THE ART OF JUDGING

DEPUTY CHIEF MAGISTRATE JELENA POPOVIC*

My son is a first year criminology student and asks me from time to time to have input into his work. He was recently assigned this essay topic: *Until the judiciary reflects broad Australian society it will never be able to reflect community views and values and therefore will be unable to effectively dispense justice.* I was struck by the irony of this question, given that I am a female, born of immigrant parents, educated in the State system and am committed to the notion that Magistrates' Courts can improve people's lives. After some help from his mother, my son received a distinction for his essay

I fell into the law. My marks at the conclusion of my final year of school were somewhat better than expected, but because I did not have the prerequisites to enrol in Arts (a language or maths), I enrolled in the law faculty at Monash University. To say I didn't 'fit in' in the law faculty would be a considerable understatement! I recall one lecturer referring to me as the 'token migrant'. In fourth year, 1977, a group of women I had not previously come into contact with organised the 'Women and the Law' Conference which completely energised and inspired me. The Conference introduced me to a new perspective in thinking about the law as an agent for social change and social justice. As a result, my final years at University were much happier ones. I was drawn to those 1970s law school subjects which I understand are no longer offered such as 'Poverty and Social Security Law' (where the main text was Professor Ronald Sackville's Poverty Report[1]) and 'Children and Parental Rights'.

I obtained Articles in a small inner suburban firm with Richard Coates (Northern Territory Director of Public Prosecutions) and Charlie Rozencwajg (a Magistrate in Victoria) where I remained for

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1 Commonwealth of Australia, Commission of Inquiry into Poverty, *Homeless People and the Law: A Report by the Commissioner for Law and Poverty, Professor Ronald Sackville* (1976).

five years. I worked for about a year at Legal Aid as a duty solicitor before going into practice with Kate Auty. Dr Auty left the practice to work on the Royal Commission into Aboriginal Deaths in Custody and the firm was sold. I had been appointed to the Residential Tenancies, Small Claims and Crimes Compensation Tribunals when I saw an advertisement seeking expressions of interest for appointment as magistrate.

Reading the advertisement, it struck me that was the career I aspired to. I had spent much of my time as a lawyer appearing in Magistrates' Courts. I greatly admired the magistrates whom I had appeared before who radiated compassion and practical common-sense and hoped that these were qualities that I could bring to the bench. I was delighted and surprised to have been a successful applicant.

That was August 1989, 19 years ago at the time of writing. I was not yet 34 years of age. I now describe myself as a 'career magistrate'. I brought approximately 10 years of legal practice experience with me to the bench, but have spent two thirds of my working life so far on the bench.

I was the 9th woman to be appointed to the Victorian Magistrates' Court bench. In 1989, there were approximately 75 magistrates. I have an abiding memory of attending my first Council of Magistrates' meeting and having the sense that I was drowning in a sea of grey suits. There are currently 110 magistrates of whom 39 are women, and there is considerably more colour and diversity when we meet as a group! The Victorian situation differs from the make-up of the magistracy for the whole of Australia, where over 75 per cent of magistrates are male.[2]

In Victoria prior to 1985, magistrates were appointed from the ranks of the Clerks of Courts. The *Magistrates' Court Act 1989* (Vic) was amended in 1985 to require five years practice as a legal practitioner for appointment to the Magistrates' Court bench.[3]

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2 K Mack and S Anleu, *Who Are the Magistrates? Social and Demographic Characteristics* (May 2006) Report No 3/06.

3 *Magistrates' Court Act 1989* (Vic) s 7(3)(b).

The first female magistrate was appointed in 1986.

In research conducted in 1990 and 1991, it was ascertained that male magistrates in Victoria initially resisted the appointment of women on the bench, but by the time of the research being conducted this resistance had largely dissipated and it was regarded by male magistrates as 'positively beneficial' to the jurisdiction. Other findings were that the main effect of the appointment of female magistrates had been to 'improve the quality of the work environment and relationships between members of the bench'.[4]

I was warmly welcomed by my male magisterial colleagues who have never at any stage treated myself or my sister magistrates as anything other than valued and esteemed colleagues. In fact, I would have to say that my male colleagues make remarks about how they admire our ability to multi-task so effectively! There still appears to be resentment by some members of the legal profession that women are appointed to the bench. I attended a function in the not too distant past where a male who sits on tribunals bluntly asserted to me that he had not been appointed to the magistracy because he 'did not wear a skirt'. It was on the tip of my tongue to retort: 'Wear a skirt and see where that gets you'. It is lamentable that this attitude continues to exist in the profession, and makes it even more important that women are appointed on merit.

One of the most surprising aspects of being appointed as a young woman, relatively speaking, was the camaraderie and mentorship offered by my colleagues of both genders. Age and gender seemed to be totally irrelevant and I was immediately enfolded into the brother and sisterhood of the magistracy (something that many new magistrates remark about). I was blessed to have been appointed at a time when I was mentored by some extraordinary magistrates such as John 'Darcy' Duggan, Sally Brown, now Justice Brown of the Family Court, Deputy Chief Magistrate Bryan Clothier, Magistrates Hugh Adams and Brian Barrow (both later to become Deputy Chief Magistrates).

4 R Douglas and K Laster, 'Women Magistrates – And Now for Something Completely Different' (1992) 66 *Law Institute Journal* 907.

The jurisdiction of the Court has changed enormously since I was appointed. A magistrate in 2008 has jurisdiction in many matters which in 1989 were presided over by County Court judges.

The civil jurisdictional limit was then $20,000; it is now $100,000. The *Magistrates' Court Act 1989* (Vic) has now been amended to expand the criminal jurisdiction to hearing common law offences such as perjury, common law assault and affray, and presiding over matters where the value on a single charge can be as high as $100,000.

The Magistrates' Court jurisdiction has increased in a variety of ways. The Court has an Industrial Division and Workcover Division and also has jurisdiction for Victims of Crime applications. In terms of workload, the greatest increase has been in the area of family violence matters. Between December 1987, when the *Crimes (Family Violence) Act 1987* (Vic) came into operation, and 31 July 1990, just over 10,000 intervention orders had been made.[5] For the year 2007-08, 26,128 Crimes Family Violence complaints were finalised.[6]

Apart from the significant increase in jurisdiction in criminal matters, many of the cases we now deal with are extremely complex and serious. Many of the types of cases we dealt with in the late 1980s and early 1990s involved petty and traffic offences which are now dealt with by infringement notices. On a daily basis, defendants are presenting with complex social issues such as drug and alcohol dependence and abuse, homelessness, mental illness, acquired brain injury and intellectual disability. The proportion of defendants who identify as Aboriginal is increasing, as are the numbers of defendants who have immigrated from varied and troubled overseas countries.

In the early 1990s my then colleague Brian Barrow worked tirelessly to improve the services delivered by the Court to persons in need. Due to his early efforts, psychiatric services were provided to defendants at Court, and young people under 21 were assisted by a Youth Justice Court Advice Service. Gradually more services were

5 Magistrates' Court of Victoria, *Annual Report 1989–90* (1990) 20.

6 Magistrates' Court of Victoria, *Annual Report 2007–08* (2008) 51.

introduced into the Court under various programs to address substance abuse and intellectual disability.

Without knowing it, our Court had embarked on a course of therapeutic jurisprudence and problem-solving. Although I was passionate about the need to address the underlying causes of offending as a means of decreasing recidivism and reducing harm to the community, not all magistrates embraced these new approaches. I was at a loss to know how to encourage magistrates to utilise the services we had been able to put in place. I had the opportunity to undertake a Master of Laws subject with Professor David Wexler, the foremost academic writing in the field of therapeutic jurisprudence and decided to enrol in a Master of Laws in order to take up that opportunity. The paper I researched for this subject was entitled 'Complementing Conventional Law and Changing the Culture of the Judiciary'.[7] The rationale for undertaking the Masters was that I thought that if I approached therapeutic jurisprudence and problem-solving courts with academic rigour, my judicial colleagues might give these concepts more credibility. I need not have bothered. It took me almost five years to complete the Masters. By that time, our Court had thoroughly embraced these notions. I would now describe the Magistrates' Court of Victoria as operating under the principles of therapeutic jurisprudence. Chief Magistrates Michael Adams QC between 1994 and 2001 and Ian Gray from 2001 onwards have both been strong supporters of therapeutic jurisprudence and problem-solving and have led the Court in this direction. Also, in May 2004, the Attorney-General issued his first *Justice Statement*,[8] in which his vision for the provision of justice in Victoria was set out. The *Justice Statement* was committed to the jurisprudential principles distilled from therapeutic jurisprudence practice in the Magistrates' Court.

The Victorian Government's commitment to these approaches resulted in the pilot of the Court Integrated Services Program, known as 'CISP'. The program is an integrated model of support

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7 Published in M McMahon and D Wexler, *Therapeutic Jurisprudence* (2003) 20(2) *Law In Context* (Special Issue) ch 7.

8 Victorian Department of Justice, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (May 2004), see <www.justice.vic.gov.au>.

and services provided at the pre-sentence stage primarily for people charged with criminal offences. It is currently available at three pilot court sites. Defendants are referred for an assessment to determine the level of intervention and nature of services required. Police officers, lawyers, the defendants themselves, other services, court staff and magistrates, can make referrals. For defendants in custody, the assessing officer prepares a report for the magistrate presiding over the bail application and, if bail is granted, participation on the CISP program becomes a condition of bail.

CISP is comprised of multi-disciplinary teams who can provide assistance in the following areas:

- Drug and alcohol issues;
- Homelessness;
- Mental impairment (mental illness, personality disorders, acquired brain injury and intellectual disability);
- Youth justice for defendants under 21 years of age; and
- Aboriginal liaison.

The level of intervention for a person accepted onto the program can range from referral to community agencies to intensive case management. Program officers are considered to be 'Officers of the Court'. They are able to provide case management, referral to treatment agencies, brokered treatment in the areas of drug and alcohol treatment, housing, mental health, disability services and acquired brain injury services among others.

Each participant has an individually developed case management plan, which sets out all the services arranged for the defendant either internally or with outside agencies. A CISP officer, generally one with expertise in the defendant's main presenting problem, is assigned to monitor progress. Judicial supervision is also encouraged, with progress reports provided to the presiding magistrate for each court appearance.

CISP is a pre-sentence option. It addresses the issues which have led to the defendant being brought to the attention of the police. CISP

clients are not required to enter a plea of guilty to access the services, though in reality almost all CISP clients enter guilty pleas when their CISP episode is completed.

Successful participation on the CISP program not only advances positive behaviour change, it can also have an impact on the ultimate sentencing disposition of the sentencing magistrate or judge. That is, successful participation can provide the sentencing judge or magistrate with a greater range of sentencing options and can reduce the likelihood of the imposition of a prison sentence. The services and supervision provided by CISP are excellent. I would not be able to work effectively as a Magistrate without this program.

In Victoria, the establishment of Koori Courts can be traced to the recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). The Victorian Government, through its Attorney-General stated its commitment to implementing the recommendations of the Royal Commission by implementing the *Victorian Aboriginal Justice Agreement* in 2002. The *Victorian Aboriginal Justice Agreement* nominated the establishment of an Aboriginal Court within the Magistrates' Court as one of its projects.[9]

The first Koori Court was established in the rural town of Shepparton after a huge amount of consultation and commitment by community, community agencies, Department of Justice staff and then Victorian Magistrate Kate Auty in 2002. The second Koori Court followed in metropolitan Broadmeadows shortly thereafter. Today there are Koori Courts at Warrnambool (this circuit includes Hamilton and Portland), La Trobe, Bairnsdale and Mildura, and there are Children's Koori Courts at Melbourne and Mildura.

In April 2006, the Chief Magistrate Ian Gray asked me to take over the co-ordination of Koori Courts from my colleague Paul Grant who had been elevated to the County Court and had been appointed President of the Children's Court. My experience of Koori Court at

9 Victorian Department of Justice and Victorian Aboriginal Justice Advisory Committee, *Victorian Aboriginal Justice Agreement* (2000) 43, '4.10 Magistrates' Court: Indigenous Initiatives', see <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eb0d4b0ad85e729/Vic_Aboriginal_Justice_Agreement_2004.pdf>.

that time had been limited to observing Koori Court sittings with Dr Auty presiding, attending conference presentations and reading papers in relation to Koori Court and long discussions with Dr Auty and Daniel Briggs.

I embarked on a very steep, multi-faceted learning curve. Presiding over Koori Court hearings and representing the Magistrates' Court in relation to Indigenous Justice Policy considerations has been by far the most challenging, and most rewarding, work of my legal career.

In a perfect world, all cases in the Magistrates' Court should be handled with the same care and consideration as those in which are heard at Koori Court.

Each case commences with an acknowledgement of Country, a description of how Koori Court differs from mainstream courts with particular emphasis on the importance and respect for culture, and a welcome and introduction to those around the table (Koori Courts are conducted with all participants including the magistrate seated around an oval table) and within the courtroom. The role of the Elders and respected persons as cultural advisors is explained. Much care is taken to ensure that the Elders, defendant and his/her family, any other community members or representatives of service providers are entirely comfortable with the Court and its processes.

Often, a set of charges which on the face of them appear very straight forward and would take five minutes to deal with in mainstream court can take an hour or hour and a half to deal with at Koori Court, and then be deferred for some months to be finally disposed of! The additional time is taken up by everyone in the Court having the opportunity to be heard, the deep exploration of background and culture and, sometimes, silences while participants order their thoughts or contemplate what has been said.

The benefits of the procedural fairness which is able to be afforded in Koori Court is palpable. It is described in the following extract:

> George, an Indigenous Australian homeless man, who has had significant contact with the court system over a number of years, spoke very highly of his experience in the Koori Court as compared with the mainstream Magistrates' Court. He said: 'In a

> normal court room, a Magistrates' Court, I get nervous. I think I'm going to get locked up and I stress out real bad … and there's all these charges and I don't even know where they're coming from. When I'm in the Koori Court I feel really comfortable 'cos I've got my Elders there and family.'
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> Another participant had a similarly positive experience in court as a result of a judicial officer taking the time to engage with her directly. Although she initially found it confronting to speak directly with the magistrate, it ultimately increased her perception of the fairness of the court process.[10]

As a judicial officer, it is considerably more satisfying sitting in a court where the participants not only feel part of the process (my description of this is that in the past Aboriginal people have had justice done to them, whereas at Koori Court they have a voice in how justice is dispensed), but where I am part of a process which is making a real and positive difference to the participants lives.

From time to time I have experienced defendants who have come to the table despondently and with seemingly no hope at all for the future. The case proceeds with Elders and family members voicing their concern, support and care for the defendant and a plan is put in place for supervision or treatment. The defendant's demeanour visibly improves and the defendant departs from the Court with renewed optimism. This optimism is again evident upon their return to the Court following a deferral of sentence when the defendants proudly tell their Elders what efforts they have made to effect behaviour change.

It is also satisfying being an observer in communities where the Elders are not only growing in status, but are themselves growing in self-confidence and are aware of their abilities to have positive effects in their communities. It is enormously satisfying being part of a process which enables communities to take some ownership of the problems and justice issues.

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10 Beth Midgely, *Improving the Administration of Justice for Homeless People in the Court Process* Report of the Homeless Persons' Court Project, Public Interest Law Clearing House (Vic) Inc (August 2004) 25.

The role of the judicial officer at Koori Court is markedly different from mainstream court. Although the magistrate is solely responsible for sentencing the defendants, there are many other considerations. The Elders and respected persons must be fully informed of any legal issues and ramifications and the magistrate must ensure that he or she effectively communicates these to the Elders. The magistrate must also take into consideration the matters which are raised by the Elders. In some respects, the magistrate becomes the facilitator of the proceedings, as it is ultimately the magistrate who ensures that everyone in the courtroom, including the parties, community observers, victims and family members have a voice and an opportunity to participate freely.

Although I have read about the circumstances many Aboriginal people find themselves in (for example, in the *Bringing Them Home* Report,[11] the Report of the Royal Commission into Aboriginal Deaths in Custody[12] and the *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody*[13]) and keep abreast of the Australian Bureau of Statistics statistical data in relation to Aboriginal persons, sitting in Koori Court has had a far more effective role in educating me and has provided me with a much better understanding about the 'real life' of defendants and their families. It continues to teach me skills of listening, taking the time to explore the real issues, allowing others to problem-solve, and above all, better and more effective communication.

Beyond doubt, I am a better judicial officer for experiencing sitting in Koori Court.

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11 Commonwealth of Australia, National Inquiry into the Separation of Aboriginal and Torres Straight Islander Children from their Families, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Straight Islander Children from their Families* (1997).

12 Commonwealth of Australia, Royal Commission into Aboriginal Deaths in Custody, *Final Report of the Royal Commission into Aboriginal Deaths in Custody* (1991).

13 Victorian Department of Justice, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody* (2005).

All I have ever aspired to be is one of the compassionate, savvy, common-sense magistrates I appeared before as a young practitioner. I want to be thought of as nothing more than A GOOD MAGISTRATE.

Being a magistrate is what you make of it. A magistrate can simply arrive at court and complete their list each day, or can immerse themselves in any number of interesting projects, including ones they initiate themselves. A magistrate is able to pursue any issue of interest to them.

The magistracy fosters creativity in a way that is not possible in the higher jurisdictions. In Victoria, the initiatives taken by magistrates have been influential in directing social justice policy in the areas of therapeutic justice, Aboriginal justice, restorative justice, family violence and sexual assault hearings.