

From Australian Courts to Aboriginal Courts in Australia – Bridging the Gap?

Mark Harris*

Within the last few years there has been an increasing trend in Australia towards the recognition of what can be loosely called ‘Aboriginal courts’, more specifically called ‘Nunga courts’, ‘Murri courts’ and ‘Koorie courts’ in their respective jurisdictions.¹ These courts are characterized by a general requirement that the Indigenous offender pleads guilty. The court is generally assisted in its sentencing by the advice or representations of Aboriginal elders. It is also important to note that these courts only have application to a narrow range of offences. This article examines the particular characteristics of the different Aboriginal courts and reflects upon the implications of this trend for Indigenous offenders and, more broadly, whether it has any ramifications for the increased involvement of Indigenous communities in the sentencing process of the Australian legal system. When discussing Aboriginal Courts the temptation is to consider them in the light of the experience of the tribal courts that have evolved in the United States of America and Canada. It should be stressed, however, that the authority and powers vested in the North American models is considerably more extensive than those envisaged in the Australian cases.

Historical examples of ‘Aboriginal Courts’

From the outset it is worth observing that the historical use of the term ‘Aboriginal Courts’ is itself problematic, in that it has related mostly to a court where the defendants who appear are of Aboriginal descent. The experience of Aboriginal courts in Australia was commented upon by the Australian Law Reform Commission (hereafter ALRC) report into the Recognition of Aboriginal Customary Laws in 1986 where it noted:

These courts have not used existing Aboriginal authority structures, but have sought to adapt the model provided by the general court system to allow for what was perceived as the special situation of Aborigines (ALRC 1986 vol 2:30).

* BA(Hons) Melb Uni; LLB (Melb Uni); Dip Ed (MCAE); MA (Monash Uni); PhD (Latrobe Uni) Senior Lecturer, School of Law, La Trobe University, Bundoora 3086; <Mark.Harris@latrobe.edu.au>. The author is grateful to the 2 anonymous referees who provided helpful comments.

1 This is a regional identification that is used for Indigenous people from certain regions in Australia and is not the same as a person’s tribal group. A Murri is an Aboriginal person from Queensland, a Koori (sometimes spelled Koorie) is a person from Victoria or New South Wales and a Nunga is an Aboriginal person from South Australia.

The ALRC report then concluded that: 'The Australian experience with Aboriginal courts or equivalent bodies is limited. Aboriginal courts have been of uneven quality and have had mixed success. Overall the experience is inconclusive, even discouraging' (ALRC 1986 vol 2:52). The courts that are discussed in this article are established pursuant to Anglo-Australian (as distinct from Aboriginal) law. Under Anglo-Australian law courts can be created either through a statutory enactment, a common law rule or through some administrative arrangement. Whilst the courts that have dealt with Aboriginal persons in some capacity have been referred to as 'Aboriginal courts' there have been significant differences in their application and authority.

Historically there are a number of examples where Aboriginal courts were used as a vehicle of colonial control. Probably the most extreme example was the establishment of the Courts of Native Affairs by statutory enactment, the *Native Administrative Act* 1936 in Western Australia. These courts, which operated from 1936 until 1954, were introduced at the instigation of citizens 'troubled by the position of Aboriginal people in the ordinary legal process in Australia' (Auty 2000:150). The purpose of the Native Courts was notionally to deal with serious indictable offences, including all cases of murder concerning Aboriginals in Western Australia. The drafting of the legislation provided for a 'head man' to assist the court, although Auty (2000:156) argues that the ambiguity of the provisions meant it was unclear as to whether they served as an interpreter or witness. The Native Courts legislation also removed the fundamental common law right of trial by jury, ostensibly on the grounds that it would enable the courts to be conducted as if dealing with offences of a trivial nature (Auty 2000:157). While the Native Affairs Courts represented a spectacular denial of rights to Aboriginal defendants, they were nonetheless portrayed by a succession of writers as an example of a 'beneficial regime' that operated in the interests of the defendants (Auty 2000:162).

It was not until the late 1960s that discriminatory legislation that had previously affected Aboriginal people around the country was, at least partially, repealed. In its stead there were moves to introduce various measures that might be termed beneficial legislation. Apart from anti-discrimination legislation, measures designed to protect Aboriginal cultural heritage sites and objects and some limited recognition of land rights, there was also some pressure to recognise Aboriginal customary law. In the period from the late 1970s onwards the government move towards a policy of self-determination for Aboriginal communities resulted in legislation being passed in some States that granted the communities by-law making powers.

The systems that were introduced in Western Australia and Queensland during this period can be distinguished from the current range of initiatives in that they either vested the community with the power to make by-laws or included a provision for the judicial officer to be an Aboriginal person. Under the Western Australian *Aboriginal Communities Act* 1979, for example, there was provision made for the Act to apply to the defined communities of the Bidjandanga Aboriginal Community La Grange Incorporated and the Bardi Aborigines Association. Section 7 of the Act also provided that the Council of these communities could make by-laws for a range of purposes, including the prohibition and regulation of persons, vehicles and animals onto community lands, the protection of the grounds of the community lands, the prohibition or restriction of the supply of alcohol and the prohibition of any offensive or indecent behavior. Significantly while the by-laws made by the community council under the Act only had application within the boundaries of the community lands, they were deemed to be applicable to all persons within those boundaries 'whether members of the community or not' (s 9(1)). In considering the objectives of the Act Wilkie (1991:26) observed that the scheme 'seeks to empower Aboriginal communities and to localise and Aboriginalise the administration of criminal justice'.

Similarly the Queensland *Community Services (Aborigines) Act* 1984 s 47 provided for the establishment of Aboriginal councils to discharge the responsibilities of local government. The Queensland legislation also provided for the establishment of Aboriginal Courts, which were required to comprise at least two Aboriginal Justices of the Peace resident in the area (s 80). Under the Queensland legislation such Courts had jurisdiction over any person present on the council land, whether Aboriginal or not (s 82). Where the council regulations make provision for a specific offence, the Act stipulates that a Magistrate does not have jurisdiction and thus when a matter is brought before a Magistrate it is a defence for the accused to show that the Aboriginal Court has already dealt with it (s 179). While there is a provision for a stipendiary magistrate to be appointed to a council area, the Act expressly provides that while a Magistrate or Clerk of the Court is at liberty to offer an opinion as to the harshness or leniency of a particular offence, the Members of the Aboriginal Court are in no way obliged to follow such advice (s 12).

Significantly when the Australian Law Reform Commission compiled its report into the recognition of Aboriginal Customary Law in 1986 it examined the workings of several kinds of local courts, including the Queensland and Western Australian models, the Papua New Guinea village courts and also the North American Indian tribal courts (ALRC vol 2 1986:53–71). These were all examples of Indigenous courts that had been modeled on the common law court system. Interestingly the ALRC report observed: ‘In submission and in its fieldwork the Commission has received very few requests from Aborigines for Aboriginal Courts to be established’ (ALRC 1986:78). The distinction that needs to be drawn between the operation of the Aboriginal Courts on the community lands and the newly established models is that the previous models all related to discrete, separate land where the population was almost all, if not totally, of Indigenous descent. The current measures operate in what might be termed the mainstream of Australian society. While the Aboriginal courts may be located in areas where there is a significant concentration of Aboriginal population, they remain a minority within the broader community.

The various Aboriginal courts that have been introduced around Australia can be distinguished from the earlier models in WA and Queensland in that they do not expressly provide for an Aboriginal Judicial Officer (as was the case with courts established under the *Community Services (Aborigines) Act* 1984 (Qld); *Community Services (Torres Strait) Act* 1984 (Qld) and the *Aboriginal Communities Act* 1979 (WA)). Further, the Aboriginal Courts deal only with offences that are applicable to the general community and there is no provision for them to hear offences against by-laws introduced by Aboriginal communities, such as occurred in the WA and Queensland legislation referred to above. The main focus of the Aboriginal Courts is upon the sentencing of Aboriginal offenders and in this they draw from a body of common law precedent which has recognised that Aboriginal community attitudes are a relevant factor for consideration.

The approach of the Aboriginal courts in creating sentencing options that take account of factors associated with an offender’s Aboriginality is not a new development. In the case of *Neal v R* (1982), for example, Justice Brennan emphasised that the courts, in sentencing offenders, should apply the same principles equally to all groups in society, but that any relevant factors arising from the offender’s membership of an ethnic or racial group should be taken into account. Brennan J (*Neal* 1982: 326) stated:

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 to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion...

In taking account of such factors Williams makes the point, citing the case of *R v Woodley*, Boonga and Charles in support, that the courts must be mindful of the importance of not homogenising all Aboriginal people as the same, and that the characteristics of each individual need to be considered. The position of Justice Brennan in *Neal* has subsequently been followed in a range of cases involving different circumstances (Williams 2003:99–102). Amongst the factors that the courts have deemed to be relevant considerations in the sentencing process the socio-economic factors pertaining to, for example, colonisation and dispossession (*R v Fuller-Cust* 2002) or substance abuse (*R v Carberry* 2000). The courts have also acknowledged that the dislocation suffered by an offender shifting from a rural Aboriginal mission to an urban centre may be a mitigating factor (*Harradine v R* 1991). There has also been recognition of the effect of racist behaviour towards an offender as a mitigating factor (*Pearce v R* 1983) and the impact upon the offender of forcibly being removed from their family as a child (*R v Churchill* 1998) have been considered by the courts to constitute mitigating factors. Importantly Williams (2003: 99) stresses that the fact that an offender demonstrates one of these identified characteristics does not mean that this will necessarily result in a lesser sentence, with the ultimate decision on sentencing depending upon 'the particular circumstances of the offence and the offender'.

In addition to considering the individual circumstances of the offender, the courts have on occasion taken into account the opinion of the offender's community. In the case of *Robertson v Flood* (1992) the Supreme Court of the Northern Territory heard an appeal against a conviction for assault that was based upon new evidence being adduced. In his judgment Justice Mildren noted that the community of the defendant had made a submission, requesting that the defendant remain in jail and observed that it was:

... appropriate for the court to take into account the special interests of the community of which the offender is a member, and to take into account the wishes of the community so long as they do not prevail over what might otherwise be a proper sentence (1992:para 35).

Mildren J went on to comment that the submission of the community, whilst a relevant factor for consideration, could not result in the defendant receiving a harsher penalty than would otherwise be the case. In the case of *Munugurr v R* (1994) the Northern Territory Court of Criminal Appeal also found that the 'wishes and views of the community are relevant as long as they do not prevail over what is the appropriate penalty' (1994:para 20). Similarly in *R v Miyatatawuy* (1996) Martin CJ considered a written plea made by the victim, who was the defendant's husband, that the court not sentence her to prison. In citing the authority of *Neal v R* Martin CJ observed that the Aboriginality of the offender was relevant to the sentencing in that:

They arise from the operation within aboriginal communities of practices affecting her. The Courts are entitled to pay regard to those matters as relevant circumstances in the sentencing process ... (1996:para 20).

Martin CJ then reiterated that the wishes of the victim could not have a bearing upon the sentencing of an offender, but that the case before him involved a submission that expressed the wishes of the community. He noted that:

... it was not so much the wishes of the victim that were placed before the Court, but the wishes of the relevant community of which the victim also happened to be a leading member and on behalf of which he spoke. Those wishes may not be permitted to override the discharge of the Judge's duty, but have been taken into account as a mitigatory factor (1996:para 21).

It is in the line of cases such as *Robertson*, *Munugurr* and *Miyatatawuy* that acknowledge the relevance of community wishes as a factor in sentencing Aboriginal offenders that we can see the clearest analogy with the operation of the Aboriginal Courts in the last few years.

Recent Developments

In large part the evolution of these new types of Aboriginal Courts can be seen as a belated response to the recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADC) released in 1991. The RCIADC was introduced as a consequence of the disturbing rise in the number of deaths in custody of Aboriginal people in the jails and prisons around Australia. There were a number of RCIADC recommendations specifically relating to treatment of Aboriginal people within the courts system, including: that Aboriginal people be recruited as court staff and interpreters (recommendation 100), that there be cross-cultural training for court personnel (recommendation 96) and that adequate provision be made for interpreters for Indigenous offenders who do not have English as their first language (recommendation 99). Probably the most significant proposal in relation to the development of Aboriginal Courts, however, was recommendation 104, which proposed that there be consultation with 'discrete' or 'remote' Aboriginal communities in relation to appropriate sentencing. The need for innovations in this area is understandable given that something approaching 90 per cent of Aboriginal offenders are dealt with in courts of the first instance and nearly 80 per cent of these matters proceed by way of a guilty plea (Cunneen 1992:121). Given that much of the focus is upon the sentencing of the offender, there is clearly a strong case for a sentencing program that acknowledges the importance of Indigenous community concerns.

It is now well over a decade since Elliot Johnson delivered the final report of the Royal Commission into Aboriginal Deaths in Custody, yet there seems little in the way of improvement in the status of Aboriginal people in their dealings with the law. The 2003 Census revealed that there were 4818 Indigenous prisoners in Australia, comprising 20 per cent of the total prison population. This represented a five per cent increase on the 1993 figures for national Indigenous imprisonment rates. The 2003 imprisonment rate of 1888 prisoners per 100 000 adult Indigenous population effectively means that Indigenous persons were 16 times more likely than were non-Indigenous persons to be imprisoned (ABS 2003). Likewise, in the preceding year Indigenous offenders were 15 times more likely to be imprisoned than were non-Indigenous persons. Therefore, despite the fact that Recommendations 92 to 121 of the RCIADC specifically addressed the issue of imprisonment as a sanction of last resort for Aboriginal offenders there was actually an increase in the rates of Indigenous imprisonment from 2002 to 2003.

In considering the role of Aboriginal Courts, however, it must be emphasised that they cannot be viewed as a single, definitive answer to curbing the rates of Indigenous over-representation in the prison system. The motivation which gave rise to the programs were, in fact, arguably more modest, such as reducing the number of Indigenous offenders who failed to appear at their listed court hearing (as was the case in the Nunga Court). The Aboriginal Courts are only one measure that has been implemented to try and reduce the disturbing imprisonment statistics for Indigenous Australia. Given the limited scope of their jurisdiction and operation it also seems excessively optimistic to consider that such Courts will result in significant reduction in incarceration rates for Indigenous offenders.

The introduction of the Nunga Courts in South Australia preceded the initiatives that were later introduced in Victoria, Queensland and New South Wales. According to Senior Magistrate Kym Boxall (2000) the court arose from the experience of having attended the circuit sittings of Magistrate's Courts in the Pitjantjara Lands in the north west of South Australia. Boxall observed that, in that setting:

The Aboriginal Community tended to resolve problems, including crime, by engaging in group discussions, often over a long period of time, until a solution was agreed upon. It was clear that Aboriginal people found aspects of the Australian legal system difficult to understand and, in particular, they did not respond well to the demands of the formal questioning process required by examination and cross-examination. It is experiences like these that have lead to the setting up of a specialized Aboriginal or 'Nunga' Courts ...

The Nunga Courts commenced operation in June 1999 and were initiated largely through the efforts of Magistrate Chris Vass (Moss 2000:6). The introduction of the Nunga Courts followed a period of several years of consultation between Vass and the main stakeholders, including Aboriginal community groups, the Aboriginal Legal Rights Movement, the police and state government agencies. The earliest operation of the Nunga Courts involved the establishment of Aboriginal court days where offenders pleading guilty have their matter heard. The Magistrate is assisted and advised by either an Aboriginal court officer or elder. In the Nunga courts, once the prosecution outlines its case the defendant has the opportunity to speak, followed by the members of the community. While the elders in the Nunga courts have no delegated authority, they can advise on sentencing. Magistrate Chris Vass described the role played by the elders in the following way:

Sometimes, after sentencing someone, the person (elder) next to me will say 'Right brother, now I know you, you've been given a chance and I'll be keeping an eye on you out there in the community'(Debelle 2000:3).

It could be argued that in this way the role of the Nunga court strengthens both the standing of the elders and also the importance of community to those who come before it.

The court scheme has subsequently expanded its operation to Port Lincoln and an early indications of its success is the fact that the attendance rate for offenders has increased from around 50 per cent to 90 per cent. Commenting upon the operation of the Nunga Courts Chief Magistrate Alan Moss (2000:7) observed that they are not true diversionary courts, but rather recognise the reality that 'in a culturally diverse society such as exists in South Australia, there can be better ways of dealing with particular groups than the Anglo Saxon model appropriate for the vast majority of the community'.

While it could be said that the South Australian Nunga Courts developed from the initiative of judicial officers in the case of Queensland, and later Victoria, the emergence of Aboriginal Courts followed a process of negotiation between government and representatives of the Indigenous community. On 4 July 1997 a Ministerial summit was convened to address the issue of Aboriginal Deaths in Custody. This meeting was attended by representatives of Aboriginal and Torres Strait Islander communities and the Commonwealth and State Ministers responsible for Indigenous Affairs, Justice, Corrective Services and Police. The ATSI Social Justice Commissioner, Dr Bill Jonas, identified two main themes in the responses provided by the State and Territory governments. The first was the reference to underlying social issues in dealing with the problem of over-representation of Indigenous persons in the criminal justice system. The second theme identified was the matter of expenditure required to implement the Royal Commission initiatives and the withdrawal of Commonwealth funding (ATSISJC 1995:99-100).

Reflecting on the resolution reached at the Summit, Dr Jonas observed: 'it is a blunt fact that the culminating resolution of the Summit does nothing more than reiterate nebulous commitments to the obvious' (ATSISJC:102).

Despite Dr Jonas' misgivings that the Summit would provide little in the way of tangible advancement there followed a series of initiatives around the country which demonstrated at least a willingness on the part of some State governments to address the issues raised. As a direct consequence of July 1997 summit the Queensland government commenced a dialogue with representatives of that State's Indigenous communities. The signatories to the Queensland Justice Agreement included the Premier, four other Ministers with relevant portfolios and the ten members of the Aboriginal and Torres Strait Islander Advisory Board. Significantly the Agreement recognised the importance of the principles of self-determination and empowerment in reaching its goals or reducing the numbers of ATSI peoples coming into contact with the Queensland criminal justice system. Amongst the initiatives of relevance for this paper is the commitment in the Justice Agreement to 'further expand the number of culturally appropriate mechanisms and community based diversionary facilities. It is important that these sentencing options are culturally appropriate and available to Aboriginal offenders'

In Queensland legislation was passed in 2000 that amended certain provisions of three pieces of legislation: the *Penalties and Sentences Act* 1992, the *Juvenile Justice Act* 1992 and the *Childrens Court Act* 1992. Uniformly the legislation now provides that, where the offender is an Aboriginal or Torres Strait Islander, submissions can be made by representatives of the community justice group from the offender's community. The content of these submissions can include the offender's relationship to the community, cultural considerations and any other factors relating to programs and services established for offenders. In response to these developments the Chairperson of the Palm Island Community Justice Group, Peena Geia, stated in 2000 that: 'I think it's a very wise move on the part of the government. We're the ones that know our people best. Nobody knows and understands our people better than us' (Forde 2000:13).

The weight to be attached to the submission made by the community justice group has subsequently been the subject of a case argued before the Court of Appeal of the Supreme Court of Queensland, which has clarified the weight to be accorded to the submissions made by community justice groups. In the case of *R v Roberts* leave was sought to appeal sentence of nine months imprisonment handed down in the Townsville District Court for a range of offences committed by the applicant on Palm Island, including unlawful wounding and common assault. The application was unanimously rejected by the Court and Byrne J observed that the trial judge had considered the report of the Community Justice Group as was required by the *Penalties and Sentences Act* 1992 but that: 'he was not bound to accept the ultimate recommendation of the group, but to consider the report; and that he has done'. In addition to the recognition of the importance of community group submissions in the sentencing process the amendments to the Queensland *Penalties and Sentences Act* also require that judicial officers handing down sentences in the Brisbane Murri Court take submissions from the Elders or respected persons. The Murri Court hears cases involving Indigenous offenders who plead guilty to matters that are within the jurisdiction of the Magistrates Courts of Queensland.

In May 2001 the New South Wales government announced, following recommendations from the NSW Aboriginal Justice Advisory Committee and the NSW Law Reform Commission the establishment of a sentencing circle program. The New South Wales sentencing circle trial was based in Nowra on the New South Wales south coast and was

conducted for a period of two years. The NSW sentencing circle model is based on the Canadian model that requires the offender to face their victims and explain their behaviour before tribal experts in an informal group sentencing circle. The circle sentencing process originated in the Yukon in Canada in 1992, when a judge adapted the idea from the healing circles of Plains Indians (NSWLRC 2000:para 4.30). This approach to community justice has subsequently been adapted to a number of First Nations communities in Canada. For example, in the Nunavut version the elders of the tribe sit with the judge and recommend penalties.

The objectives of the New South Wales scheme include the development of a sentencing format allowing for Aboriginal involvement and Aboriginal community control, the provision of more appropriate sentencing options and greater support for the victims of crime. The benefits that will derive from the successful implementation of such a scheme are succinctly outlined by the NSW Aboriginal Justice Advisory Committee (no date:12), which argues that the introduction of initiatives such as the circle sentencing model is a clear example of how:

... a local Aboriginal community can be directly involved in criminal justice decision (sic.) that affect their communities, and shape those decision to reflect and incorporate local culture and tradition.

The first circle sentencing court in New South Wales was held in Nowra in February 2002. The defendant in the sentencing circle must first either be found guilty or plead guilty to the offence. Prior to acceptance in the sentencing circle program the defendant must identify to the Aboriginal Community Justice Group those persons from the community who will support him or her. The sentencing circle remains under the control of a magistrate, who is joined in the circle by the defendant and supporting family members, the victim and their family members or support people, a prosecutor, the defence counsel, Elders from the community, service providers and other community members and also the Aboriginal Project Officer (Potas et al 2003:7).

The review conducted of the Nowra Circle Sentencing court concluded (Potas et al. 2003:51) that it had been a success, notwithstanding the fact that there had only been a small number of cases heard during the pilot (thirteen in total). The review also observed that the cases reviewed 'demonstrate the way in which members of the Aboriginal community can play an active and constructive part, not only in contributing to the determination of the sentence imposed on an Aboriginal offender but in providing support and supervision of the offender after he or she has left the circle' (Potas et al. 2003:51). While the review acknowledged the importance that is placed upon the reduction of recidivism amongst offenders as a gauge of the success of justice initiatives it concluded that:

Fundamentally the strongest aspect of the circle sentencing process, as clearly enunciated by the offenders themselves, is the involvement of the Aboriginal community in the sentencing process. Facing one's own community -- respected people who have known the offender his or her entire life -- is the most powerful aspect of this process.

The success of the Nowra Circle Sentencing Court pilot was reflected in the fact that the model was subsequently utilised on Wiradjuri land at Dubbo on 26 August 2003. The project co-ordinator of the Dubbo program, Ms Roslyn Barker, noted that the introduction of the circle represented a 'revolution in the criminal justice system' (AJAC 2003:1).

The introduction of Koori courts in Victoria resembled the Queensland experience in that it was part of the strategy for the implementation of that State's Aboriginal Justice Agreement. The Justice Agreement initially only indicated that consideration would be

given to 'replicating with cultural adaptation' the Nunga Court scheme from South Australia but in many ways the program in Victoria went beyond the South Australian model (VAJAC 2000:43). When the Victorian Koori Courts scheme was introduced it was a more comprehensive and thorough program than that of South Australia. Legislation was passed which amended the *Magistrate's Court Act 1989* to provide for the establishment of a Koori Court Division of the Magistrate's Court and also to define the jurisdiction and procedure within the new courts.

The Koori Court's jurisdiction is limited to matters where the defendant is Aboriginal and either pleads guilty to the offence or intends to plead guilty to the offence. The Court can only hear matters which usually fall within the jurisdiction of the Magistrate's Court, with the exception of sexual offences and breaches made under the *Crimes (Family Violence) Act 1987*. The Koori Court legislation requires the proceedings to be conducted with as little formality and technicality and as much expedition as can be deemed appropriate. The sentencing procedure of the Koori Court provides a wide degree of flexibility in that it may receive information in any way that it thinks appropriate and provision is made for the oral statement of any Aboriginal elder or respected person to be put forward for consideration. The Act provides that the Secretary may appoint a person 'who is a member of the Aboriginal community as an Aboriginal elder or respected person for the purpose of performing functions in relation to the Koori Court Division of the Court'. There is also provision for the Chief Magistrate, in concert with two or more Deputy Chief Magistrates, to adapt the rules and procedures of the Koori Court as circumstances demand. In making this provision there is a flexibility to allow for the transfer of matters to and from the Koori Court Division.

In the period from October 2002 to August 2003 the Koori Courts in Victoria dealt with 167 defendants and only nine of the defendants re-offended during that period. The success of the Koori Court pilot programs at Shepparton and Broadmeadows has resulted in the establishment of a third Koori Court at Warrambool, in south-western country Victoria. The Victorian Government has also announced its intention to expand the operation of the Koori Court program to hear juvenile justice matters (Shiel 2004:9).

Aboriginal Courts: A positive development?

Whilst the move towards the recognition of Aboriginal Courts is at least partially a tangible instance of the implementation of the recommendations of the RCIADC, the issue remains controversial. The most significant criticism that might be made of the establishment of Aboriginal courts is that they represent a continuance of the colonial practice of co-opting members of the Indigenous community to police members of their own community. In Australia the analogy could be drawn with the so-called Native Police, who were recruited from a different geographical area and used to police Indigenous communities during the colonial period (Cunneen 2001:55–60). To this day the term 'native police' is still sometimes used in a pejorative sense towards Indigenous people who are members of the police force.

The distinction that might be drawn between these colonial practices and the current examples is that while the Native Police depended upon the fact that the members recruited were from a different area and had no sense of shared identity or kinship with the Indigenous communities that they were intended to control, the creation of Aboriginal Courts is dependent upon the idea that the offenders are confronted by members of their own tribal affiliation or local community. It is worthwhile considering Morse's (1988:72) caution, however, that any indigenisation of the criminal justice system through the

recruitment of Indigenous people for the purposes of enforcing 'the laws of the colonial power, can rarely be a satisfactory measure'. Morse identifies the dangers of being party to such a process as including the short-term threat to identity and the challenge of managing conflicting loyalties. The longer-term danger of involvement in the legal system of the colonial power identified by Morse is what he sees as the 'political cost of participating in a hybridised system'. The implication of involvement in such a hybridised system is that it could come to represent, to the exclusion of all other forms, the generally accepted form of Indigenous justice mechanism. Importantly, the Aboriginal Court process can only represent the Indigenous systems of laws to the extent permitted by the non-Indigenous courts.

One area of concern relates to the role of the Indigenous persons assisting the Magistrate. Consistent amongst all of the programs is the importance attached to the role of 'elders' or 'respected persons'. This recognition of the traditional role of the elders has been strongly endorsed by a number of Indigenous people working in the justice system. For example, Joanne Atkinson, the executive officer of the Hume Regional Aboriginal Justice Advisory Committee (RAJAC) in Victoria, made the comment that: 'We want the Koori Court to set a standard of acceptable behaviour in our community, and that's where the Elders are involved, to help us find the answers' (VDOJ 2002:9). Despite this endorsement of the role of Elders as a basis for determining standards of acceptable behaviour there are a number of potential difficulties. The most obvious difficulty is in finding an appropriate definition of 'respected person' or 'elder'. Where the history of white settlement has resulted in the dispersal of Aboriginal groups there may not be just one tribe or nation. Consequently a person who might be accorded the status of an elder or respected person by one tribe or group, might not necessarily receive the same recognition from other groups. The danger is that pre-existing community tensions might lead to a perception of bias in the appointment of certain persons to the position of 'elder' and their role might subsequently become politicized and divisive.

A 1984 report on the experience of the Western Australian Justice of the Peace scheme further illustrates certain of these problems. The experience of the Aboriginal JPs in the Western Australian scheme was further complicated by the very real conflict between implementing the provisions of the *Aboriginal Communities Act* and the obligations that might exist under tribal law, but nonetheless has relevance for the Aboriginal communities in the south-east of the continent. Essentially a problem arose because the Aboriginal communities involved in the Justice of the Peace program still included the organisation of society based upon 'skin' sections, which defined the kinship structure and social obligations. Hoddinott's report noted that many JPs originally took on the office believing it would promote greater cohesion within the community, but found that the opposite effect occurred. One example is cited by Hoddinott where a JP stated:

Every time I go to the court I get sick in my stomach. When I sentence my people I got to be easy — he my 'lation (relation). It would be better to go back to one law for all people (Hoddinott 1985:36).

The conflict between familial or 'skin' ties and the requirement that the JPs enforce the provisions of the Act was clearly the cause of a great deal of concern amongst the Aboriginal JPs. While there may not be the same strict kinship ties in other parts of Australia, the kinship systems of their ancestors remain in operation, to varying degrees (Bourke & Edwards 1994:112). Importantly the role of the Aboriginal JPs under the WA *Aboriginal Communities Act* can be distinguished from the current initiatives in SA, Victoria, New South Wales and Queensland in that the community representation is only there to advise the Magistrate as to sentencing of the offenders and their role does not

require any determination of guilt. Significantly the review of the Nowra Circle Sentencing Court included the observation (Potas et al. 2003:44) that the 'Participants often earmarked the strong advice and cultural knowledge of Aboriginal Elders as the greatest strength of the ... process'.

Within the wider community the most common concerns expressed about the operations of the Aboriginal courts is that they represent some form of 'special treatment' for Indigenous offenders (Queensland Hansard 2000:3538) When the amendments to the Queensland legislation were proposed, for example, the debate in Parliament saw the move criticised as being 'special treatment'. Within the legal profession opinions are divided as to whether the recognition of Indigenous courts is a de facto recognition of the rights of Indigenous peoples to have a separate system of justice, which would in turn prompt calls from other minority racial or cultural groups for similar provision to be made for their particular beliefs. At the announcement of special Aboriginal magistrate's court for southeast Queensland, Tony Fitzgerald QC observed that it was not an example of preferential treatment for Indigenous people (Smith 2002:6). Fitzgerald noted that the circumstances of indigenous people made them more than just another disadvantaged group in society and that the present plight of Indigenous Australians is 'directly attributable to their invasion, dispossession and subsequent treatment by the mainstream society'. In Victoria David Galbally QC (2003:10) presented the opposite opinion, arguing that the creation of a separate Koori Court would be seen by the general community as 'giving a special advantage to indigenous people'. Reform to the *Sentencing Act*, according to Galbally, would be a far more appropriate method of dealing with the cultural factors and differences that arise in a multicultural society.

Without discounting the significance of the establishment of Aboriginal Courts there are a number of other implications that flow from their creation. It could be argued that the Aboriginal Courts replace the potential for a true system of Indigenous law with a model that is acceptable to the non-Indigenous legal system, but is not really a true representation of Indigenous beliefs. An analogy for the creation of such a hybrid form of Indigenous justice can be drawn from the comments of Sharon Payne (1992) who observed in reference to the use of traditional law as justification for violence against women that there were three types of law in Indigenous communities: Australian law, traditional law and 'bull-shit' traditional law. In making this distinction Payne was referring to the manner in which legal counsel had couched the actions of their client in terms of traditionally sanctioned actions (Eames 1994). The courts' acceptance that this is a legitimate manifestation of 'traditional law' is criticised by Payne for creating an artificial form of traditional law, the recognition of which further serves to erode the authority of the real traditional Indigenous law.

While Payne's criticism of the 'bull-shit' traditional law quite rightly repudiates the representations by non-Indigenous lawyers of what is 'real' traditional law, there is arguably another dimension to the systems of law that are of relevance to Indigenous communities. The presumption that there can only be two systems of viable law applicable to Indigenous communities effectively essentialises all Indigenous communities as having a body of extant, functioning traditional or customary law. While that is certainly the case in some communities, the danger is that those communities without such a body of customary law are either expected to produce a system of beliefs and values consistent with such customary law or, alternatively, adhere solely to the Australian legal system. Such an approach denies the possibility that there may be circumstances where neither system of law is effective or relevant for Indigenous communities. As Miller (2000:203) has criticised:

... the importation of non-local alternative dispute resolution models of aboriginal justice, promoted by the state as an effective means of quickly and cheaply diverting a portion of the problems of justice to aboriginal communities, remains a threat to communities developing their own programs.

The comments by Miller, made in relation to the operation of a number of Indigenous justice programs in British Columbia, Canada and Washington State, are pertinent for the Australian experience in that they caution against the development of a generic form of Indigenous justice, without reference to the specific needs of particular communities. The responses of the communities that have been involved in the Australian Aboriginal Courts would seem to suggest, however, that there is no danger that the programs currently operating have ignored their opinions and beliefs. As the review of the Nowra Circle Sentencing model has observed (Potas et al. 2000:51): 'The sentences that are developed are clearly developed as a collaboration between the court and the local Aboriginal community, and are increasingly involving local community resources and elements of local Aboriginal culture'.

In a similar vein, Gant and Grabosky (2000:44-5) argue that the development of Aboriginal community justice groups in Kowanyama and Palm Island in Queensland were particularly effective to combat the high levels of personal and property crime in those communities. They argue that the development of community justice groups proved successful where both traditional mechanisms for dealing with Indigenous offenders and the non-Indigenous justice system had both failed. It is a point which is echoed by Hazlehurst (1987) who observes that involvement of Aboriginal people in the criminal justice system and the development of community based options are integral to the re-empowerment of Aboriginal communities. The importance of community involvement for the successful implementation of justice measures presents a dilemma for the Aboriginal Courts models that are being implemented. In at least a number of the current programs there is what Miller has termed the 'imported non-local alternative dispute resolution model of aboriginal justice'. Certainly it could be argued that there is a strong community element in some of the Courts that are functioning, in the sentencing circles in Nowra, NSW and perhaps the Koori Court in Shepparton in Victoria.

Borrowing from the Canadian experience again it is perhaps the case that community based initiatives will be most effective in rural communities, where there is a greater prospect for there to be a shared cultural or tribal heritage (Nightingale 1997). When the introduction of the Aboriginal Courts occurs in a locality, with a strongly developed sense of community or tradition then it is arguable that the Courts will succeed because they will draw from the existing Aboriginal community social mores. It should not be thought, however, that urban Indigenous communities should necessarily be considered to be without a surviving cultural tradition. The New South Wales Law Reform Commission (2000:para 3.7f) has noted, for example, in reference to the continuing practice of customary law, the extent of conflicting views. The Commission observed on the one hand that 'even in urban areas there are discrete and strong Aboriginal communities with authority vested in an elder or elders', then goes on to acknowledge the existence of a contrary view that:

... because of the extent of assimilation of New South Wales' Aboriginal population into the general population ... very few elders have the required respect of their communities, or the requisite knowledge and learning.

Clearly the extent to which cultural practices continue in Indigenous communities will vary around the country and there will be dispute as to the extent of the survival of such practices.

The implementation of the Aboriginal Justice Agreements that preceded the introduction of Aboriginal Courts in Queensland and Victoria and the New South Wales Government's Statement of Commitment to Aboriginal People (NSWLRC 2000:para 4.10) can at least be seen as a possible alternative avenue for meaningful dialogue to occur between representatives of the Indigenous community and the respective State governments. It is certainly not clear whether success in the current programs will generate momentum to further expand the extent of community involvement to the point where a range of offences might be heard by community members alone. In some sectors of the Indigenous community there is certainly the hope, if not the expectation, that success in the Aboriginal Courts program might result in a more comprehensive recognition of Indigenous community control of community justice mechanisms. This goal was articulated, for example, when the Queensland Justice Agreement initiative to have Aboriginal elders advise the Courts on sentencing matters was announced. Ray Robinson, the ATSIC Commissioner for the region, applauded the move but called on the Queensland government to also recognise Aboriginal customary law (Koori Mail 2001:10).

The likelihood of such programs being further expanded in this way remains dubious however, given the criticism that the current initiatives have attracted for being 'special treatment' for Indigenous offenders. The opposition to any recognition of Aboriginal customary law must also be seen in the context of the argument that the recognition of Indigenous justice systems is, of necessity, recognition of the survival of Aboriginal sovereignty. During the last twelve months the current Federal government has given every indication that it will continue its assault upon any Indigenous claims to self-determination.

Conclusion

The Aboriginal Courts programs are still in their infancy but it is clear that their future survival and development will have implications for Indigenous Australians that go far beyond their impact in the criminal justice system. The development of Indigenous justice programs has the potential to have a profound impact upon the future of relations between Indigenous and non-Indigenous Australians. While recognising the potential of the Aboriginal Courts to make the existing criminal justice systems more responsive to the needs of Indigenous communities, without requiring a fundamental change to the existing processes, it should be emphasised that the Courts have a very limited range of operation and they are essentially, still part of the non-Indigenous system. In considering the possibility for Aboriginal Courts to develop their operation it is worth remembering that it was only in 1991 that the Victorian Courts Management Change Program resulted in the introduction of an Aboriginal cross cultural awareness training program (Gidley 1991). Similarly it was not until 1992 in Queensland the proposal that the position of Aboriginal Assistant of the Court be created was put forward (Fraser 1993). In a little over a decade these initial tentative proposals have not only been implemented but also have given rise to increased involvement and participation by Indigenous Australians in various aspects of the sentencing process.

In light of these gradual changes it is perhaps not too far fetched to consider that the introduction of Aboriginal courts may give rise to greater recognition of forms of Indigenous customary law within the Australian legal system. In the eyes of the NSW AJAC, for example, the introduction of the sentencing circle trial at Nowra has been hailed as an example of the 'practical recognition of customary law'. In the period since the Aboriginal Courts program first commenced operation there has been widespread interest in the proposal. In April 2003 Michael Mansell, the president of the Tasmanian Aboriginal

Centre (TAC) supported the introduction of a trial Aboriginal Court in that State, along the lines of the Victorian system. Mansell observed: 'there's no reason why that model can't be further adopted throughout Australia and particularly in Tasmania' (Condie 2003:21). In March 2004 it was announced that a system of circle sentencing would be introduced in the ACT, with the Ngambra Circle sentencing program hearing cases involving both adult and juvenile offenders (Giles 2004:10).

While the recognition of Aboriginal law may remain an unattainable goal in certain parts of Australia, the task remains to ensure that the momentum of the Aboriginal courts transforms the relationships that exist between Indigenous and non-Indigenous Australians both in the criminal justice system and also in the broader context of society itself. Failure to do so will perpetuate the cycle of over-representation of Aboriginal offenders in the nation's jails and will certainly spell the end of any dreams for true reconciliation.

LIST OF CASES

Harradine v R (1991) 61 A Crim R 201.

Munugurr v R (1994) 4 NTLR 63.

Neal v R (1982) 149 CLR 305.

Pearce v R (1983) 9 A Crim R 146.

R v Carberry [2000] ACTSC 60.

R v Churchill (Unreported, Supreme Court of Western Australia, No. 160/1998, Owen J, 6 October 1998).

R v Fuller-Cust [2002] VSCA 168 [91].

R v Miyatatawuy (1996) 6 NTLR 44.

R v Roberts [2002] QCA 105 (20 March 2002).

Robertson v Flood (1992) 111 FLR 177.

REFERENCES

ABS (Australian Bureau of Statistics) *Prisoners in Australia*, ABS Catalogue no 4517.0.

AJAC (2003) *E-News*, No. 47, June, at <<http://www.lawlink.nsw.gov.au/ajac.nsf/pages/enews>>.

ALRC (Australian Law Reform Commission) (1986) *Report into the Recognition of Aboriginal Customary Laws Vol.2*, AGPS, Canberra.

ATSIJSJ (1995) *Social Justice Report*, HREOC, Canberra.

Auty, K (2000) 'Western Australian Courts on Native Affairs 1936-1954: One of "Our" Little Secrets in the Administration of Justice for Aboriginal People', *University of NSW Law Journal*, vol 23, no 1, p 148.

Bourke, C & Edwards, B (1994) 'Family and Kinship' in Bourke C, Bourke, E & Edwards, B (eds) *Aboriginal Australia*, UQP, St Lucia, p 112.

- Boxall, K (2000) 'A Court with both Relevance and Tradition — the Aboriginal Court'. *Victims Voice*, vol 21, no 4, at <www.adelaide.net.au/~victimsa/>.
- Condie, T (2003) 'TAC calls for "Koori court"', *Koori Mail*, 23 April, p 21.
- Cunneen, C (1992) 'Judicial Racism' in McKillop, S (ed) *Aboriginal Justice Issues AIC Conference Proceedings No 21*, AIC, Canberra, p 117.
- Cunneen, C (2001) *Conflict, Politics and Crime: Aboriginal Communities and the Police*. Allen & Unwin, Crows Nest, NSW.
- Debelle, P (2000) 'White fella's justice gets a new hearing', *Age News Extra*, 29 July, p 3.
- Eames, G (1993) 'Aboriginal homicide: customary law defences or customary lawyers' defences?' in Strang, H & Gerull, S (eds) *Homicide: patterns, prevention and control: proceedings of a conference held 12–14 May 1992*, AIC, Canberra, pp 149–165.
- Forde, S (2000) 'New Qld law allows for Elders' input', *Koori Mail*, 15 November, p 13.
- Fraser, L (1993) 'Aboriginal people and the courts' in McKillop, S (ed) *Aboriginal justice issues: proceedings of a conference held 23–25 June 1992*, AIC, Canberra, pp 135–138.
- Galbally, D (2003) 'Koori Court divisive', *Law Institute Journal*, vol 77, no 5, p 10.
- Gant, F & Grabosky, P (2000) 'Community justice groups: Kowanyama and Palm Island' in *The Promise of Crime Prevention*, AIC, Canberra, p 44.
- Gidley, J (1991) 'Organisational developments in Victorian Magistrate's Court', *Papers presented at the second biennial AIJA Magistrates' Courts' Administrators and Senior Clerks of Court Conference*, AIJA, Carlton South.
- Giles, T (2004) 'ACT to join court circle sentencing', *National Indigenous Times*, 17 March, p 10.
- Hazlehurst, K (1987) 'Widening the middle ground: the development of community based options' in Hazlehurst, K (ed) *Ivory Scales: black Australia and the law*, NSW University Press, Kensington, NSW, pp 241–281.
- Hoddinott, A (1985) *That's 'Gardia' business: an evaluation of the Aboriginal Justice of the Peace Scheme in Western Australia*, A Hoddinott, Perth.
- Johnston, E (1991) *Royal Commission into Aboriginal Deaths in Custody Final Report*, AGPS, Canberra.
- Koori Mail (2001) 'Queensland move to cut prisoner numbers', *Koori Mail*, 10 January.
- McNamara, L (2000) 'Indigenous Community Participation in the Sentencing of Criminal Offenders: Circle Sentencing', vol 5, no 4, *Indigenous Law Bulletin*, pp 5–10.
- Miller, B (2000) *The Problem of Justice: Tradition and Law in the Coast Salish World*, University of Nebraska Press, Lincoln.
- Morse B (1988) in Morse, B & Woodman, G (eds) *Indigenous Law and the State*, Foris, Dordrecht, Holland.

- Moss, A (2000) 'South Australian Court Diversion Programs — A Victim Perspective', *Victims of Crime Conference*, 25 May, <www.victimsa.org/conference.chief-magistrates.htm>.
- Nightingale, J (1997) 'Community based sentencing of Aboriginal offenders: some thoughts on the Canadian experience', *Judicial Officers Bulletin*, vol 9, no 7, pp 49–51.
- NSW AJAC, (no date) *Strengthening Community Justice*.
- NSWLRC (New South Wales Law Reform Commission) (2000), *Sentencing Aboriginal Offenders*, Report 96.
- Payne, S (1992) 'Aboriginal Women and the Law' in Cunneen, C (ed) *Aboriginal Perspectives in Criminal Justice*, Sydney University Institute of Criminology, Sydney.
- Potas, I, Smart, J, Brignell, G, Thomas, B & Lawrie, R. (2003) *Circle Sentencing in New South Wales: A review and evaluation*, Judicial Commission of NSW, Sydney.
- Queensland Government (2001) *Queensland Aboriginal and Torres Strait Islander Justice Agreement*.
- Sheil, F (2004) 'Koori Court plan to curb youth crime', *Age*, 4 March, p 9.
- Smith, K (2002) 'Fitzgerald defends Aboriginal court plan', *Courier Mail*, 12 June, p 6.
- VAJAC (2000) *Victorian Aboriginal Justice Agreement*, Melbourne, Victorian Dept of Justice.
- Victorian Department of Justice (1999) *Victorian Aboriginal Justice Agreement*, Victorian Department of Justice, Melbourne.
- Victorian Department of Justice, (2002) 'Focus on Shepparton', *Koori Justice*, no 1, p 9.
- Williams, V (2003) *Background Paper on the approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family, Law*. Law Reform Commission of Western Australia, Perth.