

ANZSOC 2006 Conference
The Australian & New Zealand Society of Criminology
Criminology and Human Rights
Hobart

7 – 9 February 2006

***SENTENCING INDIGENOUS OFFENDERS
IN
DOMESTIC AND FAMILY VIOLENCE MATTERS***

***A
QUEENSLAND EXPERIENCE***

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SENTENCING INDIGENOUS OFFENDERS
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A QUEENSLAND EXPERIENCE

Sentencing Indigenous Offenders for offences concerning domestic and family violence presents some difficulties and issues which do not always overlap with offending in other groups. The Aboriginal and Torres Strait Islander Womens' Task Force on Violence Report delivered in 1999, reported that "*the injustices of the justice system were unequivocally stated to be causing Indigenous peoples most grief*".¹ It announced that "*Elders throughout Queensland are calling for the use of cultural lore to address the escalating crime in Communities and the over incarceration of the Indigenous people in both adult and juvenile centres. Crime prevention strategies are considered to be deficient with little relevance to traditional lore which provides the most effective deterrent.*"²

Early research by Heather Nancarrow concerning Indigenous domestic and family violence, the application of laws primarily driven by non-indigenous groups and the effect of traditional criminal justice sentences on indigenous families has indicated that a change of focus has been needed. Indigenous women have stated "*All we want is for the violence to stop. We don't want our men to go to jail. But by the same token we as a community have to try to address the issues of alcohol, drugs and violence.*"³

In light of the research and the demonstrated adverse effects on families of offenders arising from the intervention of the criminal justice system, it is worthwhile investigating the effectiveness of non-custodial sentences, not just from the aspect of the reduction of recidivism, but also regarding the social effects on families. Addressing the underlying issues of offenders as far as is possible must provide more positive outcomes for Indigenous families and the community at large through a reduction in future offending.

An ever-growing number of judicial officers around Australia have for some years been moving to include indigenous community members in Court processes. Federal Court Judges sit in remote communities in culturally appropriate settings. Supreme Court Judges such as former Chief Justice Mulligan of South Australia have conducted cultural awareness exchanges with judicial officers in remote Aboriginal communities such as the Pitjandara Lands. District Court Judges in Queensland and Western Australia have extended circuits to smaller remote towns to improve access to the Court. Magistrates in South Australia hold Nunga Courts, an adapted Court process for indigenous offenders. In New South Wales, Magistrates and local Elders have developed Circle Sentencing. In Queensland, Murri Court and other initiatives in indigenous communities are expanding from a firm base. Many other communities and Courts are working together in a number of ways to move towards greater and more appropriate access to justice.

The principles of criminal sentencing focus on the (at times) competing aspects of punishment, retribution and rehabilitation. Orders of imprisonment (addressing punishment and retribution) imposed in the Magistrates Court for domestic violence offences, in all but the most serious cases, tend to be short term – less than 12 months. This will of course vary

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according to a number of factors including the offender's criminal history and the seriousness of the factual situation of the offence. In Queensland, offenders the subject of a sentence of imprisonment of less than 12 months do not have automatic access to rehabilitative courses, program or counselling whilst in custody. Consequently, issues of domestic violence and related issues such as substance abuse (particularly of alcohol) are not addressed during short term periods of imprisonment. Offenders returning to their families after short term periods of imprisonment can quite often return with more risk factors for further violent offending against their family than existed previously. Jealousy (about events which may or may not have occurred in the offender's absence) is often an issue along with the other sociological effects that imprisonment undoubtedly has on people. Very commonly, the problems which contributed to the offending are still unresolved. The atmosphere generated by these issues can be more conducive to further offending than previously.

In an Indigenous sentencing context, one focus has been an attempt to ensure that the rehabilitation aspect of sentencing is culturally appropriate and effective. The Indigenous Womens' Violence Report recommended that "*Family Violence offenders must undertake mandatory accredited Family Violence Perpetrator Programs whether serving a custodial or non-custodial sentence. The preference is for programs developed and run by Indigenous people with Elders' input.*"⁴ The primary tool in this process is the small raft of programs available in the community and this requires a widespread and ongoing commitment from governments to ensure that community organisations and government services are in a position to provide such assistance where it is needed most. The inequity in the availability of appropriate programs to indigenous people is the single greatest factor holding this area back.

Background of Murri Court

"Murri Court" first commenced in the Queensland Magistrates Court in Brisbane on 21st August 2002 under the leadership of Diane Fingleton, then Chief Magistrate, and Brian Hine, Deputy Chief Magistrate, following investigation of other Indigenous court initiatives around the country, particularly Nunga Court in South Australia. The concept, fostered by Chief Magistrate Judge Marshall Irwin, has been applied in centres other than Brisbane, including Rockhampton in Central Queensland, and has been adapted to fit local communities and their needs. Rockhampton Magistrates Court has been operating a Murri Court since June 2003.

The approach grew from a desire to address the problem of over-representation of Indigenous people in the Criminal Justice System generally and particularly in prison. More than ten years on from the Report and Recommendations of the Royal Commission into Aboriginal Deaths in Custody, the trend of over-representation of indigenous people was not on the decline and in some areas was increasing.

Magistrates, through the initiative of Murri Court, are attempting to address the issue by providing for indigenous communities to have input into the sentencing process through respected persons – Elders and Community Justice Groups. The hope is that this involvement will lead to the imposition of more successful and culturally appropriate bail and sentencing orders. The perhaps unforeseen benefit has been the reconnection of offenders with their communities and the positive effects this can have for them and the community as a whole.

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Murri Court was designed to be held at a time isolated from the main list on a regular basis, in order to dedicate more time than is traditionally available in the eternally busy Magistrates Court list. In Brisbane, the Magistrate does not robe and sits at floor level at a custom-made oval table with the other participants of the Court. In Rockhampton, during consultation with the Indigenous community it became clear that there was a preference for the Magistrate to robe and sit on the Bench – their reasoning was to ensure that the offenders realised that the process was a Court process with the appropriate authority.

The Community Justice Groups are presently funded by the Department of Aboriginal and Torres Strait Islander Policy. The members are taken from the local community (usually by way of nomination or invitation) and undergo extensive training on an ongoing basis. Many members hold full time positions with government departments or community organisations and provide this service as volunteers or with the good grace of their employees. The Fitzroy Basin Elders are a volunteer organisation of Elders and are involved in many community projects and initiatives. The Community Corrections Office, a limb of Department of Corrections, contributes to the operation of the Court significantly, not only in the preparation of presentence reports but more significantly in the supervision of community based orders. The positive interaction between the Justice Group, Elders and Department of Corrections, and the dedication of additional time by both organisations to Murri Court is integral to the success of the process and is a credit to the Departments and organisations involved. The co-operation of these organisations with the criminal justice system through the Magistrates Court represents a holistic approach to a historically difficult problem in a practical and positive way.



Rockhampton Murri Court Team of Elders, Community Justice Group, Corrections Officers and Magistrate

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At the time of referral of offenders to Murri Court, presentence reports are sought from the Community Corrections Office and the Community Justice Group. The Community Justice Group is provided with a summary of the Police allegations and the criminal history of the offender by the Police. Written reports are prepared by both organisations following interviews with the offender and his/her family and following liaison regarding the availability of appropriate programs. On some occasions, offenders are referred to services prior to sentencing or may attend of their own volition. Reports address the offender's background, personal situation, the offender's attitude to the offending, availability of programs and the cultural appropriateness of sentencing options. Where the offender is from another community, the Justice Group liaises with the Justice Group from the offender's community in relation to the report. The Elders and/or Community Justice Group may decline to assist an offender for appropriate reasons at their discretion, including conflict of interest, threatening behaviour of offender, lack of bona fides of offender etc.

On the day of the Court appearance, the Elders, Community Justice Group and Community Corrections Officers meet with the offender (and family if appropriate). The Elders in particular usually speak quite frankly about the offending behaviour and the community's attitude to the offending behaviour. The ethos of the interactions between the Elders, Community Justice Group and offender is very much to strongly condemn the offending behaviour and to inform the offender of its effect on the community whilst encouraging the offender to take up the support of the Indigenous community organisations in order to rehabilitate themselves and make redress to the community for their behaviour.

The Court hearing itself proceeds much as usual, with submissions from Police (including victim impact information if available – often this comes from the reports in any event as much offending dealt with relates to domestic or family situations), Community Corrections, Justice Group, offender's legal representatives, and the offender and/or their family. A Victim Support Service is about to commence operations in Rockhampton to provide support for those victims who wish to come to Court and be involved in the process who don't already take that opportunity.

A representative of the Elders organisation sits on the Bench with the Magistrate. The Elder addresses the offender in the public setting as to the community concerns and the responsibilities of the offender regarding reparation and rehabilitation. This is a very powerful part of the proceedings and there are usually 4-6 other Elders who attend Court and sit in proximity to the offender. There is a discernible atmosphere of seriousness and respect when the Elders are present.

After consideration of all of the material presented and submissions made, the sentencing decision is taken by the Magistrate alone and this is made quite clear to the offender and his family in order to protect the Elders from any potential backlash.

There have been beneficial spin-offs for the Court process from the collaboration of organisations in the local community. A number of community organisations have dovetailed programs or created new programs and/or services in response to needs identified by the Murri Court and its participants. The cross-referrals between services have also increased

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according to anecdotal reports. The combination and more efficient use of community services will tend to create stronger community organisations and a more integrated approach to the resolution of community and individual problems. The benefit of the increase in the feeling of “community” amongst organisations and their participants shouldn’t be underestimated.

What cannot easily be explained is the power of the Murri Court process on a spiritual or emotional level. The power of the natural authority and wisdom of the Elders is striking in the Courtroom. There is a distinct feeling of condemnation of the offending but support for the offender’s potential emanating from the Elders and the Justice Group members.

Often similar emotions are expressed by the offender’s family members. Declaring private concerns and fears for and about the offender in front of those assembled in Court, in a public way, can be very cathartic for the family members (who are often victims of the offending themselves). Orders need to take intimate family considerations into account in order to tailor orders which are designed not only to punish but also to assist the offender to address his/her problems with appropriate supports.

Symbolism and Traditional/Customary Law

Murri Court acknowledges one of the basic tenets of traditional indigenous law and community values, that is, the authority of and respect for Elders. Whilst other customary actions such as banishments from the community or various areas and places, apologies and reparation are taken into account, it is the involvement of the Elders which makes the process so worthwhile. Their wisdom and knowledge are a constant inspiration. The pride of the Elders in the attempts to assist the community they are making through the Court and the support of community organisations in the process are noticeable. The acknowledgment in a public forum of the Elders’ authority and wisdom and their role as moral guardians of the community by the Court honours traditional respect for the role of the Elders. The Elders mean business and they make it quite clear to the offenders that they must honour their responsibilities after Court for the community support to be available. Often, when addressing offenders, the Elders speak of the “old people” (ancestors) and what they would have done or seen done to an offender in the “old days”. This always strikes a chord with offenders – even the toughest.

Offender Profile

The majority of offenders (approximately 85%) appearing before Murri Court (Adult) have significant previous convictions and many had been incarcerated in the past. The range of offences being dealt with include Assaults (from Common Assault through Serious Assault to Assault Occasioning Bodily Harm), Dishonesty and Property Offences, Disqualified and Dangerous Driving, Breaches Domestic Violence Orders, Breaching Probation and Bail Orders, Frauds under Commonwealth Crimes Act, and attendant less serious offences.

One of the major triggers for referral to Murri Court is the existence of substantial issues in the offender which can be addressed through intervention and treatment in order to move toward long term abstinence from re-offending. This requires significant effort and

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dedication on the part of the offender and it is essential that he/she is prepared to submit to the process and subsequent orders.

In re-designing the usual process, an aim was to ensure the significant improvement of offenders' understanding of the proceedings and his/her obligations under any resulting orders. A more precise understanding of what happened and the conditions of the orders will of course assist offenders in progressing through the orders with a more positive attitude (if they feel they have been dealt with fairly) and more successfully (if they know what they need to do), leading to a decrease in breaches of orders and again decreasing the likelihood of terms of imprisonment on re-sentencing.

An informal Exit Survey has been taken from adult offenders appearing in Murri Court. Their comments regarding the proceedings of Murri Court include the following:-

“fairer chance of being understood by Court and Elders”
“opportunity to fix my problems”
“no rush like other Courts”
“deserved what I got”
“felt I was fairly dealt with”
“fair and decent”
“Court had a chance to listen to my side of the story”

The general consensus from offenders seems to be also that the process is not a soft option. Offenders often feel quite confronted by the intensiveness of the process, the public nature of the disapproval of the community expressed by the Elders and others and the extent of rehabilitation efforts expected under the community based orders. Certainly offenders are disabused of any notion that may have been held coming into the process that it was an easier option than the usual course of Court.

Sentencing Offenders for Domestic and Family Violence

In Queensland over the last 4 years, there has been a 42.2% increase in Applications for Protection Orders and a 49.10% increase in orders made by the Court.⁵ Domestic Violence remains one of the most significant areas of the work of the Magistrates Court. With this increase has come a consequent increase in offending for breaching such orders.

One of the approaches of the Court has been to attempt to impose an order for family violence offending which, whilst imposing punishment, also addresses the offender's issues with a view to avoiding future offending.

This is usually attempted through the imposition of a Probation Order with special conditions. Those conditions include regular attendance on the Elders and or the Community Justice Group, attending counselling for domestic violence perpetrators through an indigenous Healing Centre, attending counselling for substance abuse with ATODs and/or indigenous health organisation, attending such other programs of counselling as may be appropriate to their situation.

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Offenders who were sentenced to such Probation Orders had the greatest success in reducing short term recidivism (76.2% successful two years after commencement of the Murri Court).

The crucial elements for the effectiveness for the Probation Orders are detailed below:-

Attending on Elders and Community Justice Group – This supervision of the offender's local community in addition to the traditional supervision of the Office of Community Corrections has many beneficial effects. Connections are formed between the offender and the members of the Elders committee and Community Justice Group during the pre-Court interviews. The involvement of those persons in the Court process and the public acknowledgment of them by the Court reinforces to the offender the importance of the involvement of the indigenous community. The offender is subject to much broader supervision through these community organisations than would ordinarily be possible. A chance meeting in a social setting becomes an informal reporting session.

Counselling for Domestic Violence Perpetrators – Culturally appropriate Domestic and Family Violence counselling for the offender (and if needed other family members) from an indigenous Healing Centre, Helem Yumba, is utilised in Court orders to address the underlying causes of the violent or intimidating behaviour. Counselling can be offered through the service to other family members to ensure that all issues are dealt with. Referrals are made to other relevant services and the flexibility occasioned by an indigenous community organisation increases the likelihood of the offender's continued attendance and success.

Department of Corrective Services Programs – Ending Offending and Ending Family Violence for Indigenous Offenders has been delivered in Woorabinda (an Aboriginal Community 170 kilometres from Rockhampton) - Internal programs available through community based orders, particularly Probation include the Ending Offending and Ending Family Violence programs. The latter was developed by Indigenous people for the Department and is usually delivered by Indigenous people, as is the case in Woorabinda.

The Department of Corrective Services **Ending Family Violence**⁶ program is a specific rehabilitation program for Indigenous male and female offenders. The objectives are:

- reduce the incidences of domestic and family violence
- empower & build confidence in participants to identify problems
- recognise behaviours, plan strategies & alternatives to violence
- plan and improve lifestyles
- learn an adequate level of self control to avoid reacting with violence behaviour, through a focus on alcohol misuse

The program is developed in ten two hour sessions around the concept of a Healing Circle. The major topics of these sessions are:

- Introduction to the Ending Family Violence Program
- Understanding Violence. It's never OK
- Looking at the influence of Alcohol
- The Consequences of Violence

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- Making the Violence STOP
- Empowerment/Casework
- Relapse Prevention / Review

The program contains Participant's Workbooks, Facilitator Manuals, Operational Forms and Resource Material.

The Department's program **Ending Offending**⁷ is an Alcohol Education Course for Indigenous people who have committed offences whilst under the influence.

The program targets:

- Self – Monitoring
- Develop Personal Insight
- Personal Values & Offending
- Preventing Re- Offending

The association between alcohol and offending is well documented for Indigenous people and drinking behaviour is a major contributing factor to offending and of great concern. These programs have been implemented to address the over-representation of Indigenous people in the legal system and sit well within the recommendation of the Womens' Taskforce referred to above.

Collaborations are the future

In Woorabinda, as in Rockhampton, the Court and Indigenous community through Justice Groups, Elders and Indigenous organisations are working on the issue of domestic and family violence from all angles. In Woorabinda, in addition to these initiatives in the criminal justice system, children at school are being educated not to accept family violence through the Koora project; Domestic Violence Support Workers and the Womens' Shelter work in conjunction to provide protection and assistance from victims of violence; Helem Yumba, Anglicare and Mental Health provide counselling services in the community; and the Community Justice Group provide support, information and assistance to the community and the Court on a full time basis, to name but a few.

Through an agreement with the Indigenous Unit at the Capricornia Correctional Centre (for Men), offenders from Woorabinda and Murri Court (and others where a recommendation is made by the Court) that are imprisoned for short terms are provided with family violence counselling through Indigenous organisations. This approach addresses the issues for those on straight prison orders and starts the offender on the road to further intervention for those on Prison/Probation orders where counselling continues in the community after their release. In this way, although not as intensive as can be provided in the community, offenders on short term prison orders are given the opportunity to achieve some insight into their offending before returning to their family or the community.

The collaborative approach which has been adopted between the Court and services in the community including Helem Yumba Healing Centre, Family Violence Prevention Service, and other organisations through the Community Justice Groups and the Elders, continually

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discusses and investigates further developments to enhance the way in which the criminal justice system operates in this area. Each service can learn and contribute to the whole process and the support and interconnection we achieve not only professionally but personally brings rewards to all of us and indirectly, the community as a whole.

The Wonders of Rehabilitation

It is only through real rehabilitation that offenders can move from recidivism to worthwhile members of the community. Whilst prisons were created for punishment, they are not efficient or effective rehabilitators. Re-involvement of indigenous offenders in their community through the care and leadership of Elders and responsible members of the community rather than removing them from the community would seem to have countless more beneficial effects for all concerned. The involvement of the indigenous community in the solutions to the tragedy that is domestic and family violence is essential. Culturally appropriate and effective counselling and treatment for offenders whilst they are suitably punished for their wrongs is the only path to reinstating them in society.

No one model for the more culturally appropriate operation of the criminal justice system is the primary model. Approaches vary from community to community but all seem to have at their core the critically important involvement of the Indigenous community on a sustainable basis. The wider community through such processes can support and assist Indigenous communities to heal from within.

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- ⁶ Department of Corrective Services (Qld) Aboriginal and Torres Strait Islander Unit Pamphlet
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