

Aboriginal (Nunga) Courts

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Introduction

This Information Bulletin outlines the development of the Aboriginal Courts in South Australia. The key features of the court valued by Aboriginal people are identified and described within the context of a more culturally appropriate process than mainstream courts. Suggestions are made to further enhance the operation and effectiveness of the courts.

Background to the development of Aboriginal Courts

Modifying existing court processes has been an important part of the response by Aboriginal groups and criminal justice agencies to improve outcomes for Aboriginal people and the wider community. These modifications have sought to provide a more culturally appropriate environment than mainstream courts and have included initiatives such as appointing Aboriginal advisers to provide advice to magistrates, and the adoption of conferencing and sentencing circle principles that are well established in other parts of the justice system.

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The Aboriginal Court in South Australia was the initiative of magistrate Mr Chris Vass who was a member of the Judicial Aboriginal Cultural Awareness Program and the Regional Manager of the Port Adelaide Magistrates Court and its associated circuits including the Anungu Pitjantjatjara Lands. The court resulted from several years of discussions between Mr Vass and various other interested parties including Aboriginal community groups, State Government agencies, the Aboriginal Legal Rights Movement, police prosecutors, solicitors and Aboriginal people.

The overwhelming view that emerged from those discussions was that Aboriginal people mistrusted the justice system, including the courts. They felt that they had limited input into the judicial process generally and sentencing deliberations specifically. They also saw the courts as culturally alienating, isolating and unwelcoming to community and family groups. It was clear that Aboriginal people found aspects of the Australian legal system difficult to understand and, in particular, they did not respond well to the demands of the formal questioning process required by examination and cross-examination. This hampered the delivery of justice outcomes. As Mr Vass put it:

...there was enormous dissatisfaction with the court system as it was. There was a lack of trust, a lot of frustration about not being able to have their say in court...they felt that lawyers were often not putting their story across the way they wanted (Vass, 2001).

Similarly, Mr Kym Boxall, the second magistrate to be appointed to preside over an Aboriginal Court, has described Aboriginal people in the mainstream court process as “fairly helpless pawns in a system that they didn’t understand” (Boxall, 2001).

In response to these concerns, Mr Vass, with the approval of the then Chief Magistrate, commenced a pilot in June 1999 of the special interest court that became known as the ‘Nunga Court’, the regional Aboriginal name given to it by the local Aboriginal community. One day a fortnight is set aside to sentence adult Aboriginal offenders in the Port Adelaide Magistrates Court, and monthly in the Murray Bridge and Port Augusta Courts. To be eligible, offenders must have pleaded guilty and predominantly comprise those who have committed offences in these three jurisdictions. As the Aboriginal Court is a sentencing court, it does not handle trials or any sitting in which the charges are contested. Aboriginal elders join the proceedings to give advice to the magistrate but have no delegated powers.

There is presently no specific legislative base for the courts. Unlike truly diversionary processes that aim to keep accused persons out of the court system, the Aboriginal Courts seek to promote better outcomes than conventional courts while operating within the existing court and legal framework. The court is bound, like any other sentencing court, by the *Criminal Law (Sentencing) Act* when determining sentences, and the scrutiny of the appeal process. To date, there have been only two appeals. In these instances, the appeals were on points of law, not the leniency of sentences. Desired outcomes of the court include a reduction in re-offending and linking offenders to appropriate health and rehabilitative programs.

The Aboriginal Court commenced without funding. However, in December 1999, the Courts Administration Authority funded Aboriginal Justice Officers (AJOs) who have responsibility to:



- Assist Aboriginal people to understand court outcomes and comply with sentences imposed. For example, AJOs explain the options available for the payment/discharge of fines; assess the capacity of defendants to pay; and explain the ramifications of non-compliance.
- Assist Aboriginal people to access and meet the conditions of non-custodial sentencing options.
- Educate Aboriginal communities about the operation of the criminal justice system.
- Assist Aboriginal people in court with bail obligations.
- Foster links and provide an interface between Aboriginal communities and the court as consultants on Aboriginal issues. AJOs arrange for a person to assist on the bench with the magistrate and, if community representatives are unavailable, AJOs can assume the role of court adviser.
- Make contact with defendants prior to their court appearance.
- Educate court staff and the judiciary to raise awareness of local Aboriginal issues, social structures, culture and traditions.

There are currently seven AJOs and six Aboriginal Sheriff's Officers employed by the Courts Administration Authority.

Magistrate Boxall reports considerable interest in the Aboriginal Court from other jurisdictions as a result of the pioneering work of Mr Vass. Indeed, South Australia has played some role in the development of Aboriginal courts in other jurisdictions, including Victoria's Koorie Court in Shepparton and Brisbane's Murri Court, where the Chief Magistrate was briefed and arranged for several groups to observe the court operations in South Australia. Similarly, groups of justice staff from Victoria and representatives from Western Australia's Youth Court have visited South Australia to familiarise themselves with the Aboriginal Courts.

Aims of the Aboriginal Court

There is as yet no common philosophy behind the operation of Aboriginal courts in Australia. However, there is a commitment to tailoring court processes to create a culturally appropriate setting. During consultations with, and correspondence from, Aboriginal Justice Officers and magistrates, the following key objectives were promoted:

- *To provide a more culturally appropriate setting than mainstream courts.* Experience to date has shown that sentencing processes need to be culturally appropriate if they are to be supported by Aboriginal communities. In particular, interventions that involve families and the wider community are recognised as crucial components in reducing repeat offending.

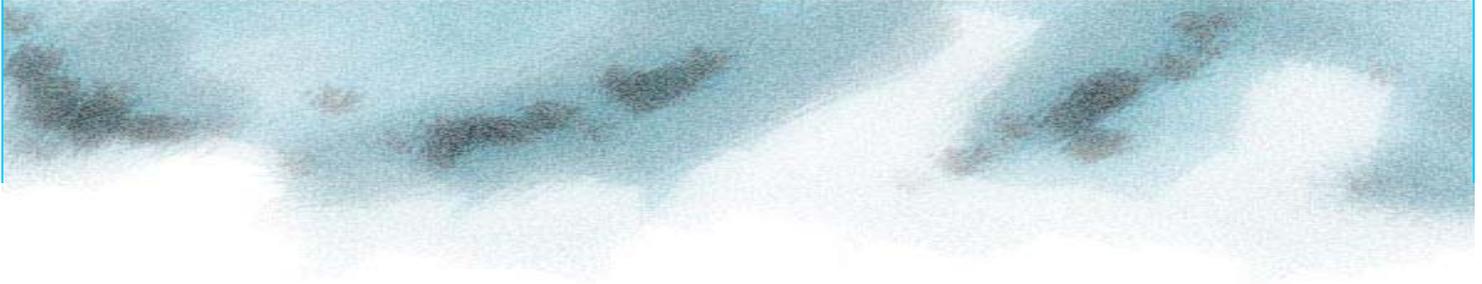


- *To reduce the number of Aboriginal deaths in custody.* Over a decade has passed since the Royal Commission into Aboriginal Deaths in Custody reported on the over-representation of Indigenous Australians in the criminal justice system. To this day, rates of over-representation continue largely undiminished. The high attendance rate of Aboriginal people in the Aboriginal Court (see next point) significantly reduces the number of arrest warrants issued for non-attendance and subsequent periods spent in custody.
- *To improve court participation rates of Aboriginal people.* At Port Adelaide, the Aboriginal Court frequently achieves a participation rate of over 80% for Aboriginal offenders, compared to a less than 50% rate for general Magistrates' Courts. Magistrate Boxall regularly achieves a 90-95% participation rate in his (metropolitan) court and he reports that it is not uncommon for Aboriginal defendants who cannot attend to call and offer explanations. According to Mr Boxall, this rate is "nothing short of astonishing" and he explains that: "Just about all Aboriginal people choose to be dealt with in the Nunga Court...they may not arrive on time – in fact they don't – but by and large most of them do turn up, which says a lot" (Boxall, 2001).
- *To break the cycle of Aboriginal offending.* Improved rehabilitative outcomes for Aboriginal defendants can be achieved by encouraging participation in the court process and compliance with community service and other conditions.
- *To make justice pro-active by seeking opportunities to address underlying crime-related problems with a view to making a difference.*
- *To recognise the importance of combining punishment with help so that courts are used as a gateway to treatment.*
- *To involve victims and the community as far as possible in the ownership of the court process.*
- *To ensure that the court process is open and transparent to victims and the community at large.*

Features of Aboriginal Courts

The following points of difference between Aboriginal and mainstream courts are valued by Aboriginal people who participate in the process, and contribute to the outcomes of the courts:

- All parties, including the magistrate, are seated at the same level and in close proximity to facilitate direct communication.
- The magistrate sits with a member of the Aboriginal community who has a sound knowledge of Aboriginal culture and can advise the court on certain issues.



- Given that kinship and relationships are prominent elements of Aboriginal culture, undertakings and promises made by Aboriginal defendants in front of their relatives and support group are far more consequential, meaningful and enduring than statements made by their legal representatives in impersonal mainstream courts.
- The courts are largely offender focused.
- Extensive use is made of pre-sentence information, including Bail Enquiry Reports, to shape sentencing decisions. These reports are designed to improve the court’s understanding of the defendant’s offence-related needs and can include information about the available resources to assist the offender and their responsiveness to intervention.
- Government and non-government agencies, such as the Aboriginal Sobriety Group, can attend to support and provide information to potential new clients. Thus opportunities for rehabilitation are more readily identified in the Aboriginal Courts than mainstream courts.
- Magistrates who preside over the courts develop a rapport with Aboriginal communities which in turn builds trust and knowledge of local issues that results in better quality sentencing decisions.

Mr Vass summarises the structure and operation of the Aboriginal Court in the following way:

You gain respect from what you do rather than where you sit or how many wigs and gowns you wear...The first thing I did was get off the bench...They weren't too keen on a white guy sitting up on a throne like a king, so I sat down on the other side of the bench where the court reporter generally sits, virtually at eye level...And I wanted to get rid of the standing...What I wanted to introduce was the ability for the accused to be able to speak...I also wanted to include groups that could include alternatives to imprisonment, provide sentencing options...People from government and non-government programs are able to sit in the court and speak and say, 'Well, this is what I can do for this person' (Vass, 2001).

The following case study, drawn from a recent matter heard in the Murray Bridge Aboriginal Court, provides a useful insight into the above features in practice.

Aboriginal defendant Mr X, a parolee, pleads guilty to the charge of serious criminal trespass (formerly 'break and enter'). Mr X is supported in court by his Parole Officer, an ALRM legal representative and a community member.

Magistrate Vass sits at eye level with all participants across a table. He explains to the defendant in plain language that he will first hear from the police prosecutor, then the defendant’s lawyer. Then he says to the defendant: “You and I will then have a chat”. Mr X agrees.

The police prosecutor reads out the charge and the circumstances described in the police report. Mr Vass confirms that the defendant agrees to the details.

The ALRM legal representative briefly explains the defendant's recent life circumstances, drawing the court's attention to his defendant's drug addiction.

Mr Vass listens quietly to the statements and then focuses his attention on the defendant. They mutually conclude that drugs are at the core of the offending. When not under the influence of drugs, Mr Vass describes the defendant as an "intelligent man who is a good person inside". The defendant agrees, but concedes that he is "prepared for jail".

The free and open discussion continues as the defendant explains he has been refused entry into several community-based drug initiatives, including the Drug Court, because he did not fit their eligibility criteria. In a problem-solving discussion, Mr Vass discovers the defendant was not aware of a particular three month, resident based drug treatment facility that would accept him as a client. Pre-sentence reports and his parole officer support his involvement in this facility as a 'last chance'.

Mr Vass notes that the victim, a young white male, is present in court. He reassures the victim that he is not forgotten in this process. Mr Vass describes the traumatic impact of house breaking to Mr X and recalls his own experience as a victim of this crime. Mr Vass explains to the victim that by putting Mr X in prison, his drug problem will still be there upon his release. This, he concludes, does not ultimately result in "keeping your home safe". Heroin addiction is difficult to overcome and people often need to be supported time and time again. The victim acknowledges these points.

Mr X is released on bail with the condition that he attends the three month, residential drug treatment facility. Mr Vass warns the defendant not to breach his conditions as the court will have little option but to incarcerate him. The defendant assures the magistrate that he will do his best in the program.

The defendant is escorted out of court and his support people agree to drive him directly to the facility.

Some Preliminary Data

While it is not currently possible to extract information on cases dealt with by the Aboriginal Courts directly from CAA's mainframe data base, a separate data collection process set up by the Courts Improvement Unit provides some preliminary statistics for the three adult Nunga courts currently operating in South Australia; namely, in Port Adelaide, Murray Bridge and Port Augusta. These are outlined below.



Number of cases dealt with

In the twelve month period from 3rd June 2003 to 4th June 2004, the Aboriginal Court sat on 69 days. At these hearings, it dealt with 504 cases, involving 1,532 discrete charges, at an average of 3.0 charges per case.

As indicated in Table 1, there were clear differences across the three courts. As expected, the Port Adelaide Aboriginal Court sat for the largest number of days and on average, processed the highest number of cases per day (10.9 compared with 3.7 at Murray Bridge and 5.0 at Port Augusta). As a result, this metropolitan-based court handled almost 70% of all Aboriginal Court cases dealt with in the 12 month period.

Table 1 Number of sitting days and cases heard by court location, 3 June 2003 to 4 June 2004				
	Port Adelaide	Murray Bridge	Port Augusta	Total
No. of sitting days	32	23	14	69
No of cases heard	349	85	70	504
Average no. of cases per day	10.9	3.7	5.0	7.3
Number of charges dealt with	1,110	243	179	1,532
Average number of charges per day	3.2	2.9	2.6	3.0

Source: Courts Administration Authority Courts Improvement Unit

Attendance levels

As noted earlier, one of the aims of these courts is to improve Aboriginal attendance rates. Table 2 shows that the defendant was present in court in almost three quarters of the 504 cases dealt with in the 12 months from June '03 to June '04. More importantly, in almost two thirds of these cases the defendant attended voluntarily rather than from custody. While no comparative data are currently available on Aboriginal attendance levels at mainstream court hearings, anecdotal evidence indicates that they are considerably lower.



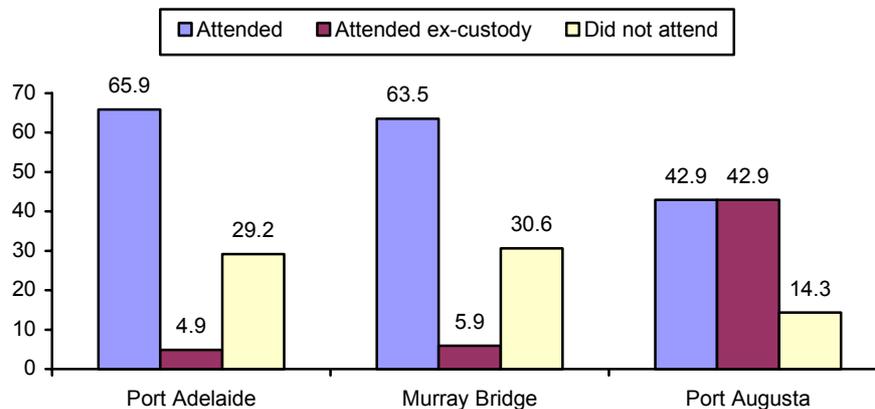
Table 2 Attendance levels, 3 June 2003 to 4 June 2004

	Total	
	No	%
Defendant attended	314	62.3
Defendant attended from custody	52	10.3
Non-appearance of defendant	138	27.4
Total cases	504	100.0

Source: Courts Administration Authority Courts Improvement Unit

There were, however, some variations in attendance levels across the three Aboriginal Court locations. As indicated in Figure 1, while the results for Port Adelaide and Murray Bridge were very similar, Port Augusta had a much higher proportion of defendants appearing ex-custody (42.9% compared with only about 5% at Port Adelaide and Murray Bridge). While no data are available to explain these differences, they may be due to a variety of factors, including variations in the severity of charges laid, prior offending records, prior bail breaches etc.

Figure 1 Attendance levels by court location, 3 June 2003 to 4 June 2004



Source: Courts Administration Authority Courts Improvement Unit

Non-finalised matters

One of the expected benefits of encouraging higher attendance rates at court hearings would be a reduction in the number of arrest warrants issued and potentially, a subsequent reduction in the number of Aboriginal persons held in custody. To examine whether this is occurring,



some preliminary data on the status of unfinalised matters at the end of the hearing were collected. The results are detailed in Table 3.

As indicated, of the 294 ‘matters’ dealt with but not finalised in the twelve month period under consideration, almost two thirds (63.6%) resulted in either an adjournment or remand with bail. In just over one in ten ‘matters’ a warrant was issued and in a further 17.0% of matters, there was a warrant to lie. In a small percentage of unfinalised matters (7.8%), the defendant was actually remanded in custody.

However, considerable care should be used when interpreting these figures. For a start, there are no comparative data available from mainstream courts. More importantly though, because of some variation in counting rules used to compile these data, what is actually being measured here is unclear. It seems that if all charges on the one case are adjourned, the matter as a whole is recorded as ‘adjourned’. However, if some charges in the case result in the person being remanded in custody, while other charges on the same case are adjourned, both are recorded separately. More precise data are therefore required before a clear assessment of the impact of higher attendance rates on the issuing of warrants can be made.

Court Outcome	Port Adelaide		Murray Bridge		Port Augusta	Total	
	No.	%	No.	%	No.*	No.	%
Adjourned	87	38.0	23	54.8	8	118	40.1
Remand in custody	19	8.3	1	2.4	3	23	7.8
Bail remand	51	22.3	11	26.2	7	69	23.5
Warrant issue	24	10.5	6	14.3	4	34	11.6
Warrant to lie	48	21.0	1	2.4	1	50	17.0
Total	229	100.0	42	100.0	23	294	100.0

**Numbers too small to calculate reliable percentages
Source: Courts Administration Authority Courts Improvement Unit*

Finalised matters; types of penalties imposed

In assessing the penalties recorded for matters finalised in the Aboriginal Courts, two points should again be stressed. First, no comparative data are available from mainstream courts and second, there are also some variations in the counting rules applied in constructing the data. In particular, if the case resulted in a good behaviour bond as well as a licence disqualification, it seems that both are counted separately. While this is an accepted method of recording penalties, it means that it is not possible to identify the ‘total’ penalty that each defendant received.

As shown, of the 334 penalties imposed over the 12 months under consideration, the one most frequently used was that of a fine, followed by a driver's licence disqualification and suspended imprisonment. Overall, just under one in ten cases involved direct imprisonment while, at the other end of the scale, 6.6% resulted in the offence(s) being discharged without penalty, withdrawn or dismissed.

Table 4 Penalties imposed, 3 June 2003 to 4 June 2004

Penalty	Port Adelaide		Murray Bridge		Port Augusta		Total	
	No	%	No	%	No	%	No	%
Imprisonment	17	9.7	2	3.4	10	10.0	29	8.7
Suspended imprisonment - bond	24	13.6	3	5.2	13	13.0	40	12.0
Community service order	13	7.4	8	13.8	8	8.0	29	8.7
Good behaviour bond	32	18.2	11	19.0	12	12.0	55	16.5
Driver's licence disqualification	35	19.9	4	6.9	5	5.0	44	13.2
Fine	38	21.6	14	24.1	46	46.0	98	29.3
Compensation	12	6.8	1	1.7	4	4.0	17	5.1
Discharge without penalty	2	1.1	1	1.7	0	0	3	0.9
Dismissed	2	1.1	4	6.9	1	1.0	7	2.1
Withdrawn	1	0.6	10	17.2	1	1.0	12	3.6
Total	176	100.0	58	100.0	100	100	334	100.0

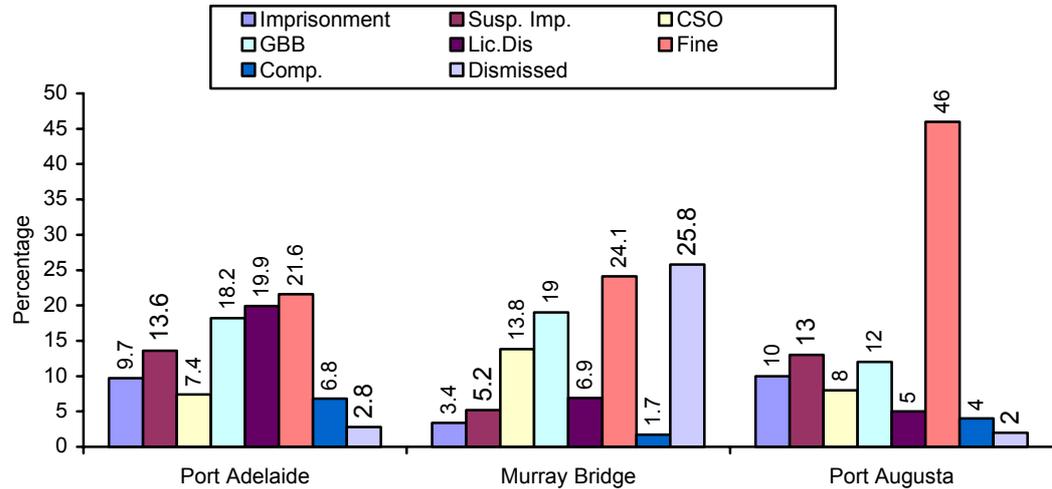
Source: Courts Administration Authority Courts Improvement Unit

Again, there were variations between the three courts. As shown in Figure 2, the most pronounced difference was the comparatively high percentage of fines issued in Port Augusta (46.0% of all penalties imposed compared with between 21% and 24% in the other two courts). In contrast, the Murray Bridge Aboriginal Court recorded a higher percentage of matters dismissed or withdrawn (over one quarter compared with about 2% in Port Adelaide and Port Augusta). Finally, licence disqualifications accounted for a higher percentage of penalties in Port Adelaide (almost 20% compared with between 5% to 7% in the two country courts).

Without access to a range of other information on these cases, such as the type of charges involved, it is not possible to offer any explanation for the different distribution of penalties between the three courts. In addition, given the issues relating to counting ambiguities, these differences may also be an artifact of data recording processes.



Figure 2 Penalties imposed by court locations, 3 June 2003 to 4 June 2004



Source: Courts Administration Authority Courts Improvement Unit

Personality vs routinisation

The features of the Aboriginal Courts outlined earlier need to be safeguarded and maintained to ensure sustainability over time and consistency across locations. While this begs the question of how these successful elements can be preserved, an assessment must firstly be made about the extent to which these elements are the product of the persona of the presiding magistrate or are replicable court processes.

Sociologist Max Weber claimed that, whenever any new purpose or vision is discovered, usually through a gifted individual, if it is to change the world it must be embedded in a process or system that gives it continuing life. Weber called this process ‘the routinisation of charisma’. As Mr Vass bluntly put it in his call for an independent Indigenous judiciary to preside over ‘Aboriginal community courts’, “...the first thing that has to happen is you’ve got to get rid of me. You’ve got to get rid of whitefella judges and magistrates; you don’t really want them in the system”. Clearly, it will be a challenge to formalise a model whose success is critically dependent on its informality.

The structural and procedural elements of the Aboriginal Courts such as pre-sentence information, the input of Aboriginal Justice Officers, the attendance of support agencies, and the physical court design that places the magistrate at eye level with participants, can all be replicated. However, it is the careful appointment and training of magistrates that will make



the greatest contribution to the enduring success of the Courts. If the single, most critical ingredient of the Courts' success had to be identified, it would be the free and open exchange of views and comments that are encouraged by the magistrate. This creates a conversational environment and builds trust and mutual understanding between local courts and Aboriginal communities. In recruiting appropriate magistrates, Mr Boxall suggests they need to be “not too cynical and also be prepared to be informal, interactive, sensitive, empathetic, listen a lot more, [and] be able to liaise with outside providers...” (Boxall, 2001).

One risk of bureaucratising the Aboriginal Courts is that opportunities for independent action and creative discretion may be reduced. Safeguards must therefore be introduced to guard against the dulling effects of bureaucracy. On this same point, Mr Vass recently commented that, in setting up the Aboriginal Court day, he did not consult with Government because “if we had consulted with the government we’d still be consulting; we’d still be sitting on committees. So we just did it within the framework of the legislation that existed” (Vass 2002).

In the United States, efforts are underway to integrate problem-solving courts into the mainstream. The US Congress has authorised the Department of Justice to provide grants to promote their highly publicised drug courts and mental health courts across the country. For example, the Justice Department recently distributed more than \$50 million in drug court grants. In addition, the American Bar Association in 2001 adopted a resolution calling for the continued development of problem-solving courts, and the Conference of Chief Justices and the Conference of State Court Administrators together passed a joint resolution in 2000 pledging to encourage the broad integration, over the next decade, of the principles and methods employed in problem-solving courts into the administration of justice (Center for Court Innovation, 2002).

Formal legislative recognition of the Aboriginal Courts will bolster their place in the western system of justice but flexibility in their implementation must be maintained because Aboriginal Courts operate across vastly different geographic areas that are confronted with local issues. The following section highlights a number of further enhancements to the Aboriginal Courts that will also serve to formalise their operation.

Further enhancing Aboriginal Courts

The following improvements have been suggested in recent consultations. These point to the continued evolution of the court along the path to an independent Indigenous judiciary working in culturally appropriate courtrooms.

- Magistrate Mr Boxall supports a purpose built Aboriginal Court. Our British-based justice processes are very different from those in Aboriginal cultures and since white settlement, have been applied to Aboriginal people without regard for these differences. The state of Aboriginal people in Australia, especially their over-representation in the criminal justice system, is such that modifying the way courts conduct business, or the development of a purpose built court, would be an entirely appropriate response. Many other jurisdictions



such as Canada have adopted similar approaches in recognition of their Indigenous populations.

- As a recent development, payments for Aboriginal elders are now available to Aboriginal elders/advisors to acknowledge and compensate them for many hours of work and to encourage other community leaders to offer their services.
- The skills of magistrates need to be updated, as Aboriginal Courts require magistrates that are comfortable in dialogue and unfamiliar styles of communication. The Aboriginal Court is about the process as much as the outcome. This style of court process requires the presiding magistrate to have very high levels of interpersonal skills.
- The need for a legislative base to underpin the operation of problem-solving courts generally has been identified. The South Australian Attorney-General is currently considering a Bill that was recently drafted for this purpose.
- Extending the court network state-wide would enable the main Aboriginal communities to be serviced. It was suggested that Aboriginal Courts, with the same magistrate and support staff, could go on circuit across the State.
- Providing offenders with more support upon release from court could help to ensure that they do not re-offend because of lack of housing, work, or simple issues such as not having a bus ticket to return home. Memorandum of Understandings with Aboriginal community organisations could further strengthen links.
- Improved reporting back to courts about the progress of offenders, with support people to monitor that progress, would also be useful.
- The Courts Administration Authority is developing a Bench Book for magistrates, similar to that which exists in Western Australia. This book will document Aboriginal cultural aspects such as traditions and languages. It will also cover the type of information that an Indigenous Elder might offer. A CD Rom for training purposes will be available.
- Aboriginal Justice Officers could be given the opportunity to understand the role and function of other jurisdictions and, in turn, be able to pass this information on to the Aboriginal community.
- Appointing a senior Aboriginal Justice Officer could improve overall management and direction-setting activities for Officers.
- Further enhancements to the courtroom could make it more culturally appropriate, such as erecting the Aboriginal and Torres Strait Islander flags and artwork, and structuring the room to enable participants to sit around the table. A current justice project seeks to pilot a 'peacemaker' style court in an Aboriginal community. This initiative is seen as a logical progression from the Aboriginal Courts in that further dialogue between participants is encouraged by sitting in a circle. In this model, local communities would also take a more



- active role in supervising and supporting offenders who have been directed to undergo community service work and rehabilitation programs.
- Providing a sufficient number of appropriate interpreters to assist both in and out of the court, particularly for country areas, continues to be a pressing issue.
- The value of an Aboriginal Youth Court was debated during consultations and a pilot program has since begun in Port Augusta.
- Finally, the need to formally evaluate the effectiveness of Aboriginal Courts has been identified. Outlined below are some suggestions on the parameters for such an evaluation.

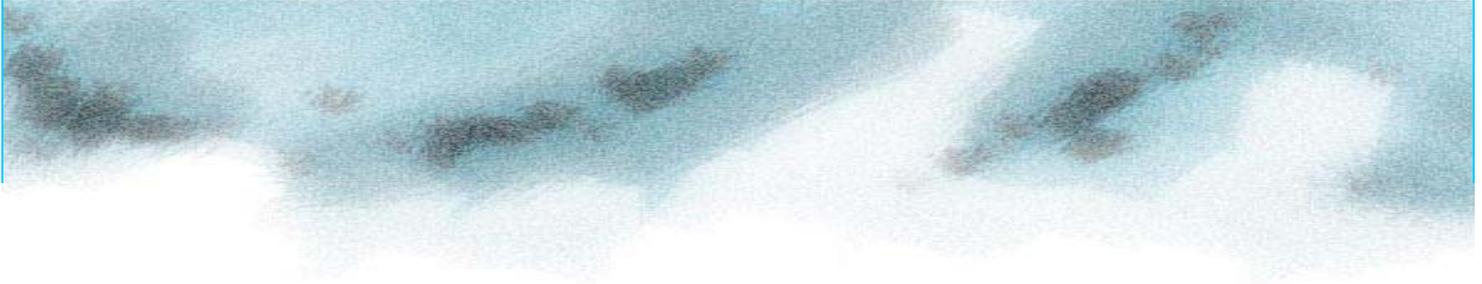
Evaluating Aboriginal Courts

When weighing up the merits of any reform effort, it is important to ask the question: ‘Compared to what?’ Aboriginal Courts must not be compared to an idealised vision of justice that does not exist but rather, to their alternatives (ie the current mainstream courts). Efforts to introduce new ways of delivering justice should always be subjected to careful scrutiny to ensure that core judicial values such as certainty, impartiality and fairness are not compromised.

An evaluation could focus on outcomes achieved from stakeholders’ perspectives (ie procedural justice), accompanied by relevant data including attendance rates, penalty outcomes and recidivism. There is therefore a need for reliable data collection to inform practitioners about the operation of Aboriginal Courts. A capacity to accurately monitor the courts’ performance will also enable early identification of problematic trends and issues and inform the development of ameliorative strategies.

An evaluation could also consider some of the documented tensions that have emerged in similar problem-solving initiatives overseas. These include:

- *Coercion* What procedures exist to ensure that a defendant’s consent to participate in the Aboriginal Court is fairly and freely given?
- *Advocacy* Does the Aboriginal Court require new definitions of effective lawyering and representation? Traditional roles for lawyers in court, especially defence lawyers, are about *minimising* the State’s intrusion into the lives of defendants. But in problem-solving courts like the Aboriginal Courts, defence lawyers more actively engage the client with the ‘system’. This also raises questions of the lawyer’s training which is heavily tailored to traditional roles such as presenting facts and challenging the prosecution case. There is also a question about the efficacy of Aboriginal Courts for defendants who are not able or willing to express themselves and identify ‘the problem’.



- *Structure* Do Aboriginal Courts give greater license to magistrates to make rulings based on their own idiosyncratic world views rather than the law?
- *Impartiality* As magistrates become better informed about specialised classes of cases and the circumstances of Aboriginal defendants is their impartiality affected? As they solicit the wisdom of court attendees are magistrates more likely to become engaged in *ex parte* communication? The extent to which courts that are friendly and informal might threaten impartiality is unclear. It could be argued that some courts, such as the Youth Court, *should* be intimidating to serve the purpose of deterring young offenders from further contact with the justice system.
- *Paternalism* Do Aboriginal Courts widen the net of governmental interference?
- *Separation of powers* Do Aboriginal Courts inappropriately blur the lines between the branches of government? In convening and brokering, are magistrates infringing upon the territory of the Executive branch? Or are they simply taking advantage of the discretion they have traditionally been afforded at sentencing to deliver more meaningful sentencing packages?
- *Positioning* What is the purpose of the problem-solving court movement? Is it to create a mixture of unique courtrooms narrowly targeted to handle specific groups of cases or is it to bring a new problem-solving focus to the work of courts in general?

Conclusion

Aboriginal Courts successfully operate within existing court and sentencing conventions and provide a more culturally appropriate process for resolving disputes than their mainstream counterparts. For many Aboriginal people, however, it must be recognised that the ideal is not merely procedural recognition of their culture, but a legislative mandate for Aboriginal self-determination, self-management and customary law. Meanwhile, the development of Aboriginal Courts has demonstrated that much can be achieved through goodwill and innovation.

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