

**USING INDIGENOUS JUSTICE INITIATIVES IN SENTENCING**  
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**Mixed Messages**

1. Throughout Australia in recent times there have been a number of legislative and informal initiatives designed to make the sentencing of Indigenous offenders more meaningful and effective. These initiatives have been developed against a background of gross over-representation of Indigenous people within the criminal justice system, particularly within prisons and youth detention centres, and a high rate of offending within many Indigenous communities.
2. The initiatives reflect a view that mainstream Australian methods of dealing with and punishing offenders are not particularly effective either in the rehabilitation of Indigenous offenders or as a deterrent to others from committing offences. It is argued that methods which involve community participation, particularly that of respected Elders, are more culturally appropriate and therefore more likely to be effective and that Non-Indigenous judicial officers need assistance and guidance from community members in order to do justice in an Indigenous context. Only last year the Law Reform Commission of Western Australia in its final report on Aboriginal Customary Laws<sup>1</sup> made a number of recommendations, the implementation of which would enhance the cultural authority of Elders by providing a role for them in the criminal justice system. The Western Australian government has already commenced implementing the recommendation that Aboriginal Courts, in which Elders sit with magistrates, be established.<sup>2</sup>
3. Do such initiatives simply feed a perception that there is “one law for whites and another for blacks”, or are they constructive acknowledgements of the statement “there is no greater inequality than the equal treatment of unequals”?
4. The current climate within Australia sends mixed messages to judicial officers who are required to sentence Indigenous offenders. On 8 November 2006 the *Crimes Amendment (Bail and Sentencing) Bill* was passed by the Senate. One of the principal features of the proposed amendments is to delete the reference to “cultural background” as a factor which a court must take into account in determining a sentence. The amendments would also ensure that no customary law or cultural practice excuses, justifies, authorises, requires or lessens the seriousness of any criminal behaviour with which the *Crimes Act* is concerned, including the granting of bail.
5. In contrast the final report of the WA Law Reform Commission which was published in September 2006 recommends the establishment of Aboriginal Courts, that cultural background be a relevant factor in the consideration of release on bail and a relevant sentencing factor. In the first chapter of its final report titled *Two Separate Systems of Law?* the Commission confronts head-

on the “one law for them and another for us” perception and emphasises that any recognition of Aboriginal customary law must occur “within the existing framework of the Western Australian Legal System”. In response to the moves made recently by the Federal Government the Commission argues that preventing courts from taking into account Aboriginal customary law will not achieve equality but will further disadvantage Aboriginal people.<sup>3</sup>

6. Criticism that Indigenous Justice initiatives may not be fair or may not be achieving their goals is not confined to non-indigenous Australians. Writing in the Weekend Australian on December 30-31 2006 Noel Pearson states “... there is evidence that one of the problems with the criminal justice system today is that it is often too lenient towards Indigenous offenders, especially when it concerns violence against other Indigenous people (usually family members). The system may be compounding problems of social disorder in Aboriginal society by treating Indigenous offenders as victims of deeper social and historical factors”.

### **Special Consideration**

7. The statistical facts highlight why Indigenous offenders should be given special consideration in courts. Indigenous people are over represented in the criminal justice system in every Australian jurisdiction. Aboriginal and Torres Strait Islander peoples represent around 2% of the Australian population but comprise 22.3% of the national prison population as at 30 June 2005.<sup>4</sup> In Queensland Aboriginal and Torres Strait Islander peoples make up 3.5% of the population but comprise over 18% of offenders. Nearly 25% of the state prison population is Indigenous, over 47% of juvenile supervised orders are made relating to Indigenous youths and, perhaps most disturbingly, 55% of detainees in juvenile detention centres are Indigenous. In Queensland the facts are that Indigenous adults are more likely to be arrested, Indigenous juveniles are less likely to be cautioned and, at least until new legislation governing court ordered parole came into effect in August 2006, Indigenous prisoners were more likely to serve their full term rather than be released on parole.
8. Apart from the gross over representation of Indigenous people within the criminal justice system, regard should also be had to Australia’s obligations under international human rights law. The International Covenant on Civil and Political Rights provides that “all persons shall be equal before the courts and tribunals” and that everyone shall be entitled to “be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”.<sup>5</sup>
9. In June 2006 the Human Rights Council of the United Nations adopted the United Nations Declaration on the Rights of Indigenous Peoples which is currently before the General Assembly. The declaration requires States to take effective measures to ensure that “Indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means”<sup>6</sup> and further that “States shall consult and co-operate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and

implementing legislative or administrative measures that may affect them”<sup>7</sup>. The provisions of the proposed United Nations Declaration on the Rights of Indigenous Peoples do therefore support the involvement of Indigenous people in the criminal justice system.

### **Particular Difficulties**

10. Those working with Indigenous people in the justice system recognise that Indigenous people may suffer particular difficulties which may mitigate against both their ability to access the justice system and to be treated equally by it. These difficulties include:-
- The very real danger of miscommunication between Indigenous peoples, the police and the courts.
  - The lack of comprehension by many Indigenous people of the criminal justice system and its processes.
  - The existence of often conflicting cultural and legal assumptions and values between mainstream Australia and Indigenous peoples, for example the right to remain silent.
  - The inability of some Indigenous people, particularly those from remote communities to speak, read or understand Standard English. In Aurukun, for example, English is a second, or even third language for many.
  - The susceptibility of many Indigenous people to be intimidated by or at least to defer to persons in positions of authority.
  - The different understanding of concepts of time and distance by some Indigenous people from that of mainstream Australians.
  - The influence of customary law or cultural inhibitions on Indigenous people when speaking with non-indigenous Australians, particularly in a court setting.
  - Health problems suffered by many Indigenous people particularly hearing difficulties and those arising as a result of alcohol abuse.
  - A lack of understanding by police, judicial officers and juries of crime and the response to it within the context of an Indigenous community.
  - A lack of awareness by lawyers of a necessity to use simple, or even Aboriginal, English when communicating with Indigenous people both outside and inside the court room.
  - A lack of understanding by lawyers, judicial officers and juries of the effect of customary law and cultural issues on Indigenous offenders and witnesses.

- Finally, there are practical issues which can impact upon an Indigenous person's experience in court particularly those from remote Indigenous communities, such as an unfamiliarity with the operation of lifts and with air-conditioned buildings.

### **Indigenous Justice Initiatives**

11. The Queensland government has implemented a number of measures in recognition of the difficulties suffered by Indigenous people in the justice system and in an attempt to reduce the offending and the incarceration of Indigenous people. On 19 December 2000 the Queensland Government entered into a justice agreement with the then Aboriginal and Torres Strait Islander Advisory Board representing Indigenous people. The agreement covered nine principles "to guide all justice policies, programmes and services in Queensland". Those principles included Indigenous participation, recognition of culture, equality before the law and "a continued commitment to implementing the recommendations of the Royal Commission into Aboriginal deaths in custody and the Aboriginal and Torres Strait Islander Women's Task Force on Violence". The agreement has a particular target of reducing Indigenous incarceration rates by 50% by 2011. Initiatives which have been implemented or enhanced since the signing of the Agreement have included the employment of Indigenous police liaison officers, an Indigenous licensing programme which assists Indigenous people in remote communities to obtain their driver's licences, the funding and support of community justice groups, the establishment of Murri courts in the Magistrate's jurisdiction and the implementation of alcohol management plans in many Indigenous communities.
12. Indigenous Justice practices have evolved in both urban and Indigenous community settings throughout Australia. The first Indigenous court, the Nunga Court was convened by Magistrate Chris Vass in Port Adelaide, South Australia in 1999. In 2002 the Koori Court was established in Victoria and it now operates in a number of centres. The Queensland Murri Court was established in Brisbane in 2002 to deal with Aboriginal and Torres Strait Islander offenders and it now also operates in Rockhampton, Townsville and Mt Isa. Circle sentencing courts in New South Wales have also been operating (initially in Nowra) since 2002 and both the ACT and the NT commenced the operation of circle sentencing courts in 2005. The first Aboriginal Court in Western Australia opened in November last year in Kalgoorlie.
13. All of these courts are of summary jurisdiction and deal in the vast majority of cases only with matters proceeding after a plea of guilty. The offender must be Indigenous (although the Rockhampton Murri Court in Queensland will also deal with South Sea Islander offenders) and the magistrate retains the ultimate power to impose a penalty after consultation with Elders or respected persons.
14. The role of the Elder or respected person differs from jurisdiction to jurisdiction. Some simply give oral advice to the magistrate or briefly address the offender, while others have significant interaction with the offender and have a substantial role in determining the sentence. Elders may play a part in

monitoring the sentence if it is community based. The number of Elders involved varies across and within jurisdictions. For example in the Brisbane Murri Court only one Elder sits with the magistrate, whereas in Rockhampton in Central Queensland as many Elders as possible are encouraged to attend.

### **Community Justice Groups**

15. When magistrates visited remote Aboriginal communities in the past many would establish relationships with respected Elders and seek their advice and assistance when dealing with offenders in their communities. In more recent years these practices have become formalised. Since 1993 the Queensland Government, through its Local Justice Initiatives Programme, has been assisting Indigenous communities to establish community justice groups. Part of the rationale behind the formation of such groups is to provide a mechanism for engagement between the community and the criminal justice system. The first three such groups were established in Kowanyama, Palm Island and Doomadgee in North Queensland. Today there are 41 community justice groups in both remote and urban areas of the state. The groups vary widely in their strength, size and the extent to which they are truly representative of their communities and in the work they consider to be a priority. For example, while some groups actively seek involvement in the court process others place emphasis on working to prevent offending, particularly with children and young people.
16. Generally groups will attempt to mediate disputes within communities, work to reduce truancy, encourage parental responsibility for children, attend court and give the courts (written or verbal) reports on offenders, visit community members in prison and assist with the supervision of offenders on community based orders. Ideally the groups are given sufficient notice of upcoming matters to meet and discuss offences prior to the court dealing with them. These meetings are often attended by the offender and sometimes by the victim. The subsequent report includes the outcome of the meeting and recommendations with respect to rehabilitative measures and penalty.
17. In 2001 amendments were made to the *Penalties and Sentences Act* and the *Juvenile Justice Act* in Queensland to provide that when sentencing an Aboriginal or Torres Strait Islander person a court *must* have regard to any submissions made by a community justice group from the offenders community that are relevant.
18. Most of the Indigenous justice initiatives referred to thus far have been limited to courts of summary jurisdiction. In Queensland however community justice groups play a role in the Magistrates Courts, District Court and even on occasion in the Supreme Court. For example, since 1996 the District Court has visited remote Indigenous communities on circuit, frequently twice a year. In this way members of the community can be sentenced in their community and with the involvement of the community justice groups.
19. There are expectations, particularly from government departments, and non-government organisations, that community justice groups will play a much broader role within their communities than that of assisting the courts. For

instance they are often consulted on child safety and child protection issues, health professionals consult with them and utilise their expertise and experience, schools will often work with them and in recent years those in remote areas have been expected to formulate alcohol management plans for their community (a very controversial and contentious role).

20. Community justice groups are in many ways now expected to be all things to all people. There are real dangers in this development. Community justice groups are not democratically elected bodies. The primary body in most Indigenous communities which has the authority to represent community members is the elected local government entity or council, headed by a mayor. By giving powers to community justice groups (whose members are to be nominated by each “main Indigenous social grouping”), particularly the function to “regulate the possession and consumption of alcohol”, the government is effectively sidelining the official elected bodies on very important issues. The alcohol management plans in particular have brought justice groups and councils into conflict and created tension generally within communities. The sale of alcohol through the local canteen or tavern is an important source of income for community councils and the severe restrictions on the sale and consumption of alcohol in the communities subject to alcohol management plans has had very significant adverse financial implications for councils. The irony is that taverns were introduced into Indigenous communities by a State government seeking to reduce the need for government funding in those communities.
21. Government funding is generally available for the employment of a coordinator and for some essential resources, for example office equipment and a vehicle, however most community justice group members give their time on a voluntary basis. Members often hold other positions within the community and most members are high profile, if not pivotal, community members with large demands being made on their time. Often members are from the older generations and may have significant family responsibilities. Many are not in good health. The work they do will often bring them into conflict with other community, and even family, members. A number of community justice group members have qualified as justices of the peace and sit on the local justice of the peace court from time to time. Of course, community justice group members live in small communities which in the case of those in remote northern and western areas can have road access cut for months at a time in the wet. To date community justice group members receive little or no payment for their time and effort. It must be particularly galling to be constantly required to be available for consultation with highly paid government employees, consultants or judicial officers who usually only fly into the community for a day. Nevertheless, justice groups are unstintingly generous in sharing their knowledge and experience with those who seek it.
22. Most Queensland judges and magistrates visiting remote Indigenous communities make an attempt to meet with the community justice groups and welcome their presence in court and any submissions they wish to make.

### **Advantages and Limitations**

23. All of these innovations and ways of doing Indigenous Justice are steps towards justice. They enable Indigenous community members to engage in the legal process so that justice can more readily be done and be seen to be done in their communities. Judicial officers are better informed as to the background of the offender and the context in which the offence took place. Penalties can be more creative, meaningful and appropriate to the offenders, their victims and their communities. Referral to appropriate treatment agencies and programmes is more likely and community based and run programmes are encouraged.
24. The Elders in communities are better informed about the court process, the reasoning behind sentences and the actual effect of sentences. There can be elements of “shaming” in the involvement of community members in the process which can be a powerful factor in sentencing and rehabilitation, and offenders are given the opportunity to take responsibility for their actions and criminal behaviour. There is often an opportunity for the victim to have a real voice in the process.
25. While some studies have indicated a positive effect on the rate of recidivism, to date a definitive evaluation of this crucial issue (certainly in Queensland so far as it relates to Indigenous justice initiatives) has yet to be concluded.
26. On the other hand, a number of criticisms have been levelled at Indigenous Justice Processes. Indigenous justice has been labelled “apartheid justice” in that it delivers a different (although not necessarily superior) version of justice to Indigenous people. Why should these processes be limited to Indigenous offenders?
27. In Queensland community justice groups are under- resourced and under-trained. Huge demands are placed on people who have little experience with the criminal justice system, many of whom no doubt find courts and lawyers, in particular judicial officers, intimidating and frightening. The very real issues of conflicts of interest when members who are related to offenders or victims makes submissions on sentence is one which arises frequently but has not been adequately addressed in terms of training and strategy. It should be noted that there are no accredited interpreters in Aboriginal languages in Queensland.
28. Many of these initiatives are essentially personality driven. Governments may provide some resources and the necessary legislation but the success of such initiatives is often reliant on the enthusiasm and drive of the judicial officer concerned. In Queensland the remote communities are visited, if at all possible, by the same District Court Judges from year to year. These judges are either the regional judges who are based in the centre closest to the remote community, or a member of the District Court Aboriginal and Torres Strait Islander Committee. This policy allows a relationship of trust and respect to be fostered between the community justice group and the visiting judge.

29. There are arguments about the reality of the consultation with communities when Indigenous Justice Initiatives are put into place. Are circle sentencing and community justice groups a response to Indigenous demands for justice or are they yet further examples of non-indigenous constructs imposed on Indigenous communities by those in power? The obligations and responsibilities which arise in Indigenous society arise from the notion of kinship. In simple terms, looking after “your mob” not from a general regard to care for “all men”. What we expect of Elders participating in Indigenous Justice is compliance with *our* cultural vision not necessarily *theirs*. In remote areas, for example, there can be on occasions, a prohibition on discussing “the other mob’s business”, but we nevertheless ask the Elders to do so.
30. For Indigenous Justice to be truly effective it requires the full co-operation of all involved in the process, including the police, the prosecuting authority, the defence legal services, the corrections staff, the juvenile justice staff, court administrative staff and judicial officers. It is rare that all these players approach the process with equal commitment and enthusiasm.
31. The one major resource which is often scarce and which militates against the success of Indigenous Justice Initiatives is time. Circle Courts and Murri Courts are time intensive. Involving community justice groups in the court process effectively involves time spent developing relationships of respect between judicial officers, other players in the process and the groups. Adding their voice to the process inevitably lengthens the time a matter takes to be finalised. In circumstances where for example a magistrate visiting Arukun community on Cape York may have to deal with over 60 defendants in one day, that time is simply unavailable.
32. Indigenous Justice invites judicial officers to be creative in their sentencing but they are nevertheless limited to the sentencing options provided by the relevant legislation. In Queensland for example, it is not possible to impose conditions on an order suspending a term of imprisonment, a sentencing tool which could frequently be appropriate for Indigenous offenders. Of course any mandatory sentences would limit the success of Indigenous Justice and be contrary to its spirit.
33. For Indigenous Justice processes to be successful the judicial officers involved need to be able to build relationships of trust and respect with communities. Problems of continuity of practice and consistency in sentencing (so important in small communities) can arise when a succession of different judicial officers conduct circuits to communities or sit in urban Indigenous courts.
34. The use of Indigenous Justice processes only in certain settings can give rise to perceptions of unfair or harsher treatment of offenders in different circumstances. For example, judges from the District Court travel twice a year to most Indigenous communities on Cape York and in the Gulf of Carpentaria. In these townships, offenders who remain in their communities on bail and who plead guilty can be dealt with, usually in a process involving the local community justice group. But offenders who are on remand in custody or who plead not guilty must be dealt with in say Cairns or Mount Isa, often hundreds

of kilometres away from their communities. Steps have more recently been taken to give the relevant community justice groups the opportunity to report to the Court prior to sentence in cases being tried in Cairns and increasingly this occurs. Slowly community justice groups are feeling confident enough to appear during sentencing hearings by telephone or via video-link as all involved in the process become more comfortable with the technology.

35. There should be no assumption that a submission from Elders or respected persons will always favour the offender. Community justice group submissions are not always favourable to the defendant and the groups often see their role as one of presenting a community point of view of the offence and will regularly include the victim's attitude in their submissions. There can be difficulties in the defence being given the opportunity to test such adverse submissions and in reality they will often have little notice of them.
36. An issue that often arises is the status of matters disclosed to the groups during meetings with the offenders and victims. Uncharged offences may be referred, different versions of the facts given (including versions which disclose possible defences), and very personal (sometimes painful) details of the defendant revealed. Such matters are not necessarily regarded as confidential and can be disclosed in a report to the Court, but whether the defendant was aware of this possibility prior to participating in the meeting is often doubtful.

### **Conclusion**

37. Sentencing Indigenous offenders is never easy. There are times when the offending behaviour clearly warrants the imposition of severe and significant penalties. There are also times when a judge who has knowledge of a community, has information about the community view of the offending, the background to it and the full particulars of those involved may decide that an alternative penalty is appropriate. Determining which category of case is before you can be problematic and can often only be done with input from the Indigenous community itself.
38. As Noel Pearson says<sup>8</sup>, the shameful number of Indigenous people appearing in our courts and doing time in our prisons is a product not of the criminal justice system itself but of the gross dysfunction of most Indigenous communities and the breakdown of social norms and constraints. Pearson urges that Indigenous people themselves take responsibility for, and take the action necessary to address, these issues. No sentencing judge has the solution to this social crisis. But on an individual level judges can at least show that they are attempting to understand and do justice.
39. It does seem that in practice the most successful Indigenous Justice Initiatives are those created by communities themselves with the co-operation of sympathetic judicial officers. Judges can only take the time to engage with, and listen to, the communities we serve and attempt to apply what we learn in order to do justice according to law.

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January 2007

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<sup>1</sup> Law Reform Commission of Western Australia – Aboriginal Customary Laws Final Report (September 2006)

<sup>2</sup> **Aboriginal Court for Kalgoorlie**, *The Australian* December 1 2006

<sup>3</sup> LRCWA, *Aboriginal Customary Laws Final Report* , Chapter 1, page 14

<sup>4</sup> Queensland Criminal Justice System Bulletin 2004-05, Criminal Justice Research, Dept of the Premier & Cabinet 2006

<sup>5</sup> Article 14, International Covenant on Civil and Political Rights, in force 23 March 1976

<sup>6</sup> United Nations Declaration on the Rights of Indigenous Peoples, Human Rights Council, Report to the General Assembly, June 2006, article 13

<sup>7</sup> Ibid article 19

<sup>8</sup> Noel Pearson writing in *The Weekend Australian* January 6-7 2007