

Victorian Aboriginal Justice Agreement



“A Sentencing Conversation”
Evaluation of the Koori Courts
Pilot Program
October 2002 – October 2004

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March 2006

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ACKNOWLEDGMENTS

This report would not have been possible without the assistance of a great many people, not least the staff who work within the Koori Court. The Koori Court workers, Daniel Briggs and Terrie Stewart were always willing to provide information or discuss the progress of the courts, despite their arduous work commitments. The insights provided by Daniel and Terrie made it possible to appreciate the complexities of the Koori Court. The Magistrates were also supportive and keen to assist in this research project. In particular I would mention the contribution of Dr Kate Auty who was so instrumental to the establishment of the Court. The Court staff at Shepparton Koori Court, particularly Kerry Thompson the Koori Court Registrar and Peter Mithen the Senior Registrar, provided access to information and data without which this report would not have been possible. The Senior Registrar for the Broadmeadows Court Don Gear was also very helpful in gaining access to required information. The Elders and Respected Persons were also generous in giving me time to discuss their experiences of the Koori Court. The difficulties gaining access to data might have proven insurmountable but for the expertise and professionalism of the Department of Justice staff who provided so much invaluable assistance. In particular Sarah Gebert from the Department of Justice, Criminal Law Policy Unit, was a great source of information and expertise, gaining access to information and data and providing wonderful editorial support. I was also given wonderful support by her co-workers, Rosemary Coombs and Rosemary Smith, such that the DOJ staff made the task of finalising this report infinitely less painful than it might otherwise have been. I would also like to acknowledge those persons who made personal submissions and shared with me their experience of working on the Koori Court reference group, particularly Sergeant Gordon Porter and Ms Sue I'Anson. The assistance of Ms Ann Bruce, Senior Data Analyst, from Corrections Victoria in providing data was also particularly helpful. Finally, Associate Professor Roger Douglas from the La Trobe Law School provided invaluable assistance in the interpretation of re-offending data while Deputy Chief Magistrate Paul Grant was extremely generous in offering comments during the preparation of the final draft of this report.

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EXECUTIVE SUMMARY

The Koori Court first sat at Shepparton on 7 October 2002, following the passage of the *Magistrates' Court (Koori Court) Act 2002*. Some six months later the Broadmeadows Koori Court commenced sitting as the first Metropolitan Koori Court. A third Koori Court has subsequently been established that sits in the south-west of the State at Warrnamabool. This report is an evaluation conducted over two years of the operation of the Shepparton (two years) and Broadmeadows (18 months) Koori Courts and provides a background to the creation of the Courts, a description of the process and procedures, an evaluation of their success in meeting specified goals and makes recommendations as to the future introduction of the Koori Court model. During the review period the Shepparton and Broadmeadows Koori Courts have finalised, respectively, 167 and 90 matters. The bulk of the offences that have been dealt with in both courts have been traffic and property offences (predominantly theft). The major sentencing dispositions have been the use of Fines, Good Behaviour Bonds and Community Based Orders. It is clear that in virtually all of the stated aims of the Koori Court pilot program, it has been resounding success. Specifically the Koori Courts have:

- Reduced the levels of recidivism amongst Koori defendants, which in turn has direct ramifications for the levels of over-representation within the prison system. The Shepparton Koori Court had a recidivism rate of approximately 12.5% for the two years of the pilot program and the Broadmeadows Koori Court's re-offending rate was approximately 15.5%. Both of these figures are significantly less than the general level of recidivism which is put at 29.4¹ %;
- Achieved reductions in the breach rates for community corrections orders and the rates of Koori defendants failing to appear for their court dates;
- Increased the level of Koori community participation in, and ownership of, the administration of law;

¹ A full discussion regarding this data is found in section 5.2

- Provided a forum for the sentencing of defendants that is less alienating for them and which has allowed them to give their account of the reasons for their re-offending;
- Provided a mechanism whereby the sentencing process takes account of cultural considerations;
- Developed a particularly effective means of integrating the various service providers who might be involved in the tailoring of community based orders;
- Reinforced the status and authority of Elders and Respected Persons, thereby strengthening the Koori community; and
- Effectively broadcast the vision of the Koori Courts, such that they have received support from some sectors that had previously been sceptical about initiatives such as the Koori Court.

Given the success of the Koori Court pilot at both Shepparton and Broadmeadows it is the recommendation of this review that the model should now be extended to allow other Koori communities throughout Victoria to have access to this initiative.

SUMMARY OF RECOMMENDATIONS

Recommendation One

That the Victorian Government should enact legislation to ensure that the Koori Courts continue to operate beyond the period specified by the sunset clause in the original legislation.

Recommendation Two

The introduction of an integrated computerised information system is crucial for any effective evaluation of the Koori Court initiative (and any other subsequent Koori justice initiatives). The introduction of discrete Koori Court defendant identifiers in the COURTLINK program should be matched by, if necessary, amendments to the LEAP data fields to ensure consistency in the identification of Indigenous defendants. This

would include making the COURTLINK Indigenous identifier being made mandatory for LEAP data. The exclusion of traffic offences from LEAP should also be reviewed.

Recommendation Three

The procedures of the Koori Court ensure that the statement of recognition of the traditional owners is made at the commencement of each individual matter in the Court.

Recommendation Four

That the choice of Koori Court Magistrate is critical to the success of the Koori Court. It is therefore imperative that Magistrates appointed should have either some previous experience working with Indigenous people or have undergone a cross-cultural awareness training in Indigenous issues in a manner that is consistent with Recommendation 96 of the *Royal Commission into Aboriginal Deaths in Custody*.

Recommendation Five

That the Department of Justice and the Magistrates' Court examine the possibility of the creation of a bench-book for the Koori Court to assist in the establishment of newly created Courts and to ensure a level of consistency in all Koori Courts, both existing and future.

Recommendation Six

That all Koori Courts, both existing and future, should have access to an Indigenous Community Corrections Officer. That Community Correctional Services should implement a comprehensive cross-cultural awareness training program for all non-Indigenous Corrections Officers. Indigenous offenders should only be supervised by either Community Corrections Officers who have undertaken such training or by an Indigenous Community Corrections Officer.

Recommendation Seven

That the Department of Justice should persevere with the goal of establishing the Koori Justice Panel in all Koori Court locations but that the personnel of the Panels should not

include the Koori Court Officer or Aboriginal Elders or Respected Persons from the Court.

Recommendation Eight

That consideration should be given to the creation of the position of Koori Court Registrar for the Broadmeadows Koori Court, and any other Koori Courts that are subsequently established.

Recommendation Nine

A review should be undertaken of the programs and services that are currently being utilised by the Koori Court. This should include, but not be limited to, drug and alcohol treatment programs, mentoring schemes, the provision of housing and access to the Victorian Aboriginal Legal Service. The review should consider the adequacy of current funding levels for such programs and services and the consequences, if any, of their providing services to the Koori Court.

Recommendation Ten

That the current Koori Court legislation should not be amended so as to include contested matters or “not guilty” pleas. However, the defendant should be given the option of having the sentencing phase of the matter heard in the Koori Court after a guilty verdict has been handed down.

Recommendation Eleven

If Recommendation Ten is implemented, the eligibility of defendants who have been found guilty of an offence that can be dealt with by the Koori Court could be assessed by the Aboriginal Elders and Respected Persons and the presiding Magistrate. The DOJ should undertake further discussion with the relevant persons to develop policy and procedure to accompany this new category of defendants who will be eligible to be heard in the Koori Court.

Recommendation Twelve

That the current exclusion from the Koori Court jurisdiction of sexual offences as defined by s.6B(1) of the *Sentencing Act 1991* be retained. The current exclusion of offences under section 22 of the *Crimes(Family Violence) Act 1987* should also be retained.

Recommendation Thirteen

That in view of the Koori Court and Criminal Justice Diversion Program (CJDP) legislation, the CJDP be incorporated into the Koori Court proceedings as an essential component of the pre-sentencing phase, thereby reducing the number of prior convictions on the record of Koori defendants.

Recommendation Fourteen

The Koori Court model should be extended throughout Victoria so as to provide access to the Court to all Victorian Koori community members.

Recommendation Fifteen

A position of co-ordinating Magistrate for the Koori Court Division should be created.

Recommendation Sixteen

That the Koori Court be extended to service unmet demand in the Metropolitan area. To ascertain the appropriate locations of future metropolitan based Koori Court Divisions, the DOJ should undertake further analysis and facilitate consultations across the metropolitan area.

Recommendation Seventeen

That a Koori Court be established at Echuca to sit as part of a circuit, along with the existing court at Shepparton. Alternatively, Koori defendants at Echuca Magistrates' Court should be able to have their matters listed for Shepparton Koori Court.

Recommendation Eighteen

To adequately maintain the existing Koori Courts in Victoria and to ensure that all future Koori Courts are adequately funded, the DOJ should undertake a cost analysis across all relevant Departments to ascertain the actual cost of maintaining Koori Courts.

Recommendation Nineteen

A steering committee should be formed to oversee the on-going administration and development of Koori courts. This committee should comprise representatives of the Koori community and the relevant government departments and other appropriate personnel from the existing Koori Courts. The committee should provide a central agency to evaluate the operations of all Koori Courts annually. The committee should convene meetings of all Koori Court Officers and Aboriginal Elders or Respected Persons on an annual basis. In addition there should be ongoing statistical monitoring in relation to Koori Court matters, every two years.

INTRODUCTION

The title of this review, *A Sentencing Conversation*, was inspired by a comment from Dr Kate Auty, formerly the Magistrate at Shepparton Koori Court and one of the key reasons for the pilot program's resounding success. In describing the Koori Court as a "sentencing conversation" she was, I believe, emphasizing the manner in which the traditional mode of operation of Magistrates' Courts has been radically transformed. From sentencing as a monologue, delivered with little, if any, involvement by the defendant, the Koori Courts have created a space where the stories behind the offences can be told and the important part of community in the life of the defendant can be recognised. Given the historical role of the courts in disempowering Indigenous Australians and presenting them only as the object, the criminal "other", the Koori Court has opened up the possibility for other voices to be heard. Writing on the representations made of Indigenous Australians by non-Indigenous Australians, Professor Marcia Langton has argued that the only true representations of Indigenous Australians can occur when there is inter-subjectivity; when the relationship is effectively based upon a conversation between parties on an equal footing.² The Koori Court is an example of this in that the sentencing conversation involves the Magistrate talking to the Elders and Respected Persons, the Elders and Respected Persons addressing the defendant, the defendant being able to give their account, and members of the Koori community having the opportunity to speak up. Marchetti and Daly put it another way, describing it as where "the black robe appears to be deferring to the black face and, at the same time Indigenous people are embracing portions of white law."³ The narrative that is assembled often goes far beyond what might be deemed relevant for usual Magistrates' Court proceedings, but it is in the detail of these stories that the possibility for real resolution of the defendant's behaviour may be found. Lest it be thought that the focus upon the dialogic nature of Koori Court is a privileging of abstract and intangible justice outcomes above more tangible outcomes, it should be emphasised that the Koori Court is clearly working. Not

² Langton, M. *Well I heard it on the radio and I saw it on the television*,

³ Marchetti, E. & Daly, K. (2004). Indigenous Courts and Justice Practices in Australia. *AIC Trends and Issues*, No 277, 5.

only are there anecdotal examples of the Koori Court making a difference in the patterns of offending behaviour or life choices of some who come before it, but its success is also evident in the lower rates of recidivism. While it is only early days, the data from both the Shepparton and Broadmeadows Koori Courts indicates a rate of re-offending that is substantially less than that of the general population figures for recidivism. The general figure of recidivism of 29.4 % used for this review was derived from the Report on Government Services for 2003-4. By comparison the Koori Court re-offending rate for Shepparton was approximately 12.5% and for Broadmeadows it was approximately 15.5%. These statistics are a clear confirmation that the Koori Court model works, particularly when considered in light of the increasing rates of incarceration of Indigenous people in Victoria over the last 12 months. Notwithstanding the success of the Koori Court in keeping people out of gaol and reducing the levels of re-offending, it seems clear that ultimately the major achievement of the Koori Court will be the manner in which it has served to increase Indigenous community participation in the justice system and recognised the status of Elders and Respected Persons. The Koori Courts are not an example of Indigenous law being applied within the non-Indigenous legal system, but they do give due recognition and respect to cultural considerations and as such can be seen as a positive step towards achieving a fair equitable justice system for Kooris in Victoria.

CHAPTER ONE: BACKGROUND

1.1 *Background to the Establishment of the Koori Courts*

The Koori Court model arose as an initiative of the Victorian Aboriginal Justice Agreement (VAJA), which was an agreement concluded in June 2000 between various State Government departments and a number of key Victorian Koori organisations. The VAJA was, in turn, a response to the issues and recommendations raised by the Royal Commission into Aboriginal Deaths in Custody. The aim of the VAJA was:

To minimise Indigenous over-representation in the criminal justice system by improving accessibility, utilisation and effectiveness of justice-related programs and services in partnership with the Aboriginal community.⁴

In effect the VAJA constitutes a commitment to a form of what Attorney-General Rob Hulls terms “true reconciliation” and is designed to ensure that “Indigenous Australians should have access to the same rights and experience the same justice outcomes as other Victorians.”⁵ The VAJA seeks to co-ordinate the service provision across all areas of government, not just the justice area, to ensure that the underlying causes of Indigenous over-representation are addressed. The VAJA’s six strategic objectives include:

1. Increase community participation.
2. Develop culturally appropriate programs and services.
3. Develop a co-ordinated and strategic approach.
4. Deliver fair and equitable justice services for Aboriginal people.
5. Increase community safety, security and wellbeing.
6. Reduce the risk of involvement of Aboriginal children and youth in the criminal justice system.

Following the signing of the VAJA the responsibility for the implementation of the agreement was given to the Indigenous Issues Unit within the Department of Justice.

⁴ Victorian Aboriginal Justice Agreement (VAJA), p. 25

⁵ VAJA p. 3

Funding was directed from the State Government for the various VAJA initiatives, including the Koori Court proposal. The Criminal Law Policy Section (formerly Legal Policy) of the Department of Justice was made responsible for the development of the legislation required for the implementation of the Koori Court. The Criminal Law Policy section employed an Indigenous Project Manager in 2001 and a Working Group was formed to facilitate the development of the Court. The Statewide Working Group consulted extensively with the Aboriginal Justice Forum during this phase. The Aboriginal Justice Forum comprises representatives from a range of Aboriginal community organisations and also key government departments. In April 2002 the Aboriginal Justice Forum decided that the first Koori Court would be located at Shepparton and it was also determined that a metropolitan Court would be established at Broadmeadows. The legislation, which allowed for the establishment of the Koori Court Division, received Royal Assent on 12 June 2002.

1.2 The Koori Court Legislation

1.2.1 Aims of the Koori Court pilot program

The Koori Court has several operational and community building aims. These can be summarised as:

Criminal justice aims:

- To divert Koori defendants away from imprisonment to reduce their over-representation in the prison system.
- To reduce the failure to appear at Court.
- To decrease the rates at which Court orders are breached.
- To deter crime in the community generally.

Community building aims:

- To increase indigenous community ownership of the administration of law.
- To increase positive participation by Koori defendants and community.
- To increase accountability of the Koori community families for Koori defendants.

- To promote and increase community awareness about community codes of conduct/standards of behaviour.
- To promote and increase community awareness about the Koori Court generally.

The *Magistrates' Court (Koori Court) Act 2002* provides for the establishment of the Koori Court Division of the Magistrates' Court and has the objective of "ensuring greater participation of the Aboriginal community in the sentencing process of the Magistrates' Court through the role to be played in that process by the Aboriginal Elder or Respected Person." The Koori Court is required to sit with as little formality and technicality as is possible and is required to take steps that ensure that the defendant, the defendant's family or any member of the Koori community who might be present can comprehend what is happening. The jurisdiction of the Koori Court is limited to Aboriginal defendants who plead guilty to an offence within the jurisdiction of the Magistrates' Court. The Koori Court is excluded from hearing sexual offences or breaches of intervention orders. Provision is made for the defendant to seek, subject to the court rules, to have their matter heard in the Koori Court. Any sentencing order made in the Koori Court is given by the presiding Magistrate. However, the Magistrate is required to consider any oral statement made by an Aboriginal Elder or Respected Person and may draw from a range of persons for submissions on appropriate dispositions. There is a degree of flexibility within the Koori Court legislation that provides for the Chief Magistrate, along with two or more Deputy Chief Magistrates, to make rules for the court relating to practice and procedure and the transfer of proceedings to and from the Koori Court Division. The legislation also incorporated at section 10 a sunset clause for the operation of the Court, which comes into effect on 1 July 2005. Given the success of the pilot program of the Koori Courts at Shepparton and Broadmeadows it would seem that confirming legislation is required to ensure that the Koori Courts model can continue to operate beyond the date of the sunset clauses.

Recommendation One

That the Victorian Government should enact legislation to ensure that the Koori Courts continue to operate beyond the period specified by the sunset clause in the original legislation

1.2.2 Role of the Local Reference Group in establishing the Court

The task of implementing the Koori Court's operation at the local level was passed to a Local Reference Group in Shepparton comprising those persons and departments who it was expected would be involved in its operation. These included Magistrate Kate Auty, the Koori Court Officer Daniel Briggs, the local police Prosecutor, Sergeant Gordon Porter, Court Registrars, Corrections, Victims Services and local Aboriginal Co-operatives. The work done by the Reference Group was crucial in addressing a range of issues, including contributing to the development of a Koori Court Operational Manual.

The first meeting of the Reference Group was held on 25 June 2002. The Group was subsequently involved in a wide range of activities as a preliminary to the first sitting of the Koori Court. This included the group members travelling to South Australia to meet with the South Australian Indigenous Court (the Nunga Court) to observe the operation of the similar scheme. At least one member of the Reference Group noted that they were forced to confront entrenched cultures of prejudice at a range of levels, including both their own organisations and in the wider community of the Shepparton region. The Reference Group was able to draw from the different areas of expertise to create a harmonious and positive working group that provided invaluable guidance in the establishment of the Shepparton Koori Court. One of the most significant contributions of the Shepparton Koori Court Reference Group was the creation of an Operational Manual for the Court which was developed in consultation with staff from the Criminal Law Policy Division of the Department of Justice. On 7 October 2002 the Koori Court at Shepparton sat for the first time.

In November 2002 the Local Reference Group was established to oversee the establishment of the Broadmeadows Koori Court and the Court was launched in March 2003. The first sitting of the Broadmeadows Koori Court was held on 1 April 2003.

1.3 Koori Court Evaluation Project

The overall objectives of the proposed Koori Court pilot program evaluation are:

- To determine effectiveness in relation to the stated aims of the Koori Court Pilot Program;
- To gather information to support future policy development and decision making about the Koori Court; and
- To review the policy and where appropriate legislative framework underlying the program to inform the development of future initiatives.

Related objectives of the evaluation are to determine whether the establishment and operation of the Koori Court:

- Has reduced over-representation of Aboriginals in the criminal justice system;
- Improved Aboriginal access to justice-related services; and
- Promoted greater awareness in the Aboriginal community of their civil, legal and political rights.

Additional objectives may include:

- To examine the Koori Court and the relationship between this and other Aboriginal programs;
- Assess the effectiveness of the Koori Court in addressing offending behaviour by Aboriginal people; and
- Identify any gaps or overlaps between the initiative and others with particular reference to the eligibility criteria and target groups.

In December 2003 an interim evaluation report on the operation of the Shepparton and Broadmeadows Koori Courts was given to the Department of Justice. The main purpose

of the interim evaluation report was to provide a description of the process in the Koori Courts but also to invite discussion and comment from those persons involved in either the establishment of the Courts or the day to day administration once they had been established. The report made 20 recommendations (see Appendix Two) that touched upon issues such as the need for appropriate resources, the importance of cultural awareness training for those personnel who are involved in Koori Court proceedings and the extension of the Koori Court program, both to other areas in Victoria and to the juvenile justice sector. It is useful to note that there has been progress in relation to the implementation of those recommendations: the appointment of further Aboriginal Elders or Respected Persons to sit with Shepparton and Broadmeadows Koori Courts including the appointment of a Wurundjeri person to sit with the Broadmeadows Koori Court⁶, the proposed establishment of Koori Court Divisions in the Murray Valley region and the Gippsland region over 2005⁷, and the extension of the Koori Court to the Children's Court division which commenced with the passage of the *Children and Young Persons (Koori Court) Act 2004*.⁸

1.4 Methodology & Collection of Data

1.4.1 Data used in the review

The data which formed the basis of this report was drawn from a range of sources. These included the case records collected by the Koori Court Officers, data collected by the Office of Corrections regarding corrections orders, court records on the original defendants provided through COURTLINK, and information from LEAP showing the rates of arrest of Indigenous defendants throughout Victoria. At the commencement of this review it was hoped that a new software program would be introduced that would allow the discrete statistics for the Koori Court to be identified. Unfortunately, the original attempt at its production needed to be rewritten during 2004. It became operational on 17 February 2005. Consequently, at the present time there is not one central computerised information management system that allows access to data relating

⁶ Recommendations 8 and 9

⁷ Recommendation 15

⁸ Recommendations 16 and 17

to Koori Court defendants and which integrates the data relating to defendants from the point of arrest, through the court appearance to the outcome of sentencing dispositions (such as breaches of orders).

From 2 July 2004 COURTLINK started to receive an Indigenous status code from the Police LEAP database for briefs sent electronically. The codes would include identifiers for defendants who are either: Aboriginal, Torres Strait Islander, Both Aboriginal and Torres Strait Islander, Neither Torres Strait Islander or Aboriginal, or where it is Not Known or Stated. This code is being recorded for statistical purposes and can also be accessed through COURTLINK by making an inquiry into the defendant's details. It should be noted, however, that this field is not mandatory in LEAP. Electronic briefs from LEAP are received in approximately 50% of cases and LEAP does not record traffic offences. COURTLINK data utilising an Indigenous Identifier was therefore not available for this Review.

In future it is proposed that this information will be received as part of the CJEP project for police briefs and will be a mandatory field as part of the police component of E*Justice. The pilot will commence on 1 May 2005 with the roll-out starting in June 2005, with an expected completion date of December 2005.

It is worth noting that the current COURTLINK data-field showing Koori Court attendances has the identifier KC. However, this alters on the computer records where there is a consolidation of matters (which alters the identifier to PG) or where there has been a breach of a Community Based Order (which alters the identifier to BCBO). The effect of the Koori Court identifier being altered by the computer is that it is much more difficult to effectively track defendants and produce reliable data regarding defendants and sentencing outcomes. The introduction of an integrated computerised information system is crucial for any effective evaluation of the Koori Court initiative (and any subsequent Indigenous justice initiatives involving police, courts and corrections). It is therefore important to develop a system that ensures compatibility between the fields of data and identifiers on the LEAP and COURTLINK programs.

Recommendation Two

The introduction of an integrated computerised information system is crucial for any effective evaluation of the Koori Court initiative (and any other subsequent Koori justice initiatives). The introduction of discrete Koori Court offender identifiers in the COURTLINK program should be matched by, if necessary, amendments to the LEAP data fields to ensure consistency in the identification of Indigenous offenders. This would include making the COURTLINK Indigenous identifier being made mandatory for LEAP data. The exclusion of traffic offences from LEAP should also be reviewed.

1.4.2 Interviews conducted

During the course of the evaluation there were a number of community consultation meetings held in Shepparton and Broadmeadows. In addition the reviewer attended a number of meetings of both the Shepparton and Broadmeadows Koori Court Reference Groups. A separate consultation meeting was held with the inmates at the Dame Phyllis Frost Centre.

Those interviews included:

Magistrates

Dr Kate Auty

Ms Angela Bolger

Ms Ann Collins

Mr Bob Kumar

Mr John Murphy

Deputy Chief Magistrate, Mr Paul Grant

Elders/Respected Persons

Mr Paul Atkinson (Shepparton)

Aunty Merle Bamblett (Shepparton)

Uncle Kevin Coombs (Broadmeadows)

Aunty Norma Langford (Broadmeadows)

Uncle George Nelson (Shepparton)

Uncle Colin Walker (Shepparton)

Aunty Rochelle Patten (Shepparton)

Koori Court Officers

Daniel Briggs

Terrie Stewart

Police Prosecutors

Sergeant Steve Lythgow (Broadmeadows)

Sergeant Gordon Porter (Shepparton)

Defence Solicitors

Kimberley Bott, Victorian Aboriginal Legal Service

Tim Whitehead, Victorian Aboriginal Legal Service

Dominico Calabro, Victoria Legal Aid

Community Corrections

Trevor Barker, ICCO

Sandra Roberts, Senior Community Corrections Officer

Geoff Cornell, Location Manager

RAJAC Executive and staff

Tanya Garling, Hume

Joanne Atkinson, Hume

Linda Bamblett, Metropolitan

Peter Rotumah, Metropolitan

Aboriginal Community Organisations

Paul Briggs, President, Rumbalara Football Netball Club

Justin Mohammed, CEO, Rumbalara Aboriginal Co-operative

Joe Narbluk, Enmaraleek Aboriginal Co-operative

Support Services

Mike Gibson, Psychiatric Court Liaison Officer

Court Staff

Don Gear, Senior Registrar, Broadmeadows

Peter Mithen, Senior Registrar, Shepparton

Kerry Thompson, Koori Court Registrar, Shepparton

Victim Representative – Local Reference Group

Sue I'Anson

Department of Justice

Andrew Jackomos, Director, Indigenous Issues Unit

1.5 The Koori Court Process

In considering how the Koori Court differs from normal Magistrates' Court proceedings it is worth noting that the legislation provides that the proceedings are to be conducted with as little formality and technicality as is possible.⁹ The proceedings are conducted around an oval table and the parties present include the Magistrate, the Elders or Respected Persons, the Koori Court Officer, the defendant, the defendant's solicitor, the police prosecutor and a representative of Community Correctional Services. The defendant may be joined by a member of their family or a supporter. The seating of the participants is, according to Magistrate Auty, crucial and is described in the following way:

Defendants sit opposite the Elder or Respected Person and next to the Aboriginal Justice Worker or a family member (or members). The Magistrate sits next to the Elder or Respected Person. It is important that the defendant and Elder sit opposite each other. We noticed in one hearing, where the defendant and Elder were diagonally opposite each other, that the powerful dynamic which the face to face contact generates was watered down. In spite of the lack of the usual ceremonial or distancing dimensions there have been no "security" problems in our court.¹⁰

⁹ Magistrates Court (Koori Court) Act 2002 s.4D(d)

¹⁰ For the most comprehensive analysis of the process and philosophy of the Koori Court see Auty, K. & Briggs, D., Koori Court Victoria – Magistrates' Court (Koori Court) Act 2002, p.11

In commencing proceedings in the Koori Court the Magistrate acknowledges the traditional owners of the country.¹¹ An example of the form that this takes, drawn from a sitting of the Shepparton Koori Court, is as follows:

Alright, [Defendant's name] this is the Koori Court, you are in the building, which we smoked.

Yep.

When we start this court we always start by acknowledging Yorta Yorta and Bangarang people. That's the way we start every Koori Court and I start every particular case by doing that....We also acknowledge the Elders who are here as part of the Koori Court and we have Uncle Colin Walker, a senior Yorta Yorta Elder here today, and we have Aunty Rochelle Patten, a senior Yorta Yorta Elder as well, but we also have Aunty Merle Bamblett who sits with the court but is not sitting with the court today...a senior Bangarang woman.

The Magistrate will then go on to identify the other persons around the table, including the Koori Court Officer, the police prosecutor and the representative of Community Corrections. The Magistrate may then identify prominent Elders or community members who are seated in the court-room or call upon them to identify themselves. While it may appear repetitious or tedious it is important that the commencement of each Koori Court matter is prefaced by the statement which acknowledges the traditional owners and the Elders or Respected persons who are seated with the Magistrate. It is not sufficient to merely open the Koori Court with such a statement. Failure to make such acknowledgment or to skim over it as a mere formality can serve to undermine the cultural recognition that is the very essence of the Koori Court and it also fails to recognise the importance of such a statement for each individual defendant who is making an appearance.

¹¹ Ibid

Recommendation Three

The procedures of the Koori Court ensure that the statement of recognition of the traditional owners is made at the commencement of each individual matter in the Court.

The police prosecutor then reads the charges and provides the court with a summary. The Koori Court Officer will have usually provided the Elders or Respected Persons with a copy of these documents prior to the sitting. At this point the defendant's solicitor will indicate that the defendant accepts the charges and intends to plead guilty. Any prior criminal history will then be read to the court or summarised and the lawyer will offer an outline of the circumstances of the defendant. To this point it could be said that, apart from the setting of the court and the additional persons who are seated around the table, the process is not dissimilar to usual Magistrates' Court proceedings. After this point however, the Koori Court Officer then speaks on the nature of the inquiries conducted into the circumstances of the defendant. At this juncture either the Koori Court Officer or the Magistrate may call upon the service providers who might be present in the court to speak about their dealings with the defendant. The Magistrate may then invite family members or other members of the Koori community whether they wish to make any comment. In observations of the sittings at both the Shepparton and Broadmeadows Koori Courts it was clear that the representatives from the drug and alcohol rehabilitation programs (such as the CREDIT program at Broadmeadows) and the Goulburn Valley Community Health Service or the Percy Green Centre in Shepparton would most frequently offer their observations to the court. The representative from the Enmaraleek Aboriginal Co-Operative, Joe Narbaluk, will also invariably speak at the Broadmeadows Koori Court as he is usually the person in the court who has the greatest prior dealings with the defendant. While there have been occasions when members from the community have been present in court and have taken the opportunity to speak it does not occur all that frequently. The Magistrate may then give the Elders or Respected Persons the opportunity to speak, after which family members are asked if they have anything which they might wish to contribute. Dr Auty comments upon this phase of the proceedings that: "Comment from the floor of the court appears fairly regularly and could best be

described as both supportive and chastising.”¹² The victim is also given the opportunity to speak if they have been invited to the court by the prosecutor, but there is prior notice given to the Magistrate and the defendant’s solicitor if this is to occur. The defendant is then given the opportunity to speak, although there is no guarantee that the defendant will always wish to speak. Their participation in the proceedings can be marked by silence or expressions of remorse for their actions or an explanation of the circumstances which led them to being present in the court. There have been a number of powerful instances where the defendant’s statement is concerned with explaining their past life and who they are, rather than the circumstances of the offence that brought them before the court. It is at this point that the Elders or Respected Persons will often speak to the defendant or ask them questions. The nature of the comments from the Elders or Respected Persons will vary from individual to individual. Daniel Briggs, the Shepparton Koori Court Officer, notes that:

...you know what their role is and how they come across and obviously, they take a very cultural angle. All of the Elders and Respected Persons address issues in relation to family, community, health education and behaviour, in both our community and the wider community, from a cultural perspective. Some Elders and Respected Persons are maybe stronger and/or focused on particular points, more-so than others. They all have their own style. If the defendant is from another country, they are told their behaviour is not acceptable in our country and advised that their behaviour most likely would not be tolerated by their community either. Some of them talk about very personal experiences that I believe have quite an impact on most defendants. But I think the fact that the Elders and Respected Persons have presence in court is one of the most significant aspects to the success of this court.

Significantly the Elders and Respected Persons may use this part of the proceedings to challenge defendants who do not seem to be treating the Court with sufficient respect. In

¹² Ibid, p. 12

one matter observed at the Broadmeadows Koori Court a defendant, originally from interstate, with a long history of prior offences appeared. The defendant sat at the Court table with his hands behind his back and took a very flippant attitude to the proceedings. When questioned as to whether he respected the Koori Court he observed that it effectively meant little to him because he was a member of the *Stolen Generation* and an urban Aboriginal. At this juncture the Elder challenged him by asking whether he was proud to be an Aboriginal. When he seemed confused by the question she put it again and he responded by saying yes. Magistrate Ann Collins, who was presiding in that matter, recalls that:

...he was just slumped in his chair and was a bit disinterested in the proceedings and the Elder said to him are you proud to be Aboriginal and he just sat up and took notice and the next time he came to court he was respectful, he sat, he didn't have the same attitude, obviously it wasn't quite as good down the track as he did re-offend, he was one of the people who re-offended.

Notwithstanding the fact that the defendant subsequently re-offended, the case is a strong example of the role that the Elders can play. It is also important to note that it involved an individual who identified as an "urban Aboriginal" and who, by his demeanour, seemed to reject any notion that the Elders or the Koori Court had any cultural relevance for him. The manner in which the Elder forced him to acknowledge his Aboriginality and, by implication, the authority of the Elders and the Koori Court, is a clear indication of why the role of the Elders and Respected Persons is so important. In some respects the role of the community is made more explicit in proceedings in Shepparton, where there is a smaller community and the relationship between the community is clearer. In proceedings in the Shepparton Koori Court, Dr Auty and Daniel Briggs note that:

Defendants are invariably reminded that they not only offend against the imposed law but also against the Aboriginal people whose country this is. If a defendant has driven a stolen car from Wurundjeri country, driven it through Tungerung country and into Bangerang and Yorta Yorta country and thereby offended all those people who adhere to a

community code of conduct and cultural issues he may be reminded of that.¹³

At this point the Magistrate will confer with the Elders and Respected Persons about an appropriate course of action. Importantly this is done in the court room, without the matter being adjourned, so that the parties are aware of the discussions that take place. There is the possibility at this juncture that the Magistrate and the Elders and Respected Person might diverge in their thinking as to what would be an appropriate penalty. Magistrate Auty recounted one occasion where the Elder was clearly of the opinion that the defendant's offence of motor vehicle theft warranted a prison sentence while she was more disposed to make a sentence of a community-based order (CBO). Dr Auty noted:

I had a discussion with the Elder at the Bar table about the observations in the Community Based Order report, and that's ultimately what was directed in that particular case. But that discussion took place at the table, perfectly transparently, and everybody was aware that the discussion had taken place.¹⁴

Once the sentence has been determined and handed down by the Magistrate, the defendant is given the opportunity to say something. On occasion the Magistrate may take this opportunity to thank the Elders and Respected Persons and the Court. While there is not general observance of the principle, the importance of the Magistrate concluding the sitting of the Koori Court by acknowledging those Elders or Respected Persons who have attended and thanking them for their assistance cannot be over-stated. An example, drawn again from a sitting of the Shepparton Koori Court, is as significant for the fact that Magistrate Auty both acknowledges the role of the Elders and Respected Persons, but also avers to the fact that the Elders and Respected Persons will, at some future date, be placed to conclude the day's sitting by making comment on what had taken place.

¹³ Ibid, p. 13

¹⁴ Shepparton's Koori Court, ABC Radio The Law Report 3 February 2004 at: <www.abc.net.au/rn/talks/8.30/lawrept/stories/s1035995.html>

In closing the Koori Court which we will now do can I make a formal comment and I always make these comments and, one day soon, you'll make these comments and I won't need to. I just want to say thank you to the respected and very senior people who sat with us today in the court. Thank you for representing your people at this court and I thank you for your assistance in relation to sentencing the people who come before us.

1.5.1 Space and the Koori Court

As noted above, proceedings in the Koori Court are conducted with as much informality as possible and the parties are all seated around an oval table. This represents a substantial departure from the usual arrangement of the Magistrates' Court, with the Magistrate seated at the same level as the defendant, rather than at the bench. Apart from facilitating a less formal environment, it should be recognised that the spatial arrangement of the court room is an example of how the court hearing "may be described within a set of spatial metaphors as an interaction in which boundaries are developed and barriers established."¹⁵ In the workings of the Koori Court there is not only a move towards making the defendant (and the members of the Koori community) feel at their ease, but also an attempt to remove the more intimidating elements of the courtroom architecture. To all intents and purposes the Koori Courts remain the same, but it is worth observing that the Koori Courts display the Aboriginal and Torres Strait Islander flags and in both Courts there are examples of art work from Koori community members and members of the Koori Court team on the walls. Also prior to the commencement of sitting at the Shepparton Koori Court the court-room was "smoked" by Uncle Wally Cooper an Elder of the Yorta Yorta people. This is a practice to purify and cleanse a site and its inhabitants. On a number of occasions the fact that this ceremony took place has been referred to by the presiding Magistrate during sittings of the Shepparton Koori Court. While the court remains part of the Magistrates' Court building it provides for a measure of re-inscription or re-definition of the Koori Court room. Tait, drawing from

¹⁵ Tait, D. Boundaries and Barriers: the Social Production of Space in Magistrates' Courts and Guardianship Tribunals. *Journal of Social Change and Critical Inquiry*, 1 at: <www.uow.edu.au/arts/joscci1/tait.html>

Garapon, observes that “rituals are not only important for preserving decorum and dignity. They are fundamental to the production of justice.”¹⁶ The ceremonies that have served to mark the formal openings of the Courts (as well as the acknowledgment of the traditional owners at the commencement of proceedings) can all be seen as a form of ritual that distinguishes the Koori Court from the mainstream Magistrates’ Courts and emphasises the importance of Koori culture. The possibility that the Koori Court space might be developed further to give even greater recognition and representation to Koori culture arose with the visit to the court by Masters students from the University of Melbourne Faculty of Architecture¹⁷. As part of their thesis requirements, the students produced plans for court interiors consistent with the spirit of the Koori Court. While nothing further has developed from this project it gives an indication of how the space of Koori Court might be further transformed to better reflect its unique nature.

1.5.2 Koori Court and time

The intense nature of Koori Court hearings will inevitably mean that not as many matters will be heard as in a conventional Magistrates’ Court. It is recognised by all participants in the court, however, that the court should take the time that is needed. Whereas various statistics estimate that a Magistrates’ Court might normally hear between 50 and 60 matters in a day (including adjournments) the number of matters listed for hearing in the Koori Court on its sitting days tends to be between five and ten. For example in the period from 3 February 2004 to 11 October 2004 at the Broadmeadows Koori Court there were 154 cases listed for 18 sitting days. This makes for an average of 8.5 cases listed per sitting day in the Court and it obviously has ramifications for the administration and case flow within the wider Magistrates’ Court.¹⁸ In the same period the Shepparton Koori Court heard 121 matters in 25 sitting days, which averages 4.8 matters per sitting day. What must be taken into account in the Koori Court process is that there will inevitably be matters that are either adjourned off or where the Magistrate defers sentencing so that the defendant has an opportunity to show whether they can comply with a treatment

¹⁶ Ibid.

¹⁷ Auty and Briggs, *op.cit.*, p.11

¹⁸ Information provided by Deputy Chief Magistrate Paul Grant

order. Despite the need for the Koori Court to take so much time, those persons who have seen the operation of the Court are aware of how essential it is to give adequate time so that all aspects of the case can be dealt with. Deputy Chief Magistrate Paul Grant has observed that:

There are many voices to be heard – the prosecutor, the defence lawyer, the justice worker, the defendant, family members, friends, support persons, community members, the Magistrate, the respected persons – and the cases need to take as long as they need to take.

To ensure that the Koori Court continues to work so effectively it is imperative that the Court continues to, as Magistrate Auty puts it, “both provide time and take time.”

CHAPTER TWO: KOORI COURT PERSONNEL

2.1 *Role of the Magistrate*

2.1.1 The role of Magistrates in the Koori Court

Whether the Koori Court is viewed as a unique and distinct form of evolution of the Magistrates' Court or as part of the wider phenomena of "specialist courts", the procedures and process within it are so different as to require significant alterations in the role of the Magistrate. In recent times a substantial body of literature has been generated with respect to how the growth of specialist courts has necessitated changes in the role of judicial officers. In many respects the work of the Koori Court has required the same sort of transformation, a shift which Zimmerman notes moves from "the dispassionate, disinterested magistrate" to a "sensitive, emphatic counsellor."¹⁹ Other areas in which the work of the Koori Court can be seen to bear resemblance to the operation of the "specialist courts" is in the manner in which "special knowledge and special personal attributes are needed to be a judicial problem-solver."²⁰ Coupled with the importance of what can be termed as specialist knowledge or sensitivity, Rottman also notes the "desirability of there being a single judge to hear all of the cases of a particular type in a jurisdiction."²¹

2.1.2 Selection of Koori Court Magistrates

There is widespread recognition within the legal community and the Koori community of the fact that the choice of an appropriate Magistrate to sit upon the Koori Court can be crucial to its success. The success of the two pilot Koori Courts is a testimony to the contributions of the individual court personnel and the manner in which they have interacted with each other. In the Koori community meetings held at both Shepparton and Broadmeadows, as part of the evaluation of the Court, there was a strongly expressed belief that the communities should be involved in some way (perhaps through the

¹⁹ Zimmerman, M. (1998). A new approach to court reform. *Judicature*, 82, 109

²⁰ Rottman, D. (2000) Does therapeutic jurisprudence require specialised courts (and do specialised courts imply specialist judges)? *Court Review*, 37, 22.

²¹ *Ibid*, p.22 at footnote 2.

RAJAC) in the selection of appropriate Magistrates. Rather than constituting an attack on the independence of the judiciary, it is a clear recognition of the importance to the Aboriginal community of the choice of Magistrate who sits in the Koori Court. Recommendation 96 of the RCIADC urged:

That judicial officers and persons who work in the court service and in the probation and parole services and whose duties bring them into contact with Aboriginal people be encouraged to participate in an appropriate training and development program, designed to explain contemporary Aboriginal society, customs and traditions. Such programs should emphasise the historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and to the nature of relations between Aboriginal and non-Aboriginal communities. The Commission further recommends that such persons should wherever possible participate in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding.

It is worth noting that the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs recommended in its 1994 review of the implementation of the recommendations of the RCIADC key principles that “the Commonwealth give greater priority and commitment to the implementation of Royal Commission Recommendation 96.”²² It should also be remembered that this recommendation is consistent with one of the strategic objectives of the Victorian Aboriginal Justice Agreement that is designed to “achieve maximum Aboriginal community participation in the processes for legislative, policy, and program development, service delivery and monitoring and review.”²³

²² House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs. (1994). *Justice Under Scrutiny: Report of the Inquiry into the Implementation by Governments of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody*. AGPS: Canberra.

²³ VAJA, p.26

In addition to the above, it is also worth highlighting Recommendation 6 of the Interim Evaluation:

Any new Koori Courts should have a number of designated Magistrates responsible for hearing matters to provide for continuity in the Court's operation. It is imperative that the Magistrates appointed to hear such matters should have either some previous experience working with Indigenous people or have undergone a cross-cultural awareness training in Indigenous issues.

Recommendation Four

That the choice of Koori Court Magistrate is critical to the success of the Koori Court. It is therefore imperative that Magistrates appointed should have either some previous experience working with Indigenous people or have undergone a cross-cultural awareness training in Indigenous issues in a manner that is consistent with Recommendation 96 of the *Royal Commission into Aboriginal Deaths in Custody*.

2.1.3 Training of Magistrates

While the current Magistrates who sit (or have sat) at the Koori Courts were consistently praised for the manner in which they displayed cultural sensitivity, the sentiment was raised repeatedly at community forums that the Magistrates who sit in a particular area should be involved in meeting with the local community and to be provided with some form of briefing on the history and culture of the local Koori community. Community members were concerned that Victorian Kooris are treated as part of an homogenous mass and that some degree of experience with Indigenous Australians in other parts of Victoria (or even Australia) is seen as being sufficient to qualify non-Indigenous persons to make decisions about Koori culture and community.²⁴ The importance of the Magistrates being aware of the differences between the various Koori communities in

²⁴ This concern regarding the homogenising of Indigenous Australians by members of the justice system was also raised in the report by the New South Wales Law Reform Commission into Sentencing Aboriginal Defendants.

Victoria was raised at the Shepparton consultative meeting where one community member commented on the need for cultural training, stating:

...it's so hard for Australia to believe that we are different people, we have different values and that. So...if you're going to have a Magistrate to sit in a Koori Court, you'd have to have some Koori cultural training before they did that.

These views were endorsed by another community member at the same meeting who reflected that in the “different traditional and tribal areas, we got our beliefs and so on and in Mildura the Elders might have a different view of the ways, you know. And so that's what the Magistrates have got to respect.” It was suggested during the course of the review that the appropriate body to oversee the delivery of such training might be the Judicial College, which could develop the curriculum in tandem with the Courts and Programs Development Unit of the Department of Justice, which is now responsible for the establishment of the Koori Courts. This is certainly a possibility that should be explored further.

2.1.4 Uniformity in Koori Court matters

As a means of ensuring this level of consistency within the Koori Court it is suggested that the Operational Manual for the first Koori Court at Shepparton could be further developed into a benchbook, providing a guide for the conduct of matters within the Koori Court. A precedent for such a document exists in Western Australia, where the Aboriginal Cultural Awareness Benchbook was developed by the National Indigenous Cultural Awareness Committee of the Australian Institute of Judicial Administration. The guidelines for the Benchbook were prepared by Justice French following a meeting in April 1999 and members of the Western Australian judiciary provided commentary to the editors as the document was prepared.²⁵ While chapters six to eight provided material in relation to pre-trial procedures, criminal proceedings and sentencing, the first five chapters of the Benchbook provided a general coverage of aspects of Indigenous culture,

²⁵ Fryer-Smith, S. (2002). *Aboriginal Benchbook for Western Australian Courts*, AIJA, Melbourne, para 1.4.21

ranging from traditional society to contemporary issues, specific geographical information pertaining to parts of Western Australia, and the barriers encountered in language and communication by indigenous people in WA. The authors of the WA Benchbook stress the status of the project as an “experimental work in progress” and offer it as a template for adaptation within other jurisdictions, subject to the adaptation required to make it relevant to different circumstances and approaches elsewhere.²⁶

Recommendation Five

That the Department of Justice and the Magistrates’ Court examine the possibility of the creation of a benchbook for the Koori Court to assist in the establishment of newly created Courts and to ensure a level of consistency in all Koori Courts, both existing and future.

2.2 Role of the Koori Court Officer

2.2.1 Importance of the Koori Court Officer

The role of the Koori Court Officer is crucial to the successful operation of the Koori Court and this was consistently recognised by the various personnel interviewed during the course of the evaluation. The Koori Court Officer at the Shepparton and Broadmeadows Koori Court are, respectively, Daniel Briggs and Terrie Stewart. The contribution of these individuals to the success of the Koori Court has been consistently raised by both parties involved with the operation of the Koori Court and also by persons who have observed the Court proceedings. One Elder noted in respect of Terrie Stewart, the Koori Court Officer at Broadmeadows, for example that:

I think Terrie Stewart’s a marvellous selection for that position, I think there’s special people that do that type of job...Terrie’s excellent. She knows the background of most people that come to court, she does her homework very thoroughly and she briefs us on their background and we see the, we see the papers before we go to court.

²⁶ Ibid para 1.2

In a similar vein, Daniel Briggs was praised by Magistrates, Elders and Court staff, as well as the staff from other government and non-government agencies, for the level of professionalism and understanding that he brought to the role. In reflecting on the role of the Koori Court Officer, Magistrate Auty noted the importance of selecting the right Koori Court Officer, and observed:

if you get the right Aboriginal justice officer a lot of stuff falls into place, like the roster for the Elders, the careful consideration of what Elders ought to sit with what Elders, considered views of which matters ought to be proceeding before those particular Elders, which matters particular Magistrates might have an understanding of and I think something like, I think working out when you sit women in matters and when you sit men in matters, those sorts of things. So that particular role has, I as I say, I had no real view about how powerful it could be, but I'm convinced that it's a court changing function if you can get the right personnel and support people in the position

The Koori Court Officer offers advice to the bench on matters “before, during and after court cases.”²⁷ In addition to working with the Magistrate and providing information and assistance to the Elders and Respected Persons it is the Koori Court Officer who liaises with the defendant and their solicitor and acts as a point of contact for the service providers from within the community, including both Aboriginal and non-Aboriginal organisations.²⁸ Importantly the Koori Court Officer provides specialist knowledge that results in “a greater level of understanding about some matters particular to the local Aboriginal community and defendants.”²⁹

²⁷ Auty, K & Briggs, D , op.cit., p.10

²⁸ Ibid

²⁹ Ibid

2.2.2 Duties of Koori Court Officer

The duties that are identified in the position specification require the Koori Court Officer to:

- Provide advice and report to the Magistrates' Court and relevant staff, including Community Correctional Services in relation to services and programs that are available to Aboriginal defendants;
- Provide assistance to Aboriginal defendants before the Koori Court with their court outcomes and obligations;
- Identify and maintain a register of services and programs offered by local service providers with a specific emphasis on Indigenous defendants;
- Liaise with Community Corrections Officers to assist in the development of case management plans for Aboriginal defendants, where appropriate;
- Educate the Aboriginal community in the operation of the court and the criminal justice system; and
- Build, maintain and foster links between the Magistrates' Court and the Aboriginal community by raising cross-cultural awareness with users of the Koori Court system, including defendants, prosecutors, legal practitioners and Magistrates.

While the Koori Court Officers currently carry out a wide range of duties there is a very real danger that they will become burdened with additional duties. Given the already onerous nature of their jobs it is important that there is clear delineation of the role of the Koori Court Officers. At Broadmeadows, for example, the absence of integrated service-provision for defendants has meant that the Koori Court Officer has had to take on a range of duties that are sometimes more akin to a case worker or para legal. It is for this reason that the support provided by the creation of the position of Registrar for the Koori Court is essential (see below). The provision of this form of administrative support will allow the Koori Court Officer to provide the type of specialist advice and support to the Koori Court that is a key element to its continuing success.

2.3 Role of Elders and Respected Persons

2.3.1 Role of Elders and Respected Persons in sentencing

The Koori Court legislation provides that at section 4G(2) that “The Koori Court Division may consider any oral statement made to it by an Aboriginal elder or respected person.” This of itself does not require the Magistrate to follow their advice or recommendations, however the general feeling amongst the Elders and Respected Persons is that their contribution is both sought and listened to. The importance of the Elders is articulated particularly well by Magistrate Auty, who likens the role that they play to being akin to a “sentencing conversation.” She comments that:

...the process is such that people are respected, they are afforded the respect due to them as an elder or a respected person, and it’s a two-way thing because of course family members who come along who might be people who have never been before court themselves, also feel that they can discuss matters with the Elders. So that in fact we have what we might be described as a sentencing conversation I think you’d probably call it, and the Elders have a lot to say about what view the community takes of the conduct of a defendant...and you observe when seated across the table from the defendants and their families, the degree of engagement with those notions. So Elders are an absolutely intrinsic part of the proceedings.

It cannot always be expected that the Koori Court proceedings will be imbued with a cultural meaning or context and, as observed above, the extent to which the Elders or Respected Persons draw from such examples will vary from individual to individual and, possibly, from area to area. The absence of an explicit cultural dimension should not, however, be thought to undermine the work of the Koori Court.³⁰ On many occasions it is the role of the Elder in either imparting part of their life experience or censuring the

³⁰ This is at odds with the comments in at least one of the case studies in the Circle Sentencing Report, which suggests that where there is absent the “socially relevant Aboriginal community involvement in determining a culturally acceptable punishment” then the full benefits of the sentencing circle cannot be achieved. Potas et al. (2003). Circle Sentencing in New South Wales, Judicial Commission of NSW, p.14

defendant that is done without explicit reference to traditional cultural practices or boundaries. One of the Shepparton Elders, Rochelle Patten, described her approach to Koori Court matters in the following way:

I just listen to what they do, and I sort of listen to – I pick up their background. A lot of them I know, and what they've done when they was young, because I've been through a lot of that myself, you know, drinking and stealing cars, but I started at 18 and I finished at 22. I could have been in gaol or dead you know...³¹

2.3.2 Appointment of Elders and Respected Persons

The legislation giving effect to the Koori Court provides at section 17A that:

(1) 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 as set out in this Act.

The current process whereby Elders are appointed to sit on the Koori Court involves the Department of Justice calling for expressions of interest through the local Regional Aboriginal Justice Advisory Committee. Advertisements are also placed in newspapers. Any applicants must provide authorisation for a criminal record check to be conducted. The original position specifications for the role of Elder or Respected Person in the Koori Court were that the appointees would:

- Provide assistance and advice to the presiding Magistrate on Aboriginal cultural and community matters for Aboriginal defendants;
- Reinforce cultural values and perspectives of the Aboriginal community to the defendant in relation to the offending behaviour;
- Provide Aboriginal community representation into the sentencing of Aboriginal defendants;

³¹ Shepparton's Koori Court ABC Radio National The Law Report at: <www.abc.net.au/rn/talks/8.30/lawrept/stories/s1267570.htm>

- Foster a relationship between the Magistrates' Court and the Aboriginal community by providing feedback on the operation of the Koori Court;
- Assist in the education of the Aboriginal community in the operation of the court and the criminal justice system; and
- Actively liaise with Koori Court staff, in particular the Koori Court Officer, to gain a knowledge of the services and programs available to Aboriginal defendants.

Upon being cleared by the police record check the applicant was then required to complete a compulsory Koori Court training program.

2.3.3 Training of Elders and Respected Persons

The five day training course introduces the Aboriginal Elders and Respected Persons to the workings of the criminal justice system and also allows for participation in a series of mock courts or “moots” so that they have an understanding of how matters will unfold once they are sitting in the court. It is worth emphasising the importance of this training course. (The fifth day provides cross cultural training designed for non indigenous participants). While some of the Elders and Respected Persons may not have had any great depth of knowledge regarding the operation of the courts, a number of those appointed have previously had a long involvement with juvenile justice matters. The training course is also important for the manner in which it allows for the various Koori Court personnel to build up some degree of connection. This period of interaction was seen as invaluable by the Shepparton Koori Court prosecutor, Sgt Gordon Porter, who urged that the police prosecutor be involved throughout the training program and further commented that:

There is an absolute need for full confidence in the police by the Elders and Respected Persons, as their attitudes will be reflected in their behaviour and when performing their function in the Koori Court...An offender that sees disrespect of the police prosecutor for example by the Elder in Court will have disastrous counter productive effects. I am pleased to say that we are experiencing quite the opposite and the surprise on some of the offender's faces when seeing how the

Elder has treated me with respect has led them to question their own beliefs.

Just as Sgt Porter emphasises the importance of the Koori Court personnel being aware, and supportive, of the role of the police in the court proceedings, so too is it important that the police are made aware of the importance of the role played by the Elders and Respected Persons. This would certainly seem to be the case in both the Shepparton and Broadmeadows Koori Courts and this is reflected by a further remark from Sgt Porter that: “The Elders and Respected Persons have all brought their own individual style to the court and have done so in a way which has brought them admiration from all.”

Applications for appointment to the position of Elders and Respected Persons are now conducted by a panel including representatives from the Indigenous Issues Unit and the Courts and Programs Development Unit. There is also some thought being given to the inclusion of other Indigenous community representatives such as, for example, the RAJAC Chairperson. The criteria that informs the decision of the selection panel includes the requirements that the applicant have significant ties with the Aboriginal community where the relevant Koori Court is located³², that they have respect and standing within the Aboriginal community, that they have life experience, that they have an understanding of the criminal justice system and the requirements of the Koori Court, and that they either be aware of, or have the capacity to learn about, the range of local service providers. The panel then makes a recommendation to the Secretary and the final decision as to appointment resides with the Secretary, Department of Justice as provided by the *Magistrates’ Court (Koori Court) Act 2002*. Should the Secretary approve the appointment of the applicant, an *instrument of appointment* is signed, which specifies the period and terms and conditions of the appointment.³³

³² The new selection criteria includes: whether the Applicant is known in the community to be an inclusive and/or divisive member within the local Koori community; whether the Applicant is known in the community to respect community standards and conduct; whether the Applicant is known in the community to have sound financial practices if they have been involved in local Koori organisations; and whether the Applicant is known in the community to be involved in controversy that would make the appointment of the Applicant detrimental to the functioning of the Koori Court.

³³ See Appendix 2

2.3.4 Code of Conduct for Elders and Respected Persons

So as to ensure that the positions of Elders and Respected Persons retain the appropriate levels of standing, a code of conduct has been introduced.³⁴ The code of conduct includes provisions that relate to the personal propriety and behaviour of the Elders and Respected Persons, including the requirement that they avoid behaviour that might bring into disrepute or undermine the impartiality of their position or convey in any way the impression that they hold a special position of influence. The code of conduct also explicitly requires an Elder or Respected Person to disqualify themselves from any proceedings in which their impartiality might be reasonably questioned. Further provisions of the code of conduct emphasise the restrictions upon official information that the Elders or Respected Persons might be privy to through their involvement in the Koori Court and the prohibition against them giving legal advice to persons.

2.3.5 Payment of Elders and Respected Persons

The Aboriginal Elders and Respected Persons are currently paid a sitting fee of \$150 per day although concerns were raised by some of them at the time of the interim evaluation that the receipt of this money would affect their entitlement to various benefits or entitlements (such as pensions)³⁵ (although it is acknowledged that not all Aboriginal Elders and Respected Persons are in receipt of Government benefits). As a consequence the Criminal Law Policy unit of the Department of Justice unsuccessfully sought an exemption from the Taxation Office. The Policy Unit has subsequently approached the Manager of Centrelink Indigenous Services in late 2004 requesting that the payments made to Elders or Respected Persons be considered exempt income or part exempt income in the terms of the Social Security Act 1991. The matter is currently being considered by the Commonwealth Department of Family and Community Services. It has been indicated that a decision will be made by mid March 2005.

³⁴ See Appendix 3

³⁵ Recommendation Three, Interim Evaluation Report, see Appendix 2.

2.4 Role of the Defendant

The part played by the defendant in Koori Court proceedings can be vastly different from the experience in usual Magistrates' Court matters. Traditionally the participation of the defendant is limited to giving a plea and any statements by way of mitigation are usually presented by the defence lawyer.³⁶ Repeatedly the observation was made during the course of the Koori Court pilot program evaluation that it was not uncommon for the defendant at the end of sentencing in traditional Magistrates' Court matters to ask about the outcome or what they had received. One of the lawyers who regularly appeared for defendants from the Victorian Aboriginal Legal Service made the observation that:

It's almost par for the course in front of a regular Magistrates' Court the client will find it completely inaccessible, they will have someone speaking down to them both physically and metaphorically, it is completely different to come before an Elder...So while there may have been one or two cases in the last 12 months where perhaps the client has gone away shaking their head, literally it would be one or two out of 80, not 70% or 80% of cases, as happens in the regular courts.³⁷

The Koori Court offers the defendant the opportunity to present their view; indeed the process encourages the participation of the defendant. The Shepparton Magistrates' Court Psychiatrist Court Liaison Officer, Mike Gibson, commented that the main difference between the Koori Court proceedings and normal Magistrates' Court hearings is the "time allowed for the development of the person's story". He then went on to observe that "in the normal Magistrates Court proceedings, people often come away feeling that they haven't been heard or that they have been alienated from the process. That someone has spoken for them in language they don't understand." While there may be opportunities for the defendant to offer a story, be it in a police interview or with the solicitor who is preparing the defence, the defendant invariably loses narrative control.

³⁶ A similar observation is made as to the difference between the operation of the NSW Sentencing circle model and the operation of "traditional Local Court proceedings". See Potas et al., *op.cit.*, p.17.

³⁷ Shepparton's Koori Court. (2004). *The Law Report 3 op.cit.*

As Berns observes, the story of the defendant is re-deployed within the parameters of a legal argument, such that the story is “retold, not by the author, but by one who is authorised to recast it.”³⁸ The lawyer representing the defendant will seek to recast the narrative in such a way as to fit it within a recognisable legal category of narrative, so that the circumstances of the defendant are made comprehensible for the legal system. Writing on his experience as an American defence attorney Mitchell commented that his interactions with clients in the earliest years of his career were concerned with getting the “relevant information to fit into my legal categories.”³⁹ Any additional material that was not germane to the “legal categories” was, as he puts it, “edited out.” It is this material that may be “edited out”, however, that defines the individual defendant and clearly the process of their story being cast in a legally-recognisable narrative or story can have the effect of disempowering or silencing the defendant. Reflecting on the manner in which defendants present their version of events, or their narrative, Gibson believes that the Koori Court is different from the proceedings in the Magistrates’ Court because:

...people are able to tell their story and believe that their story is heard, I believe there’s a sense, and I’ve seen it occur with people, that they are able to work through their narrative in a different way than is worked in the Court where they have to justify their behaviour in order to minimise the outcome. And so they are able to develop a rather more full narrative which includes perhaps the fact that they may want to change elements of their life...or that they be aware that other people have suffered. Because it is not as confronting it allows them more movement to explore parts of themselves that could offer an opportunity for change.

Gibson notes that on a significant number of occasions the space made for the defendant to tell their story in the Koori Court has resulted in such a narrative being offered. An example of such a narrative is provided at chapter four. It should be stressed that the examples of the defendants giving their narrative is not intended as a criticism of the role played by the defence lawyers, or to suggest that their importance in the proceedings is in

³⁸ Berns, S. (1999). *To speak as a judge: Difference, voice and power*, Ashgate, Aldershot, 104.

³⁹ Mitchell, J. (1999). Narrative and client-centered representation. 6 *Clinical Law Review*, 85 at 98

any way diminished. While it may be important for the individual defendant to give their narrative, to explain the circumstances surrounding their offending or their past life, some of the “relevant” information (to return to Marshall) that might be tendered by the defence lawyer will certainly remain important for the court’s determination of sentencing. It should be remembered also that there are still a substantial number of defendants who appear in the Koori Court who do not choose to make a statement of the type referred to by Gibson. Clearly the Koori Court offers the opportunity for defendants, as Auty and Briggs term it, to find their voice. They note that the process means that:

We wait and take time, we invite rather than compel engagement, we back-track and re-enter dialogue from other places. We are listening to what we are told. We listen to aunties and uncles, to mothers of young babies and to young men who have committed a criminal offence but who defer and show respect to their Elders.⁴⁰

The important dynamic of the Koori Court is therefore not only the fact that space is made for the defendant to offer a narrative, but also that the court personnel have the capacity to listen and to show the defendant that they are engaging with what they are saying. The success of the Koori Court is a testimony to the skill of the current Koori court staff in doing this.

2.5 Role of Defence Counsel

The defendants who appear in the Koori Court are represented, as in the normal Magistrates’ Court hearings, by a defence lawyer. The lawyers appearing in the Koori Courts are usually from either the Victorian Aboriginal Legal Service or Victoria Legal Aid, although some defendants have been represented by private practitioners. There is a potential for the role of the defence lawyer in Koori Court proceedings to be substantially different from normal Magistrates’ Court proceedings. Given that the defendants appearing in the Koori Court are pleading guilty the role of the defence lawyer would be

⁴⁰ Auty and Briggs, op.cit., p.14

to give background information that might mitigate the penalty to be handed down or to make a sentencing submission.

One VALS lawyer noted:

I try to keep things to a minimum as to what my submissions are and then have the relevant people speak...And it has much more meaning coming from those people and the court can sort of see whether they're really genuine or not. But after things kick off I must admit you do find yourself sitting back and it happens around you. But that's fine...you're empowering the community to speak for themselves, and you can't speak for them at the same time...If you end up doing all the talking then you may as well be in an actual Magistrates' Court, in a sense.

The different manner of proceeding in the Koori Court means that the defence lawyer is sometimes not required to participate as much as in the usual Magistrates' Court hearing, due to the role of the other Koori Court participants (including the defendant and Elders). It should be noted however that the Court often requires a degree of involvement prior to the hearing that goes beyond the usual requirements. Also, the defence lawyer still has the role of ensuring that the defendant understands the charges and the evidence against him/her as well as providing advice on an appropriate plea and ensuring that procedures are followed. The importance of the defence counsel being adequately resourced, which is particularly relevant to the Victorian Aboriginal Legal Service (VALS), was the subject of recommendation 108 of the *Royal Commission into Aboriginal Deaths in Custody*. The recommendation stated:

That it be recognised by Aboriginal Legal Services, funding authorities and courts that lawyers cannot adequately represent clients unless they have adequate time to take instructions and prepare cases, and that this is a special problem in communities without access to lawyers other than at the time of court hearings.

Given that the defence counsel's involvement in Koori Court proceedings will often mean longer hearing times of more complexity and a longer period before case finalisation, this recommendation now assumes an even greater significance. This will also have a significant impact on the resources of VALS and their ability to service existing and future Koori Court clients.

2.5.1 The Role of defence counsel and minimising state intrusion

One concern that might be raised with respect to the changed nature of proceedings in the Koori Court is that it represents a transformation of the role of defence counsel. While the advantages of the Koori Court are evident in the tailoring of appropriate sentencing dispositions that address alcohol or drug issues, it might be argued that there is a danger that Koori Court defendants are subjected to court intervention that goes beyond that which they would find in usual Magistrates' Court proceedings. This point was made by Tomaino in respect of the Nunga Court proceedings who observed that "Traditional roles for lawyers in court, especially defence lawyers, are about *minimising* the State's intrusion into the lives of defendants."⁴¹ A similar argument was made by Dominico Calabro, from the Legal Aid Commission, who noted that there is a danger that matters will be deferred excessively to allow defendants to undertake rehabilitation programs, but that it runs the risk of drawing out matters to an excessive degree. The Koori Court legislation certainly includes reference to the need to ensure that it exercises its jurisdiction with as "little formality and technicality, and with as much expedition" as the requirements of the Act permits.⁴² Based upon the observations made of the Koori Court proceedings, however, such criticisms would seem to be unfounded and the deferral of matters has invariably allowed defendants to undertake programs of rehabilitation and treatment where they would perhaps have been imprisoned.

⁴¹ Tomaino, J. Aboriginal Nunga Courts Government of South Australia, p.14

⁴² *Magistrates Court (Koori Court) Act 2002* p.4D(4)

2.6 Role of the Prosecutor

The role of the prosecutor in the Koori Court is in many ways similar to their normal role in Magistrates' Court proceedings. As noted above, the prosecutor will provide the summary of the alleged offences to which the defendant is pleading guilty. The proceedings are then primarily concerned with ascertaining the causes for the offending behaviour, allowing the defendant to offer their version of the events (or the background to their offending behaviour) and consideration by the Magistrate, with the assistance of the Elders, the Koori Court Officer and Corrections Victoria of an appropriate sentencing decision. The role of the prosecutor in the Koori Court should not be considered, however, in any way to be incidental simply because they are not carrying out the same adversarial role that they fill in traditional Magistrates' Court sittings. In the same way that the personal qualities of the Elders and Respected Persons, the Magistrates and the Koori Court Officers are integral to the success of the Koori Court, so too is the appointment of an appropriate person as the Police Prosecutor essential for establishing the harmony and spirit of co-operation that produces the most successful outcomes. The staff that have filled the role of Police Prosecutor at both Shepparton and Broadmeadows have all been excellent appointments, demonstrating flexibility and empathy in their dealings with the defendants. In particular the Shepparton Prosecutor, Sergeant Gordon Porter, was involved from the earliest days of the Koori Court through his participation in the Reference Group that developed the first Koori Court at Shepparton and he has recommended that the prosecutor in any Koori Court should be involved in both the Reference Group and the training of the Elders and Respected Persons. While Sgt Lithgow, the Broadmeadows prosecutor, notes that the involvement of the prosecutor is more limited than in normal proceedings his attitude towards the Court proceedings is indicative of the need for court staff that support the collaborative approach and stated goals of the Koori Court. He observed that:

My personal view is that the Koori Court, as it's only all new, that if a person has gone to gaol in the past and should probably go back to gaol again, that the person should be given that opportunity to have the support

and the intention of the Koori Court to hopefully get them back on the track and not only keep out of gaol but get off crime...the idea is to come up with ways for improving the defendant's future life.

The extent of interaction between the defendants and the Koori Court police prosecutor also varies between the metropolitan and regional Courts. Other than being in court on the day of the hearing the prosecutors at a metropolitan court will usually not see the defendant again unless they re-appear before the Court. Sgt Lithgow notes that there may be more involvement in a country area such as Shepparton "because it's a community up there, and you see them down the street and shopping and know the family whereas in Broadmeadows as a prosecutor in a big area I never come across them."

The *Royal Commission into Aboriginal Deaths in Custody* (RCIADC) emphasised the historical role of the police in the dispossession and management of Aboriginal people. Commissioner Johnston commented in the final report of the RCIADC that "These historical factors create a situation today where policing of Aboriginal people is a highly charged responsibility, replete with political and cultural meanings which affect the police role."⁴³ In a similar vein the interim Deaths in Custody Report by Commissioner Muirhead characterised the relationship between the police and Aboriginal people as being "the cutting edge of an uncaring society."⁴⁴ It is in this context that the choice of an appropriate police prosecutor for the Koori Court becomes all the more significant. Comments from the police that the Koori Court is a "soft option" or the choice of a prosecutor who is unable or unwilling to embrace the spirit of the Court will not only undermine the credibility of the Court, but also destroy any prospect for achieving an improvement in police and Koori relations. The police prosecutors who have worked in the Koori Court in the pilot program have demonstrated a willingness to engage with the community and consider the possibilities of the Koori Court. It is important that subsequent appointments to the Koori Courts are individuals of a similar quality and commitment.

⁴³ Johnston, E. (1991). *Final Report of the Royal Commission into Aboriginal Deaths in Custody*. AGPS, Canberra, Vol 3, para 21.22.5

⁴⁴ *Ibid*, Vol 2, para 13.1.1

2.7 Role of the Corrections Officers

In Victoria, Community Correctional Services (within Corrections Victoria) is responsible for the supervision of defendants who are placed on a range of orders. Following the signing of the Victorian Aboriginal Justice Agreement, Community Correctional Services (CCS) determined that a previous review conducted in 1999 into its role and functions had failed to adequately review Koori-specific issues.⁴⁵ As a consequence the Community Correctional Services Redevelopment Project was established and resulted in the introduction of a number of initiatives, including the creation of the position of Indigenous Community Corrections Officers (ICCOs), the development of guidelines for the supervision of Indigenous defendants, and the appropriate training for the staff of CCS. The introduction of the specialist ICCOs within CCS actually preceded the establishment of the Koori Court and so the duties identified for the position did not include specific reference to the Court. In June 2002 CCS convened a Forum with representatives from key Aboriginal community groups and representatives of various Regional Aboriginal Justice Agreement Committees and it was agreed that the newly created ICCO positions would take on an integrated case load, supervising both Koori and non-Koori defendants.⁴⁶ The description of duties for the ICCO position included:

1. Monitor and supervise Indigenous and non-Indigenous defendants; provide culturally appropriate guidance, counselling and discipline as necessary; establish objectives and goals within the defendant management process and monitor defendant compliance with community based orders.
2. Assist in the development and delivery of defendant programs for defendants utilising departmental and community resources and direct defendants to attend educational, community work, assessment and treatment programs.
3. Maximise the successful completion of orders by defendants through their increased participation in Indigenous community activities and access to Indigenous services.

⁴⁵ Ellis-Smith, T. (2003). *Edges of flexibility: The supervision and management of Indigenous defendants in Community Correctional Services – Interim Report*, p.3

⁴⁶ *Ibid.*, p.11

4. Develop strong links with local Indigenous agencies, attend Regional Aboriginal Justice Advisory Committee meetings as directed and undertake a range of community development activities within the local Aboriginal community
5. Provide advice to assist the judiciary in all stages of the sentencing process including conducting assessments of defendants at court
6. Undertake prosecutions of defendants failing to comply with orders, giving evidence in court if required, and the preparation of reports to the Adult Parole Board as directed.
7. Take a lead role in the development of community corrections staff understanding of Koori issues and the needs of Koori defendants and also contribute to the enhancement of defendants and their community's understanding of the criminal justice system.

It is worth noting that the nature of the ICCO duty statement certainly seems to be consistent with the operation of the Koori Court, although the provision for assisting the judiciary during the sentencing process would appear to have been assumed by the role of the Elders and Respected Workers or the Koori Court Worker. The degree of involvement of the ICCO with the Koori Court will be dictated by the fact that, consistent with the experience of mainstream Magistrates' Courts,⁴⁷ community based orders are the most frequently utilised non-custodial sanctions in the Koori Court. One of the strengths of the Koori Court is that it seeks to tailor orders that utilise existing service providers for the benefit of the defendant. CCS has had staff present at sittings of the Koori Court at both Shepparton and Broadmeadows since their commencement. While there is an ICCO position located at Shepparton it has been vacant since mid 2004. There is currently only one ICCO in the Metropolitan region.⁴⁸ This has presented difficulties with defendants who have appeared before the Broadmeadows Koori Court but whose place of residence is outside the region (for example, defendants who reside in Preston or Heidelberg). There is no possibility for the Corrections Officer to supervise these defendants. The

⁴⁷ Freiberg, A., Pathways to Justice p.16

⁴⁸ There is also a ICCO located in Mildura which could be utilised in the Koori Court that is proposed for that region.

importance of an ICCO taking a supervisory role has been recognised by Magistrate Kumar, who directed in one Koori Court matter that the defendant who had been placed on a Community Based Order and was brought back before him for a breach would not be considered to have breached if he had been supervised by an ICCO. Such an order obviously has serious ramifications for the staffing decisions made by CCS. It can also be viewed as a clear indication of the importance attached by at least one member of the Magistracy of there being ICCOs attending Koori Courts. The reasoning of Magistrate Kumar was that an ICCO would have a greater awareness of the issues confronting an Indigenous defendant placed on a Community Based Order and therefore the likelihood a breach occurring would be less.

Magistrate Anne Collins also commented on her frustration that there are not ICCOs at every CCS office and that it is “one of the things that I think is essential” to ensure that the defendants can comply with sentencing options apart from imprisonment (such as Community Based Orders). Magistrate Collins says it is important to recognise the range of issues that the defendants are often dealing with and that “if you don’t have Indigenous workers there to help they (the defendants) are not going to all of a sudden be able to comply with these orders.”

The requirement that all Koori Courts be staffed by ICCOs would be an important step towards addressing the issue of the post-sentencing phase of the Koori Court process.

Recommendation Six

That all Koori Courts, both existing and future, should have access to an Indigenous Community Corrections Officer.

That Community Correctional Services should implement a comprehensive cross-cultural awareness training program for all non-Indigenous Corrections Officers. Indigenous offenders should only be supervised by either Community Corrections Officers who have undertaken such training or by an Indigenous Community Corrections Officer.

2.8 Role of the Victim

The operation of the Koori Court differs from some other examples of what can be termed “restorative justice” in that the involvement of the victim in proceedings is not integral to the process. It should be noted also that even in those restorative justice models that are focused upon the role of the victim there is not always a large attendance. For example in youth conferencing in Victoria the participation of the victims is no higher than 65 per cent and in other forms of conferencing or restorative justice programs the participation may be even less. Although the Koori Court is no different to usual Magistrates’ Court matters in that the victim may be invited to attend or a victim impact statement may be provided to the court, it should be remembered that in many ways the primary focus of the Koori Court is directed towards the rehabilitation of the defendant. Significantly the Shepparton Police Prosecutor noted that he would like to see greater victim involvement in the process but that the capacity to achieve this was hampered by a lack of resources. Sergeant Porter further noted that there is a reluctance on the part of some victims to attend, for a variety of reasons, and he observed: “I’ve spoken to some victims and, and they’ve basically said: ‘Oh there’s no way I want to do anything to do with that’. I’ve spoken to other victims that, (said)... ‘I want do this, or do that to this particular person,’ so the thing, they’ve got revenge in mind and...I don’t think the court’s a back door way for them to seek retribution, that’s not to me the function of the court”. While the victims have not played a major role in the proceedings in the Koori Court it is worth noting that there have been instances where the judicious choice to invite the victim has contributed to the positive outcomes of the Court. Sergeant Porter noted that “one vehicle accident victim had the offender in tears due to realisation of the harm that she could have done to that victim.”

2.9 Koori Justice Panel

The focus of the Koori Court upon tailoring appropriate sentencing dispositions has meant that there is a need to ensure that the defendant has the necessary support to complete the order, which may be either an Intensive Corrections Order (ICO) or a Community Based Order (CBO). Following the passage of the Koori Court legislation

discussions took place between the Department of Justice and Corrections Victoria to consider what form such support might take. Significantly the model of the Koori Court that was developed by the Statewide Working Party included a Koori Justice Panel as part of the overall operation of the Koori Court. The Panel was also included in the Koori Court Operational Manual that was developed in consultation with the Shepparton Reference Group. The model was then put to the Aboriginal Justice Forum who ratified the concept. The role of the Panel was envisaged as providing support to the defendant to safeguard against breaches, convening when the defendant is at risk of being breached for failure to comply with the terms of the order that has been given. The Panel would have the power to issue a caution where the conduct of the defendant is such that they are in danger of breaching their order. The defendant would appear before the Koori Justice Panel along with their Community Corrections Officer at the point that the possibility of a breach is first detected. The Panel would have the power to decide whether to recommend that there should be formal breach proceedings against persons given orders in the Koori Court. The location Manager from Community Correctional Services is vested with the power to charge a defendant with a breach, in which case the matter is referred to the presiding Magistrate to consider the appropriate sanction, on the presumption that the defendant pleads guilty to the breach.

The suggested composition of the original model proposed for the Koori Justice Panel included at least one local Koori community member and two representatives from Corrections Victoria. The operation of the Koori Justice Panel is quite clearly crucial to the effective implementation of the sentencing orders made within the Koori Court and there clearly exists strong support for the concept amongst key participants, including Corrections Victoria and Magistrates. The internal interim evaluation of the Justice Panel program released in December 2003 made a number of recommendations with regard to the establishment and funding of the Koori Justice Panels and it is worth noting that there have been significant efforts made to establish them by the Department of Justice. The Department of Justice advertised the positions for each of the existing Koori Court locations and gained an exemption for the positions to be identified positions. Discussions between the Department of Justice and Corrections Victoria determined that

the members of the Justice Panel would be employed on a sessional basis by Corrections Victoria. The Justice Panels would presumably be convened as the need for intervention arose and would not have a scheduled sitting date akin to, for example, Koori Court sitting days.

The criterion for the selection process was specified to include:

- A sound knowledge of Victorian Aboriginal culture and society;
- An ability to work effectively within a Panel, which will collectively make recommendations;
- An appreciation and sensitive approach to the needs and aspirations of Victorian Aboriginal communities;
- Possession of well developed analytical, evaluation and assessment skills and ability to apply these skills within an operational panel;
- A demonstrated understanding of the justice system and issues affecting Aboriginal defendants;
- Highly developed communication and interpersonal skills and experience in dealing with Aboriginal issues; and
- Knowledge of, or the ability to acquire knowledge of the operation of Community Correctional Services in Victoria.

Despite the fact that a funding arrangement has been reached for the positions between the Department of Justice and Corrections Victoria, and advertisements have been placed for the Justice Panel positions in both the major and Indigenous newspapers to date, there has been no expression of interest from within the Shepparton and Warrnambool Koori Court areas. One Indigenous person has been contacted and expressed interest for the Broadmeadows Koori Court but an additional person is still required. The difficulty in attracting suitable candidates to sit on the Justice Panel can perhaps be attributed to the limited nature of the employment and possibly the fact that the Justice Panel staff will be employed by Corrections Victoria. In the course of interviews conducted with staff of Corrections Victoria, it was stated that the ICCO had indicated that their employment had led to a number of occasions during Koori community events, where the Officer was

abused. The clear implication was that the ICCO was seen as being somehow responsible if a defendant was deemed to have breached an existing order. Reluctance amongst the members of the Indigenous community to be involved in the decisions that would lead to another community member being breached (and perhaps imprisoned) could be behind the difficulty in attracting suitable candidates for the Justice Panel. Leaving aside the difficulties involved in the recruitment of appropriate persons, the composition of the Justice Panel has also prompted considerable debate, with members of Corrections Victoria at Shepparton expressing the belief that the Koori Court Officer would be ideally suited to participate in the work of the Justice Panel. Notwithstanding the fact that the current work load of the Koori Court Officer would preclude such involvement there are also concerns that this might be seen as extending the involvement of the Koori Court into the life of the defendants to an excessive degree. This point was specifically raised in interviews with Magistrate Angela Bolger and former Magistrate Kate Auty. Carrying out these dual positions may place an officer in a position of conflict.⁴⁹

2.10 General Magistrates' Court Staff

An important aspect of the Koori Court is its integration within the body of the broader court environment. The extent to which the non-Indigenous court staff are receptive to, or even supportive of, the Koori Court has profound ramifications not only for the operation of the court itself, but the wider goals of making the justice system accessible to Koori people. It is certainly observable within the Koori Court at Shepparton that the non-Aboriginal staff have embraced the challenge presented by the initiative. Magistrate Auty has observed the support has been evident from the senior registrar down to the clerks and this is of itself significant in a country town where awareness about and support for Indigenous rights may not have always been evident. Auty noted:

⁴⁹ The DOJ is of the view that: The Koori Court Officer and Aboriginal Elder or Respected Persons positions are involved at the pre-hearing and hearing stages of a defendant's matter. In this capacity all positions are privy to information that may be provided by the defendant, his or her friends and family, as well as Corrections Victoria and Victoria Police. It is not appropriate that at a later stage where potential breach proceedings are being considered that persons who have this knowledge are participating in a Justice Panel that will make recommendations regarding whether the same person should be breached. Further, the Koori Court Model dictates that there should be a clear separation of processes, that is - the hearing and post hearing matters. In these circumstances the clearly defined positions that have created to service the Koori Court should not overlap given that each has clearly defined roles with distinct functions.

We generally have the clerks in court and I've tried on occasion to have the clerks sit at the table, it just depends on how many people there are. So that people feel some ownership of what's happening. We've had very positive responses from junior clerks who came through early in the piece and we've now got a senior registrar involved in the proceedings who is consistently seeking more information, consistently wants to know more about connections, kin, country and all the other material... so we've actually got a bit of an in house training which is subliminal and there hasn't been an adverse reaction.

Daniel Briggs, the Shepparton Koori Court Officer, has commented that the support given by Peter Mithen, the Senior Registrar, was a significant factor in the early stages of the Koori Court. Briggs noted that Mithen gave him total support when he commenced his employment with the Court and that

...his first words to me, was you know when I first started, he said look, this is all new to us, he said you've got run of the mill basically, he said you do what you need to do to make the job work and we'll support you however we can, and so then, from that point, he's given me the perception that he has the trust in me that I'm gonna be responsible and professional enough to do the job without having to be sort of watched and hounded and you know, what's he doing now sort of thing and so I think that was one of the biggest things that made me feel comfortable in my role that I could just do what I needed to do within my boundaries of course to make this job work.

The appointment of a Registrar to the Koori Court in Shepparton was also an important initiative that has further served to break down some of the barriers that the Koori community felt about going to the Court. Even more importantly it has given support to the Koori Court Officer and allowed him the freedom to carry out other duties. Significantly one of the Broadmeadows Koori Court Elders, Kevin Coombs, believes that

the operation of the Koori Court has brought a gradual change in attitudes amongst the general court staff and that the initial opposition can perhaps be attributed to the fact that many of them had never had any dealings with Kooris prior to the Court being established. He commented that:

Well I guess to those people, it's a learning thing, I think you know, to be culturally aware of our cultural ways and I guess those people, wouldn't have been associated with too many Aboriginal people in the past, but I think, and that in itself is a good thing, being culturally aware of things, but I think, but now I think they've turned, they mightn't have been in the first instance, but I believe it's just business as usual and it's part of the day and I think that those people involved in the Koori court are very supportive of the court now.

Currently there is not a designated Koori Court Registrar in the Broadmeadows Koori Court and the Senior Registrar, Don Gear, is quite emphatic that the creation of such a position would represent something of a duplication of roles with the duty statement of the Koori Court Officer. Apart from the issue of duplication of roles with the Koori Court Officer, Mr Gear also believes that the creation of such a role would present problems in co-ordinating the listings with the other courts and that there would be difficulties in finding adequate staff to fill the position. In response it could be noted that the existence of a designated Koori Court Registrar does not appear to have presented any insurmountable problems with the listing procedures at Shepparton Magistrates' Court and while it may initially require some degree of co-ordination, the benefits to the operation of the Koori Court are significant. The practice of rotating clerks of courts through the Koori Court, consistent with the practice in usual Magistrates' Court matters, is also seen by Gear as part of the established procedures and not something that warrants any change or shift. Notwithstanding the reservations of the Senior Registrar it would seem the demands made upon the Koori Court Officer and the desirability of having the Court seem more accessible to Indigenous defendants (and not just through a few designated Koori staff) would support the creation of a position of Koori Court registrar at Broadmeadows and any other location where a Koori Court is subsequently

established. It also appears that the duties of the Koori Court Officer and the duties of the Koori Court Registrar are vastly different.

Recommendation Eight

That consideration should be given to the creation of the position of Koori Court Registrar for the Broadmeadows Koori Court, and any other Koori Courts that are subsequently established.

CHAPTER THREE: SERVICE PROVIDERS AND RESOURCING

3.1 Importance of Appropriate Service Providers and Resources

The location of the original two Koori Courts for the pilot program was dictated by the fact that there were disturbingly high levels of Indigenous involvement with the criminal justice system, the existing state of relations between the local courts (or police), and the extent to which there were existing service providers. In his second reading speech of the Koori Court Bill the Attorney General, the Hon Rob Hulls, noted that one of the reasons why Shepparton was chosen for the site of the first regional Koori Court was the availability of drug and alcohol treatment programs, an Indigenous women's mentoring program, and "well developed Indigenous community controlled social service providers such as Rumbalara Aboriginal Co-Operative and the Burri Family Preservation Service and others."⁵⁰ He then went on to emphasise the importance of adequately resourcing the Koori Court system, stating that:

The effective and appropriate resourcing of the Koori Court is critical to its success. This is acknowledged by this government, and we have committed funds under the Victorian Aboriginal Justice Agreement for the establishment and operation of Koori Court and its programs. This funding will not detract from existing programs; rather it is additional in order to absorb the increased demand on existing services.⁵¹

The assurances made by the Attorney-General at the second reading of the Koori Court Bill were significant for the recognition that all too often the initiatives that are intended to provide positive outcomes for Indigenous communities are either under-resourced or are introduced to the detriment of existing programs. At a conference held in Adelaide in 1997 Young observed that:

⁵⁰ Hansard, Magistrates' Court (Koori Court) Bill, Legislative Assembly, Second Reading, The Hon R Hulls, 24 April 2002, p.1129

⁵¹ Ibid, p.1132

...services to Indigenous peoples are provided by a diverse range of bodies/organisations which receive separate funding and which are able to determine their own policies, directions, operational plans and financial management.....Following discussions with Aboriginal offenders it is evident that Community, State and Federal service providers are either over-servicing or under-servicing Aboriginal offenders. Limited communications, unsatisfactory timing and financial insecurity are contributing towards disassociated services and subsequently the needs of Aboriginal services are not being fulfilled.⁵²

Clearly the challenge that exists for the existing Koori Courts, and any ones that are subsequently created, is to ensure that the range of service providers are identified and linked into the work of the Court. A number of persons interviewed in the course of the review expressed concern at the fact that there were either insufficient adequate resources available to meet the needs of the Koori Court (specifically with respect to the provision of drug and alcohol rehabilitation programs) or that, alternatively, the services were in existence but they had not been adequately linked to the operation of the Koori Court. This failure was variously attributed to either organisational rivalries or poor co-ordination. It is a scenario which seems to confirm the comments made by Young above and which has significant ramifications for the operation of the Koori Court.

3.2 Shepparton

Any consideration of the current availability of services for the Aboriginal community in Shepparton must take into account the fact that it was chosen in July 2003 to be one of the ten sites to trial the commitment of the Council of Australian Governments (COAG) to a co-operative approach to addressing Indigenous inequality in Australia. One of the key determinants for choosing Shepparton was clearly the fact that the city's population of 60,000 includes 6,000 persons who identify as Indigenous. The disadvantage of

⁵² Young R 'A Multi-Agency Resocialisation Program', in Sarre, R & D Wilson (ed.), *Proceedings of Roundtable on Sentencing and Indigenous Peoples, convened by Australian Institute of Criminology and the University of South Australia*, 31 October 1997, AIC, Canberra, p.22

Shepparton's Koori community is manifested in a range of socio-economic indicators. For example while the local unemployment figures are put at around five to six per cent, the figure for the local Koori community is put as high as 95%.⁵³ Further, the Koori community is excluded from the economic wealth of the region, estimated at an annual regional production figure of \$3.22 billion. A survey conducted by the Ganbina Koori Economic Employment Agency concluded that the Koori participation in the local economy as low at \$11 million, or little more than 0.2%. Against this background of economic and social disempowerment the COAG pilot has been concerned with eradicating waste in funding to programs. A COAG Facilitation Committee has been established with appointed Indigenous participants. Any economic initiatives, such as employment schemes, must be approved by the Facilitation Committee. While the Victorian Government considers the COAG trial to be progressing well,⁵⁴ the Eureka Project survey of the pilot released in October 2004 concluded that it was not only failing to acknowledge the knowledge and expertise of existing community organisations and programs, but also threatening "to consume all the community oxygen which has nourished a whole raft of community innovation in Shepparton during the past 20 years."⁵⁵ The success of the COAG pilot clearly could have ramifications for the co-ordination and resourcing of organisations (both Koori and mainstream) and it therefore has a potential impact upon the outcomes from the Koori Court.

Aboriginal Community Organisations and the Shepparton Koori Court

Within the Shepparton region there are a number of major Koori organisations, including the Rumbalara Co-Operative and the Rumbalara Football and Netball Club. It is important to note that these two organisations, whilst sharing the same name, are distinct and separate entities. The Rumbalara Co-operative provides a range of community services including drug and alcohol rehabilitation programs, housing and community health services. The Co-operative's management have noted that "its been really tough on

⁵³ Cutcliffe, T. (2004). *Take it or leave it: How COAG is failing Shepparton's Aboriginal people*, Eureka Project, p.15

⁵⁴ Ibid, p.7

⁵⁵ Ibid, p.8

Rumbalara organisations to assist the Koori Court because we don't get extra funding to do it, I mean basically the funding that we receive as an organisation is to deliver a service within, you know, its means." From the perspective of the Co-operative the creation of the Koori Court has meant an additional area that must be serviced from a pool of funds that are already committed or over-stretched.

Apart from the personnel from the Aboriginal Co-Operatives there are also a number of agencies that employ Indigenous staff in the Shepparton region who have direct contact with the work of the Koori Court. The Hume Region Community Justice Panel co-ordinator, Larry Jackson, attends police stations when Kooris are arrested by police. The Victorian Aboriginal Legal Service Client Service Officer, Mr David Atkinson, similarly assists clients in preparing for their court appearances. Both Larry Jackson and David Atkinson were part of the Steering Committee that was convened to oversee the establishment of the Koori Court.

Non-Indigenous Service Providers and the Shepparton Koori Court

The Goulburn Valley Community Health Service is also in regular attendance at the Koori Court and a number of defendants have been referred there for drug or alcohol treatment programs. There is certainly a strong sense of support for the Koori Court from the Health Service, with one of the workers observing that a client who had been referred by the court was usually resistant to any treatment and it often proved difficult to get them to engage with the process. The worker noted, however, that "the experience I have encountered with clients from the Koori Court is that they feel that they have been involved in the process and therefore there is little if any resentment or resistance to treatment and engagement has been an easier process."

3.3 Broadmeadows

3.3.1 Aboriginal Community Organisations

The Broadmeadows Koori Court has been supported from the outset by the Enmaraleek Aboriginal Co-operative which is located in Broadmeadows but receives limited funding. Enmaraleek offers a corrections program which provides post release support for defendants and owns nine houses which provide housing for long term tenants. In addition the Co-operative offers a number of community education and skills programs including a probationary driving program and the Community Development Economic Program (CDEP). While Enmaraleek has affiliations with numerous agencies such as the Victorian Aboriginal Health Service, the Aboriginal Housing Board, Centrelink, the Koori Unit at the Kanga-Batman TAFE, and Ngwala Willumbong (a drug and alcohol recovery centre), there is clearly a feeling that the organisation does not receive adequate funding to provide a comprehensive range of services. Since the Broadmeadows Koori Court commenced sitting, Enmaraleek has been in attendance and the insight provided by the Chief Executive Officer of the organisation has proved invaluable in giving background information regarding defendants who have, on occasion, not been known to the Elders and Respected Persons or the Koori Court Officer.

3.3.2 Service providers and the Broadmeadows Koori Court

One of the most important service providers within the Broadmeadows Koori Court is undoubtedly the Court Referral Evaluation for Drug Intervention and Treatment (CREDIT) program. The police may refer a defendant on being apprehended and charged to the CREDIT program as part of the bail process. The Magistrate of the Koori Court may refer a defendant to the treatment program as a condition of bail. The Broadmeadows Court CREDIT worker is often in attendance at the Koori Court and has worked closely with the Koori Court Officer. There have been 26 referrals to the CREDIT program since the Koori Court commenced operation.⁵⁶

⁵⁶ Information provided by Terrie Stewart, Koori Court Officer, Broadmeadows Koori Court

The Office of Aboriginal and Torres Strait Islander Health (OATSIH) funds a residential alcohol and drug service for Koori clients, the Percy Green Centre. Funding is directed through Ngawala Willumbong, which is the major Koori alcohol and drug counselling program for Indigenous clients in Melbourne. The funding to Ngawala Willumbong also includes a Counselling, Consultancy and Continuing Care position.

Among the services provided by the Department of Human Services working with the Broadmeadows Koori Court is the Adult Court Advice Service which works with young adult defendants aged between 17 and 21 years who have been given either supervised bail or a deferral at their hearing. While the program was not developed specifically for Indigenous defendants, the program had supervised between 6-8 young Koori defendants up to 9 November 2004.

Another example of a positive initiative that is being developed at Broadmeadows Koori Court is the extension of the Enforcement Review Project. This involved the co-ordinated approach of the Sheriff's Office and the Magistrates' Court in relation to the policing of multiple infringements that would be dealt with by the Penalty Enforcement Registration of Infringement Notices (PERIN court). Where repeat defendants have failed to comply with the notices and paid the fines a warrant may be issued for their arrest. The PERIN court initiative is intended to reduce the incidence of Kooris being imprisoned for failing to pay outstanding fines. If it proves successful then the program will mean that less Kooris are imprisoned for fine default. At the very least it can be seen as an example of the Koori Court providing a mechanism which makes the PERIN court system less impersonal and oppressive.

3.4 Other Issues

3.4.1 Service providers and Indigenous staff

Even where there are adequate services available for the Koori Court an issue can still arise where the case workers are not Indigenous and therefore may have difficulty understanding the Koori community. The importance of Indigenous staff in Corrections

Victoria has been noted above and it needs to be stressed that there is a similar need for Indigenous staff across the wide range of service providers linking with the Koori Court. An observation was made during the community consultations, for example, with respect to the lack of Indigenous staff in disability services. A Koori community member noted that there tended to be a predominance of young female case workers dealing with the Koori clients and that these case workers often:

... have no idea of Aboriginal culture or heritage or traditions, it's a learning curve for them and you know, it's a difficult, look you know, how do I explain this. I'm working with one young fella, who's 23 year old, I have a long history with this fellow in Juvenile Justice, so I know him pretty well, I know his family, he was assessed as having an intellectual disability as a young person, he chose not to access any of the services, but has sort of gradually as time goes by, we've encouraged him through the Koori Court process and we've got Disability Services involved, the worker has all good intentions, but she has to go to a place where, she's a non-Indigenous person, she's gotta go to a place where there may be 15 Aboriginal people living in one house... she rocks up in a government car, some of these people may have had bad experiences during their life with people coming in government cars who are non-Indigenous.

This statement is not a reflection upon the competence of the non-Indigenous worker, but rather emphasises the fact that, regardless of the level of cultural awareness training, a non-Indigenous person will find it difficult to gain access to the community and to break down the level of mistrust born out of years of administrative and bureaucratic intervention in Koori families.

Recommendation Nine

A review should be undertaken of the programs and services that are currently being utilised by the Koori Court. This should include, but not be limited to, drug and alcohol treatment programs, mentoring schemes, the provision of housing and access to the Victorian Aboriginal Legal Service. The review should consider the adequacy of current funding levels for such programs and services and the consequences, if any, of their providing services to the Koori Court.

CHAPTER FOUR: SENTENCING

4.1 *Sentencing and the Koori Court*

The Koori Courts are, as has been noted above, an initiative that flowed from the Victorian Aboriginal Justice Agreement. It is important to note the extent to which the Justice Agreement reflected the key principles and aims of the Final Report of the Royal Commission into Aboriginal Deaths in Custody. One of the key findings of the RCIADC was recommendation 92 which stated that “governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised as a sanction of last resort.” Consistent with this recommendation, the aim of the Aboriginal Justice Agreement is explicitly stated as being:

To minimise Indigenous over-representation in the criminal justice system by improving accessibility, utilisation and effectiveness of justice-related programs and services in partnership with the Aboriginal community.⁵⁷

While the Victorian Aboriginal Justice Agreement and the Koori Court both confirm a commitment to imprisonment as a sanction of last resort for Indigenous defendants, it is important to bear in mind that this principle is also advocated with respect to non-Indigenous defendants.⁵⁸

The objectives of the *Magistrates’ Court (Koori Court) Act 2002* specify that the court was established to ensure “greater participation of the Aboriginal community in the sentencing process of the Magistrates’ Court through the role to be played in that process by the Aboriginal Elder or Respected Person and others”. The sentencing procedures in the Koori Court legislation provide that the Court may consider any oral statement made by an Aboriginal Elder or Respected Person and in addition can consider a report, statement of submission made by either the Koori Court Officer or a range of other persons, including the victim of the offence, a family member of the defendant, a Community Corrections Officer or health service provider or any other person who the

⁵⁷ Victorian Aboriginal Justice Agreement, p.25

⁵⁸ Frieberg, *Pathways to Justice*, pp. 1, 6

court considers appropriate.⁵⁹ It is worth noting that the recommendations of the Royal Commission into Aboriginal Deaths in Custody also included a recommendation that sentencing authorities should consult with discrete Aboriginal communities on the general range of sentences that might be considered appropriate for a particular offence committed by members of a community.⁶⁰ At the time of the establishment of the Koori Court model it was also proposed that an Aboriginal Community Code of Conduct should be drafted. The draft principles that were proposed included the following statements:

1. That all Aboriginal people shall respect the land;
2. That all Aboriginal people shall take care and nurture the environment;
3. That all Aboriginal people agree to pass all knowledge on;
4. That all Aboriginal people will take responsibility for their own actions;
5. That all Aboriginal people shall preserve the culture in order and ritual.

The rationale behind this proposal was that this would reinforce the idea that the offences that were being heard in the Koori Court were not merely offences against the mainstream law but were also offences against the standard of the Aboriginal community. The support of community participation within the sentencing process is of itself not unproblematic. While there is frequent reference to culturally sensitive sentences or community involvement it should be noted that these terms may be interpreted in a range of different ways. The manner in which a community defines itself and its cultural practices may differ from town to town or area to area. The definition of “community” may embrace a diverse range of identifications including historical association with a particular place or area, the kinship or tribal affiliations that are given recognition in the native title process, or the community boundaries that have been created for the Aboriginal co-operatives that are vested with a range of community responsibilities including cultural heritage protection, health, education and housing. If we accept that the sentencing advice offered will be consistent with the community of each particular Koori Court then it can be seen as a practical example of the justice system being responsive to the wishes of the community. While the involvement of Koori community members in

⁵⁹ Magistrates’ Court (Koori Court) Act 2002 s 4G

⁶⁰ Royal Commission into Aboriginal Deaths in Custody Recommendation 104

giving advice to the Magistrate represents a significant development, there are other precedents in the sentencing of Indigenous defendants where the courts have taken account of factors relevant to the defendant's background as an Indigenous person. While the judicial officers apply the same principles in sentencing to all persons, irrespective of race or ethnicity, there is a substantial line of cases that demonstrate that the courts will take into account factors which arise from the particular circumstances that pertain to the particular ethnic or other group to which the defendant belongs. In the case of *R v Fernando*⁶¹ it was held that the identification of such elements may not necessarily constitute a mitigating factor, but may assist in explaining the circumstances of the offence. The judgment of Eames J in *R v Fuller-Cust*⁶² notably took account of the fact that the defendant was a member of the Stolen Generation. The significance of *Fuller-Cust* was actually referred to in at least one sitting of the Koori Court. Cases from the different jurisdictions across Australia have also recognised a range of mitigating elements, including socio-economic factors, alcohol and substance abuse and cultural considerations.⁶³

In its review into Aboriginal sentencing the New South Wales Law Reform Commission observed that:

The only practical way to achieve cultural relevance in the criminal justice system is to involve Aboriginal people in the design and delivery of sentencing options. Participation by Aboriginal communities in sentencing strategies may also be an effective means of empowering communities where the traditional Indigenous authority structures and social cohesion may have broken down, and may ultimately reduce offending.⁶⁴

⁶¹ *R v Fernando*, (1992) 76 A Crim R 58

⁶² *R v Fuller-Cust* [2002] VSCA 168

⁶³ For a summary of these factors see Williams, *V Background Paper on the Approach of Australian Courts to Aboriginal Customary Law*, Law Reform Commission of WA, 2003, pp 98-102

⁶⁴ NSW Law Reform Commission, para 4.4

4.1.1 Koori Community cultural factors in sentencing

It should not be thought that every Elder will concentrate upon cultural considerations in their contribution to the court process, but they certainly serve to emphasise the importance of the idea that the defendant has committed an offence not only against the white law but also against the values of the Koori community. One example of this occurred in a case where the defendant was charged with assaulting another woman, also Koori. In addressing him one of the Elders says:

I think you've got a problem with drink. We're all big men when we drink... You're talking to an Elder, I want you to look me in the eye. [Defendant's name], women play a big role in the Aboriginal community. You must remember that without women our community would be down the drain and so would our little children. Women are not to be knocked around, they are to be respected.⁶⁵

In this conversation the Elder impresses upon the defendant that the Koori community does not find such behaviour acceptable and that there is an expectation that community members should show respect to all women. Uncle Colin Walker, an Elder from the Yorta Yorta people makes the further observation that:

...with the Aboriginal people it's the shame thing. And, and that's why they don't like coming before the Koori Court, like people'd rather not sit there, but they come because they think 'We'll get a fair hearing'.

This comment was further supported by Aunty Merle Bamblett who commented that:

What has happened with the, the Koori Courts is that, before it was like they were anonymous? You went there and you, you stood up before people that had no idea of who you are and what you were

⁶⁵ Topsfield, J & Moncrieff, M. (2004). Tough justice or soft touch in Koori Court. *Age* (Insight section) 4, p.6

doing, and you know like, and now there's, there's the shame thing, you go up before your Elders at the Koori Court...there's the shame thing involved there.

It is an observation that further debunks the idea of the Koori Court as a “soft option” (see paragraph 4.1.2 below). The Koori Court will often engage in a form of cultural “shaming” that is also evident in other forms of restorative justice and which has been termed “reintegrative shaming”.⁶⁶ This is not to suggest that there is a formulaic or consistent approach to the role played by the Elders and Respected Persons in the Koori Court. The part they play and the extent that they are involved in the sentencing process will depend upon a range of factors, including the circumstances of the individual case, the background and approach of the particular Elder or Respected Person and the extent to which the Magistrate makes the “space” to accommodate their contribution.

4.1.2 Koori Court as a “soft option”

The announcement of the Koori Court pilot prompted a degree of comment that the new court constituted either a form of “special treatment” or a “soft-option” for defendants who chose to appear before it. When the Koori Court was first announced the project was initially denounced by David Galbally QC on the grounds that it might serve to create “a greater division between Aboriginal people and the rest of the population.” It should be noted that Galbally was not opposed to the idea that “Aboriginal culture should have a role in the sentencing of Aboriginal offenders”, but simply that there was not a need for a special court.⁶⁷ Significantly Mr Galbally has since reconsidered his original view and was prepared to concede in a newspaper article that “Maybe it is working. Maybe my views were wrong. Maybe it's what the Aboriginal community needs: something more than just tokenism but a realisation of what their needs are.”⁶⁸ The issue of Koori Court as a favourable treatment by the courts of Indigenous defendants was revived again

⁶⁶ See for example R Braithwaite, J. (1989). *Crime Shame and Reintegration*. Cambridge, Cambridge University Press.

⁶⁷ Galbally D. Koori Court tips scales. *Herald Sun* 13 March 2003

⁶⁸ Topsfield J & Moncrieff, M “Tough Justice or soft touch in Koori Court?” *The Age, Insight*, 4 September 2004, p.6

during 2004 when the media reported comments from a number of police officers who stated, anonymously, that the newly established Warrnambool Koori Court was a “soft option”. These comments were immediately denounced by senior Police but it illustrates how such misconceptions persist in the public mind. It is important to note that anyone who has attended a sitting of the Koori Court view it as anything but a soft option, having observed at first hand the manner in which the defendants are confronted by the Elders to take responsibility for their actions.

4.2 Sentencing Dispositions Available

The range of sentencing possibilities available to the Magistrate in the Koori Court is no different than those for the mainstream Magistrates’ Court. In the review he conducted into Victorian sentencing laws Professor Arie Freiberg observed that:

For community based sanctions to maintain a place within the criminal justice system they must be appropriate, logical, credible and effective. They must provide sentences with dispositions which make sense to them in terms of the seriousness of the offences which come before the courts and the background of offenders who commit those offences.⁶⁹

A large part of the Koori Courts can be seen as an attempt to provide for a specific ‘need’ group and to ensure that there are adequate resources for the orders. The view that the current sentencing regime is sufficient and that the main problems have been with the resourcing and flexibility of sentencing orders was endorsed by a number of the Koori Court Magistrates during the course of the pilot program review. The focus of the Koori Court operations has been invariably upon tailoring a sentencing disposition that does not involve imprisonment. The options for sentencing within the Koori Court include the following orders and dispositions:

- Custodial sentence
- Suspended sentence

⁶⁹ Freiberg, A, op.cit. p. 98

- Combined Custody and Treatment Order
- Intensive Correction Order
- Community Based Order
- Fine
- Good Behaviour Recognisance (Bond)

4.2.1 Range of sentences available

Custodial Sentence

A Magistrate has the power to sentence a defendant to a goal term of two years for a single criminal offence or for five years on multiple offences.

Suspended Sentence

On sentencing a defendant the court has the capacity to suspend the term of imprisonment, either partially or totally.

Combined Custody and Treatment Order (CCTO)

Where the court hands down a sentence of imprisonment of not more than twelve months there is the option for the Magistrate to order that at least six months should be served in custody and that the remainder be served in the community, with the requirement that the defendant comply with a range of alcohol and drug rehabilitation programs.

Intensive Correction Orders (ICO)

The ICO is, as Freiberg observes, at the top end of the sentencing hierarchy, having been created as a major diversion option for those offences where the defendant is likely to receive a short term of imprisonment.⁷⁰ A defendant who is placed on an ICO is required not to commit another imprisonable offence during the period and is required to be in contact with a Community Corrections Officer as frequently as specified in the order and also undertake a combination of unpaid community work and participate in designated counselling or treatment programs. The requirements specified for an ICO are not

⁷⁰ Ibid, 134

dissimilar to the Community Based Order, save for the fact that the reporting requirements are more rigorous and there is a greater component of unpaid community work. The deficiencies in the ICO as a sentencing option identified by Freiberg include circumstances where the sentencer might believe that the offence did not warrant a sentence of imprisonment (and so would therefore be inappropriate as a punishment), where there are insufficient resources for the fulfilment of a program, that the length of the order may be too short to realistically achieve any rehabilitative functions or that the conditions upon breaching are too harsh.⁷¹

Community Based Orders (CBO)

The CBO is a non-custodial sanction that has been developed for offences that might ordinarily involve a period of imprisonment. The structuring of the CBO is such that they are intended to have both a punitive element (in the imposition of tasks or duties that take up the defendant's time) coupled with a rehabilitative dimension (the requirement that the defendant complete rehabilitation or counselling programs). While the use of CBOs has become increasingly prevalent in the Magistrates' Court the system is not without its deficiencies. In the Frieberg review of Victorian sentencing laws these were identified as including; the imposition by the sentencer of unrealistic or onerous conditions, a lack of clarity in the objectives of the order, the making of orders where there are insufficient resources to allow for their completion, and the inability to adequately supervise defendants or to deal with the breaches that might arise.⁷²

⁷¹ Ibid, 135

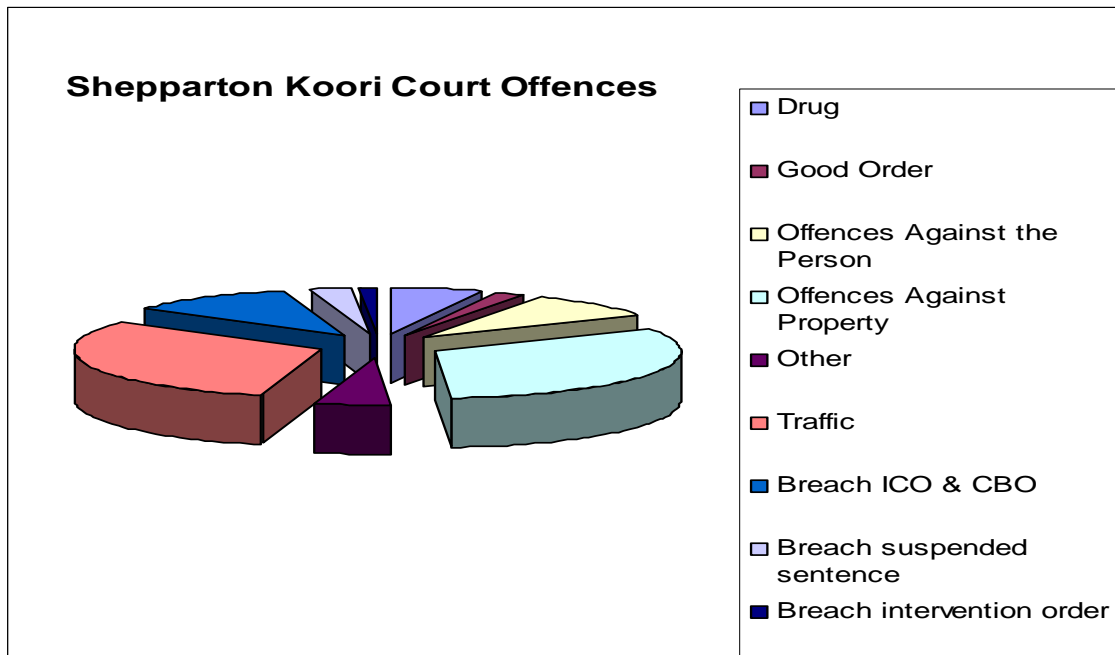
⁷² Ibid p. 163

4.3 Overview of Koori Court Cases

4.3.1 Shepparton Koori Court offences

The Shepparton Koori Court commenced operation on 7 October 2002. The period of this review therefore covers sittings from 7 October 2002 to 7 October 2004. During the period of review the Koori Court finalised 167 matters and there were approximately 21 re-offenders, which constitutes a re-offending rate of approximately 12.5%. Defendants who appeared before the Koori Court at Shepparton had committed mostly crimes against property (particularly theft) and traffic offences. Of all finalised matters, offences were as follows: Crimes Against Property (32%), Traffic Matters (31%), Breaches of ICO and CBO (11%), Offences Against the Person (9%), Drug Offences (6%), Breach of Suspended Sentences (3%), Breach of Intervention Orders (1%), Good Order Offences (2%) and Other (5%). The Shepparton Koori Court Offences are presented in *figure one*.

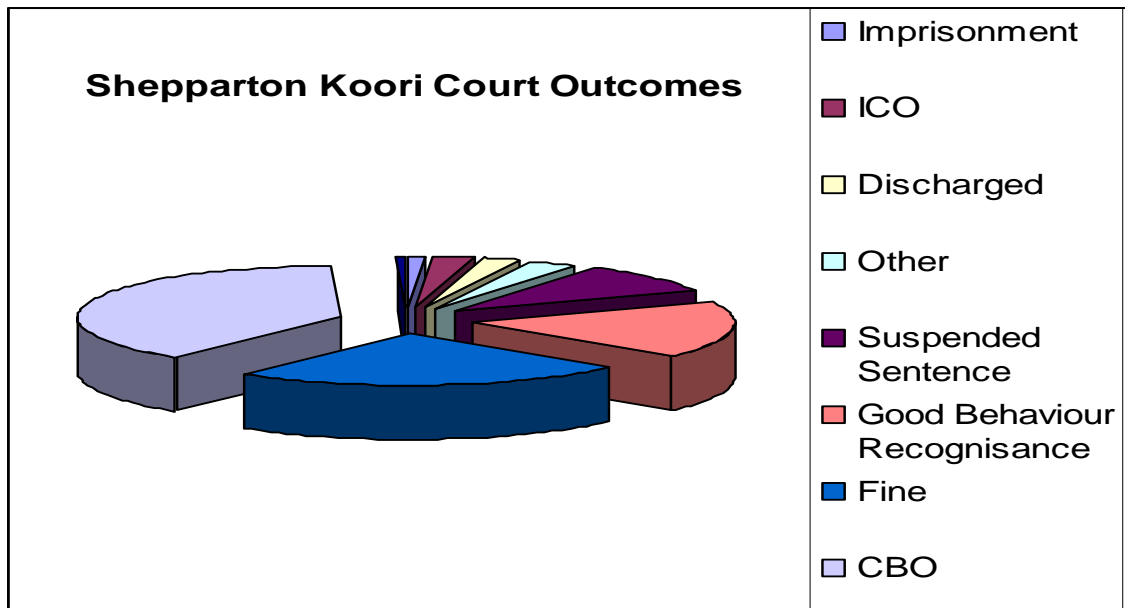
Figure 1: Shepparton Koori Court offences



4.3.2 Shepparton Koori Court sentencing outcomes

The sentencing outcomes for offences heard before the Koori Court was as follows: CBO (39%), Fine (24%), Good Behaviour Recognisance (18%), Suspended sentence (10%), ICO (2%), Discharged (2%), Imprisoned (1%) and Other (3%). These outcomes are represented in *figure two*.

Figure 2: Shepparton Koori Court sentencing outcomes



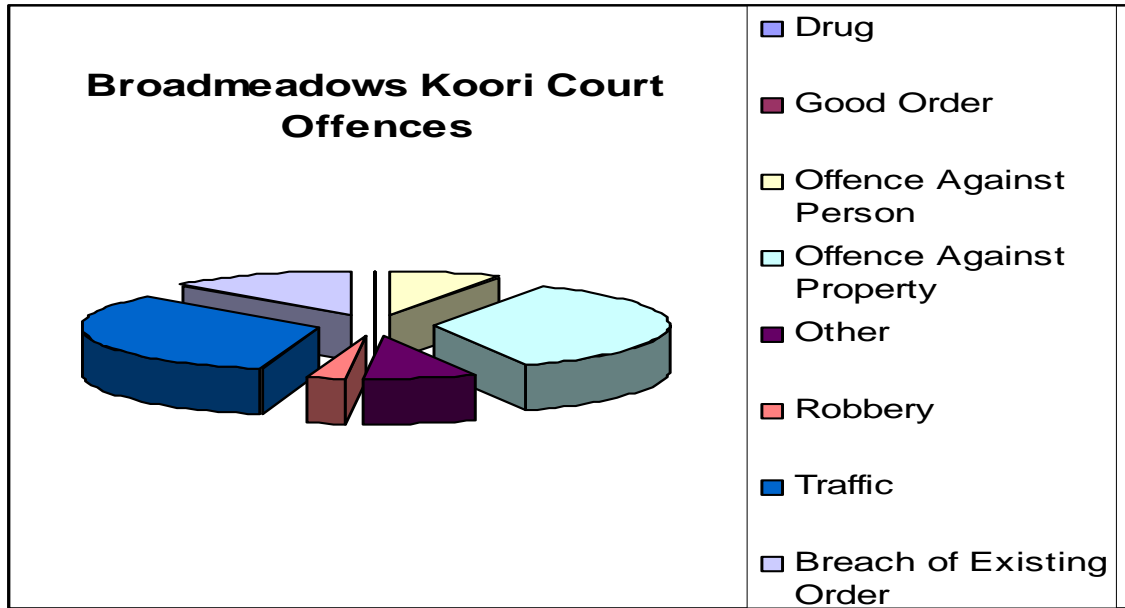
4.3.3 Broadmeadows Koori Court offences

The Broadmeadows Koori Court was officially opened on 1 April 2003 and this review encompasses the sittings from that date to 7 October 2004. During the period in question the Court heard 90 matters and there were approximately 14 instances of re-offending, representing a re-offending rate of 15.5%. Two re-offenders re-appeared before the court on more than one occasion. During the period of the Koori Court pilot program evaluation at Broadmeadows there were 25 defendants who failed to appear, resulting in a warrant being issued for their arrest.⁷³ Of all finalised matters, offences were as follows: Offences Against Property (45%), Offences Against the Person (23%), Traffic Offences

⁷³ Information supplied by Terrie Stewart, Koori Court Officer, Broadmeadows Koori Court.

(16%), Breach of Existing Orders (6%), Good Order Offences (4%), Robbery (1%), and Other (4%) (see *figure three*).

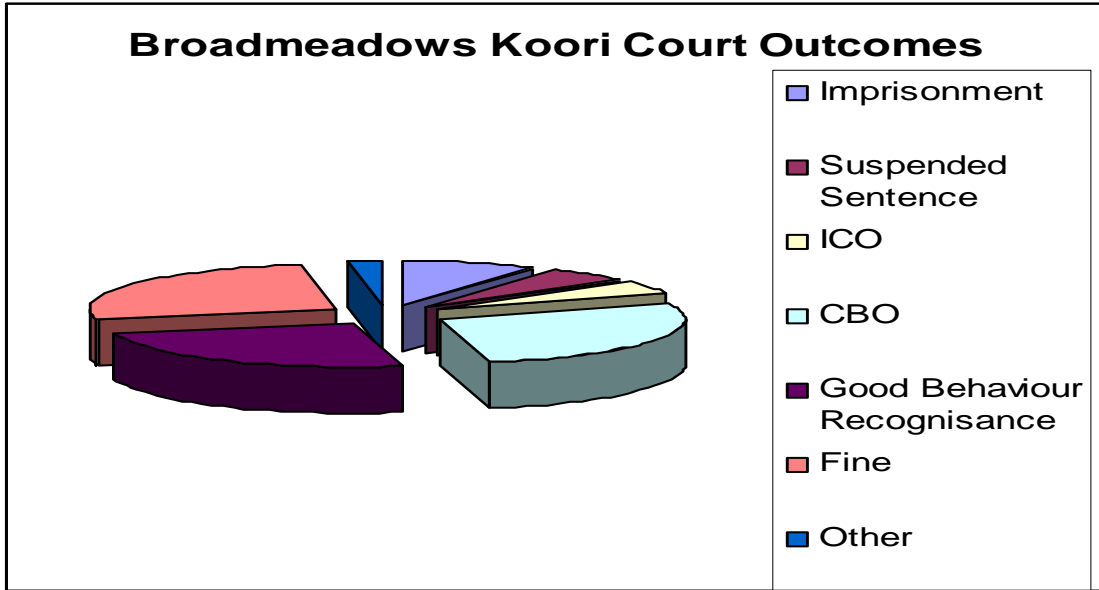
Figure 3: Broadmeadows Koori Court offences



4.3.4 Broadmeadows Koori Court sentencing outcomes

The sentencing outcomes for Broadmeadows Koori Court show that the majority of matters were dealt with by way of Community Based Orders (28%), Fines (27%) and Good Behaviour Recognisance (24%). There was a slightly higher incidence of imprisonment at Broadmeadows (9%) compared with Shepparton, while the suspended sentences accounted for six per cent of all dispositions. Sentencing dispositions under the heading of “Other” comprised two percent of the outcomes. These sentencing outcomes are represented in *figure four*.

Figure 4: Broadmeadows Koori Court sentencing outcomes



CHAPTER FIVE: MEASURING SUCCESS

5.1 *Measuring the Success of the Koori Court*

In their consideration of the impact of youth conferencing upon re-offending, Hayes and Daly⁷⁴ argue that any new criminal justice practice revolves around the “disarmingly simple question” of “Does it work?” In turn this begs the question of the appropriate measure of the success of the new criminal justice practice. Is the measure of success the reduction in statistics for offending or perhaps whether it has “some constructive impact on those who are caught in the criminal justice system”? The experience of the Koori Court pilot program would suggest that it has been successful in both counts, although it must be stressed that the Koori Court program will benefit from a continuing evaluation and monitoring process. The evaluation of the Koori Court pilot program is related to their success in meeting the following aims:

Criminal justice aims:

- To divert Koori defendants away from imprisonment to reduce their over-representation in the prison system;
- To reduce the failure to appear at Court;
- To decrease the rates at which Court orders are breached; and
- To deter crime in the community generally.

Community building aims:

- To increase indigenous community ownership of the administration of law;
- To increase positive participation by Koori defendants and community;
- To increase accountability of the Koori community families for Koori defendants;
- To promote and increase community awareness about community codes of conduct/standards of behaviour; and
- To promote and increase community awareness about the Koori Court generally.

⁷⁴ FINISH REF (2003: 725)

5.2 Criminal Justice Aims

5.2.1 Measuring recidivism

The criteria for measuring the success of the criminal justice aims of the Koori Court pilot program is essentially a reduction in rates of re-offending for both persons convicted and sentenced to a custodial sentence and for those persons who are given non-custodial, community based orders. Any survey of criminological research, however, reveals that there is a wide range of definitions of recidivism currently utilised. The definition of recidivism might measure, for example, only those defendants who have returned to prison or have been convicted for any offence or been arrested within a specified period of time. The 2004 Report on Government Services offers two measures of recidivism. Drawing from data for prisoners released during 2000-1 the Report defines the two indicators of recidivism in the following way:

The first is the percentage of prisoners returning to prison within two years of release and the second is the percentage of prisoners returning to corrective services (either prisons or community corrections).⁷⁵

It is worth noting that a distinction is also made in the figures for the percentage of offenders returning to Community Corrections as compared to the figure returning to corrective services. The figures for the return to prison services in the review period reveal a national rate of return of 37.2 per cent, with New South Wales having the highest rate of return of prisoners at 45.4 per cent of prisoners. The figure for Victoria during this period was 31.3 per cent. The figure for prisoners returning to corrective services nationally was 47 per cent, with Western Australia reporting the highest rate of return at 51.4 per cent. The figure for Victoria for prisoners returning to corrective services in this period was 39.6%. The national figure for offenders returning to Community Corrections was 19.9 per cent with the largest rate of return being recorded in Western Australia (32.7 per cent) while Victoria recorded a rate of 21.1 per cent.

⁷⁵ Report on Government Services 2004, Justice Preface C15

In considering the reliability of the data from the 2004 Report regarding recidivism it is important to note that the indicators do not include arrests or count convictions where outcome results in the defendant receiving a penalty such as a fine or a caution, which are not administered by corrective services.⁷⁶ Further, the indicators do not take into account corrections sanctions where the original conviction may have resulted in the defendant receiving a lesser penalty such as a fine. Finally, no distinction is made between the nature of the subsequent offending, such that the defendant who has previously been convicted for serious offences is deemed to have re-offended even where the re-offending involves a far less serious offence.

The importance of re-offending statistics cannot be overstated, given the literature which draws a strong link between the levels of over-representation of Indigenous prisoners in the criminal justice system and a history of re-offending. Day observes that: “Australian Indigenous people also have far higher rates of recidivism than do non-Indigenous people.”⁷⁷ It is worth noting that the rates of recidivism are not solely confined to Indigenous adult male offenders. For example, the 2002 HREOC Social Justice Report noted that:

A significant factor among the Indigenous female prisoner population is the high rate of recidivism. National statistical data indicates that nearly 3 in every 4 (76 per cent) of all Indigenous prisoners had been previously imprisoned. This statistic replicates data collected in 2000.⁷⁸

The statistics for re-offending remain consistently high across jurisdictions and in different defendant groups (amongst juveniles and women, for example). The figure for Aboriginal women in Victorian prisons in 2000 found a re-offending rate of 71 per cent as against a figure of 61 per cent for the general population.⁷⁹ Brenner makes the observation in respect of this statistic that, “The emerging pattern amongst this group of defendants is that they have had a history of contact with the criminal justice system

⁷⁶ Ibid, C14

⁷⁷ Day, A. (2003). Reducing the risk of re-offending in Australian Indigenous defendants: What works for whom? *Journal of Offender Rehabilitation*, 37(2), p.2

⁷⁸ HREOC, Social Justice Report 2002, AGPS, Canberra, chapter 5

⁷⁹ Brenner K Indigenous women in the Victorian Prison System 2002: a snapshot Dept of Justice June 2002

throughout all of their adult lives.”⁸⁰ The generally high rates of Indigenous prisoners returning to prison within two years of their release can be contrasted with generally lower rates for non-Indigenous prisoners. In Victoria in 2002/03, for example, the recidivism rate for all prisoners was 31.3 %.⁸¹

5.2.2 Koori Court and recidivism rates

For the purposes of this review recidivism is defined as the conviction of the defendant for a subsequent offence within the period from October 2002 to October 2004 for Shepparton Koori Court and from April 2003 to October 2004 for the Broadmeadows Koori Court. The emphasis here is upon the re-conviction of a defendant, rather than their arrest.⁸² This is, as Lievore puts it, a far more “certain indicator of guilt than re-arrest.”⁸³ It also ensures that the indicator as to re-offending is determined at a point that goes beyond the stage of intervention by police. During the period of review from 7 October 2002 to 7 October 2004 the Shepparton Koori Court finalised 167 matters and there were approximately 21 re-offenders, which constitutes a re-offending rate of approximately 12.5%. It should be emphasised that the period of operation of the Broadmeadows Koori Court was slightly less than the Shepparton Court, but the Broadmeadows Court nonetheless heard 90 matters between 4 April 2003 and the cut-off date of 7 October 2004. In that period there were approximately 14 instances of re-offending, representing a re-offending rate of approximately 15.5%. The current recidivism rate for all Victorian defendants is 29.4% which is based upon a figure that is the midpoint of recidivism rates for prisoners and defendants returning to corrective services.⁸⁴ As was noted above, the definitions of recidivism used in the Report on Government Services 2004 excludes those persons who receive a fine or are discharged without any correctional sanctions. In light of this it is possible that certain persons who received such sentences might comprise part of the figure for the Koori Court recidivism rates, as no such distinction was made in the

⁸⁰ Ibid, p.4

⁸¹ Commonwealth Government, Report on Government Services 2004, Table C3

⁸² Subsequent minor offences including drunk in a public place or careless drive are not included because of the nature of the offending.

⁸³ Lievore, D. (2004). Recidivism of sexual offenders: Rates, risk factors and treatment efficacy *Australian institute of Criminology*, May 2004, p.26.

⁸⁴ Commonwealth Government, Report on Government Services, 2003-4, C15, Table C.3

collection of data for this review. While there is some focus on the nature of sentences that are counted for the purposes of recidivism it is also worth noting that the measuring or re-offending in such terms frequently fails to acknowledge the fact that criminal justice measures such as the Koori Court may be successful in reducing the frequency or volume of recidivism. While a person may subsequently re-offend the possibility should be considered that they may commit fewer offences than might previously be the case. Another possibility is that the offences that they are convicted for are of a less serious nature than their previous matters. Any consideration of recidivism rates also needs to consider the nature of offences, as there is substantial literature that indicates a strong correlation between certain types of offences (such as drug offences) and a higher rate of re-offending. Different offence categories may give a different possibility for a positive outcome from the justice initiative. An assessment of the Canberra Reintegrative Shaming Experiment (RISE) which studied the impact of reintegrative shaming upon juvenile defendants found that:

... there were substantially different results for the different categories of offence, among the youth violence offenders subsequently re-offended at a far lower level, amongst the survey of juvenile property offenders there was no difference in subsequent re-offending rates in both shop-stealing and the theft of property from personal victims, while the drink driving offenders there was a small increase in detected re-offending offenders. The initial conclusions from the first five-year RISE project is that the different offence types may result in a different response from offenders and that 'there is no guarantee that it will work for all offence types.'⁸⁵

Leaving aside the concerns that are made that juvenile justice initiatives need to be seen in isolation from adult defendants and the question as to whether the conclusions drawn from mainstream non-Indigenous defendants are applicable to the experience of Indigenous defendants, there is a strong suggestion that there is some link between the

⁸⁵ Sherman, L., Strang, H., & Woods, D. (2000). Recidivism Patterns in the Canberra Reintegrative Shaming Experiments (RISE), Centre for Restorative Justice, Research School of Social Sciences, NAU, 18-19.

type of offence committed and the prospect of future re-offending behaviour. Given that the Koori Court matters involved a substantial number where drug or alcohol rehabilitation comprises part of the courts sentence or order (rather than being the main charges for which the defendant appeared) this could be seen to indicate that there are grounds to suggest that the Indigenous defendants who have a drug or alcohol addiction are more likely to re-offend. This in turn would suggest that a recidivism rate lower than the State average for all defendants is, in fact, an even more substantial reduction given that it involves offences where the defendants have a higher propensity to re-offend.

5.2.3 Koori Court and rates of incarceration

The use of imprisonment as a sanction of last resort for Indigenous prisoners was, as has been noted above, one of the key recommendations of the Royal Commission into Aboriginal Deaths in Custody. Since the tabling of the Final Report of the RCIADC there has been little indication that rate of Indigenous over-representation in the justice system has decreased. In 2002 the Australian Bureau of Statistics has reported that there was a national Indigenous rate of imprisonment that was approximately 15 times that of the non-Indigenous population.⁸⁶ The same review also revealed that there were 160 Indigenous prisoners in Victoria on that date, comprising a rate of Indigenous imprisonment that was 12.5 times that of non-Indigenous imprisonment in the State. The highest rates of over-representation recorded were in South Australia (19.1 times) and Western Australia (18 times). Subsequent quarterly statistics from the Bureau of Statistics show that there has been a consistent increase in the number of Indigenous prisoners in Victoria since 30 June 2002, with the figure for Indigenous prisoners for the 2004 September quarter reaching 189⁸⁷. As the ABS is currently reviewing the basis for its Indigenous population estimates it is no longer making available Indigenous imprisonment rates per 100,000 of the population and, consequently, there is no basis to estimate the extent of over-representation of Indigenous to non-Indigenous rates of

⁸⁶ ABS, Year Book Australia – Crime and Justice Article Indigenous Prisoners, 1301.1-2004 Table 11.31 Indigenous Imprisonment,

⁸⁷ ABS Corrective Services, September Quarter 2004, 4512.0, p.2

imprisonment.⁸⁸ Perhaps the safest interpretation is that there is no sign of any significant reduction in the rates of Indigenous over-representation in Victorian prisons. The potential for the Koori Courts to have a significant influence upon imprisonment rates obviously needs to be put into context, given the relatively small number of cases that go through the Koori Court. These statistics will also need to be considered in the context that serious indictable matters that may result in a prison sentence are often heard in higher Courts. Despite these qualifications, it is worth noting that the statistics for the Shepparton and Broadmeadows Koori Courts reveal that the percentage of defendants who were imprisoned after appearing before the Koori Courts were 1.2 and 8.8 per cent respectively. Given the continuing concerns as to the rates of over-representation of Kooris in Victorian prisons, the Koori Court's role in ensuring a custodial sentence is a sanction of last resort becomes even more crucial.

5.2.4 Koori Court and breaches of orders

The use of community based orders of various types constituted one of the main dispositions handed down by the Koori Courts. In the Shepparton Koori Court, the numbers of defendants who received either an ICO or a CBO comprised 41% of all finalised matters. In the Broadmeadows Koori Court, 32% of defendants received an ICO or a CBO. Data on the breach rate for Aboriginal defendants in the state of Victoria for 2000/01 showed that there was a 39% breach rate for all orders, which contrasted with an overall breach rate for non-Aboriginal defendants.⁸⁹ More specifically 61% of CBOs were breached by Aboriginal defendants as against a figure of 52% for non-Aboriginal defendants. Aboriginal defendants breached 58% of ICOs while the non-Aboriginal defendants breached at a rate of 44%. The breach rate for CBOs with community work for Aboriginal defendants was 44% while non-Aboriginal breach rates were 35%. Ellis-Smith observed of the statistics regarding breach rates that there were a number of differences between Aboriginal and non-Aboriginal defendants insofar as the reasons for the breach occurring. She found that “the non-Aboriginal defendants were more likely to

⁸⁸ Ibid, p.2

⁸⁹ Ellis-Smith, T. (2003). Edges of flexibility: The supervision and management of Indigenous defendants in Community Correctional Services – Interim Report, p.7

breach due to re-offending (8%) than the Aboriginal group (5%). Conversely, breach due to inability to comply with the conditions of an order was higher in the Indigenous group (81%) than the non-Indigenous group.”⁹⁰ There is currently no data that is available with regard to the breach rates for the Koori Court alone, but an analysis of the matters heard by the court shows that there were 18 breaches of CBOs or ICOs at Shepparton during the life of the pilot, a breach rate of around 27%. Obviously the appropriate period of review for such breaches would be two years from the point of the order being made, which further confirms the need for on-going review of the operation of the Koori Court.

5.2.5 Clearance rates for Koori Court

In determining the clearance rates for the Koori Court the number of finalisations in the reporting period is divided by the number of judgments in the same period. In Victoria the clearance rate for criminal matters in the Magistrates’ Court in 2003 was 90.7%.⁹¹ While there is not data available for a comparable period from either Shepparton or Broadmeadows Koori Court, the period from 2 March 2004 to 3 December 2004 for Shepparton Koori Court represented a clearance rate of 70.4%. The deviation from the Magistrates’ Court statistics is not unsurprising however, given the intensive nature of consultation and assessment that is often involved in Koori Court matters.

5.3 Koori Court and Community Building Aims

The evaluation of the Koori Court included an assessment of how it contributed to community participation in the justice system. The criteria for determining its success in this area included:

- To increase indigenous community ownership of the administration of law;
- To increase positive participation by Koori defendants and community;
- To increase accountability of the Koori community families for Koori defendants;
- To promote and increase community awareness about community codes of conduct/standards of behaviour; and

⁹⁰ Ibid.

⁹¹ Report on Government Services 2004, Part C, p.158 Table 6.23

- To promote and increase community awareness about the Koori Court generally.

Based upon the responses from questionnaires circulated to defendants who appeared before the Court, interviews conducted with various stakeholders and the discussion in meetings held at Broadmeadows, Shepparton and the Dame Phyllis Frost Centre, it seems clear that there is a very high level of support for the Koori Court model.

5.3.1 Koori Court Defendant Questionnaire responses

An anonymous questionnaire was sent to thirty defendants from each court (see Appendix Five) asking about their feelings on a range of aspects related to the Koori Court. They were asked to rank their response in a range that extended from strongly agree, to agree, not sure, disagree or strongly disagree. Those defendants who replied were unanimous in their support of the concept of the Koori Court. On the question of whether they thought that the Koori Court was a positive experience, twelve defendants strongly agreed and eight agreed. The replies were also unanimous in their support for the extension of the Koori Courts to all Victorian Kooris. Of the twenty responses to the questionnaire statement “I think that the Koori Court should be made available to other Aboriginal communities around Victoria” sixteen respondents strongly agreed and four agreed. Responding to the statement that: “The Koori Court gave me the opportunity to put my side of the case”, thirteen respondents strongly agreed and seven agreed. When asked to respond to the statement “I thought that the sentence I received from the Court was fair”, ten respondents strongly agreed, while seven agreed, one was not sure and two disagreed. The respondents were also asked “What do you think about the statement that the Koori Court is a ‘soft option’?” One respondent agreed that they believed it was a soft option, four remained unsure, six disagreed and ten strongly disagreed. On the question of whether the Elders or Respected Persons knew the defendants prior to the Court hearing the responses were fairly evenly divided, with eleven indicating that they knew them while the remaining nine indicated that they did not. Apart from the response to the questionnaire questions the defendants were also given the opportunity to state what they felt about the experience of going before the Koori Court. From the defendants who chose to make a response there was a universal endorsement of the Koori Court program.

Some of the comments received were as follows:

I have been before the judicial system for 43 years, to appear before your peers is a step in the right direction, as in the past I felt I was wrongly dealt with on a lot of occasions, to be listened to...from the bench in a respected way was heartily felt.

To be able to sit opposite the Magistrate and the Elders, you didn't just feel like a number and they actually listened to what I had to say, and when the Elders pass some advice you do actually listen.

I have had personal dealing with the justice system for the past 10 years of so. I have only recently come before the Koori Court, I feel I had my matters dealt with fairly. I think it is vital and very crucial that Koori Court is available throughout Victoria to all Indigenous people and there communities and also to the mainstream justice system

As an Indigenous person who has been incarcerated I feel that this is a unique model that is far more culturally appropriate. We should give our youth every opportunity from keeping them out of correctional institutions. It means a whole lot more to be given directions about your future life path from a person who is an Elder of your community and has a better understanding of the shoes us blackfellas walk in.

I was quite impressed that I had the opportunity to be able to sit down at the table with the Judge and people and my mother, it's not very often that people will let you speak and you can communicate directly

It was a wonderful experience to have experienced and I'm strongly thankful for those who sat and let me sit on Koori Court and listen to my behalf, that was the most beautiful thing about the Koori Court is that the Magistrate strongly does listen and instead of talking to someone other than me, the one that did the crime...it was one of the best things I could have done as I could speak upfront and be as honest as I could have ever been with him.

The consistent themes that emerge from the additional comments made by the defendants on their questionnaires were the importance of the role of Elders and cultural factors in their court appearance and the fact that they had the opportunity to speak and that they felt the Magistrate was listening to them. Significantly a number of the defendants indicated that they had a long prior history of involvement with the criminal justice system (ranging from 10 to 43 years) and they felt that the Court represented a significant and different justice experience for them.

5.3.2 Koori Court Elders Questionnaire responses

In interviews with the Elders and Respected Persons it became evident that they were both confident with the role that they played and comfortable with the response that had been received from the community. One Elder said: "...the community's pleased with us too, you know". The Elder then went on to recount how a community member had approached him and said that they would support whatever the Elders said to their child, because they no longer listened to their parents. The Elder concluded by observing that since the Koori Court appearance the child had not been in trouble.

Questionnaires were given to the thirteen Elders and Respected Persons who sit on the two courts and seven responses were received (see Appendix Six). The Elders were asked a range of questions and were asked to respond by circling either strongly agree, agree, not sure, disagree or disagree. Responding to the statement "Overall, the Koori Court has been a success", five Elders/Respected persons strongly agreed and two circled "agreed". The Elders were also asked to respond to the statement: "I believe that the defendants

have been aware of, and respectful towards, the cultural values of the Koori Court and the Elders”. Three responses indicated strongly agreed and four responses agreed with the statement. When asked whether they felt that the Magistrates listened to what the Elders and Respected Persons had to say five responded “all of the time” and two answered “most of the time”. On the statement that “There is an acceptance of the Koori Court within the local Koori community” three Elders/Respected Persons strongly agreed and four agreed. The Elders and Respected Persons were asked to respond to the statement that “Defendants believe the Koori Court to be a soft option”. Clearly the Elders did not agree with this as six responses indicated that they disagreed and one response strongly disagreed. When asked whether the sentences that have been handed down by the Koori Court were what they would have expected, two responses indicated “always”, three responses “most of the time” and two responses “sometimes”. The Elders were unanimous in their belief that the Koori Court had improved relations between the local Koori community and the police but were less emphatic on the question of whether they thought that the Court was understood and accepted by the local non-Indigenous community, with only one replying that they thought it was accepted while six replied that they were “not sure”. In summary the Elders questionnaire indicated that they believed the Koori Court to be a success and that their role was respected and valued by the defendants and other court personnel. Significantly they believed that the Koori Court had improved relations with the local police force although there was less certainty as to the degree that the Koori Court was understood and accepted amongst the wider non-Indigenous community.

5.3.3 Interviews with Magistrates

The Magistrates interviewed during the course of the review were unanimous in their view that the Koori Court pilot program has been successful. Magistrate Ann Collins observed that it was the depth of the background detail that meant that she was better informed in making sentencing orders. She commented:

I just think the Koori Court enables time to be given to the people who come before the court which means you just get a much broader history, background, so much more information, not just

from the offender but from people who are in the court themselves, the Koori Justice worker, even the elders themselves so it's not so much information just per se it's where that information is coming from and sometime the offender will sometimes speak which you don't obviously get the opportunity to do in mainstream court and I think as a starting point that's a very good thing because you're getting people's real histories and real material before a court.

On a broader note Magistrate Collins observed that the way in which the Koori Courts operate as a type of "team" is "good in terms of the understanding between black and white Australia" because it "promotes understanding and reconciliation." The sense of Koori community involvement in the Court was emphasised by Magistrate Kumar who reflected upon the significant differences in the way that business is conducted in the Koori Court. He observed that he believed that the Koori Court had been very successful and went on to note that:

... the Magistrates who sat like Ann Collins and myself and the Chief Magistrate and others found the experience very fulfilling and for the first time in my experience after 18 years on the bench that I've found that Aboriginal people for the first time feel that they've got some say in the judicial system, that they feel part of the court. In the past they came they got there and pleaded guilty or not guilty and they got their sentence and off they went see and at this stage you've got family sitting in the court, you've got the justice worker there, people taking huge responsibility and the community responsibility for defendants. It's been quite a different experience for us. Especially the way we used to handle, or how we handle the usual cases but in the Koori Court the experience has been very good.

Significantly Magistrate Kumar is a strong advocate of continuing the development of the Koori Court and the appointment of Koori lawyers to the bench. He emphasised that this

should not be seen as being an appointment solely to the Koori Court, but rather as evidence of a broader commitment to Indigenous involvement in the criminal justice system, beyond an advisory role. This view is consistent with the *Community Participation Strategic Objective* of the VAJA to “*achieve maximum Aboriginal community participation in the processes for legislative, policy and program development, service delivery, monitoring and review*” and in particular the objective to facilitate the progression of Aboriginal lawyers to judicial officers.

Consideration could also be given to Indigenous traineeships with the Courts generally.

5.3.4 Community consultation feedback

As part of the Koori Court pilot program evaluation community consultations were held in both Shepparton and Broadmeadows. The participants at both meetings were unanimous in their support for the Koori Court model. In addition a meeting was requested with the reviewer by the Koori women prisoners at the Dame Phyllis Frost Centre to allow them to comment on the Koori Court. At this meeting there was very strong support for the Koori Court concept and this was evidenced in a number of written submissions received subsequently from some of the women. The letters included the following statements:

The Koori Court by definition should be made accessible to each and every Indigenous person coming into contact with the justice system. With only two Koori Courts currently in operation in this State, perhaps applications for Change of Venue from mainstream Courts to the existing Koori Courts would be an acceptable and workable alternative

...the Aboriginal population is not offered adequate representation in the court system. There have been improvements since the introduction of Koori Court, however this program does not operate Victoria-wide. Therefore Aboriginals are currently disadvantaged depending on what court location their cases are heard at.

5.4 Case Studies from the Koori Court

The impact of the Koori Court upon the defendants who appear before it has not always been dramatic or profound. In some cases it has not resulted in a change in the offending behaviour of the defendant and it is unrealistic to expect the Koori Court to fundamentally change the habits of persons who may have a long history of appearances in the criminal justice system. As was noted above, the measure of the success of the Koori Court can also be considered in the light of a person's offending behaviour being minimised or reduced. The following examples provide an illustration of how the Koori Court can make a difference in the lives of the defendants who appear before it.

5.4.1 Example One: The Koori Court changing offending patterns

On the day of the offence the Defendant had been consuming alcohol throughout the day and then decided to ride his motorbike to another nearby town and then back again. While driving through the town he lost control of the motorcycle and ran onto the footpath. The Defendant sustained minor injuries as a result of the collision and was taken by ambulance to a hospital. A sample of his blood was taken and this subsequently showed to be more than double the legal limit. At the time of the offence the Defendant was disqualified from holding a motorcycle licence and the motorbike that he was riding at the time of the accident was not registered. The Defendant initially denied that he had been driving the motorcycle at the time of the accident.

Charges

- Careless driving
- Exceed PCA
- Driving whilst disqualified
- Driving an unregistered motorcycle

Sentencing considerations

It was noted the Defendant had four previous drink driving convictions. It was revealed in the course of the proceedings that the father-in-law of the Defendant had been killed in an accident and that the defendant had ridden his motorcycle to the scene of the accident. The incident which led to the Defendant being charged took place on the same day. In addressing the Koori Court the Defendant noted that at the time of the offence he was “out of my mind with grief.” In speaking to the Defendant one of the Elders drew his attention to the fact that they were related. The Elder went on to note that they had been through similar experiences in their own life.

Elder: We’re related I looked you know through our family trees and stuff ... I was like you too, I mean I used to drink and I was pretty angry with myself and everybody else around me, but you know you’ve gotta pull yourself out of it, you get emotional. I attended alcoholics anonymous and that helped me in lots of ways you know, I was just sort of suggesting about what he was thinking, you know, I mean you could have killed someone, kids and things like that you know, and I done the same thing, I pinched a car and rolled it and you know, but I thought about it later, I could have killed myself or I could have killed someone else.

The other Elder in attendance during the hearing noted that there were two laws – white law and Aboriginal law. He went on to say that he followed Aboriginal law but that in offences like driving cars he and the Defendant had to accept that it was the white law that had to apply even though he felt that he may well have done exactly the same thing as the Defendant in the circumstances. The Magistrate then addressed the Defendant, reflecting that:

I wonder if anybody’s ever sat in this court as you have today and had such significant things said to them by members of their community who are so respected members. I wonder if it had ever

been the case that they'd been told that those members of the community are going to support you but also tell you, you've gotta behave responsibly. Uncle ---- talked to you about the differences in white and Aboriginal law (and).... Aunty ---- talked to you from the bottom of her heart about what she's been through...

The Defendant was asked whether he had anything he wished to say to the Elders at the conclusion of the hearing and he said:

Like they've made sure that I've been keeping out of trouble, I've made another appointment for the drug and alcohol counselling, which I've gotta go back on Monday and I asked them if I can keep on attending so I can improve myself and suppose to say to the community and to me Elders that you know, I'm making a step, so that way I can just get on the right track, not the wrong one and by doing that I'll make sure I'm gonna not ride me motorbike.

In a subsequent media interview the Defendant observed of the impact that the Koori Court sitting had upon him. He said:

Well in the Koori Court like you feel like the size of an ant. When they talk to you, you do, you start getting a lump in your throat, you feel like you know, crying. I've cried even in there, and they make you understand, we're not above the law, and we get up and say what we have to say about ourselves, and they listen to what we say and feed back what they want to say to the ones that have been in trouble by the law.

5.4.2 Example Two: Koori Court dealings with two laws

The Defendant was staying on land owned by the local Aboriginal co-operative. In a confrontation with the chair of the co-operative the Defendant had grabbed a spear and wounded the victim. The victim suffered a glancing blow to the chest resulting in a 14 cm graze. The Defendant then struck the victim on the thigh with the spear, causing a wound

that required five stitches. The Defendant was arrested and made a no-comment interview and refused to make admissions. The Defendant had a history of priors, including assault, intentionally causing injury, threats to kill, and being drunk in a public place.

Charges

- Intentionally cause injury (two charges)
- Recklessly threaten serious injury

Sentencing considerations

Reports were tendered that consistently referred to the work he had done within Indigenous communities throughout Australia and the fact that he felt very keenly the history of oppression of Aboriginal Australians. The court hearing was particularly notable for the manner in which the defendant spoke at length about his past life. He referred to the fact that his grandmother had been the main influence in his life and that she had taught him tribal law and culture. He felt that he had carried out the offences in accordance with tribal law, which he characterised as being swift, rather than the long waiting periods in the white man's court. His main motivation for the attack was that his children did not have housing. He traveled from interstate to address the issue. This prompted the attack. Both of the Elders who sat in the Court spoke at length about the importance of culture, both the need to respect traditional culture and to also accept that the "white law" had, in large part, displaced traditional law.

Elder one: I understand about your spiritual and your culture cos' its my culture as well, and because you're my family...and you've realised that you've done the wrong thing because that's a white man's law and we, there's nothing we can do about it... .

Elder Two ...at times with our culture, we've got to be very careful that we don't harm anyone, you know. There's ways that we can approach our community. I'm an Elder in my community and...it's hard on us Elders to sit here and get a lot of things done, that I'd

like to do in my days, I'd like to pull out the nulla nulla and smash a few kneecaps and things like that but...when you're in a community you've got to know there's things that we can't do...we're in the white system, we work within two laws, we'd like to have our own law at the moment you know? But at times it's just that way that the white laws overridden our traditional laws where we live in today's society...

This Koori Court matter was also significant for the involvement of the Defendant's estranged sister. After not having any contact for five years she appeared to speak on his behalf. In a powerful address she said:

Our lives since we were kids were as you've read about in this report. Where the whites, the society just lets them through...we were abandoned, abandoned, we were put through the system, going to homes, all that, and welfare, the lot. And it's still here today.

Apart from the comments from the Elders and the Defendant's sister there were also comments offered from the courtroom by other Elders of the local community who spoke in positive terms of the Defendant's commitment to culture.

Sentence

The Defendant was convicted and placed on a CBO for a period of 18 months, to be completed in the area where his grandmother came from, involving the completion of 350 hours of unpaid community work and the completion of programs for the reduction of re-offending.

Observations

In handing down the sentence the Magistrate ruled, as had been urged by the Defendant's lawyer, that there were exceptional circumstances which warranted not finding that the Defendant had breached a suspended sentence. The circumstances that allowed the Magistrate to reach this decision were explained in the following way. Speaking to the defendant the Magistrate said: "Your family support has made it possible and the Elders have made it possible for me to take the view that I have that the suspended sentence would not be re-activated". The Magistrate commented further that "it's **only** through the assistance of your Elders and the Elders in this Aboriginal community here today that this result is ultimately possible." The moving experience of the Court hearing also prompted one of the Elders to reflect upon the role of the Koori Court in bringing together the family of the Defendant and how the Court was "here for healing as well." The significant aspects of this case were the fact that it involved consideration of the place of traditional Aboriginal law in relation to what was termed "white law". Whilst acknowledging the reality of white law both Elders, senior male and female community members, affirmed their commitment to a culture and law that was still very real. The case also demonstrated the possibility for the story of the Defendant to be told and for a healing process to be initiated as a consequence. Many of the cases involving Koori defendants that appear before the Koori Court (and the Magistrates' Courts) have the same history of removal from family and community that was referred to by the Defendant's sister.

5.4.3 Example Three: The Koori Court and the importance of family and community in sentencing

The Defendant appeared at the Koori Court in relation to a number of charges. The first lot of matters related to his driving at an excessive speed through a school area 40 km zone. The vehicle he was driving at the time was also unregistered and had false registration plates. The second group of charges related to the actions in the early hours of a morning when he assaulted and abused two women in a nightclub. After being ejected from the nightclub the Defendant became aggressive, took his shirt off, and

abused the security personnel. A young woman who approached him to tell him to put his shirt back on was subsequently punched in the face.

Charges

- Intentionally cause injury (two counts)
- Assault with a weapon
- Driving whilst disqualified
- Use of an unregistered motor vehicle
- Fraudulently alter/use identification.

Proceedings

In this case the Defendant came from a well-known Koori family from the region. The Defendant was very keen to ensure that his father did not attend the court and had not told him the seriousness of the charges. The Defendant also initially refused to accept one of the Elders listed to sit in his matter, alleging that there was a history of conflict between his family and that of the Elder. As the summaries were read for the matter the father became quite distressed, both by the nature of the offences committed by the Defendant and also the fact that his son had received two severe beatings by unknown males after his second assault on the woman outside the nightclub. During the course of the hearing it was made quite clear that there was a real prospect that the Defendant might be sentenced to a term of imprisonment for his offences.

Elder One Cos you know I've been through a lot of things with, with drinking alcohol, nearly killed myself, you know, jumpin' off bridges and doing all them things.

Elder Two I had a good talk to [defendant's name] and I told him that these are very serious charges, and I told him that the ---- family were a very respectable family...they were all the family that came over here, the [family name] came to Shepparton when

things were **really** tough, when racism was very bad...and they held their head up to everything...they challenged everything that come in front of them, and they were all good sportsmen and respectable people, and I don't have to tell you any more, he knows what I said to him...that more or less he was degradin' his grandfather and his grandmother and for what he'd done.

Defendant I'm just ashamed of what I've done....I've let a lot of people down and I know I've done the wrong thing. I've just got to learn by it, and so, and I apologise to youse for putting my family in pain yesterday.

Father of Defendant I'd like to first of all acknowledge the, the Elders as well and...I'd just like to acknowledge and thank my other community members here of the support they've had as for, for us here and as in the (family name). And I'd also like to acknowledge the concept of the Koori Court, I think it's very, very good and, your Worship yourself, the cultural understanding of the issues, I think you can have these sorts of processes in place but I think that it takes that kind of partnership to understand some of the things...

Sentence

The Defendant was placed on a CBO with conviction for twelve months and to involve 150 hours of unpaid community work and the payment of a fine of \$184.

Observation

From the initial possibility that the Defendant might be goaled the Defendant was given a CBO. The Magistrate observed in handing down the sentence that "if you were here by

yourself, standing in the back of the court with a Magistrate hearing a submission in relation to submission, I think you'd be struggling to stay out of gaol. It's down to your community that you're not going to gaol." This case was a clear illustration of the importance of the Koori Court process in determining the underlying facts behind the case. On more than one occasion during the course of the review the Magistrate indicated at the outset that the Defendant was facing the prospect of a term of imprisonment. The facts that were subsequently revealed in the course of the hearing were invariably highly emotional and ultimately influenced the Magistrates not to order a term of imprisonment. This case also gives a strong indication of the importance of community. Even though the family no longer had such strong links with the local Koori community, having moved away, they were placed in a network of shared history. The case was also significant for the conversation that occurred between the Elders and the Defendant and the father of the Defendant and the Elders. Such was the intensity of this case that the Magistrate commented in closing that: "It takes a bit of courage to come in here, and it takes a lot of guts to submit yourself to your Elders and we acknowledge that too". Cases such as this one are a clear indication that the Koori Court is anything but the soft option that is sometimes talked about.

5.4.4 Example Four: The Koori Court offering a space for the defendant to tell their story

The Defendant appeared before the Koori Court for a breach of a CBO that had been given in Echuca. This matter was originally listed in Morwell, before being listed to the Koori Court in Broadmeadows. The breach of the CBO arose following the assault by the Defendant of an elderly female relative, who he had grabbed by the throat and then punched.

Charges

- Breach of a CBO

Circumstances

The defendant had only been recently reunited with his father after a long period of time, who resided at an Aboriginal Elders Hostel. His father had become ill at the Elders Hostel and the elderly female relative had him removed. It was after this that the Defendant's father died, without him being able to see him again. The Defendant was particularly upset that he had lost his father again and blamed the elderly relative for removing him from the Elder's Hostel.

Sentencing considerations

After the defence lawyer made a submission, the Magistrate then asked the Defendant whether he would like to speak, but he elected to speak after all other parties. The Koori Court Officer then spoke on how highly respected the Defendant was in the Aboriginal community and these comments were supported by a representative from the local Aboriginal co-operative. There was extensive evidence given as to the voluntary work that the defendant had carried out within the local Koori community, assisting with the local football club and acting as a mentor at the local TAFE. The Defendant spoke at length during the proceedings about his experiences of having been removed from his family and being raised in what he termed "the white ways". The Defendant commented that what the court knew about him was what the system knew but that the system didn't know his spirit, emotions or soul. He went on to say that:

Defendant I learnt regimentality at an early age. As you've heard I was taken away at the time I was beginning to learn about my culture and laws and...put into another culture that was quite foreign to me...I've learnt to go with the flow in that new system and deal with the anger that was put upon me because of what happened to me... I mean who wouldn't be angry at being taken from their mob and separated from their siblings...Unfortunately you know I've learnt the non-Indigenous ways but have been taken

away from a lot of cultural stuff. I was taken from my law and introduced to another law.

Sentence

The Magistrate confirmed the breach of the existing corrections order but deemed that the work done by the Defendant in the community far outweighed any time that might have been part of the original order and no further orders were made. Significantly this sentencing option was put forward by Corrections Victoria.

Observations

This is another example of a Koori who appeared before the Court who had experienced removal from his family and community at a crucial stage in his life. What was significant about this case is that the Defendant articulated his story, his narrative and explained the context of the offence in a way that would probably not have been possible in a normal Magistrates' Court sitting. This was an example taken from the Broadmeadows Koori Court that also demonstrates the extent of community support and concern for the Defendant and the fact that issues of culture and traditional law can be, and are, raised in metropolitan courts.

5.4.5 Example Five: The Koori Court giving the defendant a chance to turn their life around

The Defendant had a long history of drug use. She appeared in the Koori Court in relation to a number of incidents.

The first matter arose when the Defendant and her partner became embroiled in a dispute whilst walking along the street. The Defendant pulled a knife from her backpack and commenced to slash her own arm. After police attended she refused to drop the knife and was placing the knife at her throat when the police intervened through capsicum spray. She was then taken to the local hospital. The second lot of charges related to an argument

between the Defendant and two other persons, who she alleged had stolen some of her possessions. Upon arrival the police observed that the Defendant had a knife in her hand. She was ordered to place the knife on the ground and complied. The defendant was charged with using offensive language under the Summary Offences Act. The third incident occurred when the Defendant followed another person from an office and began to abuse her. The Defendant grabbed the victim's hair as she attempted to get into her car and struck her on the nose. The fourth incident involved the Defendant going to a store and taking a power tool and then leaving the store without paying. When confronted by the security staff from the store she refused to return to the store and left the premises. After police were contacted they visited her home address where she confessed to the theft. The final incident involved theft of food items from a supermarket. The Defendant took the items from the shelves, placed them in her handbag, and left the store without paying. When confronted by a staff member from the store the Defendant was initially abusive but then agreed to hand over the stolen goods. Police subsequently arrested her in relation to this matter and she was charged with theft.

Charges

- Theft from shop x 2
- Possession of a controlled weapon without lawful purpose
- Possess a dangerous article
- Use indecent language in a public place
- Possession of a prohibited weapon
- Unlawful assault

Sentencing Considerations

The Elders and Respected Persons expressed their concern at the Defendant's history of self-harm and substance abuse. There was reference to a history of sexual assault and the pain suffered by the Defendant, but the Court also insisted that it was time for her to take responsibility for the events in her life.

Elder It's really heartbreaking to see you destroy, you're trying to destroy yourself the way you do...I hate to see you hurt, hurting yourself. And I really do love you [defendant's name], I do love you. But, I want to see you pick yourself up and make **your** decisions for you.

Sentence

The Defendant was convicted and placed on a CBO for a period of twelve months, which was to include psychological counselling through Corrections Victoria. In addition the Defendant was linked to other service providers, including a detoxification program for her drug and alcohol program. The Defendant entered into a nine month residential program to combat her substance abuse.

Observation

What distinguished this Koori Court case was the manner in which the Elders affirmed their love for the Defendant but insisted that she take responsibility for her life. It was then possible for the Koori Court to tailor a comprehensive order that addressed the existing problems of substance abuse and made provision for a mental health assessment. At the conclusion of the sentencing order, after the Defendant had thanked the Elders, one of them responded from around the table that she should persevere with the psychological help even though, they noted, "it's not going to be easy." The Elder concluded that "I think you're beautiful and you are...you are a valued member of our community." In a subsequent interview with this Defendant she observed that the Koori Court had been a positive experience because it allowed her the chance to tell her story. She said: "it gives you the chance to tell 'em what you are and who you are and, you know, what you've been through and that." The Defendant also emphasised the fact that the Elders had been there as an important part of the experience, because "they live in it, they're the same, they're Aboriginal themselves. And they understand..."

5.4.6 Example Six: Koori Court dealing with complex issues

The Defendant in this matter was still only relatively young (in his mid 20s) but he already had a long history of juvenile justice matters and heroin addiction. He appeared before the Koori Court on a range of charges, which breached an existing suspended sentence. The matter had been deferred to allow the Defendant to engage in a range of services. As a consequence of being assessed for mental health issues a previously untreated condition of schizophrenia was identified.

Charges

- Driving with a blood alcohol limit
- Theft
- Going equipped to steal
- Theft of motor vehicle
- Fail to appear
- Burglary

Sentencing considerations

During the period of deferral of this matter the Defendant had undertaken a CREDIT program. The CREDIT program worker spoke to the Court about how the Defendant's case was slightly different to usual referrals in the sense that it had been used as a vehicle to link him into a range of services in both drug and alcohol rehabilitation and mental health services. The Defendant had spent a total of 20 weeks receiving services from the CREDIT worker which was some seven weeks longer than the normal program involvement. The CREDIT worker noted that the Defendant had managed to establish links with a range of service providers during this period, including the Aboriginal Health Service, but that his involvement with the counselling service from the Aboriginal Health Service had been affected by the termination of funding for that program. The CREDIT worker emphasised the important role played by the Koori Court Officer in ensuring that the Defendant had attended at least some of his meetings. It was also noted that on

occasion the Defendant had missed his appointments when he had confused the agency that he was supposed to attend on a particular day, going instead to a different agency. The circumstances of the Defendant were further complicated by the fact that his emergency accommodation had terminated after thirteen weeks and he had experienced difficulties in finding alternative housing, eventually returning to live with his mother. The Koori Court Officer observed that the Defendant had been very regular with his attendance to appointments up until his accommodation difficulties arose. In sentencing the Defendant the Magistrate stated: "I'm obviously minded to impose an order today that's going to assist with that path you've taken of rehabilitating. The thing that you've done in terms of not coming back again is what I want you to continue to do."

Sentence

The Magistrate sentenced the defendant to a term of imprisonment of three months, wholly suspended for twelve months. The period that the Defendant had served in custody of nearly two months was taken into account in the period of imprisonment to be served. The Magistrate chose not to place the Defendant on any form of order, given his difficulties in complying with the terms of meeting for appointments it was observed that this would be setting him up to fail.

Observations

The Defendant in this case exemplifies the difficulties faced by Koori defendants who have mental health issues. It should also be emphasised that these mental health issues are very often undiagnosed, but the normal nature of court proceedings may not allow for sufficient examination of the circumstances surrounding the defendant. The problems encountered by the Defendant were compounded by the lack of stable accommodation, which is often a pre-requisite for entry into drug and alcohol rehabilitation programs. This case also is a striking example of the important role played by the Koori Court worker and the staff of the CREDIT program. The lack of appropriate resourcing for important rehabilitation programs is also clear in this case and it is an observation that

can be made generally with respect to the success of the court orders that Koori Court might make. Continued funding to important services which receive referrals from the Koori Court, such as counselling within the Aboriginal Health Service or the drug and alcohol rehabilitation programs, is an integral part of the success of the Koori Court. The combination of a history of institutionalisation, substance abuse, mental health problems and homelessness would normally have dictated that this Defendant would have continued the cycle of offending and incarceration. The fact that the Defendant had not re-offended during the period of his deferral (notwithstanding the difficulties experienced with finding housing) is evidence of the Koori Court's potential to transform the behaviour of Defendants. This transformation can only be achieved, however, where there is an appropriate range of service providers and those service providers are adequately funded.

5.4.7 Koori Court examples: General Observations

The six cases summarised above are intended to give some sense of the potential of the Koori Court to effect meaningful changes in the lives of defendants. There are numerous other examples that could have also been cited. Daniel Briggs, the Shepparton Koori Court Worker, refers to the case where a juvenile Defendant appeared before the Shepparton Court. The Defendant was charged with serious offences of assault and theft and had a long history of contact with the justice system. As the Koori Court does not have jurisdiction over juvenile defendants the Magistrate closed the Court but then gave the Defendant the option of sitting in the same court room, with the same seating and with the Elders seated around the table. The Defendant engaged with the Elders in the court room in a very positive way during the hearing and was sentenced to the Stepping Stones program, which he successfully completed and went on to undertake employment. According to Daniel Briggs perhaps the most significant fact that emerged from this case was the fact that the Defendant broke the family cycle of criminal behaviour. The Defendant committed his offences in concert with a co-offender who chose not to have his matter heard in the Koori Court setting. The co-offender received a good behaviour bond and, Briggs, observes:

He is still struggling in the community. So it is just a difference. One kid goes in to the Koori Court and comes out very supported, with a lot of different options and people in the community willing to assist and give him a hand. Another kid walks out very unassisted and still lost, in a sense, in the loop.⁹²

The example cited by Daniel Briggs, while not technically a Koori Court matter, demonstrates how the Court can change the behaviour of the defendant and link them back into the network of community support. It also emphasises the importance of there being appropriate rehabilitation programs to meet the needs of the defendant. It should not be presumed, however, that merely sentencing a defendant to complete a treatment or rehabilitation program will guarantee success. The issues that the Koori Court must address are often very difficult, time-consuming, and demand additional resources.

Terrie Stewart, the Broadmeadows Koori Court Officer, has observed: “We are getting a lot of people appearing before the Koori Court who have very complex issues. These are people with mental health issues and people with an intellectual disability. Most of these people have lengthy criminal history with a majority of their life being spent in gaol.” While the Koori Court may prove successful in diverting Indigenous defendants from prison there needs to be an awareness of these underlying issues, otherwise it is inevitable that they will breach the terms of their orders, or fail to comply with the conditions of their treatment. In some cases the Magistrate may decide to defer sentencing to allow defendants to participate in drug treatment, anger management courses, the CREDIT program, or other forms of rehabilitation. Terrie Stewart reflects on this deferral option that:

During this process they are intensively supported by myself. When I refer to treatment agencies I will use agencies that corrections have protocols with so that the defendant can continue on with same treatment agency should that be a condition of a community based

⁹² House of Representatives, Official Committee Hansard Standing Committee on ATSI Affairs, Monday 17 February 2003, Mooroopna., p.351.

disposition. In all cases it is a condition of a CBO and the defendant is responsible for informing corrections on their first appointment, however this is not happening. Sometimes the order has other conditions, such as cognitive skills programs and work component. These people have such complex issues and lives that some type of outreach support is required or they will not get through the order and will ultimately end up in goal...I understand that people must take responsibility to get through their orders however they are unable to without intensive support.

The issues identified by Terrie Stewart include the demands upon the Koori Court Worker in the post-sentencing phase and the need for appropriate support programs. This is an area where the development of the Koori Justice Panel (see paragraph 2.10 above) might assist in ensuring that there is appropriate assistance provided for defendants with complex issues that might result in them failing to attend meetings and consequently breach the terms of their treatment program or community order. In dealing with mental health issues, for example, there is also a need for more proactive involvement from certain service providers such as disability services. It further serves to emphasise the point made in chapter three above (paragraph 3.4.1) that there needs to be more Indigenous people employed in organisations charged with providing services to the Koori community.

5.5 *Koori Courts and Costs*

5.5.1 Costing finalised matters

At the most simple level it could be argued that the Koori Court costs could be determined with regard to the cost per finalisation. The figure for this cost is calculated by dividing total net recurrent expenditure within each court for the financial year by the total number of finalisations for the same period.⁹³ The figure for finalised matters in the Victorian Magistrates' Court for 2002-03 (including the Children's Court) is \$300. If we

⁹³ Ibid. p.161, Box 6.13

were to compare the operation of the Koori Court with the ordinary Magistrates' Court it would be difficult to determine the exact amount. The allocation from the Criminal Law Policy Unit of the Department of Justice for the 2004-5 budget was a figure of \$109,011. This comprised the salary for the Koori Court Officer, the payment made to two Elders or Respected Persons for 24 sittings, allowances for travel and administration and \$20,000 for a Registrar. If we average the 257 finalised matters for both Koori Courts for the 42 months that they have been operating we arrive at a figure of 6.1 finalised matters per month, for a total of 73 matters each 12 months. The cost for Koori Courts would therefore be \$109,011 divided by 73, for a figure of \$1,493 per finalised matter, a figure that is roughly five times greater than that of the rest of the Magistrates' Court. However it is worth noting that the 2004 Report on Government Services cautions against attaching too much weight to such an indicator of a jurisdiction's efficiency as it may involve a "trade-off between equity, efficiency and efficiency". Given the emphasis of the Koori Court upon positive outcomes, rather than just case flow, it would seem to be an inappropriate measure of the Court's success.

5.5.2 Counting the costs of crime methodology

A far more effective measure of the cost effectiveness of the Koori Court takes into account the impact that the Courts have upon re-offending behaviour and the savings to the State of Victoria from such reduction. For the purposes of this review the methodology utilised is that employed by the Department of Justice for the Costs of Crime in Victoria project. The project utilised the methodology described in the Australian Institute of Criminology Report titled *Counting the Costs of Crime*, which was released in April 2002. The cost of recorded crime is estimated by the Costs of Crime in Victoria project.

Crime Type	No of reported crimes	No. of Court Offenders	Cost or Recorded Crime	Cost per Court Offender
Robbery	3214	163	\$ 11 564 000	\$ 70945
Assault	25104	4407	\$ 34 734 000	\$ 7882
Arson	3402	43	\$ 54 754 000	\$ 1 273 349
Property Damage	42915	1950	\$ 26 600 000	\$ 13641
Burglary	64279	2298	\$ 54 418 000	\$ 23681
Deception (fraud)	29933	1732	\$ 218 302 000	\$ 126 040
Handle Stolen Goods	9618	1576	Included in theft	Included in theft
Theft	180 182	9149	\$ 93 506 000	\$ 10 220
Drugs	13192	3552	\$ 72 996 000	\$ 20 551
Going equipped to steal	833	113	na	Na
Justice procedure	13415	2308	na	Na
Regulated Public Order	2135	618	na	Na
Harassment	2076	191	na	Na
Behaviour in Public	4308	10762	na	Na
Other	9063	5180	na	Na
Cost of Victorian Criminal justice system			\$1 335 000 000	Not estimated
Total	402669	44042	\$ 1 901 874 000	\$ 43 183

The calculation of the cost of crime savings takes account of the re-offending rate and the number of re-offenders to arrive at the cost of re-offending. For the Cost of Crime project the number of eligible offenders is put at 3142. The re-offending rate of 32.6% reveals a figure of re-offenders of 1024. This number is then multiplied by the cost per crime

offender from the table above, to arrive at the cost of re-offending (1024 x \$43 183 = \$44 232 594).

5.5.3 Applying the statistics to the Koori Court program

Over the period of the pilot program there were 167 finalised matters at the Shepparton Koori Court and 90 matters at the Broadmeadows Court (bearing in mind that the latter Court only operated for 18 months). If we average the 257 cumulative matters for the 42 months that gives us an average of 6.1 matters per month, and a total of 73 matters for an average year. Respectively there were 21 and 14 re-offenders during the trial period. If we divide the 35 re-offenders by a figure of 42 months we get a figure of .833 per month. Multiplied by 12 months we have an average for re-offending of 10.

If the average of 73 finalised matters were to include the general population re-offending rate of 32.6% (Table A) then we would see a cost of re-offending of \$1,122,758 for the re-offenders. Compared with the cost of re-offending derived from the general recidivism figure the Koori Court model (Table B) shows a saving per calendar year of \$691,728.

Table	Re-offending rate	Re-offenders	Cost of re-offending	Cumulative cost of crime savings
A	32.6%	26 offenders	26 x 43,183 = \$ 1122758	
B	14%	10 offenders	10 x 43,103 = \$ 431030	\$6 91728

5.6 Other Indigenous Justice Mechanisms in Australia

The Koori Court pilot program is not the only example of an Indigenous justice mechanism that has been developed in Australia in the last few years. There is not space to reflect upon each of these initiatives in any great detail but it is worth noting that they share the common goal of involving the Indigenous community in the sentencing process. Comparable initiatives can be found in South Australia, Queensland, New South Wales and Western Australia.⁹⁴ Comparisons of the outcomes in each of these courts also needs to be qualified by the fact that there is a degree of variation in the range of offences that can be heard from, for example, the sentencing circles of New South Wales (where the circles have heard serious matters such as sexual offences) and the Victorian jurisdiction. As was noted above, the Shepparton Koori Court reference group benefited greatly from their meetings with the personnel from the South Australian Nunga Courts. The Nunga Court is very similar to the Koori Court in its mode of operation, with the court room arranged in an informal fashion with the Magistrate assisted by Elders in determining the appropriate sentencing outcome. In the twelve month period from 3 June 2003 to 4 June 2004 the Nunga Court sat on 69 days in three locations (Port Adelaide, Murray Bridge and Port Augusta) and heard 504 cases, involving 1,532 discrete charges.⁹⁵ This amounted to an average of 3 charges per case. The most frequently used penalty in the Nunga Courts in the same period were fines (29.3%) followed by Good Behaviour Bonds (16.5%) Drivers Licence Disqualification (13.2%) and Suspended Imprisonment (12%). Significantly, by comparison with the Victorian Koori Courts the community based orders were a relatively under-utilised option (8.7%) but this may well reflect the different nature of the sentencing dispositions between the two jurisdictions.

In Queensland, the Murri Courts have also been established at a number of locations (Brisbane and Rockhampton) and they also have the Magistrate handing down sentences

⁹⁴ See Harris, M. (2004) From Australian courts and Aboriginal courts in Australia – Bridging the gap. *Current Issues in Criminal Justice*, 16(1); also Marchetti, E. & Daly. K. (2004). Indigenous courts and justice practices in Australia. *Trends and Issues No 277 AIC*, Canberra.

⁹⁵ Tomaino, J , Aboriginal (Nunga) Courts Information Bulletin no. 39, Government of South Australia, p.7

assisted by one Elder. To date there is no data available on the case flow of the Murri Courts.⁹⁶ The Indigenous justice mechanism developed in New South Wales is that of the “sentencing circle” which is based upon the circles used by First Nations communities in Canada. In the circle the matters that are heard would usually result in a custodial sentence. The defendants have to satisfy an assessment procedure before being allowed to appear in the circle, including the likelihood that the defendant will receive a goal sentence. The sentencing circle model can be distinguished from the programs in Queensland, Victoria and New South Wales in that the victim plays a significant role. The persons who attend the circle are the Magistrate, the defendant, supporters for the defendant, the victim and their supporters, the Aboriginal project officer, the defence counsel and prosecutor. The sentencing circles, which are currently located at Nowra and Dubbo, convene every two weeks and hear one matter at each sitting. In this respect the circle is even more time and resource intensive than the other models. The evaluation of the sentencing circle project conducted after twelve months analysed thirteen matters that were heard at the Nowra sentencing circle between 5 February 2002 and 4 March 2003. The bulk of defendants were charged with driving or violent offences and all had previous convictions.⁹⁷ It would appear that the sentencing circle has proved very effective, with one report noting that only one of the twenty four defendants who appeared before the circle had re-offended after a year and that there were only two re-offenders two years after the commencement of the pilot program.⁹⁸ The similarities between the sentencing circle and other models of Indigenous justice are that it demands more resources than the normal Local Court matter, which might be completed in a matter of minutes, but the evaluation review poses the significant question that could be relevant for all such schemes, when it asks “what price justice?”⁹⁹

⁹⁶ Queensland Department of Justice (2003) Queensland Courts: Murri Court at <www.justice.qld.gov.au/courts/factsht/qc_fact7.htm>

⁹⁷ Potas et al, op.cit., p.9

⁹⁸ Lavelle, K. (2004). Circle sentencing breaks cycle. *Law Society Journal*.

⁹⁹ Potas et al, op. cit p.51

CHAPTER SIX: PROSPECTS FOR THE FUTURE

6.1 Review of Current Limitations on Operation of the Koori Court

6.1.1 Contested matters

The unique nature of the Koori Court, with the role of the Elders in advising the Magistrate in sentencing of defendants, is a major reason why the Koori Court should not hear contested matters. Apart from the danger of the Elders and Respected Persons potentially being blamed for the sentences given to the defendants (with the possibility that their involvement might result in retributive actions from disgruntled community members) there would be no procedural role for the Elders and Respected Persons in the determination of such matters. Having the Elders and Respected Persons sitting on the bench also could not be justified in terms of the cost involved for the period of the hearing and also the strain it would put on them in physical terms. The key participants and stakeholders involved in the Koori Courts at both locations have not altered their position on this over the course of the pilot project's life. It is worth noting that some participants in the community forum held at Kanga-Batman TAFE at Broadmeadows in November 2004 felt that the Koori Court model should be extended to hear all matters or otherwise it would not be seen to be "fair dinkum". In developing the pilot model for the Koori Court some consideration was given to the possibility for defendants who pleaded not guilty but were found guilty to have their matters brought before the Koori Court for the sentencing phase. Ultimately it was decided not to proceed with this possibility on the grounds that it might prove to be an obstruction to the processing of matters in the formative stages of the Court. Subsequent discussions have confirmed the view that the role of the Elders might be compromised by being involved in such matters and that their role during the court case would be essentially peripheral. The sentencing phase of contested matters being heard in the Koori Court was also raised by a number of persons as a means of safeguarding against the possibility that a defendant who had not committed an offence might actually plead guilty so as to have their matter brought before the Koori Court. This scenario was raised by at least one Magistrate who, whilst

not giving any substance to the possibility, suggested that the contest mention system would remove any potential for innocent parties pleading guilty to charges just so that they might go before the Koori Court. At the time that the Shepparton Koori Court was opened concerns were raised by the Queensland Greens political party that the guilty plea requirement encouraged Indigenous persons to plead guilty but this was rejected by Magistrate Auty, who observed that: “If we think that people are pleading guilty and they shouldn’t be, the magistrate can say ‘Well look, I think that you need to take some further instructions or give some further instructions’. If that were an issue we would seriously have a discussion and work out whether there’s a way to resolve it.”¹⁰⁰

In the event that a defendant is found guilty and elects to have the sentencing decision made in the Koori Court there may be some need to consider a procedure whereby the defendant is assessed for suitability. Currently there are no restrictions on a Koori defendant who wishes to have his/her matter heard in the Koori Court but it may well be that persons having been found guilty after pleading “not guilty” might bring a residue of resentment or aggression which could have an impact upon the operation of the Koori Court. It is worth noting that the current provisions for the sentencing circle model in New South Wales, for example, requires that the defendant satisfy two separate processes for entry into the circle. The first test for acceptance into the circle sentencing process is made by the court, looking at the criteria for suitability, which includes whether it falls within the definition given by the *Criminal Procedure Amendment (Circle Sentencing Intervention Program) Regulation 2003* and whether a term of imprisonment would be a possible outcome.¹⁰¹ Should the defendant fill this criteria then the matter is passed to the Aboriginal Community Justice Group to determine whether the defendant should be accepted into the sentencing circle. The criteria that the Justice Group considers includes the type of offence, whether the defendant has strong links with the community and has demonstrated a willingness to be part of the process, the impact of the offence on the victim and the community, and the potential benefits to all parties of the defendant taking

¹⁰⁰ Guest, K “Victoria’s new Koori Court welcomed”, Koori Mail, 18 September 2002, p.8

¹⁰¹ The entry to the sentencing circle occurs after the defendant has either pleaded guilty or been found guilty of an offence in the District Court. p.6

part in the sentencing circle.¹⁰² Clearly there are a number of factors that would make it unfeasible to try and introduce a similar test for acceptance into the Koori Court model. Given the difficulty in attracting community members for the Koori Justice Panel, the creation of something akin to the NSW Aboriginal Community Justice Group would clearly present difficulties in obtaining sufficient staffing. Some of the criteria used for the circle sentencing entry might also be inappropriate for the Victorian model, particularly the requirement that the defendant either be part of the community or have strong links with the community in the trial location. Nonetheless it may be appropriate for the defendant's eligibility for the Koori Court in these circumstances be determined by the Magistrate and Elders or Respected Persons prior to the commencement of the Koori Court hearing. They would ascertain whether the defendant is committed to the process or simply views it as a "soft option". Further work therefore needs to be done to develop policy and procedure to accompany this new category of defendants who will be eligible to be heard in the Koori Court.

A further practical limitation which must be considered is that the Magistrate who finds that defendant guilty of some or all of the charges will remain part heard in the matter. Therefore, the same Magistrate should also determine the sentence, even if this were to proceed in the Koori Court.

Recommendation Ten

That the current Koori Court legislation should *not* be amended so as to include contested matters or "not guilty" pleas, however the defendant be given the option of having the sentencing phase of the matter heard in the Koori Court after a guilty verdict has been handed down.

¹⁰² Ibid.

Recommendation Eleven

If Recommendation Ten is implemented, the eligibility of defendants who have been found guilty of an offence that can be dealt with by the Koori Court could be assessed by the Aboriginal Elders and Respected Persons and the presiding Magistrate. The DOJ should undertake further discussion with the relevant persons to develop policy and procedure to accompany this new category of defendants who will be eligible to be heard in the Koori Court.

6.1.2 Family violence and sexual offences

The Koori Court legislation currently provides that all Magistrates' Court matters can be heard except for

- (i) a sexual offence as defined in section 6B(1) of the *Sentencing Act 1991*; or
- (ii) an offence against section 22 of the *Crimes(Family Violence) Act 1987* (breach of intervention order or interim intervention order) or an offence arising out of the same conduct as that out of which the offence against section 22.¹⁰³

The decision to exclude such matters from the jurisdiction of the Koori Court was initially made by the Statewide Working Group based upon the fact that the complexity of such matters might be an obstacle to the effective implementation of the pilot program. The view of the Statewide Working Group was that the exclusion of such offences might be re-considered after the completion of the pilot program. The Shepparton Koori Court police prosecutor, Sgt Gordon Porter, also noted that the family violence matters and sexual offences were excluded from the pilot program because, he observed they (along with bail hearings and contests) are “inevitably involved in conflict and thus the collaborative approach used for the Koori Court would not be able to function”.¹⁰⁴ This is probably an even stronger argument for the continuing exclusion of certain matters than

¹⁰³ Magistrates' Court (Koori Court) Act 2002, s.4F(1)(b)(i),(ii).

¹⁰⁴ Sgt Gordon Porter assessment of the Koori Court Pilot Project, Shepparton, 24 December 2002

the argument that they might be too complex for the pilot program. The success of the Koori Court depends upon the parties engaging in a dialogue that is fundamentally different from the usual adversarial nature of Magistrates' Court hearings. The tenor of the Koori Court and the relationship between the parties (such as the defendant and the Elders and the prosecutor) might be substantially altered if there is an element of conflict introduced. With regard to the exclusion of sexual offences as defined by section 6B(1) of the *Sentencing Act 1991* there is a strong indication that the stakeholders are opposed to the inclusion of such offences. Interviews conducted with the Elders and Respected Persons revealed a general opposition to the possibility of dealing with sexual offences or family violence matters. One Elder did observe that they would be willing to hear such matters if there was additional training provided. Amongst the majority of the Elders and Respected Persons who were interviewed, however, there was strong opposition to any such changes.

A number of Magistrates indicated that they would see no difficulty in the Koori Court hearing breaches of intervention orders but did not consider that the jurisdiction of the Court should be extended to more serious sexual offences unless there was a strong indication to the contrary from within the Koori community.

On occasion such matters have been dealt with in the Koori Court and a number of Magistrates note that they would see little difficulty in expanding the Court's jurisdiction to deal with such breaches. Any moves to expand the Koori Court's jurisdiction to hear such matters should be considered in light of a number of important initiatives in the State of Victoria. These initiatives include the formulation of a Women's Safety Strategy setting down policy directions for the Victorian Government, the creation of the Statewide Steering Committee to Reduce Family Violence, which was convened in August 2002 by the Office of Women's Policy and Victoria Police,¹⁰⁵ and an initiative by the Victorian Police to analyse the police strategies for dealing with the violence against women. The Victorian Government has also made an allocation of funding to create a separate Family Violence Division of the Magistrates' Court, effectively specialist

¹⁰⁵ VLRC, Review of Family Violence Laws: Consultation Paper, Melbourne, VLRC, 2004: 3

Family Violence Courts. These Courts are expected to commence operation in April 2005 and will be characterised by trained court personnel and an emphasis upon inter-agency co-ordination.¹⁰⁶ The Victorian government has also designated funding for an Indigenous Family Violence Strategy, which involved the establishment of the Victorian Indigenous Family Violence Taskforce. After taking submissions from 2001 to 2003 the Taskforce provided a report to the Government in December 2003. The final report included twenty five recommendations introducing a range of initiatives that were responded to by the Victorian Government. In committing a figure of \$10.2 million to the goal of strengthening Aboriginal families in the 2004-05 budget the Victorian government noted the establishment of three Holistic Family Healing Centres and an Indigenous Men’s Resource Advisory Service. While the Family Violence Division of the Magistrates’ Court is not specifically targeted to Indigenous communities, the Government has noted that “a core component of the family division is to ensure that training, recruitment, court processes and interagency protocols provide a court service that will respond to the nature, needs and expectations of Victoria’s diverse community, including the Indigenous community”¹⁰⁷. Clearly the Family Violence Court is intended to have a general application, but to also provide quite specific expertise and services for the Indigenous community. The Family Violence Court is also obviously intended to have application distinct from operation of the Koori Court and therefore any legislative change to include the currently excluded offences could be seen to both duplicate the operation of the new Family Violence Courts and perhaps undermine any comprehensive evaluation of whether the new Family Violence initiatives are meeting the needs of the Indigenous community.¹⁰⁸

It is currently not clear from discussions with relevant stakeholders that the current exclusion in relation to family violence should be altered. Further discussion therefore needs to be facilitated, particularly with the Koori community, prior to any proposed amendment being made.

¹⁰⁶ VLRAC Review of Family Violence Laws: Consultation Paper, Melbourne, VLRC, 2004:xxii

¹⁰⁷ Victorian Government Response to the Victorian Indigenous Family Violence Task Force Final Report, p.10

¹⁰⁸ Ibid

Recommendation Twelve

That the current exclusion from the Koori Court jurisdiction of sexual offences as defined by s.6B(1) of the *Sentencing Act 1991* be retained. The current exclusion of offences under section 22 of the *Crimes(Family Violence) Act* should be retained.

The validity of these exclusions should be monitored as part of the ongoing evaluation of the Koori Court recommended in Recommendation Nineteen.

6.2 Extending the Scope of Existing Koori Courts

6.2.1 Diversionary programs

Since 1997 the Criminal Justice Diversion Program (CJDP) has operated as a pilot program in the Magistrates' Court at Broadmeadows involving defendants charged with minor offences.¹⁰⁹ Since the original pilot, the CJDP has been expanded to all court regions and has recently received funding for a further four years. The CJDP aims to provide mainly first time offenders with the opportunity of avoiding a criminal record by undertaking conditions that will benefit the offender, victim and community as a whole. The CJDP is conducted pursuant to s 128A of the *Magistrates' Court Act 1989 (Vic)* which allows the defendant to seek to have a matter adjourned for a period of up to twelve months to enable them to undertake a diversion program. A condition of CJDP is that the defendant is required to acknowledge responsibility for the offence to the Court, although this acknowledgment is not admissible in any subsequent court proceedings.

Diversion cannot commence without the consent of the prosecution. Once determined suitable by the prosecuting agency, the court must also decide that the defendant is suitable before the matter may proceed by way of Diversion. The proposed Diversion Plan, initially prepared by the Diversion Co-ordinator, must then be approved by a Magistrate and may include an apology to the victim by way of letter or in person,

¹⁰⁹ Gray, I "The Peoples Court – Into the Future", Carlton, AIJA, 2002, p.3

compensation to the victim, attending counselling and/or treatment, performing voluntary work, making a monetary donation to a charity or local community project, and/or attending a defensive driving course. The matter is heard in court and dealt with in an informal fashion that is quite similar to the manner in which matters are conducted in the Koori Court (save for the presence of the Elders). The matter is then adjourned to allow the defendant to undertake the conditions of the Diversion Plan. If the defendant is successful in completing the plan then the matter is discharged, avoiding a criminal record.

Importantly, the Koori Court legislation makes explicit reference to the defendant being able to consent to an adjournment of the proceedings to enable them to undertake a diversionary program.¹¹⁰ Therefore there are compelling arguments for the extension of the Koori Court Program, not least of which is that the process of the CJDP closely mirrors that of the Koori Court. The fact that the focus is upon the rehabilitation of the defendant and that the matter can be adjourned to determine whether they can comply with specified rehabilitation or treatment programs, or other conditions specified on the Diversion Plan, is consistent with the way that the Koori Court operates. Given that access to the diversion program is determined at the discretion of the Police, or other prosecution agencies it would seem clear that the involvement of the Koori Court Police Prosecutor who, through their involvement in the Court would be more aware of cultural factors and the availability of appropriate rehabilitation and counselling options. The involvement of the Elders or Respected Persons at the assessment stage, along with the Magistrate, would emphasise the role of the community in the development of culturally appropriate orders and would also serve to confirm that their role is ultimately concerned with the healing of defendants and the Koori community. Most importantly the active implementation of the CJDP within the Koori Court model will serve to ensure that Koori defendants are not burdened with a criminal record for matters of a trivial nature. There is substantial literature that details the extent to which the existence of such prior records has significant ramifications for Indigenous defendants if they are subsequently charged and convicted for an offence. Cunneen has made the strong point that there is a strong

¹¹⁰ *Magistrates' Court Act 1989 (Vic)* sec 4F(1)©(iii)

antipathy that exists between Indigenous communities and the police, premised both upon the historical role of the police as an agent of colonial control and also for the resentment at what are perceived as oppressive and intimidating policing practices.¹¹¹ Cunneen further goes on to argue that because Aboriginal over-representation in the criminal justice system is so influenced by prior record that:

Re-offending can result in greater police scrutiny and heavier sentences being handed down in the courts (which have the effect of confirming greater ‘criminality’)...All the major studies that have analysed sentencing and prior record have shown that Indigenous people are much more likely to have a criminal history at the time of their current court appearance...¹¹²

The most problematic aspect of the diversionary program and any prospective expansion to the Indigenous community through the Koori Courts is the role of the police as “gate keepers”. As Cunneen puts it: “lack of respect for police authority and lack of acceptance of the legitimacy of police actions already significantly undermine Aboriginal police relations.”¹¹³ There is a compelling argument, therefore, that access to the CJDP should involve the Koori Court prosecutor.

Recommendation Thirteen

That in view of the Koori Court and CJDP legislation, the CJDP be incorporated into the Koori Court proceedings as an essential component of the pre-sentencing phase, thereby reducing the number of prior convictions on the record of Koori offenders.

¹¹¹ Cunneen, C. (2001). *Conflict, politics and crime*. Allen & Unwin.

¹¹² Ibid, p.28

¹¹³ Cunneen, C. (1997). Community Conferencing and the Fiction of Indigenous Control. *Australian and New Zealand Journal of Criminology*, 30(1), p. 21.

6.3 Koori Courts for all Victorian Kooris

Given the success of the Koori Court pilot projects at Shepparton and Broadmeadows it is clear that the current Courts should be retained. It is similarly clear that there is strong support, even an expectation, from within the Koori community that additional courts should be introduced throughout the State of Victoria. It is important to bear in mind that the composition and expectations of the Koori communities may vary from town to town, but there is also a need to ensure that there is a degree of consistency in the process and procedures within each of the Koori Courts. While there is strong support for the extension of the Koori Court model throughout Victoria so that all Koori defendants can have access to it, such a transition needs to be tempered with an awareness of the laborious process of consultation and negotiation that preceded the establishment of the Shepparton court. There also needs to be acknowledgment of the fact that it will not be possible for Koori Courts to be established immediately so as to be accessible for all Koori community members.

Recommendation Fourteen

The Koori Court model should be extended throughout Victoria so as to provide access to the Court to all Victorian Koori community members.

In the event that other Koori Courts are established around Victoria there will need to be sufficient additional resources allocated to ensure that they can fulfill their promise to the community. The greatest danger remains that the spirit of the Koori Courts will be, at some later date, compromised to achieve greater case flows or to meet certain targets in processing matters. The expansion of the Koori Court model beyond the existing three courts will require central co-ordination. Given that the Koori Court is already designated as a Division of the Magistrates' Court it would be advantageous for the position of co-ordinating Magistrate to be created. This will ensure that there is a level of consistency

and cohesion in the development of the Koori Court model as the additional courts are gradually introduced.

In establishing any future Koori Courts it is important to draw from the expertise and experience of those people involved in the pilot program Courts. In particular the work of the Reference Groups, first at Shepparton and later at Broadmeadows, offers a guide to the planning and administrative details that will inevitably arise in any subsequent Courts. It is of paramount importance that the Reference Group be inclusive of all the parties who will be involved in the operation of a Koori Court and that steps should be initiated at a very early stage to ensure that all relevant service providers, including both Koori community organisations and the mainstream organisations.

Recommendation Fifteen

A position of co-ordinating Magistrate for the Koori Court Division should be created.

6.3.1 Location of Koori Courts and Proper Venue

The issue of access to the Koori Courts was frequently raised as a matter of concern by Koori community members. Given the reality of funding limitations it seems clear that the introduction of subsequent Koori Courts may need to be structured in such a way as to ensure that Koori defendants are not denied access. Currently Koori Court matters are limited to offences that are committed within the boundaries of the Court or where the defendant resides within the boundaries. In practice there have been a number of matters during the pilot program that have been listed in the Koori Court where they do not meet the normal criteria. In fact the Broadmeadows Koori Court came to hear matters from defendants from the other side of Melbourne (mostly Heidelberg and Preston) because there were insufficient numbers of defendants within the Broadmeadows Court boundary. In particular the women prisoners at the Dame Phyllis Frost Centre were adamant that there should be greater access to a Koori Court for all Koori defendants. Even with respect to the existing Koori Courts it was frequently felt that members of the community

were being denied access to the Courts because the boundaries of the Magistrate Court did not adequately reflect those of the local Koori community. At the Broadmeadows community meeting, for example, it was argued that the Court should extend its area to include a number of townships to the north of Broadmeadows. One problem that arises with respect to this is the appropriate location of any subsequent Courts, given the reality of funding limitations. It was clear however that the Broadmeadows Koori Court is operating at full capacity and that there is considerable unmet demand in the metropolitan area.

Recommendation Sixteen

That the Koori Court be extended to service unmet demand in the Metropolitan area. To ascertain the appropriate locations of future metropolitan based Koori Court divisions, the DOJ should undertake further analysis and facilitate consultations across the metropolitan area.

Recommendation fourteen of the Interim evaluation report suggested that a Koori Court be established at Echuca to sit as part of a circuit (along with Shepparton) so as to make the Court's boundaries consistent with those of the Yorta Yorta and Bangerang traditional lands. Recommendation fifteen also suggested that the area of the Murray River extending from Mildura to Swan Hill might also comprise another Koori Court circuit. These recommendations were prompted by the artificiality of the Court boundaries, such that the Echuca and Shepparton Magistrates' Courts, separated by no more than 60 kilometres and including many of the same families, were in different Court regions. If the resources required to establish a Koori Court circuit at Echuca are too great then it would seem that the close proximity of the two Courts would lend itself to the Chief Magistrate making a rule for the transfer of Koori Court matters that arise from the Echuca Magistrates' Court to the Shepparton Koori Court.¹¹⁴ The creation of a Koori

¹¹⁴ *Magistrates Court (Koori Court) Act 2002* s.8 inserting a new s.144(1)(b) in the *Magistrates' Court Act 1989*

Court circuit in regional areas would provide an appropriate method of recognising the familial links that often exist in different parts of the State.

Recommendation Seventeen

That a Koori Court be established at Echuca to sit as part of a circuit, along with the existing court at Shepparton. Alternatively, that the Koori defendants at Echuca Magistrates Court be able to have their matters listed for Shepparton Koori Court.

Recommendation Eighteen

To adequately maintain the existing Koori Courts in Victoria and to ensure that all future Koori Courts are adequately funded, the DOJ should undertake a cost analysis across all relevant Departments to ascertain the actual cost of maintaining Koori Courts.

6.3.2 Ensuring continued Community involvement in Koori Courts

The success of the Koori Court pilot program represents a strong argument for the development of additional Koori Courts around the State. It is essential that these subsequent Courts not only recognise the crucial importance of community involvement at a local level, but that there is also a central steering committee to ensure that the original vision of the Court is not diminished or compromised. Such an initiative would ensure that the Koori Court continues to fulfil the strategic objectives of the Victorian Aboriginal Justice Agreement, particularly in respect to increasing community participation, developing culturally appropriate programs, and ensuring that there is a co-ordinated and strategic approach to the Koori Courts.

Recommendation Nineteen

A steering committee should be formed to oversee the on-going administration and development of Koori courts. This committee should comprise representatives of the Koori community and the relevant government departments and other appropriate personnel from the existing Koori Courts. The committee should provide a central agency to evaluate the operations of all Koori Courts annually. The committee should convene meetings of all Koori Court Officers and Aboriginal Elders or Respected Persons on an annual basis.

In addition there should be ongoing statistical monitoring in relation to Koori Court matters, every two years.

CONCLUSION

The Nature of the Koori Court

While each Koori Court can be regarded as a unique and distinct conjunction of conventional Magistrates' Court process and procedure and Aboriginal cultural knowledge and community values, it is important to remember that they are still part of the non-Indigenous legal system. Also it should not be expected (at least initially) that the Koori Court will cause a substantial reduction in the overall imprisonment or re-offending rates for Indigenous defendants. Notwithstanding these qualifications, it is clear that the Koori Courts represent a significant and important development in the justice system, not just for Indigenous Australians but for all Victorians. Put simply, the Koori Courts have changed the manner in which business is done in the Magistrates' Court. The real success of the Koori Court should therefore not be limited to the calculation of cost or case flows, but rather should be measured in the possibility it offers for defendants to be part of a justice process that is not totally alienating and that may deliver significant changes to their patterns of behaviour (not just offending). The case stories included at chapter five illustrate the many ways in which the Koori Courts have the potential to transform the lives of those who go before it. Just as important as the impact that the Koori Courts have made upon the lives of the defendants is the capacity for the Courts to recognise Indigenous culture and incorporate the authority of Aboriginal Elders and Respected Persons in the sentencing process.

The primary objective with regard to the Koori Courts at present must clearly be the consolidation and strengthening of the current ones and the planning to extend the model so that it is available for all members of the Victorian Koori community. While it is not an appropriate time to consider radical changes to the working of the Koori Court model it is worthwhile reflecting how they may, over time, develop and evolve. There are certainly strong parallels between aspects of the functioning of the Koori Court and the developing notion of community courts. Just as the Koori Courts have been concerned with the idea of involving the Indigenous community with the justice system, so too are

community courts concerned with bridging the gap between communities and courts.¹¹⁵

Writing on the Red Hook Community Justice Centre Malkin states:

The community court model implemented in Red Hook makes possible new forms of lawyering, courtroom interactions and sentencing. The ultimate goal is to use teamwork to direct defendants with problems into social service programs and community service crews...The judge frequently informs defendants and the courtroom public of the court's teamwork.

Such a description could be seen as being particularly apt for the Koori Court, as there is the same emphasis upon courtroom interactions, there are new forms of sentencing and the success of the program is influenced greatly by the integration of the service providers. In short, the two models have in common the reliance upon teamwork as the foundation of the operation in their respective courts. Just as there are similarities between the operation of the Koori Courts and the Community Justice Centres (and perhaps some indication of how Koori Courts might evolve in the future) so too can it be argued that the Koori Courts share many of the characteristics of the new form of rehabilitative sentencing that has been termed "therapeutic jurisprudence". As the Chief Magistrate Ian Gray has observed, there has been a paradigm shift in sentencing in the last ten to twenty years, and "the growing realisation that crudely punitive sentencing is not a reliable way of dealing with recidivism has led to the introduction into courts of various modes of therapeutic and restorative justice."¹¹⁶ Clearly the innovative approach of the Koori Court is more than just "special treatment" or a "soft option" but is in fact reflective of international trends in sentencing and legal development. What distinguishes the Koori Court, however, is the importance of the Indigenous community and the role played by the Elders and Respected Persons. It is therefore important to distinguish the courts as more than just an example of restorative justice or therapeutic jurisprudence and recognize the Koori Courts as *sui generis*, unique unto themselves. In keeping with a point raised repeatedly in community consultations, it should also be recognized that each

¹¹⁵ Malkin, V. (2003). Community Courts and the process of accountability: Consensus and conflict at the Red Hook Community Centre. *American Criminal Law Review*, 40(4), 1573.

¹¹⁶ Gray I, op.cit., p.3

community's Koori Court will be, to a certain extent, unique unto itself. The Koori Courts will hand down judgment in non-Indigenous courts but the distinguishing feature will remain the contribution made by community members and it is this insight, life-experience and, on occasion, the grounding in Indigenous law that will ultimately distinguish them as more than just "specialist courts" but as Koori Courts that reflect the values of the Koori community.

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Appendix One

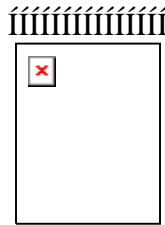
Magistrates' Court (Koori Court) Act 2002

Magistrates' Court (Koori Court) Act 2002

Act No. 27/2002

TABLE OF PROVISIONS

Section Page



Victoria

No. 27 of 2002

Magistrates' Court (Koori Court) Act 2002^[dagger]

[dagger]

[Assented to 12 June 2002]

The Parliament of Victoria enacts as follows:

1. Purposes

The purposes of this Act are--

- (a) to establish a Koori Court Division of the Magistrates' Court; and
 - (b) to provide for the jurisdiction and procedure of that Division--
- with the objective of ensuring greater participation of the Aboriginal community in the sentencing process of the Magistrates' Court through the role to be played in that process by the Aboriginal elder or respected person and others.

2. Commencement

- (1) This Act (other than section 10) comes into operation on the day after the day on which it receives the Royal Assent.
- (2) Subject to sub-section (3), section 10 comes into operation on a day to be proclaimed.
- (3) If section 10 does not come into operation before 1 July 2005, it comes into operation on that day.

3. *Principal Act*

See:

Act No.

51/1989.

Reprint No. 7

as at

1 June 2001

and amending

Act Nos

53/2000, 92/2000, 98/2000, 99/2000 (as amended by No. 12/2001), 2/2001, 14/2001, 32/2001, 44/2001, 45/2001, 61/2001, 69/2001, 92/2001, 2/2002 and 4/2002.

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In this Act, the **Magistrates' Court Act 1989** is called the Principal Act.

4. Definitions In section 3(1) of the Principal Act **insert** the following definitions--

' **Aboriginal elder or respected person**' means a person who holds office as an Aboriginal elder or respected person under section 17A;

"Aborigine" means a person who--

- (a) is descended from an Aborigine or Torres Strait Islander; and
- (b) identifies as an Aborigine or Torres Strait Islander; and
- (c) is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Island community;

"family member" has the meaning given by section 3A;

"Koori Court officer" means a person who--

- (a) is employed under Part 3 of the **Public Sector Management and Employment Act 1998**; and

(b) exercises powers or performs functions in relation to the Koori Court Division of the Court;'

5. *New section 3A inserted*

After section 3 of the Principal Act **insert--**

3A. *Meaning of "family member"*

(1) In this Act, "**family member**" of a person means--

- (a) the spouse or domestic partner of the person; or
- (b) a person who has or has had an intimate personal relationship with the person; or
- (c) a person who is or has been a relative of the person; or
- (d) a child who normally or regularly resides with the person; or
- (e) a child of whom the person is a guardian; or
- (f) another person who is or has been ordinarily a member of the household of the person.

(2) For the purposes of the definition of "family member" in sub-section (1)--

(a) "**domestic partner**" of a person means an adult person to whom the person is not married but with whom the person is in a relationship as a couple where one or each of them provides personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they are living under the same roof, but does not include a person who provides domestic support and personal care to the person--

- (i) for fee or reward; or
- (ii) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation);
- (b) "**parent**" of a child includes a guardian of the child or a person with whom the child normally or regularly resides;
- (c) "**relative**" of a person means--
 - (i) a father, mother, grandfather, grandmother, step-father, step-mother, father-in-law or mother-in-law of the person; or
 - (ii) a son, daughter, grandson, granddaughter, step-son, step-daughter, son-in-law or daughter-in-law of the person; or
 - (iii) a brother, sister, half-brother, half-sister, brother-in-law or sister-in-law of the person; or (iv) an uncle, aunt, uncle-in-law or aunt-in-law of the person; or
 - (v) a nephew or niece of the person; or
 - (vi) a cousin of the person--

and includes, in the case of domestic partners, a person who would be such a relative if the domestic partners were married to each other;

(d) "**spouse**" of a person means a person to whom the person is or was married.

(3) For the purposes of the definition of "domestic partner" in sub-section (2)--

(a) in determining whether persons are domestic partners of each other, all the circumstances of their relationship are to be taken into account, including any one or more of the matters referred to in section 275(2) of the **Property Law Act 1958** as may be relevant in a particular case;

(b) a person is not a domestic partner of another person only because they are co-tenants.'

6. New sections 4D to 4G inserted Before section 5 of the Principal Act **insert--**

"4D. Establishment of Koori Court Division

(1) The Court has a Koori Court Division.

(2) The Koori Court Division has such of the powers of the Court as are necessary to enable it to exercise its jurisdiction.

(3) Despite anything to the contrary in this Act, the Koori Court Division may only sit and act at a venue of the Court specified by the Chief Magistrate by notice published in the Government Gazette.

(4) The Koori Court Division must exercise its jurisdiction with as little formality and technicality, and with as much expedition, as the requirements of this Act and the **Sentencing Act 1991** and the proper consideration of the matters before the Court permit.

(5) The Koori Court Division must take steps to ensure that, so far as practicable, any proceeding before it is conducted in a way which it considers will make it comprehensible to--

(a) the defendant; and

(b) a family member of the defendant; and

(c) any member of the Aboriginal community who is present in court.

(6) Subject to this Act, the regulations and the rules, the Koori Court Division may regulate its own procedure.

4E. Jurisdiction of Koori Court Division

The Koori Court Division has--

(a) the jurisdiction to deal with a proceeding for an offence given to it by section 4F; and

(b) jurisdiction to deal with a breach of a sentencing order made by it (including any offence constituted by such a breach) or variation of such a sentencing order; and

(c) any other jurisdiction given to it by or under this or any other Act.

4F. Circumstances in which Koori Court Division may deal with certain offences

(1) The Koori Court Division only has jurisdiction to deal with a proceeding for an offence (other than an offence constituted by a breach of a sentencing order made by it) if--

(a) the defendant is Aboriginal; and

(b) the offence is within the jurisdiction of the Magistrates' Court, other than--

(i) a sexual offence as defined in section 6B(1) of the **Sentencing Act 1991**; or

(ii) an offence against section 22 of the **Crimes (Family Violence) Act 1987**

(breach of intervention order or interim intervention order) or an offence arising out of the same conduct as that out of which the offence against section 22 arose; and

(c) the defendant--

(i) intends to plead guilty to the offence; or

- (ii) pleads guilty to the offence; or
- (iii) intends to consent to the adjournment of the proceeding to enable him or her to participate in a diversion program; and
- (d) the defendant consents to the proceeding being dealt with by the Koori Court Division.

(2) Subject to and in accordance with the rules--

- (a) a proceeding may be transferred to the Koori Court Division, whether sitting at the same or a different venue; and
- (b) the Koori Court Division may transfer a proceeding (including a proceeding transferred to it under paragraph (a)) to the Court, sitting other than as the Koori Court Division, at the same or a different venue.

(3) Despite anything to the contrary in this Act, if a proceeding is transferred from one venue of the Court to another, the transferee venue is the proper venue of the Court for the purposes of this Act.

4G. Sentencing procedure in Koori Court Division

(1) This section applies to the Koori Court Division when it is considering which sentencing order to make in respect of a defendant.

(2) The Koori Court Division may consider any oral statement made to it by an Aboriginal elder or respected person.

(3) The Koori Court Division may inform itself in any way it thinks fit, including by considering a report prepared by, or a statement or submission prepared or made to it by, or evidence given to it by--

- (a) a Koori Court officer employed as an Aboriginal justice worker; or
- (b) a community corrections officer appointed under Part 4 of the **Corrections Act 1986**; or

(c) a health service provider; or

(d) a victim of the offence; or (e) a family member of the defendant; or

(f) anyone else whom the Koori Court Division considers appropriate.

(4) Nothing in this section affects the requirement to observe the rules of natural justice.

(5) This section does not limit--

(a) any other power conferred on the Court by or under this or any other Act; or

(b) any other specific provision made by or under this or any other Act for the making of any report, statement or submission, or the giving of any evidence, to the Court for the purpose of assisting it in determining sentence."

7. New section 17A inserted After section 17 of the Principal Act **insert--**

"17A. Appointment of Aboriginal elders or respected persons

(1) 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 as set out in this Act.

(2) An Aboriginal elder or respected person holds office for the period, and on the terms and conditions, determined by the Secretary and specified in the instrument of appointment.

(3) An Aboriginal elder or respected person may resign from office by writing signed by him or her and delivered to the Secretary."

8. New section 144 inserted

In Part 7 of the Principal Act, after section 143 **insert--**

'144. Rules of court--Koori Court Division

(1) The Chief Magistrate together with 2 or more Deputy Chief Magistrates may jointly make rules of court for or with respect to--

(a) any matter relating to the practice and procedure of the Koori Court Division of the Court; and

(b) the transfer of proceedings to and from the Koori Court Division of the Court.

(2) Sub-sections (3) to (5) of section 142 apply to a power conferred by sub-section (1) and to rules made under that sub-section as if--

(a) any reference in those sub-sections to "sub-section (1)" were a reference to sub-section (1) of this section; and

(b) sub-section (4)(c) did not contain the word "committal".'.

9. Transitional provision In Schedule 8 to the Principal Act, at the end of the Schedule **insert--**

"28. The amendments of this Act made by section 6 of the **Magistrates' Court (Koori Court) Act 2002** apply with respect to a proceeding for an offence, irrespective of when the offence was committed or the proceeding commenced."

10. Repeal of Koori Court Division provisions

(1) In section 3(1) of the Principal Act, the definitions of "Aboriginal elder or respected person", "Aborigine", "family member" and "Koori Court officer" are **repealed**.

(2) Sections 3A, 4D, 4E, 4F, 4G, 17A and 144 of the Principal Act are **repealed**.

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ENDNOTES

Appendix Two

List of Recommendations from Interim Evaluation Review

Recommendation 1

That appropriate resources be provided to ensure that the Aboriginal Justice Worker is able to commence operation in their position from the time of appointment.

Recommendation 2

That appropriate space be found for both a designated Koori Court and an office for the Aboriginal Justice Worker

Recommendation 3

That measures be introduced to ensure that the payment made to the Aboriginal Elders and Respected Persons when they sit in Koori Court is increased to a level commensurate with their role and that such payment does not have an effect upon any other benefits or pensions to which they are entitled.

Recommendation 4

That all Court personnel be required to complete a program of cultural awareness training prior to the introduction of any Koori Court. This training should include all Court staff and not be limited to staff directly involved in the administration of the Koori Court.

Recommendation 5

The status of the draft Community Code of Conduct should be clarified, through consultation with the appropriate community representatives and RAJACs.

Recommendation 6

Any new Koori Courts should have a number of designated Magistrates responsible for hearing matters to provide for continuity in the Court's operation. It is imperative that the Magistrates appointed to hear such matters should have either some previous experience working with Indigenous people or have undergone a cross-cultural awareness training in Indigenous issues.

Recommendation 7

That the training of the Aboriginal Elders and Respected Persons be conducted over a longer period of time (preferably up to 6 months prior to their commencing sitting) to give them greater familiarity with Court procedures and to enable the Koori Court "team" to develop a better working relationship prior to hearing matters.

Recommendation 8

That further efforts be made to recruit representatives from the Wurunjderi people (the traditional owners of the area in which the Broadmeadows court is located) to sit as Aboriginal Elders or Respected Persons.

Recommendation 9

That further efforts be made to approach appropriate persons to sit as either Elders or Respected Persons on the Koori Courts at both Shepparton and Broadmeadows so as to reduce the workload of the current appointments.

Recommendation 10

That the Dept of Corrections continue the precedent of appointing an Indigenous person to the person within the Koori Court, consistent with the current practice at both Shepparton and Broadmeadows Courts.

Recommendation 11

The DOJ should facilitate a meeting with existing Aboriginal community organisations to facilitate stronger links with the existing Koori Courts.

Recommendation 12

As a preliminary to the introduction of any new Koori Courts and audit should be conducted of the available services that are provided in key areas (such as substance abuse) by both mainstream and Koori organisations.

Recommendation 13

That the Department of Justice should facilitate further discussion with RAJACs and community organisations, to consider the extension of Koori Court jurisdiction to breaches of intervention orders.

Recommendation 14

That a Koori Court be established at Echuca to sit as part of a circuit, along with the existing Court at Shepparton and that there be a review of the feasibility of such a circuit to include all other Magistrates Courts in Yorta Yorta/Bangerang traditional lands.

Recommendation 15

That high priority be given to the establishment of Koori Court in the Murray Valley region (to be located at either Mildura, Robinvale or Swan Hill) and Gippsland (to be located at either Bairnsdale, Morwell or Moe). Alternatively the Koori Court in these regions could sit as a circuit at each of the aforementioned locations.

Recommendation 16

As a matter of high priority that the possibility of the Koori Court pilot being extended to include Indigenous juvenile defendants be explored.

Recommendation 17

In the event that a Koori Children's Court should be established that this be seen as a separate funding initiative that would require the appointment, appropriate resourcing, of a designated Koori Juvenile Justice worker.

Recommendation 18

Koori Justice Panels should be established in all areas where there are Koori Courts and in any areas where the Courts are set up in future.

Recommendation 19

Where Koori Justice Panels are to operate the Department of Justice should explore the possibility for the creation of a funded position for the Koori Justice Panel. The role of the Koori Justice Panel should not become part of the job description of the Aboriginal Justice Workers.

Recommendation 20

The Department of Justice to explore the possibility of appointing a media liaison person (perhaps on a fractional basis) to publicise the work of the Koori Courts.

MAGISTRATES' COURT ACT 1989

Appendix Three

INSTRUMENT OF APPOINTMENT

In accordance with section 17A of the Magistrates' Court Act 1989, this *Instrument of Appointment* confirms the appointment of NAME as an *Aboriginal Elder or Respected Person*, to sit at the LOCATION Magistrates' Court, subject to the following terms and conditions:

1. The responsibilities to be discharged under the appointment are as follows:
 - Provide assistance and advice to the presiding Magistrate on Aboriginal cultural and community matters.
 - Reinforce cultural values and perspectives of the Aboriginal community to the defendant in relation to their offending behaviour.
 - Provide Aboriginal community representation into the sentencing of Aboriginal defendants.
 - Foster a relationship between the Magistrates' Court and the Aboriginal community by providing feedback on the operation of the Koori Court.
 - Assist in the education of the Aboriginal community in the operation of the court and the criminal justice system.
 - Actively liaise with Koori Court staff, in particular the Koori Court Officer, to gain a knowledge of the services and programs available to Aboriginal defendants.
2. Your term of appointment commenced on the DATE and will continue until the 30th day of June 2008 inclusive.
3. The appointment is subject to the *Magistrates' Court Act 1989* and any other Act or law relating to the above appointment.
4. You will be paid \$150 per sitting day.
5. Your sitting days with the Koori Court Division of the Shepparton Magistrates' Court will be scheduled in accordance with arrangements prepared by the Department of Justice. If you will be unable to attend on a scheduled sitting day, you are to notify to Koori Court Officer at Shepparton so that other arrangements can be made.
6. Your appointment will be subject to your compliance with the Department of Justice's *Code of Conduct for Aboriginal Elders or Respected Persons*.
7. This appointment may be revoked by the Secretary, subject to compliance with the principles of natural justice.

PENNY ARMYTAGE
SECRETARY
DEPARTMENT OF JUSTICE

Date: _____

Appendix Four

CODE OF CONDUCT

Aboriginal Elders or Respected Persons

Introduction

The Victorian Koori Court Division is assisted by *Aboriginal Elder or Respected Persons* who sit with the presiding Magistrate and provide advice regarding the background of the defendant and possible reasons for the offending behaviour. They may also explain relevant kinship connections of the defendant, how a particular crime has affected the Aboriginal community and advise on cultural practices, protocols and perspectives relevant to sentencing.

The *Magistrates' Court of Victoria 1989* formally created the role of *Aboriginal Elder or Respected Person* who can only be a member of the Koori community. *Aboriginal Elders or Respected Persons* are appointed by the Secretary pursuant to Section 17A of the Act.

This Code provides ethical standards for the promotion and preservation of the integrity of the office of *Aboriginal Elders and Respected Persons* and the Koori Court Division. This provides the minimum acceptable standard of conduct applicable to all *Aboriginal Elders and Respected Persons*.

1. Personal Propriety and Behaviour.

- (a) *Aboriginal Elders and Respected Persons* are to maintain and promote such standards of conduct that are likely to uphold the integrity and independence of the office of *Aboriginal Elders and Respected Persons* and the Koori Court Division.
- (b) *Aboriginal Elders and Respected Persons* are to respect and comply with the law and conduct themselves in a manner to promote public confidence in the integrity and independence of the office of *Aboriginal Elders and Respected Persons*. They are to avoid behaviour, which might bring the office into disrepute or undermine the impartiality, fairness or character of *Aboriginal Elders and Respected Persons*.

- (c) *Aboriginal Elders and Respected Persons* are to always act impartially in all matters before a Court or Tribunal.
- (d) *Aboriginal Elders and Respected Persons* are not to convey, or permit others to convey, the impression that they are in a special position of influence.

2. Disqualification

- (a) *Aboriginal Elders and Respected Persons* are to disqualify themselves from any proceedings in which their impartiality might reasonably be questioned.
- (b) If it is seen that a conflict of interest may arise, *Aboriginal Elders and Respected Persons* must disclose all actual and potential conflicts of interest known to the *Aboriginal Elders and Respected Persons*.

3. Legal Advice

Aboriginal Elders and Respected Persons must not give any legal advice to any person whatsoever, unless they are also a qualified legal practitioner.

4. Misconduct by other *Aboriginal Elders and Respected Persons*

Aboriginal Elders and Respected Persons, having knowledge, based upon reasonable and sustained grounds, that another *Aboriginal Elders and Respected Persons* has acted in a manner detrimental to the integrity and/or independence of the office of *Aboriginal Elders and Respected Persons* Judiciary, should report the matter to the *Aboriginal Elders and Respected Persons*.

5. Ethics Committee

Aboriginal Elders and Respected Persons must respect and comply with all issues raised in this Code of Conduct. The DOJ Committee will consider any alleged issue of misconduct submitted in writing. *Aboriginal Elders and Respected Persons* so named will make themselves available to address any such allegation and accept the resultant decision.

Appendix Five

Questionnaire for Defendants appearing before the Koori Court.

1. How did you hear about the Koorie Court? (circle one)
 - (a) From my solicitor or representative from the Victorian Aboriginal Legal Service
 - (b) From a family/friend
 - (c) From other members of the community
 - (d) From the media (television or radio or newspaper)

2. Why did you choose to have your case heard in the Koori Court (circle one answer)
 - (a) Advice from my lawyer
 - (b) Suggestion from another person
 - (c) I wanted to appear before a court with members of the Aboriginal community sitting on it
 - (d) I thought I would receive an easier sentence
 - (e) No particular reason

3. Before I appeared in the Koori Court I had a clear idea about what it involved.

Strongly agree	Agree	Not sure	Disagree	Strongly disagree
5	4	3	2	1

4. I found that being before the Koori Court was a positive Court experience.

Strongly agree	Agree	Not sure	Disagree	Strongly disagree
5	4	3	2	1

5. I thought that the Magistrate listened to what I had to say in the Koori Court.

Strongly agree	Agree	Not sure	Disagree	Strongly disagree
5	4	3	2	1

6. The attitude of the Police Prosecutor towards me in the Koori Court was better than what I had expected or had experienced previously in other court appearances:

Strongly agree	Agree	Not sure	Disagree	Strongly disagree
5	4	3	2	1

7. The Elder/Respected Person had met me, knew me or knew of me before the Koori Court sitting day

Strongly agree	Agree	Not sure	Disagree	Strongly disagree
5	4	3	2	1

8. The Koori Court Worker had met me, knew me or knew of me before the Koori Court sitting day

Strongly agree	Agree	Not sure	Disagree	Strongly disagree
5	4	3	2	1

9. The Elders/Respected Persons spoke to me directly in the Koori Court

Strongly agree	Agree	Not sure	Disagree	Strongly disagree
5	4	3	2	1

10. The Koori Court gave me the opportunity to put my side of the case

Strongly agree	Agree	Not sure	Disagree	Strongly disagree
5	4	3	2	1

11. I thought that the sentence I received from the Court was fair

Strongly agree	Agree	Not sure	Disagree	Strongly disagree
5	4	3	2	1

Appendix Six

Questionnaire for Elders and Respected Person

1. I have known the defendants who have appeared before the Koori Court.

Always	Most of the time	About half	Sometimes	Never
5	4	3	2	1

2. The Magistrate listens to what the Elders and Respected Persons have to say

Always	Most of the time	About half	Sometimes	Never
5	4	3	2	1

3. The sentences that are handed down are what I would have expected.

Always	Most of the time	About half	Sometimes	Never
5	4	3	2	1

4. I believe that the defendants have been aware of, and respectful towards, the cultural values of the Koori Court and the Elders.

Strongly agree	Agree	Not sure	Disagree	Strongly disagree
5	4	3	2	1

5. Defendants believe the Koori Court to be a soft option.

Strongly agree	Agree	Not sure	Disagree	Strongly disagree
5	4	3	2	1

6. The Koori Court should be extended to include matters involving sexual offences.

Strongly agree	Agree	Not sure	Disagree	Strongly disagree
5	4	3	2	1

7. The Koori Court should be extended to include matters involving family or domestic violence.

Strongly agree	Agree	Not sure	Disagree	Strongly disagree
5	4	3	2	1

8. The Koori Court should be extended to hear contested matters.

Strongly agree	Agree	Not sure	Disagree	Strongly disagree
5	4	3	2	1

9. The Koori Court has improved relations between the local Koori community and the police.

Strongly agree	Agree	Not sure	Disagree	Strongly disagree
5	4	3	2	1

10. There is an acceptance of the Koori Court within the local Koori community.

Strongly agree	Agree	Not sure	Disagree	Strongly disagree
5	4	3	2	1

11. The Koori Court is understood and accepted by the local non-Indigenous community.

Strongly agree	Agree	Not sure	Disagree	Strongly disagree
5	4	3	2	1

12. Overall, the Koori Court has been a success.

Strongly agree	Agree	Not sure	Disagree	Strongly disagree
5	4	3	2	1

