strength, and participation in cultural practices.

In this study, trauma exposure, stressful life events, access to basic living expenses, and personal, relationship, community, and cultural strengths were all shown to be important predictors of posttraumatic stress symptom severity. Access to personal, relationship, community and cultural strengths was associated with lower trauma symptom severity and moderated the relationship between trauma exposure and trauma symptom severity.

Neuropsychological Assessment

Another important area of assessment is neuropsychological assessment. This can help to establish the presence or absence of damage that may lead to impairment that is directly relevant to the matters under consideration by the court. An example here is executive functioning problems that relate to the damage caused by solvent abuse (or petrol sniffing) in remote communities. Whilst the person may no longer be using solvents, damage may have occurred earlier in life (sometimes decades previously) that is responsible for

ongoing impairment. There is a recognised need for the development and implementation of guidelines for interpreter-mediated neuropsychological assessment in diverse populations and it has been recommended that race-based norms are not used to interpret group differences on neuropsychological tests. Rather research is needed to develop, validate, and standardise tests that consider inter-individual variability. In addition, a range of variables should be into account, such as linguistic factors, literacy, education, migration history, acculturation, and other cultural factors.[cxciv]

Recommendation: Expert witnesses are critical in the way they use and report psychometric test data to the court, attending to issues of validity and reliability with First Nations defendants.

Content of a Report

A pre-sentence report should focus primarily on providing an expert mental health opinion on those factors relevant to sentencing, including—but not limited to—the assessed risk of further offending and how this risk might best be managed. To do this, it is necessary to first understand the context in which the offences took place, both social and personal, and an assessment of the social and emotional wellbeing of the defendant. The aim is then to connect the two and explain how, when, and why these might be considered relevant to judicial decision making before presenting an opinion that relates directly to the reasons for referral. It is helpful here to consider the type of question that the expert is expected to respond to. Too often referral questions are either too generic (e.g., your psychological/

psychiatric opinion please) or too specific to encourage consideration of culture. For more general advice about practice principles, we recommend the ten key *Guiding Cultural Principles* developed by Indigenous Psychology Services developed for use in the cultural audit of child protection and family support services.[cxcv]

Historical and Collective Context

This would include the profile of the local community and information on matters such as the impact of colonisation and the Stolen Generations, using information from official sources as well as research explaining the impact and relevance of intergenerational trauma. Sources would likely include (but not be limited to): RCIADIC, ALRC, RCIIRCSA, research; Elders, community, and family; Aboriginal-led organisations; the individual.

Personal, Individual Circumstances

This section should include specific cultural information as well as the direct and intergenerational life experiences of the individual. This would typically include information about the individual's connection to family, community, land, and culture.

Standard assessments can be used here, including structured risk assessment tools. However, considerable care should be taken when presenting these results in relation to the cohorts upon which any calibration has been derived from. In particular, the relevance of norms or 'risk categories' that have been produced from data from other parts of the world or parts of Australia where it is not immediately obvious whether the validation samples are comparable with a local Aboriginal community. In addition, caution should always be applied considering suggestions that some items considered indicative of higher risk (e.g., number of addresses), may place

defendants from First Nations communities in higher risk categories than is warranted. Similar cautions apply to the assessment of mental health, whether this be using normative psychometric test or clinical diagnostic frameworks. Care should be given to assessment of culture-specific presentations.

Family Relationships and Language

- Mother –biological mother and her sister
- Father –biological father and his brothers
- Cousin-brother –father's brother's son
- Cousin-sister –mother's sister's daughter
- Auntie –female relative of an older generation
- Uncle –male relative of an older

It is particularly important to understand family history to identify when, how, and if the defendant has been affected by the Stolen Generation, as well as other separations as losses. This can then be used to identify life events that lead to trauma, whether this be intergenerational, personal, or cultural. A genogram is helpful here as it provides a visual representation of a family system, incorporating at least three generations of the system. It is a visual representation of how a person fits into a social system, such that notable patterns can be acknowledged and recorded.[cxcvi]

Each family has a boundary that defines those who are part of the family and those who are not part of the family. This can be depicted using an ecomap—a set of circles, each representing systems that transact with the family and which may be sources of support or conflict.[cxcvii] Arrows are used to indicate the flow of energy. For example, a solid line connecting the family with a social group

indicates that a great deal of energy is invested, and support may be available for the defendant (see Appendix 2). Once again, connections with positive social systems can be identified from the ecomap and used in preparing a safety plan. It is particularly important to be aware of how family relationships formed and broken in Aboriginal communities.

Cultural Connection

The work of the Healing Foundation identifies, from a cultural perspective, the significance of *connection* to the idea of SEWB. It suggests the need to understand seven different domains of connection (*Table 3*).

Table 3: Illustrative Aboriginal Perspectives on Change. [cxcviii]

Domain	Description	Examples of risk factors to be overcome	Examples of protective factors to be strengthened
Connection to Body	Physical health – feeling strong and healthy and able to physically participate as fully as possible in life	Chronic and communicable diseases Poor diet Smoking	Access to good healthy food/ exercise Access to culturally safe, culturally competent, effective health services
Connection to Mind and Emotions	Mental health - ability to manage thoughts and feelings	Developmental/cognitive impairment and disability Racism Mental illness Unemployment Trauma	Education Agency: assertiveness, confidence and control over life Strong identity
Connection to Family	Connections to family and kinship systems are central	Absence of family members Family violence	Loving, stable, accepting and supportive family

Domain	Description	Examples of risk factors to be overcome	Examples of protective factors to be strengthened
and Kinship	to the functioning of Islander societies	Child neglect and abuse Children in out-of-home care	Adequate income Family-focused programs
Connection to Community	Community can take many forms. A connection to community provides opportunities for individuals and families to connect, support each other and work together	Family feuding Lateral violence Lack of local services Isolation Disengagement from community Lack of opportunities for employment in community settings	Support networks Community controlled services Self-governance
Connection to Culture	A connection to a culture provides a sense of continuity with the past and underpins a strong identity	Elders passing on without full opportunities to transmit culture Services that are not culturally safe Languages under threat	Contemporary expressions of culture Attending national /local cultural events Cultural institutions Cultural education Cultural involvement
Connection to Country	Connection to country underpins identity and a sense of belonging	Restrictions on access to country	Time spent on country
Connection to Spirituality and Ancestors	Spirituality provides a sense of purpose and meaning	No connection to the spiritual dimension of life	Opportunities to attend cultural events Contemporary expressions of spirituality

Recommendation: Expert witness reports routinely include content about the personal, community, and cultural context in which the matter arose.

Trauma and Risk

To explain the relevance of the report, the mental health professional should always try to explain the hypothesised association between cultural context, personal circumstances, and the criminal behaviour. At the broadest level it is possible to talk generally about the most cited as explanations for the over-incarceration of First Nations people in prison: culture clash, socio-economic, and colonialism. In Canada, for example, the effect of colonisation has been used in relation to:

- The relocation of Aboriginal people to often marginal land bases
- Criminalisation of Aboriginal spiritual practices
- Severe restrictions on fundamental rights and liberties of Aboriginal people with respect to freedom of speech and assembly, mobility, and voting

  Indian Act provisions regarding enfranchisement which forced Aboriginal people who had ambitions to move outside of the reserve community and to give up their status, and which discriminated against Aboriginal women and their children because of the status of the man the woman married
- The residential school system
- The "Sixties Scoop" of Aboriginal children into child welfare authorities and to adoption. [cxcix]

A key task is to identify ways of linking the risk mechanisms deriving from developmental factors that allow clinicians to understand triggering processes for dynamic risk factors.[cc] Trauma processes are different in the context of different personality configurations and developmental or neuropsychological presentations. Trauma processes, for instance, play out very differently in the context of autistic spectrum disorders or externalising personality traits. Examples of trauma process may include: [cci]

- Triggering reminders and ongoing trauma (people who remind them of abusers, smells, activities, TV programs
- Revenge thoughts, fantasies, planning aimed at offsetting/ resolving trauma experiences
- Rejection trauma resulting in a need to please peers—which becomes problematic when peers are engaging in offending behaviour
- Exposure to availability of offending routes to meeting resource needs
- Exposure to drugs, availability of weapons, pro- offending cultures
- Pervasive mood states (“positive”—"manic”—or “negative” e.g., depression numbness or anxiety) derived from trauma experiences
- Accumulating sense of anticipation or frustration resulting in increased probability of offending of different kinds.

Assessment should, based on this information, focus on:

- Assessing and intervening with the context (e.g., abusive, impoverished, exposed to violence, culturally insensitive,

racist, sexist, homophobic, unsafe, emotionally abusive, socially isolating, or lacking opportunities for social contact)

- Offering social support and connection opportunities to protect the individual from the impact of trauma-triggering processes
- Assessing the availability of resources of all kinds
- Assessing for offence-related trauma triggers and associated state repertoire
- Assessing endogenous resources for managing triggers, dissociation, skills in re- establishing executive functioning or offsetting cognitive abeyance.
- Assessing use of artificially induced altered states, used to cope, that might facilitate offending processes
- Assessing and intervening with people whilst they are in an offence paralleling altered state, to enable understanding of the dynamics of the state and facilitate state dependent learning. [ccii]

The mechanism of risk has also been described from a psychological perspective in terms of compromised attachment based on the knowledge that child removals remain as the strongest contributor to the pipeline to the justice system, poor education, health, and mental health outcomes. A new cultural attachment theory is under development, based on cultural differences in parenting that have resulted in:

- Child maltreatment risk being conflated with cultural differences
- Aboriginal families failing to engage in early intervention due to existing attachment programs being based on mainstream

> attachment theory which fails to translate culturally. The result of which is the escalation of Indigenous child removals by 119 per cent over the past ten years and at the same time, reduction in non-Indigenous child removals by 12 per cent.[cciii]

The causes of crime and crime related phenomena can also be understood from both a cultural/spiritual perspective and from a behavioural perspective.[cciv] An example here is the natural understanding for First Nations men that identity comes from their spirit and culture, a place identified as Ngarlu, that informs who they are and their practice of self-mastery as men and how they behave in society. The argument here is that when this Ngarlu is broken then behaviour changes, and this cause criminal or 'wrong' behaviour. The cause of the crime is thus the person/s sense of disconnection from his Indigenous self that results from colonisation, ongoing racism, subsequent alcohol, and drug use and so on as the cultural practice of self-mastery is weakened or lost.[ccv] First Nations people will also take their spiritual beliefs into prisons where it will, in most situations, become heightened through the connection with other or simply because the environment is not spiritually safe for them. It follows then that criminal justice professionals must facilitate the process of assisting First Nations men to connect with Ngarlu at a deep level and accept the need for healing—which will then impact their decision-making relevant to how they behave.

There is, of course, considerable research interest in explaining the developmental pathways that lead to offending, with several different theories and hypotheses now available to inform the assessment. For example, it has been suggested that it is the emotional numbing and feelings of detachment that result from trauma that increase risk by inducing callousness and a lack of concern for victims. Another hypothesis is that exposure to traumatic stressors compromises

secure attachment with primary caregivers and it is this that results in self-regulatory deficits. Or perhaps the degree to which maltreatment represents a 'betrayal' of trust mediates the way in which abuse-related information is processed and remembered and then triggers antisocial behaviour.[ccvi] Regardless of which explanation is the most appropriate, the broad conclusion that can be drawn from this body of work is that trauma reactions are often a catalyst for involvement in the criminal justice system as well as increasing the risk of re-offending. Put simply, the key presentations of trauma (e.g., impulsivity, risk-taking, and low self-control) represent important criminogenic needs (or dynamic risk factors for re-offending), and thus should form important intervention targets for any sentencing conditions that aim to reduce the chance of re-offending. It also follows from this that the most logical service response will not be to punish justice-involved young people and implement measures that deter others from offending, but to offer a more therapeutic approach that helps young people to feel safe and gain control over intense reactions, destructive thoughts, and impulsive behaviours.

Suggestion: Expert witness reports provide an opinion to the court about the nature of the association between culture, trauma, and risk and how this might apply to the matter under consideration.

Case Conceptualisation / The Opinion

A specific set of skills are needed to incorporate cultural understandings into the case conceptualisation. In the forensic context this can be understood in terms of an understanding of the circumstances in which further offending is most likely to occur, and

how risk might best be managed. Thus, while the assessment essentially leads to a *description* of the presenting problem, the case formulation develops an *explanation* that can be used to inform subsequent intervention and management.[ccvii] Acknowledging the cultural context in which offending behaviour occurs seems integral to developing any meaningful explanation of problematic behaviour.

The primary aim here is to inform intervention. It enables the court to develop a coherent set of explanatory inferences—based in theory and evidence—that describe and explain why the person has a particular problem at a particular time. Instead of simply providing a narrative of an individual's life or a description of his or her overall functioning, the conceptualisation aims to explain *why* a particular person might be experiencing specific difficulties at a given time and in each context in a way that usefully identifies possible intervention opportunities that allow a wider range of sentencing options to be considered.

Trauma in Sentencing and Disposition

Lawyers should recognise that trauma evidence at sentencing or disposition may be interpreted to justify longer or harsher sentences;

Government policies should ensure that high-quality mental health interventions are available in the justice system and in the community to respond to defendants who have been traumatised, particularly those who have committed violent offences;

Policy and legislation should require judges to consider trauma as a mitigating factor in sentencing; and

Policies should require judges to consider community-based treatment for those with trauma symptoms.

Current case conceptualisation models in clinical psychology can be broadly described as problem-, disorder-, or theoretically specific, or as trans-theoretical, multi-modal, and integrative.

It is, however, probably the biopsychosocial approach to case formulation, using a '5Ps' approach (or '6Ps')—Presenting problem, Predisposing, Precipitating, Perpetuating, and Protective factors, that dominates current practice.[ccviii] The process of arriving at this type of conceptualisation is a stepwise approach. Data gathering begins with the clinical interview and assessment, and the therapist must be a competent interviewer, or the validity of the data base is compromised.

> *The psychologist and client collaboratively gather data, before defining the problem and setting specific outcome goals. To understand the client's presenting problems, hypotheses are developed about their origins through the lens of a theoretical framework or model. This might include body and emotion; cognitive models; behaviour and learning models; existential and spiritual models; psychodynamic models; and social, cultural, and environmental models. From applying these frameworks, treatment plans are developed based on the hypothesis/es which best explain(s) the origin of the distress and, finally, are used to review and evaluate treatment effectiveness. This is an iterative process as new information is gathered as the therapeutic relationship develops.*[ccix]

In the forensic setting, however, the most widely used approaches have been derived from a method of psychological assessment known as functional analysis. Originally developed originally as part of an assessment process for behaviour modification programs, the aim of a functional analysis is to establish the purpose of an action or behaviour, to specify the variables that maintain the behaviour, as well to identify other more pro-social behaviours that might satisfy a similar purpose. This type of assessment thus focuses on the current

presentation of the problem, which is then contextualised through exploration with the client of earlier formative events and experiences, and how these have shaped subsequent beliefs, emotions and, importantly, behaviour. Of course, in forensic reports the 'problem' being analysed will nearly always be the offending behaviour. There are surprisingly few practical guides which can help the forensic psychologist to develop skills in functional analysis. A relatively simple method involving a matrix, where notes are made about relevant factors 'Before', 'During', and 'After' the offending which are then cross referenced with psychological factors labelled 'Thoughts', 'Emotions', and 'Behaviour' has been developed.[ccx] This matrix is completed by asking the client to describe what the police would see as they arrive at the scene of the offence and uses this to explore associated feelings and thoughts. There is a need to begin with observable events described in behavioural terms, focusing on what happened instead of why it happened. The contribution of each event in a behavioural 'offence chain' is then evaluated to determine whether the event increased, decreased, or had no effect on the probability that offending would follow. It is only after this behavioural chain has been completed that the assessor asks for information on how the person interpreted events.

Culturally informed case conceptualisation [ccxi] will also typically involve a consideration of four themes relevant to understanding mental health and wellbeing:

- Coping skills
- Knowledge
- Social support

- Connectedness, with the latter theme (connectedness to country, family and kinship, cultural knowledge, and social networks) viewed as making a unique contribution.

In addition, factors that support and impact upon health and wellbeing and are important to assess include body; mind and emotion; family and kinship; community; spirit, spirituality, and ancestors; country; and culture.[ccxii] To integrate cultural context into the case conceptualisation and to ensure culturally safe and respectful practice, health practitioners should therefore:

- Acknowledge colonisation and systemic racism, social, cultural, behavioural and economic factors which impact individual and community health
- Acknowledge and address individual racism, their own biases, assumptions, stereotypes and prejudices and provide care that is holistic, free of bias and racism
- Recognise the importance of self-determined decision-making, partnership and collaboration in health care which is driven by the individual, family and community
- Foster a safe working environment through leadership to support the rights and dignity of First Nations people and colleagues.[ccxiii]

We would recommend that, when impairment is present, the mental health professional should aim to develop a case formulation that has the capacity to be applied to the *Verdins Principles* (i.e., "reducing moral culpability; influencing the kind of sentence to be imposed; moderating or eliminating the need for general deterrence; moderating or eliminating the need for specific (personal) deterrence; making a sentence weigh more heavily on the defendant than on a person in normal health; and/or creating a serious risk of

imprisonment having a significant adverse effect on the person's mental health").[ccxiv] The extent to which the opinion can be based on evidence that speaks to each of these principles will, in our view, determine the weight given to the evidence. In this way a report will present cultural information on matters relating to personal responsibility for behaviour, the individual's capacity to self-regulate and the environmental and personal controls that might be put in place to assist with this. Protection of the community is the primary sentencing purpose in SA so most often the Court will be interested in receiving evidence about those measures or sanctions that can be put in place to keep the community safe. This should be followed, where possible, by an opinion on the types of programs or supports that could be put in place (a safety plan) and some scenario planning that explains the likelihood of the plan being successful. It is important to remember that practice directions call for report writers to:

- Set out separately all of the factual findings or assumptions upon which any opinion is based
- Give reasons for each opinion
- Make it clear when a particular question or issue falls outside his or her field of expertise

  Declare that (the expert) has made all the inquiries which (the expert) believes are desirable and appropriate and that no matters of significance which (the expert) regards as relevant

have, to (the expert's) knowledge, been withheld from the court.

Suggestion: Expert witness reports provide a formulation of the presenting matter that is not limited to an understanding of problematic behaviour but the broader context in which it arises and with reference to the Verdins Principles.

Culturally Appropriate and Effective Sanctions

From a cultural perspective it has been suggested that the accumulation of knowledge passed from generation to generation has led to an understanding of the need to bring back into balance all aspects of wellbeing. These include spiritual and physical healing, connection to land, language, values and beliefs, cultural law and customs that build resilience in community. Safe cultural healing practices understand the importance of working with collective and individual trauma, using collective practices grounded in holistic recovery and provided by or with the support of the local community.[ccxv]

Consistent with this thinking is the idea that the courts should focus on restorative and therapeutic outcomes when sentencing. This means, in practice, that priority should be given to providing Aboriginal mentors support defendants and their families, and culturally relevant programs and processes. It also means that, in communities, Aboriginal healing and lore are given prominent place. This means that properly funded Elder-led on-country healing responses that include

family should be made available, with lore used (or recovered) to hear complaints, deal with conflicts and rule on punishment.[ccxvi]

In South Australia, services that might also be available to support First Nations Defendants would likely include (but not be limited to) ASG, ALRM, Tiraapendi Wodli, and other Aboriginal-led organisations, as well as support services provided by OARS, DCS, and the CAA (Nunga Court).

Safety Planning

It is often important to include a safety (and accountability) plan, designed to ensure the short-term management of risk. These are designed to demonstrate, logically, how a set of specific conditions can be expected to achieve the overarching aim of protecting community safety.

A safety plan outlines specific strategies that the defendant should put into place; it is not an initial case plans or a case formulation, or a formal review of progress. These are all clearly relevant to the development of a safety and accountability plan: indeed, they provide specific benchmarks against which to measure individual-level change. Rather, a safety plan outlines specific strategies that might be put into place to maintain the safety of others, and identifies areas where change is still considered necessary.[ccxvii]

The key components of any safety plan are:

> *treatment interventions, supervision, monitoring, and victim safety plans. Treatment needs are defined as strategies intended to moderate risk factors or enhance protective factors; that is, interventions intended to repair or restore deficits in adjustment and functioning that have been linked to harmful behaviour in the past. Supervision needs are defined as restrictions on activity, movement, association, or communication that are*

intended to control risk factors—to limit opportunities to be harmful—as well as enhancements to lifestyle in the form of structure, boundaries, and role expectations, intended to promote the effectiveness of protective factors. Monitoring needs are defined as those early warning signs that are an indication of a relapse to harmful behavior or any other indicator of a change in risk. Monitoring strategies, therefore, attempt to address triggers to violence to ensure their early detection and management. Victim safety plans can be prepared when there is evidence of ongoing conflict between associates".[ccxviii]

A comprehensive safety plan should also consider the impact of trauma in terms of proactive, reactive, and reparative measures. Proactive measures involve careful observation to recognise signs of stress that may trigger offending or offence-related behaviour, such as substance use, and identifying steps to minimise any opportunity for those triggers to occur (e.g., a safe space, practising stress management, seeking support from family, friends, elders, professional support). It may also involve simple distraction activities. Reactive measures should be based on documentation regarding the preferred crisis responses written for anyone who will be supporting the person.

This plan may also offer advice about the acute management of risk. It can, for example, describe what is likely to be happening physiologically and what types of behaviour might be expected. It should articulate the responsibilities of those who should respond (e.g., when trauma responses are triggered, the person might be expected to be focusing on perceived personal threats and survival—expecting the person to engage in a logical discussion will not be helpful at this time, and memory and recall will be impaired, with emotional responses under little conscious control). Those in fight mode may become aggressive and destructive. Those in 'flight mode'

may try anything they can to escape. Those in 'freeze mode' may emotionally and psychologically dissociate. Any physical restraint of the person should be reserved as only a last resort and only for the person's own or other's safety. After the initial crisis is over and the person has started to calm, it is important that they are left alone (with watchful eyes nearby) or only with those who have established rapport. No-one should touch the person unless they are sure that this is going to be helpful and welcomed. The focus for this time is physiological repair.

Some questions to inform the development of a safety plan.[ccxix]

- Who is this person and their family and community (cultural and social considerations)?
- What place does offending play in their lives?
- What are the barriers to change?
- What pathways can enhance change?
- What are the key factors that underpin and sustain pathways of abusive practice?
- What strategies can be suggested to minimise the barriers and establish new pathways to safety?
- Who do I/we need to involve when implementing these strategies?
- How do I/we help the defendant and their family/kin to implement the strategies?

Scenario Planning

It is not advised that the report writer offer an opinion on the sentencing outcome (the 'ultimate issue') as they will not have usually

heard all evidence presented in court. Rather, it is possible—considering the cultural case conceptualisation and the safety plan—to offer opinion about when, where, and how ongoing risk is likely to be exacerbated or ameliorated. The is referred to as scenario planning and involves developing hypotheses around the current scenario or the most likely scenario, a best-case scenario, and a worst-case scenario for further offending.

In practice, scenario planning involves "plotting the different kinds of harm the person could perpetrate in the future based on the knowledge gathered about the ways in which they have been harmful in the past". This involves thinking through different possible scenarios:

> in terms of their nature, severity, imminence, frequency/duration, and likelihood. Future scenarios might include the kind of harm perpetrated against others before, an adaptation of the harmful behaviour because circumstances are different, what the harmful behaviour would look like if it escalated, and what harmful behaviour would look like if, in fact, it was on a harm-reducing trajectory. [ccxx]

The purpose here is to present an opinion on the anticipated consequences of different sentencing options, such that the court can then determine the most appropriate course of action. This should also include any consequences of how more punitive or intrusive sentencing options (such as incarceration) might be expected to impact on longer-term risk.

Once again, this section of the Guide highlights the need for mental health professionals to have sufficient time to prepare reports in a culturally safe manner. This gives the person being assessed time to reflect, recover and then start again and will inevitably result in more useful evidence being presented to the court.

Community Expectations of Punishment

It is reasonable for mental health experts to provide advice on their understanding of community expectations of punishment, including the importance of ideas such as "payback" to the community.

Suggestion: Expert witness reports provide advice about available community services and sentencing options and provide advice about both scenario- and safety-planning to the court.

A Decision-Making Approach

Although developed for use in preparing pre-sentence reports for juveniles, a ten-point model has been proposed to guide decision making in report writing.[ccxxi] Each decision point relates to one or more of the essential elements of the evaluation, derived from a series of consultation with judicial decision makers and, is deigned to: a) prompt awareness and appreciation of what is required, and b) identify any shortfall in knowledge, skills or training that might limit capacity to adequately meet these requirements. Thus, while not explicitly considering the issues discussed in this Practice Guide, the decision-making model does describe a skill that all mental health professionals can utilise when preparing their reports. Decision Points 4 to 9 predominantly focus on methodology, while Decision Point 10 focuses on the content and presentation of the pre-sentence report.

Recommendation: Expert witness reports to adopt a decision-making approach to writing pre-sentence reports.

Ten Decisions to Make When Writing a Pre-sentence Report

1. Do I properly understand the legal issue to be addressed in this evaluation and associated report and the psychological constructs that will enable the legal issue to be addressed?
2. Given the individual's characteristics and offence type, Is it appropriate for me to undertake this evaluation? Am I confident that I have no personal attitudes, values or beliefs that might impact my ability to be impartial in the evaluation process or in the written report?
3. Do I have the necessary competency to complete this evaluation?
4. Do I know what assessment tools are appropriate for this evaluation? Do I have the required access to the necessary tools, have experience in administering the tools, understand the tools' psychometric properties and limitations, and have the skills to score and interpret the results?
5. Have I identified my risk assessment approach and the risk assessment tools I will use?
6. Do I know what data I need to gather to complete a comprehensive evaluation? Have I obtained the necessary consent to access the data? Where and how will I access the data? Am I confident I could justify or defend my choices if called upon to do so by the court?
7. Do I understand the issues regarding informed consent and how, in this specific forensic context, I need to demonstrate that informed consent has been obtained?
8. Have I obtained the data necessary to answer the forensic (legal) issue? Have I triangulated my data? Based on the data I have gathered, can I produce an independent comprehensive report?
9. Have I formulated an opinion from a critical analysis of the data that allows me to address the legal issue in a probative (not prejudicial) manner? Are recommendations supported by the data presented in the report? Are the recommendations specific and detailed enough to be informative to the reader?
10. Have I included all relevant data in the report? Have I presented the data clearly and succinctly? Is the logic between the data and my opinions and recommendations transparent? Have I clearly addressed the forensic (legal) issue? Have I explained why the issues have not been fully addressed?

(Bycroft, et al. (2021).

Part 5: Practitioner Self-Awareness

There is an expectation that every professional should be able to recognise diversity and be culturally competent.[ccxxii] Competence can be understood in terms of practitioner awareness as well as knowledge about those issues that impact on clients (e.g., oppression, racism, stereotypes), which is considered critical to developing the skills that are required to intervene appropriately.[ccxxiii] It is not enough, however, to only understand how people are 'different'; practitioners need to carefully examine how this difference results in differential social power.[ccxxiv] In this way, competency can be understood in relation to a personal process whereby the mental health professional first becomes more culturally aware and knowledgeable, and then learns how to establish a therapeutic relationship, conduct assessments, test, make diagnoses, and eventually provide treatment.

Engaging with a cultural mentor will often facilitate this process for the non-Indigenous practitioner. More generally, it can be argued that the aim of any cross-cultural intervention is, ultimately, to help service users make sense of their issues in a social and historical context.[ccxxv] The aim here is to develop culturally safe and self-regulated learning.

There is also a particular need to support the work of First Nations professionals, such as by an acknowledgement of how cultural knowledge and connections is relevant expertise to legal decision making.[ccxxvi] This may mean, that cultural consultants and First Nations mental health practitioners have:

- Smaller caseloads to reflect the higher complexity of needs for many clients
- Flexibility about out-of-office work so effective community contacts can be made

- Recognition for time spent upskilling non-Indigenous colleagues
- Regular training and development opportunities
- Regular supervision that combines accountability with support and skills development
- Prevention and rapid resolution of conflicts or ‘‘politics’’ in the workplace
- A variety of strategies to reduce First Nations workers’ isolation from each other in mainstream workplaces
- Culturally sensitive and appropriate mediation services, grievance processes, and counselling for staff experiencing workplace problems.[ccxxvii]

For non-First Nations practitioners, the following three steps are recommended before assessment and therapy with Aboriginal clients is undertaken:[ccxxviii]

- Self-reflection: about their motives for wanting to work with First Nations people
- Formative preparation: undertake cultural awareness training, develop links with cultural consultants, review their microcounselling skills
- Networking and supervision: build relationships with First Nations colleagues, organisations and communities; establish professional and cultural supervision mechanisms.

Recommendation: Expert witnesses should routinely reflect on the nature of their personal and professional engagement with First Nations issues, seeking advice from cultural consultants when appropriate.

Concluding Remarks

In the Practice Guide we hope to have made a start on mapping out the approach and content that might be considered relevant to the preparation of mental health expert testimony report for pre-sentencing hearings in South Australian courts. Our aim here is that, over time, this guide will develop and inform standard practice in these matters, such that cultural content is routinely presented as directly relevant to good judicial decision-making. Ultimately though this will require mental health experts to prepare reports that include more cultural content and then receive feedback from the courts about the value of this evidence.

Clearly there is a need for investment in both training, audit and the further development of the ideas contained in this Practice Guide. An important piece of work remains to present community context reports, akin to *Gladue reports*, that help the courts to better understand the context in which defendants live. This is work that should complement this Practice Guide and have much broader application. We note though, that the successful implementation of cultural reports in other jurisdictions has hampered by limited funding options and the availability of appropriate sentencing options for First Nations defendants. As stated by Judge Sandhu in relation to Canadian reports:

> *Unfortunately, the Gladue process outcomes in Manitoba are rendered generally weak and ineffective due to a lack of resourcing to put the Gladue principles into action in a manner than inspires confidence, both by the court and the public… that will permit the court to confidently send an offender back into the community, confident in the knowledge that community resources would be, if not immediately, shortly and generously*

> *made available to the accused, under supervision…. (R v Mason [2011] MJ No 347 (QL), [32]).*

A recently published review of the perceptions of the judiciary towards *Gladue* Reports and how they function in practice found that most *Gladue* submissions are made orally by defence counsel (42.6%), followed by full *Gladue* reports (38.9%), the latter being perceived to be the most satisfactory. Defence counsel submissions were considered variable: "from borderline incompetent to excellent".[ccxxix] Judges also preferred Gladue reports to pre-sentence reports because they were the product of multiple interviews with family and community members. As one Judge said:

> *[A] Gladue report gives a much more fulsome background about the particular person. The writers will usually speak to family members, siblings, parents, grandparents, and give me rich, detailed information from those sources about the person, whereas a pre-sentence report may say John Smith claims that he went to school here and claims that this happened and that happened in his childhood. A Gladue report is just a very different tenor. It's much more personal and tailored to the individual.*

An important next step then is to develop new methods from which to assess the quality of mental health expert reports submitted to South Australian courts in sentencing hearings and to establish the degree to which such evidence is valued by legal decision makers and, ultimately, leads to better justice outcomes for First Nations people and communities. We sincerely hope that this Practice Guide can assist those preparing expert testimony to strengthen the quality and impact of their work and welcome feedback or advice about how it might be strengthened over time.

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Appendix 1: Some Referral Questions For Lawyers

A specific opinion is often sought about mental impairment. Questions may be asked about:

- The nature and severity of the impairment
- The extent to which the impairment was operating on the offender's mental functioning at the time of the offending and hence can be said to have influenced or caused the offender to commit the offence and/or to have affected the offender's capacity to appreciate the wrongfulness and gravity of the offending
- Whether the impairment was the product of an underlying mental illness or disability, self-induced intoxication, or some combination of such factors
- If the product of self-induced intoxication, whether it reflected an addiction, and if so the circumstances of that addiction
- The ability of the offender to reduce or overcome the significance of any underlying condition or addiction, and the steps taken or able to be taken by the offender in that regard.

More specifically, opinion might be sought on matters concerning:

- Moral culpability
    - Is there a connection between the impairment and the offending?
    - If so, how? (e.g., did it impair the offender's ability to exercise appropriate judgment, to maintain self-control and resist impulsive behaviour, to think and reason clearly, and to make calm and rational choices. It may influence or cause the offender to act

in a disinhibited or aggressive manner. It may obscure the offender's intent to commit the offence or negate any suggestion of deliberation or premeditation. It may impair the offender's ability to appreciate the wrongfulness, gravity and implications of their offending)

- Personal deterrence (i.e., the extent to which deterrence of the individual defendant forms the rationale for the sentence)
    - Is the defendant impaired in their ability to make a rational analysis comparing the likely gains from the crime against the prospect, and likely severity, of punishment? Would the defendant have had the capacity to learn from previous sentencing exercises? For instance, defendants with cognitive impairments or conditions markedly affecting impulsivity may lack this capacity
- Rehabilitation and risk assessment
    - What treatments or supports could lessen risk of reoffending?
- Hardship of sentence
    - Does the defendant's mental condition mean that they will suffer hardship of a sentence more than someone without that condition. For instance is there a risk of imprisonment having a significant adverse effect on the offender's mental health? Does the defendant's mental condition warrant the sentence to be served in a particular way? Are there particular conditions that should be included (or not included) in a supervised order, in light of a defendant's mental condition?

Below is a list of specific questions that might be asked in a request for a report – or considered by a mental health professional who is conducting an assessment:

1. ***What is known about the community and culture of the defendant, and who in the community could the Court expect to be able to offer support and safety?***
2. ***How important, in your opinion, are the following to the defendants social and emotional wellbeing and risk of reoffending:***
    - **cultural connectedness** — connection with aunties and elders to engage with cultural knowledge, practices, rituals and spirituality; discussion regarding participating in cultural/spiritual healing with a traditional healer
    - **social connectedness** — the meaning of extended family particularly in the absence of mother/care-giver/kin and identify barriers to re-engagement with family networks
    - **family and kinship connectedness** — barriers to reconnecting with extended family; explore meaning of social roles, obligations and relationships with father and brother; engage with sisters for family support
    - **self—extended and complicated grief and** loss; explore coping strategies —cognitions and behaviours noticed to improve emotional response; rumination and meta-worry (worry about being worried for longer than “expected”)
    - **context—hidden pressures** that impact upon experience — e.g., institutional racism that negatively impacts upon employment.

3. ***Has the defendant ever experienced maltreatment or adversity and how has this impacted on their life and behaviour? Does the defendant, in your opinion, experience any symptoms of trauma – including PTSD, complex trauma, intergenerational trauma, and collective trauma that have influenced their offending behaviour? If so:***

    - what, in your opinion, is the relevance of these symptoms to the current offending?
    - has the defendant been offered, or received, mental health support or treatment in the past to address these symptoms?

4. ***How might the defendant best be supported to address or manage these symptoms, and what, in your opinion, would the impact of this on the future risk they present to the community?***

    - are there any circumstances that might exacerbate these symptoms and increase risk (such as imprisonment)?

5. ***What are the community expectations about punishment?***

In addition, please ***comment on the assessment approach adopted***, in particular:

- did you use the DSM-5 Cultural Formulation Interview (CFI) and Informant Version (IV)[1] in your assessment and/or – in addition to a suicide risk factors assessment, the AISRAP STARS tool (which considers potentially culturally appropriate factors of sense of belonging and cultural identity)?
- what are the strengths and limitations of your assessment methods and approaches (e.g., psychometrics) in working with Aboriginal defendants? (NB especially in relation to an assessment of risk of reoffending)

Appendix 2: How to complete a genogram and Cultural Map

To create a basic genogram, begin with the current family system – the current relationship or living situation. Males are represented by squares, and females are represented by circles. Males are always on the left, and females are always on the right. Marriage is noted by the solid line that connects one person to another, or a dashed line if there is not recognised legal relationship, but it is important to include kinship relations. Then add the next generation and place the person and the members of their generation in the corresponding relationships and sibling positions.

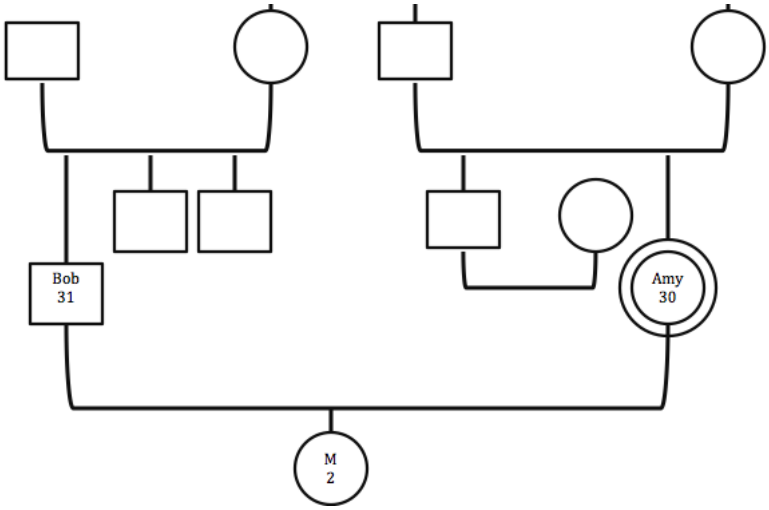


Figure 1: Example of a Basic Genogram[1]

On a completed, accurate genogram, you should be able to see everyone's relationships (marriages, separations, divorces, etc.),

children, miscarriages, and adoptions, as well as (potentially) relationship dynamics and patterns. Once three generations are depicted, enter some basic information about each person (name and current age, the deceased—marked by an 'X' through their symbol, divorce/separation and the date or year they occurred). As a final step, it is recommended that a note is made about the importance of each if person to the defendant and their relevance to the ongoing management of risk of reoffending. Those who are identified as contributing to healing and resilience (people who promote protective factors) can be highlighted, as can those who contribute to any ongoing antisocial behaviour.

Cultural mapping provides a visual representation of social networks and relationships including family, friends, and community networks, rather than a hierarchical version of a genogram.[ccxxx] The approach is considered useful for engagement and hearing the concerns and experiences of the person and identifying the involvement of service providers. There are two components: a social and emotional wellbeing map, and a migration map.

Process for completing the map:

- Draw a corner of a rectangle on the sheet of butcher's paper, about 10 cms from the edge
- Identify and name people who have regular contact or a role with the person
- Draw a circle on the sheet of paper (generally in the centre) to represent the person (leaving enough room to write down key points about the person's story, such as strengths, needs, how they were referred, and how they identify themselves)
- Draw other circles around the person, which identify individuals who are important to the client—or their social and

emotional wellbeing—and those that live close by (this may include family members, or people who have a mentor or kinship role)

- Next, using a different colour, identify any people who the client may have infrequent contact with, or whom they do not have a positive relationship with. Family or friends who the client has no contact with, but are important to them, are drawn on the outside of the rectangle corner in another colour. People who are deceased can be marked with a line through their circle
- To join the circles on the map, lines are used to represent the quality of the relationship (as determined by the person). A thick line is used to represent strong relationships. Arrows can be included if support goes both ways. Negative or damaged relationships are represented by a wiggly line. Distant relationships are shown via a dotted line. Connections can be established between members of the social and emotional wellbeing network as well (such as between nan's and grandchildren, for example)
- If it has not been raised during writing the circles and connecting, ask about what service involvement the person and their network may have, and what this support is, and whether or not it is helpful. These relationships are coded the same as the other family/friend relationships
- Finally, identify people who the person would like to develop a relationship with (those that can move into the social and emotional wellbeing map), and those that the person would like to change their relationship with.

Appendix 3: South Australian Missions Information

Thousands of children were forcibly removed by governments, churches, and welfare bodies to be raised in institutions, fostered out or adopted by non-Indigenous families, nationally and internationally. They are known as the Stolen Generations. The exact number of children who were removed may never be known but there are very few families who have been left unaffected—in some families, children from three or more generations were taken. The removal of children broke important cultural, spiritual, and family ties and has left a lasting and intergenerational impact on the lives and wellbeing of Aboriginal and Torres Strait Islander peoples. The story of the Stolen Generations cannot, however, be told without recognising the strength and resilience of Aboriginal and Torres Strait Islander individuals, families, and communities.

Please see https://aiatsis.gov.au/explore/stolen-generations#:~:text=The%20removal%20of%20children%20broke,and%20Torres%20Strait%20Islander%20peoples

Images reproduced with the kind permission of Nunkuwarrin Yunti provide some information about South Australian missions. The use of the images in no way implies Aboriginal people from these communities are involved in criminal activities.

Aboriginal Missions

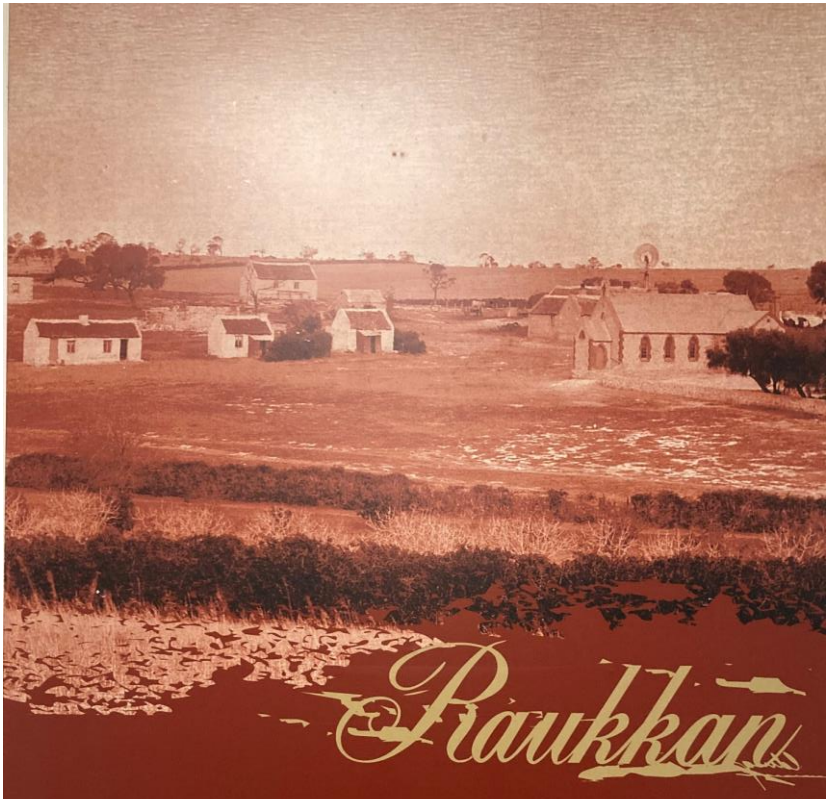
in South Australia

Since proclamation of Australia in 1836, successive governments introduced various laws to address issues regarding Aboriginal people who were considered 'primitive' and 'uncivilised'. Originally, they sought to 'protect' Aboriginal people from the British but soon changed focus to 'civilise' and 'train'. The last phase, assimilation, attempted to blend Aboriginal people out of existence.

The emphasis of the respective laws brought about the systematic removal of thousands of Aboriginal children from their families. Separation led to placements in institutions, missions, foster or adoptive care, far away from their family homes. The children were forbidden to speak their language or continue with any Aboriginal practice. Often they were told that they were Greek, Italian, Maori or a descendant of some other culture. The separation policies had devastating effects. In addition to loss of identity, culture, spirituality and land, Aboriginal children suffered harsh conditions, basic education, excessive physical punishment, sexual abuse and slavery.

Feelings of powerlessness, loss, grief and bereavement not only affected the children but also the parents, families, communities and generations which follow. For many years, Aboriginal people tried to prevent the removal of children and to assist with their reunion but were ineffective against the government system.

Finally, in 1995, the community won a National Inquiry into the Stolen Generations by the Human Rights and Equal Opportunity Commission. In 1997, the Inquiry's report, Bringing Them Home, made 54 recommendations. While government response was limited, funding was provided for a national network of Link-Up Services which continues to reunite families today.



Raukkan

In 1859, the Aborigines' Friends Association founded the Point McLeay mission. Situated next to Narrung on Lake Alexandrina, the mission was established on a traditional Ngarrindjeri campsite known as Raukkan meaning the 'ancient way'. The first missionary was George Taplin.

The lack of farming land made life difficult for many men who had to leave the mission to work. Several families applied for land grants but few were made. However, neighbouring lands were subdivided for non-Aboriginal farmers, where children and adolescents were apprenticed with non-Aboriginal families.

Following a recommendation of the 1913 Royal Commission on the Aborigines, control of Point McLeay transferred from the Aborigines' Friends Association to the government in 1916. In 1974, Raukkan was given back to the Ngarrindjeri Council, led by Henry Rankine.

Some families who lived at Raukkan or Point McLeay included Campbell, Dodd, Gibson, Gollan, Karpany, Kartinyeri, Koolmatrie, Kropinyeri, Lampard, Long, McHughes, Rankine, Rigney, Sumner, Trevorrow, Tripp and Wilson.

Point Pearce

The Point Pearce mission was established in 1868 to house the few remaining Narungga people of Yorke Peninsula. The first superintendent was a Moravian missionary, Julius Kuhn.

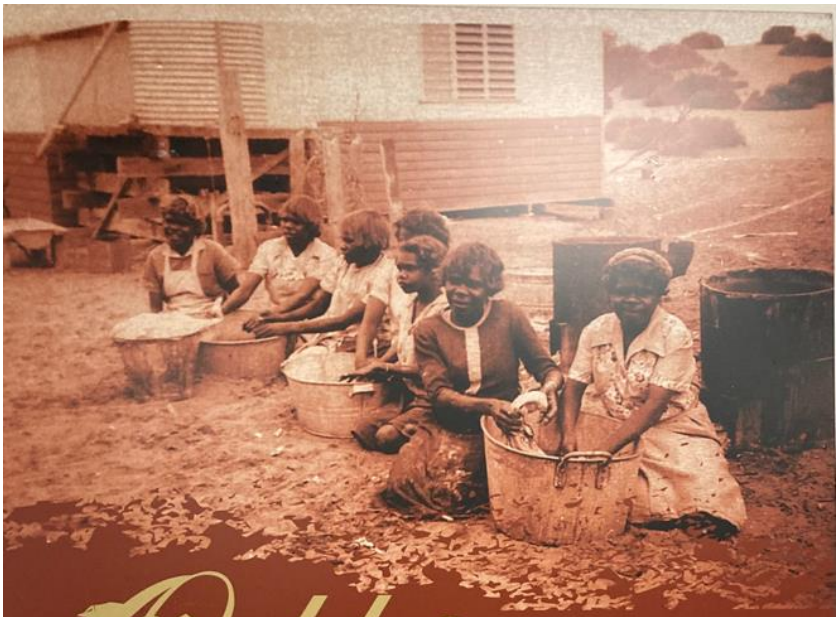
People from the Adelaide Plains and the Murray were also sent there, and in 1889 Aborigines from the Poonindie mission near Port Lincoln were transferred to Point Pearce.

The mixing of Kaurna and Murray peoples undermined the continuation of Narungga language and culture. By 1900, Point Pearce was the only home these peoples knew, and farming and domestic service had become their livelihood.

In 1911, the government enacted the Aborigines Act, which intended to place all Aboriginal families under the direct control of government officers. In 1915, control of Point Pearce transferred from the mission to the government.

Owing to the continuous struggle to be self-sufficient and resume control of the land, the title was handed to the Council in 1972.

Some families stationed at Point Pearce included Abdulla, Agius, Angie, Buckskin, Chester, Edwards, Goldsmith, Graham, Hughes, Kite, Lindsay, Milera, Newchurch, O'Brien, O'Loughlin, Sansbury, Smith, Varcoe, Wanganeen, Warrior, Weetra, Williams and Wilson.



Ooldea

Ooldea Soak was a major meeting place for groups throughout the desert regions. However, the Transcontinental Railway seized the water for their steam trains, and the Wirangu traditional owners were displaced by neighbouring Pitjantjatjara, Kokatha, Antakarinja and Ngalea peoples.

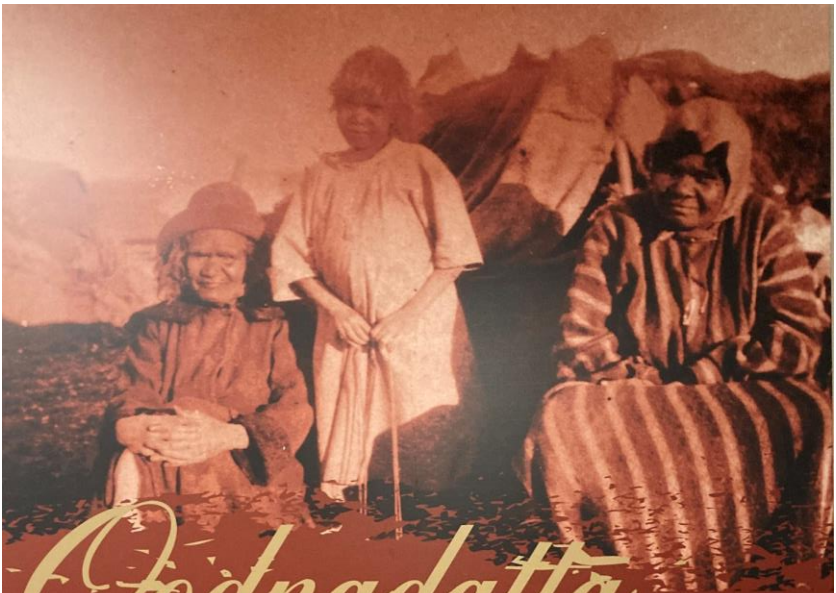
From 1918 to 1933, Daisy Bates tried, single-handedly, to keep the desert people away from the 'corrupting influences of the railway'. In 1934, the United Aborigines Mission sent Annie Lock to establish a mission at Ooldea.

The main purpose was 'training the children'. They were placed in dormitories and only saw their families once a week. Despite learning the skills necessary for station and domestic work, regular employment was a continuing problem, so some young couples were sent to Gerard.

In 1952, the United Aborigines Mission suddenly closed the mission due to internal disagreements and the British missile tests at Woomera. Together with the Pitjantjatjara people from Maralinga, the Ooldea residents were relocated to a Lutheran mission further west at Yalata where they were not allowed to speak their own language and were forced to participate in evangelical activities.

In 1975, the reserve was transferred to the Yalata Community Council, and in 1984 the Maralinga Tjarutja Land Rights Act was passed, returning most of the lands affected by the missile and atomic bomb tests.

Many families were placed at these missions including Baker, Benbolt, Chamberlain, Davey, Day, Grant, LeBoise, May, Miller, Moodoo, Queama and Windlass.



Oodnadatta

In 1924, the United Aborigines Mission established a mission at Oodnadatta on the northern railway, under the supervision of Annie Lock. Two years later, she founded a Children's Home which was transferred to Quorn in 1927. Some previous family residents of Oodnadatta home include Chimney, Dawns, French, Haines, James, Kemp, Kennedy, Khan, McInerney, McLean, Moreton and Rendle.

The Quorn Home was named Colebrook Children's Home and was staffed by 'much-loved' Matron Hyde and Sister Rutter. Most of the children at this home were brought from northern stations and attended the town school.

In 1944, Colebrook moved to Eden Hills in Adelaide. Here, children were not welcomed in local schools until after 1953. In 1952, the political upheaval within the United Aborigines Mission, which forced the closure of Ooldea, also resulted in the departure of Matron Hyde and Sister Rutter. Subsequent staff were much less than satisfactory.

In 1972, Colebrook moved to a nearby cottage and in 1981 it finally closed. However, more than 350 children who had lived there continue to have reunions and to maintain their family.

Some children of Colebrook included Ruby Ah Chee (nee Musgrave), Nancy Barnes, David Branson, Danny Colson, Malcolm Cooper, Clara Coulthard (nee Brady), Margaret Crompton (nee Long), Stephen Dodd, Doris Kartinyeri, Grace Lester (nee Sopar), Yami Lester, Amitja Levai (nee O'Donoghue), Graham McKenzie, Nellie Nihil (nee Lester), Lowitja O'Donoghue, Muriel Olsson (nee Brumbie), Faith Thomas (nee Coulthard), and George and Maude Tongerie.

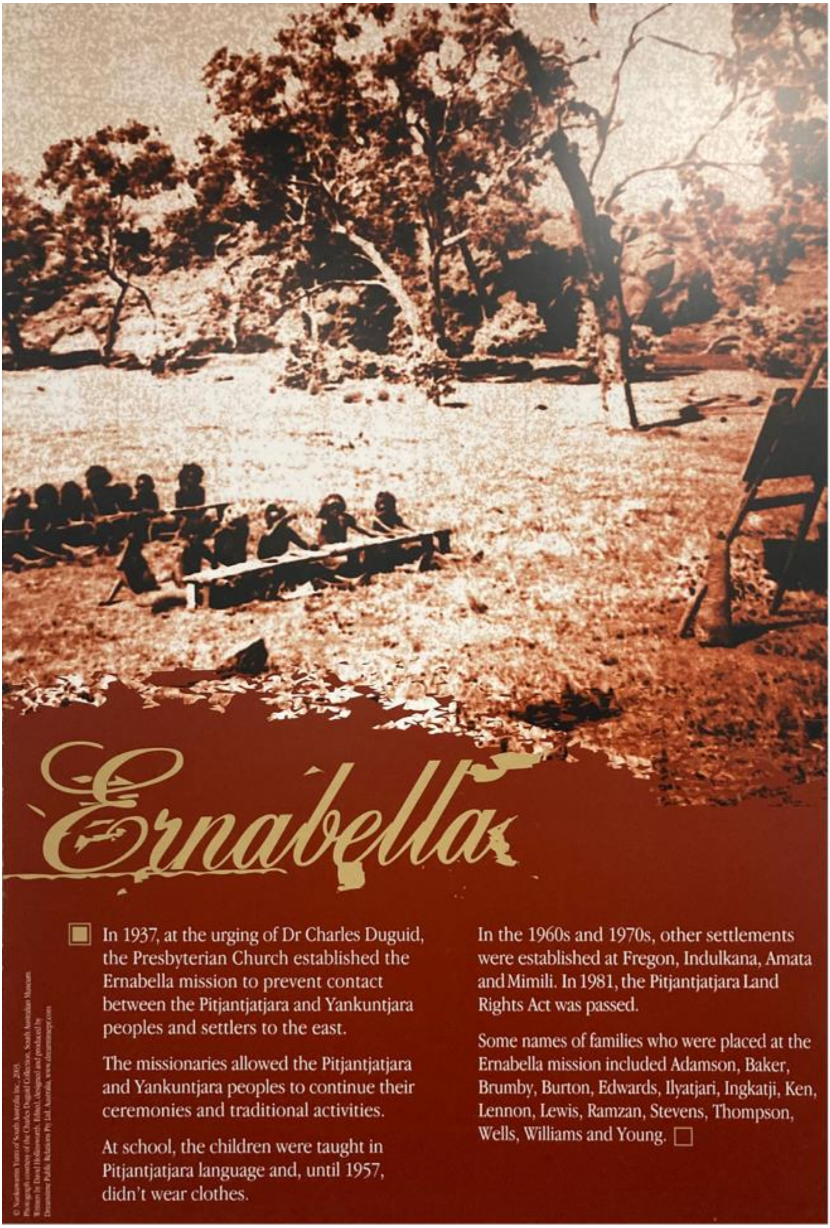
Nepabunna

In the 1850s, pastoralists assumed control of stations in the north Flinders Ranges, dispossessing the Adnyamathanha people, who then became dependent on the pastoralists for work and rations.

By the 1920s, there were no secure camping places left, so the United Aborigines Mission negotiated a small excision at the Nepabunna waterhole. Despite pressure from missionaries to abandon them, some Adnyamathanha people maintained their ceremonies into the late 1940s.

The mission provided a sanctuary in an area of intense non-Aboriginal activity and kept the people in contact with their land. In 1966, the community requested that the State Government replace the mission, which it did in 1972. In 1977, the Nepabunna Council assumed control of the mission.

Some families living at the Nepabunna mission included Austin, Brady, Clarke, Coulthard, Elliott, Forbes, Jackson, Johnson, McKenzie, Pondie, Ryan, Stubbs and Wilton.


Ernabella
In 1937, at the urging of Dr Charles Duguid, the Presbyterian Church established the Ernabella mission to prevent contact between the Pitjantjatjara and Yankuntjara peoples and settlers to the east.
The missionaries allowed the Pitjantjatjara and Yankuntjara peoples to continue their ceremonies and traditional activities.
At school, the children were taught in Pitjantjatjara language and, until 1957, didn't wear clothes.
In the 1960s and 1970s, other settlements were established at Fregon, Indulkana, Amata and Mimili. In 1981, the Pitjantjatjara Land Rights Act was passed.
Some names of families who were placed at the Ernabella mission included Adamson, Baker, Brumby, Burton, Edwards, Ilyatjari, Ingkatji, Ken, Lennon, Lewis, Ramzan, Stevens, Thompson, Wells, Williams and Young.

Endnotes

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[xxxvii] McLachlan (2022).
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[xxxix] COAG Health Council (2017).
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[xlii] Kealy-Bateman, Gorman & Carroll (2021).
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[xlvii] Butcher, Day, Miles, Kidd, & Stanton (2020).
[xlviii] Lowitja Institute (2020).
[xlix] Tauri, 2017).
[l] Blagg et al. (2015 p.3).
[li] See https://www.natureofsa.org/1-aboriginal
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[cxl] *Bugmy v The Queen* (2013) 249 CLR 571.
[cxli] see publicdefenders.nsw.gov.au/barbook/
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[cxliii] McLachlan (2022).
[cxliv] *R v Pennington* [2015] SASCFC 98.
[cxlv] Yalata community was a sheep station on the coast, 200 km west of Ceduna set up in the 1950s as a repository for the southern Pitjantjatjarra people, brought out of the desert to make way for the Maralinga bomb tests. Since the mid-70s, alcohol abuse had been endemic in the community following the opening of the Nundroo Roadhouse. Refer to Palmer and Brady (1984).
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[cxlvii] *R v Pennington* [2015] SASCFC 98, [26-29].

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[cxlix] *R v Hughes; R v Rigney-Brown* [2016] SASCFC 126.
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