The Law Society
OF WESTERN AUSTRALIA
The voice of the legal profession in Western Australia

BRIEFING PAPER

FIRST NATIONS SPECIALIST COURTS

THE ESSENTIAL MEMBERSHIP FOR THE LEGAL PROFESSION

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FIRST NATIONS SPECIALIST COURTS

Issue

First Nations Specialist Courts or First Nations Sentencing Courts (also referred to as 'problem solving courts') are sentencing courts for First Nations persons convicted of summary offences. The purpose of the courts is to address the overrepresentation of Aboriginal and Torres Strait Islander people in the justice system through culturally appropriate, individualised court experiences and alternative sentencing options to custodial sentences. The courts incorporate wraparound services to support offenders, and are recommended as an important access to justice initiative.[1]

Prior to the establishment of First Nations Specialist Courts in Australia, there was found to be an inherent mistrust by First Nations people towards the justice system, with many reporting that the court processes were difficult to understand, alienating, and allowed for limited input by the offenders themselves.[2]

First Nations Specialist Courts have been established in Victoria (Koori Courts), South Australia (Nunga Courts) and Queensland (Murri Courts). There is a push in New South Wales to establish a 'Walama Court'.[3]

Currently, the only specialist court in Western Australia is the Barndimalgu Aboriginal Family Violence Court in Geraldton.[4] Previously, Western Australia has been an early adopter of innovative court practices.[5] In 2006, a specialist court in Kalgoorlie and specialist metropolitan domestic violence courts were established, however these courts were discontinued in 2015 as they did not have a demonstrable effect on recidivism rates, and also because of the operational costs involved.[6]

The establishment of First Nations Specialist Courts are recommended in the Law Council of Australia's *Justice Project* final report,[7] and the Australian Law Reform Commission's *Pathways to Justice* report.[8]

Background

Western Australia has the highest imprisonment rates of Aboriginal and Torres Strait Islanders in Australia,[9] and the over-representation of Aboriginal and Torres Strait Islanders in the justice system is well documented.[11] [12]

In order to achieve better justice outcomes for First Nations Australians, several jurisdictions have established First Nations Specialist Courts. The first such court in Australia was the Nunga Court,

introduced in South Australia in 1999.[13] This was followed by the 2002 Koori Court in Victoria set up as a specific division of the Magistrates' Court.[14] The Queensland Murri Court was also established in 2002, although it is not expressly provided for in legislation.[15]

The general principles of First Nations Specialist Courts are that Elders or respected persons from the community are present in court to assist a sitting Magistrate to understand the lives and culture of Aboriginal and Torres Strait Islander people. The offender must face not only the Magistrate but also the Elders, and there is more opportunity for an offender and their family to contribute during a hearing.[16] The First Nations Specialist Courts may sit in less formal settings than courtrooms.[17] First Nations Specialist Courts exist for both adult and youth offenders. Other specialist courts exist for drug offences,[18] mental health,[19] and the homeless.[20]

In order to be eligible for a matter to be heard in an First Nations Specialist Court, generally the accused must have made or must intend to make a guilty plea, consent to have the matter heard in the First Nations Specialist Court, live within or have been charged within a certain area, and the offence must be a summary offence (e.g. sexual offences are excluded).[21] The courts utilise the general sentencing orders available to them, however therapeutic programs such as drug rehabilitation and victim conferencing are often part of the curial process prior to the sentence being delivered.

The approach of the First Nations Specialist Courts, through inclusion of First Nations Elders and respected persons involved in the process, causes offenders to experience a degree of shame that cannot be evoked by mainstream courts.[22] This cultural element in sentencing processes is a key factor in improved outcomes for the offender and the community.[23]

Overseas Courts

New Zealand

New Zealand has several specialist courts, including the Rangatahi Courts for First Nations youth offenders, and the Matariki Court for adults. These courts are not supported by specific legislation, bur rather by the general provisions of the *Sentencing Act* (NZ) which allow offenders in all courts to call a witness to speak on their cultural background,[24] and for courts to adjourn proceedings to for offenders to participate in a culturally appropriate rehabilitation program.[25] There have been calls in New Zealand for First Nations Specialist Courts to be established by statute, similar to the Koori Courts model in Victoria.[26]

Canada

There are a number of First Nations Specialist Courts in Canada which were established following the landmark 1999 Canadian Supreme Court decision in *R v Gladue* (*'Gladue'*)[27] which challenged a legislative provision in Canada's Criminal Code[28] pertaining to an offender's cultural background, and found that in sentencing a court must take into account 'all available sanctions other than imprisonment that are reasonable in the circumstances, with particular attention to the circumstances of Aboriginal offenders'.[29] The result was that the *Gladue* principle was required to be applied in all subsequent cases concerning an First Nations offender.[30]

However, despite the *Gladue* principles being enshrined in the Canadian common law, practical realities of applying the principles and 'First Nations Peoples Courts' in Canada has not seen a reduction in Aboriginal incarceration.[31] This can be attributed to the inability of many Aboriginal people to gain access to *Gladue* reports, either due to lack of resources to write the reports or offenders being unaware of their rights in respect of the reports.[32]

Criticisms

The main criticism of First Nations Specialist Courts is that they have not made a difference in recidivism rates.[33] However, as Professor Marchetti has noted:

> *Quantitative reoffending analyses fail to show that these innovative justice processes have greater success in changing an offender's behaviour than do conventional court processes, but there is evidence that they are exposing First Nations offenders to more meaningful and culturally appropriate court practices.*[34]

Another criticism is perceived 'reverse discrimination' where First Nations offenders, through the First Nations Specialist Courts, receive lighter sentences for the same crimes as non-First Nations offenders, inconsistent with the principle of equality before the law.[35] Related to this criticism is that if Aboriginal people have a special sentencing court it opens the doors for numerous individual courts for different cultural groups.

There is no hard evidence to support the criticism of First Nations Specialist Courts being a 'soft option', and is rather based on the inference that the mere existence of an First Nations Specialist Court results in lenient approaches to criminal justice. Offenders in First Nations Specialist Courts are sentenced under the same sentencing laws which apply in conventional courts and there is evidence that, if anything, the First Nations Specialist Court experience is more meaningful and confronting for an offender than an appearance in a mainstream court.[37]

Western Australia

In 2006, a pilot community court program commenced in Kalgoorlie-Boulder. The purpose of the Community Court pilot was to provide a courtroom sentencing experience and environment that is more relevant and less intimidating to Aboriginal people.

The Community court was discontinued in 2015 alongside other Western Australian First Nations Specialist Courts as there was a lack of evidence of a reduction in reoffending compared to conventional courts.[38] [39]

This is despite a positive reaction to the WA Aboriginal courts. In 2009, there was an overwhelming response concerning the positive impact that the courts were having on offenders, particularly in regard to increasing respect for the legal system and improving community relations.[40] At this time, there was an improvement in recidivism rates at Norseman which was thought to be attributed to the time taken to discuss the offender's background, the use of

more appropriate sentencing options and the participation of First Nations Elders and respected persons.[41] It was recommended that more courts be adopted in small remote and regional communities where populations of First Nations people were much higher.[42]

Most of issues with the Western Australian Community Courts concerned limited cross-cultural training and a lack of support services available for First Nations offenders to address the underlying causes behind their offending.[43] Despite this, many First Nations offenders sentenced in these courts reported feeling as though the process was more meaningful and culturally appropriate and enabled them better access to the court services. It was argued that the effectiveness of the courts could be improved by increasing resources and by recognising them in specific legislation, such as in Victoria.

Policy Position

Law Council of Australia

The Law Council of Australia supports the proliferation of First Nations Specialist Courts in Australia, with Aboriginal and Torres Strait Islander people and organisations involved in the design, establishment, and evaluation of the courts.[44]

However, the Law Council notes that problem-solving courts and therapeutic jurisprudence-based judging are only effective if underpinned by alternative, non-custodial sentencing options and diversionary programs, and that state and territory governments should:

- ensure there is legislative support for such sentencing options; and
- invest in accessible, disability-responsive, and culturally appropriate support services and diversionary programs to underpin non-custodial supervisory sentences, especially in rural, regional, and remote areas to ensure that there is greater parity with urban areas.[45]

Law Society of Western Australia

The Law Society of Western Australia supports the re-introduction of First Nations Specialist Courts in WA, in line with the recommendations of the Justice Project. As stated by former Law Society president Greg Mcintyre SC, “an Aboriginal sentencing Court for juveniles and adults in urban and regional areas in Western Australia would be an important initiative in engaging First Nations Peoples in addressing Closing the Gap targets”.

The courts should be enshrined in legislation as a division of the Magistrates Court, based on the Victorian model.

The courts will only be successful if they include:

- Considered and planned consultation with elders and senior persons from the proposed locations of specialists' courts
- Identification of the most suitable and culturally appropriate elders and senior members to be involved
- access to treatment, intervention and rehabilitation programs to address the causes of offending behaviour
- Preparedness to model the specialists' courts in line with the identified needs of each individual region rather than adopting a 'one size fits all' approach
- the use of culturally appropriate processes identified through a meaningful consultation process to facilitate sharing of cultural knowledge and information, such as an interpreter service;
- a specially trained magistrate who is provided with regional specific cultural training; and
- clear and consistent operating procedures that also allow for local flexibility.[46]

This is particularly important for justice outcomes in regional, rural, and remote WA where a dearth of services can result in markedly different sentencing outcomes to metropolitan courts.

The Law Society encourages the Western Australian Government to establish First Nations Specialist Courts in regional, rural and remote WA, and adequately resource wraparound services for remote courts so that community-based sentences and diversionary programs are available to the magistrate to order.

As stated in the review of the Kalgoorlie pilot program in 2009:

> *There is considerable goodwill and positive affect generated by those involved in the project and that the program as designed is good practice and therefore, if operating as designed, has the capacity to improve outcomes; however, operating without sufficient supports, the one-half to three-quarters of an hour that the client spends within the Community Court is insufficient to result in sustained behavioural change.*[47]

First Nations Specialist Courts are an important and effective initiative to close the gap if they and the support services for offenders are resourced properly. However, they are only one part of the solution to the complex problem of the over representation of First Nations Australians in the criminal justice system.

This paper should be read in conjunction with the Law Society's Closing the Gap policies.

Recommendation:

The Law Society of Western Australia encourages the Western Australian Government to establish First Nations Specialist Courts, including in regional, rural and remote WA, and adequately resource wraparound services for the courts so that community-based sentences and diversionary programs are available to the magistrate to order.

NOTES

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3 *Sydney Morning Herald* First Nations lawyers call for urgent action on Walama Court (August 2020) https://www.smh.com.au/national/first-nations-lawyers-call-for-urgent-action-on-walama-court-20200804-p55igq.html
4 "The Barndimalgu Aboriginal Family Violence Court shows encouraging signs of producing positive outcomes for Aboriginal people affected by family and domestic violence" – Legislative Assembly of WA Community Development and Justice Standing Committee *Opening Doors to Justice: Supporting victims by improving the management of family and domestic violence matters in the Magistrates Court of Western Australia* (August 2020)
5 For example, Magistrate Terry Syddall invited Indigenous Elders to sit with him on the bench of the Magistrates Court at Broome in the 1970s: https://aija.org.au/research/resources/indigenous-issues-and-indigenous-sentencing-courts/
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8 Australian Law Reform Commission, *Pathways to Justice*, 329.
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28 *Criminal Code*, RSC 1985 (Canada), s718.2(e)
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