

# Aboriginal Courts

This section of the Discussion Paper considers the development of Aboriginal courts throughout Australia. The Commission uses the term 'Aboriginal courts' to refer to all of the current models in Australia where Aboriginal Elders are involved in court proceedings. These models include the Nunga Court, Koori Court, Murri Court and circle sentencing. Aboriginal courts, as they currently exist, operate within the boundaries of the Australian legal system and in no case does an Aboriginal Elder have authority in the Australian legal system to decide a case or impose punishment. The role of Elders is primarily to advise the court. In some courts Elders also speak to the accused (about the consequences of their behaviour) in a culturally appropriate manner. It is important to note that Aboriginal courts are not Indigenous-controlled 'community courts' vested with western judicial power. Such courts do not presently exist in Australia, although there are examples in other countries.<sup>1</sup> It is apparent that court-like structures or processes are not part of Aboriginal customary law. As stated by Berndt and Berndt:

Formal gatherings in the nature of law courts with judicial functions do not exist in Aboriginal Australia; there is no formally constituted court of law, comprising special persons vested with authority and power to deal with cases, pass judgment, and impose punishment.<sup>2</sup>

As a consequence the Commission does not support the establishment of Aboriginal-controlled community courts.<sup>3</sup> It is the view of the Commission that its proposal for community justice groups is the most appropriate

method of recognising Aboriginal customary law in the criminal justice process;<sup>4</sup> however, the Commission does support the establishment of Aboriginal courts in order to make the Western Australian criminal justice system more effective. Aboriginal courts provide an environment which is more sensitive to Aboriginal customary law and other cultural matters and can, therefore, more easily and effectively take those matters into account. Importantly, by recognising the central role of Aboriginal Elders, these courts may also benefit Aboriginal communities by reinvigorating Aboriginal customary law and cultural values where those structures may have broken down.

The single most important feature of the various models currently operating is the involvement of Aboriginal Elders and other respected persons in the court process. The need for Aboriginal participation in sentencing has been recognised for some time. In *Munugurr v The Queen*<sup>5</sup> the Northern Territory Court of Criminal Appeal recommended that judges should sit in Aboriginal communities for a number of reasons, including that it would make Aboriginal witnesses more comfortable and show the community that justice was being done.<sup>6</sup> In recent years, courts across Australia have adopted various procedures and practices aimed at increasing the involvement of Aboriginal people, especially Elders, in sentencing matters. Aboriginal courts have emerged in recent times in order to: reduce the alarming over-representation of Aboriginal people in the criminal justice system; respond to the recommendations of the RCIADIC which advocated for greater participation by Aboriginal people in the

1. Tribal courts in Indian reservations in the United States of America are empowered to deal with all but the most serious offences committed on the reservations by an Indian person and these courts are able to impose imprisonment up to one year: see HREOC Aboriginal and Torres Strait Social Justice Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) 35, 39. See <[http://www.hreoc.gov.au/social\\_justice/customary\\_law/nt\\_lawreform.htm](http://www.hreoc.gov.au/social_justice/customary_law/nt_lawreform.htm)>. Village courts, such as those that exist in Papua New Guinea, were considered in some detail by the Australian Law Reform Commission (ALRC) and it is noted that, although these courts were supported to some extent by the ALRC, there was greater support for the unofficial dispute resolution methods which also operated at the village level: see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [769]–[802].
2. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 348.
3. In this regard the Commission notes that criticisms of the regime for Village courts in Papua New Guinea indicate that these courts have become more westernised over time and it has been noted that generally Indigenous-controlled courts—although commencing with flexible procedures—tend to incorporate western and formal procedures over time and thereby may eventually undermine customary law: see McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 231, 237.
4. It is the Commission's view, as stated throughout this Paper, that Aboriginal customary law should be applied by Aboriginal people within their own communities and according to their own rules.
5. *Munugurr v The Queen* (1994) 4 NTLR 63.
6. Lofgren N, 'Aboriginal Community Participation in Sentencing' (1997) 21 *Criminal Law Journal* 127.

administration of criminal justice; and as a consequence of strategies which are based upon partnerships and agreements between state governments and Aboriginal people.<sup>7</sup> They have also resulted from recognition that the adversarial system and procedures under Australian law are not always appropriate for Aboriginal people.<sup>8</sup> While many of the initiatives have resulted from the individual efforts of particular magistrates and Aboriginal community members, there is a growing trend of greater formal recognition of these courts.<sup>9</sup>

During the Commission's consultations there was extensive support for Elders to become more involved in criminal justice issues both prior to and during formal involvement with the criminal justice system.<sup>10</sup> Many communities expressed support for one or more Aboriginal people to sit with a magistrate in court<sup>11</sup> and for the various Aboriginal court models which are currently operating.<sup>12</sup> On the other hand there was limited support by some communities for Aboriginal courts where authority would be vested solely in the Elders to administer justice in relation to Aboriginal customary law matters and disputes.<sup>13</sup>

## Previous Inquiries Australian Law Reform Commission

In its 1986 report on *The Recognition of Aboriginal Customary Laws*, the ALRC did not support a general Australia-wide scheme for Aboriginal courts. However, it did consider that such courts or bodies could be established if genuinely desired by the local community.<sup>14</sup> In this respect the ALRC was referring to Aboriginal-controlled community courts as distinct from the various models of Aboriginal courts which currently operate under the Australian legal system. If such

community courts were to be established the ALRC prescribed minimum standards<sup>15</sup> which included that:

- the local community should have power to make by-laws which include Aboriginal customs, rules and traditions;
- individual rights, such as a right of appeal and the right to be dealt with under the general system, should be protected;
- by-laws should in general apply to all persons within the boundaries of the community;
- the court should determine its own procedure subject to the general requirement to be procedurally fair;
- the community should have some say as to who constitutes the court;
- the courts' powers should include powers of mediation and conciliation;
- such courts should have appropriate support facilities; and
- there should be regular reviews of the operation of these courts.

## Report on Alternative Dispute Resolution in Aboriginal Communities to the Northern Territory Law Reform Committee

In 1997 the NTLRC formed a sub-committee to report on alternative dispute resolution in Aboriginal communities. It recommended that community justice plans could incorporate a community court but that, if they did so, the court would be required to adhere to certain rights of the defendant (such as the right to an interpreter, the right to legal assistance, the right

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7. Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends and Issues* 1–2.  
 8. Freiberg A, *Innovations in the Court System* (Paper presented at the Australian Institute of Criminology Conference, *Crime in Australia: International Connections*, Melbourne, November 2004) 8.  
 9. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 35.  
 10. LRCWA, Project No 94, *Thematic Summaries of Consultations – Albany*, 18 November 2003, 15, 17; *Armadale*, 2 December 2002, 25; *Midland*, 16 December 2002, 40. The Commission also notes that research conducted for the Department of Justice in the Kimberly found that between 75–85 per cent of Aboriginal people questioned, in both remote communities and towns, supported the greater use of Aboriginal ways of dealing with problems within the court system. See Colmar Brunton (WA) and Colmar Brunton Social Research, *Kimberley Regional Justice Project: Market Research* (Perth: Department of Justice, 2002) 8.  
 11. LRCWA, Project No 94, *Thematic Summaries of Consultations – Mirrabooka*, 18 November 2002 8; *Armadale*, 2 December 2002, 25; *Rockingham*, 9 December 2002, 30; *Midland*, 16 December 2002 36; *Broome*, 17–19 August 2003, 25; *Wuggubun*, 9–10 September 2003, 39.  
 12. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wuggabun*, 9–10 September 2003, 38 where it was indicated that they were interested in circle sentencing; *Laverton*, 6 March 2003, 14 where they supported the Koori court; *Geraldton*, 26–27 May 2003, 16; *Pilbara*, 6–11 April 2003, 15 which referred to initiatives at Yandeyarra, Wiluna and the Koori court; *Bunbury*, 28–29 October 2003, 12 which also supported the Koori court model; *Pilbara*, 6–11 April 2003, 15 and *Broome*, 17–19 August 2003, 30 which both supported Yandeyarra circle sentencing court; *Manguri*, 4 November 2002, 5 which supported sentencing circles; *Mirrabooka*, 18 November 2002, 8 which supported Elders sitting with Magistrates.  
 13. LRCWA, Project No 94, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 27; *Pilbara*, 6–11 April 2003, 15; *Albany*, 18 November 2003, 15.  
 14. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [817].  
 15. *Ibid* [818].

of silence and the right to be heard) and also provide a right of appeal to a general court of summary jurisdiction.<sup>16</sup> It was proposed that a community court should have the power to impose a range of sanctions, some based on customary law and others on sanctions under the Australian legal system; however, community courts should not be able to impose imprisonment.<sup>17</sup>

Although this proposed scheme aims to recognise Aboriginal customary law (within defined limits) and allow communities to develop their own strategies to justice issues,<sup>18</sup> the Commission is of the view that an attempt to create an Aboriginal-controlled court which is partly based on Aboriginal customary law and partly based on general legal principles is fraught with difficulties. In this matter, the Commission agrees with the ALRC that it is preferable to establish structures which do not involve the exercise of western judicial power.<sup>19</sup> The Commission's proposal for community justice groups aims to recognise an Aboriginal community's right to apply and enforce its own customary law (subject to compliance with Australian law) while at the same time it does not seek to impose a series of additional restrictions as to how that customary law must be applied.

## Historical Perspective

In its report on Aboriginal customary law the ALRC considered examples of special courts which had been established for Aboriginal people throughout Australia. It was noted that the motivation was not always to accommodate the needs of Aboriginal people or to recognise Aboriginal customary law issues or cultural matters.<sup>20</sup> For example, the Courts of Native Affairs in Western Australia operated between 1936 and 1954 to deal with serious offences committed by 'natives'

against other 'natives'. The legislation which covered the operation of these courts permitted a 'head man' to assist the court; however, it was not clear whether the role of the 'head man' was to act as an interpreter or as a witness.<sup>21</sup> While the legislation ostensibly allowed 'tribal custom' to be taken into account in mitigation, it has been suggested that these courts were not only ineffective in this regard but also removed many important legal rights which operated under the general legal system.<sup>22</sup>

Both Western Australia and Queensland established Aboriginal community courts, although, as has been discussed already in relation to the by-law scheme, these courts in Western Australia never came to fruition. The Queensland community courts, which were established in the 1960s, included dealing with breaches of the community by-laws and resolving disputes that were not subject to any Australian law. These courts were convened by justices of the peace who were resident in the local community. Legislation<sup>23</sup> provided that these courts were to exercise their jurisdiction having regard to the usage and customs of the community; in theory, therefore, these courts were able to take into account and deal with customary law matters.<sup>24</sup> However, in practice there were a number of problems which led to the eventual abolishment of these courts and the repeal of the legislation.<sup>25</sup> Such problems included the lack of training for justices of the peace, the lack of administrative support, the requirement that the procedure to be followed was the same as for a general magistrates court, and the lack of sentencing options.<sup>26</sup> Perhaps the most compelling reason for the failure of these courts was that, despite the apparent ability to consider Aboriginal customary law matters, the practices and procedures of these courts were such that they essentially

16. NTLRC, *Report on Alternative Dispute Resolution in Aboriginal Communities*, Report 17C (1997) 20–22. In this regard the Commission notes the observation that it may be inappropriate to impose procedural standards to Aboriginal communities because Aboriginal dispute resolution methods involve the entire community and focus on restoration: see McRae H, Netheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 236.

17. NTLRC, *Report on Alternative Dispute Resolution in Aboriginal Communities*, Report 17C (1997) 22–23.

18. *Ibid* 2.

19. The ALRC observed in relation to the tribal courts in America that it has been argued that 'Indian justice as dispensed by Indian courts' essentially mirrors white justice and white institutions: see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [788].

20. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [721]–[722].

21. Harris M, 'From Australian Courts to Aboriginal Courts in Australia – Bridging the Gap?' (2004) 16 *Current Issues in Criminal Justice* 26, 27.

22. Auty K, 'Putting Aboriginal Defendants Off Their Country' in Auty K & Toussaint S (eds), *A Jury of Whose Peers? The cultural politics of juries in Australia* (Perth: University of Western Australia, 2004) 75–77. The Commission notes that the right to an appeal and the right to a trial by jury were removed in these 'courts'. The boundaries between the roles of police and protectors were often blurred with both at times acting as counsel for the defendant. Also at the same time that these 'courts' operated the Commissioner of Native Affairs was able to recommend to the relevant minister that notices be displayed in any district advising Aboriginal people that a particular 'tribal practice' was to be discontinued. Protectors were required to take action against any 'natives' who persistently disregarded these notices: 140–41.

23. *Community Services (Aborigines) Act 1984* (Qld).

24. Queensland Law Reform Commission, *The Role of Justices of the Peace in Queensland*, Working Paper No 54 (May 1999) 215–16.

25. The Queensland Government repealed the legislative provisions which allowed a community to establish a community court in 2005 because there were no longer any such courts in existence: see Queensland Government, *Summary of New Laws for Aboriginal Community Governance: Local Government (Community Government Areas) Bill 2004* <[http://www.datsip.qld.gov.au/pdf/mcmc/draft\\_bill\\_summary.pdf](http://www.datsip.qld.gov.au/pdf/mcmc/draft_bill_summary.pdf)> 12.

26. Queensland Law Reform Commission, *The Role of Justices of the Peace in Queensland*, Working Paper No 54 (May 1999) 218–19.

*The Commission is of the view that an attempt to create an Aboriginal-controlled court which is partly based on Aboriginal customary law and partly based on general legal principles is fraught with difficulties.*

administered Australian law.<sup>27</sup> For example, where an alleged offender pleaded not guilty to an offence, the court was required to follow the procedures applicable to mainstream courts including the requirement to follow strict rules of evidence.<sup>28</sup> A review of the community courts recommended that justices of the peace (of Indigenous descent wherever possible) should sit in a general magistrates court with all the accompanying support and training from justice agencies.<sup>29</sup> This scheme was eventually replaced with a scheme which operated within the Australian law but which aimed to include Aboriginal personnel in the administration of justice.

Similar observations can be made in relation to the attempt in Western Australia to introduce community courts under the by-laws scheme.<sup>30</sup> Unlike Queensland there was no legislative basis for their operation and it was the intention of the parties involved that Aboriginal justices of the peace would sit in a general magistrates court and that these courts would be staffed with Aboriginal personnel.<sup>31</sup> It was not therefore a separate court with separate jurisdiction. In practice, where Aboriginal justices of the peace had been appointed, it appeared that they only dealt with breaches of the by-laws, even though they had the same jurisdiction to hear matters as other justices of the peace.<sup>32</sup> The review of the by-law scheme in 1992 indicated that many Aboriginal justices of the peace found it difficult to deal with some matters that involved their family or kin. Also the literacy requirements for appointment potentially excluded Aboriginal Elders who were often considered by the community to be the most appropriate candidates.<sup>33</sup>

The ALRC noted that in some jurisdictions individual magistrates developed their own practices in relation to hearing from Aboriginal Elders and making their courts less formal; these practices were described as ad hoc and dependent upon the individual judicial officer involved.<sup>34</sup> This is a situation which has continued to the present day. Current practices in Western Australia have been developed by local magistrates and there is no legislation or formal government policy which ensures the permanency of these initiatives.

## The Relationship Between Aboriginal Courts, Problem-Solving Courts and Therapeutic Jurisprudence

While many jurisdictions in Australia are witnessing the development of Aboriginal courts; at the same time other specialist courts and problem-solving courts are emerging. Specialist courts have been defined as courts which have limited jurisdiction or alternatively exclusive jurisdiction in relation to a particular area.<sup>35</sup> Examples of specialist courts are children's courts, sexual offences courts and liquor licensing courts. Problem-solving courts (which are sometimes referred to as problem-orientated courts) use the court's authority and processes to address underlying problems.<sup>36</sup> Examples are drug courts and family violence courts (both of which currently exist in Western Australia). In addition, the practice of therapeutic jurisprudence has evolved in Australia and claims to 'explore the healing power of the law' and 'promote the wellbeing of participants'.<sup>37</sup> Therapeutic jurisprudence encourages greater participation in the

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27. Miller B, *Crime Prevention and Socio-Legal Reform on Aboriginal Communities in Queensland* (Paper presented at Police and the Community in the 1990s, Australian Institute of Criminology Conference, Brisbane, 23–25 October 1990) 141.
  28. Queensland Law Reform Commission, *The Role of Justices of the Peace in Queensland*, Working Paper No 54 (May 1999) 219.
  29. Queensland Law Reform Commission, *The Role of Justices of the Peace in Queensland*, Report No 54 (December 1999) 23, 28.
  30. See 'The Western Australian Aboriginal Community By-Law Scheme', above pp 115–16.
  31. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [750].
  32. McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Perth: Aboriginal Affairs Planning Authority, July 1992) 11.
  33. *Ibid* 13–14.
  34. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [722].
  35. Freiberg A, *Innovations in the Court System* (Paper presented at Crime in Australia: International Connections, Australian Institute of Criminology Conference, Melbourne, November 2004) 2.
  36. *Ibid* 8.
  37. King M & Ford S, *Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The example of the Geraldton Alternative Sentencing Regime* (Paper presented at The Cutting Edge: Therapeutic Jurisprudence in Magistrates Courts Conference, Perth, 6 May 2005) 1.

court process and aims to 'promote respect between the judicial officer and participants'.<sup>38</sup> It has been said that, although therapeutic jurisprudence 'acknowledges the coercive side of the court and the law, it also says that the authority and standing of the court and those who preside in it can be a powerful mechanism to inspire rather than to coerce change'.<sup>39</sup> The practice of therapeutic jurisprudence has won favour in Western Australia which is demonstrated by a resolution of all country magistrates to apply its principles in their courts.<sup>40</sup>

Some commentators have expressed the view that Aboriginal courts utilise therapeutic jurisprudence. Freiberg, for example, concludes that Aboriginal courts, although not problem-solving courts, are specialist courts with 'some problem-solving and therapeutic overtones'.<sup>41</sup> It has been claimed that due to the objective of the Victorian Koori Court to have a 'positive impact upon the lives of those people who appear before the court' it can be classified as a 'therapeutic jurisprudence initiative'.<sup>42</sup> Others have disagreed, claiming that Aboriginal courts are 'in a category of their own' because of the role of Elders.<sup>43</sup> While it is clear that Aboriginal courts are specialist courts, there are differing views as to whether Aboriginal courts should be classified as problem-solving courts and whether they operate within the framework of therapeutic jurisprudence. The Commission has strong reservations about the categorisation of Aboriginal courts as problem-orientated or problem-solving courts. If there is a problem to be solved it is the failure of the criminal justice system to accommodate the needs of Aboriginal people and to ensure that they are fairly treated within that system.

At this stage it is important to note that the Commission is concurrently working on another reference which specifically examines problem-

orientated courts and judicial case management in Western Australia. That reference will consider the effectiveness of practices such as therapeutic jurisprudence in relation to Aboriginal people. The Commission also wishes to make clear that its support for the establishment of Aboriginal courts in Western Australia should not be taken to imply that there is no need for courts generally to adapt their procedures so that they are more culturally appropriate and sensitive to the needs of Aboriginal people.<sup>44</sup> However, the focus of the discussion in this section is the relationship between Aboriginal courts and Aboriginal customary law, the role of Aboriginal Elders and the ability of Aboriginal courts to provide a more effective criminal justice system for Aboriginal people in Western Australia.

## Examples of Aboriginal Courts Throughout Australia

### Western Australia

#### Yandeyarra Circle Sentencing Court

The Yandeyarra Circle Court commenced in May 2003 after extensive consultations between the local magistrate and the community.<sup>45</sup> The magistrate, the parties to the proceedings, family members and Elders from the community sit around a table.<sup>46</sup> The proceedings involve the prosecutor and the defence counsel presenting their case and then the offender has an opportunity to speak. The magistrate and the Elders have a private discussion about the sentencing options and then the Elders and the magistrate inform the offender of the sentence.<sup>47</sup> On occasions, defendants in the South Hedland Magistrates Court have been released on bail, with the consent of the Yandeyarra community, on condition that they reside at the community until they appear in the Yandeyarra

38. King M, 'Applying Therapeutic Jurisprudence in Regional Areas – The Western Australian Experience' (2003) 10(2) *E Law: Murdoch University Electronic Journal of Law* [19].

39. King M & Wilson S, 'Country Magistrates' Resolution on Therapeutic Jurisprudence' (2005) 32(2) *Brief* 23, 24.

40. King M & Ford S, *Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The example of the Geraldton Alternative Sentencing Regime* (Paper presented at The Cutting Edge: Therapeutic Jurisprudence in Magistrates Courts Conference, Perth, 6 May 2005) 2.

41. Freiberg A, *Innovations in the Court System* (Paper presented at Crime in Australia: International Connections Conference, Australian Institute of Criminology, Melbourne, November 2004) 8; King M & Ford S, *Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The example of the Geraldton Alternative Sentencing Regime* (Paper presented at the Cutting Edge: Therapeutic Jurisprudence in Magistrates Courts Conference, Perth, 6 May 2005) 2.

42. Aty K & Briggs D, 'Koori Court Victoria: *Magistrates Court (Koori Court) Act 2002*' (2004) 8 *Law Text Culture* 7, 19.

43. Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends and Issues* 4.

44. See discussion under 'Practice and Procedure', below pp 231–34 and Part IX 'Aboriginal Customary Law in the Courtroom: Evidence and Procedure', below pp 385–416.

45. King M, 'Applying Therapeutic Jurisprudence in Regional Areas – The Western Australian Experience' (2003) 10(2) *E Law: Murdoch University Electronic Journal of Law* [24].

46. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 127. It was observed, as part of the LRCWA research for Project No 96, that all parties wore casual clothes.

47. Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends and Issues* 4.

## The Commission has strong reservations about the categorisation of Aboriginal courts as problem-orientated or problem-solving courts.

Circle Court.<sup>48</sup> During this period the Department of Justice community corrections officer and members of the community at Yandeyarra work behind the scenes to consider options available for the accused.<sup>49</sup> Like many Aboriginal courts, this scheme was initiated by a particular magistrate who had a strong connection with the local Aboriginal community. When that magistrate was transferred it was not clear whether the court would continue to operate as frequently.<sup>50</sup> It appears that the court has continued to sit every four to five weeks over the last couple of years. The magistrate who convened the court from September 2003 until June 2004 has stated that for the 50–60 matters that have been dealt with there have been no breaches of community-based orders.<sup>51</sup> This initial success has been accredited to the strong community support for the court and the existence of good local support facilities such as the women's centre, Aboriginal out-camp and juvenile bail hostel.<sup>52</sup>

### Wiluna Aboriginal Court

In 2001 the Carnarvon magistrate, after meeting with members of the Aboriginal community and other stakeholders, introduced new procedures and sentencing options in order that the court process could be more 'sensitive' to Aboriginal culture.<sup>53</sup> The layout of the court has been said to reflect 'the way in which a traditional meeting would occur in the bush'.<sup>54</sup> Tables are placed at the same level in a triangular design and an Aboriginal Elder sits with the magistrate at the base of the triangle. No-one stands during the proceedings. The magistrate retains full sentencing

authority in order to prevent any interference with the traditional role of the Elders. The role of the Aboriginal Elder who sits with the magistrate, as well as other Elders who are present in the courtroom, is to speak to the accused in the local language. The Elders speak to the defendant about how their behaviour has impacted upon Aboriginal traditions and culture.<sup>55</sup> From the magistrate's perspective, this has a significant impact on the accused.<sup>56</sup> The principle of mutual respect underpins the operation of the court; for example, if an Aboriginal person is required to attend a funeral the magistrate has allowed them to do so provided they came back to court as soon as possible.<sup>57</sup>

### Magistrates sitting with Elders and the proposed community courts

Since the 1970s magistrates in the Kimberley have, at various times, informally adopted the practice of inviting Elders to sit with them when dealing with Aboriginal people.<sup>58</sup> For example, in 2001 a Western Australian magistrate regularly invited two to three Aboriginal Elders (both men and women) to sit with him during circuit courts in Aboriginal communities.<sup>59</sup>

The Department of Justice has plans for long-term community courts in a number of remote locations. It is not envisaged that these plans will be working until the 'multi function justice facilities' recommended by the Gordon Inquiry are constructed in each location. In the meantime, if there is no change to the government policy, magistrates will continue to employ their own procedures.<sup>60</sup> The Commission understands

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48. King M, 'Applying Therapeutic Jurisprudence in Regional Areas – The Western Australian Experience' (2003) 10(2) *E Law: Murdoch University Electronic Journal of Law* [45]. In one case, observed as part of the LRCWA research for Project No 96, an accused who was charged with disorderly conduct was placed on a court order that included as a condition that he was not to leave the Yandeyarra community without the permission of an Elder.
49. Department of Justice, *A Discussion Paper on Aboriginal Courts* (Perth, 2005) 28.
50. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 127.
51. Department of Justice, *A Discussion Paper on Aboriginal Courts* (Perth, 2005) 29.
52. *Ibid* 29–30.
53. King M, 'Applying Therapeutic Jurisprudence in Regional Areas – The Western Australian Experience' (2003) 10(2) *E Law: Murdoch University Electronic Journal of Law* [23].
54. King M & Wilson S, 'Magistrates as Innovators' (2002) 29(11) *Brief* 9.
55. Interview with Magistrate Wilson, 2 August 2005, LRCWA, Project 96.
56. King M & Wilson S, 'Magistrates as Innovators' (2002) 29(11) *Brief* 9.
57. Interview with Magistrate Wilson, 2 August 2005, LRCWA, Project 96.
58. King M & Wilson S, 'Magistrates as Innovators' (2002) 29(11) *Brief* 7.
59. 'The Law Report Bush Courts', *Radio National* (Pt 2, 21 August 2001): see <<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s349743.htm>> 7.
60. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 127–28.

that the Department of Justice is generally considering the issues in relation to Aboriginal courts after completing a discussion paper on the topic.<sup>61</sup>

## Geraldton Alternative Sentencing Regime

The Geraldton Alternative Sentencing Regime (GASR) commenced in 2001 and has been described as a specialist problem-solving court program which aims to 'promote the rehabilitation of offenders with substance abuse, domestic violence and other offending related behaviours'.<sup>62</sup> Although it is clearly not an Aboriginal court, the Commission considers that it merits discussion as it is the only specialist court in Western Australia that has dealt with a significant proportion of Aboriginal people.<sup>63</sup> An evaluation of the regime found that 40 per cent of participants (as at May 2004) were Aboriginal.<sup>64</sup> Morgan and Motteram conclude that this is a result of the participation of Aboriginal services such as the ALS and 'demographic factors'.<sup>65</sup> The improved Aboriginal participation rate has also been attributed to the fact that the admissions policy for GASR is much broader than for other specialist courts in Western Australia: it includes problems which are of particular concern to Aboriginal people such as alcohol and solvent abuse.<sup>66</sup>

GASR takes a holistic approach when considering strategies for rehabilitation and it has also incorporated the stress reduction and self-development technique of transcendental meditation.<sup>67</sup> Magistrate King concludes that this practice has been beneficial for many Aboriginal offenders for two reasons: most Aboriginal offenders come from a background of 'intergenerational stress due to historical, political, social and economic factors'; and the practice of meditation is, according to Magistrate King, consistent with

Aboriginal culture.<sup>68</sup> Comments from the Geraldton office of the ALS supported the benefits of transcendental meditation for some of their clients.<sup>69</sup> Magistrate King has stated that GASR uses principles based on Aboriginal dispute resolution: the promotion of healing and the involvement of the offender by giving them a voice.<sup>70</sup> Commentators have observed that GASR has been an empowering experience for Aboriginal participants.<sup>71</sup> An evaluation of GASR mentioned that the magistrate had considered the need of one particular offender to attend a drug treatment program with the support and guidance of an Aboriginal Elder.<sup>72</sup> Despite this and the support for the program from the ALS, the evaluation highlighted that the regime did not have strong cultural support.<sup>73</sup> While the Commission supports this initiative (along with any other specialist court project which aims to be more culturally appropriate and effective for Aboriginal people), it notes that the GASR does not include the most important feature of Aboriginal courts – the direct participation of Aboriginal Elders and other community members.

## South Australia

The Nunga Court, the first of its kind in Australia, was developed in 1999 by Magistrate Vass and commenced in Port Augusta. Nunga Courts have since been established in Port Adelaide and Murray Bridge. The program now extends to children, with a pilot Aboriginal Youth Court at Port Augusta.<sup>74</sup> The court, which deals with Aboriginal people who have pleaded guilty, aims to provide a more culturally appropriate setting, reduce the over-representation of Aboriginal people in custody and reduce reoffending by promoting improved compliance with court orders. In particular, the Nunga Court has been effective in increasing court

61. Discussions with Mr John Klarich, Director, Magistrates Courts and Tribunals, Department of Justice, 17 August 2005.

62. Cant R, Downie R & Henry D, *Report on the Evaluation of the Geraldton Alternative Sentencing Regime* (Perth: Department of Justice, August 2004) 1.

63. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 126.

64. Cant R, Downie R & Henry D, *Report on the Evaluation of the Geraldton Alternative Sentencing Regime* (Perth: Department of Justice, 2004) 10.

65. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 126.

66. King M & Ford S, *Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The example of the Geraldton Alternative Sentencing Regime*, (Paper presented at The Cutting Edge: Therapeutic Jurisprudence in Magistrates Courts Conference, Perth, 6 May 2005) 3.

67. King M, 'Applying Therapeutic Jurisprudence in Regional Areas – The Western Australian Experience' (2003) 10(2) *E Law: Murdoch University Electronic Journal of Law* [37]–[40]

68. King M & Ford S, *Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The example of the Geraldton Alternative Sentencing Regime* (Paper presented at The Cutting Edge: Therapeutic Jurisprudence in Magistrates Courts Conference, Perth, 6 May 2005) 4 and note that due to a lack of government funding transcendental mediation is no longer available as part of the program.

69. Cant R, Downie R & Henry D, *Report on the Evaluation of the Geraldton Alternative Sentencing Regime* (Perth: Department of Justice, 2004) 13.

70. Submissions received from Magistrate King, 13 July 2005, in relation to Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005).

71. Cant R, Downie R & Henry D, *Report on the Evaluation of the Geraldton Alternative Sentencing Regime* (Perth: Department of Justice, 2004) 28.

72. *Ibid.*

73. *Ibid.*

74. Tomaino J, *Aboriginal (Nunga) Courts*, Information Bulletin (Adelaide: Office of Crime Statistics and Research, undated) 2, 14. The name of the court was chosen by the local Aboriginal community.

attendance rates, which are notoriously low for Aboriginal people throughout Australia.<sup>75</sup> Aboriginal justice officers are employed to assist the court, the offender and the community. The magistrate sits next to the Aboriginal justice officer or an Aboriginal Elder who provides advice to the magistrate about cultural or community issues.<sup>76</sup> While the court is held in a court building, the magistrate sits at the same level as the offender and other participants.<sup>77</sup> It has been said that the Nunga Court 'creates a far less intimidating environment for Indigenous offenders by removing the structure of hierarchy and adversarial hostility evident in the Magistrates Court'.<sup>78</sup> The court is said to be effective because of the 'free and open exchange' between the magistrate and the offender and, where Elders are involved, because of kinship and family relationships. These relationships have led to more effective undertakings and promises by the offender.<sup>79</sup> However, from the perspective of recognising Aboriginal customary law and promoting greater community involvement in sentencing, there is no legislative requirement to consider the views or information received from the Aboriginal Elder.<sup>80</sup>

The role of the Aboriginal justice officer has also contributed to more effective delivery of services. These officers assist offenders in understanding court orders, assessing the capacity to pay fines, advising magistrates of alternative options, and generally providing support to families, victims and offenders.<sup>81</sup>

## Queensland

The Murri Court commenced in Brisbane in August 2002 and has since been extended to Rockhampton and Mount Isa. There is also a Youth Murri Court in Brisbane

which was the first youth Aboriginal court in Australia.<sup>82</sup> The court is modelled principally on the South Australian Nunga Court and the Victorian Koori Court; the magistrate sits at the same level as the offender and sits next to an Elder who advises the magistrate throughout the proceedings. The Brisbane Murri Court convenes around a custom-made oval table, whereas the magistrate in the Rockhampton court still sits at the bench.<sup>83</sup> The police prosecutors do not wear uniforms.<sup>84</sup> The purpose of the court is to reduce the over-representation of Aboriginal and Torres Strait Islander people in custody by providing, through the involvement of Elders and community justice groups, more culturally appropriate bail and sentencing orders.<sup>85</sup> Queensland is the only state that has a legislative requirement that sentencing courts consider the submissions from a community justice group or Elder.<sup>86</sup>

The Murri Court has also contributed to the re-connection of participants with their communities.<sup>87</sup> The Elder who sits with the magistrate addresses the offenders directly in relation to their offending behaviour and its effect on the community. The sentencing decision is made by the magistrate in order to protect Elders from any family or cultural pressure.<sup>88</sup> However, a magistrate from the Rockhampton court states that there 'is a discernible atmosphere of seriousness when the Elders are present' and further that:

What cannot be easily explained is the power of the Murri Court process on a spiritual or emotional level. The power of the natural authority and wisdom of the Elders is striking in the Courtroom. There is a distinct feeling of condemnation of the offending but support for the offender's potential emanating from the Elders and the Justice Group members.<sup>89</sup>

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75. Ibid 4, where it is stated that the attendance rate in the Nunga court is 80 per cent compared to less than 50 per cent for the general magistrate's court.
76. Welch C, 'South Australian Courts Administration Authority – Aboriginal Court Day and Aboriginal Justice Officers' (2002) 5(14) *Indigenous Law Bulletin* 5.
77. Tomaino J, *Aboriginal (Nunga) Courts*, Information Bulletin (Adelaide: Office of Crime Statistics and Research, undated) 4.
78. Han A, *The Nunga Court: Creating Pathways for the Improved Sentencing Practices of Indigenous Offenders*, Report prepared for Sandra Kanck MLC (November 2003) 9: see <<http://www.sa.democrats.org.au/Campaigns/LawJustice/Nunga%20Court.html>>.
79. Tomaino J, *Aboriginal (Nunga) Courts*, Information Bulletin (Adelaide: Office of Crime Statistics and Research, undated) 5 & 12.
80. Han A, *The Nunga Court: Creating Pathways for the Improved Sentencing Practices of Indigenous Offenders* (November 2003) 20: see <<http://www.sa.democrats.org.au/Campaigns/LawJustice/Nunga%20Court.html>>.
81. Welch C, 'South Australian Courts Administration Authority – Aboriginal Court Day and Aboriginal Justice Officers' (2002) 5(14) *Indigenous Law Bulletin* 5.
82. Judge Irwin MP, *Queensland Magistracy – Present and Future*, Bar Practice Course (July 2004) 8.
83. This was as a result of consultations with the Indigenous community which indicated that it was their preference that the proceedings were still viewed by offenders as a court process: see Hennessy A, 'Indigenous Justice – Indigenous Laws at the Colonial Interface' (Paper presented at the LAWASIA Down Under 2005 conference, Gold Coast, March 2005) 4.
84. Ibid.
85. Hennessy A, 'Indigenous Justice – Indigenous Laws at the Colonial Interface' (Paper presented at the LAWASIA Down Under conference, Gold Coast, March 2005) 2.
86. *Penalties and Sentences Act 1992* (Qld) s 9(2)(o).
87. Hennessy A, 'Indigenous Justice – Indigenous Laws at the Colonial Interface' (Paper presented at the LAWASIA Down Under conference, Gold Coast, March 2005) 2.
88. Ibid 6.
89. Ibid.

## Victoria

The first Koori Court in Victoria was established in Shepparton in August 2002 following extensive consultation with members of the Aboriginal community and other stakeholders under the framework of the Victorian Aboriginal Justice Agreement.<sup>90</sup> Unlike other jurisdictions there is a legislative framework for the operation of Koori Courts in Victoria: the *Magistrates' Court (Koori Court) Act 2002* (Vic). This legislation establishes the Koori Court Division of the Magistrates' Court with the objective of increasing the participation of the Aboriginal community in the sentencing process, in particular, through the role of Aboriginal Elders and respected persons.<sup>91</sup> Other objectives of the court are to reduce the over-representation of Aboriginal people in the criminal justice system; reduce re-offending; decrease the rate of non-appearances by Aboriginal people; and have a positive impact on the lives of those people who appear in the court.<sup>92</sup>

The Koori Court can only deal with matters where there has been (or will be) a plea of guilty or where the defendant has been convicted and the defendant consents to being dealt with by the court. Sexual offences and certain family violence matters are excluded from the jurisdiction of the court.<sup>93</sup> The proceedings are required to be as informal as possible and there is a requirement under the legislation that the court is to endeavour to make the proceedings understood by not only the defendant and his or her family but also by any member of the Aboriginal community who is present.<sup>94</sup> The magistrate, defendant, prosecutor and Elders sit around an oval table: all of the traditional formalities associated with mainstream courts have been removed.<sup>95</sup> The procedure adopted by the Koori Court ensures that all parties are given an opportunity to speak, including the victim.<sup>96</sup> The Koori Court employs an Aboriginal

justice worker who provides advice to the magistrate, makes enquiries, liaises with local community service providers and consults with all participants.<sup>97</sup>

The inaugural Koori Court magistrate has observed that one of the implied objectives of the court is to 'enhance the prestige' of Elders and respected persons.<sup>98</sup> An Aboriginal Elder or respected person sits alongside the magistrate; he or she speaks directly to the offender and confers openly and audibly with the magistrate in relation to the appropriate options.<sup>99</sup> As is the case for all of the current models of Aboriginal courts in Australia, the magistrate retains the ultimate sentencing power. The same sentencing laws and principles which apply to all offenders under Victorian law affect Aboriginal offenders who appear before the Koori Court.<sup>100</sup> The legislation provides that the Koori Court *may* consider any oral statement made to it by an Aboriginal Elder or respected person as well as information provided by other parties including the Aboriginal justice worker.<sup>101</sup> This can be contrasted to the position in Queensland where sentencing courts *must* consider such information. The legislation provides that the Secretary of the Department of Justice may appoint a member of the Aboriginal community as an Aboriginal Elder or respected person.<sup>102</sup> The Commission draws attention to the difficulties associated with non-Aboriginal people selecting or appointing Elders.<sup>103</sup>

A review of the operation of the first two years of the Koori Court in Victoria is currently being undertaken, but early feedback indicates that there has been a reduction in the failure to appear in court, a reduction in recidivism and benefits from the involvement of the Elders, and the greater participation of the offender and others present.<sup>104</sup> The Koori Court model has been extended to Broadmeadows and Warrnambool and there are plans for a court at Mildura.<sup>105</sup> The apparent success of this initiative in the adult jurisdiction has

90. Auty K & Briggs D, 'Koori Court Victoria: *Magistrates Court (Koori Court) Act 2002*' (2004) 8 *Law Text Culture* 7, 20–23.

91. *Magistrates' Court (Koori Court) Act 2002* (Vic) s 1.

92. Auty K & Briggs D, 'Koori Court Victoria: *Magistrates Court (Koori Court) Act 2002*' (2004) 8 *Law Text Culture* 7, 19.

93. *Magistrates' Court (Koori Court) Act 2002* (Vic) s 4F.

94. *Magistrates' Court (Koori Court) Act 2002* (Vic) s 4D.

95. Auty K & Briggs D, 'Koori Court Victoria: *Magistrates Court (Koori Court) Act 2002*' (2004) 8 *Law Text Culture* 7, 24 & 28.

96. *Ibid* 30.

97. *Ibid* 26.

98. *Ibid* 19.

99. *Ibid* 31.

100. Edney R, 'The Koori Court Division of the Magistrates Court of Victoria: Philosophy, aims and legislative scheme' (2003) 3(6) *Criminal Law News Victoria* 2.

101. *Magistrates' Court (Koori Court) Act 2002* (Vic) s 4G.

102. *Magistrates' Court (Koori Court) Act 2002* (Vic) s 7.

103. See discussion under 'The Commission's Proposal for Community Justice Groups', above pp 133–41.

104. Auty K & Briggs D, 'Koori Court Victoria: *Magistrates Court (Koori Court) Act 2002*' (2004) 8 *Law Text Culture* 7 32–33. See also Hon Hulls Attorney-General, Victoria, *Hansard*, Legislative Assembly, 18 November 2004, 1758 where it was stated that figures show that approximately 200 defendants had been through the Koori court and there were only about 18 cases of recidivism so far.

105. 'Mildura Koori Court Set to Operate from July', *ABC News Online*, 20 April 2005: see <<http://www.abc.net.au/news/newsitems/200504/s1349448.htm>>.

resulted in the establishment of a Children's Koori Court and the *Children and Young Persons (Koori Court) Act 2004* (Vic).<sup>106</sup>

## New South Wales

In New South Wales a trial of circle sentencing commenced in Nowra in February 2002 and due to its success it has been extended to other parts of the state.<sup>107</sup> The Aboriginal Justice Advisory Council was responsible for the implementation of the trial in conjunction with the local magistrate. While the circle sentencing model was based on the Canadian experience,<sup>108</sup> it was adapted to suit New South Wales with sufficient flexibility to allow further changes to suit the local circumstances of specific Aboriginal communities.<sup>109</sup>

The objectives of the circle sentencing court include increasing the participation of Aboriginal communities, Aboriginal offenders and victims in the sentencing process; reducing barriers between the Aboriginal community and courts as well as increasing confidence in the sentencing process; and reducing re-offending by Aboriginal people by providing more effective sentencing options.<sup>110</sup> Circle sentencing incorporates aspects of restorative justice by aiming to repair the harm that has been caused by the offence.<sup>111</sup> The effect of the eligibility criteria, which includes that the offender must be likely to receive imprisonment, is that the court operates at the higher end of criminal behaviour dealt with at the magistrate level.<sup>112</sup>

The parties present during the circle proceedings are the magistrate, Aboriginal Elders, the defendant and any support persons, the victim and support persons, the prosecutor, defence counsel, other community members, local service providers and the Aboriginal project officer.<sup>113</sup> The magistrate's role is to ensure that the proceedings take into account legal requirements and in particular that the sentence suggested by the circle falls within the acceptable range.<sup>114</sup> The Aboriginal project officer is employed to liaise with all participants and provides administrative functions.<sup>115</sup> When the circle convenes the process is informal: participants use plain language and many of the formal features of a traditional court, such as robes, are absent. Everyone is given an opportunity to speak, including the victim. The aim is that the circle will come to an agreement about the appropriate penalty, although the magistrate retains ultimate discretion.<sup>116</sup>

The involvement of members of the Aboriginal community is twofold. The Community Justice Group is required to assess the suitability of an Aboriginal offender who has been referred by the magistrate for inclusion in the circle sentencing court and recommends the appropriate Aboriginal Elders to participate in the circle.<sup>117</sup> During the circle sentencing process, Elders are present and provide significant input in relation to the offender and his or her community. The involvement of Elders has been considered to be the greatest strength of the process and offenders who have participated described the positive effect of Elders on their appreciation of Aboriginal culture and general respect for the sentencing process.<sup>118</sup> An additional

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106. This legislation has provisions which are based upon the legislation for adults.

107. 'Regions to Adopt Circle Sentencing', *ABC News Online*, 6 May 2005. The report notes that by the end of 2005 it is expected that it will be operating in nine locations: see <<http://www.abc.net.au/news/newsitems/200505/s1361156.htm>>. The circle sentencing scheme in New South Wales was developed after the NSWLRC report, *Sentencing Aboriginal Offenders*, recommended pilot schemes for circle sentencing and adult conferencing. This report considered that such schemes should be developed in 'consultation and collaboration with Aboriginal communities' and that if such schemes were to be incorporated into the criminal justice system this should be done by broad and flexible legislation in order to ensure procedural safeguards and consistency. See NSWLRC, *Sentencing: Aboriginal Offenders*, Report No 96 (2000) 108, 128–31.

108. Circle sentencing originated in Canada in 1992 as a result of the decision of Stuart J in *R v Moses* (1992) 71 CCC (3d) 347 where he recommended greater involvement by the community in the sentencing process: see Thomas B, *Circle Sentencing: Involving Aboriginal communities in the sentencing process*, Discussion Paper (Sydney: Aboriginal Justice Advisory Council, 1998) 7. Circle sentencing in Canada has been extended to many parts of Canada, including urban areas: see McNamara L, 'Indigenous Community Participation in the Sentencing of Criminal Offenders: Circle Sentencing' (2000) 5(4) *Indigenous Law Bulletin* 5, 7.

109. Potas I, Smart J, Brignell G, Thomas B & Lawrie R, *Circle Sentencing in New South Wales: A review and evaluation* (Sydney: Judicial Commission of New South Wales, October 2003) 3–4.

110. *Ibid* 4.

111. Thomas B, *Circle Sentencing: Involving Aboriginal communities in the sentencing process*, Discussion Paper (Sydney: Aboriginal Justice Advisory Council, 1998) 5. See further discussion under 'Sentencing – Restorative Justice', below p 224.

112. Potas I, Smart J, Brignell G, Thomas B & Lawrie R, *Circle Sentencing in New South Wales: A review and evaluation* (Sydney: Judicial Commission of New South Wales, October 2003) 5. It is noted that the court can still impose imprisonment if considered appropriate and that certain sexual offences and serious drug offences are excluded.

113. *Ibid* 7.

114. *Ibid* 5–6.

115. *Ibid* 5.

116. *Ibid* 6–10, and note that procedural matters are set out in the *Criminal Procedure Regulations 2000* (NSW) sch 3.

117. *Criminal Procedure Regulations 2000* (NSW) sch 3, Pt 6. Note that the Minister appoints the members of a community justice group on the recommendation of the Aboriginal project officer for the relevant court.

118. Potas I, Smart J, Brignell G, Thomas B & Lawrie R, *Circle Sentencing in New South Wales: A review and evaluation* (Sydney: Judicial Commission of New South Wales, October 2003) 43–44.

benefit is that the involvement of the Elders has empowered the Aboriginal community in a general sense. In one community, the Elders have developed their own mini-circle to deal with family disputes.<sup>119</sup> A review of the Nowra circle sentencing court concluded that the process provides a mechanism where local Aboriginal people can actively take responsibility for their own local problems, where they are given authority to make decisions about solutions to their problems and are empowered to implement them.<sup>120</sup>

The Commission acknowledges the benefits of the involvement of local Aboriginal communities in the administration of criminal justice. As observed by Brendan Thomas, circle courts are able to 'incorporate the values and culture of the local community'.<sup>121</sup> However, it needs to be remembered that the circle sentencing model, which appears to provide the most direct input into decisions about sentencing, does not give Aboriginal communities the right to impose their own sentencing options nor the ability to impose customary law sanctions. The magistrate retains the ultimate power and the circle involves other parties who are not Aboriginal people. The Commission draws attention to its proposal for community justice groups as a more effective model to achieve these goals.

## Northern Territory

An Indigenous court has been recently introduced in Darwin and is referred to as the Darwin Community Court. It operates at the level of a magistrates court and is limited to sentencing matters for non-violent offences. Once the court is in session the magistrate and Elders enter together; all parties including the victim (and any supporters) then sit in a circle format and each person is permitted to speak.<sup>122</sup> It is claimed that this court utilises the concept of shame that has operated as a means of social control in traditional Aboriginal society.<sup>123</sup>

## Australian Capital Territory

A pilot circle sentencing court began in Canberra in April 2004 and is known as the Ngambra Court. When an Aboriginal person appears in a general magistrates court, he or she can apply to be dealt by the Ngambra Court. An applicant can only be accepted to the program if he or she has a kinship or association with the Canberra Aboriginal and Torres Strait Islander community and the Elders' Panel considers that it is an appropriate case for a sentencing circle.<sup>124</sup> If accepted, the offender will participate in a sentencing circle which includes the magistrate, four Aboriginal Elders, the prosecutor, the defence lawyer and the victim (if he or she consents). After a lengthy session, the circle recommends the appropriate sentence to the magistrate; this will often involve the offender being sentenced under the supervision of their own community.<sup>125</sup> The magistrate is not obliged to accept the recommendation of the circle, but if he does so the magistrate can only impose that sentence if the offender consents.<sup>126</sup> The Ngambra Court aims, amongst other things, to increase the involvement of Aboriginal people in sentencing and provide culturally relevant and effective sentencing options.<sup>127</sup> In May 2005 the Australian Capital Territory government announced that a trial of this initiative will continue.<sup>128</sup>

## Key Features of the Australian Aboriginal Court Models

Due to the diversity of Aboriginal communities throughout Australia the exact procedures that have developed for each Aboriginal court differs; however, there are a number of key features evident from the above discussion. While it is important to consider these features in devising a model for Aboriginal courts in Western Australia, each local Aboriginal community must be consulted in relation to the structure that is best suited to their needs and circumstances.

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119. Ibid 48.

120. Ibid 53.

121. Thomas B, *Circle Sentencing: Involving Aboriginal communities in the sentencing process*, Discussion Paper (Sydney: Aboriginal Justice Advisory Council, 1998) 7.

122. Carbonell R, 'Indigenous Court Launched in the NT', *ABC Online*, 19 August 2005: see <<http://www.abc.net.au/worldtoday/context/2005/s1348834.htm>>; Payne S, *The Darwin Community Court: Circle Sentencing in the Top End* (Paper presented at Youth Justice: A Crime Prevention Forum, Darwin, 4-6 May 2005) 1-2.

123. Payne S, 'The Darwin Community Court: Circle Sentencing in the Top End' (Paper presented at Youth Justice: A Crime Prevention Forum, Darwin, 4-6 May 2005) 6-7.

124. Ngambra Circle Sentencing Court, Final Practice Direction, 4-6: see <<http://www.courts.act.gov.au/Magistrates/Practice%20Direction%20Final%2021st%20April%202004.pdf>>.

125. Australian Capital Territory Government, *Aboriginal Justice Initiative to Continue* (2005-2006 Budget Media Release, 3 May 2005).

126. Ngambra Circle Sentencing Court Final Practice Direction, 9: see <<http://www.courts.act.gov.au/Magistrates/Practice%20Direction%20Final%2021st%20April%202004.pdf>>.

127. Ibid 1.

128. Ibid.

## Physical Layout

Generally, Aboriginal courts have a different physical layout than a mainstream court. Some employ a circle layout while others have all parties (including the magistrate) sitting at the same level. In addition, the Elders or respected persons sit next to the magistrate, indicating their importance in the process. The effect is the abolition of the hierarchical and elevated position of the judicial officer. As well as changing the physical layout of the court, Aboriginal artefacts and the Aboriginal flag are sometimes displayed and magistrates generally acknowledge Aboriginal custodianship of land and pay respect to the Aboriginal Elders.<sup>129</sup>

## Informal Procedure and Communication

Aboriginal courts encourage better communication between the judicial officer, the offender and other parties involved in the process and place less reliance on the adversarial roles of the defence counsel and the prosecutor.<sup>130</sup> Proceedings are informal and use of legal jargon is discouraged. In some cases Elders communicate to the defendant in their own language. It is well known the many Aboriginal people have faced difficulties understanding court proceedings as a result of language barriers and a general sense of alienation from the criminal justice system. The Commission supports the use of informal procedures and the avoidance of technical legal terminology. While this approach will no doubt assist in promoting a better understanding of court processes by Aboriginal defendants and community members, it is important that they also have a voice in the proceedings.

## Resource Intensive

An examination of the various models for Aboriginal courts indicates that while they are significantly less formal than mainstream courts they are certainly more resource intensive. Circle sentencing, in particular, can take anywhere from two hours to up to an entire day

for one matter compared to a matter of minutes in a typical magistrates court.<sup>131</sup> As Blagg observes, circle courts are also generally more 'labour intensive' than the Aboriginal court models such as the Koori Court.<sup>132</sup> It is accepted by the Commission that any form of Aboriginal court would be more resource intensive than mainstream courts and this is reflective of a process which allows greater participation by all parties and encourages a holistic approach to the offender's circumstances. If in the long-term Aboriginal courts prove to be successful in terms of reoffending, reducing over-representation and importantly, improving the satisfaction of Aboriginal people with the justice system, then Aboriginal courts will be truly cost effective.

## Jurisdiction

Currently, all Aboriginal courts in Australia operate at the level of a magistrates court.<sup>133</sup> However, in *R v Scobie* the Supreme Court in South Australia adopted a process which is similar to that used in Aboriginal courts.<sup>134</sup> This case dealt with the sentencing of a traditional Pitjantjatjara man and during the sentencing proceedings the court attended the Anangu Pitjantjatjara lands where the judge spoke with community members as to their views and took into account statements by two Aboriginal Elders.<sup>135</sup> There is no reason in principle why a superior court could not sit as an Aboriginal court and certainly, as occurs with the GASR, an Aboriginal court could be involved in bail and other pre-sentencing matters for cases which must be dealt with by a superior court at a later date. While most Aboriginal courts operate in the adult jurisdiction, there are Aboriginal courts for children in Victoria, Queensland and South Australia. As the justification for Aboriginal courts is predominantly the over-representation of Aboriginal people within the criminal justice system and the statistics in Western Australia are even more disturbing for Aboriginal children than for adults, these courts should be extended to juveniles. The Commission notes that its proposal in relation to changes to the *Sentencing Act 1995 (WA)* and the *Young Offenders Act 1994 (WA)* that require a court

129. Auty K & Briggs D, 'Koori Court Victoria: Magistrates Court (Koori Court) Act 2002' (2004) 8 *Law Text Culture* 727–29; Hennessy A, *Indigenous Justice – Indigenous Laws at the Colonial Interface* (Paper presented at the LAWASIA Down Under Conference, Gold Coast, March 2005) 7.

130. Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends and Issues* 5.

131. Potas I, Smart J, Brignell G, Thomas B & Lawrie R, *Circle Sentencing in New South Wales: A review and evaluation* (Sydney: Judicial Commission of New South Wales, October 2003) 51.

132. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 38.

133. It has been noted that there are plans for an Indigenous District Court at Ipswich, Queensland: Marchetti E & Daly K, *Indigenous Courts and Justice Practices in Australia* (2004) 277 *Trends and Issues* 2.

134. *R v Scobie* [2003] SASC 85.

135. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 118.

to consider submissions made by a community justice group or a respected Elder<sup>136</sup> will ensure that all courts are informed, where appropriate, about Aboriginal customary law and other cultural matters. This will not be dependant upon whether there is an Aboriginal court in a particular jurisdiction.

Aboriginal courts operate only in respect of sentencing matters and require either a conviction or an indication that the accused intends to plead guilty. Considerations in relation to bail will only fall within the jurisdiction of an Aboriginal court if the matter is going to proceed to sentencing. The Commission's proposal in relation to amendments to the *Bail Act 1982 (WA)* requiring courts to take into account the submissions of a community justice group or respected Elder will alleviate this problem.<sup>137</sup> In other words, the Commission acknowledges that Aboriginal courts cannot operate in all places, in all jurisdictions and for all matters. A member of a community justice group or an Elder can, where appropriate, provide advice to a court in relation to bail and sentencing and potentially give evidence during trials in relation to Aboriginal customary law matters.

## Enabling Legislation and Establishment

While the Nunga Court in South Australia and initiatives in regional Western Australia were developed as a result of the industry of individual magistrates, the Aboriginal courts in Victoria and Queensland and the circle sentencing court in New South Wales evolved as a result of negotiations between the government and the Indigenous community.<sup>138</sup> In the locations where there is specific government support for Aboriginal courts, legislation has been enacted. Victoria has opted for specific legislation covering the operation of the Koori Court in both the adult and juvenile jurisdictions.<sup>139</sup> New South Wales has regulations dealing with certain procedures in the circle sentencing court and Queensland has the legislative requirement for courts to take into account submissions from community justice groups in sentencing and bail matters. There

are plans in South Australia to enact legislation which will allow any court to convene a sentencing conference and this legislation includes a provision that the court may include an Aboriginal Elder or respected person to provide cultural advice in relation to sentencing matters.<sup>140</sup>

The extensive involvement of judicial officers in the development of Aboriginal courts is not unique to Australia. Circle sentencing in Canada has been referred to as a 'joint venture' between the judiciary and the First Nations communities.<sup>141</sup> It has been argued that this is both a positive and a potentially negative feature: the flexibility of the approach allows individual communities to shape their own practices while, on the other hand, it leaves the entire scheme vulnerable to changes to the judicial officer. This is a factor which the Commission has taken into account when considering the need for a formal policy or legislative base for Aboriginal courts in Western Australia.<sup>142</sup>

## Aboriginal Court Workers

Some jurisdictions have incorporated the role of an Aboriginal justice officer or worker who is able to make enquiries with other organisations and the Aboriginal community, provide support to all participants and in some cases play an active role in the court proceedings. The Commission supports this concept in order to provide an effective link between the general criminal justice system and the Aboriginal community.

## Aboriginal Elders

The extent of the involvement of Aboriginal Elders or respected persons differs from court to court. In some courts Elders play a significant role in speaking to the offender about their conduct and its effects on others, particularly their own community. Mainstream courts are presided over by persons of authority with which Aboriginal people generally have no connection.<sup>143</sup> The presence of Elders or respected persons in court can be effective in imparting a positive and constructive notion of shame (as a result of Indigenous people

136. See discussion under 'Evidence of Aboriginal Customary Law and Sentencing', below pp 221–24.

137. See discussion under 'Bail – Personal Circumstances of the Accused', below pp 196–97.

138. Harris M, 'From Australian Courts to Aboriginal Courts in Australia – Bridging the Gap?' (2004) 16(1) *Current Issues in Criminal Justice* 26, 31–32.

139. Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) *Trends and Issues* 2.

140. Department of Justice, *A Discussion Paper on Aboriginal Courts* (Perth, 2005) 7. The *Statutes Amendment (Intervention Programs and Sentencing Procedures) Bill 2005 (SA)* was read a second time in the Legislative Council on 17 February 2005.

141. McNamara L, 'Indigenous Community Participation in the Sentencing of Criminal Offenders: Circle sentencing' (2000) 5(4) *Indigenous Law Bulletin* 5.

142. *Ibid* 5.

143. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 36.

speaking to and supporting an offender), rather than from a more distant legal authority who may make offenders feel afraid and bad about themselves.<sup>144</sup> Aboriginal Elders also provide valuable information to the judicial officer in relation to the offender's background, cultural matters and sometimes advice as to the appropriate sentencing options.<sup>145</sup>

Difficulties have been identified as a result of potential conflicts of interests when the offender and the Elder are connected by family or kin ties. This is especially relevant in remote communities.<sup>146</sup> This is one of the main reasons why the ultimate sentencing authority is retained by the judicial officer in all Aboriginal courts.<sup>147</sup> As the ALRC highlighted, the specific aspects of Aboriginal social structures present 'real difficulties in setting up courts which vest power in specified persons'.<sup>148</sup> There are important considerations in relation to the appointment or selection of Elders or respected persons to sit in Aboriginal courts. As has been identified there may be a 'perception of bias in the appointment of certain persons to the position of elder and their role might subsequently become politicised and divisive'.<sup>149</sup> The Commission found during its consultations that there was strong opposition to the selection or appointment of Aboriginal Elders by government agencies.<sup>150</sup> The Commission notes that in Victoria, Elders or respected persons are appointed by the Secretary of the Department of Justice<sup>151</sup> and in New South Wales they are appointed by the Minister after a recommendation by the Aboriginal project worker. The Commission considers that the selection of Elders or respected persons should be made by the local Aboriginal community and that the establishment of community justice groups in Western Australia will provide an effective panel of Elders for nomination or appointment to a court.

## Effectiveness

While it is still too early to judge the success of Aboriginal courts, especially in terms of recidivism, there are positive signs that these courts have achieved significant gains in terms of justice outcomes for Aboriginal people. Participation rates are significantly improved. It is well known that Aboriginal people have a high rate of non-appearance and both the Nunga Court and the Koori Court have experienced improved rates of court attendance.<sup>152</sup>

Critics have expressed the view that these courts are soft options; however, others highlight that the process of Aboriginal people facing their Elders is certainly not a soft option.<sup>153</sup> It appears that there have only been three appeals from decisions made in Aboriginal courts.<sup>154</sup> The most pertinent observation in this regard was made by Nyland J in one of these cases: although the Nunga Court was established 'to allow a more creative approach to be taken' when sentencing Aboriginal people, the court remains 'subject to the usual sentencing principles'.<sup>155</sup> Therefore, any concerns that Aboriginal courts may impose penalties which are too lenient are misguided. They operate within the same justice system as any court, and both the prosecution and the defence are entitled to appeal against any perceived sentencing errors. Aboriginal people that appear before an Aboriginal court will be subject to the same sentencing principles that apply to non-Aboriginal people as well as the specific principles which have been adopted by general courts in relation to characteristics or factors associated with Aboriginality.<sup>156</sup>

The active involvement of Aboriginal people results in a more meaningful court experience.<sup>157</sup> As a consequence of the involvement of Elders, Aboriginal defendants are more likely to comply with the decision

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144. Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends and Issues* 5.

145. *Ibid.*

146. *Ibid.*

147. Similarly, the ultimate sentencing authority is retained with the judiciary in sentencing circles in Canada: see McNamara L, 'Indigenous Community Participation in the Sentencing of Criminal Offenders: Circle Sentencing' (2000) 5(4) *Indigenous Law Bulletin* 5.

148. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [802].

149. Harris M, 'From Australian Courts to Aboriginal Courts in Australia – Bridging the Gap?' (2004) 16(1) *Current Issues in Criminal Justice* 26, 35.

150. See discussion under 'The Commission's Proposal for Community Justice Groups – Membership', above pp 134–35.

151. For the Koori court, the positions of Elders and respected persons were advertised; the applicants were required to address selection criteria and participate in interviews: see Department of Justice, *A Discussion Paper on Aboriginal Courts* (Perth, 2005) 11.

152. Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) *Trends and Issues* 5.

153. *Ibid.*

154. *Onus v Sealy* [2004] VSC 396 which dealt primarily with procedural issues which occurred in the Magistrates Court before the matter was dealt with by the Koori Court; *Police v Koolmatrjie* [2002] SASC 47 which involved an appeal against the inadequacy of an order for the disqualification of the defendant's driver's licence imposed in the Nunga court; and *Police v Carter* [2002] SASC 48 which dealt with an appeal against the inadequacy of the sentence imposed by the Nunga Court. In this later case the appeal was upheld and the term of imprisonment which had originally been ordered to be served concurrently was then ordered to be served cumulatively.

155. *Police v Carter* [2002] SASC 48 [16].

156. See 'Aboriginality and Sentencing', below pp 202–12.

157. Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends and Issues* 5.

of the court and change their behaviour and Aboriginal communities are strengthened by the reinforcement of the traditional authority of Elders. The Commission highlights that no-one is required to participate in the process. This is especially relevant for the accused: an Aboriginal person must have the right to elect not to be dealt with in an Aboriginal court.

## The Commission's View

As identified in the beginning of this section, Aboriginal courts are not based on Aboriginal customary law.<sup>158</sup> While Aboriginal courts may be effective in reducing over-representation, they should not be considered as the 'definitive answer to curbing the rates of Indigenous over-representation in the prison system'.<sup>159</sup>

While recognising the potential of Aboriginal courts to make the existing criminal justice system more responsive to the needs of Indigenous communities (without requiring a fundamental change to the existing processes), it should be emphasised that they are still part of the non-Indigenous system.<sup>160</sup>

The Commission considers that its proposal in relation to community justice groups is the appropriate vehicle for the practical recognition of Aboriginal customary law and envisages that once established, these groups in discrete communities will be empowered to deal with law and order issues on their own terms (subject to the constraints of Australian law). Community justice groups in all locations will also have a role in advising courts about Aboriginal customary law and cultural issues. This can be done at the instigation of the parties, the community justice group or the court. The question therefore remains: is there a need for Aboriginal courts in Western Australia? In the Commission's view, the answer is, 'Yes'. The Commission considers that Aboriginal courts in Western Australia will assist in reducing the numbers of Aboriginal people in custody for a number of reasons:

- Aboriginal courts are potentially more sensitive to cultural and Aboriginal customary law issues than general courts and unless and until there are functioning community justice groups in all locations, Aboriginal courts will be an important mechanism

for ensuring that the Australian criminal justice system is informed accurately about these issues.

- Due to the informal nature of the court process and the more culturally appropriate physical setting, Aboriginal courts have the potential to eliminate many of the barriers that have existed between Aboriginal people and the legal system. As John Toohey has noted, many Aboriginal people criticise the administration of the criminal justice system and the lack of Aboriginal input, rather than the substance of Australian law.<sup>161</sup>
- Aboriginal Elders may be a more effective authority structure than a non-Aboriginal judicial officer in terms of impacting on the offender's behaviour and encouraging compliance with orders of the court.
- The process of encouraging active participation by the offender, the Elders, the victim and the community as well as the involvement of the Aboriginal justice worker results in a more meaningful dialogue about the possible options available to reduce that person's risk of reoffending in the future.
- The role of Aboriginal Elders and respected persons provides a symbolic recognition of their traditional authority and will therefore contribute to their ability to maintain social control in their communities.

In respect of the term of reference whether the practices and procedures of Western Australian courts should be modified to recognise Aboriginal customary laws, the Commission is of the view that there should be a formal government policy to establish Aboriginal courts in this state. While the Commission commends the efforts of individual magistrates in Western Australia, for the long-term sustainability of Aboriginal courts a commitment by government in terms of resources and formal policy is needed. If the issue is left to individual magistrates it runs the risk that these initiatives will fall way with changes to personnel. The Commission is of the view that pilot Aboriginal courts should be established in Perth and regional locations. In this regard it is important to recognise that there is a benefit in reconnecting Aboriginal people who are not from remote areas to their cultural values<sup>162</sup> and that it is

158. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 35.

159. Harris M, 'From Australian Courts to Aboriginal Courts in Australia – Bridging the Gap?' (2004) 16(1) *Current Issues in Criminal Justice* 26, 30.

160. *Ibid* 38.

161. Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project 94, Background Paper No 5 (September 2004) 17.

162. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 128.

not just Aboriginal people from remote traditional areas who feel alienated from the criminal justice system. Possible locations for pilot Aboriginal courts identified during the Commission's consultations include Geraldton, Wuggabun, Laverton, Bunbury and the Pilbara. It is important to note that Aboriginal communities in these areas supported different models – some preferred the Koori court model while others favoured circle sentencing. The pilot project to establish Aboriginal courts



should ensure that there is extensive consultation with the relevant Aboriginal community about how they would like the Aboriginal court in their area to operate, whether any particular offences should be excluded (especially during the pilot stage) and what would be the appropriate method for selecting Elders to sit on the court (bearing in mind the Commission's view that they should be selected by their own community). The Commission also considers that a pilot Aboriginal court should be set up in the Children's Court.

The Commission does not consider that it is necessary to legislate for pilot Aboriginal courts. It may be necessary for legislation to be developed after the pilot stage is completed; however, this would be a matter for the Aboriginal community and the Aboriginal courts to consider after they have operated for some time. The provisions of the *Sentencing Act 1995 (WA)* and the *Sentencing Regulations 1996 (WA)* allow a speciality court to be prescribed.<sup>163</sup> The *Magistrates Court Act 2004 (WA)* also authorises the Chief Magistrate to establish a separate division of the Magistrates Court at any location to deal with a specified class of offenders.<sup>164</sup> These legislative provisions could be used to prescribe a particular Aboriginal court in a specified location or establish an Aboriginal court division of the Magistrates Court. The Commission suggests that pilot Aboriginal courts should operate for two years in their respective locations. At the end of that period, the courts should be independently evaluated with reference to not only recidivism and attendance rates, but also the impact upon the participants and the Aboriginal community.

In conclusion, the Commission highlights that its proposal for Aboriginal courts and its proposal for community justice groups, although capable of operating independently from one another, together offer a system where the Aboriginal people of this state can practise their own customary laws with as little interference as possible, while at the same time providing a more meaningful and effective criminal justice system. In tandem, these initiatives can aim to reduce the mass imprisonment of Aboriginal people in this state – a situation which is unacceptable for the quality of life of Aboriginal people as well as a factor which contributes to the further destruction of Aboriginal customary law and traditions.

#### Proposal 19

That the Western Australian government establish as a matter of priority pilot Aboriginal Courts for adults and children in the metropolitan area and, subject to the views of the relevant Aboriginal communities, in other locations across the state.<sup>165</sup> This pilot project must ensure adequate consultation with Aboriginal communities and other stakeholders and be sufficiently resourced and supported by government departments.

After two years of operation each Aboriginal court should be evaluated independently and consideration given to whether any legislative changes are required and whether any particular courts should be afforded permanent status.

163. Note that the Drug Court in the Perth Magistrates Court is currently the only prescribed speciality court. The effect of being classified as a speciality court is that the court has the power to impose a presentence order under Part 3A of the *Sentencing Act 1995 (WA)*, which can operate for up to two years, for matters where imprisonment is likely. Otherwise any court can only adjourn sentencing for up to six months after conviction: see *Sentencing Act 1995 (WA)* s 16.

164. *Magistrates Court Act 2004 (WA)* ss 24, 25.

165. It is the Commission's view that the pilot Aboriginal Court for adults should initially be established in the Magistrates Court.