

SOUTH AUSTRALIA: NUNGA COURT II- ABORIGINAL SENTENCING CONFERENCES

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Background

The Nunga Court was initiated by Chris Vass SM in South Australia and has been copied with variations to suit local Aboriginal communities around the country. Its success is due to two key factors. One is the involvement of respected community elders to advise the court and to counsel the defendant, including elements of shaming, by making him or her realise the impact of the crime on his or her community. The other is a change of style by the magistrate, who participates more and takes and gives advice. The process is by both these changes is more relevant to the Aboriginal community and less alienating to the defendant. However, the process is defendant focussed, has depended on a few Magistrates who have specialised in this work, and has been relatively time intensive for the Magistrates.

Legislation was introduced in late 2005² to legitimise the Nunga court, by creating special provisions for Aboriginal sentencing conferences. It recognises a role of Elders and advisors on cultural issues in sentencing. In addition it creates a new position of Aboriginal Justice Officers appointed by the Courts Administration authority to organise the sentencing conference and provide advice on Aboriginal culture. The Act makes it clear that the victim must be given an opportunity to attend the sentencing process in an Aboriginal sentencing court. Clearly conscientious attempts must be made to advise the victim of a crime in respect of which an Aboriginal sentencing court is convened and the victim must be given the opportunity to make an informed choice whether or not to be involved in the conference. This change makes the process more akin to the sentencing circle model where sentencing is a process involving the victims, the defendant, relevant community members as well as prosecution.

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² s 9C of the *Criminal Law Sentencing Act 1988*, which is reproduced at the end of this paper.

In addition to these changes the Court is keen to develop processes for Aboriginal sentencing that are flexible and robust enough to be compatible with busy circuit lists and which are not totally dependant on the skills and commitment of a particular magistrate, which has tended to be the situation with the Nunga Court thus far. The court has developed a new model for the Aboriginal sentencing that combines aspects of the present Nunga Court model with the adult conferencing model that was successfully piloted in the Adelaide Magistrates Court to convene an Aboriginal sentencing court that complies with the Act. The new model will be trialled in a regional court Pt Lincoln this month.

Elements of the model.

The proposed model combines elements of the sentencing circle and restorative justice conferencing with the Nunga Court method.

Elements of the sentencing circle

Sentencing circles have been described in this way:³

“Circle sentencing involves taking a sentencing court to the local community, where the magistrate and the community sit in a circle, discuss the matter and arrive at an appropriate sentence.

Community members include the offender and victim and their families and respected members of the local Indigenous community.”

The concept is from Canadian Indigenous Courts⁴ and has been adapted for use in the Nowra and Dubbo in NSW⁵ and more recently in Yandeyarra in Western Australia. In NSW the following attend the conference:⁶

“The circle is presided over by the responsible magistrate and includes:

³ Australian Institute of Criminology website at <http://www.aic.gov.au/topics/indigenous/interventions/alternatives/circle.html> (accessed 6 August 2007).

⁴ For example the Tsuu T’ina indigenous court, Alberta, Canada discussed in a seminar by Judge Tony Mandamin on circle sentencing for the AIJA local chapter and Aboriginal awareness program for the judiciary in Adelaide (June 2002),

⁵ Details of the NSW model were described by Potas, Smart, Brignall, Thomas, Lawrie and Smart, “Circle sentencing in NSW: a review and evaluation”, at <http://www.austlii.edu.au/au/journals/AILR/2004/16.html> (accessed 6 August 2007).

⁶ Ibid.

- the defendant with support people or family member(s)
- the victim or victims and support people or family members
- a prosecutor
- the defendant's legal representative
- Elders from the community
- other community members affected by the offence
- service providers who may be required to provide services to the defendant or victim
- the Aboriginal Project Officer.

Attendees at each circle vary and are selected to cater for the particular offence committed and the particular offender. The Aboriginal Project Officer has the responsibility of ensuring that appropriate people know about the circle sentencing time and place, and the Aboriginal Community Justice Group also plays a role in determining who might be invited to attend.”

The NSW evaluation reported that while the sentencing circle model has high levels of satisfaction from key participants it uses a great deal of magistrates time.

Elements of adult restorative conferencing

The Adelaide Magistrates Court conducted a pilot adult restorative justice conferencing program in 2004/5.⁷ Conferences were conducted after a plea of guilty to encourage restorative outcomes and to assist the sentencing process. The following attended these conferences:

- Conference officers from the Family Conferencing Team and the Mediation Unit of the CAA conducted these conferences⁸.
- The defendant and any support people.
- The victims and any support people.
- A police prosecutor.

⁷ The author managed this program. It was independently evaluated in Goldsmith, Halsey and Bamford, “Adult Restorative Justice Conferencing Pilot,: An Evaluation”, a report to the CAA (August 2005).

⁸ The family conference program conducts victim offender mediation as a diversion program in the Youth Court and the Mediation Unit conducts facilitation style mediation in civil claims. Both these programs have been in place for more than a decade.

The purpose of these conferences were to provide a safe opportunity for victims to express the effect of the crime on them, for defendants to account for their actions and to explore restoration through apologies and understanding. The independent research was most favourable about the process, both from a victim and defendant point of view.⁹

In this new model the court will convene a sentencing conference involving the victim, the defendant, Aboriginal Elders and prosecution which will be facilitated by a skilled and experienced Family Conference Team coordinator (“the coordinator”) and an Aboriginal Justice Officer (AJO). They will undertake the circle process using non-adversarial methods to assist the participants to engage with the justice process and outcomes. The facilitators will report any outcomes back to the Court to assist the Magistrate to deliberate on sentence, with the benefit of information from participants having undertaken this process.

The model

- *Criteria for selection as an Aboriginal sentencing matter.* Any matter that is relevant for a Nunga court process would be eligible for the Aboriginal Sentencing Conference (ASC).¹⁰ Typical offenders will be at risk of harming the community and themselves by repeat offending, and who have connections with the local community. The circuit Magistrate will need to approve the proposed conference, which will be convened under the Magistrate’s authority. Guilty pleas should be recorded before the conference commences.
- *Identification of suitable matters.* Any suitable defendants for a conference may be identified by the Magistrate conducting a circuit, to be conducted on the following circuit, or by prosecution or ALRM before a circuit commences. The list of matters will be circulated as early as possible before the circuit to assist this process. The experience with adult and juvenile conferencing shows that careful preparation to ensure that participants enter conferences with clear and accurate expectations is important to achieve successful

⁹ Goldsmith et al, *ibid*.

¹⁰ The name of these sentencing conferences will need to be adopted in consultation with the community. This is a suggestion only.

outcomes. For this reason it is not the intention generally to do a conference immediately a suitable matter is identified, although if the matter is urgent that may be considered.

- *Provision of details of the offence(s), prior offence details.* The AJO will collect this information, ensure it is agreed between the Police and the Aboriginal Legal Rights Movement (ALRM) and make it available to the relevant participants in the ASC.
- *Arranging the ASC.* The coordinator will arrange the conference with the assistance of the AJO, briefing participants if possible one month before the conference and maintaining phone and other contact with them in the lead up to the conference.
- *Elders.* The AJO will liaise with the local Aboriginal community to select suitable elders having regard to kinship and other relevant considerations and will ensure information on cultural considerations is available to at the ASC.
- *Police.* SAPOL's role during the ASC is to contribute the factual background and any advice on any minimum penalties to the ASC. The process is intended to be conciliatory and empowering for the victim, the community and the defendant to discuss the offences and potential outcomes.
- *Victims.* SAPOL are to make any victim impact statements available to the coordinator who will contact the victims and after explaining the conference ask them whether they wish to participate, in person or by phone. If they do not wish to participate directly then they will be given the opportunity to have the victim impact statement and any other written material relevant to the effect of the crime on the victims produced at the ASC. If a victim declines to participate the ASC can still proceed. If a victim participates and dissents from any outcome, the dissent and reasons for it must be relayed by the coordinator to the sentencing Magistrate. Any outcomes from the conference, and the sentencing result should be relayed to the victims.
- *Participants in the ASC*
 - Elder(s)
 - Defendant
 - Victims and any supporters and for a juvenile, parents or guardian
 - Relevant family members of the victim or defendant

- Relevant community representatives
 - SAPOL
 - ALRM field officer
 - Interpreters as required
 - Coordinator and AJO
 - The defendant's lawyer will attend but it will be expected that the defendant will speak for him or her self and the lawyer's role will be as an observer and to give advice as required.
- *Venue and time of the ASC.* The ASC will be conducted in the conference room at the court house unless other wise ordered by the Magistrate. It will be conducted on the Monday or Tuesday of the week when the Magistrate is in Port Lincoln on circuit, in preparation for sentencing of the defendant on the Wednesday.
 - *Accessibility issues for the clients (including victims).* The court may assist parties to attend when relevant by providing relevant support. Victims may attend by phone, in person or may send a representative.
 - *Facilitation of the ASC.* ASC's will be facilitated using a dual facilitation model. The FCT coordinator will lead the process and the AJO will co-manage the proceedings and arrange for advice, in consultation with the Elder(s) and appropriate other members of the relevant community, on any cultural issues. The Elder(s) will also be present at the ASC to engage with the defendant and parties present. The focus of the meeting is to acknowledge the harm done to the victim (whether present or not) and to the community, and to provide opportunities for relevant parties to contribute and attempt to develop relevant responses to the offending behaviours.
 - *Sentencing.* Sentencing will generally occur the next day after the ASC. A record of who attended the ASC and sny recommendations will be put in writing and given to the sentencing magistrate. The Elders, coordinator, and AJO will attend the sentencing hearing and advise the sentencing magistrate of any other relevant matters that arose from the ASC. The Magistrate will have the clerk record such of these oral submission as s/he thinks are important for sentencing in her or his sentencing remarks. The written summary of

attendances and outcomes and the sentencing remarks will be made available to any participants in the conference who request them.

Aims

The following aims of this new process for Aboriginal sentencing have been identified and independent research will be arranged to measure the success of the process in achieving these aims.

- To comply with the requirements of s. 9C of the *Criminal Law Sentencing Act 1988* (SA), in a way that is compatible with busy court lists conducted by different visiting Magistrates.
- To include members of Aboriginal communities in the sentencing process so that the Aboriginal community has more confidence in the sentencing process.
- To provide an appropriate sentencing environment for Aboriginal offenders.
- To provide opportunities to victims of offences by Aboriginal offenders to express their concerns about the harm that has been done to them.
- To bring to the attention of the defendant the harm done to the victim and the community and to encourage appropriate responses to remedy that harm.
- To assist the sentencing Magistrate by enhancing the information before her or him about the causes of the crime, the views of the victims and the available sentencing options.
- To reduce recidivism by Aboriginal defendants who participate in the process.

These, without the cultural specificity, should be the aims of all courts for all defendants.

ANNEXURE A

9C—Sentencing of Aboriginal defendants

- (1) Before sentencing an Aboriginal defendant, the court may, with the defendant's consent, and with the assistance of an Aboriginal Justice Officer—
 - (a) convene a sentencing conference; and
 - (b) take into consideration views expressed at the conference.
- (2) A sentencing conference must comprise—
 - (a) the defendant and, if the defendant is a child, the defendant's parent or guardian; and
 - (b) the defendant's legal representative (if any); and
 - (c) the prosecutor; and
 - (d) if the victim chooses to be present at the conference—the victim, and, if the victim so desires, a person of the victim's choice to provide assistance and support; and
 - (e) if the victim is a child—the victim's parent or guardian.
- (3) A sentencing conference may also include (if the court thinks the person may contribute usefully to the sentencing process) one or more of the following:
 - (a) a person regarded by the defendant, and accepted within the defendant's Aboriginal community, as an Aboriginal elder;
 - (b) a person accepted by the defendant's Aboriginal community as a person qualified to provide cultural advice relevant to sentencing of the defendant;
 - (c) a member of the defendant's family;
 - (d) a person who has provided support or counselling to the defendant;
 - (e) any other person.
- (4) A person will be taken to be an Aboriginal person for the purposes of this section if—
 - (a) the person is descended from an Aboriginal or Torres Strait Islander; and

(b) the person regards himself or herself as an Aboriginal or Torres Strait Islander or, if the person is a young child, at least one of the parents regards the child as an Aboriginal or Torres Strait Islander; and

(c) the person is accepted as an Aboriginal or Torres Strait Islander by an Aboriginal or Torres Strait Islander community.

(5) In this section—

"Aboriginal Justice Officer" means a person employed by the South Australian Courts Administration Authority whose duties include—

(a) assisting the court in sentencing of Aboriginal persons by providing advice on Aboriginal society and culture; and

(b) assisting the court to convene sentencing conferences under this section; and

(c) assisting Aboriginal persons to understand court procedures and sentencing options and to comply with court orders;

"close personal relationship" means the relationship between 2 adult persons (whether or not related by family and irrespective of their gender) who live together as a couple on a genuine domestic basis, but does not include—

(a) the relationship between a legally married couple; or

(b) a relationship where 1 of the persons provides the other with domestic support or personal care (or both) for fee or reward, or on behalf of some other person or an organisation of whatever kind;

Note— Two persons may live together as a couple on a genuine domestic basis whether or not a sexual relationship exists, or has ever existed, between them.

"domestic partner"—a person is the domestic partner of another if he or she lives with the other in a close personal relationship;

"family" includes—

(a) the defendant's spouse or domestic partner; and

(b) any person to whom the defendant is related by blood; and

(c) any person who is, or has been, a member of the defendant's household;
and

(d) any person held to be related to the defendant according to Aboriginal or Torres Strait Islander kinship rules and observances;

"spouse"—a person is the spouse of another if they are legally married.