COMMUNITY-BASED SANCTIONING OF OFFENDERS

A new solution for Indigenous justice?[1]

STEPHANIE E HACK

As a group, Aboriginal and Torres Strait Islander peoples form around 3.2% of the Queensland population, yet make up 23.1% of the prison population, and 8.4% of people involved in community corrections.[2] In addition, (and perhaps more concerningly) recent statistics show that 55% of youths in detention centres were of Aboriginal or Torres Strait Islander descent.[3] Australia-wide, a recent study of sentencing trends shows that from 1987 until 1998, the imprisonment rate for Indigenous offenders increased by a greater amount than the general rate of imprisonment.[4] These are alarming statistics, particularly since nearly 18 years have elapsed since Indigenous criminal justice issues were first highlighted by the Royal Commission into Aboriginal Deaths in Custody.[5]

This article examines whether our criminal justice system is meeting the needs of Aboriginal and Torres Strait Islander peoples specifically in relation to sentencing. Two areas of interest are considered: the extent to which the community of an accused person is involved in higher court criminal proceedings — in the form of community justice groups — and the impact that consultation with Indigenous people may have on sentencing; and by way of comparison, the concept of circle sentencing as it occurs in Canada and the United States.

Community involvement: community justice groups in Queensland

Court circuits

In Queensland, both the Magistrates Court and the District Court regularly conduct court circuits to Aboriginal communities in northern Queensland.[6] Essentially, this means that the court travels from an urban centre and relocates in one or more regional circuit towns, usually over the space of a week. The three main areas covered by circuits are the Cape (traveling to Weipa, Aurukun, Kowanyama and Pormpuraaw), the Gulf (Doomadgee, Burketown, Normanton and Mornington Island), and Badu Island/ Thursday Island. As a general rule, court circuits to these communities deal almost exclusively with criminal matters; 2001 Magistrates Court statistics show that in Aurukun, Kowanyama, Pormpuraaw, Doomadgee, Burketown, Mornington Island and Badu Island, there were no civil matters filed or dealt with by the court.[7]

Due to the short nature of court circuits, there is generally a high volume of work for the court to complete; a District Court Cape circuit in October 2002 involved more than 20 matters dealt with in Weipa (one day) and Aurukun (one day), and just less than 20 in Pormpuraaw (one day). The transitory nature of circuits adds to the already stressful nature of the work for all involved. Magistrates speak of 'the frustration of late starts, provoked by an inability of solicitors and their field officers to get adequate instructions from their clients in an [acceptable] time frame ... [and] long hours flying'.[8] The pressure on defence lawyers to be adequately briefed in a great number of cases is also strong; there are only two Indigenous legal services providing representation for the entire Cape area.[9]

Community justice groups

A significant feature of all court circuits to Indigenous communities is the level of consultation with local citizens. Section 9(2) of the *Penalties and Sentences Act 1992* (Qld) provides that in sentencing an Indigenous person, courts must have regard to submissions made by a community justice group; these submissions may relate to the offender's relationship with his or her community, cultural considerations, and programs and services available in the Indigenous community which may be suitable for the offender.

Section 9(8) defines a 'community justice group' as a group established under state legislation; or a group which is involved in providing information to courts about Indigenous offenders, activities which may be suitable for the offender to undertake as a diversionary or rehabilitative measure, and other local justice issues; or a group of elders or respected persons in the Indigenous community. The offender's community can be any urban, rural or DOGIT (Deed Of Grant In Trust Communities) community. (Section 150 of the *Juvenile Justice Act 1992* (Qld) contains identical provisions in relation to children being sentenced for an offence.)

The concept of community justice groups began in Queensland in the early 1990s,[10] following a move by Aboriginal community leaders to encourage greater involvement and autonomy of Indigenous communities in law and justice issues.[11] Generally speaking, community justice groups are staffed by volunteers, who meet on a regular basis, and interact with other groups in the community to address crime and criminal justice issues.[12] The work of the groups is based on the idea 'that grass roots planning and community based co-ordination is the best way to tackle crime issues'.[13] The groups receive funding under the Local Justice

REFERENCES

1. The views expressed in this article are the personal views of the author

2. Queensland Government, *Queensland Aboriginal and Torres Strait Islander Justice Agreement: Full Text of the Agreement Signed on 19 December 2000 and Summary* (2001) 7.

3. Queensland Government, above n 2, 7.

4. N Morgan, 'Sentencing Trends for Violent Offenders in Australia' (unpublished paper, Crime Research Centre, University of Western Australia) 111.

5. See the website of the Aboriginal and Torres Strait Islander Commission <www.atsic.gov.au> for detailed discussion of the Royal Commission into Aboriginal Deaths in Custody, which began in 1987 and concluded in 1991.

6. Information on the conduct of court circuits was obtained by the author while working as a judge's associate in the District Court of Queensland. See also the *Queensland Magistrates Court Annual Report for 2001* (2002).

7. *Qld Magistrates Court Annual Report for 2001*, above n 6, appendices 1-5.

8. *Qld Magistrates Court Annual Report for 2001*, above n 6, 34.

9. C Taplin, 'Administering "Justice" in Cape communities' <www.jcu.edu.au/soc/clss/publish.htm> at 31 January 2005.

10. P Chantrill, 'The Kowanyama Justice Group: A study of the Achievements and Constraints on Local Justice Administration in a Remote Aboriginal Community' (seminar presented at the Australian Institute of Criminology) <www.aic.gov.au/conferences/occasional/chantrill.html> at 31 January 2005, 4.

11. Chantrill, above n 10, 4.

12. Queensland Government, *Yaldilda (Standing Strong): Preventing Crime in Aboriginal and Torres Strait Islander Communities*, 57.

13. Queensland Government, above n 12, 57.

The concept of community justice groups began in Queensland in the early 1990s, following a move by Aboriginal community leaders to encourage greater involvement and autonomy of Indigenous communities in law and justice issues.

Initiatives Program, and fall under the control of the Department of Aboriginal and Torres Strait Islander Policy.[14]

By way of illustration, the Kowanyama Justice Group was formed in 1993, following funding being made available to engage in community consultation about local justice issues. Residents of the area were asked for their views on a variety of topics, including how they felt about the establishment of a local justice body, who might be identified as appropriate people to be involved with a justice group, and how the group would take control of justice and crime issues in the area.[15]

After the consultation was completed, the group was formed, and its initial functions were largely based around the issue of community corrections; since then it has expanded its operations, and now engages in a diverse range of activities, including mediations conducted by the Justice Group support officer, and bail hearings conducted by two elders, who, sitting as Justices of the Peace, can constitute a Magistrates Court for limited purposes. Chantrill states that:

> the justice group at Kowanyama provides a mechanism for community control and input: it is possible for the community to have its say in the administration of justice and its [work is] contributing to broader community development processes that are making Kowanyama a safer place and a better place to live ... [the group is] a promising case of self-management.[16]

There have since been a number of Indigenous communities that have engaged in the Department of Justice training program for Justices of the Peace — a recent statement by the Attorney General indicated that more than 170 Indigenous Justices of the Peace had been sworn in since 1998.[17] The purpose of the training program is, as was the case in Kowanyama, for local Indigenous community members to be able to form a Magistrates Court for dealing with simple matters such as bail applications, traffic matters, domestic violence applications and other simple offences.

More recently, in September 2002 the Queensland Government passed the *Community Services Legislation Amendment Act 2002* (Qld). This Act, which amends the *Community Services (Aborigines) Act 1984* (Qld), formalises many of the powers previously held by community justice groups, and extends powers of groups which are formed under the act. It also establishes clear guidelines for the operation of justice groups. Under the amended *Community Services (Aborigines) Act 1984* (Qld) community justice groups may be established under regulation (s 86), and the appointment of a co-coordinator is regulated (s 90).

Once established, community justice groups may exercise a variety of powers under the Act, including:

- the power to advise the community that an area is being considered for an alcohol ban, and the power to receive submissions in relation to the ban (s 97)
- the power to declare any public area in a community a 'dry zone', in which alcohol must not be carried or consumed (s 96(1)(a)(i))
- the power to declare private areas to be 'dry zones' at the request of the owner (s 96(1)(b)(i)) — the Act also makes it a punishable offence to be drunk, or possess alcohol in declared areas (s 103).

Community justice groups are also given the power to carry out local strategies to address justice issues (s 87(1)(b)); make recommendations to the community liquor licence board in relation to the community canteen (s 87(1)(c)); and make recommendations to the Minister (s 87(1)(d)). A person who tries to obstruct a member of a justice group in their duties may also be punished by the group (s 102).

Why consult the community?

The consultation process prescribed by the *Penalties and Sentences Act* is unique, in that Indigenous peoples are the only group to whom such procedures apply. Community justice groups are an exception to the usual behaviour of members of the community with judges. This approach occurs in other Australian jurisdictions as well; in *R v Miyatatawuy*,[18] Martin J, of the Western Australian Supreme Court, recognised the need to take into account the wishes of an Aboriginal community in sentencing an offender; his Honour stated that the views taken into account, '[were] the wishes of the relevant community of which the victim also happened to be a leading member ... those wishes may not be permitted to override the discharge of the judge's duty, but have been taken into account as a mitigatory factor'.[19] His Honour Judge Robertson, in describing a meeting with Mornington Island justice group members in 1999, pointed out that 'much care needs to be taken, to avoid the real criticism of unequal justice'[20] (note that the *Penalties and Sentences Act* provisions were not in force at the time).

The Royal Commission into Aboriginal Deaths in Custody identified allowing Indigenous communities to develop ways of resolving disputes in a culturally

14. Queensland Government, above n 12, 57.

15. Chantrill, above n 10, 9.

16. Chantrill, above n 10, 28.

17. Queensland Government (Attorney General and Minister for Justice), 'Indigenous Communities Take Justice Initiative' (Media release, 11 May 2004), <http://statements.cabinet.qld.gov.au/cgi-bin/display-statement.pl?id=1099&db=media> at 31 January 2005.

18. (1996) 87 A Crim R 574.

19. *R v Miyatatawuy*, above n 18 at 580.

20. J Robertson, 'Sentencing Options for Juveniles' (paper presented at Australian Institute of Criminology, 17 June 1999) <www.aic.gov.au/conferences/children/robertso.pdf> at 31 January 2005, 8.

appropriate manner as a proposed long-term goal. This proposal was seen as important in counteracting the racism and discrimination occurring within the criminal justice system.[21] Furthermore, traditional decision-making in Indigenous communities involves consultation with a wide range of family and community members because family responsibility, and authority, goes well beyond the Western nuclear family unit.[22] Consultation on issues such as sentencing therefore extends to families, communities, and community organisations.[23] Chantrill, in studying the operation of the Kowanyama justice group, concludes that, 'there is clear justification for the documentation and dissemination of information about current community initiatives'.[24]

Anecdotal evidence suggests that because judges from urban centres may have little knowledge of Aboriginal towns and culture, it is important that community members play an active role in sentencing. Indigenous people might, quite understandably, tend to distrust judges who merely fly in and fly out of a community, without having regard to its people or way of life, hence the courts are presently trying to limit Cape and Gulf circuits to a set group of judges. A different approach is therefore warranted in the sentencing of Indigenous offenders. Aside from the legislation pertaining to community justice groups, the Government has also recognised the need for a different approach in its Aboriginal and Torres Strait Islander Justice Agreement, which states:

> Aboriginal and Torres Strait Islander peoples need to be involved at *all* stages in the development and delivery of justice-related programs and services in order to achieve a sustainable long-term reduction in [Indigenous contact with the criminal justice system].[25]

Community justice groups in the sentencing process

The Supreme Court Practice Direction No 5 of 2001 gives practical effect to the requirements of the *Penalties and Sentences Act*, and the *Juvenile Justice Act*. It provides for communication prior to sentencing, between the justice group and both defence counsel and the Crown (cll 1 and 2). It also states that the justice group may make its submission to the court beforehand, or during the proceedings by a written statement tendered orally, or by video/telephone link (cl 4). In practice, the justice groups tend to provide their submissions by appearing in court. The usual procedure is for the Crown and defence to make their submissions to the judge, and then for the representative of the justice group to come forward and speak to the judge in open court.[26]

The judge will, as the legislation dictates, take into account the views of the justice group when imposing a sentence. The reliance placed by the judge on the group's statements may often go beyond sentence recommendations, however; it extends to particular information about the accused person, the victim, their families, and their character. In one matter witnessed by the author, an elderly man who was a deaf mute had been charged with assaulting another person living in the same house. Because of the particular difficulties faced by defence counsel in obtaining full instructions from their client (complicated by the fact that defence counsel was visually impaired), the judge relied heavily on the representative of the community justice group to obtain information on the man's background. It became clear that he had struck the other man because of an insult to the deaf man's brother, who had recently passed away. The justice group stressed the extraordinary nature of the case, and emphasised the particular problems the accused would face if forced to complete a custodial sentence. The accused received a wholly suspended sentence, and the justice group volunteered to make regular visits to ensure the accused was performing his reporting requirements under the sentence.

Similarly, in *R v Kawangka*,[27] the court heard evidence from a local justice group to the effect that an insult given by the victim to the accused, about the accused's deceased mother, was a serious breach of traditional Aboriginal values, and should be taken into account as a mitigating factor. The judge said: 'it should be appreciated [that this event was] an important and very upsetting feature in the Aboriginal community'.[28] The judge's comments demonstrate the level of cultural information provided by justice groups to judges who might otherwise be unaware of cultural norms.

Circle sentencing

Theory of circle sentencing

In recent years, courts in Canada and the United States have adopted an alternative approach in relation to sentencing of Indigenous offenders. 'Circle sentencing', a term coined by Judge Barry Stuart in the case of *R v Moses*,[29] involves conducting a sentence hearing in a community setting (often literally in a circle) where members of an offender's community, as well as the victim, and families of the victim and accused, sit and discuss the offence, and possible outcomes with a judge or magistrate. This alternative method reflects the growing view that the Western criminal justice

21. Royal Commission into Aboriginal Deaths in Custody, quoted in Chantrill, above n 10, 2.

22. Department of Aboriginal and Torres Strait Islander Policy, *Protocols for consultation and negotiation with Aboriginal people* (1999) <www.indigenous.qld.gov.au/pdf/Protocols.pdf> at 31 January 2005, 22.

23. Department of Aboriginal and Torres Strait Islander Policy, above n 22, 22.

24. Department of Aboriginal and Torres Strait Islander Policy, above n 22, 7.

25. Queensland Government, above n 2, 2.

26. Department of Aboriginal and Torres Strait Islander Policy, *Community Justice Training* (videorecording) (2002)

27. (Unreported, District Court of Queensland (Aurukun)), 29 October 2002.

28. Ibid 3.

29. (1992) 3 CNLR 116; (1992) 71 CCC (3d) 347; (1992) 11 CR (4th) 357. See also Benevides H, 'R v Moses and sentencing circles: a case comment' (1994) 3 *Dalhousie Journal of Legal Studies* 241.

Anecdotal evidence suggests that because judges from urban centres may have little knowledge of Aboriginal towns and culture, it is important that community members play an active role in sentencing.

system ignores the social context in which offences occur, and marginalises the key players in that society.[30] By involving the community in a sentence, the interests of the community are best recognised, and the process will have more meaning for both victim and offender.[31] Circle sentencing thus promotes the idea of restorative, as opposed to retributive, justice, 'seeking to repair harm done and to transform communities'.[32]

In addition, community involvement in sentencing encourages communities to feel empowered. One of the goals of circle sentencing is '[to] empower victims, community members, families, and offenders by giving them a voice and a shared responsibility in finding constructive solutions'.[33] The role of shame in circle sentencing is also important; it has been suggested that shame is essential to the regulation of social life, and in this way, an offender's feelings of shame can be channelled and used to produce a positive outcome.[34]

Procedure and rules

Notwithstanding that a circle court is intended to be less formal than the usual court environment, it has been recognised that there must be rules in place for the effective operation of circle sentencing procedures. In *R v Joseyounen*,[35] the Provincial Court of Saskatchewan set out criteria to determine which cases were appropriate for referral to circle courts. In general terms, these were cases where:

- there has been a preliminary stage when the matter was assessed and referred to circle sentencing
- the accused has strong ties to the community in which the circle is formed
- there are elders and/or respected community members willing to take part
- the victim is willing to take part in the sentence (free from coercion)
- the court is made aware if the victim is subject to battered spouse syndrome, and if so, if a support worker should attend
- there are no disputes as to the facts of the offence
- the case is one in which the court could be prepared to take a calculated risk in departing from the usual sentencing procedure.

Circle sentencing in practice — Canada

In one case in Canada, a 16-year-old boy crashed a car he was joyriding into a parked car, owned by a middle-aged man. The offender also damaged a police car. The sentencing circle proposed that the offender meet with the police officer on a regular basis, for counselling and community service. The offender offered to pay compensation by way of small, regular payments to the owner of the car, and one of the community members attending the circle was asked to act as a mentor to the boy.[36]

In another case, Jeremy Boyd, a member of the Ojibwe clan in Minnesota, was charged with cruelty to animals. He chose to take part in a sentencing circle (which included an initial 'healing' circle, where he and the owner of the animals had a discussion about why he had committed the offence), and said that he, 'felt embarrassed for a while ... (as he) had to open up and talk about it ... I wanted to (apologise), but it was hard to do.' The recommendation of the sentencing circle, which was accepted by the judge, was for Boyd to install 14 geese nesting boxes on the reservation where he lived, attend an anger support group, and take part in ritual fasting. Having completed the sentence over a period of 18 months, he later led work crews of juvenile delinquents, and assisted with other sentencing circles.[37]

Circle sentencing in practice — Australia

In 2002, a 28-year-old man took part in a sentencing circle in Nowra. He was sentenced on charges of behaving in an offensive manner, using offensive language, assault police and common assault (of his de facto partner). It became clear during the hearing that the offender had suffered from domestic violence as a child, and had a psychiatric illness. The offender discussed the offence with the victims; when speaking with the police, it became clear that his resentment of the police stemmed from earlier incidents in which he believed the police had failed to assist him. Ultimately, the offender apologised to the police officer, and a traditional handshake was taken in the circle. The offender was given a suspended sentence with several conditions, and a progress report was obtained three months later. The offender's grandmother said that she was pleased with her grandson's assistance around the house, and that he had not used drugs or alcohol. He was enrolled in a TAFE course, and had become involved in a cultural program teaching traditional dance. He said that he had appreciated the opportunity of speaking in Aboriginal English in the circle, which enabled him to speak more freely than other languages used in court.[38]

Robert Bolt, an Indigenous member of the Nowra community in New South Wales, was the first person sentenced by the trial sentencing circle in early 2002.

30. C La Prairie, 'Altering Course: New Directions in Criminal Justice, Sentencing Circles and Family Group Conferences' (1995) 28 *Australian and New Zealand Journal of Criminology* 78.

31. L Rieger, 'Circle Peacemaking' (2001) 17 *Alaska Justice* Forum 1.

32. Ibid 1.

33. G Bazemore and M Umbreit, 'A Comparison of Four Restorative Conferencing Methods' (2001) *Juvenile Justice Bulletin*, <http://www.ncjrs.org/html/ojjdp/2001_2_1/contents.html> at 31 January 2005.

34. La Prairie, n 29 at 81.

35. [1995] WWR 438 at 442 per Fafard PCJ.

36. Bazemore and Umbreit, n 32.

37. J Adams, 'Circle of Justice,' *Minneapolis Star Tribune*, (18 August 1998), A1.

38. I Potas et al, 'Circle sentencing in New South Wales', (Judicial Commission of New South Wales, 2003) 16 <www.jc.nsw.gov.au/monograph22/circle.pdf> at 2 February 2005.

He explained that the circle process helped him become aware of the underlying problem of alcohol abuse in his life, which was a factor in all of his previous offending. His sentence took into account his ability as an artist, and he has since produced artworks depicting the process of circle sentencing, and has also spoken of his experiences of circle sentencing with several judicial groups. Overall, he thought that the circle hearing was much more effective than going to court, as 'in court you face a judge and plead not guilty or guilty, but it doesn't resolve the issue'.[39]

Conclusions

Community input is clearly a vital part of sentencing of Indigenous offenders. It provides much needed information to judges sentencing in Indigenous communities, such as information about the circumstances of an offence, the character of the offender and victim, and the larger issues at stake in a particular community. In addition, community involvement empowers Indigenous communities, who have long been excluded from 'white man's law', and encourages ownership of community activities, and direction for the future. For these reasons, the involvement of community justice groups is to be greatly applauded, and encouraged. However, it must be noted that this level of community involvement in sentencing tends only to occur in regional settings; there is much less input from justice groups in urban settings (for example, in Indigenous sentencing in Brisbane). Since urban centres will naturally conduct a greater portion of sentencing, initiatives must be embarked upon to address the lack of community involvement in these sentences.[40]

Circle sentencing has, for the most part, been successful in its application in Canada and the United States. It will therefore be interesting to analyse the results of the New South Wales, Victoria and ACT programs. Notwithstanding the apparent advantages of circle sentencing, there are several reasons to be cautious of introducing true circle sentencing procedures in Queensland. The first is that the current political and social environment is unprepared for such a departure from traditional sentencing practices; there is a risk of community backlash if sentences are perceived to involve different rules and outcomes for Indigenous and non-Indigenous offenders. Marchetti and Daly refer to this perception in their discussion of Indigenous court practices, noting that in any

event it would be difficult to assess court outcomes quantitatively in a meaningful way.[41]

Furthermore, the practicalities of circle sentencing are inappropriate for large-scale higher court sentencing; a sentencing circle generally involves a great deal of time and effort, and must include follow-up meetings. This would seem to be unsuitable in light of the large numbers of sentences to be conducted in, for example, District Court circuit centres, where time is a precious commodity. A better option would be for a conglomeration of the concepts of community justice group consultation and circle sentencing; in cases where time constraints allowed, greater discussion in a non-court environment could be allowed, to assist the judge in his or her decision.

The true test of the Queensland justice system's ability to meet the needs of Indigenous peoples will be found in statistics; the Government's Justice Agreement proposes a ten-year timeframe for the reduction, by half, of Indigenous incarceration and community corrections rates. In the meantime the work of community justice groups should be continued; they are an essential part of the process of empowering Indigenous communities, and helping Indigenous peoples address the problems of crime and alcoholism facing their communities.

STEPHANIE E HACK is a Legal Officer at Legal Aid Queensland.

39. Judicial Commission of New South Wales, 'Learning to Swim Against the Tide,' *Judicial Officers' Bulletin*, 20. (The New South Wales Government has established a Circle Court in Nowra, with the intention to expand to Brewarrina, Dubbo and Walgett; The Victorian Government has enacted the Magistrates Court (Koori Court) Act 2002; and the ACT has launched a trial circle sentencing court in Ngambra.)

40. The author notes the continued success of the Murri Court program run by the Brisbane Magistrates Court. The author has not included discussion about the Murri Court in this paper, as the emphasis of the paper is on sentencing models for the higher courts.

41. Elena Marchetti and Kathleen Daly, 'Indigenous Courts and Justice Practices in Australia', (2004) 277 Trends and Issues in Crime and Criminal Justice, <www.aic.gov.au/publications/tandi2/tandi277t.html> at 31 January 2005.