

THE CHILDREN'S KOORI COURT IN VICTORIA¹

Introduction

Aboriginal Australians have suffered a long history of cultural displacement, trauma and grief, and social and economic disadvantage. The disadvantage is deeply entrenched and difficult to break from. Consistent with the position throughout Australia, Aboriginal Victorians² suffer more ill health than non- indigenous Australians, die at much younger ages, have lower levels of educational attainment and income, higher rates of unemployment and poorer housing conditions. Not surprisingly, the legacy of disadvantage plays out in the Children's Court with significant over-representation of Aboriginal families and children in our Family Division. If you are a child in an Aboriginal family, you are 12 times more likely to be on a child protection order than a child is in a non-Aboriginal family. Similarly, there is significant over-representation in our Criminal Division. An Aboriginal youth is 13 times more likely to be under some form of youth justice supervision.³ It is nearly 20 years since the 1991 report of the Royal Commission into Aboriginal Deaths in Custody highlighted the link between the over-representation of Aboriginal people in Australia's criminal justice systems and the high level of disadvantage suffered by Australia's Aboriginal population. The Royal Commission made it clear that any effective response to over-representation would need to address the underlying issues driving over-representation and, at the same time, reform specific programs and practices in the justice system. It emphasized the importance of engaging with, listening to and working with, Aboriginal communities.

¹ Koori is the collective term used by the Aboriginal peoples from the south east of Australia.

² Kooris make up 0.6% of the total Victorian population (30,141 people out of 5,000,000) and 6% of the total Australian Aboriginal population. Just half of the population is under 25 with more than one- third under 15. (See the 2006 Census).

³ See the Australian Institute of Health and Welfare report on "Juvenile Justice in Australia, 2006-07".

In recognition of the need to work together, members of the Victorian Government and representatives of Victorian Aboriginal communities entered into the Victorian Aboriginal Justice Agreement (VAJA) in May 2000.⁴ The agreement highlighted the importance of a partnership approach to reducing Aboriginal contact with the justice system, detailed an action plan and suggested strategic objectives for the delivery of “fair and equitable justice services.”

The agreement established the Aboriginal Justice Forum (AJF) with senior level membership from government, government agencies and courts together with the heads of Aboriginal agencies and the chairs of the more localized Regional Aboriginal Justice Advisory Committees (RAJACS).⁵

One project suggested for consideration in the agreement, and subsequently endorsed by the AJF, was the replication “with cultural adaptation” of the Nunga Magistrates’ Court in Port Adelaide, South Australia. The Nunga Court was developed in 1999 as a court where elders from the local community could speak directly to Aboriginal offenders during the sentencing hearing. One of the aims of this approach was to make the court process more meaningful for the offender.

AJF endorsement provided the impetus for the Department of Justice, Aboriginal communities and members of the Magistrates’ Court to work together on legislation to establish a Koori Court.

In his speech in support of the legislation for Victoria’s adult Koori Court, the Attorney-General, Rob Hulls, made it clear that one of the aims of the court was to address the over-representation of Aboriginal people in the criminal justice system. The government did not “pretend that the Koori Court is the only answer to address the alarming number of Aboriginal people represented within our justice system”. Rather, it was one part of a comprehensive package of services to support

⁴ It was updated in 2006.

⁵ The AJF is responsible for developing and endorsing particular Koori justice programs. The involvement of the RAJAC chairs ensures that matters come before the forum from all Aboriginal communities in Victoria. The AJF meets at least three times a year at different venues throughout Victoria.

Aboriginal offenders.⁶ The court would have an informal, accessible atmosphere to allow greater participation by the Aboriginal community in the court and sentencing process. This would reduce the intimidation and cultural alienation experienced by Aboriginal offenders under the mainstream system. It also reflected the view that input by the offender's community would be a more effective method of sanctioning unacceptable conduct than the traditional approach has been. The Attorney-General spoke of the important role of the elders/respected persons in ensuring a cultural context is "applied to the court's processes allowing for Koori Court participants to comprehend the consequences of their offending behavior from both the law's and the Aboriginal community's perspective".

Establishing Koori Courts

The first two Koori Courts were adult summary courts.⁷ One was established in rural Victoria at Shepparton in October 2002 and the second at Broadmeadows, a north-western suburb of Melbourne, in April 2003.

These locations were agreed after extensive consultation with Koori communities. There was significant preparatory work with local indigenous and non-indigenous communities before the courts commenced sitting.

An evaluation of these two courts was conducted over a two-year period from October 2002. The evaluation found the courts achieved a significant reduction in recidivism rates. There has been some criticism of this aspect of the report on the basis that there was not an appropriate comparable control group and the follow up period for measurement of recidivism was inadequate. Even so, Dr Harris⁸ made a number of findings about the court that have been more readily acknowledged. The court had -

⁶ Other suggested initiatives included a residential facility for male offenders, Aboriginal bail justices, cultural immersion programs, family history and link up programs, community legal education and improving relations between police and local communities.

⁷ Victoria's courts of summary jurisdiction are called Magistrates' Courts. They have a broad jurisdiction that includes summary offences, traffic offences and a significant number of indictable offences. They determine more than 95% of Victoria's criminal matters.

⁸ Dr Mark Harris, Senior Lecturer, School of Law, Latrobe University, conducted the evaluation on behalf of the Department of Justice.

- less Koori offenders breaching correctional orders and fewer failures to appear on bail than the mainstream courts;
- reinforced the status and authority of elders and respected persons, thereby strengthening the Koori community;
- provided a forum for the sentencing of defendants that is less alienating for them and has allowed the court to hear their account of the reasons for the offending;⁹ and
- developed a particularly effective means of integrating various service providers to support offenders in the community.

The evaluation highlighted a major achievement of the court as being the manner in which it has served to increase indigenous community participation in the justice system and recognized the status of elders and respected persons. This observation has been confirmed by subsequent developments. In 2002 there were no indigenous people working in Victorian courts. Now there are more than 60 elders and respected persons participating in adult and Children’s Courts throughout Victoria.¹⁰ In addition, the courts employ 14 Aboriginal people as Koori Court officers or within the Koori Court Unit. This has been a positive development for local Aboriginal communities and for local courts. Local communities have come to see courts in a new way. Members of communities are developing confidence in the local court and are now more prepared, for example, to attend the court to obtain protection under Family Violence legislation or seek assistance as victims of crime. On the other hand, members of the court are meeting with local communities and acquiring an understanding of the issues that confront those communities.

⁹ A number of offenders spoke to the evaluator of the two adult courts. They made positive comments about the court and its processes. For example, one offender said, “it means a whole lot more to be given directions about your future life path from a person who is an elder of your community and has a better understanding of the shoes us blackfellas walk in”. Another said, “to be able to sit opposite the magistrate and the elders, you don’t just feel like a number and they actually listened to what I had to say, and when the elders pass some advice you do actually listen”. (See pages 92 to 94 of M. Harris (2006) – *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program* October 2002- October 2004. Department of Justice, Victoria).

¹⁰ Victoria has seven Magistrates’ Koori Courts, two Children’s Koori Courts and a pilot County Koori Court.

The Children's Koori Court¹¹

In October 2003, the AJF determined that the Department of Justice and the Department of Human Services (DHS) should work towards developing a Children's Koori Court. A statewide reference group was established that included broad representation from the Department of Justice, Youth Justice (a division of DHS), the Children's Court, Aboriginal agencies and the RAJACs. The reference group commenced meeting in mid 2004 and in October of that year the AJF endorsed Melbourne as the site for the first Children's Koori Court. The next 12 months were spent establishing the court, which commenced sitting in October 2005. With just over 50% of Kooris living in metropolitan Melbourne the decision to commence in that city was understandable.

In November 2007, a second court commenced sitting in rural Mildura. Again, the location was determined after detailed consultation with the Koori community. The Melbourne court has a panel of eight elders/respected persons. The Mildura court has a panel of seven elders. Both courts sit fortnightly.¹²

There was extensive training before each court commenced sitting. Judicial officers learnt about Koori culture and communities, and Elders learnt about the legal system. These learning days were important in many ways - not least in building trust amongst participants.¹³

The Children's Koori Court has the objective of "ensuring greater participation of the Aboriginal community in the sentencing process of the Children's Court through the role to be played in that process by the Aboriginal elder or respected person and others so as to assist in achieving more culturally appropriate sentences for young

¹¹ The Children's Court of Victoria deals with offenders aged 10 and over and under the age of 18. The court deals with offenders who are over 18 if they have offended before their 18th birthday and been charged before their 19th birthday. The court can summarily determine all offences except murder, manslaughter, culpable driving and arson causing death.

¹² An evaluation of the courts will be completed by the end of this year.

¹³ This interaction has continued with regular meetings between elders, judicial officers, court staff and support services. On occasions, we will visit places like the Youth Justice facility or the Bert Williams Hostel (for young indigenous males). The Mildura elders have travelled to Melbourne to observe that court. Reference group meetings are held regularly. There is an annual conference for all Koori Court participants to come together and talk about the workings of the court.

Aboriginal persons”. The legislation establishing the court requires proceedings to be conducted in a way that is comprehensible to the defendant, the defendant’s family and any member of the Aboriginal community present in the court. The legislation allows the court to consider any oral statement made to it by an Aboriginal elder or respected person and inform itself in any way it thinks fit.

The court has jurisdiction if the defendant –

- is Aboriginal¹⁴; and
- has pleaded guilty or been found guilty of the offence; and
- consents to the matter proceeding in the Koori Court.

In addition, the offence must not be a sexual offence and must otherwise be within the jurisdiction of the court.

The court applies the same sentencing principles and has the same sentencing orders as the non-Koori court. The court does not apply “traditional law” and, as in any criminal case in Victoria, the judicial officer is responsible for making the sentencing order.

The legislation does not offer detailed guidance on sentencing procedure and the court has adapted the adult court model to achieve the objectives of the legislation.

The sentencing conversation

Courtrooms used for Koori Courts have been adapted for the court’s particular processes. Aboriginal artworks are on the walls and the Australian, Aboriginal and the Torres Strait Islander flags displayed. The courts are “smoked” in accordance with custom and tradition prior to the first sitting.

The “sentencing conversation” takes place at an oval bar table in the body of the courtroom. The judge sits at the table with two elders or respected persons. In

¹⁴ This means that the person is “descended from an Aborigine or Torres Strait Islander, identifies as an Aborigine or Torres Strait Islander and is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Islander community”.

addition, the Koori Court officer¹⁵, the prosecutor, the Koori Youth Justice worker, the defense lawyer, the defendant and family members will also sit at the table. If there is a particular worker involved with the defendant, that worker may also sit at the table. Other family members, support persons and community members are present in the courtroom.¹⁶

The “sentencing conversation” opens with matters of cultural significance. Each case commences with an acknowledgement of country. The judicial officer explains to the defendant that the court respects Aboriginal people and culture and how the court was “smoked” according to culture and tradition. The role of elders and respected persons is explained and it is made clear that the elders/respected persons are not responsible in any way for the sentencing decision – that is the responsibility of the judicial officer. The young person confirms that he/she consents to the matter proceeding in the Koori Court.

The prosecutor then provides an agreed summary of the offending behavior and outlines the impact of the offending on the victim.

The defence lawyer will then outline the offender’s situation, placing before the court the material in mitigation and make submissions on penalty. Offenders may, at this time, be invited to speak about the offending behavior and about their lives. For some young people this is very difficult. No-offender is compelled to speak.

Family members, community members and support persons are invited to talk about the offender and the offending. Elders and respected persons will participate throughout this process.

¹⁵ The Koori Court employs a “Koori Court officer”. This is an important position and the officer – who is Aboriginal - can support an offender prior to attending court, offer support and advice in court and assist after court in case management. The Koori Court officer also supports the elders by arranging the rosters for sitting days and assisting with any other administrative issues. Importantly, Koori Court officers are based in the registry of those courts that have a Koori Court division.

¹⁶ Youth Justice designates a specific Aboriginal Youth Justice worker to attend our hearings. These workers offer advice on programs that are available to support those young people who may be placed on a supervisory order. They can also support offenders on deferral of sentence. Aboriginal people from Aboriginal agencies that provide support in specific areas such as accommodation, drug and alcohol treatment and mentoring, attend court on a regular basis to provide support to an offender. If a young person is already engaged with a particular agency, for example, the Victorian Aboriginal Child Care Agency, a representative of that agency will also attend the court.

It is a matter for the elders and respected persons as to what they say. Often they will speak strongly to an offender on the importance of obeying the law and the harm caused to the victim and the community by their misbehaviour. A question such as “what if someone had done this to your mother or sister” can be very confronting for an offender. Elders often speak of relevant kinship connections and the impact of the offending on family and the Aboriginal community. They may also provide information about relevant cultural matters. Offenders are reminded of their value within the community and encouraged to change their behaviour and work with agencies that offer help in that regard. Elders and respected persons frequently offer advice based on their own life experience.

The elders/respected persons give the court its unique authority and flavour. Defendants nearly always engage in discussion with elders/respected persons and accord respect to the process.

The Koori Court officer will speak about matters relevant to the defendant. There will be discussion with the Youth Justice worker and other agency workers about appropriate support programs. The Youth Justice worker can also provide advice about programs that Youth Justice offers for offenders in the community or in custody. The aim of this approach is to coordinate appropriate supports to maximize the rehabilitation prospects of the offender.

Proceedings are often dynamic with various persons contributing to discussion. Dr Kate Auty¹⁷ and Daniel Briggs¹⁸ have written on their experience of proceedings in the adult court – “Comment from the floor of the court occurs fairly regularly and could best be described as both supportive and also chastising....Sometimes people are halting or reticent, but if the court waits quietly even the most reserved people speak. No one is made to speak if they do not wish to – and this includes the defendant. 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

¹⁷ Dr Auty was the magistrate who sat in the Koori Court at Shepparton.

¹⁸ Daniel Briggs was the Koori Court Officer at Shepparton.

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 say so, can be quite disarming for a defendant who would in the “mainstream” court be able to remain anonymous and avoid family disapproval.....”¹⁹

This process is different from other sentencing courts. In most sentencing courts, the defendant only becomes involved in the proceedings when he or she stands to be sentenced. In the Koori Court the voice of the defendant, family and community are always present and central. There are many voices to be heard and the court is attentive to those voices. The Koori Court is an attempt to make the court process meaningful for an offender and, at the same time, responsive to the offender’s needs.

The open exchange of information that occurs within the Koori Court gives the judicial officer a sound understanding of the young person’s circumstances, the context of the offending and the prospects for rehabilitation. The sentencing decision is a fully informed one. Where necessary, the court endeavors to coordinate support services to assist an offender with their rehabilitation. This approach is well suited to the Children’s Court where the focus in sentencing is on the rehabilitation of an offender.

Some concluding comments

The Children’s Koori Court provides an alternative sentencing process for Koori offenders. Elders and respected persons from Aboriginal communities engage directly with offenders. Offenders consent to participate in a process that is meaningful to them because it involves engaging with people whose authority they respect. Offenders accept responsibility for their offending behavior and the elders

¹⁹ See “Koori Court Victoria – *Magistrates’ Court (Koori Court) Act 2002*. Briggs and Auty (2003). Paper presented at ANZ Society of Criminology Conference.

and respected persons challenge offenders to change their behavior and work with those agencies that can help bring about change.

Sometimes the issues before the court, extending as they often do beyond the individual and into the social and economic life of our community, are very hard for the law to address. This means the work is challenging. The Koori Court is not a magic solution to the problem of over-representation. Crucially, what the Royal Commission described as the “underlying causes” of over-representation must be addressed. With more than 33% of Kooris under the age of 15 years, we will sustain high levels of over-representation in our court unless, as a community, we address the factors driving Aboriginal disadvantage. The law can only do so much for a young person whose problems are deeply entrenched because of poverty, disrupted family life, disconnection from school, culture and community, and who is abusing drugs and alcohol. However, even in the hardest cases, it is my experience that the Koori Court process is respected and endorsed by the young people who participate in it.

The court has been fortunate to have the support of important agencies to assist those young people who appear before it. Those agencies that appear regularly at the court include the Bert Williams Hostel (accommodation, supervision and access to some education), Moreland Hall (drug and alcohol services, including residential de-toxification), and Bunji Bunji (youth support and mentoring). The court is aware of the pressure placed on these agencies by their commitment to the court. All of these agencies need more resources to support the offenders before the court. It is also apparent to the court that there are significant gaps in services for those offenders who have a mental illness or intellectual disability; those offenders with a combination of mental illness and drug or alcohol problem; and those offenders with multiple and complex needs.

In conclusion, the best indicator of the value of Koori Courts comes from the Koori community itself. In 2005, Associate Professor Joy Murphy and Dr Mark Rose²⁰ undertook the “Victorian Implementation Review” of the Royal Commission

²⁰ Both of whom are Aboriginal.

recommendations. The review involved extensive consultations with Koori communities throughout Victoria. The review noted how the Koori Court initiative received almost universal approval from the Koori community. Mr. Andrew Jackomos, the head of the Koori Justice Unit in the Department of Justice, has described Koori Courts as “the jewel in the crown” of the Aboriginal Justice Agreement. The *Aboriginal Justice Agreement (Phase 2)* of 2006 identified the need to “enhance and expand the Koori Court network.” Perhaps the best recognition of all comes from the comments of those who participate in the process. Elders and respected persons are enthusiastic about their role in the court and are strong advocates for extending Children’s Koori Courts to other places in Victoria where there are significant Aboriginal populations. I have already referred to the findings of Dr Harris on the positive views of the offenders who have been through the adult court. I will finish by quoting the words of an Aboriginal man who recently appeared at Court to support his 12-year-old daughter. At the end of the hearing he made these remarks – “I would like to thank you for this opportunity. I was hoping it was going to be a good deterrent for my daughter when she fronted the elders and respected persons. I sat in awe of what is going on here. It’s brilliant. It gave me goose bumps. I did get emotional but this is wonderful, the talk, the advice, the structure. I thank you for this opportunity. ”

Judge Paul Grant

President, Children’s Court of Victoria

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