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CIRCLE SENTENCING OF ABORIGINAL OFFENDERS

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This paper expresses thoughts and procedures that have been adopted from extensive readings and lessons learnt in practice. Others have spoken or written on similar topics on previous occasions. This paper contains some original developments and, in some cases, I have borrowed shamelessly from my readings because those readings have shown means and processes that could be applied without re-invention. As a result the Nowra experiment reflects many diverse and wide-ranging experiences. I do not claim this paper as my own. I am indebted to the following persons for their valuable contribution:

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Circle sentencing of aboriginal offenders

I open with an apology; some of what I have to say today has been canvassed by the previous two eminent speakers. I fear if I was to attempt to edit my paper on the run I will do an injustice to the topic.

This paper outlines the principles of Circle Sentencing. It examines community perspectives and the role that community members play in Circle Court. It explores the impact and possibilities of Circle Sentencing and highlights the significance of community support in maintaining the success of the programme. While we have a way to go in achieving our aims, the empirical evidence we have collected to date indicates that Circle Court is working well.

What Is Circle Sentencing—Principles

By way of introduction, I open my paper with a quote from the *Sydney Morning Herald*,

We feel we are in circumstances of imminent danger to our property, and danger to our very lives. Robberies and murders, increasing in numbers and in audacity, infest our streets...Anxiety and alarm have seized our families ... something must be done, done effectually and done forthwith. (Hogg and Brown, 1998)

You have no doubt read similar articles before, but what maybe of interest is the date, 8 June 1844. There has always existed dissatisfaction with the ability of the legal system to prevent crime.

As a Magistrate, my sentencing of recidivists had been reduced on many occasions to the sterile considerations that accompany the length of imprisonment to be imposed. When asked to trial Circle Courts I did not know what to expect. Rupert Ross in 1996 observed of the Canadian experience,

Sentencing needs to become more of a step in the healing process rather than a diversion from it.

I wondered what 'healing' really meant. So what is Circle Sentencing? In short, it represents a major policy shift to a crossbreed form of law and order.

The pilot was welcomed with reservation and suspicion by all court users. Did this 'white' Magistrate really want to hear what the Aboriginal Community had to say? How long had they been hearing unfulfilled promises? In the face of history they had a right to regard the proposal with scepticism. A justice proposal, prepared in 1989 by the Sandy Lake First Nation community in north-western Ontario, noted,

Probably one of the most serious gaps in the system is the different perception of wrongdoing and how best to treat it. In the non-Indian community, committing a crime seems to mean that the individual is a bad person and therefore must be punished ... the Indian communities view a wrongdoing as a misbehaviour which requires teaching or an illness which requires healing. (Ross, 1996)

Circle Courts are designed to educate the community on issues surrounding offending and the promotion and enrichment of Aboriginal culture and family values. Circle

Sentencing operates on the belief that crime is broader than one person; where the consequences of individual actions can have a rippling effect on entire communities. It must not be overlooked that Aboriginal offenders regularly suffer from intergenerational transference of trauma (Wallace, 2006). It is tragically apparent that young Aboriginal males in some places have a greater chance of going to prison than finishing secondary school. Society has a tendency to hide the truth in a gaol cell, and blame the individual.

It is well recognised that drugs and alcohol play a major role in Aboriginal offending rates. Substance abuse is a surface problem, an escapist activity, and a symptom of much deeper, collective trauma. If the reasons behind substance abuse are not addressed and dealt with, maladaptive behaviour will continue. The way to overcome the increase in crime is not to focus upon the legal systems capacity to respond, it is the underlying social determinants of crime that need analysis. While maintaining an eye on the past, the Aboriginal community looks at the question ‘Where to from here?’ rather than ‘Where were we 200 years ago?’

In Nowra the local Aboriginal community is mostly made up of people who are not originally from the south coast district. Only a few families would be regarded as descendents of the traditional landowners. This has, at times, caused factions, making it difficult to maintain local customary laws. Aboriginal culture is dying. Children frequently fail at education and then launch upon a life of crime. I have heard Elders say with confusion, ‘How is it that the Chinese, the Greeks, the Italians manage to maintain their cultural beliefs yet still participate in the wider community?’ Aboriginal people have difficulty knowing where they fit in society today.

At our first Circle Court I suggested we arrange tables in a circle to enable the proceedings to begin. Having already abandoned my coat and tie it was another gesture at informality. An Aboriginal man in the group said, ‘Hey Mr Magistrate, you’re not sending me back to school, I don’t wanna sit behind no desk’. I give you this information because it symbolises for many what that Elder, and other Aboriginal people, feel about the trappings and formalities of western institutions and in particular the legal system. A system that is entrenched with proprieties, rules and regulations that have always signified for Aboriginal people, their powerlessness and the power of ‘white man’ over them. Without the physical barriers of a table, desk, bench, microphones, western images carved in mahogany, colonial symbols and other paraphernalia, the Circle Court has come to represent a place of fairness where people feel comfortable, leading to better communication.

The venue of Circle Court is important to its success because community settings make it more meaningful and less alienating for Aboriginal participants. The language of the western legal system is generally threatening to the unfamiliar. It is often seen as a language of power, of blame, of accusation and of discrimination. The circle breaks down the barriers of both verbal and non-verbal communication (Douglass, 2003). The language of the community becomes the language of the court.

The Elders chosen for each Circle possess an affinity with the offender. The Elders are genuine, caring, non judgmental; they understand why the offender is in his or her

current situation. They are persons to whom the offender easily relates and, most importantly, trusts. Satisfying these requirements ensures that the deliberations have a positive and effective impact on the offender. It is one thing for me, as a Magistrate, to address an offender on sentence; it is another entirely to have the crime denounced by persons for whom an offender holds a deep-seated respect.

It is an unfortunate fact that Aboriginal people have oppressed their own people (Wallace, 2006). I realise that is a very general statement but you only have to spend time with some Aboriginal people to hear their complaints. Problems experienced not only require a holistic approach but also a realistic approach. One solution is to facilitate a process where Aboriginal people can not only help themselves, but can also be provided with the judicial support necessary to achieve community goals associated with respect, justice, equity, empowerment, health and well being. Circle Courts provide just one mechanism to that end.

The Role of the Community—Perspectives

Preliminary Steps

In deciding whether or not to hold a Circle Court a judicial discretion is exercised. That means that the decision must not be made arbitrarily, it must be made with reference to certain criteria. Those principles have been laid down in a Draft Practice Direction administered by the Chief Magistrate of NSW.

An offender cannot participate in Circle Court unless an acceptability test is satisfied. This assessment is performed by a group of Aboriginal Elders. Because of factions within Aboriginal communities, ensuring that each community is represented in the process is critical. The representative's role is to assess applications for Circle Court having regard to set criteria. The offender is required to meet the Elders face to face and present a case for participation in Circle Court. Community representatives who have no knowledge of the offender would be of little use to Circle Court. They may even be conned by an experienced offender. It is precisely because they know the background, the culture, the strong points and the weaknesses that members of the offender's community can reach out in a much more effective way than the criminal Court. The Elders make a recommendation to the Magistrate concerning the acceptability of the offender and provide reasons for accepting or rejecting an application.

Empowering the community ensures that the punishment is culturally relevant. Having communities punish their own members means that punishments are seen as real community sanctions and not as a continuation of an oppressive colonial system. The offender is confronted with his or her sentencers everyday; making the sentence more real and immediate.

There are no PhDs in the group. Elders have not been trained, only informed of their roles. It is vitally important to allow the Elders to discover their own ability to deal with a case, apply what they have to offer in terms of knowledge, wisdom and life's experiences and relate that to Aboriginal culture. This way they are in control. Their knowledge of the ways in which disharmony may spread within families and travel from generation to generation gives the Circle an astounding effectiveness.

The loss of legal filters results in more facts, more details, and a more accurate focus on what occurred and how it occurred. For offender's, the process has been a life changing experience, they could no longer run and they could no longer hide. With more access to detail the Circle Court considers the social determinants rather than just dealing with the dry matter of crime and punishment.

The Circle, in removing the table, literally turns the tables and allows not just for a sentence to be considered, and passed, but also demands that the offender be responsible for his or her actions. Aboriginal people have always had the knowledge, wisdom and expertise to deal with Aboriginal offenders but since colonisation, this authority has been lost.

Circle Court Process

Offenders often leave the criminal court without any feeling of remorse. They frequently leave with an increased sense of anger towards the system, the victim, and the Magistrate who imposed sentence.

In Circle Court the Magistrate takes on the appearance of a person rather than a figurehead who will pass sentence. Deliberations are typified as being a power sharing arrangement. It has been recognised in other indigenous courts that if the community does not have confidence that the sharing will be honoured, the prospects for a successful Circle Court are likely to be diminished. I cannot over emphasise the importance of the Magistrate, Prosecutor and Solicitor allowing this to happen. It is perhaps the most crucial aspect of promoting community ownership.

The presence of community members incites shame and contrition. The Circle does not represent offender or victim it represents the community. It voices community concerns. Teaching and healing are cornerstones of traditional Aboriginal thought. It is a powerful image because it can represent for the offender the continuity of life and the prospect of change and recovery rather than just being a symbol of punishment.

Sentences reflecting tribal law and payback punishment are not considered or imposed. Nevertheless, the sentence should reflect social, cultural and legal factors. In determining the sentence the Circle Court will have regard to customary laws of not only the offender's community but also the customary laws of the victim's community, should they differ (Wallace, 2006). The greatest possibility for success depends on the work done up front and a process that is flexible.

Initially, sentences imposed were a little 'too white' but as the relationship of trust has developed with the Elders, more creative sentences have been imposed. The sentence passed by the Circle Court must fall within, what the Magistrate would ordinarily view, an acceptable penalty range. Sentences that are unduly harsh or undeservedly lenient will not receive endorsement. This means that we have not thrown out the essence of impartiality that comes with a Magistrate dealing with the case.

Victims Experiences

Victims often get lost in the legal system. Circle courts provide an excellent opportunity for victims to air their feelings. The victim is there, adding flesh and blood to police facts that normally are lifeless bare bones. For victims it is an opportunity to have a say, get support, understand why it happened, and face the offender. That is justice not only being done, but being done well.

Patrick is the owner of three retail stores on the south coast of New South Wales. His shops had been the broken into eight times in one 12-month period. He summed up his experience of Circle Court:

I felt comfortable to be able to say what I wanted. I did not feel threatened or under pressure to go harder or to go easier ... The Aboriginal Elders took up the concerns of each of the victims to the offender to reinforce that they felt he had let down his heritage and his community. (Elder, 2003)

This is a major step forward. The support of the community in condemning the offending behaviour is vitally important if the victim is to heal.

Children are often unrecognised victims of crime, but in Circle Court that is not the case. In an unsolicited letter written by an 11-year-old son of an offender, he said to the Circle,

I would like my dad to: Stop drinking; Stop showing up in the middle of the night drunk; Stop calling people names and threatening people; Stop stealing my money; Stop hurting my mum; I want to feel safe with dad. (2003)

I am sure you will agree that its impact upon the offender was far more effective than anything I could have said.

Impact of Circle Sentencing—Possibilities

It took me some time to realise just what Circle Court is capable of achieving. In short, it allows the values of indigenous people and the structure of the legal system to merge. I recall one Elder linking an offender's children to his crimes. I saw his demeanour change when she said,

My parents didn't teach me how to live; They lived and I watched; Your children are doing the same. (Elder, 2002)

Another Elder said,

You don't learn responsibility from outsiders. You learn it from family. (Elder, 2003)

In times past, community members avoided going anywhere near a court of law. They did not know the full extent of the crimes committed. Often all they heard was poor so and so got 6 months gaol. It reinforced the barriers. With Circle Court the Elders are learning about what Aboriginal offenders are doing and why they are doing it. One mother of an offender who sat in Circle Court to support her son heard for the first time what he had actually done. She looked at him with a clear expression of disgust and said, 'Now I know what you really did, I ought to slap your face'.

I do not see Circle Court as undermining the legal system. I see it more as extending it, enhancing its capacity for fairness and social justice. Circle Courts are affecting judicial officers, legal practitioners, prosecutors and Aboriginal participants in a way that is positive and revolutionary. I am honoured and humbled at the immense respect I am shown by the Aboriginal community. My experiences over the last 4 years have made me a better person. The bond between the legal system and the Aboriginal community has never been so strong. This may be because Circle Court does not end in the Courtroom, it continues to surround those who enter.

Success should not be measured on the raw data of re-offending rates. The strong desire to find ways that allow for increased victim and community participation in the process of justice is paramount to a healthy community and prevails above all else. Circle Court will not work for everyone, however, it is making a difference. It is far too early to tell just how effectively it is performing. It will be a long road but pleasingly early evaluation has found that:

The majority of victims reported positive experiences of being involved with circle courts. (Judicial Commission of NSW, 2003)

One male offender had a record of 58 convictions. I imposed 32 of those convictions. I had sentenced him to terms of 3, 6, 12 and 18 months gaol. He went through the circle court process. He now has a solid family life, a job, a home, and most importantly, he has gained self-respect. He wears the experience as a badge of honour. Unfortunately, he has re-offended but, significantly, the man who appeared before me on the fresh charges was a different man to the pre-Circle Court offender I had seen so many times before. Once again, alcohol had brought him into conflict with the law. He could not make eye contact with the Prosecutor or me. His head hung low. I was later told by the Project Officer that the offender felt deeply ashamed and felt that he had let down each of the Circle Court participants.

Women have similar success stories. For example, one female offender has left a life of drugs and alcohol far behind. She has secured permanent Department of Housing accommodation, has furniture in her home rather than the 'hockshop', and she has earned enough trust to now baby-sit five of her grandchildren daily.

I have no concerns if an offender, or the wider community, considers Circle Court an easy way out. Because, put simply, that is far from the case. We have experienced an outpouring of emotion, an unrelenting rebuke, and an unwavering condemnation of the offending behaviour. I would argue that the process is punishment, real punishment, a room of mirrors. A process that lasts for two to three hours that is followed by penalties which consistently fall in the heavier end of the scale tend to lend credit to the integrity of Circle Court. After the close of another Circle Court, an Elder said to me,

You have no idea how difficult it is to send you own nephew to gaol. (Elder, 2005)

Community welfare comes first, if an offender resists the process, he or she will be returned to the legal system to be dealt with according to established law.

An offender admitting to what he or she has done is only the first step. What the process is looking for is an offender who regrets the conduct that led to the charge and is calling upon the community for help. We cannot expect a change in conduct until there is a change in attitude: not just in the offender, but also in the community with respect to how we as a society view culture and difference. Culture is not about tolerance; it is about acceptance. To quote Rupert Ross,

Traditional teachings have been brought forward into full ... flower by good people determined to replace silence and suffering with honesty, hope and health. (Ross, 1996)

One must recognise the differing problems and life styles of the various distinct communities. In other words, it is important to recognise that the Nowra model cannot be considered a panacea for Aboriginal justice ills. Aboriginal cultures are not all the same. The huge difference between urban, rural and remote communities will continue to present as a real challenge.

In Circle Court we come together with the knowledge that our decisions may help make life better for the next generation. Dignity is being returned. A voice is put in place for the future. I would like to leave you with words of one of the Elders:

This is not white man's law anymore, it's the people's law. (Elder, 2003)

References

- Circle Sentencing and Circle Court—Practice Direction* (Draft form), Chief Magistrate of the Local Court of New South Wales.
- Circle Sentencing in New South Wales. A Review and Evaluation*, Judicial Commission of New South Wales, October 2003.
- Circle Sentencing—Involving Aboriginal Communities in the Sentencing Process*. Discussion Paper. Aboriginal Justice Advisory Council of New South Wales. Undated.
- Community Justice Conferences For Adult Offenders*, Discussion Paper, Attorney General's Department, New South Wales 2001.
- Community Justice Groups*, Aboriginal Justice Advisory Council, NSW 2001.
- 'Cross Cultural Awareness', *Judicial Officers Bulletin*, NSW 1994.
- 'Diverting Aboriginal Adults from the Justice System.' Outcomes of the workshop. Aboriginal Justice Advisory Council of New South Wales. 2001.
- Green, RG. *Justice in Aboriginal Communities, Sentencing Alternatives*. Purich Publishing, Saskatoon, Saskatchewan, Canada. 1998.
- Hogg R & Brown D, *Rethinking Law & Order*, Pluto Press, 1998.
- Large N, 'Healing Justice. The Tsuu T'ina Peacemaker Court.' *Alberta Views*. First Peoples of Alberta, Calgary. 2001.
- McNamara L, 'Indigenous Community Participation in the Sentencing of Criminal Offenders.' *Circle Sentencing. Indigenous Law Bulletin*, November-December 2000 Volume 5, Issue 4
- McNamara L, 'Indigenous Community Participation in the Sentencing of Criminal Offenders: Options and Pre-conditions for Success.' Presentation to SRAJAC Customary Lore Workshop, Nowra. 2000.
- Ross R, *Returning to the Teachings, Exploring Aboriginal Justice*. Penguin Books, 1996.
- Weatherburn D, 'Does Australia have a law and order problem?' A public lecture delivered at the Scientia, University of New South Wales on 21 May 2002.