

## Chapter 13: Healthy Change at the Micro-Level— Victoria's Koori Courts

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### Introduction

By contrast with our constitutional arrangements, which are 'big picture' and likely to impact negatively on Indigenous health, this case study examines the Koori Courts, a comparatively small pilot project that seeks to address injustices in the way Indigenous people interact with the criminal justice system. It is arguable that such a project impacts positively on the individuals involved and, through them, on their families and the broader community. This project could deliver health benefits in addition to better social justice. This paper does not take the next step to undertake an epidemiological study to measure any health outcomes from the Koori Courts project. It describes the project and suggests that such small projects are worthy of examination as health interventions in a social determinants framework, in the same way that Reynolds *et al.* (2004) argued that the Australian constitutional arrangements are similarly worthy of examination as part of a social structure that will have health consequences for those affected. While the concept of Indigenous courts is not in itself new,<sup>2</sup> Victoria's Koori Court project represents the most recent example of this type of court, and can be distinguished from other similar courts by the fact that the project is not only the result of direct requests by Victoria's Indigenous communities themselves, but also that it receives direct legislative recognition.<sup>3</sup>

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<sup>2</sup> Indigenous courts have been established in other States for some time. See, for example, the Nunga Court in South Australia. Accessible at [http://www.ocsar.sa.gov.au/docs/information\\_bulletins/IB39.pdf](http://www.ocsar.sa.gov.au/docs/information_bulletins/IB39.pdf).

<sup>3</sup> See *Magistrates Court (Koori Court) Act 2002*.

## The Koori Court

Introduced in 2002, Victoria's Koori Court is an innovative community-controlled project initiated under the Victorian Aboriginal Justice Agreement.<sup>4</sup> As already noted, one of the major impacts of the court is to change local conditions and influence the larger social system, which could have positive outcomes for the health and wellbeing of Indigenous Victorians.

### Background

Over the past three decades three key reports have highlighted the problem of the massive over-representation of indigenous people in custody and within all levels of the justice system.

Recent statistics show that:

- Indigenous Victorians are twelve times more likely to be imprisoned than non-Indigenous Victorians;
- Indigenous offenders are more likely than non-Indigenous offenders to be remanded in custody (23.4 per cent compared to 13.8 per cent); and
- during 2000–01, Victoria Police processed 4676 Aboriginal people for alleged offences, an increase of 1118 people, or 31.4 per cent over the previous five-year period.

Historically, the legal system has been viewed with suspicion and mistrust by Aboriginal people, in part due to past government policies allowing the dispossession of land, the removal of children from families and communities, and the systemic racism within government and other institutions. As numerous reports have identified, the existing criminal justice system did not address such historical concerns. In particular, the report of the Royal Commission into Aboriginal Deaths in Custody made it clear that the legal system

needed to be modified to make it less culturally alienating and more tailored to the needs of Aboriginal offenders. In addition, that report highlighted the need of the justice system to address the underlying reasons associated with offending behaviour; for example, issues relating to employment, health, education, community services, housing and economic development of Aboriginal communities—issues traditionally thought of as outside the scope of the criminal justice system.

The Victorian Aboriginal Justice Agreement is a direct response to these concerns and recommendations. It is a joint initiative by the Victorian Department of Justice (DOJ) in partnership with the Indigenous community and the Victorian Department of Human Services (DHS).<sup>5</sup> In developing the initiatives under the Agreement, extensive consultation was undertaken with Indigenous organisations, including the Aboriginal and Torres Strait Islander Commission, Aboriginal Affairs Victoria, Victoria Police and the DHS.

The success of the Agreement and its initiatives can be seen in the significant changes that have occurred for Indigenous people across Victoria's criminal justice system, such as improvements to Indigenous access to justice-related services and greater awareness in the Indigenous community of civil, legal and political rights.

In 2004, for the first time in Victoria, Indigenous people began employment in the development of policies and programs that affect Indigenous communities. These included local initiatives or other programs under the Regional Aboriginal Justice Advisory Committee (RAJAC) justice plan.<sup>6</sup>

During the consultation process strong community support was expressed for the establishment of a Koori Court, the aim of which was to ensure that the court sentencing process was culturally responsive to the needs of Indigenous defendants.

<sup>4</sup> Victorian Aboriginal Justice Agreement, 2000. The following parties were signatories to the agreement: the Attorney-General, the Minister for Aboriginal Affairs, the Department of Human Services (DHS), the then Commissioner of the Aboriginal and Torres Strait Islander Commission, the chairperson of the Victorian Aboriginal Justice Advisory Committee, and the Chairperson of Binjirru and Tumbukka Regional Councils.

<sup>5</sup> VicHansard, Whole Speech, Magistrates Court (Koori Court) Bill, Second Reading, by Mr Hulls, 24 April 2002.

<sup>6</sup> There are six RAJACs in Victoria. All have a membership and partnerships with Aboriginal community service providers and the DHS, Police, Corrections, Courts and the Sheriff. All six RAJACs have developed their own Social Justice Plans that identify the needs in their regions and initiatives to address those needs.

## The Koori Court model

In considering the operation of the Koori Court model, this paper will focus on the Koori Court both in regional Victoria and in metropolitan Melbourne.

Created under the *Magistrates Court (Koori Court) Act 2002*,<sup>7</sup> the Koori Court is a special sentencing division of the Victorian Magistrates Court. Essentially, the Koori Court is an alternative way of administering sentences so that court processes are more culturally acceptable and comprehensible to the local Indigenous community. The key emphasis is on creating an informal and accessible atmosphere, which allows greater participation by the Indigenous community in the court and the sentencing process.

### (a) The aims and objectives of the Koori Court

From a criminal justice perspective, the Koori Court seeks to tailor sentences appropriate to the needs of Indigenous offenders, to reduce the number of failures to appear, to decrease breaches of court orders, to reduce recidivism, to provide general deterrence and to increase community safety.

From an Indigenous community perspective, the objectives of the Koori Court are to increase Indigenous participation in the administration of the law, most significantly by the appointment of Aboriginal Elders or Respected Persons and Koori Court Officers to the Koori Court; to increase positive participation by Koori offenders and their community; to increase the accountability of the Koori community, families and offenders; to promote and increase community awareness about community codes of conduct and standards of behaviour; and to promote and increase community awareness about the Koori Court generally.

### (b) The role of the Aboriginal Elder or Respected Person

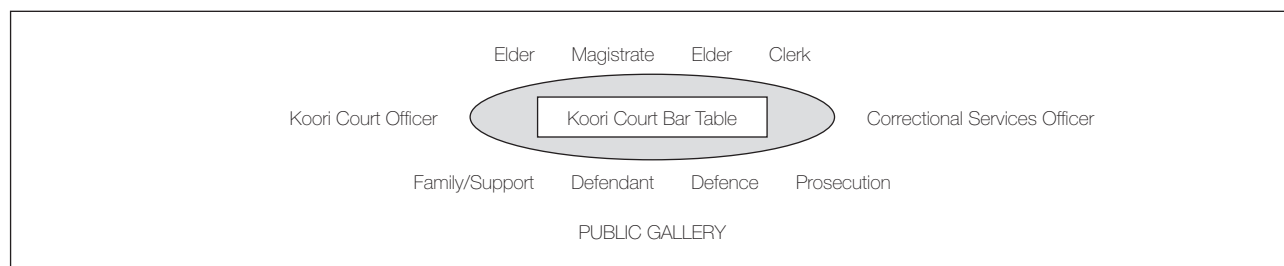
The Aboriginal Elder or Respected Person is an Aboriginal person of high standing within the Aboriginal community and is appointed by the Secretary of the DOJ. The Aboriginal Elder or Respected Person can assist the Magistrate with background information, is able to explain which family or kin the offender belongs to and, through personal life experiences, is able to describe how being involved with committing a particular crime can affect the whole Aboriginal community. The Aboriginal Elders or Respected Persons are strong advocates for respect to land and for respect to other people and culture, and often refer to other community protocols. They provide a sense of belonging and a sense of worth to offenders, who normally would go through the mainstream system and have no relationship with the Magistrate or anyone within the courtroom.

### (c) The role of the Koori Court Officer

The role of the Koori Court Officer (KCO) is filled by a local Aboriginal person who is based within the Magistrates Court. KCOs are the linchpin to the success of the Koori Court process; they bring together all the significant players for each matter on the day, they provide the court with background information and, when appropriate, develop a plan suitable for the offender.

### (d) The environment of the court and process

Compared with the usual formality of a Magistrates Court, the environment of the Koori Court is significantly different. The Magistrate does not sit at the bench, but sits between two Aboriginal Elders or Respected Persons at a specially built table. Aboriginal artwork adorns the walls of the court and three flags—Aboriginal, Australian and Torres Strait Islander—are displayed.



<sup>7</sup> The *Magistrates (Koori Court) Act 2002* received bipartisan support. All offences can be heard in the Magistrates Court except family violence and sexual offences. The Aboriginal community made this decision, as there was concern in having an Aboriginal Elder or Respected Person in a position of conflict; it was also thought best to take it slowly.

In terms of court process, there are again significant differences between the process of the Koori Court and the process of the Magistrates Court. In contrast to the Magistrates Court, the Magistrate acknowledges the traditional custodians of the land,<sup>8</sup> introduces the Aboriginal Elder or Respected Person, and acknowledges other Elders and senior members of the community present in the court. The 'smoking of the court', a ritual that took place before the first sitting, is explained. This process is repeated at the beginning of each matter for the benefit of the defendant so he or she knows the court is truly acknowledging the traditional custodians and the Aboriginal Elder or Respected Person. Other participants around the table introduce themselves and explain their roles.

Once the plea is taken and the charge found, the Magistrate might ask the defendant to say something to the Aboriginal Elder or Respected Person. Regarding sentencing of the defendant, the decision-making is ultimately up to the Magistrate. However, the Magistrate may seek advice from the Aboriginal Elder or Respected Person or others within the court. To ensure transparency, all discussions about the appropriate sentence are conducted in the view and hearing of everyone in the court, not behind closed doors.

Only Koori defendants, in particular those who plead guilty to an offence and who have shown an intention to take responsibility for their actions, can elect to have their matters heard in the Koori Court (DOJ 2002).

For many defendants, going before an Aboriginal Elder or Respected Person and other community members present in the court can be more daunting than appearing in the Magistrates Court.

## Two case studies

The case studies that follow present a brief overview of procedures in the Koori Court. However, a full understanding of these procedures is best appreciated first hand by observation of court processes.

### Koori Court—case study 1

One matter involving a young offender appearing for his first time before the Koori Court (however, he was not a stranger to the criminal justice system). The defendant presented himself with little, if any, interest in the process until prompted by one of the Aboriginal Elders to pay attention and participate in the hearing of his matter. The defendant came to court with his grandmother but little other support was present, as the offender had not previously been engaged with the Indigenous community. A representative of a local community organisation advised the court that the defendant was a talented artist and that his grandfather had made a significant contribution to local football.

After seeking advice from the Aboriginal Elder or Respected Person, the court adjourned the sentence for two months to allow development of a case management plan. The plan involved a full assessment to ascertain appropriate support for the defendant and programs that could become part of a Community Based Order (CBO).

On the return date, there was significant change in the appearance of the defendant; he willingly participated in the process and had several support people with him. The court heard that the assessment had identified intellectual disabilities and alcohol and drug problems, and appropriate support services were recommended. The defendant was linked up to Aboriginal service providers and demonstrated a commitment to his own rehabilitation. He had tackled his drug abuse and regularly participated in football training and matches. The defendant was linked up with other role models in the Aboriginal community and has been invited to act as a role model for younger persons in the community. Before completing the hearing, the Magistrate asked if the defendant wanted to say anything to the Aboriginal Elder or Respected Person. The defendant thanked the Aboriginal Elder or Respected Person for taking the time to listen and giving him the opportunity to gain the support he is now receiving.

<sup>8</sup> This could vary depending on where the Koori Court sits. In Broadmeadows, it is the Wurundjeri and the peoples of the Kulin Nations. In Shepparton, it is the Bangarang and the Yorta Yorta people. In Warrnambool, it is the Gunditjmara Kirrae Whurrong.

## Koori Court—case study 2

A difficult matter at the Koori Court involved a defendant, who, while on a suspended sentence, was charged with an assault on another Aboriginal person. As the matter unfolded, the court heard that the defendant and his siblings had been abandoned by their parents, and that he had taken on the role of looking after and protecting them. He described the traumatic experiences of being separated and placed in foster homes. He also spoke of his gift of being a dancer and how his spiritual connection to land and culture kept him alive.

During the hearing, one of the Elders asked the defendant where it would be suitable for him to undertake a CBO. The offender replied that he wished to go to his grandmother's country. Although exceptional circumstances were demonstrated, the handing down of the sentence was adjourned for several months to allow the offender to re-establish himself in his grandmother's country. The court heard on the return date that the offender was working with a local Aboriginal community organisation, and was actively involved in a men's camp involving the RAJAC members, including the local Magistrate and members of the Victorian police. The Court heard that he was one of the leaders in taking Indigenous men out on the land, where drug and alcohol and anger management issues were discussed along with other cultural matters concerning Indigenous men. The defendant further advised the court that being involved with these activities was important to him as it not only gave him the opportunity to share his knowledge and wisdom on dance and other cultural business with other Indigenous men, but it was a real healing experience for him and something truly meaningful.

Due to the significance of the offence committed, the Magistrate was considering a sentence including an Intensive Community Corrections Order (ICCO),<sup>9</sup> but was persuaded by submissions put by the defendant's counsel, and the actual demeanour of the defendant himself, that a Community Based Order was more appropriate. The CBO required the offender to continue working with the men's group and in other community activities.<sup>10</sup>

Similarly to the first case study, this defendant thanked the Aboriginal Elder or Respected Person for listening to him and his struggles. The defendant took great pride in telling the Aboriginal Elder or Respected Person that he would carry on with the work he had been doing. He made a commitment to continue to share his knowledge of the land and other cultural business with local Indigenous youth and men in the community.

In this matter, the Koori Court not only achieved what the establishment of the Koori Court in Victoria intended, but also probably surpassed what the model originally envisaged. In appearing before the Elders and the Indigenous community, the defendant faced the difficulty of being, in a sense, tried twice.

## Some observations

While it can be argued that the successful elements of the Koori Court model are due largely to the role of the Koori Court Officer and the Aboriginal Elders or Respected Persons in the court, there is no doubt that the opportunity for the defendant to speak and be listened to is significant in the process. As more mainstream and Indigenous services become available, the ability of the Koori Court to tailor sentencing options is improved.

The early success of the Koori Court has been significantly influenced by the leadership of Dr Kate Auty, a Regional Co-ordinating Magistrate until mid-2004. Magistrate Auty has been able to bring together all stakeholders within the court to ensure the Koori Court model achieves its objectives. The Koori Court also serves to highlight the gaps in the service provision and these concerns are being raised and discussed with appropriate agencies.

Accordingly, the evaluation completed in April 2005 (see below) suggested that the ongoing success of the Koori Court will depend upon the continuing active involvement of local Indigenous organisations, particularly in their capacity to provide culturally appropriate support services (Harris 2006).<sup>11</sup>

<sup>9</sup> The CBO is a non-custodial sanction that has been developed for offences that might ordinarily involve a period of imprisonment. The structuring of CBOs is such that they are intended to have a punitive element (in the imposition of tasks or duties that take up the defendant's time), coupled with a rehabilitative dimension (the requirement that the defendant complete rehabilitation or counselling programs). An ICCO can be up to 12 months long. The ICCO is, as Freiberg (2001) observes, at the top end of the sentencing hierarchy, having been created as a major diversion option for those offences where the defendant is likely to receive a short term of imprisonment.

<sup>10</sup> The Magistrate will retain all sentencing alternatives, including the power to send defendants to prison, as in the conventional Magistrates Court. However, the primary goal of the Koori Court is to create sentencing orders that are more culturally responsive to Aboriginal offenders, thereby reducing the rate of re-offending. The Koori Court therefore benefits not only the Koori community but also the wider community.

<sup>11</sup> Since the introduction of the Koori Court there has been a significant increase in the number of service providers attending Koori Court sittings. It is important that stronger links between the Koori Court and service providers are made and maintained.

## Is the Koori Court good for health?

The Koori Court is an example of the law operating to change the social structure to address substantial social justice issues. Such an initiative may also provide significant health benefits. Burrell *et al.* (2002) suggest that such community involvement may also translate into positive health outcomes for all those involved by addressing the fundamental social determinants of health at the local level where they are embodied in actual lives, practices and environments.

It appears that the Koori Court is effectively identifying the underlying factors that lead to the presentment of persons before the court, in particular the broader societal factors of disadvantage caused by the dispossession of traditional lands and separation from family, community and identity.

The Koori Court applies culturally sensitive sentencing options involving existing Indigenous services, and identifies additional areas of need in community services. The role of the Aboriginal Elder or Respected Person in the Koori Court addresses social factors that may contribute to offending behaviours, such as social isolation and marginalisation. As illustrated by the case studies above, the Koori Court has a role in connecting Aboriginal persons to their community and identity.

People who come before the Koori Court generally have complex problems, often involving drug and alcohol and/or mental health issues; many have disrupted childhoods, low educational levels, limited employment experiences and few aspirations for the future. The CBOs handed down by the Koori Court have often required offenders to participate in

initiatives under the Victorian Aboriginal Justice Agreement, such as the mentoring program in local communities,<sup>12</sup> or the wellbeing program sponsored by the local Aboriginal Co-operative.<sup>13</sup>

The Koori Court model was evaluated over a two-year period by independent evaluators to ensure that it is effectively achieving its intended outcomes. The evaluation was completed in April 2005 and was conducted by the La Trobe University Law School.

The assessment criteria of the evaluation included:

- a detailed qualitative analysis—examining the responses to the Koori Court of all participants including defendants and the Koori community, and
- a detailed quantitative analysis—examining a statistical breakdown of the impact of the court upon re-offending, breach of orders and the comparative costing of Koori Court proceedings.

The central focus of the evaluation was whether the Koori Court has an ability to reduce the over-representation of Indigenous people in the criminal justice system in Victoria (Harris 2006).

The final evaluation found that in virtually all of the stated aims of the Koori Court pilot program it has been a 'resounding success', including reduced levels of recidivism among Koori defendants. Specifically, the Shepparton Koori Court had a recidivism rate of approximately 12.5 per cent for the two years of the pilot program, and the Broadmeadows Koori Court's re-offending rate was approximately 15.5 per cent. Both these figures are significantly less than the general level of recidivism, which is reported at 29.4 per cent by the evaluator (Harris 2006).

<sup>12</sup> The mentoring program came about during the Victorian Aboriginal Justice Agreement consultations held in the community, which revealed that young women, often with children, were not successfully completing community-based sentences of the Magistrates Court and orders of the Parole Boards, and were thus becoming enmeshed in the justice system. The aims of the program are to assist Aboriginal women on Community Corrections Orders to complete their orders successfully; to ensure the mentoring program provides a planned response to Aboriginal women on CBOs; to make sure that Aboriginal Elders are involved in the mentoring program so as to provide support, advice and cultural connection to program participants; and to ensure that the project officer operating out of Rumbalara Co-operative in Mooroopna fosters support, networking and the sharing of resources. (Involves women from the local community to act as mentors for woman offenders coming before the Koori Court.)

<sup>13</sup> Aboriginal Co-operative, Healthy Lifestyles Program, came about because Aboriginal footballers and netballers, together with the local Koori community, created the Football and Netball Club. The club's major objective is to strengthen the spiritual and emotional wellbeing of its people, promote recreation, and enhance public understanding of and reconciliation with Aboriginal culture. The club is a vehicle for addressing fundamental social issues, including health and employment, through the spirit of the sport. The Healthy Lifestyles Program is a health program to promote health holistically using the local facilities and programs and sport as a vehicle to convey health messages. It deals with youth issues, leadership and personal development, men's health, women's health, substance abuse, cultural awareness and fitness performance.

Accordingly, Reynolds *et al.* (2004) suggest that the Koori Court can play a pivotal role in helping to achieve more positive health outcomes for Indigenous Victorians and believe this is an area worthy of further exploration. Linking defendants into culturally appropriate support services can lead to better health outcomes.

It is time to apply social epidemiology to the law and legal initiatives to consider their effect as part of the social determinants of health, which are related to aspects of people's social environment, such as living and working circumstances and their lifestyles (Marmot & Wilkinson 1998). So far this discourse has identified a history of health, racism and marginalisation, poverty, social class, education, training, control over own health, powerlessness, employment, place, income, incarceration and the justice system, housing and infrastructure, family separation, land and reconciliation as social determinants of health (Anderson 1988; Anderson 2001; Tsey *et al.* 2003; Australians for Native Title and Reconciliation 2004).

The World Health Organization identified ten main social determinants of health: social gradient, stress, early life, social exclusion, work, unemployment, social support, addiction, food and transport (Marmot & Wilkinson 1998)—all of which are relevant to Indigenous Australians.

However, these social determinants of health were not framed from an Indigenous viewpoint and do not take into account what happened more than 200 years ago to Aboriginal people. Indigenous people not only have lower mental health and general wellbeing but they are still struggling to overcome effects of intergenerational trauma that has existed since occupancy. Cultural dispossession, poor nutrition, overcrowded conditions, poor sanitation, lack of healthcare, welfare dependence, unemployment and poor education are all social determinants impacting on Aboriginal health today.

Vickery and Clarke (2007) claim that cultural survival is an important part of Aboriginal people's emotional wellbeing, and that it needs to be affirmed through cultural ceremony, oral history and site recognition, as well as self-determination and community control. They suggest it was the cultural wellbeing of Aboriginal people that was the impetus for seeking recognition of native title.

Brennan (2004:3) was of the view that changes in public policy can affect the social environment of a community in ways that are conducive to better health. He based his view on approaching health through its social determinants and environmental changes, which can lead to healthier individual behaviour. He further suggested that some of these changes could happen in the health sector; other changes lie outside health in the realm of law, politics and economic policy.

The area of Indigenous health is an important place to begin such considerations. In particular, Australia's refusal to recognise Indigenous people in its constitution, and early legal assumptions such as *terra nullius*, have had significant social consequences for our Indigenous community. We believe that there have also been health consequences from these policies and that those consequences are worthy of further examination within a social determinants framework.

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