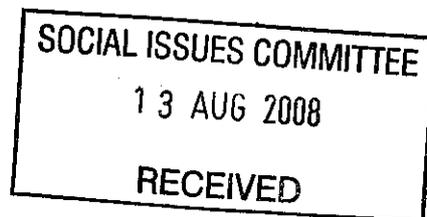


Submission
No 79

INQUIRY INTO OVERCOMING INDIGENOUS DISADVANTAGE

Organisation: New South Wales Local Court, Downing Centre
Name: Mr Graeme Henson
Position: The Chief Magistrate
Telephone: 9287 7615
Date received: 13/08/2008



The Chief Magistrate of the Local Court

7 August 2008

The Director
Standing Committee on Social Issues
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Director

Additional submission: Inquiry into closing the gap – overcoming Indigenous disadvantage

Thank-you for your letter dated 3 July 2008, enclosing an Executive Summary and issues for consideration from your inquiry "*closing the gap – overcoming indigenous disadvantage.*"

I address some of the issues you raise for consideration as follows:

1. Measuring outcomes

The recent evaluation of Circle Sentencing prepared by the NSW Bureau of Crime Statistics and Research emphasised the objective of *reducing recidivism*, concluding that Circle Sentencing has not achieved a reduction in the level of recidivism.

This is not entirely surprising. Circle Sentencing has to date focused on offenders who are likely to face imprisonment. Such persons tend to be those who have, by and large, become somewhat entrenched both in the Court process and the criminal justice system generally. Factors such as employment, social context and the general environment in which such offenders live also play a part in affecting the immediate and longer-term outcomes; so too does understanding of the immediate and long term consequences of involvement in the criminal justice system.

The collective experience of the members of this Court involved in Circle Sentencing, however, is that involvement of members of the Aboriginal community in Circle Sentencing and the operations of the Local Court is beginning to forge a link between the educational processes of the Court and communities. Importantly, this process is two-way.

For example, for the first time in the history of the Court the Aboriginal Project Officers from each of the Circle Courts were included in the annual regional conferences for Magistrates.

The consequence of this invitation was a reciprocal invitation by community justice groups for the Court to visit and speak with elders and respected persons about the justice system and the consequences of involvement in it for victims and offenders. I have accepted invitations from Kempsey and Mt. Druitt to visit their communities. The Executive Officer of the Aboriginal Justice Advisory Council is in the process of facilitating invitations to visit other communities.

I provide this information by way of illustration that there are peripheral benefits to the Circle Sentencing Programme that should be considered when "measuring outcomes" and measuring the *success* of programmes such as Circle Sentencing.

2. Coordinated service delivery and Funding

I note two of your issues for consideration concern support services for Aboriginal offenders and in particular funding for Circle Sentencing:

"There is a significant lack of support services for Aboriginal offenders, whilst in custody, prior to release, after release and in relation to drug and alcohol services. The Committee is concerned about this lack of appropriate service provision for Aboriginal offenders and will examine relevant initiatives." (At 10.5)

"The Committee is concerned that there are insufficient resources available for Circle Sentencing courts and highlights this issue for discussion." (At 10.9)

I understand that an approach being contemplated following the recent reviews of Circle Sentencing is to build into Circle Sentencing an holistic approach to addressing underlying contributors to offending behaviour, such as alcohol and drug dependency, anger management etc. I support that approach with a necessary qualification.

The assumption that current rehabilitation resources are sufficiently resourced to support the competing demands of the various Court intervention programmes and need in the community has not been validated. In my view it would be precipitous to promise such support services will be available for offenders and to promise to the Aboriginal community in particular, if there is no capacity within the community, government or non-government to deliver.

Raising expectations within the Aboriginal community without the capacity to deliver is a concern regularly expressed to me by those who are committed to improving outcomes for participants; including services for victims.

The recent report prepared by the NSW Attorney General's Department Cultural & Indigenous Research Centre identified that "*in most locations the support services available to address related issues such as alcohol and other drug use are not adequate, which it was felt limited the effectiveness of the Sentencing approach.*"¹ The report also noted that the issue of adequacy in the availability of support services for victims could not be conclusively assessed and required further investigation.²

The same report also acknowledges the intensive nature of Circle Sentencing and its potential impact on resources, not just within the Court but also within the Aboriginal community. This mirrors the results of my visits to the Nunga Court in South Australia and the Koori Court in Victoria where there is a common thread of "fatigue" on the part of members of the Aboriginal community and a seeming lack of capacity to increase the number of people available to participate in Aboriginal centric Court processes.

3. Specific strategies

"The Committee will consider the accessibility of community based sentencing options to Aboriginal offenders"

Cultural assistance

My earlier submission focussed on the lack of community based sentencing options in rural and regional areas and the potential impact that this has on Aboriginal offenders. In a similar vein, I regard it as highly desirable that the focus on addressing the involvement of the Aboriginal Community within the criminal justice system should be as expansive as possible.

There is little doubt that the contribution Circle Sentencing has made to the Aboriginal Community has been of the highest significance. As noted above, however, it is limited to specific locations and the focus has tended to be on more serious offenders. It may be that it is persons at the lower end of offending who are the most vulnerable in terms of progressing from intermediate penalties to imprisonment and who could benefit from a hybrid or community based approach (outside the Circle Sentencing approach).

I see no reason why the Aboriginal Community, outside the Circle Sentencing programme could not effectively operate and provide the Magistrate with culturally appropriate insight into the background of an offender. Whether this is through the Probation and Parole Service or by being present in the Courtroom as advisors to the Magistrate is something for further consideration and discussion.

¹ Cultural and Indigenous Research Centre Australia: New South Wales Attorney General's Department Evaluation of Circle Sentencing Program May 2008, at page 6.

² Note 1 at page 7.

Addressing underlying causes of crime

Traditional approaches to crime focus on prosecution. Sentencing is governed by the *Crimes (Sentencing Procedure) Act 1999* and the Common Law. Outcomes produced against this background often find it difficult if not impossible to address aspects of causation, particularly where they are associated with social and other disadvantage. Addressing these issues may well lead to an improvement within the criminal justice sphere through a reduction in the rate of recidivism. The MERIT programme is a case in point.

Continuing Judicial Education along with the breadth of qualifications and experience of the Magistracy has led the Court to recognise that underlying issues such as drug and alcohol addiction, poverty, mental health, financial management, homelessness and social isolation should be addressed.

There is, however, a limit to what a Court can do through the organisation of its internal processes. Beyond that it is a matter for Government to determine what is an acceptable alternative and what is not possible in meeting community expectations.

Expanded conferencing model

The granting of legislative authority to members of the Police Force to issue infringement notices for a small category of offences is representative of a move away from using the blunt instrument of the law as the automatic response to minor offending. This is similarly so with the Adult Cannabis Cautioning Scheme.

Youth Conferencing under the Young Offenders Act 1997 is another example. Youth Conferencing aims to reduce the number of juveniles, and Aboriginal juveniles in particular appearing before the Children's Court jurisdiction. The purpose of the legislation is, where appropriate, to remove the stigma of a criminal record for young offenders, by diverting them pre-charge to a conference facilitated by Juvenile Justice.

Acknowledging that what I am about to write is properly a matter for government, there is in my view an opportunity to better manage minor offending within the Aboriginal community (and minor offending by the community in general) based on this conferencing model.

The objective of reducing the number of Aboriginal (and other) offenders appearing before our courts may be better addressed by their involvement in a community based outcome similar in terms to Youth Conferencing as an alternative to the traditional charging process.

In such an approach the Court would be removed from involvement save in those situations where there was a failure to comply with an agreed community sanction or an election to proceed according to law. The scope for involvement, as indicated to you would necessarily be limited to the types of minor anti social offending which are capable of being suitably addressed in a manner similar to the conferencing model.³

Not only would this reduce the number of Aboriginal offenders being required to appear before the Courts⁴, it has the potential to reduce the stigma associated with criminal records and to render the offender accountable directly to the community, rather than the Court.

There is also in my view, an associated benefit in involving respected members of the Aboriginal community in a process that is divorced from the Court based sentencing regime. The use of Aboriginal Community Justice Group involvement in such a process has the capacity to alleviate one of the identifiable concerns arising within the Circle Sentencing Process and the proposed Aboriginal Court, namely the social burden imposed on members of the Aboriginal community having to address possible prison or other sanctions for offenders and the consequential potential for division within the Aboriginal community.

As well as addressing aspects of the Aboriginal Justice Plan this approach also accommodates the Aboriginal Strategic Direction 2007-2011 Policy document issued by the Police Force of New South Wales. In this regard I note a specific commitment at Section 2 Part 5 – Table of objectives is expressed, inter alia in the following terms:

4. Divert Aboriginal Youth from Crime and Anti Social Behaviour

7. Reduce offending and over representation of Aboriginal people in the criminal justice system.

The cautioning/conferencing concept is well known to Police and therefore little would be required by way of education and training to extend this approach to aboriginal and other offenders who have passed the cut off age of 18.

It is even possible to foresee an alternative avenue into the MERIT programme (although differently named). Pressure from the Aboriginal community to participate in this successful initiative may redress the poor take-up rate by Aboriginal defendants under the current referral system.

³ See "Cautioning Aboriginal Young People" brochure – NSW Police Force 07/07

⁴ Applying BOCSAR data to fine or lesser outcomes – approximately 6,000 persons per annum

If you would like to discuss any of the above in further detail, please contact me.

Yours sincerely

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke.

Graeme Henson
Chief Magistrate