National Indigenous Justice Conference, February 2024

A Murri District Court? Is it needed? Is it possible? Would it help?

Judge Ken Barlow KC

Introduction

In 2022, the District Court and the Department of Justice and the Attorney-General started considering whether to introduce a Murri Court at the District Court level. In this paper, I propose to discuss some of the considerations relevant to that issue.

Some of you may be asking, what is a Murri Court? The simplest way to respond is to quote from the Murri Court brochure that is available on the Queensland Courts website for the Magistrates Court.

> Murri Court links Aboriginal and Torres Strait Islander defendants to culture and services to help them make changes in their lives and stop offending. Murri Court has Elders or Respected Persons from the community in court to help the Magistrate understand the lives and culture of Aboriginal and Torres Strait Islander people. Murri Court is not as formal as mainstream court so you can speak up for yourself. You will have to face the Elders and talk about your offending. You will go to services and be expected to work hard to make better choices. Elders will be in court to guide and encourage you, and help you tell your story in court.

As part of our investigations, the District Court and DJAG commissioned the UQ Pro Bono Centre to undertake research into similar courts in Australia and overseas and into relevant issues. The Pro Bono Centre encourages law students at the university to offer their services free of charge to worthy legal causes.

Part of the Pro Bono Centre's work includes undertaking research and providing reports to organisations on matters relevant to the law, including access to justice for all. In that process, the students are supervised by appropriate academic staff of the university.

I hope I do justice to the Centre in giving you this brief description.

In this case, the Centre produced a report and the students who undertook the research and wrote the report presented it to the Court in September 2022. The students who did the work were Jackson Briant, Rupert Hoare, Madeline Lilly-Howe and Sarah Long. I have used that report and the powerpoint slides produced by the students extensively in preparing this paper. I am extremely grateful for the research undertaken by those students and for their comprehensive report. Their report has proved to be of substantial assistance to the Court and, I believe, to the Department in identifying and considering the legal and practical issues around whether a District Murri Court should be established and, if so, its characteristics.

I am also grateful to Magistrate Tina Previtera, of the Murri Court in Brisbane, for providing to me information about the court and its operations, as well allowing me sit in a sentencing conversation in that court.

Statistics

To set the context for my discussion, I propose to start by considering a number of relevant statistics, even though many of you may already be familiar with some or all of them.

In the 2021 census, 4.6% (237,303) of people in Queensland identified as Aboriginal or Torres Strait Islander. That comprised 29.2% of those who identified as ATSI throughout Australia.[1]

In Queensland as at 30.6.23, there were 10,226 adult prisoners in total. Of those, 3,801 (37.2%) were ATSI (of whom 328 were female).[2]

The average daily number of ATSI prisoners in custody in Queensland in 22/23 was 3,607.[3] This was up from 3,442 in 21/22. In 22/23, that was 36.6% of all Queensland prisoners (by average daily number).

In 2021-2022, 4,145 adults were convicted of offences in the District Court. Of that number, 821 (or 19.8%) were ATSI.[4] The most common serious offence among ATSI defendants was acts intended to cause injury, accounting for 40.7% of their convicted appearances in the Supreme and District Courts in Queensland in 2021-22.

Again in the Supreme and District Courts in 2021-22, imprisonment (including partially suspended sentences) accounted for 80.5% of convicted ATSI defendants, but only 67.3% for other defendants.[5]

One more comparison is the crude rate of imprisonment per 100,000 adults in a financial year. For non-indigenous prisoners in Queensland in 22/23, that rate was 155.9. For ATSI prisoners, the rate was 2,332.[6] That is, a nearly 15 times greater rate of imprisonment.

Obviously, only certain types of offences can or are likely to be determined in the District Court (although clearly some would be in the Magistrates Court or the Supreme Court).

The number of those types of offence committed (being the most serious charge against them) by indigenous prisoners who were in jail on 30 June 2023 are set out in this table.[7] These did not include offences for which the offenders were not in prison.

---

1 Australian Bureau of Statistics, *Queensland 2021 Census All persons QuickStats.*
2 ABS, *Prisoners in Australia 2023*, released 25.1.24, table 29.
3 Productivity Commission, *Report on Government Services 2024*, 29.1.24, Part C, Section 8, table 8A.5.
4 Queensland Government Statistician's Office, *Justice Report, Queensland, 2021-22*, Section 3.2.7, Table 26.
5 *Ibid*, Table 29.
6 See footnote 3.
7 ABS, *Prisoners in Australia 2023*, Table 16.

02 Acts intended to cause injury	1,471
03 Sexual assault and related offences	396
04 Dangerous/negligent acts	127
05 Abduction/harassment	31
06 Robbery/extortion	415
07 Unlawful entry with intent	465
08 Theft	143
09 Fraud/deception	16
10 Illicit drug offences	152
11 Weapons/explosives	49
14 Traffic and vehicle regulatory offences	14
15 Offences against justice	249
TOTAL	**3,528**

Finally, of the 3,801 ATSI prisoners in jail at 30.6.23, 3,082 (81.1%) had been previously imprisoned.[8] (As at 30 June 22, that figure was 2,747 (80.6%).) The equivalent statistic for non-indigenous prisoners was 61.8%. So much for jail being a deterrent to further offending or achieving rehabilitation! This statistic is particularly relevant to whether a Murri Court would work in reducing imprisonment and recidivism rates, about which I will have more to say later..

The problems that are notable from those statistics are well known: the vast over-representation of indigenous prisoners in Queensland jails in proportion to non-indigenous prisoners and as a proportion of indigenous members of the community; the high rate of recidivism of prisoners; and the failure to address the reasons for these numbers or to give sufficient pre or post-jail assistance to offenders in rehabilitation, particularly to give them the economic and social skills and ability to prosper in the community.

The topic of the usefulness or otherwise of imprisonment is beyond the scope of this paper, but I commend to you a recent article by Mirko Bagaric and Mia Schlicht in the January 2024 edition of the ALJ, in which there is a detailed discussion of prison and its alternatives as serving the community's interests.[9] As that paper and earlier research to which it refers show, the theories of both general deterrence and, in most cases, personal deterrence have been demonstrated to have no basis in fact. They are pure fiction, yet courts continue to take them into account in sentencing (and are obliged to do so by relevant legislation and appellate courts).

The operating cost to the government of each prisoner per day in Queensland in 2022-23 was about $251, or $91,615 pa. [10] Taking into account capital costs, the cost per day was about $352, or $128,480 pa. Having regard to the average daily number of ATSI prisoners that year (3,607), that equates to some $1,270,000 cost per day of ATSI prisoners in Queensland jails, or a cost to the government to jail ATSI prisoners of $463,427,000 pa.

---

8 ABS, *Prisoners in Australia 2023*, table 29.

9 *A Step-Wise Approach to Less Reliance on Prison: Victim Restitution and Proportionate Sanctions as the Main Focus in Sentencing Fraud Offenders* (2024) 98 ALJ 37.

10 Productivity Commission, *Report on Government Services 2024*, table 8A.19.

The issues

Surely there must be better ways of sentencing offenders.

Surely there must better factors to take into account.

Surely there must be better ways of spending taxpayers' money on punishing people who offend against the law.

Surely there must be better ways of trying to keep people out of jail.

One way in which the District Court of Queensland and the Department of Justice and the Attorney-General are considering to deal, at least partly, with these issues for indigenous people in Queensland is to introduce a Murri Court at District Court level. While this could be done without specific legislation (as was done in the Magistrates Murri Court), at least some amendments to the District Court Act may be required, but what any amendments may be is beyond the scope of this paper.

A brief history

I propose now to discuss briefly the history and operation of the Murri Court in Queensland. It has existed and operated only at the Magistrates Court level.

The Murri Court started in Queensland in 2002 in the Magistrates Court at Brisbane. Government funding for it ended in 2012, although thereafter a number of Magistrates Court sites continued to operate with the assistance of volunteers. The court was officially re-established and funded in 2016, since when it has been operating in up to 14 centres around Queensland.

The Murri Court process in Queensland is described on its website, from which I have adapted the following description (with additional input taken from the UQ paper).

A person is eligible to participate in the Murri Court if:

- the person is Aboriginal or a Torres Strait Islander;
- there is an available Murri Court at the place where the charges will be heard;
- the person will plead guilty to the charges;
- the person agrees to be dealt with in that Court; and
- a Murri Court magistrate considers the person and the case suitable to be dealt with in the court.

Once a Murri or TSI defendant is found to be suitable for Murri Court, the magistrate will adjourn the matter to provide them with an opportunity to work with the Community Justice Group, Elders and support services. They have occasional court appearances to allow the Murri Court Magistrate to discuss the defendant's progress. The court and the supporting Elders etc attempt to determine why the offender committed the offence so that underlying issues might be addressed. After some time, usually about three months, the matter is set down by the magistrate for sentencing. Before sentencing happens, the Community Justice Group, Elders and the defendant discuss the defendant's progress and future plans, which they set out in a report to the court. The Murri Court magistrate takes this report, along with any other relevant information, into consideration when sentencing the defendant. The magistrate sentences according to normal principles, but taking into account the information provided to the court.

Elders and other respected persons involved in the Murri Court process are paid, although not very much, for each day that they are part of a Murri Court panel.

Reviews of Murri Court

How has the Murri Court progressed? Has it met its objectives?

As far as I am aware, there have been four reviews of the Murri Court since its first establishment. The first three are referred to and their outcomes summarised in the fourth. I shall look at the first and last of those reviews.

Remember that the court was first established in Brisbane in 2002. About four years later, in 2006, at the direction of the Attorney-General, DJAG conducted an internal review of the court to assess its effectiveness and whether its operations could be improved so as to make it a permanent fixture. That review found that it was not possible, with the limited data available, to determine conclusively whether the court was meeting its objectives of reducing imprisonment, decreasing the rate of re-offending and reducing the number of indigenous offenders who failed to appear in court. However, based on the number and type of Murri Court orders made across all places where the Court sat, there were indications that the Court was having success, at least in its objective of diverting offenders from prison. Anecdotal evidence from Murri Court Magistrates was that many of the offenders appearing in the court received rehabilitative probation orders rather than imprisonment.

The report recorded that stakeholders considered that:

1 the Elders' and respected persons' involvement in the court process assisted offenders to develop trust in the court;

2 the court's problem-solving focus assisted offenders to undertake rehabilitation and to stop their offending conduct;

3 it was not considered to be a soft option; the penalties were onerous on the offender as they often involved treatment and close supervision;

4 the presence of members of an offender's community in the court assisted the offender to be more responsible for their offending behaviour and increased the offender's awareness of the impact of their offending on the victim and their own community; and

5 the Murri Court was more effective than the normal Magistrates Court because the offender was acknowledged in the process and was encouraged to change and to be reintegrated into the community.

The last review was conducted by an external team who, in June 2019, published a report for DJAG. It reported that, in the authors' view, the Murri Court was operating as intended in providing a culturally informed specialist court to assist in the rehabilitative efforts of Aboriginal and/or Torres Strait Islander offenders within Queensland.

The report recorded the profile of participants in the Murri Court, which is worth repeating. Between 1 July 2016 and 30 June 2018, 1077 indigenous Australians were referred to Murri Court. Almost three-quarters (73%) of defendants were male. Just over half of the male defendants were aged 18–34 (437), and there were 52 male youths under the age of 18. A

quarter of the defendants were female (287). Just over half of the female defendants were aged 18–34 (159) and there were 18 female youths under the age of 18.

Additionally, 76% of participants were referred to Murri Court once, 20% twice and 4% had three or more referrals.

The greatest number of cases in those two years occurred in Brisbane (231), followed by 169 in Mount Isa, 147 in Cairns, 128 in Toowoomba, 123 in Rockhampton and 106 in Townsville.

The 2019 review attempted, by asking for participants' views, to assess whether the Murri Court had met its objectives. The following summarises the findings on those objectives.

1 Reduce recidivism

The vast majority believed that the specialist court had helped them avoid deviant and criminal behaviour. The provision of mentoring, having to appear before Elders and other respected persons as well as before the Magistrate, access to rehabilitative options, and the prompting of reflection and self-awareness were cited as the means by which this was achieved.

2 Offender responsibility and awareness of consequences

The Murri Court program contributed to defendants taking personal responsibility for their criminal conduct and having increased awareness of how their acts or omissions affected victims and their community. The presence of Elders and other respected persons and the ability of defendants to interact openly with the court helped stimulate behavioural change.

3 In sentencing, the court should consider how cultural and personal circumstances contribute to offending

This had mixed results, depending on the sitting magistrate's views.

4 Encourage defendants' attendance and engagement with support services

The structure of the Murri Court, with the presence of the Elders and other respected persons, encouraged participants to fulfil bail requirements. The influence of the Elders' and other respected persons' directions, alongside offenders not wanting to displease them, was a motivating source of offender compliance with bail conditions and utilisation of support services, where available.

5 Facilitate improvements in defendants' physical and psychological health and quality of life

Murri Court, through providing a less intimidating court system and through referral of offenders to needed support services, facilitates improvement in the quality of life and psychological and physical health of offenders.

6 Improve defendants' engagement with and understanding of court processes

Offender participants wanted to be sentenced by the Murri Court so they could access what they perceived as a culturally safe and fair process (free of racial bias), preferably avoid incarceration and adhere to familial or community desires. The cultural safety of Murri Court improved participant engagement with the court process, although it did not necessarily improve understanding.

7 Improve Elders' and other respected persons' confidence in and knowledge of the court processes

Elders and other respected persons learned about the criminal court process and consequently had more confidence in that process. They then took that knowledge back to their communities.

The report attempted to analyse whether the Murri Court was cost efficient. It conceded that this was difficult to evaluate. A large amount of work was undertaken voluntarily, which seems inappropriate. To be cost efficient, it should have sufficient funding, staff and community participants who are paid adequately for their involvement. It was very under-staffed. Additional funding was needed for staff and also for external service providers to whom offenders might be referred while on bail.

Other indigenous courts

There are indigenous courts in three other States and one Territory in Australia, as shown in this map. Those in black are summary courts. Those in red are indictable courts.

All of them operate in the summary jurisdiction of the Magistrates or Local Courts of those places. But, in Victoria and New South Wales, there are also such courts at County Court and District Court level.

County Koori Court - Victoria

The County Koori Court in Victoria was established by legislation and commenced operation in 2009. It is now operated in eight locations around Victoria.

To be eligible to participate in sentencing by the County Koori Court, an offender must establish their indigeneity, plead guilty and consent to participate. The offences must fall within the general jurisdiction of the County Court, except sexual offences. The court has a discretion whether to hear a matter.

In recent years, the court has heard around 50 matters a year, with the majority in Melbourne.

The County Koori Court was formally evaluated in 2011.[11]

The authors acknowledged that it was difficult to evaluate some of the outcomes, particularly its impact on re-offending. Nevertheless, they reported that, of 31 offenders included in the analysis, only one had reoffended. They recorded that the Koori Court process had had some benefits in promoting personal deterrence and the potential for rehabilitation (through the participation of support services in the court).

The report said that, of 15 participants interviewed, 14 agreed that the process of the court was more engaging, inclusive and less intimidating than the mainstream court. Also, accused were encouraged to participate in the Koori Court largely as a result of the informal and inclusive model adopted, using plain language and involving Elders and community members in the sentencing conversation.

The report concluded that there was strong evidence that the County Koori Court was making significant achievements in providing 'access to fair, culturally relevant and appropriate justice'. There was also evidence that the Court had some impact on reducing contact with the

---

[11] ***County Koori Court Evaluation Report*, 27.9.2011.**

justice system (reoffending), but it was too early to say definitively whether the Court would have a long term impact on reoffending.

Unfortunately, despite the continued existence and operation of the County Koori Court in Victoria, there has been no subsequent evaluation of its effectiveness.

Walama List – New South Wales

In NSW, the Chief Judge and judges of the District Court established a Walama List Pilot programme by a Practice Note. It began operations in February 2022. "Walama" is the word for "Come back" in Dhurag language. As it is described, it is a pilot to ascertain how effective such a court at District Court level may be.

At present, the Walama List operates only in Sydney. There are similar eligibility requirements to other such courts. An offender must be descended from and identify as an Aboriginal or Torres Strait Islander person (and be accepted as such by the relevant community), plead guilty and consent to the matter being transferred to the Walama List. Defendants charged with sexual offences and some serious violent offences are excluded from participating in the list.

A District Murri Court? Issues

Obviously, given the statistics with which I opened this paper, including as to the types of offence committed by indigenous offenders and the vast over-representation of those offenders in Queensland prisons, serious consideration is merited of the possibility of establishing a Murri Court within the District Court. A number of issues arise, some of which are no doubt still to be recognised.

Should it be a condition of participation:

- that the offender plead guilty? (Other courts require this, but it is possible that offenders who initially plead not guilty might benefit from the Murri Court process and ultimately change their plea, perhaps after negotiation with the DPP.)
- Should the offender be on bail? Why should a person on remand not be entitled to participate? How would that work realistically in terms of accessing support services, including Elders, etc?

What offences (if any) should be excluded from the District Murri Court?

As demonstrated in the ABS table of offences that I showed you earlier, 396 indigenous prisoners at 30 June 2023 were convicted of sexual and related offences. Whether offenders charged with these types of offences should be allowed to participate in Murri Court processes includes issues such as those identified here.

In 2022-23, 26,237 domestic violence protection orders were made. In the current financial year up to 31 December 2023, 11,147 DVOs have been made. These orders would principally, if not wholly, have been made in the Magistrates Court. Not all would have involved criminal charges, particularly not indictable charges, but some of them would be associated with charges of violence, whether sexual or otherwise, that might later come before this court.

Of the orders made so far this financial year, 1,732 respondents to protection orders were ATSI people.[12]

Particular issues arise in considering whether violence offences that involve family or close associates in a Murri community should be dealt with in the Murri Court. There are arguments both for and against it, some of which are briefly described here.

I don't express any conclusions. I am simply noting these issues briefly. However, given that the preponderance of offences committed by ATSI offenders were acts intended to cause injury (40.7% in 21/22), one might consider it unfortunate if a large proportion of those offenders were excluded from Murri District Court processes, particularly when a defendant must plead guilty and cooperate with appropriate external services in order to be sentenced by the Murri Court.

Other issues obviously need to be considered in deciding whether, and if so when and where, a District Murri Court might be established. In particular, in Queensland, the District Court sits in many locations, but has judges permanently in only eight: Brisbane, Beenleigh, Ipswich, Gold Coast, Sunshine Coast, Rockhampton, Townsville and Cairns.

According to the ABS, the Queensland indigenous areas (as defined by the ABS) with the largest number of Aboriginal and Torres Strait Islander people in 2021, were:[13]

- Brisbane City (22,940 people, up from 17,074 in 2016)
- Cairns (15,728 people, up from 13,706 in 2016)
- Logan (14,520 people, up from 9,817 in 2016)
- Gold Coast (13,593 people, up from 9,283 in 2016).

On the other hand, as a percentage of the total population of those areas (where there are permanent District Courts), Cairns had the largest proportion, as shown in this table.[14]

Torres Strait	80.9
Cape York	51.7
Mount Isa	27.6
Cairns - Atherton	10.9
Townsville - Mackay	7.9
Toowoomba - Roma	6.3
Rockhampton	6.2
Brisbane	2.8

12 www.courts.qld.gov.au, *Queensland Courts' domestic and family violence statistics.*

13 ABS, *Census of Population and Housing - Counts of Aboriginal and Torres Strait Islander Australians – Queensland*, Indigenous Locations, Indigenous Areas and Indigenous Regions.

14 ABS, *Census of Population and Housing - Counts of Aboriginal and Torres Strait Islander Australians – Queensland*, Table 8, Distribution of persons by Indigenous Status, Queensland Indigenous Regions, 2021.

Those two statistics indicate that either Brisbane (on numbers) or Cairns (on population ratio) is likely to be the most appropriate District Court centre in which to trial, or to establish first, a District Murri Court.

Canadian experience: the Gladue Court

Before I conclude, I want to refer to research into the effects of participation in the Toronto Aboriginal (Gladue) Court in Canada, which showed a significant reduction in recidivism rates for those who were sentenced in that court in comparison with those who did not participate in the court's systems (either from choice or because their offences did not qualify for the court).

As this table shows, the recidivism rates of participants were consistently about half the rates of the non-participant indigenous offenders.[15]

Percentage who re-offended after…	AJS participants	Non-participants
6 months	6%	13%
4 years	27%	49%
8 years	32%	59%

These data are perhaps the most positive indication that Murri and equivalent courts may, over time, reduce the ATSI prison population and reduce repeat offending.

Conclusions

Going back to the title of this paper: *A Murri District Court: Is it needed? Is it possible? Would it help?*

Whether a Murri District Court should be established has not been decided. If it is decided to trial such a court, it will take some time to get it up and running, even in only one location.

Based on other courts and evaluations of them that have been undertaken, it is difficult to interpret the data as definitely showing benefits of a Murri court or its equivalent. In particular, there are limited reliable Australian data (as opposed to anecdotal opinions) on their effect on recidivism. However, it is generally believed among those who have been or are involved in such courts that they do have positive effects on the individuals concerned and their communities. The UQ Pro Bono Centre students located reports that gave broadly positive indications. For example, they reported that, in the circle sentencing context, a Cultural and Indigenous Research Centre Australia study (although somewhat dated now) found a "dramatic

[15] Department of Justice Canada, "Aboriginal Justice Strategy Summative Evaluation," 31 July 2009, as reported in Janet Manuell, *The Fernando principles: the sentencing of Indigenous offenders in NSW*, December 2009, [85].

influence on offenders beyond reoffending".[16] Participation in the specialist courts has been linked to 'positive changes in offenders' behaviour in relation to substance abuse, employment and family relations'.[17] It has been suggested that these widespread impacts may have a 'crime prevention value' beyond the individual level by improving 'the informal social controls that exist in Aboriginal communities'.[18] Related to this, the specialised court process involves and empowers indigenous Elders and other respected persons, which may lead to consequential benefits within the relevant communities.[19]

However, as highlighted by the Department of Justice and Attorney-General in Queensland in a Parliamentary Committee as long ago as 2010, '[J]ust having a court with a special process is not necessarily helpful if you do not back it up with programs, like employment programs or education programs, that give people meaningful lifestyles away from the court'.[20] I would add to those programs, drug addiction programs and housing availability.

Related to this comment, I wish to make one final point.

In June 2020 there was a report in *The Age* newspaper, in Melbourne, in which journalist Michaela Whitbourn reported that, in December 2018, the NSW Justice Department had prepared a business case for a Walama Court. As reported, the Department costed a five year pilot at $19.3M in total, or less than $3.9M a year. It calculated potential savings over six to eight years of $16.2M on prison beds and $5.6M from a reduction in recidivism rates, plus potential productivity gains. And that was for a Walama Court based only in Sydney, not in any of the regional centres of NSW.

I have not seen the business case, so I cannot comment on how those conclusions were reached. However, the figures reported in that article, together with the costs of keeping people in prison in Queensland to which I referred early in this paper, lead one to ask, from governmental, taxpayers' and community perspectives, wouldn't it be worth spending some proportion of the costs of keeping offenders in jail to try to stop people offending and being imprisoned?

I leave that question for you to think about.

My personal view, for what it is worth, is that there would be considerable merit in establishing a District Murri Court, provided that it is properly funded, including for the recruitment, training and utilisation of appropriate Elders and other respected persons, and appropriate support services are also adequately funded and available in the locations where the court may sit.

---

16 Cultural and Indigenous Research Centre Australia, 'Evaluation of Circle Sentencing Program: Report' *NSW Attorney General's Department* (2008) 1, 61.

17 Elena Marchetti, 'Indigenous Sentencing Courts' (2009) 5 *Indigenous Justice Clearinghouse*, 3.

18 Jacqueline Fitzgerald, 'Does Circle Sentencing Reduce Aboriginal Offending?' (2008) 115 *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice*, 7.

19 Law Council of Australia, Submission No 46 to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Inquiry into the High Level of Involvement of Indigenous Juveniles and Young Adults in the Criminal Justice System Doing Time* (June 2011) 10; Jacqueline Joudo, 'Responding to Substance Abuse and Offending in Indigenous Communities: Review of Diversion Programs' (2008) 88 *Australian Institute of Criminology,* 1, 10.

20 Terry Ryan, Queensland Department of Justice and Attorney-General, Committee Hansard, Brisbane, 4 May 2010, 8.