

A series of Research Briefs designed to bring research findings to policy makers

Indigenous-specific court initiatives to support Indigenous defendants, victims and witnesses

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Introduction

It is well known that Indigenous offenders are overrepresented in the Australian criminal justice system (see Anthony 2013: 55-71). As at December 2014, the Indigenous adult imprisonment rate was 12 times the general rate of imprisonment (Australian Bureau of Statistics (ABS) 2015). Indigenous people are also overrepresented as victims. For example, the available data indicate a 2.3-3.7 times higher sexual assault victimisation rate, while the Indigenous homicide victimisation rate in South Australia was 20.5 times higher (ABS 2014).

Previous Indigenous Justice Clearinghouse (IJC) briefs have examined the principles that apply when sentencing Indigenous offenders (Anthony 2010) and the operation of Indigenous sentencing courts (Marchetti 2009). These issues will not be revisited in detail, although the High Court's decisions in *Bugmy v The Queen* (2013) 249 CLR 571 and *Munda v Western Australia* (2013) 249 CLR 600 should be noted. The abolition in 2012 of the Northern Territory community courts and Murri sentencing courts in Queensland (see Marchetti & Ransley 2014) is also relevant in this context.

This brief highlights some current initiatives in operation in Australian courts which seek to make the court process more responsive to the needs of Indigenous participants. Further sources of support, for example Aboriginal legal and victim support services and judicial education, including judicial benchbooks, are then considered. The paper also examines issues around language and communication. It is acknowledged that most of the initiatives described here have not been formally evaluated, although some have been identified by the (then) Standing Council on Law and Justice (SCLJ 2013) as examples of 'good practice' or 'promising practice'.¹

Court innovations

Blagg (2008: 126) has noted that '[t]he much maligned court system has shown itself to be more flexible and more able to accommodate alternative strategies for dealing with offending than was assumed to be the case'. This section presents a cross-jurisdictional overview of court initiatives designed to assist Indigenous defendants, victims and witnesses. These initiatives were identified through an examination of court websites and supporting materials, and their objectives include:

- addressing cultural and linguistic barriers;
- engaging Indigenous communities in criminal justice processes;
- facilitating access to support services;
- ensuring the court process is fair; and
- reducing Indigenous offenders' contact with the mainstream court process.

Specialist court processes

At the time of writing, some form of Indigenous sentencing court was operating in New South Wales (NSW), Victoria, Queensland, South Australia, Western Australia and the Australian Capital Territory (for evaluations see Aquilina et al. 2009; Borowski 2011; Cultural and Indigenous Research Centre Australia (CIRCA) 2008; Fitzgerald 2008; Harris 2006; Morgan & Lewis 2010; see also SCLJ 2013). As noted above, Murri sentencing courts were abolished in Queensland in 2012, but a specialist Indigenous Sentencing List (ISL) now operates in 11 locations across Queensland (Queensland Department of Justice and Attorney-General (QDJAG) 2012b: 1). Although the ISL is 'very similar' to the Murri Court, it 'provides additional support

and referrals to program[s]' and 'assists in addressing the underlying causes of a defendant's criminality', as 'offenders can be referred to services as part of their bail undertaking, including drug or alcohol rehabilitation, work readiness courses or ending offending programs' (C White, pers comm, 23 October 2014).

In addition, the Remote Justice of the Peace (JP) (Magistrates Court) Program empowers Queensland's JP magistrates, most of whom are Indigenous, to deal with offences against local laws and summary offences, as well as bail applications and granting adjournments (QDJAG 2012c; see also Anthony 2014: [1.5.980]). The program currently operates in six areas, has trained and sworn in over 200 JPs, and has been described as an example of promising practice (SCLJ 2013). An independent evaluation of the program found that stakeholders were 'almost unanimous' in their support for the program, due in part to its 'potential to build capacity for Indigenous communities to own solutions to offending within them' (Allison et al. 2012: 25). A 'great strength' of the program was that 'JPs spoke the same language and shared the same cultural background as the people who appeared before them' (2012: 27). However, the evaluation also identified some criticisms, including: concerns with recruiting and retaining Indigenous JPs; the lack of clear or consistent criteria about which matters to refer to JPs; the lack of legal assistance; the over-reliance on fines as a sentencing option; and disproportionately harsh sentencing outcomes, when compared with the Magistrates Courts.

The Barndimalgu Court in Western Australia is a pre-sentencing court which hears family and domestic violence matters involving Aboriginal people (Western Australian Department of Attorney-General (WADAG) and Department of Corrective Services nd: 1). It 'provides offenders with the

opportunity to complete programs to address their violent behaviour before the final sentence is delivered' (Magistrates Court of Western Australia (MCWA) 2014a). This initiative is currently being evaluated (SCLJ 2013).

Another West Australian initiative is the Aboriginal Alternative Dispute Resolution Service, which 'aims to reduce the incidence of Aboriginal people's involvement with the criminal justice system by providing an effective and culturally appropriate form of dispute resolution' (MCWA 2014b). This service recognises that some of the issues affecting Aboriginal people include complex and sometimes chronic inter- and intra-family feuding and is another example of promising practice (SCLJ 2013).

Community justice groups

NSW has community justice groups (CJGs) operating in 20 locations. These groups comprise of Aboriginal people examining local crime and offending problems and developing ways to address these issues. They work with different parts of the criminal justice system to improve its effectiveness for Indigenous people (NSW Justice and Attorney-General 2009). This initiative has been identified as an example of promising practice (SCLJ 2013).

The Queensland CJGs Program operates in over 55 locations and is estimated to support over 5,000 Indigenous offenders and 3,000 victims of crime each year (QDJAG 2012a; see also Anthony 2014: [1.5.980]). Most CJG members are Elders, 'Respected Persons', Traditional Owners and members of the Indigenous community. CJGs encourage diversionary processes (including the ISL) and 'develop networks with other government agencies to ensure that issues impacting on Indigenous communities are addressed' (QDJAG 2012a: 2). They also make cultural submissions to the Magistrates Court

and identify and promote supporting programs that assist Magistrates in their decision-making. An evaluation of this program (KPMG 2010) found it was closely aligned with strategic government initiatives at the state and national level. It also had widespread support amongst Indigenous community leaders, community-based service providers, and justice system stakeholders. However, the quality and effectiveness of the program were seen as severely constrained by poor program resourcing and governance arrangements. In addition, the efficiency of the program could not be reliably estimated using the available financial and performance data, and poor data quality was identified as a weakness of the program.

Procedural support for court participants

NSW runs the Aboriginal Client Service Specialists Program in the local courts. The program provides advice and support to Indigenous defendants and aims to minimise breaches of court orders (Marchetti & Ransley 2014).

The Koori Liaison Officer Program is available to support any party to a court proceeding (applicants, respondents and defendants) in the Magistrates Court of Victoria (MCV) (eg the Family Violence Court Division) (MCV 2014b). There are also Koori Community Engagement Officers at two Magistrates Courts, who assist Koori participants in the court process and liaise with Koori communities (MCV 2014a). In addition, the Koori Victims of Crime Assistance Tribunal (VOCAT) List operates within the VOCAT and specifically helps Koori victims of crime (Courts and Tribunals Victoria 2014). Another program managed by the VDHS is the Koori Intensive Support Program, which works with young people to help them comply with the conditions of their bail or deferred sentences (Department of Human Services Victoria (DHSV) 2014).

The South Australian Courts Administration Authority (SACAA) (2014) employs 10 Aboriginal Justice Officers (AJOs) to support Aboriginal court participants, judicial officers and the community. AJOs are permanently based at five courts, including the Youth Court, as well as servicing 14 other metropolitan, regional and remote courts.

Western Australia has Aboriginal Court Liaison Officers (ACLOs) located in eight courts. A 2011 evaluation found Aboriginal stakeholders, judicial officers and other justice stakeholders found them highly valuable (see SCLJ 2013). In addition, the MCWA website refers to the Aboriginal Visitors Scheme, which provides support and counselling for Aboriginal detainees and prisoners.

In Tasmania, an Aboriginal court support officer is 'available to provide support to Aboriginal adult and child victims of family violence (including referral to appropriate counselling and other services) and guide them through the justice system during and after court appearances' (Victim Support Services Tasmania 2014).

The SCLJ (2013) described the NSW Aboriginal Client Service Specialists Program, Koori VOCAT List, Koori Intensive Support Program, South Australian AJOs and Western Australian ACLOs as examples of promising practice, and the Koori Liaison Officer Program and Koori Community Engagement Officers as examples of good practice. Blagg has described Indigenous justice/court officers as 'pivotal [and]... the lynchpin of the process, bringing their local knowledge of offenders and their families to the table' (2008: 132; see also Daly & Marchetti 2012: 465).

Social support for court participants

In Victoria, the Koori Youth Justice Program was developed in response to the findings of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) (DHSV 2014). The program employs Koori youth justice workers to provide access for young Aboriginal offenders to appropriate role models and culturally sensitive support, advocacy and casework. The program targets young people at risk of offending, as well as offenders on community-based and custodial orders (Courts and Tribunals Victoria 2014). The SCLJ (2013: 43) noted that a review of this program in 2010 'found that overall the approach and types of interventions provided by the Koori Youth Justice Program are in line with promising practices'.

Further sources of support

There are a number of other sources of support for Indigenous participants in the court system. The following is not a comprehensive list, but provides some examples that seek to respond to the specific needs of Indigenous defendants, victims and/or witnesses.

First, there is at least one Aboriginal Legal Service (ALS) in each jurisdiction. These agencies provide a range of services, including legal advice and representation, prisoner support, community education and liaison, research, law reform and advocacy. For example, the Victorian ALS works with Koori communities to explore ways to make the justice system more equitable for Indigenous people and seeks to change attitudes within mainstream services, such as the police and courts. The SCLJ (2013) considered this an example of promising practice. In addition, the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) was

established as the national peak body for ALS agencies in 2007 (NATSILS 2014). Its key functions include:

- advocating at the national level for the rights of Indigenous people within the justice system;
- working to ensure Indigenous peoples' equitable access to justice; and
- ensuring that ALS agencies are adequately funded and equipped to provide high quality and culturally competent legal assistance services.

The NT Chief Justice has described ALS agencies as 'significant contributors to the administration of justice' (Riley 2012: 10).

Each state and territory also has a legal aid organisation, some of which specifically acknowledge the needs of Indigenous people. For example, Legal Aid Queensland (nd) has developed a brochure entitled 'Best practice guidelines for lawyers providing legal services to Aboriginal and Torres Strait Islander [ATSI] clients'. This sets out 10 guiding principles in relation to such issues as: effective communication, the central role of community in the lives of Indigenous clients, and the complex causes of Indigenous overrepresentation in the criminal justice system as both victims and defendants. Legal Aid Queensland also provides free seminars for lawyers on communication skills and cultural considerations when representing Indigenous clients and an Indigenous legal information hotline. All of these initiatives are seen by the SCLJ (2013) as examples of promising practice.

Many public prosecution agencies have a witness assistance scheme (WAS) which provides specific assistance to Indigenous witnesses and victims. For example, the NSW Office of the Director of Public Prosecutions

(ODPP) website notes that each region has an Aboriginal WAS officer to assist Aboriginal victims and witnesses, which is another example of promising practice (SCLJ 2013). These officers 'have professional qualifications, training and experience in counselling to assist victims and witnesses and their families going through the prosecution process' (NSWODPP 2014).

There is also a range of victim support services, some of which acknowledge the specific needs of Indigenous victims. By way of example, the South Australian Commissioner for Victims' Rights (2010) has prepared a document called 'Speaking Up as a Victim of Crime'. Aimed at Aboriginal victims, it presents information on talking to the police, the court and support services, and is presented in both English and Creole.

Judicial education

The National Judicial College of Australia (NJCA), Judicial Commission of NSW (JCNSW), Judicial College of Victoria (JCV) and Australasian Institute of Judicial Administration (AIJA) provide education for Australian judicial officers. The NJCA also has a national Indigenous Justice Committee, chaired by the Chief Justice of Western Australia, which makes decisions on the allocation of funds to conduct professional development programs for judicial officers on Indigenous justice issues (NJCA 2014a).

The following judicial education events were scheduled for 2014 (JCNSW 2014; JCV 2014):

- guided walks in Sydney and Melbourne for judicial officers to gain a better understanding of Aboriginal connections to place;
- a seminar on the impact of *Bugmy* and *Munda* on sentencing Aboriginal offenders and a session on

sentencing Indigenous offenders at the biennial NJCA Sentencing Conference;

- a seminar on mental health in Indigenous communities, which sought to provide participants with a better understanding of Indigenous approaches to health and the need to provide culturally appropriate and holistic mental health services to Indigenous people in the criminal justice system; and
- a presentation on the key findings of a recent Victorian Sentencing Advisory Council report on sentencing outcomes for Koori and non-Koori adult offenders in the MCV, as well as some of the issues around bail applications for Koori offenders.

The topic of the AIJA's 2013 annual conference was 'Current Issues In Delivering Indigenous Justice – Challenges for the Courts' (AIJA 2013). Session themes included:

- Indigenous courts in Australia and New Zealand;
- the need for further innovations to assist both Indigenous courts and mainstream courts in their work with Indigenous people;
- comparisons in sentence severity for Indigenous and non-Indigenous offenders;
- learning about Indigenous communities and their needs; and
- Aboriginal young people and justice.

Some jurisdictions also hold ongoing cultural awareness training for judicial officers and court staff. In South Australia, a two-day course on Aboriginal cultural awareness issues is mandatory for all new staff, and new magistrates also attend. It is delivered every three months by CAA Aboriginal staff (SACAA 2014). According to the

SCLJ (2013: 11), the course 'has been delivered to over 500 CAA participants and regularly receives extremely positive feedback'. Accordingly, this is seen as an example of promising practice. There is also a South Australian NJCA Indigenous justice committee, which raises Aboriginal cultural awareness among judicial officers by providing presentations, workshops and community visits (SACAA 2014).

Judicial benchbooks are reference materials to assist judicial officers. The *Aboriginal Benchbook for Western Australian Courts* was first written in 2002 and updated in 2008 (Fryer-Smith 2008). There are also sections on Indigenous issues in the Western Australian and NSW *Equality Before the Law* benchbooks (WADAG 2009; JCNSW 2006) and the Supreme Court of Queensland (2005) *Equal Treatment Benchbook*. In addition, the *Solution-Focused Judging Benchbook* (King 2009) addresses a range of issues relevant to Indigenous defendants.

Judge Stephen Norrish (2013) has noted the limitations of judicial education, in that it is voluntary in nature. He suggested that all jurisdictions should have compulsory components on Indigenous issues as part of both orientation information (as already occurs in South Australia) and annual conferences, as well as an Aboriginal benchbook. In addition, he suggested that all judicial officers dealing with Aboriginal people 'should have access to a checklist of issues particular to the jurisdiction that permit consideration of the context in which the individual offender comes before the court' (2013: 49). These suggestions are worthy of further consideration.

Language and communication issues

The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HRSCATSIA) (2011) recommended that a national Indigenous interpreter service be established by 2015. At present, such services are only available in some jurisdictions. The NT Aboriginal Interpreter Service is the most comprehensive, and provides a 24-hour service (NT Magistrates Courts 2014). According to the Chief Justice of the NT Supreme Court (Riley 2012: 12-13), '[i]nterpreters are now used as a matter of course where language difficulties have been identified'. The Commonwealth Government is funding over \$6 million in initiatives in 2014-15 to improve the supply of Indigenous interpreters in the NT, Queensland, South Australia and Western Australia. In addition, the Commonwealth and NT governments are exploring the feasibility, cost and service delivery issues involved in using the NT service as a platform for a national Indigenous interpreter service (F Byers, pers comm, 27 August 2014).

The Queensland *Equality Treatment* benchbook (Supreme Court of Queensland 2005) includes a chapter on Indigenous language and communication which covers such issues as misinterpretation, silence, gratuitous concurrence, leading questions in cross-examination and the use of court interpreters. It also sets out guidelines for effective communication with speakers of Aboriginal English, such as the use of indirect questions and avoiding figurative speech and 'either/or' questions. Similar issues are also examined in some of the other judicial benchbooks discussed above (see Fryer-Smith 2008: Chapter 5; JCNSW 2006: 2303-2313). The AIJA has also developed a handbook entitled *Indigenous Interpreting Issues for Courts* (Cooke 2002), which explains key concepts in Aboriginal English,

interpreting issues in the context of evidentiary discourse and determining the need for an interpreter.

It is vital that all relevant stakeholders in the court process – police, court and judicial officers, as well as legal representatives for the prosecution and defence – are adequately informed about these issues, in order to minimise miscommunication and unjust outcomes in cases involving Indigenous defendants, victims and other witnesses.

International initiatives

New Zealand

The New Zealand court websites do not suggest there are any Māori-focused court practices, but there are currently 13 Rangatahi youth courts in operation; the first such court was established in 2008, based on the Victorian Koori Children's Court (Sharp 2013). These courts operate within the existing youth court model, but take place at a marae, a traditional Māori meeting place, and adopt Māori language and protocols as part of the court process, including rituals, blessings, songs and food. The purpose of the court hearing is to monitor the progress of the young person's Family Group Conference (FGC) plan; FGCs have been described as 'the lynchpin of the New Zealand youth justice process' (Taumaunu 2014: 7). An evaluation by the Ministry of Justice (2012) indicated positive early outcomes for offenders, communities and organisations. The Principal Youth Court Judge has described Rangatahi courts as 'a revolution within New Zealand's youth justice system' (Becroft 2013: 2), while Sharp (2013: 37) suggested that the courts 'are driving change by exposing broader, system-wide deficiencies such as the under-representation of Māori judges'. The Pasifika Youth Court, which operates in Auckland, is based on similar principles, but caters for young offenders from a number of Pacific Islander nations (Sharp 2013).

Canada

In *R v Gladue* [1999] 1 SCR 688, the Supreme Court of Canada set out general principles that apply when sentencing Aboriginal offenders, including that judges must consider the unique systemic or background factors which may have played a part in bringing the offender before the courts. In response to a perceived failure to implement the principles set out in *Gladue*, so-called 'Gladue courts' were established in 2001, with Aboriginal caseworkers appointed to provide reports to the court on the systemic and background issues affecting the lives of Aboriginal offenders, together with available culturally relevant sentencing options (Hopkins 2012; see also Jeffries & Stenning 2014). A central part of the courts' operation is the Gladue report, which is written by Aboriginal people about an Aboriginal defendant's cultural background and is 'designed to give a Judge a full picture of the person they are dealing with' (Sharp 2013: 13).

A recent report released by the Department of Justice Canada (April & Magrinelli Orsi 2013) indicated that there were at least 19 specialised courts in operation, in eight out of 11 jurisdictions. Judicial training on the decision in *Gladue*, the relevant legislation and cultural awareness took place in about half the jurisdictions. Seven jurisdictions provided training for probation officers, court workers and legal counsel on the preparation of independent sentencing and pre-sentence reports involving Aboriginal offenders, although participants were divided on the utility of this training. In most jurisdictions, bail and parole decision-making in respect of Aboriginal defendants were also informed by 'Gladue type information' (April & Magrinelli Orsi 2013: 1). To date, there has been no formal evaluation of these courts (Jeffries & Stenning 2014).

There were also community justice programs in operation in nine jurisdictions, including court and

corrections liaison officers and programs specifically designed for juveniles. A key concern was around information sharing and communication; indeed, this was described as 'one of the key challenges of Aboriginal justice, [which] undoubtedly affects the consistency and effectiveness of the delivery of services for Aboriginal individuals who must make their way through the system' (April & Magrinelli Orsi 2013: 24). Research should be undertaken to ensure that the same does not apply in the Australian context, and that Indigenous court participants are able to appropriately draw on the support of relevant services.

Conclusion

This brief has identified a range of Indigenous-specific court initiatives which variously seek to:

- provide advice on court processes to Indigenous defendants, witnesses, victims and their families;
- assist Indigenous people to access relevant services;
- liaise with relevant agencies to coordinate service delivery;
- educate and provide advice to judicial officers, court staff, prosecutors, defence counsel, police, corrections officers and other key stakeholders in the criminal justice system;
- assist with Aboriginal sentencing courts and conferences;
- recruit, train and support Elders and Respected Persons;
- deliver community education on criminal justice and Indigenous issues;
- assist in the development, evaluation and implementation of new policies and procedures relating to Indigenous issues; and
- maintain records of referrals and services provided, as well as preparing statistical and other reports.

The brief then considered Indigenous legal and victim support services, judicial education, and issues in relation to language and communication.

As noted above, there is little evaluation information available in this context. This accordingly limits the strength of the conclusions that can be made in respect of 'what works' for Indigenous defendants, victims and witnesses. In addition, as Blagg (2008: 185) has noted, '[t]he road to justice reform in Aboriginal Australia is littered with the wreckage of promising one-off initiatives, pilot projects and local strategies that have failed to be refunded, nurtured and maintained by government'. The decision to abolish the Murri courts in Queensland is clearly an example of this (Moore 2012). Consistent funding is therefore required to ensure adequate ongoing support for all Indigenous participants in the court process. Further research is also required to better understand the operation and effectiveness of the initiatives described in this paper in terms of both process (eg, the impact of Indigenous liaison officer involvement on participant satisfaction) and outcome (eg, the impact of judicial education on conviction rates or sentencing outcomes).

Daly and Proietti-Scifoni (2009: 8) have observed:

It would be naive to suppose that... innovative justice practice, can alone produce significant reductions in re-offending or imprisonment. Other socio-economic policies are required in education, health, and economic development. However, conventional criminal justice practices can be improved by being less harmful and more socially re-integrative.

This brief has identified a number of initiatives which may make the Australian court system less harmful for Indigenous defendants, victims and witnesses. However, it is critical that measures of this nature be developed in partnership with members of the community they purport to represent. As Anthony (2013: 202) has noted, 'empowering Indigenous communities in the justice process would fortify their laws, restore their governance structures and contribute to Indigenous healing'.

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Cases

Bugmy v The Queen (2013) 249 CLR 571

Munda v Western Australia (2013) 249 CLR 600

¹ Initiatives categorised as 'good practice' have been fully evaluated and found to be successful, while 'promising practice' relates to initiatives based on program models that have been evaluated or rigorously researched and found to be advantageous; partly evaluated programs with successful outcomes to date; and programs with consistent positive feedback from workers, participants and other stakeholders over a period of time (SCLJ 2013: 4).