

THE CHILDREN'S KOORI COURT (CRIMINAL DIVISION)

On the 31st of May 2000 the Victorian Government and representatives of the Victorian Aboriginal community entered into the Victorian Aboriginal Justice Agreement (VAJA). The agreement proposed, amongst other things, the establishment of a Koori Court in Victoria. The high over-representation figures for Aboriginal people within the criminal justice system had to be addressed. The development of a court with participation of elders and respected persons from the Koori community was seen as one aspect of a comprehensive strategy to combat the over-representation. As a result of the VAJA a Koori Court model was developed culminating in the *Magistrates' Court (Koori Court) Act 2002*.

Brief history of Koori Courts in the Magistrates' Court of Victoria.

Koori Court "pilots" commenced in Magistrates' Courts at Shepparton in October 2002 and at Broadmeadows in April 2003. Sittings are on a designated day each fortnight.

In January 2004 the Koori Court commenced sitting at Warrnambool, Portland and Hamilton. The court sits on a circuit once a month. The court sits at Warrnambool on Tuesday and then moves to Portland on the Wednesday and Hamilton on the Thursday.

The Koori Court commenced in Mildura in July 2005 with sittings every second Wednesday. Moe commenced sitting in May 2006 and Bairnsdale in March 2007. The Attorney- General has recently announced that a new Koori Court will be established at Swan Hill in 2008.

An evaluation of the Koori Courts at Shepparton and Broadmeadows noted a significant reduction in recidivism rates from those two Courts. The evaluation revealed a rate of re-offending for participants in the Koori Court that was substantially less than that of the general population figures for recidivism. The recidivism rate for all Victorians was said to be 29.4 per cent. The rate from Shepparton Koori Court was found to be 12.5 per cent and from Broadmeadows it

was 15.5 per cent. There was a reduction in Koori offenders breaching correctional orders from the Koori Courts and also a reduction in failures to appear.

The evaluation highlighted a major achievement of the Court as being “the manner in which it has served to increase indigenous community participation in the justice system and recognized the status of Elders and Respected persons.”

Sittings in the Magistrates’ Court are governed by sections 4D to 4G of the Magistrates’ Court Act 1989.

3. The Children’s Koori Court (Criminal Division).

The Children’s Koori Court (Criminal Division) is a pilot project. The Melbourne Children’s Court was chosen by the Koori community to conduct the pilot and sittings commenced in October 2005. The Court sits on every second Thursday. At the moment the Court deals with cases involving Koori children who reside in the Department of Human Services north or west regions or within the boundary of any court in that region. This means that cases listed at Heidelberg, Broadmeadows, Sunshine, Werribee and Melbourne are capable of being heard in the Children’s Koori Court at Melbourne. The Court is being evaluated. Even though the evaluation is not complete the Attorney-General has announced that another Children’s Koori Court will commence sittings at Mildura in September 2007.

The proceedings in the Children’s Koori Court are governed by sections 517 to 520 of the Children, Youth and Families Act 2005 (CYFA).

The legislation that established the Koori Court (Criminal Division) had the following purposes -

(a) to establish a Koori Court (Criminal Division) of the Children’s Court;
and

(b) to provide for the jurisdiction and procedure of that Division –

With the objective of ensuring greater participation of the Aboriginal community in the sentencing process of the Children’s Court through the

role to be played in that process by the Aboriginal elder or respected person and others so as to assist in achieving more culturally appropriate sentences for young Aboriginal persons.

The Secretary of the Department of Justice is given power to appoint a person who is a member of the Aboriginal community as an “Aboriginal elder or respected person for the purpose of performing functions in relation to the Koori Court (Criminal Division)...”

The Act also creates the position of “Children’s Koori Court officer” (KCO) who exercises and performs functions in relation to the Koori Court (Criminal Division). This position is a very important one and the officer has a major role pre court, in court and after court in case management.

The Court must exercise its jurisdiction with as little formality and technicality, and with as much expedition, as the requirements of the Act and the proper considerations of the matters before the Court permit: s.517 (3). It must take steps to “ensure that, so far as practicable, any proceeding before it is conducted in a way which it considers will make it comprehensible to:

- (a) the child; and
- (b) a family member of the child; and
- (c) any member of the Aboriginal community who is present in the Court.” (s.517(4))

Criteria for exercise of jurisdiction.

The Children’s Koori Court only has jurisdiction to deal with a defendant if each of the following four criteria apply:

- A. The defendant must be an Aboriginal. This means a person who:
 - (i) is descended from an Aborigine or Torres Strait Islander; and
 - (ii) identifies as an Aborigine or Torres Strait Islander; and
 - (iii) is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Islander community.

The Court does not involve itself in the determination of issues to do with Aboriginality. If there is an issue it is resolved by the Children's Koori Court officer and the elders/respected persons.

B. The offence must be within the jurisdiction of the Criminal Division of the Children's Court: Note, however, that sexual offences (as defined in S.6B (1) of the *Sentencing Act*) are specifically excluded from the Children's Koori Court.

C. The defendant intends to plead guilty to the offence or pleads guilty to the offence or has been found guilty of the offence by the Criminal Division.

D. The defendant consents to the proceeding being dealt with by the division.

Sentencing powers

The Court does not have any different sentencing orders for defendants appearing in the Children's Koori Court. In other words, the Court exercises the same sentencing powers that apply in the Criminal Division of the Children's Court. The Koori Court is not a separate court with separate sentencing orders. As in any criminal case, it is the Magistrate/President who is responsible for making the sentencing order. This is explained clearly to each offender who appears in the Court. This is done at the commencement of proceedings.

The Act does state that the Children's Koori Court may:

- (i) consider any oral statement made to it by an Aboriginal elder or respected person;
- (ii) inform itself in any way it thinks fit, including by considering a report by, or a statement or submission from:
 - (a) a Children's Koori Court officer employed ; or
 - (b) a juvenile justice worker employed under Part 3 of the *Public Administration Act 2004*; or
 - (c) a health service provider; or
 - (d) a victim of the offence; or

- (e) a family member of the defendant; or
- (f) anyone else whom the Koori Court (Criminal Division) considers appropriate.

The Act does not offer detailed guidance on sentencing procedure and the Court has adapted procedures developed in the Magistrates' Court to achieve the purposes of the legislation.

The courtroom and procedure in the Koori Children's Court.

The Melbourne Children's Court has a particular courtroom that is used for the Koori Court. Aboriginal art works are displayed on the walls and the Australian, Aboriginal and the Torres Strait Islander flags are also displayed.

The courtroom has an oval bar table at which all persons involved in the case (including the Magistrate/President) are seated. It is generally the case that the Magistrate/President sits with two elders or respected persons. This is the first obvious change from normal court procedure. Also present at the oval table during a hearing will be the KCO, the prosecutor, a youth justice worker, the defence lawyers, the defendant and family members. If there is a particular worker (i.e. drug and alcohol worker, or mental health worker etc) involved with the defendant, that worker will also sit at the bar table. Other family members and community members will be present in the courtroom.

A second difference with normal procedure is that each case commences with an acknowledgement of country. In Melbourne there will be an acknowledgement of the Wurrundgeri people of the Kulin Nations. The magistrate/President will explain to the defendant that the court respects Aboriginal people and culture. It will be highlighted that the court has been smoked according to tradition and culture. The role of the elders and respected persons will be explained and it will also be made clear that the elders and respected persons are not responsible in any way for the sentencing decision – that is the responsibility of the magistrate/President.

As in any other criminal proceeding, the plea will be taken and the police prosecutor will read the charges and provide a summary of the circumstances of the offending. After the summary the court will be provided with the list of prior convictions – if there are any. The defence lawyer will then provide an outline of the defendant’s situation. It is then common for the young person to be asked to speak about themselves or their offending or both. Family members will say things about or to the young person. Elders and respected persons will speak to the young person and to the family.

It is a matter for the elders and respected persons what they say. Often they will speak strongly to a young person on the importance of obeying the law and the harm they have caused to the victim and the community by their misbehaviour. They may talk to the young person about the harm they cause to all Aboriginal people and to their heritage by their misconduct; about the young persons family and regard within the Aboriginal community; how the misbehaviour has distressed the family; encourage the young person to change their behavior and work with agencies that offer support in that regard; or offer advice based on the Elders own experience. It is the elders and respected persons who give the Court its unique authority and flavour. Defendants will nearly always engage in discussion with the elders and respected persons and accord respect to the process.

The KCO and other support workers will inform the court of matters relevant to the defendant and advise of possible support persons or programs.

The process is very different from what occurs in a traditional court. Generally, in the ordinary court the defendant plays a bit part. They become a player at the time they stand to be sentenced. In the Koori Court the voice of the defendant, family and community are always present and central.

At times, the proceedings become very dynamic with various persons contributing to discussion – it may be family members, support persons or other members of the Aboriginal community who make a contribution to the hearing. As Kate Auty and Daniel Briggs have observed in relation to proceedings in the adult Koori Court – “Comment from the floor of the court occurs fairly regularly and could

best be described as both supportive and also chastising. People stand or sit to make their comments. Sometimes people who wish to comment do not wait to be invited to speak. This is taken as an indication of the confidence parties are gaining about the procedure. On occasion people not generally comfortable with speaking have been reported as doing so in this forum. Sometimes people are halting or reticent, but if the court waits quietly even the most reserved people speak. No one is made to speak if they do not wish to – and this includes the defendant. The defendant is then asked to respond to the community and also whether he or she has anything to say to the elder by way of respect. Often a defendant will apologise and sometimes he or she is just silent and seemingly remorseful at this time. Those of us involved in the court have often been surprised about the depth of responses of defendants to their community, and the expressions of remorse or shame can be quite overwhelming, as can be acknowledgements of respect for those who have spoken. The fact that a senior community member knows an older relative of the defendant who disapproves of the conduct alleged, and say so, can be quite disarming for a defendant who would in the ‘mainstream’ court be able to remain anonymous and avoid family disapproval....”

At the conclusion of the “sentencing conversation” the magistrate/President will then either determine the matter with the appropriate sentence or, if necessary, adjourn sentence to another date and obtain reports that address particular issues relevant to the defendant’s circumstances. When a sentencing order is made it will be explained to the defendant in clear terms.

As can be seen from this summary, the procedure is dynamic and inclusive. Cases in the Children’s Koori Court take much longer than they do in the normal court proceedings. There are many voices to be heard and the court is attentive to those voices. The process is resource intensive and this means that no more than five cases are listed on any Koori Court-sitting day.

The Koori community is clearly expressing confidence in the court. The role of the elders, respected persons and the KCO is being acknowledged by defendants

who appear to be making substantial efforts to address the problems behind their offending behaviour.

In conclusion, I would like to quote the comments of a journalist who attended Koori Court sittings and reported on the experience on the 27th of May 2006 – “But what is most striking to an observer is the humanity of the court. Like a regular Magistrates’ Court, the Koori courts remain a place of sentencing and punishment but they are also a place of recognition and understanding.” And a little bit later”What the Koori courts show us is how powerful the law can be when it is used, not as a big stick, but as a means of allowing those who come before it to confront the consequences of their actions. They show us what is possible when people are allowed to speak and be heard We have a great deal to learn from the Koori Courts.”

Judge Paul Grant

President of the Children’s Court of Victoria

27/8/07.