'Court' in the System: The Impact of the Circuiting Bush Court Upon Criminal Justice Administration and Domestic Violence Prosecution in Aboriginal Communities

> ... it is impossible to devote as much time to each client as is desirable. This is compounded by the logistical difficulties of working from footpaths, on the side of dirt roads and beside rivers. Of course, we cannot carry every case, every textbook or even every statute to court. We do not have faxes or telephones. We do not speak the language. There is no opportunity to obtain a second opinion and the single lawyer will have to deal with every matter from swearing to murder committals[1].

Defence lawyers face uniquely challenging conditions when the Magistrates court intermittently circuits remote Aboriginal communities and isolated towns in Northern Australia. Bush Court administers the Australian justice system to the Aboriginal population of an entire region by providing one magistrate to sit for a single day in a particular community anywhere between once a month and once a quarter. Magistrates are based in Darwin and Alice Springs and are circulated to the Bush Courts corresponding to their region.

The 'arrival' of the court consists of one magistrate appearing on the day with two court orderlies and sometimes a police prosecutor. Counsel for the defence will attempt to access community members for the purpose of advice and instruction-taking the day before court sits. However, a number of constraining factors surrounding the current operation of the Bush Court system mean it is frequently an impossible task for the Aboriginal Legal Service (ALS) lawyer to access community-clients any time other than on court day for the purpose of instruction-taking and plea-advice. The ALS lawyer is the only defence counsel made available at Bush Court. Aboriginal clients have little conception of what is transpiring in court and virtually no access to interpreters during instruction-taking. The opportunity to follow-up a client's case, or even provide a simplified explanation of its outcome is virtually non-existent, due to the enormous caseload Bush Courts bear and the irregularity with which they are visited.

Problematically, justice delivery and its excesses can proceed unchecked in these communities, because the rest of the Australian population is not in a position to observe. The following discussion is based upon findings of research conducted by the author over a six-month period beginning July 2000, attending eight Bush Courts: Jabiru (Kakadu), Nguyu (Tiwi), Wadeye (Port Keats), Daly River, Oenpelli (Arnhem Land), Hermannsburg, Yuendumu and Marble Bar (north-western WA).

Virtually all legal process administered by the Bush Court is criminal. Of the 486 Bush Court cases witnessed only three cases were non-criminal. A policy director at the North Australia Aboriginal Legal Aid Service (NAALAS), explained that it is rare that genuine civil matters are brought to the attention of the criminal lawyers sent on Bush Court circuit. Consequently, advice and assistance for any civil matter or family matter is practically unavailable to people living in remote Aboriginal communities.

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1 NAALAS Bush Court lawyer speaking of a typical Bush Court day, interview 8 August 2000, copy on file with author.

Oppressive Case Numbers

Of the court-days observed, the remote community courts of Daly River and Yuendumu possessed case lists of 40 cases and 100 cases on court-day, respectively.[2] Darwin Magistrates Court by comparison heard only 14 cases.[3] One solicitor reported that at one particular circuit, the court and the magistrate rely upon a substantial number of non-appearances to be able to dispose officially of the day's cases.

The constant adjournment of cases due to Bush Court's inability to complete the caseload is also problematic. A case adjourned at a sitting such as the Daly River Bush Court means the case will not be revisited for another three months (as the community is circuited quarterly), whereas similar issues were observed adjourned for a maximum of two weeks at Darwin Magistrates Court[4]. The ability of the legal system to 'forget about matters' may be a perception unintentionally given by the delay at Bush Court.

The sheer caseload makes taking even remotely sufficient instructions from the Bush Court client difficult. Aside from language barriers, according to one solicitor, Bush Court defendants actually require more time with their lawyer and in court than the general city court defendants need:

> Cultural issues are not always explained because they seem self-evident to the client ... I once asked a man from Arnhem Land why he beat a strange woman. He replied 'because she went up the hill'. I arranged for a psychiatric assessment.[5] The matter was adjourned for a couple of months to allow this to take place. In the meantime, I was advised by someone at the cultural centre that the particular hill in question is a sacred men's site. It was the woman who was suffering from a mental illness. I cancelled the appointment. There are literally hundreds and hundreds of these type of misunderstandings.[6]

The need for longer instruction-time with each client, so as to obtain sufficient individual details, is increased by the fact that Aboriginal community members operate within different frames of reference to mainstream white society. 'Simple questions such as "how old are you" are often met with ambiguous answers — or, if the family is present, a variety of answers'.[7] Another ALS lawyer expressed that time available for instruction-taking with Bush Court clients is never sufficient. Because Bush Court clients deliberate before they give their answers and pause more frequently, longer is needed (this is confirmed in Eades 1992:55 and by The Queensland Criminal Justice Commission 1996:76).

Obstacles to a matter ever being contested

The obstacles to conducting a hearing at a Bush Court sitting are numerous and are detailed only briefly here. Over 486 Bush Court cases were observed, in eight different communities. However, only two hearings actually took place, although on average, four or five had been *scheduled* at each court.

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2 Case load of Daly River Bush Court, 2 August 2000 Yuendumu Bush Court, 31 August 2000.

3 Caseload of Darwin Magistrates Court, 18 July 2000. The excessive caseload endemic of most Bush Courts is further detailed in Siegel N (2002) 'Uncovering the Bush Court in Remote Communities of Australia' *Australian Law Journal*, vol 76, p 640.

4 Observations of Darwin Magistrates Court, 18 July 2000. Reinforced in interview with Darwin Magistrate, 27 July 2000, copy on file with author.

5 It is in fact rare that such an opportunity is available at Bush Court. A Miwatj Aboriginal Corporation (Nhulunbuy) solicitor, revealed his constant struggle to obtain psychiatric assessments where they are integral to mitigating a plea. There is no psychiatric doctor at Nhulunbuy (which is the only town in Arnhem Land) to produce an assessment. There is no time available, or money to fly clients to Darwin, in order to receive assessments there. Telephone discussion, 2 February 2001.

6 Interview with NAALAS lawyer, 8 August 2000, copy on file with author.

7 Ibid.

The way justice delivery is affected by the overwhelming caseload at Bush Court displays itself through the pressure it exerts upon defence counsel to settle contested matters. Frequently a case will be called in for hearing and the ALS lawyer will still not have viewed the police statements. In such a case, he/she will be unaware of its contents and, consequently, which aspects of the defence can be used in argument. One lawyer described this problem as endemic of the Top End. A particular Darwin Magistrate acknowledged and expressed disappointment at the fact that many cases over which he had presided should have been run as hearings, but collapsed into pleas because of time constraints. The root of the problem in running a hearing at Bush Court is the incredible time constraints imposed by the caseload, often forcing prosecution and defence to negotiate the terms of a guilty plea to hurry the matter through the system.

A Darwin magistrate expressed concern that several cases over which he had presided (in the Katherine Region) may have been reduced to guilty pleas when they should not have been:

> In four years in Katherine I didn't do very many hearings at all, so much did collapse into a plea at the end of the day, for which you could say 'this isn't just, this is a sausage factory'. You also had lawyers and prosecutors realising 'we have an immense amount of work, we can't do it all in one day — what will you offer?'

At Bush Court, hearings are always scheduled at the end of the list. On the occasions when they are capable of taking place, the small amount of time left between the end of the glut of pleas and the time by which the magistrate must leave, means a lawyer generally does not have the luxury of spending as much time as needed with the client. The consequent miscarriage of justice is recognised by solicitors in the Top End also:

> In relation to matters which are contested, Bush Court is really a farce. It is ordinarily impossible to have done more than had a brief conversation with the client prior to the hearing of the charges.

Inadequate dealing with Domestic Violence and Violence against Women by the Bush Court

Clearly then, the conduct of domestic violence cases is vastly affected by the above-mentioned pressures to settle a case at Bush Court. Compounding this, the Top End Women's Legal Service (TEWLS) is the only women's legal service that attends Bush Court communities in the Northern Territory, providing domestic violence assistance and advocacy. TEWLS' two solicitors are able to visit only four of the Bush Courts in the entire NT and have been obligated to act for men in some circumstances also. Where TEWLS is absent, the ability for the ALS lawyer to handle domestic violence matters at Bush Court is severely confined, because of the conflict of interest that would result from the need to represent both parties. In fact, the outcome seems to be that the victim is generally left unrepresented because most ALS officers consider that the accused in a matter takes priority in acquiring advocacy services.

The sparse distribution of women's legal assistance (and its complete absence in the majority of the Territory) is deplorable given that the NT has the highest rate of sexual and physical violence against women in Australia[8]. In fact research has shown that rates of violence are increasing and their types worsening in some indigenous communities (Memmot et al 2001:6). The lack of resources and disadvantages suffered by Aboriginal

8 Stated in interview with TEWLS Director, 14 July 2000. The Australian Bureau of Statistics recorded the highest victim rate for assaults in the 1998/99 period, in the Northern Territory: *ABS 4510.0 Recorded Crime, Australia 28.6.2000.*

and Torres Strait Islander women in obtaining domestic violence assistance is a well-documented nationwide experience (See ALRC 1994:5.24; Atkinson 1996)[9]. The then director of TEWLS Director pointed out that, in reality, no rape support exists in indigenous communities. From discussions with the Darwin DPP's Aboriginal Support Coordinator of the Victim Support Unit, it seems TEWLS is solely relied upon to provide support to women in domestic violence matters in remote communities. But how is this appropriate when TEWLS only covers a total of five communities (one of which doesn't host Bush Court) out of the 250 communities in the NT to which the services need to be provided? No such services for communities exist in Central Australia, nor in any of the investigated regions of WA at all.[10]

Yet further obstacles present themselves; such as the intimidation that physical features of Bush Court venues impose upon victims of domestic violence, through ad hoc court-room facilities, whereby a victim is forced to sit sometimes only a foot away from her abuser while being cross-examined from very close range.

Problems manifest themselves through the handling of domestic violence assault charges and restraining order applications by young, inexperienced community police. Frequently a case will reach its fifth adjournment (which equals five months later than the original hearing date at most Bush Courts, sometimes longer) without a plea having been entered. The interests of justice demand expeditious process in these matters, particularly for the victim's safety. A Darwin Magistrate expressed his frustration at his inability to circumvent the injustice:

> ... [W]e're supposed to have fast-tracking [for domestic violence matters] but there was no way I could fast-track domestic violence in Katherine [due to the caseload], but up here [Darwin] there's enough magistrates that you can find early enough dates to be able to fast-track. Aggravated assaults on any woman are meant to be dealt with within six weeks. But that's not really possible in remote communities. I found it very difficult in Katherine. I couldn't work out a system as a one-man band to keep half days free all over the place [for domestic violence matters to have the opportunity to be heard].

The same magistrate conceded that 'six week fast-tracking' is a relative impossibility at Bush Courts, given the most regular sittings occur only once a month. The Kimberley Magistrate on his own admission successfully fast-tracks domestic violence matters and will do so regardless of the prosecuting police officer's conduct, but it is submitted that his ability to do so is facilitated by the reduced caseload his Bush Courts bear. The time restraints upon instruction-taking and congested case lists can provide inequitable predicaments for TEWLS staff. Those obstacles will continue to exist even if further women's legal services are established, because of the encumbrance upon current Bush Court process.

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9 Further: The Women's Issues and Social Empowerment organisation's *Report on Consultations with Aboriginal Communities*, 'Domestic Violence Information Manual' discovered that in only two towns of all those the organisation researched in Australia, 'were women able to say that their ALS catered for women within the community ... Women complained that the ALS would represent the perpetrator in domestic violence cases, but would not assist the women.'

10 Ascertained from all interviews conducted in WA (throughout the Kimberley, Pilbara and Gascoyne regions). That no such services exist in regional WA is implied by the ALS WA pamphlet listing available services to victims of domestic violence The only services described other than the ALS offices themselves, are accessible only to city dwellers. See *What you need to know about ... Domestic Violence*, ALS WA (Inc), Legal Education Pamphlet No. 6.

Given that 70% of the NT's Aboriginal population reside in remote communities, any addressing of the poor state of legal protection from domestic violence *must* take into account the above obstacles imposed by Bush Court process. The current consequence is a system which is over-zealous in prosecuting alleged general offenders, but unable to protect victims. The organisation of the Bush Courts must be reformed if Aboriginal offenders coming before these courts are to receive a fair trial and if victims' interests are to be better served.

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