

SPECIALIST COURTS FOR SENTENCING ABORIGINAL OFFENDERS IN AUSTRALIA

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SUMMARY

The specialist Aboriginal court is one of the most visible measures introduced to address the disadvantage and particular needs of Aboriginal people in the criminal justice system.

This study examines the different facets of the Aboriginal courts: their aims, how they work and what they achieve. These inquiries lead to a broader question - what is the significance of the Aboriginal court? Since the first Aboriginal court was established, that question has been variously answered, with some emphasising the court's distinctive features, such as the use of a more culturally appropriate court process or the empowerment of the Aboriginal community, whilst others stress their expected outcomes in terms of recidivism and compliance with court orders. Each of these features is important, influencing the court's processes and outcomes, its relationship to the Aboriginal community and the way Aboriginal people experience the criminal justice system through the Aboriginal court.

However, the main focus of this thesis is the significance of the Aboriginal court as a sentencing process. With informality and direct communication between the participants, the Aboriginal court receives a diverse range of information and cultural advice from Aboriginal Elders and other community members. This and the pivotal relationship of the Elders and judicial officer produce a distinctive form of decision-making. As a result, the Aboriginal court provides a simple and direct means to inform the court about the defendant's Aboriginality, offending and personal circumstances in a manner that a busy magistrates' court rarely has the time or resources to achieve.

This work is based primarily on a review of the literature, court publications and the growing number of studies which provide quantitative and qualitative data on the Aboriginal courts. Also, I draw on my previous experience as a lawyer in the South Australian Aboriginal courts (and now as a magistrate in mainstream and specialist courts) to add to these sources.

The capacity of the Aboriginal court to provide a better appreciation of Aboriginality in sentencing is almost wholly overlooked in the literature. Yet it should not be. It is the practical significance of Aboriginal court sentencing; it provides the means to overcome barriers of language, culture and social disadvantage so that Aboriginal people may be sentenced in a way that allows their 'story' to be heard and understood.

DECLARATION

'I certify that this thesis does not incorporate without acknowledgement any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where the reference is made in the text'.

Paul Bennett

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LIST OF SPECIAL NAMES AND ABBREVIATIONS

ACT	= Australian Capital Territory
AJIA	= Australasian Institute of Judicial Administration
ALRM	= Aboriginal Legal Rights Movement Inc.
AJAC	= Aboriginal Justice Advocacy Committee
AJO	= Aboriginal Justice Officer
ALS	= Aboriginal Legal Service
ALO	= Aboriginal Liaison Officer
ALS	= Aboriginal Legal Service
AMC	= Adelaide Magistrates Court
APOSS	= Aboriginal Prisoners and Offenders Support Services Inc.
APY	= Anangu Pitjantjatjara Yankunytjatjara (Lands)
ASC	= Aboriginal Sentencing Conference
ASG	= Aboriginal Sobriety Group Inc.
CAA	= Court Administration Authority (South Australia)
CMC	= Ceduna Magistrates Court
CSO	= Community Service Order
DPP	= Director of Public Prosecution (South Australia)
LSC	= Legal Services Commission
MBMC	= Murray Bridge Magistrates Court
NSW	= New South Wales
NSWLRC	= New South Wales Law Reform Commission
NT	= Northern Territory
NWY	= Nunkunwarrin Yunti of South Australia Inc.
PAUMC	= Port Augusta Magistrates Court

PLMC	= Port Lincoln Magistrates Court
PSR	= Presentence Report
OCSAR	= Office of Crime Statistics and Research (South Australia)
QLD	= Queensland
RCIADIC	= Royal Commission into Aboriginal Deaths in Custody
SA	= South Australia
SM	= Stipendiary Magistrate
VAJA	= Victorian Aboriginal Justice Agreement
VIC	= Victoria
VIS	= Victim Impact Statement
WA	= Western Australia
WALRC	= Western Australian Law Reform Commission

GLOSSARY

Aboriginal: I use the term *Aboriginal* as it is commonly used in Australia and overseas as a general description for Aboriginal peoples. It is also the most common description used by participants in the South Australian Aboriginal courts. *Indigenous* may be more appropriate elsewhere, such as Queensland, where there are much larger Torres Strait and Pacific Islander populations. For convenience I use the term *Aboriginal* for both Aboriginal and Torres Strait Islander peoples, unless it is appropriate to mention them separately.

Aboriginal court: There are numerous terms used throughout Australia for specialist Indigenous courts. Even in South Australia there is no uniformity in nomenclature, though *Aboriginal court* is the most common term used to describe the specialist Indigenous courts (in South Australia) by staff and other participants. I will use *Aboriginal court* as a generic term since it is accurate, concise and culturally neutral.

Aboriginal Justice Advocacy Committee: Committees established in most Australian states as a result of the Royal Commission into Aboriginal Deaths in Custody with the responsibility to monitor government compliance with RCIADIC recommendations. The Aboriginal Justice Advocacy Committee no longer exists as a separate entity in South Australia.

Aboriginal Justice Officer: Aboriginal Justice Officers (AJO) advise and assist Aboriginal people on warrants, payment arrangements for unpaid fines and court procedures. Though based in the Magistrates court (in South Australia), they organise section 9C sentencing conferences in all jurisdictions. More generally, they act as a link between the Aboriginal community and the court system. Interstate Aboriginal courts have similar positions, though variously described as Court or Project Officers.

Aboriginal Legal Service: The generic description for the various Aboriginal legal aid bodies specifically for Indigenous people in Australia. Some are state-wide, others are community or regional-based.

Aboriginal Liaison Officer: The Aboriginal Liaison Officer (ALO) is employed by the Department of Correctional Services (in South Australia) and based in prison or remand facilities to provide assistance to Aboriginal prisoners and their families. They act as an intermediary between the Aboriginal prisoners and the prison authorities with the additional responsibility to monitor prison compliance with the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

Aboriginal Sentencing Conference: A sentencing conference (commonly referred to as a '9C Conference') which may be conducted in an Aboriginal or mainstream criminal court in South Australia according to section 9C, *Criminal Law (Sentencing) Act 1988* (SA). The sentencing conference may only occur with the defendant's consent after a finding of guilt. The conference must include the prosecutor, an Aboriginal Justice Officer and will usually involve a defence counsel, Elders or Aboriginal community representatives and, less often, a victim. The exact process and degree of informality is variable and ultimately determined by the judicial officer. The sentencing conference may offer information, cultural advice and a general recommendation on sentence. However, the magistrate or judge remains responsible for the decision on penalty.

Anangu Pitjantjatjara Yankunytjatjara lands: The Aboriginal lands in the north-west of South Australia, Western Australia and the Northern Territory, commonly referred to as the 'APY lands'. The term will be used to refer to the APY lands in South Australia, unless otherwise indicated.

Circle-sentencing Court/Circle Court: The terms used for the conference-style Aboriginal courts in NSW and the ACT. The circle-sentencing court originated in Canada in the early 1990's. The circle-sentencing court process is similar to the conferencing courts in South Australia, though the circle usually meets in an Aboriginal community building rather than a courtroom. The circle often makes specific recommendations on penalty, which are usually adopted by the court. However, the magistrate remains responsible for the decision on penalty.

Colonisation: The term I use for the arrival and establishment of European society in Australia in 1788 and after. This is a vexed issue, with other terms such as *invasion* or *settlement* also sometimes used. Each term is not only a different description but also implies a particular view of post-colonial history.

Community Court: The title for the Aboriginal courts in Western Australia and the Northern Territory. It is a title rather than a particular form of Aboriginal court. In Western Australia the Community Court uses a Nunga court process, whilst the Darwin Community Court is a hybrid of the Nunga and circle court models. The Community courts are generally limited to Indigenous defendants, with some exceptions such as the Darwin Community Court, which is open to all offenders. *Community court* is used to describe these Indigenous courts, though the term also describes non-Indigenous, therapeutic courts in other jurisdictions (Victoria).

Community Justice Committee: The generic term I use for the committees established in many regional and remote Aboriginal communities interstate

(Northern Territory and the eastern states). In some instances the committees participate in the Aboriginal court or have a self-policing role in their community.

Community Service Order: An order imposed by a criminal court that may require a person to perform up to 320 hours of community service (the statutory maximum in South Australia) as a penalty or in discharge of existing fines. Community service is supervised by the Department of Correctional Services.

Complaint: The form of summons used in South Australia for summary charges, laid and usually finalised in the Magistrates Court.

Conferencing Court: The generic term I use for the Aboriginal court model in South Australia based on the section 9C sentencing conference (see *Aboriginal Sentencing Conference*).

Disputed Fact Hearing: A hearing conducted where the defendant admits the charge(s), but disputes the factual basis for sentencing. Evidence may be called or statements tendered, as determined by the sentencing judge/magistrate. These hearings rarely occur in the Magistrates Court (in South Australia), where such disputes are usually resolved by negotiation.

District/County Court: The intermediate court (between the Magistrates' and Supreme courts), presided over by a judge who hears more serious, indictable charges in most state jurisdictions (except the ACT, Tasmania and Northern Territory). This level of court is termed the *District* court in South Australia and the *County* court in some other jurisdictions.

Diversion Court: The term used for convenience to describe the Magistrates Court Diversion Program in South Australia, established in 2001 to provide an alternative (to mainstream criminal courts) for adults with a mental or intellectual impairment who are charged with summary or minor indictable offences. Since 2010 it has gradually merged with a substance abuse program to become the *Treatment Intervention Program Court*.

Elders/Respected Persons: Both terms are used in the Aboriginal courts and literature to describe the community representatives who advise and assist the judicial officer. The latter denotes that the representative may not be an Elder in the traditional sense. I use *Elders*, for convenience, as it is the description used in the South Australian legislation – see section 9C 3(a) *Criminal Law (Sentencing) Act 1988* (SA).

Ex Parte: A description for a proceeding or order made in the absence of one party, in the criminal context this will usually be the defendant. A typical example is an Intervention Order, which is initially made on the application of

the Police or, less often, a complainant acting on their own behalf, before the defendant is notified of the proceedings.

First Instance Warrant: The term in the Magistrates court in South Australia for a warrant issued for a defendant who fails to attend court. The warrant may be certified so that they can be bailed after arrest by the police. If not, the defendant must be brought before the court.

Information: The form of summons used in South Australia for minor or major indictable charges.

Intervention Order: An order, made by the Magistrates court or a police officer (in South Australia) to prevent or restrain a person from actions such as approaching or contacting another person (often granted in regard to domestic or family violence matters). Formerly called *Restraining Orders* in South Australia and described by a variety of other terms interstate.

Koori Court: The title of the Aboriginal court in Victoria, based on the term of self-description used by the Aboriginal community in Victoria. The court process is similar to the Nunga court in South Australia.

Magistrates Court: For convenience, I use this as the generic term for the summary, criminal courts where the Magistrate determines all matters of fact, law and penalty. They are the lowest tier of court, called Local Courts in NSW, and Magistrates Courts elsewhere (sometimes also referred to as *summary* or *lower* courts).

Major Indictable: More serious offences which, though initially laid in the Magistrates Court, must be determined in the District or Supreme Courts before a judge and (usually) jury.

Minor Indictable: Less serious indictable offences which are usually dealt with in the Magistrates court, though the defendant may elect for trial by jury in the District Court (in South Australia).

Murri Court: The title of the Queensland Aboriginal court, based on the term of self-description used by the Queensland Aboriginal community. The court process is similar to the Nunga court in South Australia.

Nunga Court: This term is used in two contexts. First, *Nunga Court*, the title of the Aboriginal court model in South Australia that does not employ the section 9C conference process. This model originated with the first Aboriginal court at Port Adelaide Magistrates Court in 1999. The Nunga court process has similarities to that of the mainstream criminal courts, with the main difference being that the magistrate is advised during the sentencing hearing by one or

more Elders on matters of the defendant's background, culture and, at times, penalty. Second, the term *Nunga court model*, or similar, will be used as a generic description for this type of sentencing process, which is currently employed in Aboriginal courts in Victoria, Western Australia, South Australia and (until recently) Queensland.

Presentence Report: The term for a report prepared, at the court's request, by the Department of Correctional Services (in South Australia) to provide information about the defendant's offending and personal circumstances to the sentencing court. The report can only be ordered by the court after a plea or finding of guilt.

Stipendiary Magistrate: The term for a Magistrate in South Australia - see section 3, *Magistrates Act 1983* (SA). Some other Australian jurisdictions use slightly different formal titles for magistrates. Whenever possible, I use the honorific *Magistrate* as the generic term.

Summary: The term *summary court* is sometimes used as an alternative description for the Magistrates court. *Summary offences* are those that are usually determined in the Magistrates court and for which there is no right to elect for trial by jury.

Supreme Court: The highest level of court in all state and territory jurisdictions, hearing the most serious criminal matters (murder, attempt murder etc.) and exercising appellate jurisdiction.

Suspended Sentence: The term in South Australia for a sentence of imprisonment that is not required to be served, subject to the person entering into a good behaviour bond. The whole sentence may be suspended, or part of the sentence may be served, with a portion suspended - see section 38, *Criminal Law (Sentencing) Act 1988* (SA).

Treatment Intervention Program Court: The specialist court in South Australia which currently operates in five magistrates' courts, combining mental health and substance abuse programs, usually of six months duration. The programs are only available to defendants who are pleading guilty to charges that can be finalised in the magistrates' court. The Treatment Intervention Program court has gradually replaced the *Diversion Court* since 2010.

Victim Impact Statement: A statement pursuant to section 7 *Criminal Law (Sentencing) Act 1988* (SA), provided by prosecution after a finding of guilt to inform the court of the affects of the offending on the victim. It may be read by the victim (or another nominated person such as a family member or the

prosecutor), or tendered in written form. They are usually provided in the higher courts, but less often in the magistrates' courts.

