



SENTENCING OPTIONS: CAN THEY INCORPORATE CULTURAL HEALING

ADDRESS TO THIRD NATIONAL INDIGENOUS JUSTICE CEO FORUM

UNDUMBI ROOM

PARLIAMENTARY ANNEXE, BRISBANE

Thursday, 22 November 2007

10.00am

**Judge Marshall Irwin
Chief Magistrate**

I have been asked to address the issue of whether sentencing options can incorporate cultural healing in the context of the challenges in sentencing Aboriginal and Torres Strait Islander offenders in remote Queensland.

Indigenous sentencing initiatives have burgeoned in Australia since 1999, primarily led by judicial officers responding to the over representation of Indigenous offenders in the prison system.¹

¹ *Indigenous Sentencing Practices in Australia*, Magistrate Annette Hennessy delivered at International Society for Reform of Criminal Law Conference, July 2006, Brisbane, page 1.

These initiatives have been made with a view to promoting involvement of local Indigenous communities in the Court system resulting in more culturally appropriate sentencing processes – with a focus on achieving just sentencing results for those communities.²

Just over a quarter of the nation’s Indigenous population lives in Queensland and is the most decentralised of all states, with only 26 percent of Aboriginal and Torres Strait Islander Queenslanders living in major city areas, compared with 52 percent living in regional areas and 22 percent in remote and very remote areas.³

In other states, more than two out of every five Indigenous people lived in the major cities of New South Wales, Victoria and South Australia, while one in three were in major city areas of Western Australia.⁴

As a result the Murri Courts through which these Indigenous sentencing initiatives have been implemented in Queensland have been developed in urban and regional areas in slightly different ways to respond to the needs, social structure and customs of the local Indigenous community.⁵

The first Queensland Murri Court sat in Brisbane on 21 August 2002 and since has expanded to Rockhampton, Townsville, Mount

² Ibid.

³ *Indigenous mob tops half a million*, Namalata Thusi, Office for Aboriginal and Torres Strait Islander Partnerships, Spring 2007; page 16.

⁴ Ibid.

⁵ *Indigenous Sentencing Practices in Australia*, page 2.

Isa, Caboolture, Cherbourg, Ipswich, Coen, Cleveland, Caloundra and Cairns.

In addition to reducing the over-representation of Indigenous offenders in prison, the goals of the Murri Court are to improve attendance rates in court, to decrease the re-offending rate, to reduce the number of Court Orders breached by Indigenous offenders, and to strengthen the partnership between the Magistrates Courts and Indigenous communities with Indigenous justice issues.

The Murri Courts are Queensland Magistrates Courts, or Childrens Courts that are designed specifically for Aboriginal and Torres Strait Islander offenders. Indigenous Elders and respected persons are involved in the court process by enabling them to:

- advise the magistrate about cultural issues
- assist the offender in understanding court processes
- assist the magistrate to decide on a sentence that is most appropriate; and
- act as a connection between the court and the local Indigenous communities.

The role of Elders and respected persons is authorised under section 9(2)(o) of the *Penalties and Sentences Act 1992*, and equivalent provision of the *Juvenile Justice Act 1992* which require the court to consider relevant submissions from Community Justice Groups, including elders and respected persons when sentencing Aboriginal and Torres Strait Islander offenders. The

court may also take into account such submissions when considering applications under the *Bail Act 1980*. However it is the court which makes the decision on sentence and bail.

A review of the effectiveness of the Murri Court by the Department of Justice and Attorney-General has resulted in financial support for the Brisbane, Rockhampton, Townsville, Mount Isa and Caboolture Murri Courts from January 2007. Over three years, \$5.2m is available, for departmental staff to coordinate the activities of the Murri Court and the Indigenous Community in each location, to support the work undertaken by Murri Court magistrates, to provide an expense allowance for Elders volunteering their time to attend Murri Court, to provide training for Elders, and to meet other related costs of the Murri Court.

The review has also resulted in the introduction of legislation to permit the court to direct that a Community Justice Group in a defendant's community have access to court files, and to make it an offence to retaliate against a member of a Community Justice Group because of a submission made under the *Penalties and Sentences Act*, the *Juvenile Justice Act* or the *Bail Act*.

During the 3 year funding period the Australian Institute of Criminology will conduct an independent evaluation of the Court. This will be decisive to its future development. The feedback available to the court from the departmental review was that –

- the involvement of Elders and respected persons in the court process helps the offender develop trust in the court

- the court's problem-solving focus helps offenders to undertake rehabilitation and stop their offending conduct
- Murri Court partners do not regard the Murri Court as lenient in its sentencing practices. The penalties are onerous on the offender as they often involve treatment and close supervision
- the presence of members of the offender's community in the court:
 - assists the offender to be more responsible for their offending behaviour
 - increases the offender's awareness of the impact of their offending on their own community and the victim

Feedback was also received that the Murri Court is more effective in dealing with Indigenous offenders than other Magistrates Courts because:

- the offender is acknowledged in the process
- the offender is encouraged to change and be reintegrated into the community.

Court partners regard the Murri Court as an effective mechanism for increasing participation and ownership by the Indigenous Community in the criminal justice process.

This is consistent with the statement in the Media Release announcing a report of the Australian Institute of Criminology,

Indigenous Courts and justice practices in Australia, in October 2004 by Dr Toni Makkai, that:

“Indigenous Courts in urban, rural and remote areas can empower Indigenous Elders and other community members and change the attitude of offenders. The court’s work is not about processing a case or finalising a file, but rather, learning more about the offender and the offence, and working to develop an appropriate response. Through this system, Indigenous people, organisations, Elders, family and kin group members are encouraged to participate in the sentencing process and give officials insights into the offence, the character of victim-offender relations, and the offender’s readiness to change. In this way, greater attention to the reasons and context related to the offending behaviour, coupled with involvement of Indigenous justice workers, give the urban court experience more meaning and make it less alienating.”⁶

In this way the Murri Court redresses the deep distrust of Indigenous people towards the criminal justice system and facilitates cultural healing.

I address the role of the Murri court in this healing process by focusing on the processes of the Mount Isa Murri Court. I do so because in the context of the challenges of sentencing Aboriginal and Torres Strait Islander offenders in remote Queensland, with

⁶ Media Release, Australian Government, Australian Institute of Criminology, No 8/04, 10/8/04 – www.aic.gov.au/media/2004/20040810.html *Indigenous courts and justice practices in Australia*, E Marchetti and K. Daly, Trends and Issues in Crime and Justice, No 277, May 2004, AIC; see also *Indigenous Sentencing Practices in Australia*, page 2.

the exception of the relatively small Cape York community of Coen, Mount Isa in North West Queensland is our most remote court. The Mount Isa Murri Court will also deal with offenders referred to it from the more remote communities in the Gulf of Carpentaria Region.

Because Mount Isa is a single magistrate centre there was flexibility to adopt practices tailored to the needs of the local community.⁷

Magistrate Manthey who established the Mount Isa Murri Court recognised that, if a Murri Court was to operate successfully, it was important that the initiative should come from the community itself. Through a series of meetings with various stakeholders and members of the Aboriginal and Torres Strait Island community, it was decided that a Murri Court would address issues including the high proportion of Indigenous offenders appearing in court, particularly for breaches of domestic violence and their high rate of recidivism.⁸

For the Murri Court to be successful, it was essential that a local Community Justice Group be formed to advise the Murri Court in its operation. Magistrate Manthey worked in consultation with the Indigenous community to establish the Mount Isa District Justice Association. Its membership consists of representatives of the various tribal and family groups who reside in and around Mount

⁷ *Indigenous Sentencing Practices in Australia*, page 3.

⁸ *From little things, big things grow*, L Roughan, Magistrates Court of Queensland Annual Report 2006-2007, page 142.

Isa.⁹ Wherever possible, it is important that Elders and respected persons from the same tribal group, skin or moiety address offenders. The Murri Court has a significant impact on offenders because their own Elders and respected persons hold an extremely important role in their cultural life. As a consequence the Mount Isa Murri Court pilot commenced on 12 February 2004.

Magistrate Manthey's relationship with the Community Justice Group and the Elders and respected persons developed into a harmonious working relationship which enabled them to provide the court with first hand knowledge of the Indigenous defendants' backgrounds and their cultural links with the community.

As a consequence any magistrate constituting the Mount Isa Murri Court can make properly informed decisions when considering bail applications and sentencing options.

With input from the Community Justice Group, elders and respected persons the Murri Court (which includes a Youth Court) has been refined to become a unique Indigenous sentencing forum which is recognised as truly culturally relevant amongst the Indigenous Communities.

The specific practices that distinguish the Mount Isa Murri Court are:

- a lengthy bail program that forms the basis of rehabilitation

⁹ Ibid

- imprisonment is not imposed unless it is subject to immediate parole release
- customary rites such as men's business and women's business are implemented as part of the bail program

The purpose of the Court is to address the underlying causes of offending. As a result although the eligibility criteria for referral to the Court include a danger of being sentenced to a term of imprisonment, it will also accept referrals of persons who are habitually charged with public nuisance offences. This has been done at the request to the Community Justice Group, elders and respected persons in order to address the underlying causes before such conduct escalates into more serious crimes. These offenders usually have underlying drug, alcohol, homelessness or cultural issues which can be addressed through the Murri Court.

The cornerstone of the Mount Isa Murri Court is the bail program that forms the basis of rehabilitation. This program runs for a minimum of 3 months and sometimes beyond 6 months depending on the response of the offender.

To be eligible for referral to the Murri Court, the defendant must be considered suitable by the Community Justice Group to engage in a bail program.

The conditions to the bail order include:

- residential rehabilitative programs

- complying with the directions of the Community Justice Group, including attending and satisfactorily participating in any mediation sessions and/or performing any voluntary community service work
- reporting to ATODS for counselling
- attending the Murri Men's Support Group or the Murri Women's Life Skills program

The pre-sentence period when the defendant is on bail allows the Community Justice Group, elders and respected persons to work closely with the offender and their family on issues that have led to their contact with the Court.

This can prepare the offender for re-integration into the community on a community based order and to act as an indicator as to whether the offender is suitable for a particular order. It also reduces the breach rates of community based orders.

ATODS is the Alcohol, Tobacco and Other Drugs Unit of Queensland Health. It works with the defendant during the pre and post sentence phase of the Murri Court, providing counselling and assistance with alcohol and substance abuse. It also counsels the family of the defendant to assist them in dealing with the problems.

The purpose of the focus of the Murri Men's and Murri Women's support groups are to reconnect the defendant with the beliefs of Indigenous culture. Because of the spirituality of Murri people, this reconnection with traditional ways can allow the offender to

explore the deeper issues that may have lead to offences that brings them into contact with the Court.

Additionally the spousal partners of offenders may also be asked to attend the appropriate group. The counselling of both parties are an integral part of the healing process of the family.

Elders and respected persons meet with offenders and their partners on the sentencing day and talk over the offences, the effect on themselves, family and community, past troubles and future aspirations to finalise their submission for the Court. This may be carried out as Men's and Women's business where the male and female participants meet in separate rooms.

This is an important aspect of Murri Court, as it enables the spouse of the defendant to be acknowledged in the process. As many of the offences coming before Murri Court include partner violence, this separate interview allows frank and honest discussion away from the intimidation of the presence of the perpetrator, and thereby contributes to the healing process.

At the sentence the magistrate hears submissions from the elders and respected persons on cultural considerations, the offender's future aspirations and any aspects of the defendant's life that they feel the offender may need to address, such as anger management or alcohol addiction.

The Court will only consider a term of imprisonment after carefully considering all other sentencing options. If a sentence of

imprisonment is imposed, the offender is immediately released on parole so that they are subject to intense supervision by the Department of Corrective Services.

There are two reasons for this approach.

Firstly, it was the belief of the Elders and respected persons that if offenders were sent to prison from the Murri Court, it will quickly lose its credibility in the eyes of the Indigenous Community – and become another arrest court with a token Murri Court component as opposed to being regarded as a rehabilitative forum.

Secondly, Magistrate Manthey was concerned to avoid reprisals against Elders and respected persons. Their role in the Murri Court is sometimes misinterpreted by the Community as that of a “judge” sentencing the offender. He was firmly of the belief that they should not be put in that position. The offender would generally have served a period of remand while waiting assessment for being released on the bail program.

Probation orders are widely used, because they tie in with the objectives of the Court, to address the underlying causes of offending behaviour and to reduce re-offending rates.

Additional conditions are usually placed on a probation order such as the offender must complete courses like Ending Family Violence Program, Ending Offending and Anger Management to further enable the rehabilitation of the offender and to address the underlying issues that lead to offending behaviour. It may also

include a condition that they report to the Co-ordinator of the Community Justice Group and carry out the reasonable directions of the Group, and attending the Murri Men's or Women's Support Groups. The extent of compliance required represents what might be considered to be significant punishment and deterrence while offering rehabilitation opportunities.¹⁰

It can be seen that the Mount Isa Murri Court has evolved to a "holistic" or "family healing" approach to sentencing. It involves participation in the healing process by the Indigenous community through the Community Justice Group, elders and respected persons, and the Murri Men's and Women's Support Group.

Under this approach, not only the offender receives the appropriate assistance addressing matters such as employment, health checks, counselling and cultural support, but the offender's family, the victim and the victim's family also receive such assistance.

In relation to offences involving domestic violence, the elders and respected persons were of the view that it was important to involve the whole family. The offence is usually the "straw that breaks the camel's back" in relation to underlying issues such as jealousy, gambling, extended family problems, and drug/alcohol issues.

Ultimately, the benefits (including financial) flow onto the community at large with reductions in the crime rate including domestic violence and property related offences. For example

¹⁰ *Indigenous Sentencing Practices in Australia*, page 10

where as in 2003 the Mount Isa region had the highest rate of domestic violence related offences per head of population in Queensland, at the end of 2006 these rates had reduced by 50 per cent.

A further indication of the success of the Murri Court is that in the first 12 months of the 61 persons were sentenced (57 of whom were charged with domestic violence related offences) only 4 had re-offended.

Mount Isa also operates a Youth Murri Court as part of the Childrens Court. At the request of the elders and respected person, most Indigenous children appear in the Youth Murri Court and are seen by them to be counselled on the effects of their offending activity, any substance abuse or other dangerous behaviours in an attempt to curtail the childrens' offending and to reconnect them with the Indigenous community.

The position of respect that the elders or respected persons have in their community, usually has a profound effect on the child who comes before them. They also question the child about what they think is an appropriate action to show remorse for their offences, such as apologising in writing or in person to the victim of a property offence.

As has been observed by Magistrate Annette Hennessy of the Rockhampton Murri Court:

“It does acknowledge one of the basic tenets of traditional Indigenous community values, that is the authority of and the respect for the Elders of the community....it is the involvement of the Elders which makes the process so worthwhile. Their wisdom and knowledge are a constant inspiration. The acknowledgement in a public forum of the Elders’ authority and wisdom and their role as moral guardians of the community by the Court honours traditional respect of the role of the Elders.”¹¹

As she also states:

“The power of the natural authority and wisdom of the Elders is striking in the Courtroom. There is a distinct feeling of condemnation of the offending but support for the offender’s potential, emanating from the Elders and the Community Justice Group members”.¹²

This acknowledgement of the role of the elders both enhances their authority in the community and the cultural healing.

Further increasing the involvement of the Indigenous community in the process enhances community confidence in it and reduces barriers between the community and the court.¹³

As has been said about the Darwin Community Court, it provides “a place where offenders can express their shame and remorse in an environment that assures them of their intrinsic worth as human beings. It is a place where victims can hear that remorse and start

¹¹ Ibid, page 11.

¹² Ibid, page 10.

¹³ Ibid, page 6.

to heal. Finally it's a place of restoration – of community values and personal relationships.”¹⁴

In other words it is a place of cultural healing.

I can express this no better than in the personal dedication to me by Uncle Albert Holt, foundation member of the Brisbane Murri Court in his autobiography, *Forcibly Removed* in which he said:

“It has been a watershed achievement to structure our Queensland Murri Court process on a spiritual or emotional level generating dignity and respect, an achievement that I am proud of.”

Additional Reference

Murri Court – Mount Isa Procedure Manual prepared by Lyn Roughan, Murri Court co-ordinator, Mount Isa and Magistrate Bevan Manthey.

¹⁴ The Darwin Community Court Trial, Sharon Payne, Director North Australian Aboriginal Legal Aid Service delivered at the Crime Prevention Forum, May 2005, Darwin – www.nt.gov.au/justice/ocp/docs/forums/darwincommunitycourttrial; Indigenous Sentencing Practices in Australia, page 6