

Koori Court Victoria – Magistrates Court (Koori Court) Act 2002*

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The introduction of Koori Courts in Victoria pursuant to the Magistrates Court (Koori Court) Act 2002 has not been without its detractors and like all change, is attended by controversies. Steps which attempt to ‘move the law along’ (as if she were an old bag lady), are often seen as a threat to the legitimacy of the legal system. Before we even commenced sitting at Shepparton by the Bayunga or Koriella river, known to non-Aboriginal people as the Goulburn, our regional Koori court was the subject of criticism with members of the legal profession commenting that Aboriginal people would not be able to find their way to the court, or that they would ‘go walkabout’ on the day of the hearing (Herald Sun 6/5/2002).¹ This early criticism was met by much positive commentary (The Age October 2002).² Nevertheless criticism continued, when a senior member of the Victorian bar, citing the establishing Act incorrectly, suggested that the Koori Court ‘tipped the scales’ and provided ‘luxury’ or ‘special’ courts and some ill-defined special regime of sentencing options (Galbally, Herald Sun 13/3/2003).³ He also contrasted the banning of Father Christmas from child-minding centres with the Koori Court initiative. The Victorian Attorney General, Rob Hulls then lambasted the ‘impaired logic’ which underpinned this commentary (Herald Sun 14/3/2003).⁴ It is timely to put the controversy and distractions to one side and start seriously considering what we do in the Koori Court in Victoria.

Victorian Koori Courts have not been established in a vacuum. Neither have they been imposed as a matter of inflexible government policy oversights by administrators concerned about ‘control’, as has historically been the case when colonial administrations imposed law via ‘native courts’ (Adewoye 1977; Auty 2000; Washburn 1971/1995).⁵ These courts have their genesis in Aboriginal people’s aspirations for a place in the legal system as *other* than defendants, which aspirations have developed from Aboriginal people’s increasing role in other legal or quasi-legal inquiries and litigation such as the RCIADIC, the stolen generations investigations, and native title cases. Indigenous people are weary of, and are sloughing off, their status of imposed contingency at the periphery, which somehow runs parallel to, and in spite of, their centrality to the ‘post-colonial’ law project. Oppositional storytellers and ‘outsiders’, to use critical race scholar Richard Delgado’s descriptors, want their place in the narrative recognised (Delgado 1984).⁶ The impetus for some form of change is intimately connected to the deliberations, community conferencing, and emphasis on ‘underlying issues’ which developed during, and typified the reporting of, the RCIADIC and the Bringing Them Home Report, notwithstanding the many criticisms which have been made of the processes adopted by these inquiries.

Additionally, the ‘idea’ of Koori Courts has developed in a parallel dimension incorporating justice agencies, lawyers and the judiciary in spite of our reputed conservatism and fear of risking status, reputations, and legitimacy (Schubert et al 2002: 190).⁷ Increasingly, lawyers and judicial officers are becoming exposed to the need for theoretical jurisprudential innovations in respect of Aboriginal defendants and Aboriginal witnesses (Mildren 1997; Coldrey and Vincent 1980, Coldrey 1987; McCorquodale 1987, QldCJC 1996).⁸ Further, once culture is recognised as intruding into otherwise formulaic legal spheres those *in* the law cannot but be open to the *possibility* that the law has its own cultures and is, as Derrida says, inherently open to deconstruction (Derrida 1990).⁹ Attentive listening to outsiders potentially destabilises

* The views expressed in this paper are those of the authors and should not be attributed to the Court.

seemingly immobile or intransigent legal systems, as, we increasingly discover, boundaries are never impregnable.

So, for a number of reasons, some more compelling than others, the ‘climate’ might be milder for changes in how we ‘do’ the law relating to Aboriginal people, at least at the summary level where it may be less ‘risky’ to do so.

The change we speak of not only emanates from many different sources but can be reflected in many different ways. It is important to ensure that symbolism and mechanics are married for the greatest effect. In developing the Koori Court the Victorian Magistrates Court has recognised this.

Symbolism

Symbolic actions

Symbolic steps towards reconciliation and the delivery of RCIADIC recommendations in the courts started before the Koori Courts were sanctioned by government policy. For some, these overt symbolic steps were underpinned by a desire to become more inclusive of Aboriginal concerns in the legal system and the courts and to recognise that native title claims had changed forever the legal landscape in the south east, even if such claims were to prove unsuccessful in the courts.

Tentative discussions were commenced in early 2000 about the need for the Victorian Magistrates Court to employ an Aboriginal *Cultural* Liaison Officer whose function would be to advise magistrates about services available, co-ordinate service provision for initial hearings, respond to urgent ‘in custody’ concerns, and liaise with other courts services; but ultimately, most significantly and most sensitively, provide advice about cultural concerns and about the complexities of cross cultural communication (Saville-Troike 2003),¹⁰ a problem which impacts not just upon exchanges between the non-Indigenous bench and Indigenous people (Eades 1992a, 1992b, 1993, 1995)¹¹ but also between the defendant and his or her legal counsel (see for instance the Queensland case of R v Robyn Kina (1993)). The creation of this position is discussed below.

Victorian magistrates courts at Melbourne, Shepparton, Bendigo and Moe held ceremonial reconciliation sittings in Reconciliation Week in June 2000. The Melbourne sitting involved the display of the Aboriginal flag on the bench, and the symbolic delivery of an Apology and Deed of Commitment to Joy Wandin-Murphy, a senior Wurundjeri woman upon whose country the Melbourne Magistrates Court is sited.¹² Many members of the Victorian Aboriginal community were invited to the Melbourne sitting and many Wurundjeri, Gundijmara, Bangerang and Yorta Yorta people attended, some travelling long distances to do so. One senior Aboriginal woman later commented that she was unable to speak at the ceremony as she was too choked with emotion. Non-Aboriginal participants included many senior and junior members of the Victorian Bar and legal practitioners, and the Victorian Bar Council and the Law Institute of Victoria sent senior representatives. One Supreme Court justice attended and later remarked that draping the Aboriginal flag from the bench was the most positive use of a flag in a court that he had ever seen. Other senior judicial officers regretted their inability to attend due to sitting obligations. The Victorian Attorney General and Minister for Aboriginal Affairs attended. Notwithstanding the relatively short notice of the sitting, court one, which is the largest courtroom in the complex, was filled to overflowing. Barristers were standing in the dock, all seating was taken, the aisles were full, the crowd was two and three deep in some places, and the door of the court was kept open to provide an ‘ear’ for those outside. The faces of senior Aboriginal men and women dotted

the seated crowd. Magistrates who wished to attend were seated in front of the bar table facing towards the crowd. The then Chief Magistrate Michael Adams invited Joy Wandin-Murphy to the bench from where she delivered her response. One magistrate obtained and the court framed the Herald Sun banner 'Court delivers historic apology' which was informally presented to a senior Yorta Yorta women for display at the Echuca Aboriginal Keeping Place in Yorta Yorta country on the Tongala river, a river which we now call the Murray.

Since that time the Melbourne Children's Court, and Victorian County Court and Supreme Court have conducted ceremonial openings and commemorations involving senior Wurundjeri people. The opening of the Koori Court in Shepparton was also attended by many Yorta Yorta and Bangerang people. A smoking ceremony conducted by senior Yorta Yorta man, uncle Wally Cooper, preceded the formal opening conducted by the Attorney General. As an indication of the broad support for the Koori Court those who attended this opening included local, federal and state politicians; local council representatives, including the mayor and CEO; local non-Aboriginal members of the Shepparton and Euroa Reconciliation Groups; non-Aboriginal people who work in various government departments in justice and other areas; and local and more senior police, including police from regions where the establishment of a Koori court is being considered. Local legal practitioners and their staff attended as did the Victorian Legal Aid and Aboriginal Legal Service personnel. Again, the foyer of our court was filled. A local press reporter attended the opening and, having since attended a number of sittings, she has remarked that even she finds the court less intimidating, an innovation which she welcomes. The Broadmeadows Koori Court has also recently been opened with similar ceremony and an equally broad range of participants.

Symbolic Dialogue

Aboriginal communities and individuals have been quietly pro-active in generating dialogue and debate about how justice can be 'done better' for those on the periphery. Discussions with those in the law started somewhat tentatively, and have for the most part remained within small compass, mostly connected through Aboriginal agencies operating in the law. Individual Aboriginal people and Aboriginal Co-operatives and service providers have opened channels of communication with the courts, legal practitioners external to Aboriginal Legal Services, and even police prosecutors, sometimes drawing upon personal acquaintance or chance meetings at, say, sporting carnivals.

And, just as Aboriginal people have initiated contacts, so too has the court. The traffic is two-way. In the Shepparton Magistrates Court we have, in the last two years, started to develop an open door policy for senior Aboriginal people and service providers. Aboriginal people have been asked to regard the court as open to them as 'court users', just as it is the court of other groups, such as the Victim's Referral Service. Aboriginal people wishing to discuss law reform issues and particular projects from crisis housing proposals¹³ to large scale complexes, family group conferencing, employment projects, drug and alcohol service provision via such innovations as the Koori Night Patrol have attended meetings which both they and the court have established. Magistrates and some registrars have attended co-operatives to discuss programs and specific or general projects, including the flag raising which accompanies NAIDOC week. This dialogue promotes respectful exchanges, and we are told, enhances community decision-making, augments respect for family structures, discourages youth offending and advances authoritative recognition of an Indigenous 'community code of conduct' which sanctions offending and anti-social conduct. The court, judicial officers and registrars are thereby becoming informed about previously opaque Indigenous community concerns and being drawn into the discussion of potential remedies. The court at Shepparton will generally be apprised of Aboriginal projects in the region even if these projects are outside the scope of narrow legal issues. The success of this

relationship reflects a willingness on the part of all of the court staff to expand their engagement with Indigenous people.

We, as a community of local legal personnel advance this dialogue in both formal and informal ways. And, situated as we are in our localities we learn that small scale local solutions have a greater potential to remedy local problems. For instance, the Shepparton Koori night patrol in 2001-2002 reduced street offending arrest rates by 37% within two months of its commencement. This is an impressive achievement when one considers that in the calendar year 2000-2001 the rate of charging of Aboriginal people in Victoria increased by 16% and in Shepparton alone the increase was 12.4% (statistics provided by Victoria Police). Asking young people who came before the court about their use of this patrol it is encouraging to hear that 'waiting for the bus' is commonplace. The police prosecutor recently trained with Indigenous footballers - even though he is an umpire.

Summary

These symbolic efforts and the development of dialogue, is suggestive of a relationship of co-operation and trust developing between the courts and the respected and senior members of the Aboriginal community. The steps we have taken are small but each involves 'risk' for all the parties. The preparedness to take those risks is significant, particularly as there is no personal *quid pro quo*. The benefits are for the community – both legal and extra-legal.

The innovations discussed above were under-way before structural or mechanical changes were undertaken as a function of a more formal discussion between tiers of government and Aboriginal people. These more formal discussions, at some remove from the 'grass roots', have, in the main, led to legislative and other innovations which concluded in the establishment of the Koori Courts.

Mechanics

The Aboriginal Justice Agreement

The *Justice Agreement* presented the Magistrates Court of Victoria with three distinct functions. These were, firstly, the establishment of an Aboriginal Liaison Officer position to be sited in the court; secondly, participation in the training of Aboriginal Bail Justices; and thirdly, in collaboration with the Aboriginal community to develop and then commence to operate a Koori Court.

Each of these initiatives is intended to encourage meaningful access to the law for indigenous people who have been, one might argue, paradoxically marginalised, in spite of their intimate connection with the multifaceted operations of the imposed legal system.¹⁴ The first two initiatives were undertaken with relatively little further debate about how and when this might occur.

Aboriginal Liaison Officer

The implementation of this initiative departed but little from the ordinary course of employing staff in a large organisation. The innovation was in the position itself not in the manner of filling it. Advertisements were placed and applications taken, interviews conducted and an appointment made. The court filled the position in consultation with the Department of Justice Aboriginal Policy Unit.

Although the title excludes the word 'cultural', included in the court's original, pre-Agreement, proposal, the duties of the appointee do include the need to consider the cultural concerns of south eastern Aboriginal people in their dealings with the legal system and courts in particular.. One officer covers the whole state, and the current incumbent is male. In discussions about the

position Aboriginal people have advised that the appointment of a female ALO is also necessary. It is suggested that a woman officer would be more readily able to deal with some Aboriginal women defendants and the issues which might be particular to women's cases. The statistics, approximate as they are, suggest an increasing number of young Aboriginal women are entering the legal system as defendants (The Age 21/3/2003 p 11).¹⁵ Young women present with different and difficult issues which are often, as with many Aboriginal defendants, embedded in the fabric of their families, who continue to struggle with the legacy of the stolen generations and colonialism more generally. The recent appointment of an Aboriginal women's mentoring co-ordinator and a panel of Aboriginal women mentors by the Office of Corrections addresses some problems associated with this increased rate of exposure, but the difficulty is that mentors are not 'front end' positions, the expectation being that a mentor will be in contact with female defendants after they are placed on community based orders.

The ALO is accountable to the court but provides advocacy and advice, and assists in bail and other hearings, often in a collaborative fashion with other 'parallel service' court employees who are generally situated in Melbourne. The ALO is expected to make connections for the court with health and other service providers about which the court or judicial officer might not be aware. Although attached to the Magistrates Court the ALO has already been called upon to provide assistance to superior courts. Cultural awareness seminars for magistrates have been organised by the ALO, and he has continued to connect the court to various Aboriginal community activities, including NAIDOC week celebrations.

An individual does not change the culture of an organisation, as organisations 'think' in much more complex and capillary ways that singularly and laterally, but the creation of this position provides one of a number of hooks for other initiatives. The second initiative, that of training Aboriginal Bail Justices, does considerably more to (re)populate the landscape in and out of the courts with Indigenous participants but the ALO position provided an important commencement point for introducing Aboriginal people into the court's structures.

Bail justices

The first trial operations of the new committee structure of Regional Aboriginal Justice Agreement Committees (RAJACs), reference groups and government agency working parties, and the means by which they fitted into and informed the partnership between the Aboriginal community and the courts, was in the achievement of a successful Aboriginal Bail Justice Program.

The Aboriginal Bail Justices Training Program was developed after consultation with the Department of Justice Aboriginal policy unit, the University of Melbourne Institute of Criminology, and local Aboriginal communities, importantly including the members of Regional Aboriginal Justice Agreement Committees. The Victorian Magistrates court State Training Office, which trains non-Aboriginal Bail Justices, developed and conducted the training program in consultation with these committees, working parties and Magistrates. This was an innovation for the court as the program had previously been virtually stand-alone.

The delivery of the program has already been evaluated by Lisa Rasmussen who was brought in to the training process as a facilitator and rapporteur.¹⁶ In evaluating the program Aboriginal people were asked to comment about the experience. Comments made by the Aboriginal participants included the following –

*[I gained] a better understanding of the justice system.
I now have a wider knowledge of the law compared to what I knew.*

*[I now have] a better understanding about how the justice system seeks to make access use easier for Kooris – Something I [had] always thought negatively about.
I have more respect for the law, before I didn't.
Having touched on the Justice System, I would like to learn more so I can help my people to understand the legal system and how it affects us all.
[I gained] the confidence to talk to officials.
[The course] creates empowerment for the community.
We are going through a new era in legal issues and it's a good opportunity to have more Koories involved.*

The first intake resulted in 12 appointments and there has now been a second intake where 9 Aboriginal people underwent the training program. This is the first time this state has had any Aboriginal Bail Justices although there have previously been a few Aboriginal Justices of the Peace.

To get to this level of involvement the training program was extensively advertised in the Aboriginal community. Individual approaches were made to particular individuals who might have an interest in the program. An information session was followed up with course delivery. The 'mainstream' course material was augmented with additional material to break down barriers and reduce unfamiliarity with the structures of the legal system. The delivery of this material reflected the fact that Aboriginal people were less likely to have post secondary education and that this might provide people with a significant disincentive to undertake the training. The additional course material will now, as a result of the success of the program, be adopted in part when training non-Indigenous applicants. Apart from incorporating innovations in pedagogical approaches, the course was also modified to incorporate cultural concerns. There was discussion of the problems associated with conflicts of interest, the potential impact of family connections, and ethical concerns about perceived intra-Aboriginal community bias and reasons for disqualification were incorporated and discussed at the behest of the Indigenous applicants.

Those who sat the examination and completed the role plays successfully were appointed to act as bail justices in matters involving both Indigenous and non-Indigenous people. Successful applicants have now joined the list of Bail Justices rostered for after-hours bail applications. Some of those who completed the first course helped to deliver the second. Each of the training programs involved extensive discussion and non-confrontational interrogation. Each included an understanding that 'education' for outsiders is not best undertaken by means of the 'banking'¹⁷ or accumulation of facts as if they were 'knowledge'. Greater emphasis was placed on delivering the course through 'narrative' which is more collaborative and non-hierarchical. More could be done to develop this means of educating Indigenous people for roles in the legal system, but it is important to recognise that a start was made in the first of these programs and that the second group to undertake the course benefited from the work done with the first intake.

Koori Court

The Koori Court legislation is the creature of the *Victorian Aboriginal Justice Agreement* which both the Aboriginal community and the government adopted in May 2000. The establishment of Koori Courts was recommended in the Agreement and legislation formalises the process (2002).

The stated objectives of the court are to redress the over-representation of Aboriginal people in the criminal justice system; to reduce rates of re-offending amongst Aboriginal people; to decrease rates of non appearance at court which has the effect of reducing bail opportunities; and, to have a positive impact upon the lives of those who appear before the court. Given the emphasis on 'slowing' Indigenous people's entry rates into the criminal law operations of the

legal system the Koori Court initiative could be seen as a ‘therapeutic jurisprudence’ initiative in that it is intended to both effect, and culturally ameliorate, the application of existing laws and also act as a ‘preventative’ to involvement with the legal system (Stolle et al 2000).¹⁸ One non-explicit objective is that of enhancing the prestige of Indigenous respected persons and elders in both the Indigenous and non-Indigenous communities. This may ultimately be one of the unintended, but highly significant consequences, of the establishment of the Koori Court, furthering, in some respects, that which was commenced by the appointment of Aboriginal Bail Justices.

The Koori Court proposal was presented in skeletal frame in the Agreement as a function of discussion about how to give effect to the RCIADIC recommendations which treated with the desire to reduce imprisonment rates and slow the rate of entry of Aboriginal people into the criminal justice system. Extensive consultation and negotiation took place with and between Indigenous people, groups, and various levels of government and service providers, including, the Victorian Aboriginal Legal Service and other Aboriginal service organisations and co-operatives, the magistrates court, Department of Justice, Office of Corrections and Victoria Police. The development of the model and the means to deliver the training to elders and others involved in the courts was undertaken in a fairly unique fashion, as follows.

It was always possible that the Shepparton court would be the first or one of the first Koori Courts, and for this reason considerable discussion was undertaken with the formal and informal Aboriginal networks already built around other programs and projects. Discussions were held with health workers, with service group co-ordinators, with those working in the juvenile justice field and with Aboriginal friends. Any opportunity to talk to groups such as the Shepparton and Euroa Reconciliation Groups, the Tatura Business Women’s group, the Women of Euroa, North east Victoria Young Lawyers, were accepted by the Co-ordinating Magistrate, and the Koori Court proposal, issues of equity and discrimination, and access to justice were taken up providing opportunities where people could ask questions about how the system would operate and why it was perceived to be necessary. Careful attention was given to ensuring that the general public had the proposal explained to them. In-services for lawyers, court user groups, and court staff were and continue to be held at the behest of individual local legal practitioners and the Aboriginal Justice Officer. Opposition to the proposal on the basis outlined by David Galbally, that it should be available for Macedonians and Turks etc, has evaporated in some quarters where such views were plainly problematic. And, opposition to the proposal amongst Aboriginal people in the region has also evaporated as a result of these discussions and, in some instances, participant observation from the floor of the court.

At the conclusion of these initial negotiations other bodies/committees were established and, at various levels, charged with the delivery of the terms of the Agreement all of which were oversighted by the Aboriginal Issues Unit of the Department of Justice, headed up by a senior Yorta Yorta man who is a public servant. These layers of agencies included a high level interdepartmental Aboriginal Justice forum; an Aboriginal justice agreement working party (ie similar to that established for the Aboriginal Bail Justices project); departmental committees; and, the agencies most connected to the local and regional Aboriginal communities - the statewide RAJACs comprised of local Aboriginal co-operative members, local police, office of corrections staff, and a local magistrate.

To facilitate the establishment of the Koori Courts reference groups were formed and co-ordinated initially through Shepparton and then Broadmeadows courts after a statewide RAJAC meeting determined that these would be the sites of the pilot Koori Courts. These reference groups were convened after hours in the courts, with the organisational assistance of the court

staff, and they drew into the frame local victims support groups, police, solicitors, and Aboriginal people from the RAJAC, the Aboriginal Legal Service, the Aboriginal Co-operative and Aboriginal Community Justice Panel members. The regional RAJAC continued to meet and discuss overarching concerns while the reference groups worked on developing the court process.

Although seemingly bureaucratic and hierarchical this network of committees has worked effectively to achieve the goals set in the Agreement. Success has been achieved because grass roots Aboriginal people and their community organisations were actively included, and included themselves, in all discussions. The sophistication Aboriginal people have developed over the years in their dealings with government agencies and initiatives was exploited to good effect by Aboriginal people and their agencies in embracing the initiative. Further, the notion that the initiatives were community owned was not only not discouraged nor actively encouraged by those non-Aboriginal people and agencies involved, but, rather, simply treated as a 'fact'. Previously powerful players attempted not to adopt paternalist positions because the parties involved in the meeting and discussion process were too acutely aware of the problems of agenda-capture and too vigilant to allow this to happen. In some respects the conservative politeness and hypersensitivity of local solicitors and senior police to the need not to patronise or assume control also promoted evenhandedness in the process. To some extent it might also be argued that no one wanted to capture the agenda because the Koori Court was 'risky business' and no one really wanted to control the process in the event it might comprehensively and flamboyantly fail. Finally, there was genuine good will to establish the court because people, including police, justice agencies and court staff, thought the problems too significant and the issue 'too important'. Motivations for all participants varied and for those Aboriginal people involved the primary impulse was expressed again and again as the 'future of our kids'. Such concern caused even those who might dispute other issues within the community to work together for solutions. Most importantly, however, from the point of view of the court, was the fact that those who volunteered to act as elders and respected persons attached to the court did so with real determination in spite of some insipient sniping and in defiance of the doomsayers. As the project unfolded it became apparent that a certain confidence about the court developed separate from government agency pushing or pulling. And, finally, it may be that those Aboriginal people involved drew a new confidence from the exposure of the stolen generations policies which meant that people could explain some of what happened to their families as the outcomes of such government policies, not personal idiosyncrasies and 'shortcomings', and they could do so with confidence.

This combination of factors positioned the committee and reference group comfortably and interactively. Mindful that the foregoing is not an analysis of why the committee structure seems to have worked at this early stage it is important to note that our mechanical processes seem to have avoided some of the pitfalls outlined in studies of 'development praxis/discourse' (Porter, Allen and Thompson 1991; Escobar 1995; Croll and Parkin 1992).¹⁹ This can be explained superficially as local solutions for local problems, and as bottom up not top down processes.

The working model for the Koori Court, developed in the formal conferencing process, was taken back to Aboriginal communities through their RAJACs and through informal discussions which our court held with local Aboriginal co-operatives. In Shepparton the local co-operative organised a discussion with the elders group and the proposal was discussed over one morning. Local bureaucrats in corrections and juvenile justice were also canvassed for their views and had the proposal explained to them in small group meetings both in the court and in their offices. Models which had been suggested but rejected, such as the circle sentencing format adopted in First Nations countries (and in Nowra NSW), were also discussed and parties advised of the reasons for rejection. Even the site of the proposed court was discussed at the local level and the

legal constraints imposed upon us as a court were explained as reasons for why the court should remain in the current courthouse. Siting the court at a co-operative was rejected because of the court's obligation to tape-record hearings which would prove difficult at any other site. There were also concerns expressed about maintaining the court as a forum open to the scrutiny of the broader community.

This working model was extensively workshopped in the RAJACs and in a forum developed to include the executive officers of the RAJACs and the indigenous unit of the Department of Justice. The Department of Justice took the proposed Koori court model back to community committees twice for further refinement and discussion.

The model

The current working model will be evaluated after two years of operation. The court will hear only guilty pleas. Each case which comes before the Koori Court will, in the initial stages at least, have gone through the mention system, and each Indigenous defendant will be explicitly asked to elect to proceed before the Koori court. At the insistence of Aboriginal negotiators and community groups matters involving sexual assaults and breaches of intervention orders are beyond jurisdiction in the pilot years. Interestingly, at a recent forum about the Queensland proposal for a Murri court in Brisbane, concerns of one forum participant evaporated when advised these two types of offending were excluded.

The magistrate retains the ultimate power and discretion about the sentence imposed, subject to commentaries from the elder or respected person at the hearing. Indigenous people's concerns about payback for sentences of imprisonment was one of the considerations which led to this decision. Sentencing options remain exactly the same for both the Koori court and the 'mainstream' matters. Whilst the court has a strong philosophical commitment to using alternatives to imprisonment, such sentences remain an option, as a last resort, just as is the case for non-Aboriginal defendants. One elder or respected person sits with the magistrate in each case but at this stage we are retaining two elders at each hearing to provide for alternative benches in the event of a conflict of interest.

The court is mandated to adopt informal processes but not abandon the principles of natural justice. To fulfil these statutory obligations the court convenes around an oval bar table at which all parties sit. Formalities such as standing and bowing are dispensed with. The clerk of courts may sit at the bar table with all the other participants.

The court does not formally extend its jurisdiction to Children's Court matters, but if youths and family members request the case proceed in the Koori courtroom with elders and community members present this is accommodated. A number of Children's Court matters have been dealt with in this fashion. One young person has re-attended the court a number of times, but not for new matters, and been asked to volunteer progress reports which he has done, initially appearing quite reserved, but latterly with alacrity.

Personnel

Elders or respected persons

The changes to court personnel include the incorporation of Aboriginal elders or respected persons who take a position on the bench and engage in the hearing process with the magistrate. One elder or respected person sits on each case, but as it is our current practice to ask two elders to assist the court each day, and both sit at the bar table on either side of the magistrate.

The elders and respected persons undertook a training course similar to that provided for the Aboriginal bail justices. The course was delivered in the Shepparton region and in a narrative and collaborative manner. Those who participated were introduced to procedural matters, relevant legislation, and their responsibilities. As with the Aboriginal bail justice training package role plays and general discussion answering queries formed a significant part of the process. The local prosecutor, the magistrate and the senior registrar at the court took the participants through the role plays. The University of Melbourne criminology department was engaged to produce materials and deliver the formal legal component in a culturally appropriate way. On the day the program commenced the Aboriginal Justice Officer commenced employment with the court, attending the training program with the elders and respected persons.

Over the final day of the training program the local police prosecution service and court staff undertook a cultural awareness training course. The senior prosecutor regarded the training program as stimulating, informative and challenging. He was exposed to considerable interrogation by the elders and respected persons about the police service, its obligations and its perceived shortcomings. A very useful exchange of views took place between all parties and the understanding of the role of the court for everyone engaged in its operations was much clearer. Although there has been no formal evaluation of the training program it is conceivable that the participants gained insights into the legal system similar to those of the Aboriginal bail justices as outlined above.

Aboriginal Justice Officer

The Aboriginal justice officer position is another novel position in the court structure. The AJO is a court employee who sits with, and as a part of, the court. In Shepparton the AJO advises the bench before, during and after court cases. He makes his own inquiries about matters, which inquiries are located in and intimately connected to the Aboriginal community in the region. Local community services, including non-Aboriginal groups, are drawn into the court process by the AJO. He confers with the defendant and his or her solicitor; and discusses matters with the local police and the Office of Corrections staff. The AJO and the court's forensic psychiatric liaison officer share office space to facilitate collaboration in the court environment about matters as diverse as mental health, residential programs, drug and alcohol rehabilitation and social and cultural concerns. They work collaboratively to discuss rehabilitation options in consultation with other justice bureaucracies. The office of the AJO, situated in the library of the court, conducts an open door policy and court staff can often be found directing people to the AJO room. Frequently community consultations are undertaken there with those from local co-operatives and the community more generally and the AJO is effectively on call to attend community meetings and discussions about various matters of concern.

The AJO has a paralegal and outreach role and is actively involved in gaining feedback from the local community about the operations of the court. The role of the AJO includes roster co-ordination of the elders and respected persons who attend court. Local knowledge of the Yorta Yorta and Bangerang communities ensures a specialist understanding of the potential for conflicts of interest. Negotiations with the Aboriginal Legal Service, organisation of court lists and extended family attendances at hearings, further extends the position, as does liaison with the Sheriff's office about outstanding fines. The AJO has a role in speaking to those involved in disability and child and adolescent mental health service, the Thomas Embling Psychiatric Prison and community health services. An early AJO (Shepparton) report provides some insight into how the position commenced and the potential inherent in the position -

... the opportunity and encouragement for people to participate has really given our community a sense of control and ownership about issues over which we had little say before. This gives us hope ... the chance to achieve goals ... [and] ... address and push

boundaries on other issues ... [which] ...in some way or another impact on the community (Daniel Briggs Report on Operations - 6/11/2002).

The AJO position is unique in that the role involves considerable connection with the defendant additional to his or her engagement with the solicitor instructed. The AJO has commenced a process of developing a case history about a defendant in consultation with family, solicitors and defendants themselves. The innovation involved in incorporating an Indigenous person in the court processes as a specialist results in a greater level of understanding about some matters particular to the local Aboriginal community and defendants.

The site and space

In Shepparton one small court conducive to the atmosphere which we wanted to create has been refurbished for the Koori Court. This was done in consultation with senior Aboriginal people. We discussed the layout of the room and the furnishings and the court room is now lined with the Aboriginal, the Torres Strait Islander and the Australian flags and displays of local Aboriginal people's art work. The prosecutor has remarked that there is a signal power in the display of the Koori flag which is eye catching upon entry into the hearing room. A number of people have expressed interest in the other flag, not being aware that it is the Torres Strait Islands ensign. Inquiries were initially made by a visiting non-Aboriginal judicial officer about how the Australian flag came to be displayed in the court. It is there at the request of the elders who were involved in the design, and no one thought to exclude it.

All parties assume a place at the oval bar table which has been specially fitted to provide for the connection of the court computer, a lap top which folds down out of view. The court room will continue to be used for cases in the ordinary jurisdictions, including VCAT and other tribunals. The interior is fixed and is not modified for these other jurisdictions.

Space is an important issue in the design of court rooms and it is notable that this court lacks any familiar ceremonial dimensions. Defendants sit opposite the elder or respected person and next to the Aboriginal Justice Worker or a family member (or members). The magistrate sits next to the elder or respected person. It is important that the defendant and elder sit opposite each other. We noticed in one hearing, where the defendant and elder were diagonally opposite each other, that the powerful dynamic which the face to face contact generates was watered down. In spite of the lack of the usual ceremonial or distancing dimensions there have been no 'security' problems in our court.

Since we commenced the court we have also been given a painting by a group of young men who are currently undertaking a job training scheme. This painting has been accepted as an exhibition piece but remains the property of the artists. The court has had the work framed.

The University of Melbourne Architecture faculty has requested Masters students attend the court and it is envisaged they will develop court interiors as part of their thesis requirements. Victoria University has also expressed interest in having Aboriginal and non-Aboriginal education students attend the court to view the operation of a hearing. Local schools have also requested permission to have their students attend as a bloc on sitting days. The size of the court room prohibits large numbers attending but the court staff are facilitating visits when they can.

Procedure

The first case is called by the clerk of courts. The magistrate and elder or respected person will usually already be at the bar table having entered and greeted the other people in the court room. The clerk does not ask the parties in the court to 'rise' – although we had to break the clerks of

this routine in the first few sittings! A brief informal discussion might take place between the parties in the court and at the bar table. The uniformed police prosecutor, who has volunteered for the position and who will alternate with the another prosecutor who is also keen to be involved, sits at the end of the table next to the Office of Corrections personnel. On the other side of the prosecutor is the defendant's lawyer - most often, but not always, the Victorian Aboriginal Legal service. The defendant sits next to the lawyer and is flanked by family, extended family or spouse or partner. Babies are not 'strangers' in the court. Other family members can sit at the bar table if there is space but they mostly find seating around the court room. The AJO sits between the family members and the respected person. The magistrate sits next to the respected person and the clerk of courts sits to the magistrate's left.

Defendants and their family members are welcomed to the bar table or the court room. Some have expressions of wary apprehension when they first enter the court and some seem quite shocked by the changed dynamics. Others who have been asked to come back on diversions or deferrals appear to be increasing in confidence at each sitting.

If no family are present the defendant will be asked if he or she wishes to have some time for them to attend, or elect some other party to sit with them. It has been rare to have a person attend without any family member. All the parties in the court then identify themselves. If people appear to have difficulty with this the magistrate can, and sometimes does, conduct the introductions. Elders and respected persons have been advised that if they wish to do so they should feel free to identify themselves as part of particular country and that acknowledgment of country is perfectly acceptable. The matter then proceeds with the defendant being asked if he or she is aware that the case is before the court as a plea of guilty. An affirmative answer results in the following procedure.

The magistrate will acknowledge country and pay respect to both Yorta Yorta and Bangerang people and also advise the defendant that the court was smoked before it was opened and that this was done to pay respect to Aboriginal culture. The police prosecutor will read the charges and provide a summary which might be a precise of the police summary or might be the complete text. The text is adopted by the lawyer for the defendant, and prior convictions, if there are any, are either read out, handed up, or again, precised. The lawyer will then provide an outline of the defendant's situation. The magistrate or respected person may interrupt and ask questions as this plea is proceeding. The AJO will then speak about the inquiries he has made and advise the court of other matters relevant to the defendant. He will also advise about the possibility of programs for the defendant and ask people in the court, say, the Community Health Worker, the Drug and Alcohol worker from the local Aboriginal co-operative, or housing or other workers, if they have some things they wish to tell the court. He will also invite family to speak if they wish to at this time. Some of these questions are also asked by the magistrate. As it is the intention to empower senior Aboriginal people and the AJO in this process we are developing our process as we increase our experience of running the court. The magistrate will then ask the elder or respected person if he or she wishes to say anything to the defendant. This may occur at this time.

Family members are then asked if they wish to comment and other members of the Aboriginal community who are seated in the court will also be asked if they wish to make a contribution to the hearing. Comment from the floor of the court occurs fairly regularly and could best be described as both supportive and also chastising. People stand or sit to make their comments. Sometimes people who wish to comment do not wait to be invited to speak. This is taken as an indication of the confidence parties are gaining about the procedure. On occasion people not generally comfortable with speaking have been reported as doing so in this forum. Sometimes people are halting or reticent, but if the court waits quietly even the most reserved people speak.²⁰

No one is made to speak if they do not wish to – and this includes the defendant. People in the court will generally refuse to speak if they feel they have a conflict. This is self-policed. Elders have disqualified themselves in cases where they feel they might compromise themselves or the court. If the prosecutor has arranged for a victim to attend at court he or she will also speak on invitation. The prosecutor has always advised the magistrate and the solicitor for the defendant if he intends to have a victim present.

The defendant is then asked to respond to the community and also whether he or she has anything to say to the elder by way of respect. Often a defendant will apologise and sometimes he or she is just silent and seemingly remorseful at this time. Those of us involved in the court have often been surprised about the depth of responses of defendants to their community, and the expressions of remorse or shame can be quite overwhelming, as can be acknowledgements of respect for those who have spoken. The fact that a senior community member knows an older relative of the defendant who disapproves of the conduct alleged, and says so, can be quite disarming for a defendant who would in the ‘mainstream’ court be able to remain anonymous and avoid family disapproval.

After these exchanges the elder is asked to speak to the defendant about the conduct before the court, the impact it has upon the community and victims, and the Indigenous Community Code of Conduct. If there are two elders sitting at the table, they might both be involved in talking to the defendant at this time. As an indication of the variety of responses, in one particular case, one elder shared a history of (remedied) alcohol abuse with a defendant whilst another spoke of ‘two laws’ – white and Aboriginal - and the need to comply with both.

On occasion a defendant is reminded that the offending has been committed in another person’s traditional country and that this demonstrates a lack of respect. Defendants are invariably reminded that they not only offend against the imposed law but also against the Aboriginal people whose country this is. If a defendant has driven a stolen car from Wurundgeri country, driven it through Tungerung country and into Bangerang and Yorta Yorta country and thereby offended all those people who adhere to a community code of conduct and cultural issues he may be reminded of this. Where a defendant acknowledges culture as a significant part of his or her life this has been picked up by people in the court and used as a means to remedy conduct by both supportive and chastising comments. In some respects this hearing process develops native title issues in that it certainly relocates defendants in ‘place’, reignites the importance of cultural connection, and recognises it in a non-judgemental fashion. It is remarkable to observe the power of the statement ‘I am Barkinji’ on a woman who appears otherwise disempowered by her particular circumstances.

The elder dealing with the case and the magistrate then confer about rehabilitation, community and family considerations and penalty at the bar table, audibly and openly. If there are orders already on foot the magistrate will ask the Office of Corrections if a report is necessary. If the matter is very complex; if there are outstanding matters; like unresolved or uncompleted drug rehabilitation; if there are housing concerns; if there are concerns about the defendant’s health circumstances that need time to clarify; the matter will be adjourned for further hearings or reports. If sentence is imposed on the day of hearing and it involves an order of some kind the defendant will have those requirements explained directly after the hearing as the court will stand the next matter down. Women who have appeared before the court have been connected with senior women mentors. Those who struggle with alcohol or drug issues are referred to services and given opportunities to engage in self motivated rehabilitation if they have previously failed to comply with formal orders. This reflects the view of many people involved with the court that a person has to personally desire change. If there are housing difficulties the AJO connects the

person or family members with service providers. We have recently been advised that the community health service worker who provides drug rehabilitation for younger people has noticed a marked improvement in demeanour of those referred to her by the Koori court compared with those referred through mainstream court.

The interest in the operations of the court is intense and many people and services have attended as observers. Interestingly, once parties have either attended the court or a discussion forum, interest increases in extending the process to 'mainstream'. Feedback on the Koori Court to date has been overwhelmingly positive. Some scepticism was expressed within the indigenous and non-indigenous communities about the possibility of the Koori Court providing a soft option Koori defendants, however, this has not been the experience of those who have attended the court.

One of the most notable points of feedback from defendants, as the magistrates have found, is that the defendants and their family members are very engaged with the process. They participate and 'have a say' in the hearing. People often acknowledge that the defendant, family and community would not be given the opportunity to participate in a mainstream court as occurs in the Koori Court.

Anecdotally it appears that defendants are benefiting from this exposure to the critical and also reinforcing comments of their elders and community members. We have already noticed a reduction in failures to appear. We have had one person send family members (plural) to the court to explain an absence due to attending an aunty in ill health interstate; adjourned a hearing upon receiving this advice; and then concluded the hearing on the subsequent date when the defendant and family attended. We have had two occasions when defendants have travelled from Sydney by bus and train to attend court, and more recently, a case where a defendant from out of town attended late after being let down by the person who was to provide transport as he had to wait to catch the bus to get to court. Reinforcing comments were made to these defendants by those elders and community members who attended court. We have adjourned hearings to allow defendants to continue with self initiated drug rehabilitation and been pleased to observe voluntary rehabilitation continuing and working. We have all been moved by some of the stories which have been told in the courtroom about homelessness, about the loneliness of being out of gaol and losing kids, about difficulties with substance abuse, and about incidents of self harm.

What is impressive about the court at this early stage is that many Aboriginal people have found their voice in it. We wait and take time, we invite rather than compel engagement, we back-track and re-enter dialogue from other places. We are listening to what we are told. We listen to aunties and uncles, to mothers of young babies, and to young men who have committed a criminal offence but who defer and show respect to their elders. Neither of the magistrates who sit in our court have formed the impression that a defendant has regarded the process as soft or humorous. On occasion a defendant who commenced the hearing in an off-hand fashion concluded it close to tears.

Equally as important as other aspects of the Koori court is the commitment from community agencies, service providers and individual members of the local community to attend Koori court. Their attendance enhances the Koori court's ability to put together meaningful sentencing options and strengthens the Koori court's status, credibility and relevance in the community.

Further education

Part of the process assumed by the court is the continuance of training and education about legal processes to elders and respected persons as we develop the model in practice. So far we have

held one in-service, three months into the operation of our court, in which we invited Indigenous mediators to speak about ADR; court staff to speak about intervention orders; and a member of VCAT to discuss residential tenancy litigation. At that in-service we also workshopped the Community Code of Conduct which is now routinely discussed with defendants in the hearing process. We propose to hold another in-service to continue debriefing about the operations of the court; discuss the Code of Conduct; and, we will be inviting the Equal Opportunity and the Health Services Commissions to speak about their functions and the services they provide. We will also be asking the Ombudsman to talk to the group at a later stage and we remain open to suggestions for other guest speakers.

Others

The Koori Court initiative is not isolated. South Australia has been operating Aboriginal sentencing Courts for about 2 years now in the metropolitan districts of Port Adelaide, Port Augusta, and Murray Bridge, with another planned for Ceduna. The model there is not the subject of legislation as is the case in Victoria but provides the template for culturally inclusive courts in southern and metropolitan regions. The SA model, whilst not formally evaluated, demonstrates that Aboriginal people are more willing to attend these courts reflected in a reduction in the number of people failing to appear – from 50% to 20%. This figure translates into a reduction of ‘failing to answer bail’ charges as prior convictions which lessens ‘flight’ risk opposition to bail applications. There is also anecdotal information that there has also been a reduction in breach rates in community orders.

Queensland has recently initiated a Murri court in Brisbane pursuant to the powers outlined in the Penalties and Sentences Act (section 9) which provides for community justice groups of Indigenous people to assist the court by advising at sentencing hearings.

The Magistrates Court at Nowra in NSW is conducting a circle sentencing court for serious recidivists. The philosophy behind circle sentencing is that prison sentences do not deter crime, prisons make people worse not better, and there is an essential imbalance in a procedure which excludes victims from expressing their views or concerns. Circle sentencing is described as a means to ‘restorative justice’ in that it provides for shared responsibility for resolving offending patterns. Informal community mechanisms can be of assistance in this process, and crime is conceived as an ‘injury’ not just an infraction against someone else’s ‘law’. The circle is said to reflect concern about community or holistic ‘health’ and attempts to make the offender more conscious of the impact of his or her actions. The model works towards re-integrative shaming but it is not without its detractors in North America and criticisms include the lack of informed consent to the process, the potential for sentencing disparity, the need for guidelines and procedures, the potential for power imbalances to result in injustices, the place for such models in urban settings, and the blurring of lines between social work and law enforcement.

Conclusion

It is only in comparatively recent times that the need for Indigenous culturally appropriate innovation in legal and court practices/culture has been recognised in the more closely occupied, southern, and metropolitan, parts of this country (Qld Criminal Justice Commission 1996; Cunneen, 2001, unpub). It is in these areas that we have persistently heard ‘there aren’t any Aborigines’. The more accurate position, which suggests the continuity of Aboriginal cultural norms and practices in the ‘south’, builds upon the pioneering work of linguists such as Diana Eades (1982, 1988) and Liberman (1985), and collections such as that by Ian Keen (1988) about Aboriginal people in ‘settled’ Australia, and is finding voice in the Koori Courts where culture and connection to country and place is still evident.

The Australian reconciliation movement has suggested a groundswell of support for the incorporation of Aboriginal people's knowledge, skills, values, cultural beliefs and practices into the dominant society's processes, practices and norms, of which the legal system is one. In establishing and running Koori Courts we are showing that we can embrace reconciliation and partnerships in diverse ways. These indigenous sentencing courts will encourage, from the inside, our imposed legal system to recognise the continuity of difference, the significance of kin, the meaning of sharing, and the methods by which this is culturally undertaken, and allow for attribution of appropriate weight to these factors when sentencing Aboriginal people. We are embarked upon a paradigm shift, blending disciplines and cultures in real partnerships which would have been unthinkable ten years ago.

In embarking on this journey we have started a debate about what it is we are doing - openly and in small circles. We have started to talk about how the 'culture' of our legal system and our courts need to change to more comprehensively serve a group in the community whose understanding of justice has always been, since colonisation, from the 'outside'. This discussion is still inchoate in that it takes time for us to understand that we are talking about our 'culture'. We are talking about taking risks with our processes and making ourselves vulnerable to both rational criticism and intemperate harangue. More than just the built environment of our small third court at the Shepparton is under scrutiny, and more than the shape of the bench is being changed.

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Endnotes

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- ¹³ Anglicare has just published a report that some 200,000 families are without adequate public housing, Aboriginal people are represented in this group (ABC radio news 20/3/2003).
- ¹⁴ The concept of an 'imposed legal system' has been discussed for a considerable time and extensively in legal anthropology, see for instance, the work of Laura Nader, 1969/1997, ed., *Law in Culture and Society*, Berkeley, University of California Press. The work of the subaltern studies school, convened through R. Guha also carries much commentary on the notion and associated issues. And for some recent discussions see the collection of essays by Olivia Harris, 1996, *Inside and outside the law. Anthropological studies of authority and ambiguity*, London, Routledge.
- ¹⁵ The Age reported the Human Rights and Equal Opportunity Commission statistics of 104 women in custody in 1991 and 307 in custody in 2001 (@ p 11).
- ¹⁶ See Lisa Rasmussen, 2001, *Aboriginal Bail Justice Initiative. Final Evaluation Report*, Draft
- ¹⁷ This is Paulo Freire's representation of the western model of education and the 'banking' model has long been rejected as appropriate to Indigenous people (Institute of Koorie Education, Deakin University, Geelong, Victoria).
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- ²⁰ Note the work of Muriel Saville-Troike (2003, *Ethnography of Communication*, Oxford, Blackwell Publishers), where she reports that interlocutors failed to wait for Navajo to engage simply because the length of culturally appropriate silence was 'too long' for the 'limit of tolerance' of the discussion leader (@ p 169).