



Australian
PolicyOnline

**Joining Forces: A partnership approach to effective justice –
community-driven social controls working side by side with the
Magistracy of the Northern Territory**

Daniel Suggit

APO [apo.org.au] 15 September 2016

In February 2012, the author was engaged by the NT Department of Justice to undertake a review of Community Courts. This report outlines his observations and is available for the first time to the general public, courtesy of the author and the NT Attorney-General and Department of Justice.

Number of pages: 42

Copyright/Creative commons license: Creative Commons Attribution-Non Commercial 3.0
(CC BY-NC 3.0 AU)

DOI: 10.4225/50/57D88DC8D0842

Joining Forces

*A partnership approach to effective justice: community-driven social controls
working side by side with the Magistracy of the Northern Territory*

A review of

Community Courts

Northern Territory Government

Pilot and Program 2005-2012

A report commissioned by the

Northern Territory Department of Justice

Daniel Suggit

Local Knowledge (NT) Pty Ltd

August 2012

Acronyms *et al*

ACPO – Aboriginal Community Police Officer

AIC – Australian Institute of Criminology www.aic.gov.au

ATSIC – Aboriginal and Torres Strait Islander Commission (Australian Government – abolished in 2005)

BOSCAR – NSW Bureau of Crime Statistics and Research www.boscar.nsw.gov.au

CAALAS – Central Australian Aboriginal Legal Aid Service www.caalas.com.au

CC – Community Court (IJIS code under ‘Claim Type’ field)

CCP – Community Court Pilot (IJIS code under ‘Claim Type’ field)

CJC – Community Justice Centre www.nt.gov.au/justice/courtsupp/ctc/

DoJ – Northern Territory Government, Department of Justice www.nt.gov.au/justice

DPP – Director of Public Prosecutions

IJIS – Integrated Justice Information System (NT DoJ’s Information System)

JC – Juvenile Court (replaced by YJC)

NAAJA – Northern Australia Aboriginal Justice agency www.naaja.org.au

NTG – Northern Territory Government www.nt.gov.au

NTLJ – NT Legal Journal and Reports

NTLAC – NT Legal Aid Commission www.ntlac.nt.gov.au

NTPS – Northern Territory Public Service

RCIADIC – Royal Commission into Aboriginal Deaths in Custody

SJ – NT Court of Summary Jurisdiction

YJC – Youth Justice Court

Victims of Crime NT www.victimsofcrime.org.au

Acknowledgements

I am grateful to all of the stakeholders with whom I have discussed this review from February through August 2012. I would especially like to acknowledge the following individuals who have also provided me with additional references and documents to assist me in this task:

- Chief Magistrate Hilary Hannam
- Justice Jenny Blokland
- Richard Coates
- James Teh
- Danial Kelly
- Ben Grimes
- Fiona Hussin
- Michael Petterson
- Ippei Okazaki

In addition, special thanks to Anne Redman from www.circaresearch.com.au for providing me with a broader theoretical and praxis context in relation to Aboriginal sentencing courts and conferencing around Australia. (CIRCA Research are currently undertaking a national evaluation of a number of such courts and conferencing models on behalf of the Australian Government's Attorney-General's Department).

Many thanks also to Ray Morrison, the DoJ's current Community Court Co-ordinator, for allowing me to review his own case files and also for assisting me to observe a community Court (YJC) at Alyangula in May 2012. Thank you also to Chris Cox, Director of Courts and Tribunals in the NT Department of Justice, for assisting me as the Department's project contact throughout. I would also like to acknowledge the assistance of Joe Yick from Research and Statistics in the Department of Justice for his advice on the data analysis component of this project.

Finally, I would like to recognise the tremendous commitment and patience of Angelito (Lito) Lontoc from NT Governments Data Centre Services to compile, structure and analyse the available IJIS data in relation to the Community Court program included within this report.

Daniel Suggit

1. Introduction



Alyangula Community Court (Youth Justice Court): 10 May 2012, Alyangula Court House, Groote Eylandt, Northern Territory. The Magistrate (seated in high-backed chair at the far end of table) came down from the raised bench area and joined a common table of Community Court members which included: offenders (and family members if present), victim (if present), community corrections officer, police prosecutor, defence lawyer, panel of community members and the community court co-ordinator; also present at the table at this particular Community Court was an officer from the NT Department of Children and Families who presented a formal assessment of the two youth offenders for the benefit of the court.

In February 2012, the consultant was engaged by the NT Department of Justice to undertake a review of Community Courts (refer: Appendix 2, *NT DoJ Terms of Reference*).

Community Courts began as a formal pilot project in 2005 within the NT Court of Summary Jurisdiction under the direction of the then Chief Magistrate, Hugh Bradley, and with funding and support from the Yilli Rreung ATSIC Regional Council. In 2008, the pilot was 'expanded' to program status through the NT Government's *Closing the Gap of Indigenous Disadvantage: A Generational Plan of Action (2007)*, which provided a funding commitment of \$2.1 million over 5 years: 2008-2012. A Requirement of this funding was for the Department to undertake an external evaluation of the 5 year program. It is understood that the evaluation was intended to be undertaken in the third or fourth year of the 5-year program. However, this evaluation was commissioned at the start of 2012 within the program's final 6 months.

The methodology employed by the consultant includes:

- Stakeholder consultation (*refer: Appendix 1: List of Stakeholders consulted*)
- Observation of one community court (Youth Justice Court) at Alyangula Court House, Groote Eylandt on 10th May 2012
- Desktop research (*refer: References*)
- Analysis of IJIS data in relation to Community Court pilot and program implementation, reoffending and breach of court orders

Key limitations to the effectiveness of this review methodology have been:

- Suspension of Adult Community Courts (2011): due to the suspension of Community Courts for adult offenders from 2011 (as detailed below), there was limited opportunity within the current project timeframe to observe this specialist court operation and moreover, to discuss the effectiveness of the program with all participating stakeholders. This particular limitation undoubtedly constrained the consultant's ability to interview Indigenous community participants in relation to this model of court delivery.
- Data: the Community Court program objectives refer explicitly to two quantitative indicators of program success: a reduction in both rates of reoffending and breach of court orders. While these may have been both stated program objectives, there appears to have been no commitment to establishing a data analysis framework to monitor these objectives against mainstream outcomes over the past 5 years. It has been left to the consultant – with the patient and time-consuming assistance of NTG officers within and outside the Department – to define, collate, test and analyse the various datasets from scratch. While it is admirable to have identified quantitative measures within the list of original program objectives, it would have been helpful in terms of the program's implementation and subsequent improvement to have established at the outset a framework to monitor and analyse this data. ¹

¹ In discussions with the Department it appears an 'informal' attempt was made in approximately 2007 to look at the reoffending data of this program. This earlier attempt was aborted when the dataset – at the time – was found to be both insignificant in overall number and also to contain various anomalies which challenged the validity of the attempted analysis.

2. Community Courts: history and practice

The following section provided the reader with some of the background needed to appreciate the origins and the evolving practice of the community court model within the Northern Territory.

2.1 NT Community Courts: an historical overview

Community courts commenced in Nhulunbuy (north East Arnhem Land) in about 2003/2004 after respected Raymattja Marika visited the Nhulunbuy Courts Chambers stating that 'down south' there are Koori courts, Nunga Courts circle sentencing and that the Yolngu wanted a 'Yolngu Court'. Being a new Magistrate at the time, I wasn't sure if I could, with any authenticity, preside in a court called 'Yolngu Court'. With other developments occurring in Darwin (our then Chief Magistrate Mr Hugh Bradley came to an agreement with Yilli Rreung Council to trial 'circle sentencing' in Darwin, Nhulunbuy and the Tiwi Islands and make some funds available for the process), we settled on 'Community Court' to describe an informal participatory process.

Subsequently there were general public meetings and education sessions involving Dr Kate Auty (formerly a Victorian Magistrate and now in Western Australia) and a number of restorative justice practitioners and educators in allied professional groups. The Community Court possesses some principals referable to restorative justice but whether the goals of restorative justice are met, depends greatly on the level and extent of participation, the type of case and the level of engagement of all relevant parties (Blokland, 2007a: 9).

Community Courts in the Northern Territory, as the above quote suggests, began with the joint interest within the Territory Indigenous Leadership and legal profession to explore Aboriginal restorative justice models operating in other Australia jurisdictions. In an internal and unpublished NT DoJ report from 2007, additional detail of this history is provided:

The Community Court formally commenced in Darwin and Nhulunbuy as pilot projects in January 2005. Courts have also been held at Galiwinku and the Tiwi Islands since 2005. The Nhulunbuy Community Court has also heard a few cases at Galiwinku on Echo Island in 2006 and Magistrate Luppino has commenced a Community Court at Oenpelli. Magistrates in Central Australia are also working towards programs in their courts. At the end of 2004, ATSIC and the Department of Justice co-sponsored officers and Dr Kate Auty, the Magistrate of the Shepparton Koori Court in Victoria to visit Darwin and conduct public information sessions on ways of operating such courts. ATSIC also agreed to provide a one-off funding to trial the project in Darwin and Nhulunbuy for the 2005 year. (NT DoJ unpublished report, 2007)²

² It should be noted that ATSIC was abolished officially by the Australian Government on 24 March 2005.

In May 2005, the then Chief Magistrate, Hugh Bradley, published a set of guidelines which outlined: the purpose, background, aims, participants, types of offences and offenders and procedures of the trial Community Court program. This document defines a number of key features of the trial model:

- The offender must have pleaded guilty or been found guilty of the offence
- The offender can be a youth or an adult
- 'Whilst it is anticipated that the Indigenous offenders will make up the vast majority of defendants appearing in court it is not intended that the court will be limited to Indigenous offenders'
- The offender must agree to participate in the community court process and undergo a pre-court assessment
- The victim is encouraged to participate, but it is not a requirement for the victim to be present
- 'Community representatives: there should be at least one or more members of the community sitting with a Magistrate. They will discuss aspects related to the offence and background of the offender and victim/s (if present), explain how the offending behaviour has breached the community code of conduct and will consider an appropriate sentence. These members are the key to empowering the victims/s, offender, support persons and the community in the sentencing process by developing a shared responsibility'.
- 'The sentence will ultimately be determined by the Magistrate, not the community members.'
- Offence types that can be heard by this court 'are to be kept as broad as possible' but will exclude 'sexual assaults.... Caution needs to be exercised for offences of violence, domestic violence and offences where the victim is a child.'

These original guidelines have remained without revision to guide the following 7 years of this specialist court's operation.

From 2005-2007, the initial community court 'trial' or 'pilot' received one year of funding from ATSIC. Following the one-off year of funding, the ongoing pilot was supported entirely through the financial and in-kind assistance of NT DoJ, the NT Magistrate and other interested stakeholders (e.g. NAAJA – formerly NAALAS; CAALAS and NTLAC) whose officers formed a reference committee which supported the ongoing evolution of this specialist court model. In these early trial/pilot days, it would appear that the program was primarily implemented by a few committed Magistrates working closely with a dedicated Program Coordinator and defence lawyers from NAAJA (formerly NAALAS) and CAALAS in Central Australia. It was not until 2008 that the Community Court program was

allocated a dedicated departmental budget in line with the NT Government's *Closing the Gap of Indigenous Disadvantage: A Generational Plan of Action (2007)*.

In 2007, the Northern Territory Government commissioned the report '*Little Children are Sacred*' Report of the Northern Territory Board of Inquiry into the protection of Aboriginal children from sexual abuse. This report discussed the NT's Community Court Model in some detail. What follows is a large extract from the politically influential report authored by Rex Wild QC and Patricia Anderson:

The Inquiry acknowledges that the Northern Territory presently has what are called community courts operating in a limited sense.

A recent review of the community court program demonstrates that the process is effective (and often the sentences are tougher and that process "harder" for offenders), but that it is under-resourced and under-promoted. Present problems are that:

- It only operates when the offender requests it
- The Elders selection process is not comprehensive
- There is no clear process for conducting a community court
- There is not proper training for participants
- There is not enough promotion of the court and encouragement for people to become involved
- Interpreters are not used enough
- There is no clarity of roles (for example, who is responsible for ensuring participants attend?)
- The process is not adequately supported by all members of the magistracy and by all service providers

Not many of the Aboriginal people with whom the Inquiry consulted across the Northern Territory were aware of the existence of the community court. Many wanted their own court in which their Elders could participate on a regular, and not an ad hoc, basis. In this way, the traditional authority of the Elders of the community will be built back to a position of strength.

The inquiry suggests that it should be the victim's choice as to whether a matter is dealt with by the Aboriginal court. This empowers the victim but it does not require them to participate in the process. The victim's participation should be voluntary.

The Community Justice Group of each community would be able to provide a panel of Elders for the Aboriginal court....

There also needs to be legislative mechanisms that allow courts to have specific regard to traditional processes in a broader context than just sentencing, and power for courts to order persons to undergo traditional processes...

The inquiry acknowledges that there is much work required before Aboriginal courts will be established. For this reason, the inquiry has recommended that the process of dialogue with Aboriginal communities start, with a view to developing resource efficient, empowering and effective Aboriginal courts as soon as practicable. The Inquiry notes that the positive outcomes from the community court are an encouraging sign. However, the Community Court does not go far enough.

The Inquiry notes the positive outcomes experienced by Aboriginal courts in other jurisdictions and in particular notes the cost benefit analysis conducted in Western Australia as being strong support for this recommendation

RECOMMENDATION

74. That, having regard to the success of Aboriginal courts in other jurisdictions in Australia, the government commence dialogue with Aboriginal communities aimed at developing language group specific Aboriginal courts in the Northern Territory.

Following the 15 June 2007 publication of *The Little Children are Sacred* report by the Northern Territory Government, the Australian Government took control of Indigenous Affairs in the Northern Territory on 21 June 2007 as a response to what was described by the then Prime Minister Howard and Minister for Indigenous Affairs Brough as a 'National Emergency'. This significant policy, program and legislative change agenda enacted by the Australian Government was known initially as the Federal Intervention. At this time the *Northern Territory National Emergency Response Act 2007* was passed by the Australian Government into Commonwealth legislation. Of note is Section 91 of the Act, which appears to run contrary to the recognition for, and encouragement of Aboriginal 'traditional authority... and practices' within mainstream Australia court processes proposed within the *Little Children are Sacred* report (refer above):³

91 Matters to which court is to have regard when passing sentence etc.

In determining the sentence to be passed, or the order to be made, in respect of any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for:

- a) Excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates: or
- b) Aggravating the seriousness of the criminal behaviour to which the offence relates

The longstanding political, policy and academic debate over the validity of acknowledging and/or integrating Aboriginal customary and/or traditional law within the mainstream NT legal court system was undoubtedly reignited in the context of the Federal Intervention (refer: 2001. Kurduju Committee Report; 2007, ARDS report; 2001. Gaymarani).

The NT Government also responded to the 'Little Children are Sacred Report' with its own *Closing the Gap of Indigenous Disadvantages: A Generational Plan of Action (2007)* which included a series of '5 year actions' that were to be undertaken from 2008-2012. As part of its 'new initiatives to close the gap' in 'community justice', the Northern Territory committed to establishing 10 community courts with a budget of \$2.1 million over the subsequent 5 years (2008-2012). In response, specifically to the report's Recommendation 74 (reproduced above, p 8) to 'develop language-group specific Aboriginal Courts', the *Closing the Gap* plan stated that:

³ The consultant understands that Section 104A of the NT Sentencing Act was also added following the Federal Intervention in Response to concerns raised by the Australian Government over the possible (mis)use of Aboriginal customary law within NT courts. The reader will note that this amended section of the NT Act is the reason why Community Courts are currently suspended for adults.

The Northern Territory will expand the use of Community Courts in remote Communities. This model is based on community participation in sentencing, rehabilitation and reintegration for matters heard in the Magistrates Court. Aboriginal interpreters play a key role in the Community Court process. *Additional Cost: \$2.1m over 5 years (p.15)*

It is important to note that this commitment to 'expand the community court model' was also referred to by the NT Government in 2007 in addressing three other separate recommendations from 'The Little Children are Sacred' Report on offender rehabilitation and community justice priorities (Recommendations 39, 71 and 72).

As a result of this commitment by the NT Government to 'close the gap of Indigenous disadvantage' a recurrent budget of \$417,000 per year from 2008-2012 was assigned to establish 10 community courts. What was from early 2005 to mid-2008 only a pilot, in mid-2008 quickly became a dedicated and 5 year funded court program to be delivered in ten sites across the NT. Initially the annual budget covered:

- 70% of the cost of a Magistrate
- 1 community Court Co-ordinator (A06 NTPS officer level) to service the whole of the NT
- 10 x 0.25 (part-time) = 4 FTE x Indigenous Community Court Liaison officers (A03 NTPS Level) for the 10 sites
- Program travel budget

It is understood that there was an attempt early on to recruit the 10 part-time Community Court Liaison officer positions but these positions proved difficult to fill part-time so they have not been advertised nor filled for a number of years. This budget clearly addresses costs incurred by the Magistracy and the Department in delivering the specialist court program, but does not compensate other key parties involved such as defence lawyers, police prosecutors and community corrections officers who are all potentially impacted by the specific delivery requirements of this program.

In October 2011, the Community Court program was suspended for adult offenders by the current Chief Magistrate, Hilary Hannam, due to a conflict with the NT Sentencing Act, section 104A (*refer: Appendix 3 for the full section of the Act*). This section of the Act refers to how a court may receive "views expressed by members of an Aboriginal community about the offender or the offence". It required, *inter alia*, that such "information is presented to the court in the form of evidence on oath, an affidavit or a statutory declaration." Such a formal requirement would appear to contradict the intent and practice of a Community Court to hear community views within an "informal atmosphere" (Section 8) which includes the offender, the victim, senior community members and others participating in a "[g]eneral discussion as to the impact of the

offending and the appropriate sentence (Section 22) facilitated by a Magistrate (Community Court Guidelines, 27 May 2005). It is understood that the Department is currently considering possible legislative changes to the NT Sentencing Act to address this conflict.

It should be noted, however, that the current suspension of the Community Court format does not extend to the Youth Justice Court (YJC) as there is no such restriction on the submission of informal forms of evidence to this court when sentencing young offenders. As such, Community Courts continue to be held within the Youth Justice Court of the Northern Territory. This fact, regrettably, was not taken into account in the recent review of Youth Justice by the NTG (Report, September 2011). It is the view of the consultant that a significant opportunity was lost during this earlier review to consider the effectiveness of the Community Court model within the NT youth justice system. The only reference to Community Courts in the 2011 review dismisses its relevance:

Some submissions received referred to the benefits community courts may have for young offenders. These courts have limited operation in the Territory, and are currently being reviewed by the Commonwealth and Northern Territory Governments. Accordingly, it is unnecessary for this Review to comment other than to encourage both governments to work with legal aid provider if and when the courts are to be expanded. (*Review of the North Territory Youth Justice System: Report*. Northern Territory Government, September 2011: 62)

2.2 NT Community Courts: a Statistical snapshot

From 2005-2012, the NT Department of Justice recorded a total of 217 Community Courts held in 18 different locations across the NT. It is important to note that over 70% (155) of these Community Courts have been held in just 4 locations: Darwin, Nhulunbuy, Nguiu (Wurrumiyanga) and Alyangula.⁴

Table 1: Community Courts by location (CCP court listings by venue)

Venue	2004/5	2005/6	2006/7	2007/8	2008/9	2009/10	2010/11	2011/12	Total
Alyangula	0	1	0	3	4	4	5	4	21
Borroloola	0	0	0	0	0	0	0	2	2
Daly River	0	1	0	0	0	0	2	1	4
Darwin	3	32	14	7	7	1	0	3	67
Galiwinku	0	0	1	1	2	2	0	0	6
Gapuwlyak	0	0	0	0	0	1	0	0	1
Jabiru	0	0	0	0	1	0	3	0	4
Katherine	0	1	0	0	0	0	0	0	1
Maningrida	0	1	0	0	1	1	1	2	6
Milikapiti	0	1	1	0	1	0	0	0	3
Nhulunbuy	1	11	12	2	5	3	6	1	41
Numbulwar	0	0	0	0	0	2	1	0	3
Oenpelli	0	0	2	0	0	4	5	0	11
Pularumpi	0	1	3	2	0	0	0	0	6
Tennant Ck	0	1	0	0	0	0	0	0	1
Wadeye	0	0	0	0	8	2	3	0	13
Nguiu	0	5	11	1	3	3	2	1	26
Yuendumu	0	0	0	0	0	1	0	0	1
Total/year	4	55	44	16	32	24	28	14	217

Between 2005 and 2012, the 217 Community Courts were heard by a total of 19 Magistrates. Three of these Magistrates presided over 54% of the total number of community courts held (117 community courts): Magistrates Blokland, Luppino and Bradley. Furthermore, 6 of the 19 Magistrates presided over 75% (or 162) of all community courts held: Magistrates Blokland, Luppino, Bradley, Cavanagh, Little and Oliver.

⁴ The data collected in this report has been sourced from NT DoJ's IIS System. In relation to Table 1, it should be noted on 2 separate days in Darwin in 2006: 23/01/2006 and 03/02/2006, there were 2 CCPs listed for each day – i.e. there were a total of 4 CCPs over 2 days.

Table 2: Community Courts by Magistrate (CCP court listings by magistrate)

Magistrate	2004/5	2005/6	2006/7	2007/8	2008/9	2009/10	2010/11	2011/12	Total
Bamber	0	1	0	0	0	0	0	0	1
Blokland	1	21	24	10	9	3	0	0	68
Borchers	0	0	0	0	0	2	0	0	2
Bradley	2	17	0	0	1	0	0	0	20
Carey	0	0	0	0	1	1	6	0	8
Cavanagh	1	3	1	2	2	2	5	1	17
Fong Lim	0	0	0	0	0	2	2	3	7
Hannam	0	0	0	0	0	0	2	3	5
Little	0	1	0	0	10	3	0	0	14
Loadman	0	4	1	0	0	0	0	0	5
Lowndes	0	1	0	0	0	0	1	2	4
Luppino	0	3	16	3	6	1	0	0	29
McGregor	0	0	0	1	0	0	0	0	1
Morris	0	0	0	0	0	2	0	1	3
Oliver	0	0	2	0	2	4	5	1	14
Smith	0	0	1	0	0	0	0	2	3
Trigg	0	0	0	0	1	4	6	0	11
Wallace	0	3	0	0	0	0	1	1	5
Total/ Year	4	54	45	16	32	24	28	14	217

From an analysis of the data coded to the Community Courts Pilot and Program in IJIS (CCP/CC), ⁵ 179 individuals were sentenced and received a ‘punishable order’ from a Magistrate within the Community Court from 2005 – 30 June 2012. ⁶ An offender is defined within this report as an individual who has received a ‘punishable order’ from a court in the NT (*refer* Appendix 4 for definitions).

⁵ Within the NT Department of Justice’s information system (IJIS) anyone that is required to attend court in the NT will be given a unique IJIS ID number. This number will remain unique to that individual even if they are found not guilty of an offence and will be reassigned to them whenever they return as an alleged offender.

⁶ There are a total of 190 IJIS ID holders recorded with a CCP listing type in the dataset. However, 11 of these records are repeats. That is 10 offenders who received a punishable order in a Community Court also appeared in a later Community Court a second time and received another punishable order within the period 2005-2012. Furthermore, one offender appeared 3 times in different Community Courts and received a punishable order each time. This last individual is recorded to have participated as a youth in all 3 attendances at the Community Court (i.e. recorded as YJC three times).

In addition to the 179 individuals who have been sentenced in a community court there are also a number of anomalies within the Community Court data.⁷

Out of the total of 179 individual IJIS ID holders who received a punishable order within the community court program:

- 158 have been male (88% of cohort) and 21 have been female (12% of cohort)
- 31 individuals have been dealt with by a youth court (YJC or JC Jurisdiction) which is 17% of the total with the majority (83%) of all CC/CCP individual offenders being heard in the adult magistrate's court (MC/SJ)
- Only 3 of the 179 are recorded as non-indigenous⁸

⁷ There are an additional 3 individuals who have participated in a community court but have not received a 'punishable order' from the court. Of more concern is that there appears to be 36 further individuals that have apparently been listed for a community court but no final order has been handed down in their case at the listed community court proceedings. These 39 individuals in the system are anomalous since the Community Court is intended to sentence an offender who has pleaded guilty or has been found guilty as a precondition of them participating in this specialist court. So the core assumption of this particular court process is that the offender will receive a punishable (and final) order of some kind. A potentially valuable additional research process would be to analyse what went wrong in relation to these 39 individuals who were listed for community court. Such research might lead to important improvements in the future implementation of the program.

⁸ This is a self-reported statistical data type which is recorded by the defendant themselves via a survey form completed within the court.

2.3 Aboriginal Courts across Australia

Parties at the oval table are afforded *due* respect in a fashion previously inconceivable in non-Aboriginal imposed western courts. This may not be therapeutic in any formal medicalised fashion. It may not even be capable of being understood as on the fringe of therapeutic but as Aboriginal people have been peripheral or fringe-dwellers in closely occupied Australia, the very reverse colonization taking place must be a kind of mending. To rail again calling the Koori Court therapeutic justice is to return to the old linear notions of what constitutes legal practice as if there had been no journey. (Kate Auty, 2006: 127)

The thing to remember about Circle Sentencing is it may not have any immediate effect on reoffending but it certainly does not make things worse and if you had to choose between that and a classic court format and your concern was capacity building and strengthening Aboriginal communities, it would be better to go down that Circle Sentencing track. It is good to think about diversion programs not just in terms of the narrow focus on getting the imprisonment rate down now, or getting the reoffending rate down now, but looking to the medium to longer term.

(Don Weatherburn, BOCSAR, quoted in Hansard, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System*. House of Representatives Standing Committee on ATSI Affairs, Canberra: 2011)

The development of the Community Courts model in the Northern Territory arose from a growing awareness amongst local Indigenous leaders and Legal practitioners that Indigenous sentencing courts were being implemented in other state and territory jurisdictions from the late 1990s in Australia.

The history of Australian Indigenous Sentencing Courts is well documented within a number of academic papers and evaluation reports (e.g. Elena Marchetti, 2009; AIC report on the Queensland Murri Court, 2010; 9-14). Authors frequently point to the important recommendations to increase participation by Indigenous Australians in the justice system within the 1991 Royal Commission into Aboriginal Deaths in Custody (RCIADIC), as a key driver in the subsequent development of these Indigenous Sentencing Courts nationally.

The first such court in formal operation in Australia was the Nunga Court (Aboriginal Court) in Port Adelaide, South Australia which was established in June 1999. In NSW, the Nowra Circle Court (Circle Sentencing Court) was established in January 2002. 'Circle Sentencing' was based on a Canadian model first implemented with traditional First Nations people and then applied to urban contexts throughout Canada, and more recently in the USA. In Victoria, the Koori Court (Aboriginal Court) was first established at Shepparton in October 2002. In the ACT, the Ngambra Circle Court (Circle sentencing Court) was first established in Canberra in May 2004. In the NT, the Darwin Community Court (Community Court) was first established in 2005. In WA, the Yandeyarra Community Court (Circle Sentencing Court) was established in 2004, and later on the Norseman and

Kalgoorlie-Boulder Aboriginal Community Courts were both established in 2006. Tasmania is the only jurisdiction which has not established a form of Indigenous sentencing court.

The role of instituting and supporting these various courts through legislations, practice directions and/or guidelines has varied markedly across jurisdictions. The Koori Courts in Victoria are the only courts of this type to be established under specific legislation. In contrast, NSW and South Australia have amended existing sentencing acts and criminal court procedures to enable their respective specialised Indigenous sentencing courts to operate. In the Northern Territory, QLD, WA and the ACT sentencing provisions and guidelines have been developed in order to support the operation of the respective courts.

Indigenous sentencing courts across Australia tend to prioritise the principals of therapeutic jurisprudence and/or restorative justice which focus principally upon rehabilitative outcomes for both the offender and the victims instead of more mainstream justice outcomes of punishment and legal argumentation. It is important to note that recent recommendations for improvements of the Nunga Courts in South Australia by Retired Judge Peggy Fulton Hora have suggested incorporating alcohol treatment approaches ('problem-focused' methodologies) within the scope of the established Aboriginal court model (2001. Smart Justice: 16).

In recent evaluations of Indigenous sentencing courts, there is a general consensus that these specialised courts are greatly improving the participation of Indigenous Australians in the justice system – a key recommendation of the RCIADIC in 1991 (Marchetti, 2009; CIRCA Research 2008; AIC Murri Court evaluation 2010). In contrast, however, positive significant changes to recidivism and/or reoffending rates through the implementation of Indigenous sentencing courts across Australia are yet to be established (e.g. AIC, Murri Court Evaluation 2010; Shelby Consulting, 2009; J. Fitzgerald (BOCSAR), 2008).

What is particularly significant in the Australia research literature around Indigenous sentencing courts from 2006 onwards is a growing interest in the potentially powerful role of social controls imposed by family, peers and community upon an offender's behaviour. Of course, community-based social controls lie at the heart of how Indigenous sentencing courts maybe adding value to mainstream court systems:

Informal social controls, such as the opinions of families and friends, are more effective in controlling criminal behaviour than criminal justice responses (Snowball and Weatherburn 2006). Fitzgerald (2008) suggests that circle sentencing courts may, through the involvement of representatives of the community, work to strengthen social controls which may, in turn, help to prevent crime. This is more difficult to measure, but highlights the need for a better understanding as to how being sentenced through Indigenous sentencing courts results in behavioural change. (AIC Evaluation of the Queensland Murri Court, 2010:13)

Don Weatherburn, the Director of BOCSAR in NSW has discussed social controls and their possible importance in offender behaviour change:

While law enforcement and criminal justice offer important opportunities through which to reduce offending behaviour, informal social controls are often more potent in controlling criminal behaviour than formal social control measures, such as arrest and prosecution (Paternoster et al. 1982). Offenders, in other words, are often more strongly influenced by the opinion of family and friends than they are by the formal legal consequences that might flow from apprehension and prosecution. (Snowball and Weatherburn, 2006; 16)

It is possible to argue that for the majority of Indigenous Territorians the mainstream justice system (i.e. the police, the courts and prisons) exerts minimal social control and authority over individual and community-wide behaviours. For many Indigenous Territorians, there appears to be little personal and social shame or embarrassment about an involvement with the justice system. This would be contrasted to the majority of non-Indigenous Territorian, who may view their own or others direct involvement in the justice system as a clear deterrent for criminal and/or anti-social behaviours. In this context, the Community Court program in the NT provides a significant opportunity for Indigenous Communities, in which social controls are clearly working to join forces and partner with the Magistracy of the Northern Territory to deliver and enforce effective and local sentencing solutions.

3. Review Findings

The following section is an overview of this Review's findings in regard to the current program's

- Implementation; and
- Outcomes (against stated objectives)

3.1 Implementation

The implementation of Community Courts as a formal model in the Northern Territory can be divided into two distinct phases:

- Pilot/trial (2005-2007)
- Program (2008-2012)

In the pilot phase, internal and unpublished Departmental evaluation reports refer to ongoing challenges in relation to the implementation and ownership of the evolving pilot (reports 2006 & 2007). However, during the pilot phase the new model was supported and guided by a dedicated reference committee representing the Magistracy, the NT Department of Justice and relevant non-government legal service providers. Nowhere is it explained why this reference committee ceases to operate from 2008 onwards once the pilot became a program.

Unfortunately, it appears from stakeholder consultations that the 'expansion' of the pilot model to a 10 location court in 2008 as part of the *Closing the Gap Indigenous Disadvantage: A Generational Plan of Action (2007)* was rushed and poorly planned. Pressured by political imperatives to address significant gaps in a range of community justice priorities, Community Courts were hurriedly enlisted to address multiple targets within broad-ranging Indigenous policy and program reforms across the Territory

For example, there is little evidence of rigorous implementation planning to address even the most obvious questions such as: how will the program be structured so as to service 10 sites throughout the Territory? The program continued with the limited pilot resourcing of a single co-ordinator based in Darwin to cover 10 sites with most sites in the

Top End and some in Central Australia.⁹ With one program co-ordinator located in Darwin, regional development of the program has been limited ever since. Central Australian initiatives have also proved especially difficult to support and sustain from Darwin. In addition to the single program co-ordinator, regional supports were planned in 2007/2008 by employing part-time A03-level Aboriginal field officers in the court sites outside of Darwin. This initiative, it appears, proved a major recruitment failure early on and most of these part-time positions have remained vacant over the past 5 years. It does not appear that the Department ever attempted to address this clear failure in regional support and development for multiple sites outside of Darwin.¹⁰

Furthermore, the financial modelling for the program phase 2008-2012 appears to have addressed only additional costs to the Magistracy and the Department for the specialist program delivery, but never allowed for additional costs borne by the legal defence agencies and police prosecutors for their participation in this more time consuming process. Thorough implementation planning would have identified and dealt with these financial issues to ensure program support flowed from all participating program partners.

Relevant training of Community Court panel members in a number of court sites appears to have been provided by NAAJA (formally known as NAALAS) in 2008 and 2009 with some financial support from the Department. However, such training has apparently not been delivered in the past 3 years of the program. This raises the question: is training of community panel members in the court sites outside of Darwin – and also potentially, the training of participating Magistrates – part of a formal implementation plan for the Community Court program?

Finally, effective implementation of such a program required a whole-of-agency approach. Currently, the consultant can see clear policy and program delivery linkages to

⁹ There have been a total of 187 Community Court held in Darwin over the past 5 financial years (from 2007/8 through to 2011/12). Over the same period there was a total of 96 community courts held outside of Darwin. For example, at Alyangula alone there have been 20 held over the same period.

¹⁰ It is interesting to compare the implementation of another current innovative Indigenous justice program, the Elders Visiting Program (EVP) within the Correctional Services division of the Department. In contrast, the EVP has slowly been regionalised across the territory with an increasing number of Departmental officers being located in regional centres to support the program's effectiveness outside Darwin. It is also important to note that a number of years ago, there was an attempt to link the justice work of community members participating in the EVP with (potentially the same) community members involved in the community panels within the Community Court program. This attempt to collaborate between the two programs across two divisions of the Department was unsuccessful.

a number of divisions within the Department: Courts Correctional Services, Youth Justice and Alcohol Strategy. However, during extensive consultations with key Departmental staff these apparent linkages in policy and program outcomes were nowhere in evidence. Currently, the Community Court stands alone as an alternative court program within the Department's Court Services division clearly disconnected from any broader strategic policy and program directions supported by other key relevant NTG agencies such as the Department of Children and Families. Finally, the program also does not appear to leverage the considerable opportunity to develop closer working relationships with the significant non-government sector (e.g. NAAJA, CAALAS, NTLAS and Victims of Crime NT).

3.2 Program Outcomes

There are six defined Community Court program objectives which are divided into two domains, criminal justice and Community:

- a) In the criminal justice area to:
 - Provide more effective, meaningful and culturally relevant sentencing options; and
 - Reduce breach of court orders and reoffending

- b) In the community to:
 - Increase community participation in the administration of the law and sentencing process in defined cases;
 - Increase community knowledge and confidence in the sentencing process in defined cases;
 - Provide support to victims and enhance the rights and place of victims in the sentencing process; and
 - Enhance the offender's prospects of rehabilitation and reparation to the community

The following section individually addresses six program outcomes as they directly relate to these stated objectives

3.2.1 Sentencing Options

Provide more effective, meaningful and culturally relevant sentencing options

During the Review, the potential for this specialist court model to 'provide more meaningful and culturally relevant sentencing options' was clearly substantiated throughout the stakeholder consultations and also during the observations of one Community Court.

For example, within the observed community court process, a number of the program participants provided important information within the informal discussion which directly informed the Magistrate's final sentencing decision. On one hand, a senior Indigenous community member who was part of the community panel assisting the Magistrate described the employment program in which he has recently enlisted the two young male offenders (this case was a Youth Justice matter). This information was supported by the independent assessment provided by an officer from the Department of Children and Families who argued that the employment program the two youths had been involved in has noticeably improved their sense of purpose within the community. The Magistrate's sentencing in this matter referred to the value of the community employment program that the two young offenders were participating in. Furthermore, the court orders that formed part of the final sentence also reflected the court's expectation that the youths continue in the employment program to make reparation to the community as well to assist in their rehabilitation.

In addition, during a number of this Review's consultations, stakeholders who had participated in numerous Community Courts recounted similar examples whereby community panel members as well as agency representatives had provided significant advice to the Magistrate which directly informed innovative and effective sentencing orders and outcomes.

However, the potential for the community court model to provide 'more meaningful and cultural relevant sentencing options' is also partly dependant upon, and limited to the number of relevant programs available and/or accessible locally. This is a point that was frequently made throughout the stakeholder consultation phase, that although the community court participants may discuss innovative and effective sentencing solutions, the requisite rehabilitation program – e.g. alcohol, family violence, anger management – was frequently unavailable within that particular region.

3.2.2 Reduce rates of reoffending & the breach of court orders

Despite the importance of recidivism, there is a large divide between research and policy. What policy makers would like to measure often bears little resemblance to what researchers are able to measure, given the limitations on appropriate data and available information. As a result, research findings are often used out of context and with little regard for limitations imposed on them by the methodological constraints they face. This is driven primarily by a lack of clarity surrounding an appropriate definition of recidivism and clear articulation of research methodologies. (Payne, AIC 2007: vii)

Recidivism and/or reoffending rate analysis is a complex and contested activity to undertake at the best of times. One important complexity, for example, which is not often appreciated by policy-makers is that not all (re)offenders are 'equal'. From extensive data analysis, Payne in his monograph on recidivism in Australia reflects on the exponential correlation between the number of offences and the increased likelihood of reoffending:

Broadhurst and Loh (1995) examined the probability of rearrest for each successive arrest over a ten year period. Figure 10 illustrates that, for all offenders, the probability of being rearrested for the first time was 52 percent. Of those offenders rearrested once, the probability of rearrest for the second time increased to 68 percent. This is equivalent to saying that 68 percent of those rearrested for the first time, will be rearrested on a second occasion within ten years. Note also from Figure 10 that the probability of rearrest increases with each successive arrest episode. If an offender is rearrested nine times in ten years, the probability of being arrested a tenth time is 94 percent. (Payne, 2007: .95; refer also to figure 10 on p.96)

Taking into account the established statistical evidence in regard to recidivism, directly comparing a second time offender and a sixth time offender within a reoffending rate analysis is problematic when deriving important policy or program assumptions.

Other limitations relevant to the comparative analysis of reoffending rates in the Community Court (adult) Magistrates Court and Youth Justice Court (previously known as the Juvenile Court) since 2005 are:

- The relative insignificance of the Community Court pilot/program dataset as opposed to the other two courts;
- The Community Court hears matter for both adults and young people.

However, it is hoped that the comparative data analysis below provides some indicative value within the current Review process.

The following comparative reoffending rate analysis relies on:

- An offender having offended (i.e. having received a punishable order from the court) once in the period 1 January 2005 – 30 June 2010.

- An offender – as defined above – committing a second offence within 24 months of the first offence. (Noted: this explains why those who offended for the *first* time in the period from 1 July 2010 – 30 June 2012 are excluded from this analysis)

Court Type	Reoffenders	Total Offenders	Reoffending Rates
<i>Community Court</i> Pilot & Program	71	104 ¹¹	51%
<i>Magistrates Court</i> Adult (all)	14,749	35,254	42%
<i>Magistrates Court</i> Adult (Indigenous)	11,785	22,069	53%
<i>Youth Justice Court</i> Youth (all): YJC & JC	1,256	2,200	57%
<i>Youth Justice Court</i> Youth (Indigenous)	1,036	1,663	62%

If the above analysis is considered valid – acknowledging the relatively small CCP/CC data sample – there is not a significant difference observable between these comparative rates. A significant difference is commonly defined in a range between 10% and 50% for similar program interventions.

Comparing the rate of breaching order between court entails the same set of limitations on the data analysis as described above in relation to reoffending. The following table relies on the following specific assumptions in regards to offenders:

- An offender having offended (i.e. having received a punishable order from the court) once in the period 1 January 2005 – 30 June 2012
- A breaching offender is an offender – as defined above – who has breached a court order within the same financial year as the year in which the order was handed down

¹¹ To analyse the rate of reoffending, the analysis has limited the total offender group to those who offended from 2005 through to 30 June 2010 to allow a reoffending period of maximum of 24 months from the first offence. In this process, the total number of 179 CCP/CC individual offenders is reduced to 140 individual IJS ID-Holders who are measured for their reoffending in the total period 1 January 2005 – 30 June 2012.

Court Type	Breaching Offenders	Total Offenders	Breaching Rates
<i>Community Court</i> Pilot & Program	54	179	30%
<i>Magistrates Court</i> Adult (all)	4,036	50,424	8%
<i>Magistrates Court</i> Adult (Indigenous)	3,615	32,097	11%
<i>Youth Justice Court</i> Youth (all): YJC & JC	786	3,302	23%
<i>Youth Justice Court</i> Youth (Indigenous)	686	2,517	27%

Once again, if the above analysis is considered valid – acknowledging again the relatively small CCP/CC data sample – this data does not demonstrate a significant improvement in the rate of court order breaching within the Community Court pilot and program. In fact it shows that offenders appear to breach court orders at a higher rate in the Community Court than in any other court.

In 2005, the then Chief Magistrate Bradley expressed hope that the newly instituted trial of the Community Court model may reduce reoffending rates as similar specialist court models had apparently achieved elsewhere in Australia:

Interstate courts and programs of this type appear to have succeeded in drastically lowering the rates of recidivism for offending so it is hoped that this will be just one of the benefits to be achieved out of the Community Courts in the Northern Territory. (Bradley, 2005. Guidelines. Paragraph 3)

Unfortunately, significant positive statistical change in recidivism and other key justice/crime indicators due to the implementation of similar specialist courts such as the Koori Court (Vic), Murri Court (Qld), Circle Sentencing (NSW) and the Aboriginal Sentencing Court of Kalgoorlie (W.A) has not been clearly demonstrated by research conducted throughout Australia from 2008 onwards (*refer*: 2010: AIC report; 2009. Shelby Consulting Report; 2008; BOCSAR report).

There are a number of possible contributing factors to a lack of positive significant change data in relation to any specific justice program in comparison to mainstream delivery. Some of the most obvious of these are:

- Limited program implementation
- Program needs to be implemented over an extended timeframe to demonstrate significant change effect(s)¹²
- Data collection systems and analysis require improvement

Overall, the Community Court program would clearly benefit from the establishment and ongoing maintenance of an effective data analysis framework which could inform the program's future improvement, evaluation and monitoring.

3.2.3 Community Participation

Increase community participation in the administration of the law and sentencing process in defined cases

Throughout stakeholder consultations undertaken in this Review, this stated objective of the program was argued to be consistently achieved whenever the program has been effectively implemented. Community participation afforded by this program was valued greatly by one magistrate who recognised the need as a judicial officer to properly understand the local community view in regard to a particular offence in delivering a meaningful sentence within that community. This magistrate explained that in many regional and remote NT communities the local views on a particular offence may be vastly different from accepted mainstream and/or urban views of the same. Overall, community participation in the court process was perceived as highly valuable to all parties when the program was being effectively implemented.

3.2.4 Community Knowledge

Increase community knowledge and confidence in the sentencing process defined cases.

This objective was difficult to evaluate during the current Review. It is understood that relevant legal training had previously been provided to community panel members as part of the program in 2008/9 but has not been offered in the last few years. During the observation of the one community court that occurred as part of the Review process, the young offenders, family members and community panel members did not appear to

¹² Currently, this is an argument that is forcefully prosecuted by the Australia Government in regard to the implementation of a number of behavioural/social change policy agendas and programs (e.g. income management; alcohol management planning etc) under the *NT Emergency Response* now *Stronger Futures* policy framework. The Indigenous affairs policy discourse in Australia in recent years has clearly shifted to one achievable within a much large timeframe of 'generational change'. This may also reflect the inability for program statistics to reveal a required level of positive significant change in a short (e.g. political life-cycle) time horizon.

demonstrate a great knowledge, confidence or understanding of the sentencing process that they were participating in with the Magistrate. However, this objective of the program – where training is routinely provided across the Territory – has great potential to be achieved and, as a result, to impact positively upon each participating community’s overall knowledge, understanding, confidence and relationship with the NT Justice system.

3.2.5 Support and enhance rights to victims

Provide support to victims and enhance the rights and place of victims in the sentencing process

As the guidelines currently direct, the offender (not the victim) agrees to whether a sentence will be delivered in a Community Court or not. In contrast, the authors of the *Little Children are Sacred* report (2007) proposed that it should be the victim’s choice for such a court option to proceed or not.

Currently, a victim can choose to participate and/or prepare a written victim impact statement for the Community Court and can be accompanied by a victim support person. It is not possible within the current Community Court program records to easily determine the rate at which victims – where there is an identified victim – have participated in person in these specialist courts. A number of stakeholders consulted during the Review raised the issues of safety and re-traumatisation of victims when participating in person. It is understood that this was a key reason for Community Courts no longer dealing with domestic and family violence cases from around 2008 onwards due to concerns raised by the DPP (among other stakeholders) regarding issues of personal safety and possibility re-traumatisation of victims.

During the Review consultation, Victims of Crime NT explained that their current support services to victims within court settings are limited to Darwin and Alice Springs only. This small non-government agency has two paid staff (one counsellor and one social worker) and currently 14 volunteers who are available to support victims in preparation for court and to attend with victims at court in Darwin and Alice Springs. The agency has identified and raised the issues within the sector that there is not current in-person support offered to Territory victims of crime outside of Darwin and Alice Springs.

The role of victims in the overall justice outcomes of the Community Court program needs to be more effectively researched and understood. A lack of structured support for victims participating in Community Courts outside of Darwin is, very possibly, negatively affecting

the overall justice outcomes of this specialist court and also potentially reducing the participation of victims within the court process itself.

3.2.6 Rehabilitation and reparation to community

Enhance the offender's prospects of rehabilitation and reparation to the community

As with the Community Knowledge objectives in section 3.2.4 above, this particular objective is hard to evaluate mainly because it is difficult to measure.

If we accept the statistical data presented in section 3.2.2 above on reoffending and breach of order rates by offenders who have participated in the Community Courts program, there is little positive evidence here of improvements in offender rehabilitation and reparation within their own home communities.

As discussed previously, the Community Court model relies partly on working social controls being enforced by the local community partnering with the Magistracy to deliver a meaningful and effective sentence. But this is not the end of the matter. The effectiveness of Community Courts also relies upon the availability and accessibility of effective and appropriate rehabilitation and reparation programs within the offender's region. Without these two justice system components working together, it is difficult to see how an 'offender's prospects of rehabilitation and reparation to the community' might be effectively achieved.

4. Conclusion and Recommendations

Community Representation – There should be at least one or more members from the community sitting with a Magistrate. They will discuss aspects related to the offence and background of the offender and victim/s (if present), explain how the offending behaviour has breached the community code of conduct and will consider an appropriate sentence. These members are the key to empowering the victim/s, offender, support persons and the community in the sentencing process by developing a shared responsibility. (*H.B. Bradley, Chief Magistrate. Community Court Darwin: Guidelines, 27 May 2005*)

The Community Courts program remains a significant opportunity for communities in which social controls are clearly working. This program allows such communities to join forces and partner with the Magistracy of the Northern Territory to deliver and enforce effective sentencing solutions.

Community Courts can never be viewed as the only answer to improving Indigenous justice outcomes across the Territory. Rather, the program must be implemented as one of a number of alternative justice models (e.g. mediation and conferencing) that can be employed on a case-by-case basis to achieve justice outcomes which support the mainstream court system. The NT justice system needs to be flexible and responsive to the diverse range of communities, cultures, offenders and offences that it attempts to deal with daily. Rather than a simplistic belief in a single solution, the Northern Territory requires a complementary suite of approaches to ensure that the excessive over-representation of Indigenous Territorians in the justice system (i.e. in court lists; offender, reoffender and prisoner numbers) is addressed urgently. If not, the future of such a justice system is plainly untenable as numbers continue to grow beyond the scope of any achievable service delivery (i.e. police, court and prison) model.

Community Courts provide one innovative approach to harness a community's own resources – through its self-commitment to implementing justice. As has been established in other jurisdictions, this kind of approach must always be linked to the provision of effective community-based reparation and rehabilitation programs to support offender behaviour change. One part of the system cannot work effectively without the other. Effective justice requires the implementation of both system components to achieve sustainable changes to an individual offender's behaviour.

Since 2005, the Summary Court of Jurisdiction in the Northern Territory has trialled, and then implemented a program of community courts for adults and young people in a number of communities. Over the last 7 years there have been a variety of lessons learnt and this Review argues that there are many lessons yet to be learnt from effectively implementing, governing and monitoring such a program into the future.

The following list of recommendations attempt to address significant gaps in the program's current governance, implementation, improvement and outcome monitoring components and system.

1. **Governance:** the Review notes that when Community Courts began in 2005 as a pilot in the Northern Territory it was supported and guided by a dedicated reference committee. This reference committee representing the Magistracy, the NT Department of Justice and relevant non-government legal service providers, appears to have ceased in 2008 for no clear reason.

The program continues to require a high level program committee to drive it's effective implementation, improvement and monitoring. A sector Departmental officer is required to ensure that all relevant divisions of the agency (Courts, Correctional Services, Youth Justice and Alcohol Strategy) are effectively linked into this program's future development. The following is a proposed list of members for such a committee:

Community Courts Program Strategic Implementation Committee

Chief Magistrate and/or delegated Magistrate(s)
NT DoJ Dep. CEO Policy Coordination & Legal Services
NT DoJ Executive Director Court Support and Independent Offices
NT DoJ Community Courts Program Co-ordinator
Senior Policy and/or Legal officers from DPP, NAAJA, CAAJAS, NTLAS
Victims of Crime NT
NT Department of Children and Families: senior policy officer

2. **Review Guidelines & Program Implementation Planning**

As noted in the body of this Review, the original *Guidelines* developed for the Community Court pilot by Hugh Bradley in 2005 have not been revised in the past 7 years.

One of the first tasks of the Strategic Implementation Committee will be to revisit and revise the original Guidelines in light of the leanings and experiences of the past 7 years of practice across the Northern Territory. This review of the Guidelines must also take into account the soon to be published report by www.circaresearch.com.au on best practice in a number of Indigenous justice program, courts and conferencing initiatives around Australia.

Related to a review of the 2005 *Guidelines*, the Strategic Implementation Committee will also need to develop a comprehensive program implementation plan for Community Courts for the next five years. To date the consultant has not seen sufficient evidence of effective implementation planning in relation to the Community Courts program.

This program implementation plan will define the following key components:

- *Funding* model
- *Service Delivery* model: court locations; Magistrates assigned to the delivery of this model; court support personnel number and locations; personnel job descriptions
- *Training* model; define and cost training needs of magistrates, community panel members and others' as required
- *Communications and Community Engagement* strategy for the NT
- *Evaluation and Monitoring framework*: definition of key evaluation data-sets, comparison data-sets and identification of cost and resource to maintain them throughout program timeframe.

3. **Future Legislative Framework for Community Courts**

Finally, the strategic Implementation Committee will research and, ultimately propose an appropriate and effective legislative framework for Community Courts in the Northern Territory.

However, it is only advisable to legislate once this program has been broadly embraced by both the community and the legal sector, and after the program has been effectively implemented. It is the consultant's firm opinion that neither of these threshold conditions has been met to date in the Northern Territory. As a result, legislation at this stage would be premature and potentially damaging to the future development of the program.

References

2012. *Criminal Laws Northern Territory*. Stephan Gray & Jenny Blokland. 2nd Edition. Annandale, NSW: The Federation Press
2012. *Stronger foundation for community-based legal education in remote Aboriginal communities*. Ben Grimes. (2012) 2 NTIJ: 1-23
2011. *Review of the Northern Territory Youth Justice System: Report*. Jodeen Carney. Northern Territory Government, September 2011.
2011. *Law & Disorder in Aboriginal Communities*. Richard Coates. Criminal Lawyers Association of the Northern Territory. Paper presented at Bali conference: 25 June – 1 July 2011. 23 pages
2011. *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System*. House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs. The Parliament of the Commonwealth of Australia. Canberra: June 2011.
2011. *South Australian Government Response to Smart Justice*. Attorney-General's Department, South Australian Government.
2011. *Smart Justice: Building safer communities, increasing access to the courts and elevating trust and confidence in the justice system*. Judge Peggy Fulton Hora (Ret). Adelaide Thinkers in Residence. Government of South Australia, 14 Feb 2011.
2011. *An Introduction to the Ngarra Law of Arnhem Land*. George Pascoe Gaymarani. (2011) 1 NTLJ: 283-304
2011. *Evaluation of the Elders Visiting Program: A report for the NT Department of Justice*. Catherine Holmes and Peter Stephenson. May 2011.
2010. *Reducing Indigenous Contact with the Court System*. Boris Beranger, Don Weatherburn and Steve Moffat. Crime and Justice Statistics Bureau Brief: Issue Paper No. 54. December 2010. www.bocsar.nsw.gov.au
2010. *Evaluation of the Queensland Murri Court: Final Report*. Anthony Morgan and Erin Louis. Australian Institute of Criminology. www.alc.gov.au
2009. *Indigenous Sentencing Courts*. Elena Marchetti. Indigenous Justice Clearing house: Brief 5 December 2009. www.indigenousjustice.gov.au.
2009. *Evaluation of the Aboriginal Sentencing Court of Kalgoorlie*. Shelby Consulting: 16 October 2009.
2009. *Solid Work you mob are doing: case studies in Indigenous dispute resolution & conflict management in Australia*. Edited by Toni Bauman and Juanita Pope. www.fedcourt.org.au
2008. *Does Circle Sentencing Reduce Aboriginal Offending?* Jacqueline Fitzgerald. Crime and Justice Bulletin Number 115. NSW Bureau of Crime Statistics and Research. May 2008/ www.bocsar.nsw.gov.au
2008. *Evaluation of the circle sentencing: report*. Cultural and Indigenous Research Centre of Australia (CIRCA). Sydney. www.circaresearch.com.au

- 2007a. *The Northern Territory Experiences*. Jenny Blokland. Paper presented at *The Australian Institute of Judicial Administration: Indigenous Courts Conference*: Mildura 4-17 September 2007. 30 pages
- 2007b. *Bush Courts – A forum*. Jenny Blokland. Criminal Lawyers Association of the Northern Territory. Paper presented at Bali Conference “Remote Justice”: July 2007. 13 pages
2007. *An Absence of Mutual Respect*. Aboriginal Resource and Development Services Inc. www.ards.com.au
2007. *Closing the Gap of Indigenous Disadvantage: A generational Plan of Action*. Department of the Chief Minister, Northern Territory Government
2007. *Arnpe Akelyernamane Meke Mekarle “Little Children are Sacred.” Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from sexual abuse*. Rex Wild QC & Patricia Anderson. 30 April 2007. Northern Territory Government.
2007. *Recidivism in Australia: findings and future research*. Jason Payne. Australia Institute of Criminology. Research and Public Policy Services No. 80. www.alc.gov.au
2006. *Indigenous over-representation in prison: the role of offender characteristics*. Lucy Snowball and Don Weatherburn. Crime and Justice Bulletin Number 99. NSW Bureau of Crime Statistics and Research. September 2006/ www.bocsar.nsw.gov.au
2006. *We teach all hearts to break but can we mend them? Therapeutic jurisprudence and Aboriginal sentencing courts*. Kate Auty. Murdoch University Electronic Law Journal Special Series 101(1). www.elaw.murdoch.edu.au/archives/issues/special/we_teach.pdf
2005. *Speciality courts in Australia. A report to the Criminology Research Council*. Jason Payne. www.criminologyresearchcouncil.gov.au/reports
2005. *Community Court Darwin: Guidelines*. H.B. Bradley. Chief Magistrate, NT Magistrates Court. 27 May 2005.
2004. *A Path to Good Corrections: A review of the Northern Territory Correctional Services – adult custodial operations*. Ole Ingstrup and Paul Crookall, Caya Management Consulting International Inc. March 2004
2001. *The Kurduju Committee Report: All Curung, Yuendumu*. Law and Justice Committee of Ali Curung, Lajamanu Yuendumu. Volume 1: December 2001
1983. *Perceived risk and social control: Do sanctions really deter?* R.Paternoster et al, *Law and Society Review*: vol. 17: 457-479

Appendix 1: Stakeholder Consultation Summary

Interviewee	Date and Location
Peter Shoyer & Chris Cox NT DoJ	9 Feb 2012 NT Supreme Court Building Darwin
Hilary Hannam NT Chief Magistrate	13 Feb 2012 Darwin Magistrates Court
Susan Ahmat Courts Support and Independent Services, NT DoJ	13 Feb 2012 Darwin Magistrates Court
Greg Shanahan, CEO DoJ Peter Shoyer DoJ	17 Feb 2012 Ald Admiralty Tower, Darwin
Susan Ahmat & Ray Morrison Court Support and Independent Services, NT DoJ	20 Feb 2012 Darwin Magistrates Court
David Woodroffe & Iva Julsaint NAAJA lawyers	3 April 2012 NAAJA office, Darwin
Greg Borchers Magistrate	19 April 2012 Alice Springs Court House
Sarah McNamara Court Services, NT DoJ	19 April 2012 Alice Springs Court House
Mark O'Reilly, Principal Legal Officer Maxine Carlton, Legal Project Officer	19 April CAALAC, Alice Springs
Tanya Fong Lim Magistrate	37 April 2012 Darwin Magistrates Court
Betty Herbert ACPO Alyangula	10 May 2012 Alyangula Police Station
Sergeant Shayne Warden Police Prosecutor Alyangula	10 May 2012 Alyangula Police Station
Lisa Stelfox & Marissa Clohsey NT Dep. Of Children and Families, Nhulunbuy Office	10 May 2012 Outside Alyangula Court House
Greg Smith Magistrate	22 May 2012 Darwin Magistrates Court
James Teh Department of Lands & Planning (Previously, Yuendumu Mediation Group Co-ordinator)	23 May 2012 NT DLP, Parap
Fiona Hussin & Michael Petterson NTLAC	24 May 2012 NTLAC Office, Darwin

Rex Wild, QC	28 May 2012 William Forster Chambers, Darwin
Chris Cox Director of Courts and Tribunals	28 May 2012 Darwin
Eddie Cubillo NT Anti-Discrimination Commissioner	4 June 2012 Darwin
Marianne Conaty Director, Community Justice Policy	5 June 2012 Old Admiralty Towers, Darwin
Danial Kelly Lecturer, law School CDU	6 June 2012 CDU, Casuarina
Ippei Okazaki Director, Community Justice Centre	13 June 2012 Darwin Magistrates Court
Jenny Blokland NT Supreme Court Justice (previously NT Chief Magistrate)	14 June 2012 NT Supreme Court
Ben Grimes Aboriginal Interpreter Service (previously NAAJA Lawyer)	18 June 2012 AIS office, Darwin
Sean Parnell NT Police Prosecutions	18 June 2012 Old Admiralty Towers, Darwin
Michael Campbell Victims of Crime NT	22 June 2012 VCNT Office, Darwin
Salli Cohen Youth Justice Division, NT DoJ	5 July 2012 Phone call
David Mauger Court Services, NT DoJ	9 July 2012 Phone call
Alastair Shields NT DoJ	10 July 2012 Old Admiralty Towers, Darwin
Joe Yick Research and Statistics, NT DoJ	11 July 2012 Phone call
Richard Coates NT Director of Public Prosecutions	11 July 2012 Old Admiralty Towers, Darwin
John Fattore, Louise Blacker & Alan Clarke Community Corrections, NT DoJ	13 July 2012 Old Admiralty Towers, Darwin
Margeret Friel Reintegration, Education & Indigenous Affairs Corrections Services, NT DoJ	2 August 2012 Phone call

Appendix 2: NT Department of Justice

Review: Terms of Reference

Community Courts

Community Courts are designed to promote community involvement in court processes by engaging the offender, victim families and community members in the sentencing process. The presiding Magistrate is assisted by a panel of respected community members but the final decision on sentencing remains with the Magistrate.

While decisions on sentencing are ultimately a matter for the Magistrate, community elders and other community members are involved in a process designed for, and in consultation with, the individual community to meet community needs and expectations.

Not every case is suitable for conduct in a Community Court. Cases are chosen in consultation with the relevant community at the discretion of the Magistrate. These cases usually take considerably more time than a standard hearing due to the number of participants. A discrete block of time or a separate day will usually be set aside for a Community Court hearing. Time taken and distance travelled can add considerably to the cost of running such hearings in remote communities.

Pilot Community Courts have been held in a small number of centres over a number of years. Under the NT Government's 'Closing the Gap' Generational Plan of Action, \$419,000 per year has been allocated for expansion of Community Courts to a total of ten centres.

Since July 2007, 67 Community Courts have been held at Darwin, Wadeye, Daly River, Jabiru, Oenpelli, Nguiu, Pirlangimpi, Milikapiti, Galiwinku, Nhulunbuy, Numbulwar, Alyangula, Yuendumu and Gapuwiyak.

An interim review is to be conducted to assess the progress of the Community Courts Program.

Context

The review should be conducted bearing in mind the aims and objectives set out in the Department of Justice's 2005, *Generic Community Based Sentencing Initiatives – Framework Policy* (Attachment 1).

Scope of Review

The Review will assess the implementation, and to the extent possible, the outcomes of the extended Community Court program to date. It will make recommendations

concerning the future conduct of the program. The review should consider the Community Courts held in both urban and remote areas.

The review will initially include a consideration of:

- Whether the rationale for the Community Court process was or is valid particularly by reference to interstate research;
- Whether the aims and objectives are practical and realistic as opposed to sounding good in theory

When considering these issues, the review should consider the history of Aboriginal law and Justice strategies in the Northern Territory and whether the current structure could be improved in light of past practices.

If the rationale is found to be valid and the goals and objectives are found to be practical and realistic the review should also consider:

- The readiness of communities to recognise and respect the decisions made by the Community Court;
- The method by which venues and matters are selected for conduct as Community Courts;
- The method by which individual community members are selected to take part in Community Courts;
- The current and future training needs of community members, court officers, Magistrates and interpreters;
- The current and future resource needs of the community courts and related stakeholders, including legal services;
- The adequacy of preparation of communities/ participants;
- The involvement and treatment of victims in the process;
- The sustainability of processes adopted in the conduct of Community Courts;
- The extent to which Community Courts cater for indigenous cultural perspectives, attitudes and sensitivities;
- Views of community participants who have been involved in the Community Court process (including victims and offenders) and views of the general community;
- Views of professional participants who have been involved in the Community Court process;
- Views of court officials who have been involved in the Community Court process
- Any beneficial or negative outcomes of Community Courts which can be identified at this stage taking into account the objectives of the Community Court program (attachment 2).

The review will include:

1. Extensive consultation with relevant participants and stakeholders;
2. A literature review of evaluations undertaken of similar programs in other jurisdictions; and
3. An analysis of re-offending data.

Deliverables

The review will involve delivery of:

1. A draft report for consultation with the Department of Justice;
2. A final report for the Department of Justice
3. All consultation materials created in the course of the review; and
4. Presentation of final outcomes to Department of Justice officials and stakeholders, as identified by the Department.

Attachment 1

Generic Community Based Sentencing Initiative – Framework Policy

Background

Community sentencing initiatives are based on the rationale that court processes allowing sentencing options that are more relevant to the defendant, are likely to have an impact on the likelihood of the defendant re-offending. A number of similar initiatives have been undertaken in other Australia jurisdictions, including Circle Sentencing in New South Wales; The Koori Court in Victoria; and The Nunga (NOONGAR) Court in South Australia.

The objectives of these initiatives is participation in the process by:

1. The defendant and their family;
2. Victims and their support where appropriate; and
3. Respected members of the defendant's community who act as community representatives.

Participants have a role in offering solutions to the defendant's offending behaviour, for example offering to teach the defendant cultural knowledge or supervising the defendant's participation in locally based community work. By aiming to treat the defendant in a holistic manner, with sentences better tailored to deal with the individual defendant's offending behaviour, these community sentencing initiatives are consistent with other therapeutic justice initiatives in the NT, such as CREDIT NT or juvenile diversionary conferences.

Aims and Objectives

Community sentencing initiatives are to be implemented within a process that allows for achievement of the following objectives;

- Identify individual community aims from the community sentencing initiatives;
- Increase community knowledge and understanding of the sentencing process;
- Increase community participation in the sentencing process;
- Increase the range of community based non-custodial sentencing options available to Courts;
- Strengthen partnerships between the criminal justice system, local communities and relevant community organisational
- Increase the capacity of the criminal justice system to deal with defendants holistically;
- Increase the opportunities for victims to engage and participate in the criminal justice system
- Reduce recidivism rates;
- Decrease the rates of offending in the community; and
- Decrease rates of imprisonment to that those rates consistent with other similar populations in Australia (e.g. North West WA).

Attachment 2

Objectives of the Community Court

The objectives of the Community Court are split into two main areas which are (a) the criminal justice; and (b) the community participation and partnership perspective as follows:

a) In the criminal justice area to:

- Provide more effective, meaningful and culturally relevant sentencing options, and
- Reduce breach of court orders and reoffending.

b) In the community to:

- Increase community participation in the administration of the law and sentencing process defined cases;
- Increase community knowledge and confidence in the sentencing process in defined cases;
- Provide support to victims and enhance the rights and place of victims in the sentencing process;
- Enhance the offender's prospects of rehabilitation and reparation to the community.

Appendix 3: Sections of relevant legislation

NT Sentencing ACT (2011)

104A Information on Aboriginal customary law and community views

1. This section applies in relation to the receipt of information about any of the following matters by a court before it passes a sentence on an offender:
 - a) An aspect of Aboriginal customary law (including any punishment or restitution under that law) that may be relevant to the offender or the offence concerned;
 - b) Views expressed by members of an Aboriginal community about the offender or the offence concerned.
2. The court may only receive the information:
 - a) From a party to the proceeding; and
 - b) For the purposes of enabling the court to impose a proper sentence or to make a proper order for restitution or compensation (as mentioned in section 104(1) and (2)).
3. In addition, and despite any other provisions, the court may only receive the information if it is presented to the court as follows:
 - a) The party to the proceedings that wishes to present the information (*the first party*) gives notice about the presentation to each of the other parties to the proceedings;
 - b) The notice outlines the substance of the information;
 - c) The notice is given before the first party makes any submission about sentencing the offender;
 - d) Each of the other parties has a reasonable opportunity to respond to the information;
 - e) The information is presented to the court in the form of evidence on oath, an affidavit or a sworn declaration.
4. In this section:
Aboriginal Community includes a community of Torres Strait Islanders
Aboriginal customary law includes a customary law of the Torres Strait Islanders

Northern Territory National Emergency Response Act 2007 (No. 129, 2007)

91 Matters to which court is to have regard when passing sentence etc.

In determining the sentence to be passed, or the order to be made, in respect of any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for:

- c) Excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
- d) Aggravating the seriousness of the criminal behaviour to which the offence relates.

Appendix 4: IJIS Codes

Punishable orders; non-punishable orders; non-final orders

Punishable orders are ones that indicate the defendant was found guilty of the offence. However, the Magistrate may decide not to record a conviction even though a punishable order is being delivered by the court. The following list of court orders are all punishable orders and they are all final orders of the court.

Order type	Description
AIL	ALCOHOL IGNITION LOCK
AOT	ALCOHOL PROHIBITION ORDER
BND	Bond
CAD	Convicted and Discharged
CBO	Community Based Order
CCO	Community Custody Order
CLI	Cancellation of License
COS	COSTS
CSC	Community Service Order
CWO	Community Work Order
CWP	Convicted without Penalty
DET	Detention – juvenile
DFL	DISQUALIFICATION FIREARMS LICENCE
DIV	Diversinary Order
FIN	Fine
GBO	GENERAL EXTRADITION
HDO	Home Detention Order
IMP	Imprisonment
IMV	IMPOUNDING OF A MOTOR VEHICLE
LIF	Life Imprisonment
LVY	LEVY
NAO	NOISE ABATEMENT ORDER
NFT	No further trouble
OFO	Other forfeiture
OOP	Order of Payment
ORP	ORDER FOR REPARATION
PDC	Proved and Discharged
PRO	Probation – Juvenile
REC	Recognizance to be of good behaviour
RES	Restitution
RIJ	Interstate Penalty/ Order
ROF	RETURN OF FIREARM
SDO	Suspended Detention order
SSD	Suspended Sentence of Imprisonment

If the defendant is found not guilty of the offence then the court should deliver them a **non-punishable order** which is also a final order of the court, such as:

DIM	Dismissed
DIS	Discharged
DSC	Discontinued
NCA	No case to answer
NOG	NOT GUILTY
NPC	No penalty/ conviction
SAO	Set Aside
STO	Struck Out
WDN	WITHDRAWN

The court may also hand down **non-final** orders (which also constitutes a non-punishable order). These non-final orders indicate that the case has not been finalised for some reason and the order requires a future action of the court in this case. These are some examples of non-final orders:

ADJ	ADJOURNMENT
BAI	BALI ALLOWED
BAC	BAIL CONTINUED
FSI	FRESH SUMMONS TO ISSUE
WOA	WARRANT OF APPREHENSION