MINIMUM STANDARDS FOR ABORIGINAL AND TORRES STRAIT ISLANDER COURTS IN WESTERN AUSTRALIA, SOUTH AUSTRALIA, VICTORIA, QUEENSLAND & NORTHERN TERRITORY (NORTH) 2007-2010

By Australia's Aboriginal and Torres Strait Islander legal services of Western Australia, South Australia, Victoria, Queensland and Northern Territory (North) as a joint project.
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BACKGROUND
This paper has been jointly prepared by the Aboriginal and Torres Strait Islander legal services of Western Australia, South Australia, Victoria, Queensland and Northern Territory (North).

We are community based organizations who provide legal advice and representation in a culturally appropriate manner across a wide range of areas to our peoples living in our States and Territories.

Beyond our legal practice, through our law reform and advocacy activities we also inform governments and other bodies about law and justice issues. This paper is prepared on that basis.

Australia's criminal justice system is, for the most part, the model inherited from the British justice system.

This model consistently yields high rates of recidivism by Aboriginal and Torres Strait Islander people[1].

In contrast, the Australian jurisdictions that have set up specialist Courts to deal with sentencing of Aboriginal people[2] have yielded far lower recidivism rates[3] - and a range of other benefits including changing behaviour and community capacity building[4]. This

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[1] See for example Western Australian statistics at Department of Justice website www.justice.wa.gov.au and at Crime Research Centre website www.crc.law.uwa.edu.au . Nationally, in June 2002 the imprisonment rate for Aboriginal and Torres Strait Islander adults was 15 times that of non-Indigenous adults and the detention rate for Aboriginal and Torres Strait Islander juveniles was 19.9 times that of non-Indigenous juveniles (Human Rights and Equal Opportunity Commission, *Face the Facts*, 2005 at http://www.hreoc.gov.au/racial_discrimination/face_facts/atsi.html#q4)

[2] As yet, no specialist Court has been set up for Torres Strait Islander peoples, though in some cases Torres Strait Islanders are permitted to access specialist Aboriginal Courts if they wish

[3] See for example Victorian Department of Justice, *Victorian Implementation Review of the Recommendations from the Royal Commission Into Aboriginal Deaths in Custody, Review Report* (Vol 1, October 2005) 485, which indicates Koori Courts at Shepparton and Broadmeadows reduced recidivism by nearly half; Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006 at page 15 http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf ; Opening of the Murri Court at Townsville, 2 March 2006, Transcript of Proceedings, 3, which refers to significant reduction of re-offending by juveniles; Steering Committee for the Review of Government Service Provision (SCRGSP), Overcoming Indigenous Disadvantage – Key Indicators 2005 (July 2005) 9.9 in relation to circle sentencing and Murri Courts

[4] See for example Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006, especially the conclusion http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf and the Law Reform Commission of Western Australia, *Aboriginal Customary Laws Final Report* (September 2006) at page 127 http://www.lrc.justice.wa.gov.au/094-fr.html

is notwithstanding that different jurisdictions have developed different models; for example the South Australian Nunga Court model, the Victorian Koori Court model, the New South Wales Circle Court model and the Northern Territory Community Court model all differ from each other. The general development of Aboriginal Courts in Australia and the variety of models this phenomenon embraces has generated considerable research and scholarship.[5]

The variety of models of Aboriginal Courts in Australia provides an opportunity for comparison, to identify what sort of features work best and what doesn't work. As the number of such Courts increases, it is also an opportunity to work towards an appropriate level of consistency intra- and inter- Australia's States and Territories. The purpose of this paper is to identify minimum standards for developing and establishing a successful Aboriginal or Torres Strait Islander Court in our regions. It is intended as a practical tool, not an exhaustive scholarly review.

It is also necessarily a work in progress; the "newness" of Aboriginal and Torres Strait Islander Courts to the Australian legal system means that knowledge about them is continually expanding. We have chosen to set these standards for the period 2007 to 2010, based on the level of information currently available to us. A review is appropriate thereafter, to take into account new learning.

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[5] Recently published research includes: Auty, K and Briggs, D *Koori Court Victoria: Magistrates Court (Koori Court) Act 2002* Law Text Culture Vol 8 2004; Professor Chris Cunneen, Ms Neva Collings, Ms Nina Ralph *Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement,* Institute of Criminology, University of Sydney Law School, 21 November 2005; Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006 http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf; Law Reform Commission of Western Australia *Aboriginal Customary Laws Final Report* (September 2006) http://www.lrc.justice.wa.gov.au/094p.html; Marchetti, E. & Daly, K. (2004). Indigenous courts and justice practices in Australia. *Trends and Issues No 277 AIC*, Canberra http://www.aic.gov.au/publications/tandi/index6.html; Parker, N and Pathe, M (Department of Justice and Attorney General, Queensland) *Report on the Review of the Murri Court* December 2006 http://www.justice.qld.gov.au/courts/pdfs/MurriCourtReport.pdf ; Ivan Potas, Jane Smart and Georgia Brignell (Judicial Commission of New South Wales) and Brendan Thomas and Rowena Lawrie (NSW Aboriginal Justice Advisory Council) with survey conducted by Rhonda Clarke *Circle Sentencing in New South Wales: A Review and Evaluation,* October 2003 http://www.austlii.edu.au/au/journals/AILR/2004/16.html ;Queensland Government, *Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement: Queensland Government Response*, November 2006; Tomaino, John *Aboriginal (Nunga) Courts* Information Bulletin #39, Office of Crime Statistics and Research, Government of South Australia http://www.ocsar.sa.gov.au/docs/information_bulletins/IB39.pdf; Victorian Department of Justice, *Victorian Implementation Review of the Recommendations from the Royal Commission Into Aboriginal Deaths in Custody, Review Report* (Vol 1, October 2005); and Westcott, Mary *Murri Courts,* Research Brief No 2006/14, Queensland Parliamentary Library, 2006. In addition to published research, staff at existing Aboriginal Courts have been active in providing information.

CONTEXT

Existing Aboriginal Courts are not the only model that has been used to try to make Australia's legal system work better for our peoples. Other models include community justice groups and community conferencing. This paper focuses on Aboriginal Courts only. The reasons for our choice are that this model exists in most States and Territories, and several individual Courts have been recently evaluated, making the development of national minimum standards at this time an appropriate thing to do.

A feature of existing Aboriginal Courts in Australia is that they all apply State or Territory law. Unlike some other models they do not apply traditional law. It is important to understand this point, as press coverage has on some occasions erroneously suggested otherwise[6].

Opinion amongst our peoples about Aboriginal Courts is divided. Some people object to Aboriginal Courts on the ground that, being a vehicle for the delivery of non-Aboriginal/Torres Strait Islander law, they legitimise government interference with our lives and worse, co-opt us into policing our own communities according to laws not of our making. Another objection is that Aboriginal Courts only recognise our laws insofar as they are acceptable to non-Aboriginal/Torres Strait Islander people rather than in their entirety[7]. Other people support Aboriginal Courts, on the ground that they provide substantive equality for those of our people who experience Australia's non-Aboriginal/Torres Strait Islander legal system.

This purpose of this paper is to identify the necessary minimum features of a successful Aboriginal or Torres Strait Islander Court. It is not our intention here to advocate for or against the existence or expansion of these Courts. It is for local Aboriginal and Torres Strait Islander communities to decide whether or not they want such a Court in their locality. We will advocate according to their wishes. This paper assumes that through sound "bottom up" processes a community has decided that it would like an Aboriginal or Torres Strait Islander Court.

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[6] This distinction was also stressed by the Law Reform Commission of Western Australia (LRCWA) in its *Aboriginal Customary Laws Final Report* (September 2006) at pages 124-125 http://www.lrc.justice.wa.gov.au/094-fr.html . NB: The LRCWA also stressed that Aboriginal Courts should be distinguished from problem-solving courts ("If there is a problem to be solved it is the failure of the criminal justice system to accommodate the needs of Aboriginal people and to ensure that they are fairly treated within that system", p125) while acknowledging that therapeutic justice initiatives or restorative justice may be effective for Aboriginal offenders

[7] Westcott, Mary *Murri Courts,* Research Brief No 2006/14, Queensland Parliamentary Library, 2006, at page 5 citing Harris, Mark *From Australian Courts to Aboriginal Courts in Australia – Bridging the Gap* in Current Issues in Criminal Justice, 16(1) July 2005; also see Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws,* 12 June 1986 at para 814 http://www.austlii.edu.au//cgi-bin/disp.pl/au/other/IndigLRes/1986/2/2.html?query="Aboriginal%20Courts

OVERRIDING PRINCIPLES

Our people comprise about 2.2% of the Australian population.[8] However the imprisonment rate for adults is approximately 15 times that of other Australian adults, approximately 25% of women in prison are Aboriginal or Torres Strait Islander, the detention rate for juveniles is approximately 19.9 times that of other Australian juveniles, and between 1990 and 2002 18% of all deaths in custody were Aboriginal or Torres Strait Islander people's deaths [9].

Aboriginal Courts are a special measure intended to address the above disadvantages by enabling Aboriginal and Torres Strait Islander peoples to enjoy their rights to equality before the law and equal treatment before Court[10]. This is consistent with Articles 1 paragraph 4, 2 (1) (c) and 5 (1) (a) of the International Convention on the Elimination of All Forms of Racial Discrimination, and section 8 of the Racial Discrimination Act 1975.

Self-determination, that is the right of people as a group to be involved in decisions about their own lives, is key to special measures[11].

This was emphasised in Gerhardy v Brown (1985) 57 ALR 472, a High Court case about special measures. Justice Brennan (as he was then) said: "*The purpose of securing advantage for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted upon them*".[12]

The necessity of self-determination was also emphasised in the Royal Commission for Aboriginal Deaths in Custody. Recommendation 88 is: *"That governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-*

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[8] Human Rights and Equal Opportunity Commission, *Face the Facts*, 2005 at http://www.hreoc.gov.au/racial_discrimination/face_facts/atsi.html#q2

[9] Human Rights and Equal Opportunity Commission, *Face the Facts*, 2005 at http://www.hreoc.gov.au/racial_discrimination/face_facts/atsi.html#q4

[10] For discussion about special measures in the context of ATSILS' role, see Boersig, John *A submission made on behalf of the Coalition of Aboriginal Legal Services of New South Wales (COALS) to the Review Committee conducting the 'Reassessment of Indigenous Participation of Commonwealth Policies and Programmes',* COALS, 24 February 2002

[11] The necessity of self determination in respect of Aboriginal Courts is discussed in Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws,* 12 June 1986 at para 880 http://www.austlii.edu.au//cgi-bin/disp.pl/au/other/IndigLRes/1986/2/2.html?query="Aboriginal%20Courts

[12] See pages 514, 516 and 522

determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people."[13]. Recommendation 192 is: *"That in the implementation of any policy or program which will particularly affect Aboriginal people the delivery of the program should, as a matter of preference, be made by such Aboriginal organisations as are appropriate to deliver services pursuant to the policy or program on a contractual basis. Where no appropriate Aboriginal organisation is available to provide such service then any agency of government delivering the service should, in consultation with appropriate Aboriginal organisations and communities, ensure that the processes to be adopted by the agency in the delivery of services are appropriate to the needs of the Aboriginal people and communities receiving such services. Particular emphasis should be given to the employment of Aboriginal people by the agency in the delivery of such services and in the design and management of the process adopted by the agency."*[14]

Minimum Standard 1: The two overriding principles at all stages of development and implementation and evaluation of an Aboriginal or Torres Strait Islander Court must be: a. that the Court is a special measure enabling Aboriginal and Torres Strait Islander peoples to enjoy their rights to equality before the law and equal treatment before Court; and b. self determination of Aboriginal and Torres Strait Islander peoples in respect of Aboriginal and Torres Strait Islander Courts, particularly that "*The purpose of securing advantage for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted upon them*" Brennan J of the Australian High Court in Gerhardy v Brown (1985) 57 ALR 472, at 514, 516 and 522.

Any model that does not comply with both these principles is not an Aboriginal or Torres Strait Islander Court.

PERMISSION AND CONSULTATION

It follows from the above that before developing an Aboriginal or Torres Strait Islander Court, permission must be obtained from local Aboriginal and Torres Strait Islander communities and consultation with them must occur throughout the development, implementation and evaluation process[15]. Stakeholder groups, reference groups, justice

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[13] http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol5/5.html#Heading5

[14] Ibid

[15] See for example Law Reform Commission of Western Australia, *Aboriginal Customary Laws Final Report* (September 2006) http://www.lrc.justice.wa.gov.au/094-FR.html Recommendations 24.2 and 24.5 at page 136

panels and community justice groups are ways of achieving this[16]. One of the people we consulted suggested this process:

- Start by asking the local Aboriginal and Torres Strait Islander community whether they would like an Aboriginal or Torres Strait Islander Court in their area
- Consult with all groups over a number of months. Widely advertise consultation via major Aboriginal and Torres Strait Islander service providers (eg medical services, legal services, resource agencies)
- Give key people in the community the opportunity to meet one on one so they can voice any concerns in a safe environment
- If the community decides they wish to have an Aboriginal or Torres Strait Islander Court in their area, consult again on the type of model
- Facilitation of all consultation should be by an Aboriginal person, to ensure active engagement of the target audience.

Minimum Standard 2: An Aboriginal or Torres Strait Islander Court must not be developed without first obtaining permission from local Aboriginal and Torres Strait Islander communities and community organisations and consultation with them must occur throughout the development, implementation and evaluation process.

PURPOSE

As stated (but it bears repeating), Aboriginal Courts apply the non-Aboriginal/Torres Strait Islander law of the local jurisdiction. It is not their purpose to apply the traditional law of the local Aboriginal or Torres Strait Islander community. For traditional law, people go to the local Elders not to the local Aboriginal or Torres Strait Islander Court.

Beyond the overriding principles above, an Aboriginal or Torres Strait Islander Court will have other more specific purposes. The decision about these strongly impacts on what features the Court should have, its jurisdiction and on how to evaluate its success.

Possible purposes of an Aboriginal or Torres Strait Islander Court include[17]:

Procedural

Court procedures that aid and enhance cross cultural communication and understanding through:

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[16] See for example Ivan Potas, Jane Smart and Georgia Brignell (Judicial Commission of New South Wales) and Brendan Thomas and Rowena Lawrie (NSW Aboriginal Justice Advisory Council) with survey conducted by Rhonda Clarke *Circle Sentencing in New South Wales: A Review and Evaluation,* October 2003 http://www.austlii.edu.au/au/journals/AILR/2004/16.html

[17] For example, as identified by Tomaino, John *Aboriginal (Nunga) Courts* Information Bulletin #39, Office of Crime Statistics and Research, Government of South Australia at pages 3 and 4 http://www.ocsar.sa.gov.au/docs/information_bulletins/IB39.pdf and in clause 5.2 (Strategic Objectives) of the Victorian Aboriginal Justice Agreement

1. In all aspects of court process and outcomes, clear framework for allowing and facilitating relevant cultural considerations to be brought forward to the court by Aboriginal and Torres Strait Islander communities and community members, including [Aboriginal and Torres Strait Islander] victims of crime so that they can be taken into account
2. Increasing comprehension of and participation in the court process by Aboriginal and Torres Strait Islander participants
3. Increasing comprehension of Aboriginal and Torres Strait Islander languages and social and cultural processes of participation in the court process, (such as for example avoidance relationships) by judicial officers, including recognition of the use of Aboriginal English and the sophisticated use of interpreters
4. Openness/transparency of process to community at large including Aboriginal and Torres Strait Islander peoples
5. Acknowledging the need to demystify the court process and legal language and recognising the constraints on communication which it imposes

Interventionist[18]

6. Therapeutic jurisprudence aimed at providing to the court the means to address underlying problems that cause a person to be in Court and so providing more appropriate options for participants
7. Restorative justice aimed at increasing offender awareness of the effects of crime on victims and community and at restoring relationships between parties and with the community

Social

8. By means of any or all of the above, reducing re-offending and/or increasing compliance with orders and court participation rates by adults or juveniles or both
9. By reducing re-offending and non-compliance with orders, reducing deaths in custody by decreasing numbers of Aboriginal and Torres Strait Islander individuals in prison
10. Enhancing authority of and respect for Elders/Respected Persons as well as of the criminal justice system generally
11. Enhancing effective participation in criminal justice processes by Aboriginal and Torres Strait Islander communities and community members[19]
12. Increased awareness in Aboriginal and Torres Strait Islander communities of the broader social and political context of criminality and the means to address the same through community controlled social programs and campaigns in a broader context of therapeutic jurisprudence and social justice outcomes (for example, child protection campaigns and alcohol control and campaigns to limit and control liquor licences)

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[18] The Law Reform Commission of Western Australia in its *Aboriginal Customary Laws Final Report* (September 2006) http://www.lrc.justice.wa.gov.au/094-fr.html has stressed that Aboriginal Courts should be distinguished from problem-solving courts ("If there is a problem to be solved it is the failure of the criminal justice system to accommodate the needs of Aboriginal people and to ensure that they are fairly treated within that system", p125) while acknowledging that therapeutic justice initiatives or restorative justice may be effective for Aboriginal offenders

[19] Sussex, Roland (MA) *Intercultural Communication and the Language of the Law* (2004) 78 ALJ 530

13. Encouraging co-operation between government and communities so that there is a more integrated approach to Aboriginal and Torres Strait Islander justice issues[20]
14. Enhanced appreciation of the importance of restoration and achievement of just outcomes for all members of the community

Physical Environment of the Court

15. Consulting with the community leading to the design and construction of an Aboriginal or Torres Strait Islander Court and community justice centre in a way that reflects the aspirations of the community through the building of physical infrastructure.

The above purposes are not mutually exclusive. Existing Aboriginal Courts generally operate under a range of purposes from the above list.

We strongly submit that as a matter of substantive equality the purposes described as "procedural" should apply to all Australian Courts, particularly criminal Courts in light of the statistics cited above. Without those issues being addressed, a Court is alien, intimidating and incomprehensible and does not enable those of our peoples who appear before them to enjoy their rights to equality before the law and equal treatment before Court[21].

Including all of the purposes described as "procedural" are therefore a Minimum Standard for an Aboriginal or Torres Strait Islander Court.

Existing Aboriginal Courts have all developed as criminal Courts of summary jurisdiction, operating at the sentencing stage, with a judge or magistrate presiding. All of mainland Australia's States and Territories have Aboriginal Courts for adult offenders; some also have Courts for juvenile offenders.

Depending on its purpose(s), an Aboriginal or Torres Strait Islander Court could operate in the family law or civil law jurisdiction, or in respect of indictable offences, or in respect of bail applications. There are however potential pitfalls in relation to Elders/Respected Persons' involvement in contested matters that would need to be carefully considered before establishing an Aboriginal or Torres Strait Islander Court with jurisdiction over those matters.[22]

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[20] Parker, N and Pathe, M (Department of Justice and Attorney General, Queensland) *Report on the Review of the Murri Court* December 2006 http://www.justice.qld.gov.au/courts/pdfs/MurriCourtReport.pdf
Recommendation 1 proposes that this be made a specific objective of Murri Courts

[21] Discussion and recommendations about how this could be achieved generally, beyond the context of Aboriginal Courts, can be found at Law Reform Commission of Western Australia *Aboriginal Customary Laws Final Report* (September 2006) http://www.lrc.justice.wa.gov.au/094-fr.html

[22] See for example discussion in Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006 at pages 119-121
http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf

People consulted in Western Australia expressed strong interest in Aboriginal and Torres Strait Islander Courts presided over by Justices of the Peace, particularly Aboriginal and Torres Strait Islander Justices of the Peace, though such an Aboriginal or Torres Strait Islander Court would need to address the following potential pitfalls:

1. The limited jurisdiction of Justices of the Peace
2. The lesser legal expertise of Justices of the Peace compared with judges and magistrates. Aboriginal and Torres Strait Islander Courts are legally complex, requiring a strong understanding of law relevant to cases involving Aboriginal and Torres Strait Islander peoples in addition to other legal principles
3. Justices of the Peace often deal with urgent matters. This may be impracticable in an Aboriginal or Torres Strait Islander Court context
4. Justices of the Peace often have considerably more local knowledge than judges/magistrates, increasing the risk of perceived or actual bias by way of pre-judgment[23]
5. Historically in Western Australia, Justices of the Peace were the local face of a system that meted out summary justice and imprisoned Aboriginal people at extraordinarily high rates. Justices of the Peace in regional and remote towns were invariably non-Aboriginal, and were often local employers or pastoral leaseholders. Justices of the Peace without any legal training had the power to hear a range of defended and undefended matters, except indictable offences, and could sentence people to jail terms. In the past, Justices of the Peace regularly jailed Aboriginal people for public order offences. A Law Reform Commission of Western Australia report in 1986[24] found that Justices of the Peace "appeared to be more punitive" than stipendiary magistrates in sentencing and recommended that Justices of the Peace should not be allowed to impose custodial sentences. But this recommendation has not been implemented, and under section 38 Sentencing Act 1995 (WA) Justices of the Peace retain the power to impose jail sentences, though these sentences must be reviewed by a magistrate within 2 working days.

In line with the overriding principle of self-determination the further purpose(s) of an Aboriginal or Torres Strait Islander Court beyond procedural purposes should be based on research including consultation with local Aboriginal and Torres Strait Islander communities.

Minimum Standard 3: The purpose(s) of an Aboriginal or Torres Strait Islander Court must be specified and must at a minimum include purposes of increasing cross cultural communication and understanding through culturally appropriate procedures and physical setting of the Court.

[23] Livesey v NSW Bar Association [1983] HCA 17 sets out the law as stated by the High Court in relation to this issue

[24] The Law Reform Commission of Western Australia, *Final Report on Courts of Petty Sessions*, 1986 WALRC 55(II) at http://www.austlii.edu.au//cgi-bin/disp.pl/au/other/walrc/55

To the maximum extent practicable it should be directed to increasing comprehension of and openness/transparency of Court process to the community at large including Aboriginal and Torres Strait Islander peoples.

To the maximum extent practicable it should be directed to increasing comprehension of Aboriginal and Torres Strait Islander society, culture and language as they are relevant to the Court's processes.

The exercise of jurisdiction by an Aboriginal or Torres Strait Islander Court must reflect its purpose. The purpose(s) chosen must be based on research and proper public policy considerations in the implementation of justice in a cross cultural context including consultation with local Aboriginal and Torres Strait Islander communities.

POWER BASIS

There are 2 options for a power basis for an Aboriginal or Torres Strait Islander Court:

1. Inherent discretion of the judge or magistrate to manage his/her Court as s/he sees fit
2. Legislation.

Existing Aboriginal Courts in Western Australia, Australian Capital Territory and the Northern Territory operate pursuant to the discretion of the presiding magistrate. So do Queensland's, but legislation is planned.

Existing Aboriginal Courts in New South Wales are legislated. So are Victoria's and South Australia's, but prior to legislation both of these operated pursuant to the discretion of the presiding magistrate.

The advantage of basing an Aboriginal or Torres Strait Islander Court on the inherent discretion of the judge/magistrate rather than on legislation is that the Court can be established without the delays and political compromises that may occur in the legislative process. Indeed, in a political climate that opposes the Court it may not be possible to establish it in any other way.

The advantages of basing an Aboriginal or Torres Strait Islander Court on legislation rather than on the inherent discretion of the judge/magistrate are:

1. The Court's continued existence is not dependent on individuals and will survive events such as retirement or transfer of the judge/magistrate
2. The Court is not subject to idiosyncrasies of individual judges/magistrates, affording better protection to the rights of participants
3. Legislation promotes proper participation by all participants because processes have the authority and formality of being "the law" not a "whim" of the presiding judge/magistrate

4. Legislation promotes uniformity and consistency in processes and in decision-making throughout the relevant jurisdiction, which is desirable for participants and for the public generally[25]
5. Legislation can and should be seen to encompass and incorporate key human rights principles including those in Minimum Standard 1.

Under non-Aboriginal/Torres Strait Islander law, orders are made by judges/magistrates. If an Aboriginal or Torres Strait Islander Court is intended to involve Elders/Respected Persons in deciding sentence, legislation will be necessary to effect this.

On balance, legislation has more advantages for participants and for the public than inherent discretion of the judge/magistrate, and is therefore the preferable power base upon which to establish an Aboriginal or Torres Strait Islander Court[26] – at least if there is a choice.

Minimum Standard 4: An Aboriginal or Torres Strait Islander Court should have a legislative basis, developed by Parliament in consultation with affected communities.

PARTICIPANTS

"Indeed the full potential of circle sentencing cannot be attained unless all participants work as a team. Each must make a constructive contribution to finding an outcome that satisfies the need to impose a sentence of appropriate severity to punish the offender as well as the need for retribution and community protection. At the same time, the sentence should provide the best prospects for the offender's rehabilitation so that all participants may ultimately be satisfied not only that justice has been done but that the risk of future offending is diminished." (Ivan Potas, Jane Smart and Georgia Brignell (Judicial Commission of New South Wales) and Brendan Thomas and Rowena Lawrie (NSW Aboriginal Justice Advisory Council) with survey conducted by Rhonda Clarke *Circle Sentencing in New South Wales: A Review and Evaluation,* October 2003 http://www.austlii.edu.au/au/journals/AILR/2004/16.html)

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[25] In addition to legislation, another possibility for promotion of consistency is a Benchbook (Western Australia has one) – see Recommendation 5 in Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006 http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf and also see Tomaino, John *Aboriginal (Nunga) Courts* Information Bulletin #39, Office of Crime Statistics and Research, Government of South Australia at page 13 http://www.ocsar.sa.gov.au/docs/information_bulletins/IB39.pdf

[26] See for example Professor Chris Cunneen, Ms Neva Collings, Ms Nina Ralph *Evaluation of the Queensland Aboriginal and Torres Strait islander Justice Agreement,* Institute of Criminology, University of Sydney Law School, 21 November 2005 at page 151; also see Tomaino, John *Aboriginal (Nunga) Courts* Information Bulletin #39, Office of Crime Statistics and Research, Government of South Australia at pages 11 and 13 http://www.ocsar.sa.gov.au/docs/information_bulletins/IB39.pdf and Recommendation 14 Parker, N and Pathe, M (Department of Justice and Attorney General, Queensland) *Report on the Review of the Murri Court* December 2006 http://www.justice.qld.gov.au/courts/pdfs/MurriCourtReport.pdf

Clientele (offenders if the Court deals in criminal law matters)
Options for determining Aboriginal or Torres Strait Islander status of clientele can be by self-identification or by certification.

Certification would be a disincentive for clientele to use the Court. It would likely be regarded by many of our people as offensive. It would also be cumbersome and time-consuming to arrange. Self-identification by participants is therefore preferable. Non-Aboriginal/Torres Strait Islander people sometimes worry that asking a person if they are Aboriginal or Torres Strait Islander is offensive. We advise that it is not an offensive question to ask, provided of course that the question is put politely. We also advise that most people identify themselves by their particular group (eg Yorta Yorta) or by the wider terms of Aboriginal or Torres Strait Islander. Many people object to being called Indigenous and so this word should not be used. We ourselves do not ordinarily use that word, in recognition of the wishes of our members and management committees.

Some people consulted for this project said that making an Aboriginal or Torres Strait Islander Court available to non-Aboriginal/Torres Strait Islander people would have advantages, for example by educating non-Aboriginal/Torres Strait Islander people about cultural matters, or by catering for those people who are not themselves Aboriginal or Torres Strait Islander but have lived a long time in Aboriginal or Torres Strait Islander communities. Existing Aboriginal Courts in the Northern Territory and Western Australia are available to non-Aboriginal/Torres Strait Islander people; however, the Courts are not designed to be culturally appropriate for non-Aboriginal/Torres Strait Islander clientele and an alternative Court is available.

We consider that in circumstances where resources are limited and an alternative Court is available, making the Courts available to non-Aboriginal/Torres Strait Islander people is inconsistent with their role as a special measure enabling Aboriginal and Torres Strait Islander peoples to enjoy their rights to equality before the law and equal treatment before Court. In any case an Aboriginal or Torres Strait Islander Court can easily be reconstituted as an ordinary court of summary jurisdiction to hear and determine cases involving non-Aboriginal/Torres Strait Islander people.

It appears to the writers that where existing Aboriginal Courts are available to non-Aboriginal/Torres Strait Islander offenders the reason is avoidance of opposition by non-Aboriginal/Torres Strait Islander people to the Court and fear of resentment of the Aboriginal/Torres Strait Islander community, by reason of the existence of the Court. This is not desirable and where Aboriginal or Torres Strait Islander Courts are established by legislation, consideration should be given to ensuring that the legislation defines the people who may be subject to the Aboriginal or Torres Strait Islander Court's jurisdiction.

Minimum Standard 5: An Aboriginal or Torres Strait Islander Court should not normally be available to non-Aboriginal/Torres Strait Islander people. Status as an Aboriginal or Torres Strait Islander person of the relevant culture should be by self-identification and acceptance as an Aboriginal or Torres Strait Islander person by the community affected. This issue of jurisdiction over a person should be defined by the establishing legislation for the Aboriginal or Torres Strait Islander Court.

Some cases will involve a victim who is not Aboriginal or Torres Strait Islander. It could be argued that if the Court is not culturally appropriate to the victim it ought not be used. Our view however is that if there is no available Court that can simultaneously meet the cultural needs of both victim and offender, then those of the offender should prevail, for 2 reasons:

1. The jurisdiction of a criminal Court once established is not dependent upon voluntary attendance of victims (since prosecutors represent the public interest, victims do not have locus standi), although a victim's participation is an important part of the inclusiveness of the Aboriginal and Torres Strait Islander Court concept. Aboriginal and Torres Strait Islander Courts should encourage the attendance and participation of all victims in the general context of encouraging a process of reconciliation and restoration between perpetrators and victims of crime

2. The Court process aims to change the offender's behaviour, not the victim's. It is important that the victim feel satisfied with the process; however, it is more important for the community as a whole, including the taxpayers paying for the criminal justice system, that there be no future victims of wrongdoing by that particular offender. It is also likely that a victim will feel more satisfied and safe with a process that successfully changes the offender's behaviour. This would be an interesting issue for evaluation and future research.

Minimum Standard 6: The jurisdiction of an Aboriginal or Torres Strait Islander Court that deals in matters involving the interests of victims must be attracted by the Aboriginal or Torres Strait Islander status of the offender only; however the Court should maintain a policy of actively encouraging the attendance and participation of victims in the context of the Court's aims.

A complicated issue, particularly in Australia's cities, is which Aboriginal and Torres Strait Islander people ought to be able to access an Aboriginal or Torres Strait Islander Court. Our peoples come from many different cultures. The experience of our peoples in non-Aboriginal/Torres Strait Islander Courts shows that a Court developed to be culturally appropriate and effective for one group of people will not necessarily be culturally appropriate and effective for another.

In particular, because an Aboriginal or Torres Strait Islander Court relies on its Elders'/Respected Persons' authority over clientele and knowledge of their culture and backgrounds it cannot necessarily deliver similar service to a person from different country.

Ways of responding to this include:

1. No restriction, on the assumption that the process may not be ideal but will be better than the non-Aboriginal/Torres Strait Islander alternative[27]
2. No restriction, on the assumption that potential clientele who do not regard the Court as authoritative will elect not to use it (see "Consent to Jurisdiction", below) – but our observation is that such offenders are not in practice screening themselves out
3. No restriction on clientele from different country using the Court, provided the Court's Elders/Respected Persons and the client's own elders consent to this
4. Restrict services to clientele who share the culture or community of the Court's Elders/Respected Persons
5. As for 4, save that services are also available to Aboriginal or Torres Strait Islander people who have committed offences on the country of the Court's Elders/Respected Persons
6. Adopt the South Australian model (a variation of 4). This model enables the Court, via its Aboriginal liaison officer, to find Elders/Respected Persons appropriate to a particular case where necessary, rather than limiting the Court to a set pool of Elders/Respected Persons.

Aboriginal or Torres Strait Islander Courts must be able to screen cases to ensure resources are directed where they are of most benefit. The extent of authority and knowledge over a particular client held by the Court's Elders/Respected Persons is one factor to take into account, particularly if the Court is an interventionist type.

In New South Wales' Circle Courts, screening is carried out by the Aboriginal Community Justice Group and is based on an assessment of the offence, the strength of the offender's links to the community, the willingness of the offender and his/her support people to engage fully in the process, the impact of the offence on the victim and community and the potential benefits of the process to the offender, victim and community.[28]

Another factor to take into account in screening, particularly if the Court is an interventionist type, is the client's willingness to accept responsibility for their behaviour.

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[27] See for example discussion of relevance of Koori Court to a person who identified as an "urban" Aboriginal and member of the Stolen Generation in Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006 at pages 28-29 http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf

[28] Ivan Potas, Jane Smart and Georgia Brignell (Judicial Commission of New South Wales) and Brendan Thomas and Rowena Lawrie (NSW Aboriginal Justice Advisory Council) with survey conducted by Rhonda Clarke *Circle Sentencing in New South Wales: A Review and Evaluation,* October 2003 http://www.austlii.edu.au/au/journals/AILR/2004/16.html

Most existing Aboriginal Courts require a plea of guilty to activate their jurisdiction. The Koori Children's Court however accepts a finding of guilty following a plea of not guilty.

We submit that there is a temptation to plead guilty without cause if a guilty plea is the only way to access a culturally appropriate criminal Court. This potential must be eliminated in a Court that is a special measure to address disadvantage. It is therefore preferable to accept findings of guilt as well as guilty pleas in Aboriginal or Torres Strait Islander Courts that deal in criminal law[29], provided, if the Court has an interventionist focus, that the person accepts responsibility for their behaviour sufficiently to make the process worthwhile.

Some people consulted suggested that another way of screening to make sure the process is worthwhile is to limit the number of times a client can access an Aboriginal or Torres Strait Islander Court in respect of similar matters.

Minimum Standard 7: Access to an Aboriginal or Torres Strait Islander Court that deals in criminal law matters should not be dependent on a guilty plea; rather jurisdiction should be grounded upon a finding of guilt or a plea of guilty where the factual basis of the finding or plea is not in dispute or has been resolved between defence and prosecution.

However, if a Court has an interventionist focus, then screening of cases may occur to ensure resources are directed where they will be of most benefit. This may include screening out clientele who do not accept responsibility for their behaviour.

Currently offenders eligible for an Aboriginal Court are offered a choice between the usual Court and the Aboriginal Court. Offenders appearing before Aboriginal Courts have therefore consented to the jurisdiction.

Consenting to jurisdiction avoids foisting an unwanted special measure upon people intended to benefit from it[30] and also avoids complications arising from situations where the person does not strongly identify with his or her Aboriginal or Torres Strait Islander culture.

However, if an Aboriginal or Torres Strait Islander Court has one regular judge/magistrate, a consent requirement gives clientele a limited ability to choose their judge/magistrate. One existing Aboriginal Court has found some offenders choose the

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[29] See for example Recommendations 10 and 11 in Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006
http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf

[30] See quote from Brennan J in Gerhardy v Brown at page 3 of this paper and also see Law Reform Commission of Western Australia, *Aboriginal Customary Laws Final Report* (September 2006) http://www.lrc.justice.wa.gov.au/094-FR.html Recommendation 24.7 at page 136

usual Court on the ground that the magistrate at that particular Aboriginal Court is regarded as "too harsh". A solution to this issue, at least in locations that have multiple judges/magistrates, is to have more than one judge/magistrate available at each Court. Similarly, it is appropriate that there be a pool of Elders/Respected Persons available to an Aboriginal or Torres Strait Islander Court, for this reason and also for the reasons described in Minimum Standard 16.

Minimum Standard 8: The jurisdiction of an Aboriginal or Torres Strait Islander Court over a particular person must be activated only upon the person consenting to the jurisdiction. Where consent is refused, the relevant non-Aboriginal/Torres Strait Islander Court should be used instead.

We have not seen any conclusive research on the topic, but it appears that existing Aboriginal Courts work for juveniles as well as adults[31]. The choice whether an Aboriginal or Torres Strait Islander Court should be for adults or juveniles should be based on need, ascertained by research including consultation with local Aboriginal and Torres Strait Islander communities.

The intensive efforts toward therapeutic practices found in the legislation and practice of Children's Courts throughout Australia is broadly consistent with the generalist approach toward therapeutic jurisprudence espoused in this paper.

However, the therapeutic approach of Children's Courts is generally directed to the use of psychologists, psychiatrists and social workers in an unspoken, but assumed, normative context of child development and social integration[32], necessarily within a non Aboriginal/Torres Strait Islander context. Behind these disciplines is a set of tacit assumptions of what constitutes "good childhood", to which therapeutic efforts can be directed. There is a further tacit assumption that these disciplines can be transplanted and readily appropriated to Aboriginal and Torres Strait Islander life. These assumptions are not necessarily correct in this particular context[33]. Our view is therefore that Aboriginal and Torres Strait Islander communities, Elders/Respected Persons, and participants who might be involved in an Aboriginal or Torres Strait Islander Children's Court need to be able to pick and choose what kinds of therapeutic interventions are appropriate, or not, to

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[31] See for example Professor Chris Cunneen, Ms Neva Collings, Ms Nina Ralph *Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement,* Institute of Criminology, University of Sydney Law School, 21 November 2005 at page 148; see also Law Reform Commission of Western Australia, *Aboriginal Customary Laws Final Report* (September 2006) http://www.lrc.justice.wa.gov.au/094-fr.html Recommendation 24.1 at page 136

[32] Dr Suzi Hutchings, *Social contexts, personal shame: an analysis of Aboriginal engagement with juvenile justice in Port Augusta, South Australia* PhD thesis, Adelaide University Anthropology Department (1995). This paper does not necessarily accept these assumptions and recommends critical reappraisal of psychological, psychiatric and welfare practices to Aboriginal children

[33] See above

Aboriginal and Torres Strait Islander children and to have resources available to them to develop suitable models and practices.

This is consistent with Standard 8, Rule 14 (Recommendations 53a and 53b) of the *Bringing Them Home* report[34] that a sentencer must take into account:

1. The best interests of the child or young person
2. The wishes of the child or young person's family and community
3. The advice of the appropriate accredited Aboriginal or Torres Strait Islander organisation
4. The principle that Aboriginal and Torres Strait Islander children are not to be removed from their families and communities except in extraordinary circumstances, and
5. Standard 3 [which is that Aboriginal and Torres Strait Islander children must only be removed from their families and communities by the juvenile justice system as a last resort, and not unless the danger to the community as a whole outweighs the desirability of the child remaining with his/her family and community].

In this way an Aboriginal or Torres Strait Islander Children's Court would put general Children's Courts' therapeutic endeavours very firmly back into the cultural and social context of Aboriginal and Torres Strait Islander societies.

Minimum Standard 9: Whether the Court should operate as an adult Court or a Children's Court or both in a given geographical area must be based on need, ascertained by research including research into cross cultural understandings of appropriate child development and normative structures for Aboriginal and Torres Strait Islander children. It must also be based upon consultation with local Aboriginal and Torres Strait Islander communities.

Some existing Aboriginal Courts exclude from their jurisdiction matters that are divisive in their local Aboriginal and Torres Strait Islander community eg family violence and feuding. Conversely, a community experiencing many matters where both the victim and perpetrator are Aboriginal or Torres Strait Islander may find it useful for an Aboriginal or Torres Strait Islander Court to be involved in these cases.

Another possible category of matters to exclude, at least for Aboriginal or Torres Strait Islander Courts with an interventionist focus, is offences of a technical or trumped up nature[35]. In relation to these, there is less need of reforming clientele than there is need

[34] Human Rights and Equal Opportunity Commission, *Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (April 1997) at page 520 (electronic version) http://www.humanrights.gov.au/pdf/social_justice/bringing_them_home_report.pdf

[35] Consistent with Minimum Standard 7 such charges could be dealt with by the Court, and the process of negotiation prior to plea may remove some such charges; however little therapeutic jurisprudence or intervention may be appropriate in relation to charges that are minor, technical or relate to offences which frankly ought to be repealed

for reforming the way police exercise their prosecutorial discretion. In such cases the nature of the Court's jurisdiction may warrant comment upon the desirability of law reform to change inappropriate laws which single out Aboriginal or Torres Strait Islander people or which are enforced in a way which gives rise to unfairness or oppression.

Some people consulted suggested other categories of matters to exclude, for example homicide cases or other cases where the Court is likely to jail the offender. In contrast, in South Australia section 9C of the Criminal Law Sentencing Act 1988 applies to all Courts exercising criminal jurisdiction – including potentially those that deal with homicides.

Excluded matters may be specified in legislation or, since what is divisive in a community is subjective and may change over time, another option is that each case be screened by the Elders/Respected Persons and excluded if they consider it to be divisive in their community. It should be for the local community to decide whether and how the jurisdiction of an Aboriginal or Torres Strait Islander Court should exclude certain cases.

Minimum Standard 10: The jurisdiction of an Aboriginal or Torres Strait Islander Court may exclude certain cases.

Victims (where applicable)

Many victims are Aboriginal or Torres Strait Islander. Research suggests that our women and children are 45 times more likely to be victims of domestic violence than other Australians[36] and figures from the Australian Institute of Criminology show a high rate of victimisation generally[37].

It would be inconsistent with the purpose of Aboriginal and Torres Strait Islander Courts as a special measure to address disadvantage to dilute the rights that Aboriginal and Torres Strait Islander victims have in non-Aboriginal/Torres Strait Islander Courts.[38]

Further (subject to what is said below) the facts and circumstances of an Aboriginal or Torres Strait Islander domestic violence case could properly be put before an Aboriginal or Torres Strait Islander Court as a matter of social and cultural context. That includes statements as to personal, social and cultural impact upon victims. Such statements may in turn give rise to submissions on behalf of victims (whether made by the victim himself or herself, or their legal representative, or by a police prosecutor), of the need for exemplary punishment and principles of personal and general deterrence being made paramount. The procedural aims of Aboriginal and Torres Strait Islander Courts discussed above should apply even handedly to victims and defendants.

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[36] Human Rights and Equal Opportunity Commission, *Face the Facts*, 2005 at http://www.hreoc.gov.au/racial_discrimination/face_facts/atsi.html#q4

[37] See for example http://www.aic.gov.au/stats/victims/indigenous.html

[38] Such rights include participation as provided in non-Aboriginal/Torres Strait Islander law, safety on Court premises, and having their situation taken into account as provided in non-Aboriginal/Torres Strait Islander law when the Court makes orders or passes sentence

This is consistent with the then Justice Brennan's statement in Neal v R (1982) 149 CLR 305 at page 326 that cultural factors may be matters of aggravation or mitigation:

> "*The same sentencing principles are to be applied of course in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential for the even handed administration of criminal justice. That done, however, the weight to be attributed to the factors material to a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal*."

With respect to victim impact statements, Aboriginal and Torres Strait Islander victims may find it easier to provide a victim impact statement orally than in writing, and so should be permitted to provide an oral victim impact statement in an Aboriginal or Torres Strait Islander Court.

Victims with a potential criminal injuries compensation claim should be referred by the Court's Aboriginal or Torres Strait Islander Justice Officer/Court resource unit for independent legal advice.

Beyond those rights is the question of whether in Aboriginal or Torres Strait Islander Courts victims should be able to participate more than they can in non-Aboriginal/Torres Strait Islander Courts.

Greater participation of victims may promote accountability of the offender for his or her actions and may assist in healing the hurt to the victim, particularly if the victim is related to the offender. This thinking is central to New South Wales' Circle Courts[39] and evaluation of the Murri Court has recommended greater victim participation[40].

On the other hand, if the victim seeks revenge on the offender this could detract from the Court's purpose[41]. We understand that research by Heather Strang[42] suggests that

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[39] Ivan Potas, Jane Smart and Georgia Brignell (Judicial Commission of New South Wales) and Brendan Thomas and Rowena Lawrie (NSW Aboriginal Justice Advisory Council) with survey conducted by Rhonda Clarke *Circle Sentencing in New South Wales: A Review and Evaluation,* October 2003 http://www.austlii.edu.au/au/journals/AILR/2004/16.html

[40] Professor Chris Cunneen, Ms Neva Collings, Ms Nina Ralph *Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement,* Institute of Criminology, University of Sydney Law School, 21 November 2005 at page 151

[41] See for example discussion in Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006 at page 56

conferencing with a restorative justice focus may in general be a more appropriate vehicle than Court for victim participation. Some non-Aboriginal/Torres Strait Islander Courts and tribunals offer or have links with additional services such as counselling, conferencing, mediation and/or conciliation eg Family Court, National Native Title Tribunal. It would be appropriate if in the future the services of Aboriginal and Torres Strait Islander Courts expand in the same way to provide, or provide referrals to, culturally appropriate community conferencing in appropriate cases subject to the consent of both the offender and the victim.

We submit in light of the existing differences of opinion that the question of any greater than usual participation by the victim should be determined after taking into account all relevant research and stakeholder views at the time a new Court is being developed; we do not suggest it become a Minimum Standard for all Aboriginal and Torres Strait Islander Courts in our regions.

Minimum Standard 11: Victims must not have fewer rights in an Aboriginal or Torres Strait Islander Court than in a non-Aboriginal/Torres Strait Islander Court. Those rights must include: the right to attend Court if they wish with or without a support person and in person or by a representative, the right to provide the Court with a victim impact statement orally or in writing directly or via a representative, and the right to access independent legal advice about criminal injuries compensation. An Aboriginal or Torres Strait Islander Court may provide, or provide referrals to, a community conferencing service in appropriate cases subject to the consent of both the offender and the victim.

Prosecutors (where applicable)

Many existing Aboriginal Courts use self-selected personnel in this category, from a pool of prosecutors already working in the criminal justice system. We agree that providing motivated people with a system that supports them to do their job well is likely to be more effective than leaving them in the usual system or providing a supportive system to people who are not motivated to use it[43].

Where multiple people apply for the job, the most appropriate person should be selected and in this regard Aboriginal or Torres Strait Islander status and previous experience with the local community should be treated as a desirable selection criterion, in recognition of job-relevant skills such as ability to communicate in a culturally appropriate way.

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http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf

[42] Strang, Heather *Repair or revenge: victims and restorative justice*, New York, Oxford University Press, 2002

[43] See for example discussion in Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006 at page 51 http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf

The role of the prosecution in an Aboriginal or Torres Strait Islander Court must not be less than in a non-Aboriginal/Torres Strait Islander Court. The responsibilities of the prosecution must include usual disclosure of relevant information to the defence (eg statement of material facts, criminal record), addressing the Court on relevant sentencing principles when called upon[44] and at the invitation of the Court, addressing the offender directly about the actual or potential effect of the offence on the victim, the actual or potential effect of the offence on others in the community (eg people present at the scene) and about the environment at relevant custodial or detention facilities. It is also desirable that the responsibilities of the prosecution include victim liaison and getting victims to court where appropriate.

Minimum Standard 12: In Aboriginal or Torres Strait Islander Courts that deal in criminal law matters, the prosecutor must if possible be self-selected; in the event of multiple applications, Aboriginal or Torres Strait Islander status and previous experience with the local community must be treated as a desirable selection criterion. The duties and obligations of the prosecution in an Aboriginal or Torres Strait Islander Court must not be less than in a non-Aboriginal/Torres Strait Islander Court. The responsibilities of the prosecution must include usual obligations of disclosure of relevant information to the defence (eg statement of material facts, criminal record) and at the invitation of the Court, addressing the offender directly about the actual or potential effect of the offence on the victim, the actual or potential effect of the offence on others in the community (eg people present at the scene) and about the environment at relevant custodial or detention facilities. The prosecution role is also to highlight factors of aggravation in an offence and to address the court on sentencing principles including general and personal deterrence when called upon.

Lawyers/Court Officers

Existing Aboriginal Courts have maintained the right of the offender to be legally represented by a person/agency of his or her choice. The legal representative's role is to assist with legal matters such as applications and the plea in mitigation. He or she is not required to act as a conduit for general communication between the Court or other participants and the offender. Nor does the legal representative have sole responsibility for ensuring the offender and his or her family understand orders/sentence and consequences for breach. The Court takes responsibility for both of these.

We support this.

[44] See for example section 7 Criminal Law Sentencing Act 1988 (SA) which specifies the duties of a prosecutor in sentencing submissions

Minimum Standard 13: The right of an offender, or a party to proceedings, to be represented by a lawyer or Court Officer[45] of the person's choice in Court must not be less in an Aboriginal or Torres Strait Islander Court than in a non-Aboriginal/Torres Strait Islander Court. The legal representative must carry out the role of defence counsel (eg applications, plea in mitigation and submissions on sentencing principles and penalty) but would generally not act as a conduit for general communication between the Court or other participants and the person or the person's support people. Instead, the Court is also responsible for ensuring the person and the person's support people and any Aboriginal or Torres Strait Islander people present in Court understand everything that happens in Court including any orders/sentence and the consequences of breach.

Judges/magistrates

As with prosecutors, many existing Aboriginal Courts use self-selected personnel in this category, from a pool of judges/magistrates already working in the legal system. We agree that providing motivated people with a system that supports them to do their job well is likely to be more effective than leaving them in the usual system or providing a supportive system to people who are not motivated to use it.

Where multiple people apply for the job, the most appropriate person should be selected and in this regard Aboriginal or Torres Strait Islander status should be treated as a desirable selection criterion, in recognition of job-relevant skills such as ability to communicate in a culturally appropriate way.

In Western Australia, people consulted strongly supported Aboriginal or Torres Strait Islander Courts of appropriate jurisdiction being presided over by paid Aboriginal or Torres Strait Islander Justices of the Peace[46].

In addition to responsibility for ensuring an Aboriginal or Torres Strait Islander Court applies relevant law, the judge/magistrate is responsible for ensuring the Court also applies relevant cultural aspects determined by the local Aboriginal and Torres Strait Islander community such as welcome and introduction. S/he is also responsible for facilitating participation by the various participants and ensuring the proceedings are fully comprehensible to all Aboriginal or Torres Strait Islander people present in Court (see Minimum Standard 13 above).

If legislation provides for Elders/Respected Persons to participate in decision-making, the judge/magistrate must facilitate this. If not, the judge/magistrate must determine the Court's orders. Either way, the judge/magistrate must make it clear to all participants and other people present in Court who the decision-maker is (this is discussed further under "Elders/Respected Persons", below).

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[45] A Court Officer is an Aboriginal person certificated under section 48 Aboriginal Affairs Planning Authority Act 1972 (WA) to represent Aboriginal people in Western Australia

[46] See above, at "Purpose"

The High Court decision in Neal v R (1982) 149 CLR 305 at page 326, quoted below, provides the policy basis for Aboriginal and Torres Strait Islander Courts' detailed consideration of cultural and social factors in sentencing, and for the proposition that those cultural and social factors may be matters of aggravation or of mitigation. It should not be assumed that Aboriginal or Torres Strait Islander Courts impose more lenient sentences than other courts[47].

> "*The same sentencing principles are to be applied of course in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential for the even handed administration of criminal justice. That done, however, the weight to be attributed to the factors material to a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal.*"

Given the nature of Aboriginal and Torres Strait Islander Courts as special measures designed to help overcome disadvantage to our peoples in the legal system it is appropriate that in all cases the relevant views or information provided to the Court be taken into account, unless specifically excluded by relevant law or natural justice. As shown, this is consistent with High Court authority.

Minimum Standard 14: The judges/magistrates of an Aboriginal or Torres Strait Islander Court must if possible be self-selected; in the event of multiple applications, Aboriginal or Torres Strait Islander status must be treated as a desirable selection criterion. The judge/magistrate must preside over, participate in and facilitate proceedings in accordance with relevant law and cultural considerations in the operation of the Court. Orders must be determined by the judge/magistrate unless legislation provides for Elders/Respected Persons to participate. Subject to relevant legislation and practice, including principles of procedural fairness, decisions must take into consideration any relevant views or information provided to the Court.

Court staff

As for prosecutors and judges/magistrates, existing Aboriginal Courts use staff already employed in the legal system. For the reasons already given, we consider it appropriate that where possible they be self-selected to the Court and that if there are multiple applications, Aboriginal or Torres Strait Islander status should be treated as a desirable criterion, in recognition of job-relevant skills such as ability to communicate in a culturally appropriate way.

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[47] See Police v Carter No. SCCIV-01-1630 [2002] SASC 48 (20 February 2002)

Minimum Standard 15: Court staff must be self-selected to the Court if possible. In the event of multiple applications, Aboriginal or Torres Strait Islander status must be treated as a desirable selection criterion.

Elders/Respected Persons

Existing Aboriginal Courts involve Elders/Respected Persons sitting on the matter next to the judge/magistrate, opposite the offender. Their roles vary between different States and Territories and may include any of: participating in deciding orders/sentence or advising the judge/magistrate on the appropriateness of proposed court orders/conditions, assessing whether an offender is showing contempt for the Court and if so standing the matter down, reintegrative shaming or advising the offender on how their behaviour has affected their community, providing advice about any cultural, historical or social matters relevant to any Aboriginal or Torres Strait Islander participant, providing advice about any matters relevant to the person, ensuring (without acting as an interpreter) that all Aboriginal or Torres Strait Islander people in Court understand the proceedings including orders/sentence and consequences of breach, ensuring (without acting as an interpreter) that the magistrate/judge understands information provided to the Court by Aboriginal or Torres Strait Islander people, liaising between the Court and local Aboriginal and Torres Strait Islander communities, supporting participants after Court to make changes to their lives, and being consulted by the Corrective Services Officer in relation to an offender's case management plan.

The role of Elders/Respected Persons in relation to deciding orders/sentence is controversial amongst our peoples. Some people support it as consistent with self-determination. Others oppose Elders/Respected Persons having any role in sending people to prison. A Court must make it clear to participants in each case whether or not Elders/Respected Persons will be deciding orders/sentence.

In order to fulfil their role effectively, it is important that the Elders/Respected Persons selected to any particular case have a connection with and a genuine concern for the participants. As discussed at "Participants - Clientele" above, our peoples come from many cultures, and a particular location (for example a city) may be home to people of various cultural backgrounds.

The number[48], gender balance[49], selection[50] and appropriate role of Elders/Respected Persons is best determined by the local Aboriginal and Torres Strait Islander community, subject to relevant law and the purpose and jurisdiction of the Court.

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[48] Existing Aboriginal Courts generally have a pool of Elders/Respected Persons, enabling "matching" of clients to the most appropriate Elders/Respected Persons in each case

[49] Most people consulted indicated that there should be an equal number of male and female Elders/Respected Persons sitting on each case, unless the Aboriginal traditional law relevant to a particular case indicates only males or only females should sit

[50] See Law Reform Commission of Western Australia, *Aboriginal Customary Laws Final Report* (September 2006) http://www.lrc.justice.wa.gov.au/094-FR.html Recommendation 24.5 at page 136

Minimum Standard 16: An Aboriginal or Torres Strait Islander Court must have Elders/Respected Persons sitting on every case. Elders/Respected Persons sitting on a particular case must be: regarded by the client, and accepted within the client's community, as Aboriginal or Torres Strait Islander people who have authority over the client; and people who are respected by the client and by the client's community; and people accepted by the client's community as people qualified to provide cultural advice relevant to the proceedings involving the client; and include a person who is, if appropriate, of the same gender as the client; and be people who are not disqualified from sitting on the case by reason of (or perception of) bias or conflict of interests or any other relevant reason.

The role of Elders/Respected Persons must be as is determined by the local Aboriginal and Torres Strait Islander community, subject to relevant law and the purposes and jurisdiction of the Court.

In each case it must be made clear to participants who will decide the Court's orders/sentence.

Aboriginal or Torres Strait Islander Justice Officer

Existing Aboriginal Courts employ Aboriginal Justice Officers (depending on the particular Court, this participant may instead be called an Aboriginal Liaison Officer, Aboriginal Project Officer or Aboriginal Court Officer[51]) to assist them[52]. This person is the link between the Court and the local community, and is the conduit for communication between them[53].

An Aboriginal or Torres Strait Islander Justice Officer's functions will depend on the purposes and jurisdiction of the Court and may include:

1. Arranging venue
2. Arranging any ceremonies or rituals eg smoking of the Courtroom
3. Recruiting Elders/Respected Persons
4. Making travel arrangements for Elders/Respected Persons to attend Court
5. Matching clients to appropriate Elders/Respected Persons
6. Contacting all participants before Court appearance
7. Arranging for all participants' support people to attend Court
8. Briefing Elders/Respected Persons before Court and identifying any issues of concern

[51] Not to be confused with a Court Officer of the Aboriginal Legal Service of Western Australia, who is an Aboriginal person certificated under section 48 Aboriginal Affairs Planning Authority Act 1972 (WA) to represent Aboriginal people in Western Australia's courts

[52] This has also been recommended by the Law Reform Commission of Western Australia, *Aboriginal Customary Laws Final Report* (September 2006) http://www.lrc.justice.wa.gov.au/094-FR.html Recommendation 24.3 at page 136

[53] For example, the Aboriginal Justice Officer is crucial to the operation of Nunga Courts in South Australia, see sections 9C(1)(a) and section 9C(5) Criminal Law Sentencing Act 1988 (SA)

9. Educating local Aboriginal and Torres Strait Islander community and others about the Court, including the role of Elders/Respected Persons in the Court context and who decides the Court's orders/sentences[54]
10. Establishing Aboriginal and Torres Strait Islander community justice group, reference group or stakeholder group
11. Educating Court about relevant cultural issues
12. Assisting Aboriginal and Torres Strait Islander people in Court with bail obligations
13. Developing links with Aboriginal, Torres Strait Islander and non-Aboriginal/Torres Strait Islander services/programmes for referral purposes eg cultural mentoring, alcohol, drugs, gambling, anger. The availability of appropriate services is key to the success of the Court, and people consulted repeatedly stressed this. Some people consulted strongly suggested Aboriginal or Torres Strait Islander Courts should each include a resource unit with at least 2 staff to provide clientele with assisted referrals to appropriate agencies and practical support such as driving clientele to appointments
14. Liaising with Corrective Services Officer about development of case management plans
15. Ensuring relevant cultural issues are raised in Court
16. Sitting in Court and addressing the Court if he or she wishes
17. After Court assisting client and his/her support people to understand Court outcomes and comply with orders/sentence eg how to part pay fines, ramifications of non-compliance
18. After Court assisting clients to access and meet conditions of non-custodial options.

Minimum Standard 17: An Aboriginal or Torres Strait Islander Court must employ an Aboriginal or Torres Strait Islander Justice Officer to assist it to function effectively according to its purposes and jurisdiction.

Corrective Services Officer (where applicable)

Like judges/magistrates and prosecutors, corrective services officers in Aboriginal Courts come from a pre-existing pool, and the person selected is usually motivated and self-selected to the Court. In some Courts the corrective services officer is Aboriginal[55] and some people consulted said that the role of corrective services officer working at an Aboriginal or Torres Strait Islander Court should be an identified position.

In contrast to certain non-Aboriginal/Torres Strait Islander Courts, the corrective services officer is fully prepared with appropriate recommendations and will make assisted referrals for the offender to access relevant programmes and services. The corrective

[54] People consulted stressed the importance of community education about the role of Elders/Respected Persons in the Court context and about who decides the Court's orders/sentences

[55] See for example Recommendation 6 in Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006 http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf

services officer's case plan for example may include alcohol/substance, mental health, gambling or domestic violence agencies.

We support this.

Minimum Standard 18: In Aboriginal or Torres Strait Islander Courts that deal in criminal law matters, the corrective services officer must carry out all duties for community corrections officers, laid out in relevant legislation, or by order of the Court. After Court, the corrective services officer must support the offender by making assisted referrals for the offender to access relevant programmes and services. The corrective services officer must be self-selected to the Court if possible and must have cross cultural communicative competence. In the event of multiple applications, Aboriginal or Torres Strait Islander status must be treated as a desirable selection criterion.

Support people

People consulted said that where intervention is to occur, it is important to work with the family as a whole if possible.

In existing Aboriginal Courts offenders are encouraged to bring support people to Court, particularly family. Apart from family, an offender might bring other people, such as a person who has provided support or counselling to the offender. These people participate at the judge/magistrate's invitation, speaking about the offender and the offender's behaviour.

We support this.

Minimum Standard 19: An offender or party to the proceedings including an (Aboriginal or Torres Strait Islander) victim should be encouraged to bring a person or people to an Aboriginal or Torres Strait Islander Court to support him or her. Where the offender or party is a child, it is generally preferable that the support person be an adult. Support people may participate in discussions at the judge/magistrate's invitation.

LOCATION

Relevant considerations about where to put an Aboriginal or Torres Strait Islander Court include:

1. Where likely clientele live. This place will be co-located with the relevant culture applicable to the Court. In addition, Aboriginal and Torres Strait Islander people are generally poorer than other Australians and as a result they are more likely to have difficulty affording travel to Court. Failure to attend Court when required can lead to charges and imprisonment. Arrangements that cause this would be inconsistent with any social purpose of the Court aimed at increasing compliance with Court orders or reducing imprisonment

2. Where there is a suitable pool of Elders/Respected Persons. Elders/Respected Persons are also key Court participants who may have difficulty getting to Court

3. Where relevant services are available[56]. In a narrow context, this assists the Court to make appropriate orders, for example to order a person to attend counselling. Such services include Aboriginal and Torres Strait Islander legal services, alcohol and drug/substance abuse services, and family violence services for perpetrators as well as community initiatives such as men's/women's/youth groups, healing circles etc[57]. In a broader context, inclusion of other services such as health, education, housing, Centrelink, police, community development and local government assists the Court to promote a "whole of court" process by opening dialogue, co-ordinating and improving service delivery to clientele and to the Aboriginal and Torres Strait Islander community generally, and by informing people of their entitlements as a client of these agencies. We note that "available" means more than mere presence of the service in the locality. The service must also be available to the Court's likely clientele. This is not always the case. Non-Aboriginal/Torres Strait Islander services may be so culturally inappropriate as to be inaccessible by Court participants. Culturally appropriate services may lack resources to assist Court participants.

   Our legal services for example are funded according to 3 year contracts based on services we provided at the time the contract was entered. For us to service clients of a new Aboriginal or Torres Strait Islander Court from our existing funds, particularly if travel is involved, would require us to redirect a lot of resources to a few people. Our funds and contract terms (which include a requirement that we service a particular number of clients) may therefore preclude us from doing it. Since Aboriginal or Torres Strait Islander Courts are a special measure aimed at equality before the law of Aboriginal and Torres Strait Islander peoples, they must be placed where people appearing before them can have culturally appropriate legal representation.

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[56] This is emphasised in Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006 at pages 63-69 http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf and in Law Reform Commission of Western Australia, *Aboriginal Customary Laws Final Report* (September 2006) http://www.lrc.justice.wa.gov.au/094-FR.html Recommendation 24.4 at page 136 and was also stressed by people consulted for this project

[57] See for example Professor Chris Cunneen, Ms Neva Collings, Ms Nina Ralph *Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement,* Institute of Criminology, University of Sydney Law School, 21 November 2005 at page 150 and Ivan Potas, Jane Smart and Georgia Brignell (Judicial Commission of New South Wales) and Brendan Thomas and Rowena Lawrie (NSW Aboriginal Justice Advisory Council) with survey conducted by Rhonda Clarke *Circle Sentencing in New South Wales: A Review and Evaluation,* October 2003 http://www.austlii.edu.au/au/journals/AILR/2004/16.html

Minimum Standard 20: An Aboriginal or Torres Strait Islander Court must be placed where access is easy for Elders/Respected Persons and likely clientele and where relevant services including legal services are available for likely clientele.

FUNDING

Flowing from the above comments about the need for Aboriginal and Torres Strait Islander Courts to be serviced by Aboriginal and Torres Strait Islander legal services is the need for consideration of increased funding to us specifically for us to service the Court's clientele[58].

In relation to the cost of providing staff to go to court to represent clients, it is noted that section 48 Aboriginal Affairs Planning Authority Act 1972 (WA) enables the Aboriginal Legal Service of Western Australia (Inc) to employ Aboriginal Court Officers to, amongst other tasks, represent clients in criminal law Courts of summary jurisdiction to do remands and pleas in mitigation. Current Court Officer pay rates range from $38,376 to $61,204.

Minimum Standard 21: When planning a new Aboriginal or Torres Strait Islander Court, consideration must be given to funding the local Aboriginal and Torres Strait Islander legal service to provide services to clientele of the Court.

CULTURAL ASPECTS

There are various possible cultural aspects to include in an Aboriginal or Torres Strait Islander Court in order to make it culturally relevant so that participants can engage meaningfully with the process. Selection should depend on what is appropriate to the local culture of the target clientele. This should be established by consultation with the relevant Aboriginal or Torres Strait Islander community, not by imposing a pre-determined model on people. Cultural aspects of the Court should be tailor-made to the relevant community[59]; they need not be consistent across all Courts in the jurisdiction and could be counterproductive if they were.

There are probably only two rules, first to screen out any cultural aspects that are inconsistent with the function or authority of the Court and secondly to stay within the allocated budget.

A non-exhaustive list of possibilities includes:

1. Name of the Court

[58] See for example Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006 at pages 48-49 http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf and also see Recommendation 13, Parker, N and Pathe, M (Department of Justice and Attorney General, Queensland) *Report on the Review of the Murri Court* December 2006 http://www.justice.qld.gov.au/courts/pdfs/MurriCourtReport.pdf

[59] See for example Law Reform Commission of Western Australia, *Aboriginal Customary Laws Final Report* (September 2006) http://www.lrc.justice.wa.gov.au/094-FR.html Recommendation 24.2 at page 136

2. Setting. An Aboriginal or Torres Strait Islander Court can operate out of a suitable place such as a cultural centre or in a bush setting. Alternatively a Courtroom can be purpose-built or remodelled

3. Participants may sit at the same level around a large oval table and there may be particular positions for each participant. There may be no bench, as such

4. There may be art by locals or clientele; this can be selected by a competition (with prizes) or be purchased or borrowed from the artist. There may be Aboriginal and Torres Strait Islander flags in the room. There may be no coat of arms, or if there is it may be placed side by side at the same height with a painting or cultural symbol. If the room has been cleansed by a smoking ceremony or other ritual, relevant items may be placed in the room eg cauldron and fresh gum leaves daily

5. Cleansing ritual before Court opens eg smoking ceremony

6. Elders/Respected Persons enter and leave with the judge/magistrate

7. At the start of each case the judge/magistrate may formally welcome the person to the Court, advise if there have been any cleansing rituals conducted in the Court, acknowledge past and present traditional owners of the country on which the Court is sited, acknowledge the Elders/Respected Persons sitting on the case and introduce all participants

8. Introductions for Aboriginal and Torres Strait Islander participants may include their cultural group eg I am Joe Smith, I'm a Yorta Yorta man

9. Lack of formality to the maximum extent consistent with natural justice and maintaining authority of the Court

10. No lawyer robes or police uniforms in Court

11. No bowing or standing

12. Everyone is invited by the judge/magistrate to have a turn to speak

13. Plain language (this should not be regarded as a substitute for a competent interpreter, if one is needed)[60]

14. Support people for the parties sit at the table and/or sit in the Courtroom

15. Role of Elders/Respected Persons (see discussion at Minimum Standard 16).

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[60] See for example Frank v Police [2007] SASC 288 (2 August 2007), though note that at the time of writing the Crown was expected to appeal to the Full Court of the Supreme Court of South Australia

Minimum Standard 22: An Aboriginal or Torres Strait Islander Court should have cultural aspects appropriate to its clientele that are consistent with the Court's function and authority. These aspects should be chosen by the relevant Aboriginal or Torres Strait Islander community and should not be standardised across the jurisdiction save as specified elsewhere in these Minimum Standards.

ACCOUNTABILITY AND TRANSPARENCY

Aboriginal or Torres Strait Courts are a special measure intended to secure the advancement of Aboriginal and Torres Strait Islander peoples in experiencing their rights to justice and equality before non-Aboriginal/Torres Strait Islander law. Therefore an Aboriginal or Torres Strait Islander Court should be no less accountable or transparent than the local non-Aboriginal/Torres Strait Islander Court.

Another reason in support of a high level of accountability and transparency is that as a new measure and a publicly funded measure, Aboriginal and Torres Strait Islander Courts need to be able to be formally evaluated to assess their level of effectiveness and to identify any problems. They are in any event likely to be subject to much public scrutiny. Some sections of the non-Aboriginal/Torres Strait Islander public have concerns that the Courts may be too lenient, while some sections of the Aboriginal and Torres Strait Islander public have concerns that the Courts may be too harsh. Secrecy may tend to confirm the suspicions of either group[61].

In any event Aboriginal and Torres Strait Islander Courts are as subject to appeal as any other court of competent jurisdiction to hear matters. This is the primary focus of accountability and the fact that Aboriginal and Torres Strait Islander Courts are so subject reinforces the need for appropriate legislation[62].

One person consulted expressed a different view, suggesting the Courts should be somewhat private, and that there should be limits on the number of support people attending for victims and offenders, for security reasons. We consider that existing laws permitting judges/magistrates to close court or exclude certain people from court in appropriate circumstances are probably sufficient protection in practice, but suggest this is a matter that could usefully be considered during evaluation (see "Evaluation", below).

Like judges/magistrates, Elders/Respected Persons are only human and are members of their community. They may hold opinions or social or professional positions that in certain cases could be perceived as biasing their role or as a conflict of interests[63]. This

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[61] See for example discussion about communication between magistrate and Elders about sentence occurring in open court in Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006 at page 30 http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf

[62] See Police v Carter No. SCCIV-01-1630 [2002] SASC 48 (20 February 2002)

[63] See for example discussion in Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006 at page 45

should be remedied in the same way as for judges/magistrates, by enabling parties to apply for them to be disqualified from sitting on the matter. Also similarly to judges/magistrates, disqualification of an Elder/Respected Person should not be available on the ground that she or he is considered "too harsh" or "too lenient".

Minimum Standard 23: An Aboriginal or Torres Strait Islander Court must be open, transparent and accountable. This includes: applying relevant law; maintaining existing rights of prosecution, defence, offenders/parties and victims; the Court being open to the public where an equivalent non-Aboriginal/Torres Strait Islander Court would be open to the public; recording proceedings; and retaining materials for the same period as other Courts of equivalent jurisdiction. Parties' rights to apply for a particular person to be disqualified from the matter on the grounds of actual or perceived bias or conflict of interests must be extended to apply in respect of Elders/Respected Persons as well as in respect of judges/magistrates.

TRAINING

Aboriginal or Torres Strait Islander Courts are an interface between non-Aboriginal/Torres Strait Islander law and local Aboriginal or Torres Strait Islander culture.

In general, participants apart from the clientele, their support people and the Elders/Respected Persons will have limited (perhaps non-existent) knowledge of the local culture. This may include any Aboriginal or Torres Strait Islander participants who are not from that country. Some participants may also have limited experience in using plain English in a Court setting. Some participants may have limited understanding of the historical and social factors that affect the day to day lives of Aboriginal and Torres Strait Islander peoples, or hold opinions based on stereotypes. Elders/Respected Persons may not be versed in non-Aboriginal/Torres Strait Islander law or how that law identifies bias and conflicts of interest.

Training for all participants (including Court staff, the judiciary and the prosecutor) in the local culture is necessary to ensure the Court operates in a culturally appropriate way[64]. We consider that this training also needs to include education about historical and social factors applicable to the likely clientele of the court. This will help to highlight strategies Court staff can use to improve their client contact and service delivery. Training in non-Aboriginal/Torres Strait Islander law including bias and conflict of interests for

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http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf

[64] See for example Recommendations 4 and 6 and discussion at pages 36-37 in Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006
http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf

Elders/Respected Persons is necessary to ensure they carry out their role appropriately[65]. If that role includes decision-making it is particularly important to ensure that all Elders/Respected Persons are equipped to make consistent decisions that are not idiosyncratic or likely to lead to appeal.

Training should be repeated regularly, say every 2 years, to ensure continued competency[66].

In the day to day operation of the Court, situations are likely to arise where further guidance is needed. We consider it appropriate for the Aboriginal or Torres Strait Islander Justice Officer to attend on the judge/magistrate or an Elder/Respected Person as needed with "hypothetical" scenarios to assist with problem solving without affecting that person's impartiality.

We also consider it important that after court there be an opportunity for the judge/magistrate, Elders/Respected Persons and Aboriginal or Torres Strait Islander Justice Officer to debrief. This assists them each to continue to accumulate relevant knowledge and, importantly, strengthens and is seen to strengthen the partnership between the Court and the local Aboriginal and Torres Strait Islander community.

Minimum Standard 24: Before commencing work in an Aboriginal or Torres Strait Islander Court, participants must receive cultural training about the local culture including training in using plain English and education about historical and social factors likely to be relevant to the Court's clientele. Elders/Respected Persons must receive legal training and training in how to identify bias and conflicts of interest. Both kinds of training must be sufficient to enable all participants to carry out their roles effectively. The State or Territory Department responsible for the Court is a proper body to conduct the training for Elders/Respected Persons. The Elders/Respected Persons are the proper people to conduct or arrange the cultural training. Training should be repeated regularly to ensure continued competency.

Minimum Standard 25: After training is completed, the Aboriginal or Torres Strait Islander Justice Officer may attend the judge/magistrate or an Elder/Respected Person as needed with "hypothetical" scenarios to assist with problem solving without affecting that person's impartiality. In addition, after each court day there should also be opportunity for the judge/magistrate, Elders/Respected Persons and Aboriginal or Torres Strait Islander Justice Officer to debrief.

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[65] See for example discussion in Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006 at page 43 http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf ; also Law Reform Commission of Western Australia, *Aboriginal Customary Laws Final Report* (September 2006) http://www.lrc.justice.wa.gov.au/094-FR.html Recommendation 24.5 at page 136

[66] See for example Recommendations 10 and 11, Parker, N and Pathe, M (Department of Justice and Attorney General, Queensland) *Report on the Review of the Murri Court* December 2006 http://www.justice.qld.gov.au/courts/pdfs/MurriCourtReport.pdf

PAYING ELDERS/RESPECTED PERSONS
It is not appropriate that Elders/Respected Persons be unpaid for this kind of work. Their role is at least as substantial as that of the judge/magistrate, Court staff, Aboriginal or Torres Strait Islander Justice Officer, prosecution, defence and community corrections officer – all of whom are paid; so too should be Elders/Respected Persons[67].

The question is how.

For the above reasons, payment of an honorarium is not appropriate.

Payment of a salary is not currently a realistic option. Existing Aboriginal Courts do not sit full time (due to lack of resources and due to the draining nature of the work) and use a pool of Elders/Respected Persons. The work done by individual Elders/Respected Persons is therefore of a casual nature.

The best option therefore seems to be that Elders/Respected Persons be treated as casual employees paid not less than a set minimum rate applicable to all Aboriginal or Torres Strait Islander Courts in the jurisdiction.

In relation to Elders/Respected Persons who are public servants, we suggest all Australian governments consider making employment arrangements that permit Elders/Respected Persons who are public servants to take up to say 20 days per year paid cultural leave to work in an Aboriginal or Torres Strait Islander Court[68]. As public servants have different payrates, it might be appropriate that the Court top up public servants' pay where applicable to the level received by other Elders/Respected Persons working in that Court. NB: The nature of public servants' employment should be disclosed to parties in case a disqualification application is appropriate.

In relation to the many Elders/Respected Persons who are dependent on Centrelink for their income, things are more complicated. Centrelink recipients earning income above a set level must by law disclose it to Centrelink. This involves paperwork, which Elders/Respected Persons may find difficult to complete correctly. Failure to disclose other income to Centrelink can attract charges. Even if a Court provides, or provides referrals for, help with completing forms correctly, following disclosure Centrelink may reduce the amount of benefits paid. This may be a disincentive for Elders/Respected Persons to work in the Court.

To get around this problem, payment may be set at a low level that does not interfere with Centrelink payments. This however underpays Elders/Respected Persons for the service they provide. It would be preferable if the Commonwealth Government would legislate

[67] See for example Law Reform Commission of Western Australia, *Aboriginal Customary Laws Final Report* (September 2006) http://www.lrc.justice.wa.gov.au/094-FR.html Recommendation 24.6 at page 136

[68] See for example Recommendation 8, Parker, N and Pathe, M (Department of Justice and Attorney General, Queensland) *Report on the Review of the Murri Court* December 2006 http://www.justice.qld.gov.au/courts/pdfs/MurriCourtReport.pdf

to make casual payment to Elders/Respected Persons exempt income for Centrelink purposes[69]. We will advocate for this. If successful, it would then be appropriate that payment for Elders/Respected Persons be at rates set by properly negotiated agreements, or (equally as for judges/magistrates) determinations of judicial remuneration tribunals, which take into account the competence and skills brought to the Court by Elders/Respected Persons.

In the meantime, bearing in mind the possible impact on Elders/Respected Persons of social security laws, the minimum payment rate should be set in consultation with Elders/Respected Persons.

Some existing Aboriginal Courts pay a travel allowance, but Elders/Respected Persons do not always claim this. Elders/Respected Persons may not have access to efficient or reliable transport. A bus service provided by the Court to transport Elders/Respected Persons to and from Court would therefore be preferable[70].

Similarly, if overnight accommodation is required, it is preferable that this be arranged and paid for directly by the Court, rather than Elders/Respected Persons having to claim it.

Minimum Standard 26: Elders/Respected Persons working in Aboriginal or Torres Strait Islander Courts should be paid. The minimum rate of pay at a Court should be set in consultation with Elders/Respected Persons. Consideration should be given to enabling eligible public servants to take paid cultural leave to work in the Court as Elders/Respected Persons, on the basis that the person's employment is disclosed to the parties so that a disqualification application can be made if appropriate.

Minimum Standard 27: An Aboriginal or Torres Strait Islander Court should assist Elders/Respected Persons to travel to and from Court where appropriate, preferably by providing a bus service, and if necessary by also arranging and paying for overnight accommodation.

NUMBER OF CASES

An Aboriginal or Torres Strait Islander Court is at risk of backlog. Causes include popularity of the Court with clients, the length of time proceedings take and the fact that the emotionally draining nature of the work minimises the number of cases that can be handled in a day. A judge/magistrate with Elders/Respected Persons in an Aboriginal or

[69] This approach is being attempted in respect of Koori Courts, see Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006 at page 45 http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf

[70] Parker, N and Pathe, M (Department of Justice and Attorney General, Queensland) *Report on the Review of the Murri Court* December 2006 http://www.justice.qld.gov.au/courts/pdfs/MurriCourtReport.pdf at Recommendation 7 proposes that transport be arranged for Elders/Respected Persons

Torres Strait Islander Court may handle only up to 10 cases per day, a small fraction of the number of cases handled by a non-Aboriginal/Torres Strait Islander Court.

Backlog is likely to be counterproductive to the purposes of the Court. As the saying has it, justice delayed is justice denied.

Means of limiting case numbers include restricting jurisdiction to a limited type of matter, restricting jurisdiction to clients living within a small geographical area, withdrawing the Court's services from clients who fail to appear in Court more than once, and having an upper limit of cases that can be referred to the Court.

Minimum Standard 28: An Aboriginal or Torres Strait Islander Court must limit its cases to numbers it can realistically manage within its allocated resources.

We strongly emphasise here the desirability of State and Territory governments allocating an appropriate level of resources to Aboriginal and Torres Strait Islander Courts. While the number of cases these Courts can handle is far lower than that of a non-Aboriginal/Torres Strait Islander Court, their capacity to successfully divert members of the most substantial group using Courts is far greater. Hence putting resources into Aboriginal and Torres Strait Islander Courts and appropriate programmes supporting them leads to overall savings in resources allocated to policing, Court and corrections, not to mention improving quality of life for all participants, the people who support them, and their communities[71]. Putting resources into non-Aboriginal/Torres Strait Islander Courts and programmes that are ineffective for the main group using the Courts is wasteful.

EVALUATION

Some existing Aboriginal Courts keep data on offenders, orders made by the Court and whether the offender's rate of re-offending reduces. Some Courts undergo formal evaluation.

Evaluation enables the effectiveness of Aboriginal or Torres Strait Islander Courts against their purposes to be assessed[72] and any problems to be identified. It can assist

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[71] This point is raised in Ivan Potas, Jane Smart and Georgia Brignell (Judicial Commission of New South Wales) and Brendan Thomas and Rowena Lawrie (NSW Aboriginal Justice Advisory Council) with survey conducted by Rhonda Clarke *Circle Sentencing in New South Wales: A Review and Evaluation,* October 2003 http://www.austlii.edu.au/au/journals/AILR/2004/16.html and by Professor Chris Cunneen, Ms Neva Collings, Ms Nina Ralph *Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement,* Institute of Criminology, University of Sydney Law School, 21 November 2005 at page 150 and also by Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006 at pages 114-116 http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf Also see footnote 73 below

[72] Evaluation was a specific recommendation in respect of Murri Courts made by Professor Chris Cunneen, Ms Neva Collings, Ms Nina Ralph *Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement,* Institute of Criminology, University of Sydney Law School, 21 November 2005 at page 151 and was also recommended by the Law Reform Commission of Western Australia, *Aboriginal*

Courts to achieve maximum effectiveness and it can assist departments responsible for Courts to identify where funds and other support are most needed.

To ensure knowledge learned from evaluation is available to be used in respect of other Courts where appropriate, results should be published and in addition copies forwarded to all Australian departments responsible for Courts and to all Aboriginal and Torres Strait Islander legal services.

To assist with evaluation, all relevant records (eg criminal records) should specify whether an Aboriginal or Torres Strait Islander Court or other Court has been used, and at which location[73]. A specific information system/database may be required to assist with evaluation[74].

There also needs to be a consistent measure of recidivism across all Courts, not only Aboriginal and Torres Strait Islander Courts, so that data can be accurately compared. The impact of any Court on recidivism rates may be measured by any or all of: reduced frequency of offending/non-compliance with orders by an individual client, reduction in the seriousness of offences committed by him/her, or in stopping offending/non-compliance by him/her altogether. In evaluation it needs to be clear which of these is being measured.

Possible matters to include in evaluation are[75]:

1. Whether the client freely consented to the process (see Minimum Standards 7 and 8)
2. Suitability of the process to parties who are reluctant to speak for themselves
3. Whether rulings are appropriate or idiosyncratic
4. Impartiality of the Court

Customary Laws Final Report (September 2006) http://www.lrc.justice.wa.gov.au/094-FR.html Recommendation 24.8 at page 136

[73] See for example Recommendation 2 in Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006 http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf ; also see Recommendation 15, Parker, N and Pathe, M (Department of Justice and Attorney General, Queensland) *Report on the Review of the Murri Court* December 2006 http://www.justice.qld.gov.au/courts/pdfs/MurriCourtReport.pdf

[74] See for example Recommendation 2, Parker, N and Pathe, M (Department of Justice and Attorney General, Queensland) *Report on the Review of the Murri Court* December 2006 http://www.justice.qld.gov.au/courts/pdfs/MurriCourtReport.pdf

[75] Tomaino, John *Aboriginal (Nunga) Courts* Information Bulletin #39, Office of Crime Statistics and Research, Government of South Australia at pages 14 and 15 http://www.ocsar.sa.gov.au/docs/information_bulletins/IB39.pdf; see also Recommendation 2 in Harris, Mark *A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program October 2002 – October 2004,* Victorian Department of Justice, March 2006 at page 20 http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebdb170d0fcc95c/Evaluation_of_the_Koori_Courts_Pilot_Program.pdf

5. Whether all purposes of the Court are being effectively met and any recommended improvements
6. Whether the local community perceives the Court to have authority
7. Level of satisfaction of stakeholders with the Court
8. Whether the Court is assisting to build the capacity of the local community[76]
9. Whether the local community perceives any positive change to its social fabric and attitudes towards its members
10. Rates of recidivism
11. Rates of compliance with court orders
12. Cost benefit analysis[77]
13. Whether stakeholders consider the Court is appropriately exercising its powers to close court or exclude certain people from court[78]
14. Level of satisfaction of stakeholders with the process used to develop and implement the Court, for example whether stakeholders felt they had been appropriately consulted, informed, given opportunity to input into the model and otherwise treated as an equal partner
15. Any recommendations for change.

As stated earlier in this paper, the local Aboriginal and Torres Strait Islander community needs to be involved in developing ways to carry out evaluation. For example, local community advice about literacy levels in Standard Australian English may indicate that certain methods of evaluation are less suitable than others eg written surveys/questionnaires to be completed by stakeholders without assistance.

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[76] This factor is specifically mentioned by both Ivan Potas, Jane Smart and Georgia Brignell (Judicial Commission of New South Wales) and Brendan Thomas and Rowena Lawrie (NSW Aboriginal Justice Advisory Council) with survey conducted by Rhonda Clarke *Circle Sentencing in New South Wales: A Review and Evaluation,* October 2003 http://www.austlii.edu.au/au/journals/AILR/2004/16.html and by Professor Chris Cunneen, Ms Neva Collings, Ms Nina Ralph *Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement,* Institute of Criminology, University of Sydney Law School, 21 November 2005 at page 151

[77] See for example Recommendation 3, Parker, N and Pathe, M (Department of Justice and Attorney General, Queensland) *Report on the Review of the Murri Court* December 2006 http://www.justice.qld.gov.au/courts/pdfs/MurriCourtReport.pdf NB: The Law Reform Commission of Western Australia cites in its *Aboriginal Customary Laws Final Report* (September 2006) at page 132 http://www.lrc.justice.wa.gov.au/094-fr.html a cost benefit analysis indicating that for every dollar spent on an Aboriginal Court in Western Australia there would be a saving of at least $2.50, taking into account the reduced cost to the State of imprisonment and reduced costs associated with the criminal justice system

[78] See discussion about "Accountability and Transparency", above

Minimum Standard 29: Each Aboriginal or Torres Strait Islander Court should be evaluated according to the processes used to establish it, its effectiveness in meeting its purposes, and any recommendations for change. Copies of evaluations should be published and copies provided to all Australian departments responsible for Courts and to all Aboriginal and Torres Strait Islander legal services. Records of relevant Departments (eg criminal records) should specify whether an Aboriginal or Torres Strait Islander Court or other court has been used, and the location.

OTHER STRATEGIES

Aboriginal and Torres Strait Islander Courts are one strategy for addressing our peoples' disadvantage in relation to the non-Aboriginal/Torres Strait Islander legal system. It is important to remember that they are not the only strategy available, and they do not replace the need for other strategies[79], for example:

1. Interpreter services in Aboriginal and Torres Strait Islander languages nationally[80]
2. Community legal education delivered in a culturally appropriate manner
3. Law reform and advocacy where disadvantage or discrimination exist eg mandatory sentencing, inappropriate exercise of police discretion
4. Implementation of the recommendations of the Royal Commission Into Aboriginal Deaths in Custody nationally
5. Community conferencing
6. Community justice groups
7. Healing centres
8. Education for Australians about the historical and social factors relevant to Aboriginal and Torres Strait Islander peoples.

Minimum Standard 30: An Aboriginal or Torres Strait Islander Court does not replace the need for other strategies to address Aboriginal and Torres Strait Islander disadvantage in the non-Aboriginal/Torres Strait Islander legal system. Other appropriate strategies include: interpreter services in Aboriginal and Torres Strait Islander languages nationally; community legal education delivered in a culturally appropriate manner; law reform and advocacy where disadvantage or discrimination exist eg mandatory sentencing, inappropriate exercise of police discretion; implementation of the recommendations of the Royal Commission Into Aboriginal Deaths in Custody nationally; community conferencing; community justice groups; healing centres, and education for Australians about the historical and social factors relevant to Aboriginal and Torres Strait Islander peoples.

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[79] This is specifically discussed in respect of Aboriginal Courts in Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* 12 June 1986 at para 880 http://www.austlii.edu.au//cgi-bin/disp.pl/au/other/IndigLRes/1986/2/2.html?query="Aboriginal%20Courts

[80] This issue is specifically noted in Tomaino, John *Aboriginal (Nunga) Courts* Information Bulletin #39, Office of Crime Statistics and Research, Government of South Australia at page 14 http://www.ocsar.sa.gov.au/docs/information_bulletins/IB39.pdf

LIST OF MINIMUM STANDARDS FOR ABORIGINAL AND TORRES STRAIT ISLANDER COURTS IN WESTERN AUSTRALIA, SOUTH AUSTRALIA, VICTORIA, QUEENSLAND & NORTHERN TERRITORY (NORTH)

Overriding principles

Minimum Standard 1: The two overriding principles at all stages of development and implementation and evaluation of an Aboriginal or Torres Strait Islander Court must be: a. that the Court is a special measure enabling Aboriginal and Torres Strait Islander peoples to enjoy their rights to equality before the law and equal treatment before Court; and b. self determination of Aboriginal and Torres Strait Islander peoples in respect of Aboriginal and Torres Strait Islander Courts, particularly that "*The purpose of securing advantage for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted upon them*" Brennan J of the Australian High Court in Gerhardy v Brown (1985) 57 ALR 472, at 514, 516 and 522.

Any model that does not comply with both these principles is not an Aboriginal or Torres Strait Islander Court.

Permission and consultation

Minimum Standard 2: An Aboriginal or Torres Strait Islander Court must not be developed without first obtaining permission from local Aboriginal and Torres Strait Islander communities and community organisations and consultation with them must occur throughout the development, implementation and evaluation process.

Purpose

Minimum Standard 3: The purpose(s) of an Aboriginal or Torres Strait Islander Court must be specified and must at a minimum include purposes of increasing cross cultural communication and understanding through culturally appropriate procedures and physical setting of the Court. To the maximum extent practicable it should be directed to increasing comprehension of and openness/transparency of Court process to the community at large including Aboriginal and Torres Strait Islander peoples. To the maximum extent practicable it should be directed to increasing comprehension of Aboriginal and Torres Strait Islander society, culture and language as they are relevant to the Court's processes. The exercise of jurisdiction by an Aboriginal or Torres Strait Islander Court must reflect its purpose. The purpose(s) chosen must be based on research and proper public policy considerations in the implementation of justice in a cross cultural context including consultation with local Aboriginal and Torres Strait Islander communities.

Basis of power
Minimum Standard 4: An Aboriginal or Torres Strait Islander Court should have a legislative basis, developed by Parliament in consultation with affected communities.

Participants
Clientele (offenders if the Court deals in criminal law matters)
Minimum Standard 5: An Aboriginal or Torres Strait Islander Court should not normally be available to non-Aboriginal/Torres Strait Islander people. Status as an Aboriginal or Torres Strait Islander person of the relevant culture should be by self-identification and acceptance as an Aboriginal or Torres Strait Islander person by the community affected. This issue of jurisdiction over a person should be defined by the establishing legislation for the Aboriginal or Torres Strait Islander Court.

Minimum Standard 6: The jurisdiction of an Aboriginal or Torres Strait Islander Court that deals in matters involving the interests of victims must be attracted by the Aboriginal or Torres Strait Islander status of the offender only; however the Court should maintain a policy of actively encouraging the attendance and participation of victims in the context of the Court's aims.

Minimum Standard 7: Access to an Aboriginal or Torres Strait Islander Court that deals in criminal law matters should not be dependent on a guilty plea; rather jurisdiction should be grounded upon a finding of guilt or a plea of guilty where the factual basis of the finding or plea is not in dispute or has been resolved between defence and prosecution. However, if a Court has an interventionist focus, then screening of cases may occur to ensure resources are directed where they will be of most benefit. This may include screening out clientele who do not accept responsibility for their behaviour.

Minimum Standard 8: The jurisdiction of an Aboriginal or Torres Strait Islander Court over a particular person must be activated only upon the person consenting to the jurisdiction. Where consent is refused, the relevant non-Aboriginal/Torres Strait Islander court should be used instead.

Minimum Standard 9: Whether the Court should operate as an adult court or a Children's Court or both in a given geographical area must be based on need, ascertained by research including research into cross cultural understandings of appropriate child development and normative structures for Aboriginal and Torres Strait Islander children. It must also be based upon consultation with local Aboriginal and Torres Strait Islander communities.

Minimum Standard 10: The jurisdiction of an Aboriginal or Torres Strait Islander Court may exclude certain cases.

Victims (where applicable)
Minimum Standard 11: Victims must not have fewer rights in an Aboriginal or Torres Strait Islander Court than in a non-Aboriginal/Torres Strait Islander Court. Those rights

must include: the right to attend Court if they wish with or without a support person and in person or by a representative, the right to provide the Court with a victim impact statement orally or in writing directly or via a representative and the right to access independent legal advice about criminal injuries compensation. An Aboriginal or Torres Strait Islander Court may provide, or provide referrals to, a community conferencing service in appropriate cases subject to the consent of both the offender and the victim.

Prosecutors (where applicable)

Minimum Standard 12: In Aboriginal or Torres Strait Islander Courts that deal in criminal law matters, the prosecutor must if possible be self-selected; in the event of multiple applications, Aboriginal or Torres Strait Islander status must be treated as a desirable selection criterion. The duties and obligations of the prosecution in an Aboriginal or Torres Strait Islander Court must not be less than in a non-Aboriginal/Torres Strait Islander Court. The responsibilities of the prosecution must include usual obligations of disclosure of relevant information to the defence (eg statement of material facts, criminal record) and at the invitation of the Court, addressing the offender directly about the actual or potential effect of the offence on the victim, the actual or potential effect of the offence on others in the community (eg people present at the scene) and about the environment at relevant custodial or detention facilities. The prosecution role is also to highlight factors of aggravation in an offence and to address the court on sentencing principles including general and personal deterrence when called upon.

Lawyers/Court Officers

Minimum Standard 13: The right of an offender, or a party to proceedings, to be represented by a lawyer or Court Officer[81] of the person's choice in Court must not be less in an Aboriginal or Torres Strait Islander Court than in a non-Aboriginal/Torres Strait Islander Court. The legal representative must carry out the role of defence counsel (eg applications, plea in mitigation and submissions on sentencing principles and penalty) but would generally not act as a conduit for general communication between the Court or other participants and the person or the person's support people. Instead, the Court is also responsible for ensuring the person and the person's support people and any Aboriginal or Torres Strait Islander people present in Court understand everything that happens in Court including any orders/sentence and the consequences of breach.

Judge/Magistrate

Minimum Standard 14: The judges/magistrates of an Aboriginal or Torres Strait Islander Court must if possible be self-selected; in the event of multiple applications, Aboriginal or Torres Strait Islander status must be treated as a desirable selection criterion. The judge/magistrate must preside over, participate in and facilitate proceedings in accordance with relevant law and cultural considerations in the operation of the Court. Orders must be determined by the judge/magistrate unless legislation provides for Elders/Respected Persons to participate. Subject to relevant legislation and practice,

[81] A Court Officer is an Aboriginal person certificated under section 48 Aboriginal Affairs Planning Authority Act 1972 (WA) to represent Aboriginal people in Western Australia

including principles of procedural fairness, decisions must take into consideration any relevant views or information provided to the Court.

Court staff

Minimum Standard 15: Court staff must be self-selected to the Court if possible. In the event of multiple applications, Aboriginal or Torres Strait Islander status must be treated as a desirable selection criterion.

Elders/Respected Persons

Minimum Standard 16: An Aboriginal or Torres Strait Islander Court must have Elders/Respected Persons sitting on every case. Elders/Respected Persons sitting on a particular case must be: regarded by the client, and accepted within the client's community, as Aboriginal or Torres Strait Islander people who have authority over the client; and people who are respected by the client and by the client's community; and people accepted by the client's community as people qualified to provide cultural advice relevant to the proceedings involving the client; and include a person who is, if appropriate, of the same gender as the client; and be people who are not disqualified from sitting on the case by reason of (or perception of) bias or conflict of interests or any other relevant reason.

The role of Elders/Respected Persons must be as is determined by the local Aboriginal and Torres Strait Islander community, subject to relevant law and the purposes and jurisdiction of the Court.

In each case it must be made clear to participants who will decide the Court's orders/sentence.

Aboriginal or Torres Strait Islander Justice Officer

Minimum Standard 17: An Aboriginal or Torres Strait Islander Court must employ an Aboriginal or Torres Strait Islander Justice Officer to assist it to function effectively according to its purposes and jurisdiction.

Corrective Services Officer (where applicable)

Minimum Standard 18: In Aboriginal or Torres Strait Islander Courts that deal in criminal law matters, the corrective services officer must carry out all duties for community corrections officers, laid out in relevant legislation, or by order of the Court After Court, the corrective services officer must support the offender by making assisted referrals for the offender to access relevant programmes and services. The corrective services officer must be self-selected to the Court if possible and must have cross cultural communicative competence. In the event of multiple applications, Aboriginal or Torres Strait Islander status must be treated as a desirable selection criterion.

Support people

Minimum Standard 19: An offender or party to proceedings including an (Aboriginal or Torres Strait Islander) victim should be encouraged to bring a person or people to an Aboriginal or Torres Strait Islander Court to support him or her. Where the offender or

party is a child, it is generally preferable that the support person be an adult. Support people may participate in discussions at the judge/magistrate's invitation.

Location

Minimum Standard 20: An Aboriginal or Torres Strait Islander Court must be placed where access is easy for Elders/Respected Persons and likely clientele and where relevant services including legal services are available for likely clientele.

Funding of culturally appropriate legal services

Minimum Standard 21: When planning a new Aboriginal or Torres Strait Islander Court, consideration must be given to funding the local Aboriginal and Torres Strait Islander legal service to provide services to clientele of the Court.

Cultural aspects

Minimum Standard 22: An Aboriginal or Torres Strait Islander Court should have cultural aspects appropriate to its clientele that are consistent with the Court's function and authority. These aspects should be chosen by the relevant Aboriginal or Torres Strait Islander community and should not be standardised across the jurisdiction save as specified elsewhere in these Minimum Standards.

Accountability and transparency

Minimum Standard 23: An Aboriginal or Torres Strait Islander Court must be open, transparent and accountable. This includes: applying relevant law; maintaining existing rights of prosecution, defence, offenders/parties and victims; the Court being open to the public where an equivalent non-Aboriginal/Torres Strait Islander Court would be open to the public; recording proceedings; and retaining materials for the same period as other Courts of equivalent jurisdiction. Parties' rights to apply for a particular person to be disqualified from the matter on the grounds of actual or perceived bias or conflict of interests must be extended to apply in respect of Elders/Respected Persons as well as in respect of judges/magistrates.

Training

Minimum Standard 24: Before commencing work in an Aboriginal or Torres Strait Islander Court, participants must receive cultural training about the local culture including training in using plain English and education about historical and social factors likely to be relevant to the Court's clientele. Elders/Respected Persons must receive legal training and training in how to identify bias and conflicts of interest. Both kinds of training must be sufficient to enable all participants to carry out their roles effectively. The State or Territory Department responsible for the Court is a proper body to conduct the training for Elders/Respected Persons. The Elders/Respected Persons are the proper people to conduct or arrange the cultural training. Training should be repeated regularly to ensure continued competency.

Minimum Standard 25: After training is completed, the Aboriginal or Torres Strait Islander Justice Officer may attend the judge/magistrate or an Elder/Respected Person as needed with "hypothetical" scenarios to assist with problem solving without affecting

that person's impartiality. In addition, after each court day there should also be opportunity for the judge/magistrate, Elders/Respected Persons and Aboriginal or Torres Strait Islander Justice Officer to debrief.

Paying Elders/Respected Persons
Minimum Standard 26: Elders/Respected Persons working in Aboriginal or Torres Strait Islander Courts should be paid. The minimum rate of pay at a Court should be set in consultation with Elders/Respected Persons. Consideration should be given to enabling eligible public servants to take paid cultural leave to work in the Court as Elders/Respected Persons, on the basis that the person's employment is disclosed to the parties so that a disqualification application can be made if appropriate.

Minimum Standard 27: An Aboriginal or Torres Strait Islander Court should assist Elders/Respected Persons to travel to and from Court where appropriate, preferably by providing a bus service, and if necessary by also arranging and paying for overnight accommodation.

Number of cases
Minimum Standard 28: An Aboriginal or Torres Strait Islander Court must limit its cases to numbers it can realistically manage within its allocated resources.

Evaluation
Minimum Standard 29: Each Aboriginal or Torres Strait Islander Court should be evaluated according to the processes used to establish it, its effectiveness in meeting its purposes, and any recommendations for change. Copies of evaluations should be published and copies provided to all Australian departments responsible for Courts and to all Aboriginal and Torres Strait Islander legal services. Records of relevant Departments (eg criminal records) should specify whether an Aboriginal or Torres Strait Islander Court or other court has been used, and the location.

Other strategies
Minimum Standard 30: An Aboriginal or Torres Strait Islander Court does not replace the need for other strategies to address Aboriginal and Torres Strait Islander disadvantage in the non-Aboriginal/Torres Strait Islander legal system. Other appropriate strategies include: interpreter services in Aboriginal and Torres Strait Islander languages nationally; community legal education delivered in a culturally appropriate manner; law reform and advocacy where disadvantage or discrimination exist eg mandatory sentencing, inappropriate exercise of police discretion; implementation of the recommendations of the Royal Commission Into Aboriginal Deaths in Custody nationally; community conferencing; community justice groups; healing centres, and education for Australians about the historical and social factors relevant to Aboriginal and Torres Strait Islander peoples.

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