Submission No 74

NEW SOUTH WALES

The Chief Magistrate of the Local Court

10 February 2010

Standing Committee on Aboriginal and Torres Strait Islander Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Committee Members

Submission on Inquiry into the high levels of involvement of Indigenous juveniles and young adults in the criminal justice system

Thank you for your letter of 4 December 2009 requesting submissions in relation to the above inquiry.

I note that your terms of reference seek to identify best practice examples of programs that support diversion of Indigenous people from juvenile detention centres and crime.

Below I have provided some background information on rates of incarceration of Indigenous people in New South Wales prisons and detention centres, together with some details of alternative court models, diversionary programs and sentencing options currently being used in New South Wales in an attempt to address that relatively high level of incarceration. I note that in many instances, the availability of these diversionary programs or sentencing options (particularly in rural and regional locations) is a limiting factor upon Magistrates sentencing Indigenous offenders.

Rates of imprisonment

It is well documented that Indigenous people are overrepresented in the criminal justice system and remain greatly overrepresented among both the adult prison population and in juvenile detention centres in New South Wales.

Adult prisoners

In the period 2001 to 2008[1]:

- The rate of imprisonment amongst the Indigenous population increased to the point of being more than 13 times higher than the rate of imprisonment amongst the non-indigenous population.

[1] NSW Bureau of Crime Statistics and Research, Crime and Justice Bureau Brief Issue Paper No. 41 *"Why are Indigenous imprisonment rates rising?"* (August 2009)

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- New South Wales had the highest number of Indigenous adults in prison, with 32% of the national total Indigenous prison population.

- There has been an increase in the proportion of convicted Indigenous adults who are being sentenced to imprisonment. In 2001, 16.9% of Indigenous adults convicted of an offence received a sentence of imprisonment, rising to 20.4% in 2007. At the same time, there has not been an increase in the number of Indigenous people being brought before New South Wales courts, and generally no overall increase in the number of Indigenous adults being found guilty.

- There has also been an increase in the number of Indigenous adults being held in prison on remand pending the outcome of court proceedings, from 12.3% in 2001 to 15.4% in 2007.

Juvenile detainees

As at 30 June 2007[2]:

- Of 279 juveniles aged 10 to 17 in detention in New South Wales, 153 (that is, 54.8%) were Indigenous.

- Indigenous juveniles aged 10 to 17 were 25.9 times more likely than non-indigenous juveniles to be detained in New South Wales.

There can be no doubt that imprisonment is detrimental to an individual's physical and mental health. However, the incarceration of an individual also has an impact on the community from which that individual is removed. Families of offenders sentenced to imprisonment lose the presence of that family member, their income is reduced if that family member is the main income earner and they may have to travel great distances to visit the offender. It perpetuates social disadvantage, an underlying cause of crime itself, and exacerbates the poor health and social conditions of future generations.

Court initiatives to address Indigenous disadvantage

The New South Wales Local Court has supported, and continues to support, the use of community based sentencing options as alternatives to full-time imprisonment where appropriate.

The Court has also implemented a number of strategies, diversionary programmes, specialist Court models and sentencing as alternatives to full-time imprisonment, discussed further below, and measures to involve the Indigenous community in the legal process.

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[2] Natalie Taylor, Australian Institute of Criminology, *"Juveniles in detention in Australia, 1981-2007"* (July 2009)

Aboriginal Project Officers

Following the recommendations of the *Aboriginal Child Sexual Assault Taskforce Breaking the Silence: Creating the Future*, the Local Court invited the Court Appointed Aboriginal project officers who liaise with Aboriginal Community Justice Groups to attend the Court's regional conferences in 2008. Following this, the Court received reciprocal invitations to meet and speak with Elders about Indigenous involvement in the justice system at events held by several Community Justice Groups. This has been part of an ongoing effort to involve Aboriginal Community Justice Groups more comprehensively in the sentencing process, both in terms of making cultural advice and possible alternative sentencing options available to Magistrates and in terms of enhancing the community justice groups' understanding of the sentencing process.[3]

Economic and social disadvantage play a large role in causing crime and the social and economic context of Indigenous offending should not be ignored. Until we address social and cultural root causes for offending, we are applying the most basic sentencing tool (imprisonment) with little prospect for long-term change. In my view, better use can be made of the expertise in Indigenous communities to provide assistance to the Court. This is discussed in further detail below. It should be recognised that capacity building over time is a long-term positive effect of this kind of involvement, even if re-offending rates do not immediately decline.

Alternative court models and diversionary programs

The NSW Local Court operates a number of alternative court models and diversionary programs, the majority of which are only currently available in limited locations throughout the State. These include:

- Magistrate's Early Referral into Treatment (MERIT): a drug treatment and rehabilitation program that seeks to enable defendants to break cycles of drug-related crime.

- Rural Alcohol Diversion (RAD): based on the MERIT program, the RAD program was available at Bathurst and Orange Local Courts and sought to help defendants address alcohol abuse and dependence problems. The similar Wellington Options (WO) program also operated at Wellington Local Court. In July 2009, the RAD and WO programs at these courts were merged into MERIT.

- Circle Sentencing: an alternative sentencing process for adult Indigenous offenders in which community elders are involved, used for more serious repeat offences.

- Domestic Violence Intervention Court Model: a specialist Court that seeks to reduce re-offending through focusing upon increased level of support for victims of domestic violence and accountability for offenders.

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[3] Specifically, recommendation 86 that Aboriginal Community Justice Groups make cultural advice available to judicial officers.

- Youth justice conferencing: a process where a juvenile offender and the victim of crime participate in a conference, together with family members, police, community members and/or the juvenile's lawyer. The conference process seeks to have participants develop an agreed outcome plan for the juvenile offender with the aim of preventing further offending.

- Forum sentencing: a program to bring together a young offender and victim with the opportunity for young offenders to discuss the impact of the offence and formulate an "intervention plan" for the offender.

- Court Referral of Eligible Defendants Into Treatment (CREDIT): a program which offers participants access to training, treatment, rehabilitative and social services across a wide range of areas, with a view to addressing problem areas in participants' lives in order to reduce the rate of re-offending. CREDIT commenced as a two-year trial program in August 2009 and is presently available at Tamworth and Burwood Local Courts.

- Balund-a: This is a residential diversionary program located near the Clarence River in northern NSW. It is available to Indigenous people aged between 18 and 35 who are referred by a Magistrate, whether upon conviction or prior to sentence. The program, which officially opened in August 2009, can accommodate about 50 people. It encourages participants to develop vocational skills and cultural links, and also has programs to address personal, psychological and health issues.

In the attached Appendix 1, I have included a more detailed overview of the alternative court models and diversionary programmes in which the court is involved.

Limits experienced by the Court in applying alternative court models and diversionary programs

The main limitation experienced by the Court in utilising the above alternative court models and diversionary programs is a lack of availability depending on location. Notwithstanding the release of the NSW Parliament Standing Committee on Law and Justice's report into "*Community based sentencing options for rural and remote areas and disadvantage populations*" in March 2006, which highlighted the comparative lack of sentencing options available to people in rural and regional communities in New South Wales, in recent years there has been limited action to provide greater availability of alternative court models and diversionary programs across the State.

Circle Sentencing is regarded as a valuable opportunity to increase Indigenous input into the legal system by enabling the direct intervention and involvement of Indigenous elders in the sentencing process and has generally received positive feedback from participants. However, delays have been experienced in the employment of government appointed project officers to run Circle Sentencing and lengthy delays have been experienced in replacing project officers who have resigned.

A recent review by BOCSAR found that, whilst meeting the majority of its aims including facilitating Indigenous community involvement in the legal process, Circle Sentencing does not appear to have a substantive impact in reducing the rate of recidivism amongst Indigenous offenders in the short term.[4] As I have noted above, the building of links with Indigenous communities over time will likely be of long-term positive effect, even if not seen in an immediate drop in re-offending. Indeed, as the focus of the Circle Sentencing program is upon the sentencing process for more serious repeat offenders rather than ongoing rehabilitation, the absence of a short-term lack of impact on re-offending rates is perhaps not surprising. It has also therefore been suggested that combining Circle Sentencing with other programs such as cognitive behavioural therapy, drug and alcohol treatment and education programs might assist in lowering recidivism amongst Indigenous offenders. [5]

One such possible drug and alcohol treatment program is MERIT, which has been the subject of positive evaluation and extended to additional locations, but is not yet available in many rural or regional areas. The RAD program has now been merged with MERIT at Bathurst and Orange Local Courts, but has also not yet extended beyond the two original pilot locations. The NSW Government has recently indicated a commitment to expanding the MERIT program to more locations. I believe such an expansion, which will enable more defendants (including Indigenous individuals) the opportunity to access the program, to be highly desirable, for the reasons set out below.

A high proportion of crime involving Indigenous defendants is alcohol related.[6] NSW Bureau of Crime Statistics and Research data shows that in urban areas of NSW during 2004-05, alcohol played a role in 45% of domestic assaults, 45% of non-domestic assaults and 33% of sexual assaults of all police recorded crimes involved Indigenous accused persons. In rural areas, the corresponding figures were even higher – 60%, 51% and 56% respectively.[7]

The MERIT program (which now incorporates the RAD program, dealing with alcohol use, at some locations) has been shown to provide a significant opportunity for defendants to address the effect of substance use and abuse on their behaviour and improve their health and rehabilitation outcomes. In general, participants who have successfully completed MERIT have recorded lower rates of recidivism than defendants not completing MERIT, as well as decreased drug use and improved physical, psychological and mental health.[8]

Since the commencement of the pilot program in 2000, as at 30 June 2009, 19,513 individuals had been referred to MERIT, with 12,101 having been accepted into the program and 7,439 having successfully completed the program.[9] Data available from

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[4] NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 115 *"Does circle sentencing reduce Aboriginal Offending"* (May 2008)
[5] Note 4 p 7
[6] NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 99 "*Indigenous over-representation in prison*" (September 2006), p 15
[7] Note 6, pp 15 and 17
[8] Crime Prevention Division, Department of Justice and Attorney General, Crime Prevention Issues, No 8 *"Magistrates Early Referral Into Treatment: An overview of the MERIT program as at June 2009"* (November 2009), pp 3-4
[9] Note 8, p 1

2007 indicates that in that year, the proportion of Indigenous individuals participating in MERIT was 16 percent, approximately the same rate of identification of Indigenous defendants in NSW criminal courts. A smaller proportion (60%) of Indigenous participants completed MERIT than non-Indigenous participants (69%).[10] However, in the Hunter/New England area, the development of alternative case management processes, which focus largely on stopping drug use, relapse prevention and referral to job seek programs to enhance employment prospects, appear to have had a significant impact on improving Indigenous completion rates[11] and may have the potential for wider utilisation.

With further funding, I believe that the extension of successfully established programs including Circle Sentencing and MERIT to other rural and regional locations throughout New South Wales would be of benefit in ensuring that the diversionary options are available for Indigenous offenders and accused persons located outside metropolitan Sydney.

An Indigenous involvement in the Local Court

Another possibility would be the development of a greater Indigenous involvement in courts in New South Wales that enables the Indigenous community to participate in a court process that is adapted to be more culturally specific to Indigenous people.

With appropriate resources, I believe that the Local Court would benefit from an approach that utilises the input of Indigenous communities to extend to minor and moderate level offending, and not just instances of more serious offences that may presently be referred for Circle Sentencing.

There are different models upon which such a court could be based:

- A restorative justice system, whereby an Indigenous offender is referred to a community conference for the development of an intervention plan to deal with the offence, with the matter only progressing to the Local Court in the event of a breach of the plan or an election at the conference to proceed in the Court. This would be based upon the current approach used in relation to young offenders in New South Wales, and would be suitable for more minor to mid-level offences; or

- A culturally sensitive Indigenous court that adapts the current Circle Sentencing model to include minor and moderate-level offences, which takes into account the advice, and enables the involvement, of community Elders in the sentencing process. The involvement of community Elders could be in the form of directly advising the magistrate in court, through having input into pre-sentencing reports by providing cultural information and other details about an offenders' background and what matters might be able to be addressed in a social context for that particular offender, or by way of "expert evidence" from community justice groups regarding cultural perceptions of particular offending.

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[10] Note 8, p 2

[11] Australian Resource Centre for Healthcare Innovations (ARCHI), *"Aboriginal People and the Magistrate's Early Referral Into Treatment (MERIT) Program"*, available at http://www.archi.net.au/e-library/awards/2009-nsw-aboriginal-awards/merit-program (accessed 9/2/10)

An initial proposal for the development of a greater degree of Indigenous involvement in the Local Court has been put to the Crime Prevention Division of the NSW Department of Justice and Attorney General. To date there has been no response. A copy of the correspondence is attached for your information as Appendix 3.

Sentencing options

Alternative custodial and non-custodial sentencing options available to Magistrates may include:

- Periodic detention (for sentences of imprisonment not longer than 3 years);
- Home detention (for sentences of imprisonment not longer than 18 months); and
- Community service orders.

The above sentencing options have the benefit of ensuring that an offender is able to maintain community, social and family connections, while continuing their employment or acquiring vocational skills through community service, throughout the period of a sentence. The lack of availability of alternative sentencing options in rural and regional locations is concerning to the Court for the fundamental reason that a person's sentence may be determined by the availability of different sentencing options in a particular location.

Although the assumption has been that, due to the lack of options, Magistrates may therefore have no option but to impose a full-time custodial sentence, BOCSAR research indicated that, to the contrary, offenders in regional New South Wales are actually less likely than their city counterparts to receive a sentence of full-time imprisonment.[12] A possible explanation for this is that Magistrates, mindful that a full-time custodial sentence is the only form of sentence of imprisonment available to them, have responded by being more sparing in giving sentences of full-time imprisonment.[13] However, this does not in my view derogate from the need to ensure that alternative sentencing options are more widely available as a matter of basic fairness.

The 2006 Parliament Standing Committee on Law and Justice report referred to above noted that the full range of sentencing options is only available in the Sydney metropolitan area and a small number of large regional centres.[14] Home detention is only available in Sydney, the Hunter and parts of the Illawarra region, periodic detention is available in only a few additional locations and there are less community service placements in regional areas.

In comparison to city Courts, a larger proportion of Indigenous and young Indigenous people appear before Courts in rural communities. As such, Indigenous offenders participate to a much smaller extent, in community based sentencing options such as home detention, periodic detention and community service.

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[12] NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin, No 111 *"Does the lack of alternatives to custody increase the risk of a prison sentence?"* (January 2008), p 4

[13] Note 12, p 4

[14] NSW Parliament Standing Committee on Law and Justice "*Community based sentencing options for rural and remote areas and disadvantage populations*" (March 2006), p 32

To that end, recommendation 2 of the Report was:

> "*That the Government make community based sentencing, particularly in relation to the disadvantaged groups examined by the Committee, a priority within its sentencing and criminal justice policies and that, where it may be practically implemented, all community based sentencing options should be made available throughout New South Wales.*"[15]

Aboriginal offenders were identified as a disadvantaged group in that report; however, since the Report's release there has been no expansion to any of the alternative community based sentencing options such as home detention or periodic detention.

As the Report noted, the recidivism rate for those discharged from home detention is approximately 12%, a significant reduction from an overall re-offending rate for all prisoners of over 50%.[16] The Committee noted, however, that at that time, Indigenous offenders made up only 5% of all males on Home detention and only 13% of all Indigenous offenders who might have been eligible for home detention were placed on home detention.[17] Similarly, Indigenous offenders made up only 6.9% of offenders in periodic detention facilities. This is in comparison to accounting for (at that time) 17.1% of all offenders in correctional centres.

There may be a number of reasons for the under representation of Indigenous people in community based sentencing options such as home detention and periodic detention. Sentencing takes account of the individual circumstances of an offender including for example, their criminal history and prospects of rehabilitation and the particular facts and circumstances of the offence. There is no doubt, however, that there is also a lack of community based sentencing options as alternatives to imprisonment that available in the areas in which Indigenous people are predominantly appearing before the Court. Appendix 2 (attached) sets out a table that details the availability of community based sentencing options across NSW.

Conclusion

The flexibility of diversionary programs and community based sentencing options and their ability to address some of the causes of offending means they are particularly useful for disadvantaged groups such as Indigenous offenders. Home detention and periodic detention allow an offender to maintain family and community ties, whilst community service provides meaningful activity and an opportunity to acquire vocational skills. Whilst many rural and regional areas technically have community service available as a sentencing option, in practice many of these areas find it difficult to place offenders due to a lack of resources, participating organisations and programmes.

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[15] Note 14, p 45
[16] Note 14, p 198
[17] Note 14, p 200

I recognise that Indigenous disadvantage is a complex problem of which the criminal justice system is only one part, however, to the extent that it delivers outcomes for Indigenous offenders, we must ensure that the most effective sentencing options, alternative court models and diversionary programmes are available in the locations where Indigenous people are appearing before the Court.

If you would like to discuss any of the above, please do not hesitate to contact me.

Yours sincerely

Graeme Henson
Chief Magistrate

Appendix 1

Magistrate's Early Referral into Treatment (MERIT)

The Magistrate's Early Referral into Treatment program (**MERIT**) is a Commonwealth and State initiative funded by the National Illicit Drug Strategy. Based in the Local Court, MERIT provides adult defendants an opportunity to break the drug crime related cycle by entering into a three month drug treatment and rehabilitation program which allows defendants to focus on treating drug problems independently from their legal matters.

Defendants are closely case-managed by the MERIT Team throughout the program and the Magistrate receives regular reports on the participant. The final hearing and/or sentence proceedings generally coincide with the completion of the MERIT program. Magistrates are then able to consider the defendant's progress in treatment as part of final sentencing.

Since July 2009, MERIT has incorporated the Rural Alcohol Diversion (RAD) program piloted at Orange since December 2004 and Bathurst since May 2005. Formerly, the main difference between MERIT and RAD was that the latter required a defendant to have a demonstrable illicit drug problem whereas the former was for defendants whose primary substance of concern was alcohol. Defendants at Orange and Bathurst Local Courts with are now eligible for MERIT whether their primary substance of concern is alcohol or an illicit drug.

The final evaluation of the Lismore pilot program indicated a positive effect on recidivism rates (i.e. a reduction in re-offending), an improvement in social function and significant improvements in the health and psychological health of participants.

MERIT is currently **not** available throughout NSW. In particular it is **not** available at Walgett, Lightning Ridge, Albury, Coffs Harbour, Bourke, Brewarrina, Armidale, Bega, Goulburn, Griffith, Moree, or Taree to name a few. Subject to additional funding, there is no reason why the program cannot be expanded, in particular to areas of identified Indigenous need.

Circle Sentencing

Circle Sentencing is an alternative sentencing Court for identified adult Indigenous offenders. Circle Courts are designed for more serious repeat Indigenous offenders and are aimed at achieving full community involvement in the sentencing process. Circle Sentencing is a genuine partnership between the Indigenous community in the particular location and the Local Court. It empowers Indigenous people to address criminal behaviour within their local communities by directly involving them in the sentencing process.

The program currently operates in NSW in the Local Courts in Nowra, Dubbo, Walgett, Brewarrina, Bourke, Lismore, Armidale, Kempsey and Mt Druitt. Subject to additional funding, expansion to other areas of identified Indigenous need, such as Redfern and Taree, may be beneficial.

Domestic Violence Intervention Court Model

The Domestic Violence Intervention Court Model (**DVICM**) operates at Wagga Wagga and Campbelltown. The DVICM deals with criminal domestic violence matters and is an integrated criminal justice and community social/welfare response to domestic violence. It relies on the inter-agency cooperation between the New South Wales Attorney General's Department, New South Wales Police, Department of Corrective Services, Legal Aid and Department of Community Services.

DVICM aims to bring about proactive responses from police, improved evidence collection, and better support for victims. The DVICM focuses on increasing accountability for perpetrators of domestic violence whilst providing greater support and safety for victims from the time domestic violence is reported until finalisation of associated Court proceedings.

Evaluation of the pilot DVICM found that its holistic and coordinated response has been beneficial, with most victims reporting a high level of satisfaction with the handling of matters by police and victims' support services.

Youth justice conferencing

Youth justice conferencing is a diversionary option available under the Young Offenders Act 1997, which sets out a graded system for dealing with juvenile offending, ranging from police cautions and warnings to conferences. The principle object of the Act is to provide an alternative scheme to the court process for young offenders and allow a community based response in appropriate cases. The Act is also specifically aimed at addressing the overrepresentation of Indigenous children in the criminal justice system.

At a youth justice conference, the juvenile offender and the victim of crime are brought together to discuss the offence. The juvenile's family members, police, and lawyer may be present. For Indigenous juvenile offenders, community Elders may also attend. Participants work together to develop an outcome plan for the juvenile offender with the aim of preventing further offending.

Forum sentencing

Forum sentencing is a post-plea program for 18-24 year olds, aimed at serious offenders or those for whom a custodial sentence is being contemplated. It is currently available at Tweed Heads and Liverpool.

Forum sentencing brings an offender and victim (and support people) together with a facilitator, police (if available) and other community members to discuss the harm caused by an offence and prepare an "intervention plan" for an offender.

Formal evaluation of the program has been positive. Once again, subject to additional funding, there is no reason why the program cannot be expanded, in particular to areas of identified Indigenous need.

Court Referral of Eligible Defendants Into Treatment (CREDIT)

CREDIT commenced in August 2009 as a two-year trial program available at Tamworth and Burwood Local Courts.

The aim of the program is to assist participants in identifying and addressing the factors contributing to their criminal behaviour in order to reduce re-offending. Participants are provided with support services across a range of areas including:

- Accommodation
- Financial counselling
- Counselling for gambling
- Mental health assessment or support
- Suicide counselling
- Domestic violence or sexual assault support
- Drug assessment, treatment or support
- Alcohol misuse and treatment
- Education, training or employment
- Disability services

The program is in its early stages, but anecdotally appears to be highly beneficial for offenders although resource intensive.

Balund-a

Balund-a is a newly opened correctional facility on the Clarence River, located near Tabulam in northern New South Wales. It offers a residential diversionary program for young Indigenous people aged between 18 and 35 who are referred by a Magistrate, whether upon conviction or prior to sentence. Individuals are assessed for suitability prior to referral and must indicate good rehabilitative prospects.

The facility can accommodate about 50 men and women and offers a range of vocational and cultural programs, many of which are run by Indigenous community groups. Programs include:

- Getting SMART, a drug and alcohol program
- Think First, a cognitive behavioural therapy program
- My Story - a program is aimed at helping participants in understanding their Indigenous identity
- Cultural Activities facilitated by Elders, including weekend excursions to sacred sites, stories, music, dance, and art
- Hey Dad, a parenting program

Appendix 2

Location	MERIT	Circle Sentencing	DVCIM	Young Adult conferencing	Mental Health Liaison	CREDIT
Albion Park	✓					
Albury						
Armidale		✓				
Ballina	✓					
Balmain						
Balranald						
Bankstown	✓					
Batemans Bay						
Bathurst	✓ (includes RAD)					
Bega						
Bellingen						
Belmont						
Blacktown	✓				✓	
Blayney	✓					
Boggabilla						
Bombala						
Bourke		✓				
Brewarrina		✓				
Broken Hill	✓					
Burwood	✓				✓	✓
Byron Bay	✓					
Camden	✓					
Campbelltown	✓		✓		✓	
Casino	✓					
Central	✓				✓	
Cessnock	✓					
Cobar						
Coffs Harbour					✓	
Condobolin						
Cooma	✓					
Coonabarabran						
Coonamble						
Cootamundra						
Corowa						
Cowra						
Crookwell						
Deniliquin						
Downing Centre	✓					
Dubbo	✓	✓			✓	
Dunedoo						
Dungog						

Location	MERIT	Circle Sentencing	DVCIM	Young Adult conferencing	Mental Health Liaison	CREDIT
Eden						
Fairfield	✓					
Finley						
Forbes	✓					
Forster						
Gilgandra						
Glen Innes						
Gloucester						
Gosford	✓				✓	
Goulburn						
Grafton	✓					
Grenfell						
Griffith						
Gulgong						
Gundagai						
Gunnedah						
Hay						
Hillston						
Holbrook						
Hornsby	✓					
Inverell						
Junee	✓					
Katoomba	✓					
Kempsey	✓	✓				
Kiama	✓					
Kogarah	✓					
Kurri-Kurri						
Kyogle	✓					
L Cargelligo						
Leeton						
Lidcombe						
Lightning Ridge						
Lismore	✓	✓			✓	
Lithgow						
Liverpool	✓			✓	✓	
Lockhart						
Macksville						
Maclean	✓					
Maitland	✓					
Manly	✓				✓	
Milton	✓					
Moama						
Moree						
Moruya						
Moss Vale						

Location	MERIT	Circle Sentencing	DVCIM	Young Adult conferencing	Mental Health Liaison	CREDIT
Moulamein						
Mt Druitt	✓	✓				
Mudgee						
Mullumbimby	✓					
Mungindi						
Murwillumbah	✓					
Muswellbrook	✓					
Narooma						
Narrabri						
Narrandera						
Narromine						
Newcastle	✓					
Newtown	✓					
North Sydney	✓					
Nowra	✓	✓			✓	
Nyngan						
Oberon	✓					
Orange	✓ (includes RAD)					
Parkes	✓					
Parramatta	✓				✓	
Parramatta CC						
Peak Hill						
Penrith	✓				✓	
Picton						
Port Kembla	✓					
Port Macquarie	✓					
Queanbeyan	✓					
Quirindi						
Raymond Terrace	✓					
Ryde						
Rylstone						
Scone						
Singleton	✓					
Sutherland	✓				✓	
Tamworth	✓				✓	✓
Taree						
Temora						
Tenterfield						
Toronto	✓					
Tumbarumba						
Tumut						
Tweed Heads	✓			✓		

Location	MERIT	Circle Sentencing	DVCIM	Young Adult conferencing	Mental Health Liaison	CREDIT
Wagga Wagga	✓		✓		✓	
Walcha						
Walgett		✓				
Warialda						
Warren						
Wauchope	✓					
Waverley	✓					
Wee Waa						
Wellington	✓					
Wentworth						
West Wyalong						
Wilcannia	✓					
Windsor						
Wollongong	✓					
Woy Woy						
Wyong	✓				✓	
Yass						
Young						
Bidura CC						
Broadmeadow						

Appendix 3

NEW SOUTH WALES

The Chief Magistrate of the Local Court

1 February 2008

Mr. Brendan Thomas
Director Crime Prevention Division
Attorney General's Department
Locked Bag 5111
PARRAMATTA NSW 2124

Dear Mr Thomas

As requested by you during our meeting on Wednesday of this week to discuss the concept of an Aboriginal "Court" operating within the framework of the Local Courts of New South Wales I set out hereunder my views. I have no objection to the issues raised being taken forward within government for consideration. My advice to you is lengthy, necessarily so in my view for the issues are of significant importance both within the capacity of the court to deal with Aboriginal issues, and within the wider community.

The concept of an Aboriginal "Court"

As Head of Jurisdiction of the Local Court I support a better approach in dealing with aboriginal offenders before the Local Court. I do however have concerns about identifying this proposed adjunct jurisdiction, as an Aboriginal "Court" simply by dint of some wrongly perceived administrative fiat.

I have been concerned for some time about the fragmentation of the various aspects of jurisdiction exercised by Magistrates. This proposal would add to what I believe to be a problem that in a modern organisational context needs to be properly resolved.

Firstly, without legislative intervention there is no authority for the establishment of an Aboriginal "Court". The Local Courts, Children's Court and Licensing Courts that are part of the overall jurisdiction of the Magistracy are creatures of statute. This is also the position in relation to the coronial jurisdiction and the industrial jurisdiction. Neither of these roles is established as a court but only as an aspect of jurisdiction vested in the Local Court.

The need for a legislative underpinning is demonstrated by the Victorian approach. The Magistrates' Court (Koori Court) Act 2002 establishes a Koori Court Division of the Magistrates' Court in that state. The "divisional" approach to particularising the disparate aspects of jurisdiction within the Local Court is one I urged on government last year. It has not yet occurred.

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If it were to happen then it may be timely to establish an identifiable Aboriginal Division if that is deemed to be politically acceptable.

The Victorian Legislation is refreshingly simple in its approach and recognizes that it is the Court that determines the way in which the Koori Court operates within the umbrella of the governing legislation. Of fundamental importance in terms of engaging with the magistracy, the legislation acknowledges and preserves the judicial independence of the Court.

The Mount Druitt "Trial"

Mount Druitt Local Court contains 2 principal courtrooms and a smaller, recently fitted out third courtroom. There is a lack of judicial accommodation available so far as allocating a magistrate to a 3rd Court room is concerned but, as has ever been the case, the magistrates cope with this reality.

Whilst Mt. Druitt has a number of advantages, such as The Shed, the Marrin Weejali Aboriginal Corporation and a focus on aboriginal health through the Western Sydney Aboriginal Medical Service which would fit in with the concept of sitting culturally sensitive court for aboriginal offenders it is wrong in the proposal [see page 8 Resources] to assert that the program (sic) *will be implemented within existing resources.* I have explained to you why, from the perspective of the Court that is an erroneous assumption. For the sake of completeness I include my views in this letter.

Mt. Druitt is one of the busiest Courts in Western Sydney. It has heavy workloads and high proportion of which is the more serious type of conduct now frequently dealt with to finality by a Local Court.

The proposal in your letter suggests that an Aboriginal "Court" would sit 24 times per year and deal with an anticipated 144 matters. Even if this is a realistic target [which is not conceded] rounded up 24 days is the equivalent of 5 weeks of sittings. During that time a Local Court would be expected to deal with close to 1000 list matters. Sitting as a defended court it would be expected to be able to list approximately 250 hours of defended work. That work does not go away simply because an Aboriginal "Court" is inserted.

To accommodate the current proposal the Court would require funding for 5 weeks of an Acting Magistrate sitting at Mt. Druitt. This is a minimum cost to government of $20,000 not to mention the need for the Attorney General's Department to find staff for that Court during the requisite period. The alternative would be to reduce sittings at another Local Court to free up a magistrate to assist Mt. Druitt. The consequences however would be the same – an increase in delay in the finalization of matters.

It is not appropriate at a Court where the daily pressures on the regular magistrates are relentless to allow the delays at this Court to increase simply to accommodate this initiative. The Local Court has Time Standards established in its Strategic Plan and it is expected to meet them.

Delays are a well-known stressor in Court management and I would be failing in my duty to my colleagues were I to uncaringly fail to identify this issue as one which cannot and will not be ignored.

One of the other concerns I have with limiting the applicability of culturally focused sentencing to Mt. Druitt is that which relates to access to justice. As I indicated to you during our discussions I regard it as highly desirable that the focus on addressing the involvement of the Aboriginal Community within the criminal justice system should be as expansive as possible. I have a fundamental disagreement with an approach that lacks equity. Establishing a culturally sensitive court at only one location with an expected capacity of dealing with 144 people out of a total in excess of 17,000 across the state would be in danger of being seen as tokenistic.

It is far more equitable in my view to stretch the imagination and consider how a greater number of people might be served in a variety of different but complementary ways spread across as much of the State as possible. At the very least this would allow linkage between each of the current Aboriginal Community Justice Groups and the Court to maximise the existing potential benefit to the Aboriginal Community. It is also in my view somewhat precipitous to confine the types of matters an Aboriginal "Court" might deal with to those at the lower end of criminal offending behaviour.

There is little doubt that Circle Sentencing is a valuable tool in addressing repeat offending and that the contribution of the Aboriginal Community in this process has been of the highest significance. It would seem however that the view taken in relation to Mt. Druitt is that it is Circle Sentencing or 144 minor offenders, with nothing in between. I would have thought that it is the persons in between who are the most vulnerable in terms of progressing from intermediate penalties to imprisonment and are a group that could benefit from a hybrid approach outside the Circle Sentencing approach.

I see no reason why the Aboriginal Community in the context of an Aboriginal "Court" could not effectively operate and provide the Magistrate with culturally appropriate insight into the background of an offender. Whether this is through the Probation and Parole Service or by being present in the Courtroom as advisors to the Magistrate is something for further discussion.

Acknowledging that what I am about to write is a matter for government it is my view there needs to be a layered approach to this issue.

An alternate view

In setting out an alternative approach it is helpful to inform you of the progress the Local Court is making in several areas of its overall functions.

1. Utilisation of Community Resources

During the last 12 months strategic planning within the Local Court has focussed on a number of ways in which access to justice and the administration of justice within the Local Court can be improved beyond the currently limited response embraced within the Circle Sentencing intervention programme and to a lesser extent the opportunities presented through participation in the MERIT and the Rural Alcohol Diversion Programmes. This planning takes place internally and without any direct involvement of the various agencies of government. It is part of the strategic approach from within my office to constantly review the way in which we manage our jurisdiction and resources and how we might improve our practices.

2. Utilisation of Technology

A reflection of the positive outcomes associated with the internal strategic planning process can be seen in the introduction of initiatives such as Practice Note 5 of 2007 mandating the use of Audio Visual Link facilities to obviate the need for the transport of adults and juveniles in custody over long distances to and from the geographically disparate courts throughout the State.

The impact on Aboriginal persons in particular was one of the dominant considerations in moving the court towards greater use of technology as a more humane way of dealing with persons deprived of their liberty.

3. Ongoing Review of Legislative Effectiveness

Recently, the scheduling of a meeting with the Police Department, Aboriginal Legal Service, Legal Aid Commission and Department of Juvenile Justice re-visited the problematic success of Youth Conferencing under the Young Offenders Act 1997 with a view to determining whether it is possible to reduce the number of juveniles, and aboriginal juveniles in particular appearing before the Children's Court jurisdiction. In its developmental phase it was anticipated that Court based referrals to youth conferencing would be relatively few. Presently the rate of referral by Police and the Court is almost 50% for each organisation. Given that the purpose of the legislation is, where appropriate, to remove the stigma of a criminal record for young offenders, this ratio fails to adequately address the policy considerations behind the governing legislation. All who attended accepts this reality.

With the encouragement of the Court there is a positive commitment of each of these agencies to re-assessing their respective roles holds some promise that the rate of pre-charge diversion to youth conferencing may increase.

If that is so the benefit, particularly to the aboriginal community will be significant. I have reason to anticipate that with commitment and encouragement from each of the organisations involved, and from the Court, the intended referral targets can increase to an identifiably higher level.

These are but two steps taken within the Court to improve the interface between the criminal justice system and the wider community.

4. Future Possibilities-Proposals

In my view the matters set out in 3 above address Strategic Direction 5 of the NSW Aboriginal Justice Plan. However, there is more than can be either achieved or considered. It is against the background of progress thus far and the objects of the Justice Plan that I confirm the view expressed to you and to Mr. Blacklaws this morning that the proposal for an Aboriginal "Court" at Mt. Druitt is too limited an approach to properly meet the capacity for the criminal justice system to "*reduce the number of aboriginal defendants proceeding through the criminal justice system*"[1]

There is however a limit to what a Court can do through the organisation of its internal processes. Beyond that it is a matter for government to determine what is acceptable and what is not possible in meeting community expectations.

Testing the waters as it were has already been undertaken through positive initiatives being trialled at the behest of government within the Local Courts. Young Adult Conferencing at Lismore and Liverpool, the Domestic Violence Court Intervention model being trialled at Campbelltown and Wagga Wagga are but two examples of initiatives that hold promise for extension throughout the Court system.

The granting of legislative authority to members of the Police Force to issue infringement notices for a small category of offences is also representative of a move away from using the blunt instrument of the law as the automatic response to minor offending. This is similarly so with the Adult Cannabis Cautioning Scheme. Diversion of sufficient matters away from the Local Court has the ability to improve the capacity of the court to devote more time towards improving the way in which it deals with more serious offending behaviour and to acquire the time that, from the clear inference in the proposal sent to me, is necessary to deal with Aboriginal offending in a culturally sensitive manner.

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[1] Aboriginal Justice Plan Strategic Direction 5: Criminal Justice System – Strategic Action 8

Options and Opportunities

1. An expanded Conferencing Model

Although it is a perspective arrived at independent of the Aboriginal Justice Plan there is in my view an opportunity to better manage minor offending within the aboriginal community [and minor offending by the community in general]. It is a view shared by other senior members of this Court.

As you know Strategic Action 8 of the Plan refers to a plan to "*Develop and utilise a full range of Aboriginal community based alternatives to avoid Aboriginal prosecution for minor summary offences*".

Traditional approaches to crime focus on prosecution. In our courts sentencing is governed by the Crimes (Sentencing Procedure) Act 1999 and the common law. Once a matter comes before a Court "creativity" is necessarily truncated. After all the Judicial Oath requires a member of the judiciary to deal with matters "according to law". Outcomes produced against this background often find it difficult if not impossible to address aspects of causation, particularly where they are associated with social and other disadvantage. Addressing these issues may well lead to an improvement within the criminal justice sphere through a reduction in the rate of recidivism. The MERIT programme is a case in point.

The Local Court has long recognized that its role is not limited to crime and punishment. Continuing Judicial Education and the breadth of tertiary qualifications and experience in the field of criminology has broadened the approach taken by Courts in recognizing that addressing underlying issues such as drug and alcohol addiction, poverty, mental health, financial management, homelessness and social isolation are all responsibilities that a Court should acknowledge as it manages its workloads in the criminal jurisdiction.

So I come to the issue of extending the Young Offender concept to the adult jurisdiction of the Local Court. In raising this for your contemplation I am not talking about Adult Conferencing – that policy initiative is a post charge trial programme directed towards offenders on the verge of receiving a sentence of imprisonment.

Rather, it is my view that the concept of a restorative approach to justice and the objective of reducing the number of aboriginal [and other] offenders appearing before our courts may be better addressed by their involvement in a community based outcome similar in terms to Youth conferencing as an alternative to the traditional charging process.

In such an approach the Court would be removed from involvement save in those situations where there was a failure to comply with an agreed community sanction or an election to proceed according to law. The scope for involvement, as indicated to you would necessarily be limited to the types of

minor anti social offending which are capable of being suitably addressed in a manner similar to the conferencing model.[2]

Not only would this reduce the number of aboriginal offenders being required to appear before the Courts[3], it has the potential to reduce the stigma associated with criminal records and to render the offender accountable directly to the community rather than the Court.

There is also in my view, an associated benefit in involving respected members of the aboriginal community in a process that is divorced from the Court based sentencing regime. The use of Aboriginal Community Justice Group involvement in such a process has the capacity to alleviate one of the identifiable concerns arising within the Circle Sentencing Process and the proposed Aboriginal Court, namely the social burden imposed on members of the aboriginal community having to address possible prison or other sanctions for offenders and the consequential potential for division within the aboriginal community.

As well as addressing the aspects of the Aboriginal Justice Plan the suggested approach also accommodates the Aboriginal Strategic Direction 2007-2011 Policy document issued by the Police Force of New South Wales. In this regard I note a specific commitment within that organisation at Section 2 Part 5 – Table of objectives is expressed, inter alia in the following terms:

> 4. *Divert Aboriginal Youth from Crime and Anti Social Behaviour*
> 7. *Reduce offending and over representation of Aboriginal people in the criminal justice system.*

The cautioning/conferencing concept is well known to Police and whilst at the moment they are being urged to review the entry level decision making processes little would be required by way of education and training to extend this approach to aboriginal and other offenders who have passed the cut off age of 18.

It is even possible to postulate an alternative avenue into the MERIT programme [although differently badged] whereby the pressure from the Aboriginal community for participation in this successful initiative may redress the poor take-up rate by Aboriginal defendants under the current referral system.

2. A court based Model

If it came to pass that the concept of cautioning/community conferencing was extended beyond the juvenile jurisdiction this would change the dynamics of the way the Aboriginal Community interacted with the Court. It would not mean that the framework set out in the proposal sent for my consideration

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[2] See "Cautioning Aboriginal Young People" brochure – NSW Police Force 07/07
[3] Applying BOCSAR data to fine or lesser outcomes – approximately 6,000 persons per annum

was irrelevant, it would simply broaden the scope and again increase the number of persons who had access to a culturally sensitive court.

I need not set this out at length. The document prepared in relation to a proposal intended for the District Court is just as relevant and applicable to the Local Court jurisdiction. No one should lose sight of the fact that the Local Court shares a significant level of coverage of criminal offences with the District Court. The concept of the court being assisted by input from members of the Aboriginal Community whether in liaison with the Probation and Parole Service or through the involvement of members of the Aboriginal community, whether they be members of the Local Aboriginal Community Justice Group or not is one that I have long endorsed. This approach mirrors to some extent the approach set out in Section 4G of the Victorian legislation.

I do not at this time intend to be more expansive on this area at this time. As you know from our discussions, Deputy Chief Magistrate Syme and Magistrate Dick will be travelling to Queensland next week to meet with the Chief Magistrate of Queensland, the magistrate responsible for the Murri Court and with Aboriginal participants. Magistrate McRae from Mt. Druitt and I will be travelling to South Australia and Victoria to discuss the operations of the Nunga and Koori Courts with the respective Heads of Jurisdiction, operational magistrates and members of the Aboriginal Community involved in the dedicated courts of each State. I am particularly interested in discussing proposed changes to the South Australian approach that are about to be implemented. Once this Court has considered the knowledge gained from these visits I will contact you to arrange a further meeting.

Effective communication is important in dealing with issues of such importance. Please do not hesitate to discuss with me the foregoing issues or any other matters you consider important in developing a successful outcome for aboriginal people, the community and the Court.

Yours Sincerely

Graeme Henson
Chief Magistrate