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Koori Court Victoria: Magistrates Court (Koori Court) Act 2002

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Shepparton Magistrates' Court

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Abstract

This paper has grown out of the practice of the Shepparton Koori Court in Victoria (Australia). It reflects the views of two ‘insiders’ to the process — the first sitting magistrate and the first enabling Aboriginal Justice Officer. We do not pretend that our views of the court’s operations in its first 18 months are anything other than our own unabridged social and cultural constructions of what we have seen and heard in the court as hearings and procedure have evolved. This is not a paper replete with data and external evaluation. We have not collected statistics on our court. We present our thoughts on what we have observed. We do not present an analytical paper and we have not explored theoretical underpinnings about the place of Indigenous people in the imposed legal system. This paper is essentially descriptive. We believe this is the place to start — describing the changes in the culture of the court and the jurisprudence of the post-colonial state. In our view it is only after we start this conversation, in this way, that we can start to understand how much work we still have to do. We believe that in engaging insiders and outsiders in the sort of description which follows we can start to unpack our complex exclusiveness with its insistent inclusiveness. Aboriginal people are statistically more likely to come before a court than non-Aboriginal people, yet they are invariably outsiders to the process. We think our paper starts to uncover reasons why this is so and how we can, in practice, remedy this situation.

Koori Court Victoria: *Magistrates Court (Koori Court) Act 2002*¹

Kate Auty and Daniel Briggs

This paper has grown out of the practice of the Shepparton Koori Court in Victoria (Australia). It reflects the views of two ‘insiders’ to the process — the first sitting magistrate and the first enabling Aboriginal Justice Officer. We do not pretend that our views of the court’s operations in its first 18 months are anything other than our own unabridged social and cultural constructions of what we have seen and heard in the court as hearings and procedure have evolved. This is not a paper replete with data and external evaluation. We have not collected statistics on our court. We present our thoughts on what we have observed. We do not present an analytical paper and we have not explored theoretical underpinnings about the place of Indigenous people in the imposed legal system. This paper is essentially descriptive. We believe this is the place to start — describing the changes in the culture of the court and the jurisprudence of the post-colonial state. In our view it is only after we start this conversation, in this way, that we can start to understand how much work we still have to do. We believe that in engaging insiders and outsiders in the sort of description which follows we can start to unpack our complex exclusiveness with its insistent inclusiveness. Aboriginal people are statistically more likely to come before a court than non-Aboriginal people, yet they are invariably outsiders to the process. We think our paper starts to uncover reasons why this is so and how we can, in practice, remedy this situation.

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Let us speak for a moment in the third person for the purposes of introductions in this conversation. Daniel Briggs is in his early 30s. He is a Yorta Yorta man from the north east of Victoria and he was the first person to have been employed in the role of Aboriginal Justice Officer to a Koori Court. Daniel has returned to his Aboriginal community in the second half of his life — having been adopted at birth Daniel returned to his family at the age of 16. Daniel’s background is in Aboriginal health and mental health. He is an active member of the Rumbalara Aboriginal Football and Netball Club in Shepparton. Since becoming involved with the Koori Court Daniel has commenced a law degree. Daniel lives with his partner Melanie Winmar, a Nyoongar woman from Western Australia. They have three children and live in Shepparton. Kate Auty is Australian but non-Aboriginal. She is a graduate in law, arts and environmental science and holds a doctorate in law and legal studies. She was first exposed to the Yorta Yorta community, and in particular to the senior Aboriginal women in that community, in the early 1980s when working for the Victorian Aboriginal Legal Service. She has worked in the law as an advocate since that time but also taught a graduate program in heritage management at the Institute of Koorie Education (Deakin University) and worked as a senior solicitor with the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) in Victoria, Tasmania and Western Australia.

Speaking for ourselves, before the establishment of the Koori Court we two had not met, although each of us knew the other by reputation. Our first discussion about the operations of the Koori Court occurred at the initial training program held for the Aboriginal elders who expressed a desire to sit with the court. Neither of us knew what to expect of the other, of the process, or of the journey which the court process would represent. We were both insiders in the court in that we were both employed in its business, but we were both, contemporaneously, outsiders to the process in various complex ways. We were volunteers. What follows is the description of how we became more embedded in the process, how we, in subtle ways, impacted upon the process, and how we, together with the rest of the Koori Court team, ‘grew the court up’.

The introduction of Koori Courts in Victoria pursuant to the *Magistrates Court (Koori Court) Act 2002* (Vic) has not been without its detractors and like all change, is attended by controversies. Processes or reforms developed to ‘move the law along’, as if she were an old bag lady, are often seen to threaten the legitimacy of the legal system. Before we even commenced sitting at Shepparton by the Bayunga or Koriella river, known to non-Aboriginal people as the Goulburn, our regional Koori Court was the subject of criticism, with some members of the legal profession commenting that Aboriginal people would not be able to find their way to the court, or that they would ‘go walkabout’ on the day of the hearing (*Herald Sun* 6 May 2002). This early criticism was met by positive commentary (*The Age* October 2002). Nevertheless, criticism continued when a senior member of the Victorian Bar, citing the establishing Act incorrectly, suggested that the Koori Court ‘tipped the scales’ and provided ‘luxury’ or ‘special’ courts and some ill-defined special regime of sentencing options (*Herald Sun* 13 March 2003). He also contrasted the banning of Father Christmas from child-minding centres with the Koori Court initiative. The Victorian Attorney-General, Rob Hulls then lambasted the ‘impaired logic’ which underpinned this commentary. It is timely to put the controversy and distractions to one side and start seriously considering what we do in the Koori Court in Victoria.

Victorian Koori Courts have not been established in a vacuum. Neither have they been imposed as a matter of inflexible government policy overlooked by administrators concerned about ‘control’, as has historically been the case when colonial administrations imposed law via ‘native courts’ (Adewoye 1977, Auty 2000, Washburn 1995). These courts have their genesis in Aboriginal people’s aspirations for a place in the legal system as *other* than defendants, which aspirations have developed from Aboriginal people’s increasing role in other legal or quasi-legal inquiries and litigation, such as the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) in 1988 to 1991, the stolen generations investigations, and Native Title litigation. Indigenous people are weary of, and are sloughing off, their status of imposed contingency at the periphery, which somehow runs parallel to, and in spite

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of, their centrality to the 'post-colonial' law project. Oppositional storytellers and 'outsiders', to use critical race scholar Richard Delgado's descriptors, want their place in the narrative recognised (Delgado 1984). The impetus for some form of change is intimately connected to the deliberations, community conferencing, and emphasis on 'underlying issues' which developed during, and typified the reporting of, the RCIADIC and the Stolen Generations Report *Bringing Them Home* (HREOC 1997), notwithstanding the many criticisms which have been made of the processes adopted by these inquiries.

Additionally, the 'idea' of Koori Courts has developed in a parallel dimension incorporating justice agencies, lawyers and the judiciary in spite of our reputed conservatism and fear of risking status, reputations and legitimacy (Schubert et al 2002: 190). Increasingly, lawyers and judicial officers are becoming exposed to the need for theoretical jurisprudential innovations in respect of Aboriginal defendants and Aboriginal witnesses (Mildren 1997, Coldrey & Vincent 1980, Coldrey 1987, McCorquodale 1987, Queensland Criminal Justice Commission 1996). Further, once culture is recognised as intruding into otherwise formulaic legal spheres, those *in* the law cannot but be open to the *possibility* that the law has its own cultures and is, as Derrida says, inherently open to deconstruction (1990). Attentive listening to outsiders potentially destabilises seemingly immobile or intransigent legal systems, as, we increasingly discover, boundaries are never impregnable.

So, for a number of reasons, some more compelling than others, the 'climate' might be milder for changes in how we 'do' the law relating to Aboriginal people, at least at the summary level where it may be less 'risky' to do so.

The change we speak of not only emanates from many different sources but can be reflected in many different ways. It is, in our view, important to ensure that symbolism and mechanics are married for the greatest effect. In developing the Koori Court the Victorian Magistrates Court has recognised this.

Symbolism

Symbolic actions

Symbolic steps towards reconciliation and the delivery of RCIADIC recommendations in the courts started before the Koori Courts were sanctioned by government policy. For some, these overt symbolic steps were underpinned by a desire to become more inclusive of Aboriginal concerns in the legal system and the courts and to recognise that Native Title claims had changed forever the legal landscape in the south-east, even if such claims were to prove unsuccessful in the courts.

Tentative discussions were commenced in early 2000, between Kate Auty and the then Chief Magistrate Michael Adams QC, about the need for the Victorian Magistrates Court to employ an Aboriginal *Cultural Liaison Officer*. This person's function would be to advise magistrates about services available, coordinate service provision for initial hearings, respond to urgent 'in custody' concerns and liaise with other courts services; but ultimately, most significantly and most sensitively, provide advice about cultural concerns and about the complexities of cross cultural communication (Saville-Troike 2003), a problem which impacts not just upon exchanges between the non-Indigenous bench and Indigenous people (Eades 1992a, 1992b, 1993, 1995) but also between the defendant and his or her legal counsel (see eg *R v Robyn Kina* (1993)). The creation of this liaison officer position is discussed below.

Victorian magistrates courts at Melbourne, Shepparton, Bendigo and Moe held ceremonial reconciliation sittings in National Aboriginal Reconciliation Week in June 2000. The Melbourne sitting involved the display of the Aboriginal flag on the bench, and the symbolic delivery of an Apology and Deed of Commitment to Joy Wandin-Murphy, a senior Wurundjeri woman upon whose country the Melbourne Magistrates Court is sited. Many members of the Victorian Aboriginal community were invited to the Melbourne sitting and many Wurundjeri, Gundijmara, Bangerang and Yorta Yorta people attended, some travelling long distances to do so. One senior Aboriginal woman later

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commented that she was unable to speak at the ceremony as she was too choked with emotion. Non-Aboriginal participants included members of the Victorian Bar, legal practitioners, and senior representatives of the Victorian Bar Council and the Law Institute of Victoria. One Supreme Court justice attended and later remarked that draping the Aboriginal flag from the bench was the most positive use of a flag in a court that he had ever seen. The Victorian Attorney-General and Minister for Aboriginal Affairs attended. Notwithstanding the relatively short notice of the sitting, Court One, which is the largest courtroom in the complex, was filled to overflowing. Barristers were standing in the dock, all seating was taken, the aisles were full, the crowd was two and three deep in some places, and the door of the court was kept open to provide an 'ear' for those outside. The faces of senior Aboriginal men and women dotted the seated crowd. Magistrates who wished to attend were seated in front of the bar table facing towards the crowd. The then Chief Magistrate invited Joy Wandin-Murphy to the bench from where she delivered her response to his address. One magistrate obtained and the court then framed the *Herald Sun* banner 'Court delivers historic apology' which was informally presented to a senior Yorta Yorta woman for display at the Echuca Aboriginal Keeping Place in Yorta Yorta country on the Tongala river, a river which we now call the Murray.

Since that time the Melbourne Children's Court, and Victorian County Court and Supreme Court have conducted ceremonial openings and commemorations involving senior Wurundjeri people. The opening of the Koori Court in Shepparton was also attended by many Yorta Yorta and Bangerang people. A smoking ceremony conducted by senior Yorta Yorta man, Uncle Wally Cooper, preceded the formal opening conducted by the Attorney-General. As an indication of the broad support for the Koori Court those who attended this opening included local, federal and state politicians; local council representatives, including the mayor and CEO; members of the Shepparton and Euroa Reconciliation Groups; non-Aboriginal people who work in various government departments; and local and more senior police. Again, the foyer of our court at Shepparton was filled.

Symbolic dialogue

Aboriginal communities and individuals have been quietly proactive in generating dialogue and debate about how justice can be ‘done better’ for those on the periphery. Discussions with those in the law started somewhat tentatively, and have for the most part remained within small compass, mostly connected through Aboriginal agencies operating in the law. Individual Aboriginal people and Aboriginal Cooperatives and service providers have opened channels of communication with the courts, legal practitioners external to Aboriginal Legal Services, and even police prosecutors, sometimes drawing upon personal acquaintance or chance meetings at, say, sporting carnivals.

And, just as Aboriginal people have initiated contacts, so too has the court. The traffic is two-way. In the Shepparton Magistrates Court we have, in the last two years, started to develop an open door policy for senior Aboriginal people and service providers. Aboriginal people have been asked to regard the court as open to them as ‘court users’, just as it is the court of other groups, such as the Victim’s Referral Service. Aboriginal people wishing to discuss law reform issues and particular projects from crisis housing proposals to large scale complexes, family group conferencing, employment projects, drug and alcohol service provision via such innovations as the Koori night patrol, have attended meetings which both they and the court have established. Magistrates and some registrars have attended cooperatives to discuss programs and specific or general projects, including the flag raising which accompanies National Aboriginal and Islander Day Observance Committee (NAIDOC) week. This dialogue promotes respectful exchanges, and we are told, enhances community decision making, augments respect for family structures, discourages youth offending and advances authoritative recognition of an Indigenous ‘community code of conduct’ which provides sanctions against offending and anti-social conduct. The court, judicial officers and registrars are thereby becoming informed about previously opaque Indigenous community concerns and being drawn into the discussion of potential remedies. The court at Shepparton will generally be apprised of Aboriginal projects

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in the region even if these projects are outside the scope of narrow legal issues. The success of this relationship reflects a willingness on the part of all of the court staff to expand their engagement with Indigenous people.

We, as a community of local legal personnel advance this dialogue in both formal and informal ways. Court staff and police prosecutors have, since we started this court, attended football carnivals and training and women's breakfasts and other celebrations. Situated as we are in our localities, physically and socially, we learn that small scale local solutions have a greater potential to remedy local problems. For instance, the Shepparton Koori night patrol in 2001–2 reduced street offending arrest rates by 37 per cent within two months of its commencement. This is an impressive achievement when one considers that in the calendar year 2000–1 the rate of charging of Aboriginal people in Victoria increased by 16 per cent and in Shepparton alone the increase was 12.4 per cent (statistics provided by Victoria Police). Asking young people who came before the court about their use of this patrol it is encouraging to hear that 'waiting for the bus' is commonplace.

Summary

These symbolic efforts and the development of dialogue are suggestive of a relationship of cooperation and trust developing between the courts and the respected and senior members of the Aboriginal community. The steps we have taken are small but each involves 'risk' for all the parties. The preparedness to take those risks is significant, particularly as there is no personal *quid pro quo*. The benefits are for the community — both legal and extra-legal.

The innovations discussed above were underway before structural or mechanical changes were undertaken as a function of a more formal discussion between tiers of government and Aboriginal people. These more formal discussions, at some remove from the 'grass roots', have, in the main, led to legislative and other innovations which concluded in the establishment of the Koori Courts.

Mechanics

The Aboriginal Justice Agreement

The Justice Agreement presented the Magistrates Court of Victoria with three distinct functions or tasks. These were, firstly, the establishment of an Aboriginal Liaison Officer position to be sited in the court; secondly, participation in the training of Aboriginal Bail Justices; and thirdly, in collaboration with the Aboriginal community, to develop and then commence to operate a Koori Court.

Each of these initiatives is intended to encourage meaningful access to the law for Indigenous people who have been, one might argue, paradoxically marginalised, in spite of their intimate connection with the multifaceted operations of the imposed legal system. The first two initiatives were undertaken with relatively little further debate about how and when this might occur.

Aboriginal Liaison Officer

The implementation of this initiative departed very little from the ordinary course of employing staff in a large organisation. The innovation was in the position itself not in the manner of filling it. Advertisements were placed and applications taken, interviews conducted and an appointment made. The court filled the position of Aboriginal Liaison Officer (ALO) in consultation with the Department of Justice Aboriginal Policy Unit.

Although the title excludes the word ‘cultural’, included in the court’s original, pre-Agreement, proposal, the duties of the appointee do include encouraging in court personnel the need to consider the cultural concerns of south-eastern Aboriginal people in their dealings with the legal system. One officer covers the whole state, and the current incumbent is male. In discussions about the position Aboriginal people have advised that the appointment of a female ALO is also necessary. It is suggested that a woman officer would be more readily able to deal with some Aboriginal women defendants and the issues which might be particular to women’s cases. The statistics, approximate as they are, suggest an increasing number of young Aboriginal

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women are entering the legal system as defendants (*The Age* 21 March 2003: 11). Young women present with different and difficult issues which are often embedded in the fabric of their families, many of which continue to struggle with the legacy of the stolen generations and colonialism more generally. The recent appointment of an Aboriginal women's mentoring coordinator and a panel of Aboriginal women mentors by the Office of Corrections addresses some problems associated with this increased rate of exposure, but the difficulty is that mentors are not 'front end' positions, the expectation being that a mentor will be in contact with female defendants after they are placed on community based orders.

The ALO is accountable to the court but provides advocacy and advice, and assists in bail and other hearings, often in a collaborative fashion with other 'parallel service' court employees who are generally situated in Melbourne. The ALO is expected to make connections for the court with health and other service providers about which the court or judicial officer might not be aware. Although attached to the Magistrates Court the ALO has already been called upon to provide assistance to superior courts. Cultural awareness seminars for magistrates have been organised by the ALO, and he has continued to connect the court to various Aboriginal community activities, including NAIDOC week celebrations.

An individual does not change the culture of an organisation, as organisations 'think' in much more complex and capillary ways than singularly and literally, but the creation of this position provides one of a number of hooks for other initiatives. The second initiative, that of training Aboriginal Bail Justices, does considerably more to (re)populate the landscape in and out of the courts with Indigenous participants, but the ALO position provided an important commencement point for introducing Aboriginal people into the court's structures.

Aboriginal Bail Justices

The new Aboriginal Justice Agreement sponsored committee structure, involving the Regional Aboriginal Justice Agreement Committees (RAJACs), reference groups and government agency working

parties, and the means by which they fitted into and informed the partnership between the Aboriginal community and the courts, was reflected in the achievement of a successful Aboriginal Bail Justices Training Program.

The Aboriginal Bail Justices Training Program was developed after consultation with the Department of Justice Aboriginal policy unit, the University of Melbourne Institute of Criminology, and local Aboriginal communities, importantly including the members of Regional Aboriginal Justice Agreement Committees. The Victorian Magistrates Court State Training Office, which trains non-Aboriginal Bail Justices, developed and conducted the training program in consultation with these committees, working parties and magistrates. This was an innovation for the court as the program had previously been virtually stand-alone and any training delivered to Indigenous people was uniformly the same as for non-Aboriginal people. Indicative of the success of the old methodology, there were no Aboriginal Bail Justices sitting in after-hours bail hearings when we started this training program. No one had previously recognised the need for an Indigenous-ingrained pedagogical approach.

The delivery of this program has been evaluated by Lisa Rasmussen who was brought in to the training process as a facilitator and rapporteur (Rasmussen 2001). In evaluating the program Aboriginal people were asked to comment about the experience. Comments made by the Aboriginal participants included the following:

[I gained] a better understanding of the justice system.

I now have a wider knowledge of the law compared to what I knew.

[I now have] a better understanding about how the justice system seeks to make access easier for Kooris — Something I [had] always thought negatively about.

I have more respect for the law, before I didn't.

Having touched on the Justice System, I would like to learn more so I can help my people to understand the legal system and how it affects us all.

[I gained] the confidence to talk to officials.

[The course] creates empowerment for the community.

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We are going through a new era in legal issues and it's a good opportunity to have more Koories involved.

The first intake resulted in 12 appointments of Aboriginal Bail Justices and there has now been a second intake where nine Aboriginal people underwent the training program. This is the first time this State has had any Aboriginal Bail Justices although there have previously been a few Aboriginal Justices of the Peace.

Our court was informed throughout the process. As the magistrate delegated to the discussion process Kate Auty kept the Chief Magistrate informed of developments. To attain the numbers of participants the training program was extensively advertised in the Aboriginal community. Individual approaches were made to particular individuals who might have an interest in the program. An initial information session was followed up with the course delivery. The 'mainstream' course material was augmented with material to break down barriers and reduce unfamiliarity with the structures of the legal system. The delivery of this material reflected the fact that Aboriginal people were less likely to have post-secondary education and this might produce a significant disincentive to undertake the training. The additional course material will now, as a result of the success of the program, be adopted in part when training non-Indigenous applicants. Apart from incorporating innovations in pedagogical approaches, the course was also modified to incorporate cultural concerns. There was discussion of the problems associated with conflicts of interest, the potential impact of family connections, and ethical concerns about perceived intra-Aboriginal community bias and the rationale for judicial officers' self-imposed disqualification. The issue of conflicts of interest was incorporated and discussed at the behest of the Indigenous applicants.

Those Aboriginal people who sat the examination and completed the role plays successfully were appointed to act as bail justices in matters involving both Indigenous and non-Indigenous people. Successful applicants have now joined the list of bail justices rostered for after-hours bail applications. Some of those who completed the first course helped to deliver the second. Each of the training programs

involved extensive discussion and non-confrontational interrogation. Each included an understanding that ‘education’ for outsiders is not best undertaken by means of the ‘banking’ or accumulation of facts as if they were ‘knowledge’. Greater emphasis was placed on delivering the course through ‘narrative’ which is more collaborative and non-hierarchical. More could be done to develop this means of educating Indigenous people for roles in the legal system, but it is important to recognise that a start was made in the first of these programs and that the second group to undertake the course benefited from the work done with the first intake.

Koori Court

The Koori Court legislation, *Magistrates Court (Koori Court) Act 2002* (Vic) is the creature of the Victorian Aboriginal Justice Agreement which both the Aboriginal community and the government adopted in May 2000. The establishment of Koori Courts was recommended in the Agreement and legislation formalises the process.

The stated objectives of the court are to redress the over-representation of Aboriginal people in the criminal justice system; to reduce rates of re-offending amongst Aboriginal people; to decrease rates of non-appearance at court which has the effect of reducing bail opportunities; and, to have a positive impact upon the lives of those who appear before the court. Given the emphasis on ‘slowing’ Indigenous people’s entry rates into the criminal law operations of the legal system the Koori Court initiative could be seen as a ‘therapeutic jurisprudence’ initiative in that it is intended to both affect, and culturally ameliorate, the application of existing laws and also act as a ‘preventative’ to involvement with the legal system (Stolle et al 2000). One non-explicit objective is to enhance the prestige of Indigenous respected persons and elders in both Indigenous and non-Indigenous communities. This may ultimately be one of the unintended, but highly significant consequences, of the establishment of the Koori Court, furthering, in some respects, that which was commenced by the appointment of Aboriginal Bail Justices.

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The Koori Court proposal was presented in skeletal frame in the Agreement as a function of discussion about how to give effect to the RCIADIC recommendations to reduce imprisonment rates and slow the rate of entry of Aboriginal people into the criminal justice system. Extensive consultation and negotiation took place with and between Indigenous people, groups, and various levels of government and service providers, including the Victorian Aboriginal Legal Service and other Aboriginal service organisations and cooperatives, the Magistrates Court, Department of Justice, Office of Corrections and Victoria Police. The development of the model and the means to deliver the training to elders and others involved in the courts was undertaken in a fairly unique fashion, as follows.

It was always possible that the Shepparton court would be the first or one of the first Koori Courts, and for this reason considerable discussion was undertaken with the formal and informal Aboriginal networks already built around other programs and projects. Discussions were held with health workers, with service group coordinators, with those working in the juvenile justice field and with Aboriginal friends. Any opportunity to talk to groups such as the Shepparton and Euroa Reconciliation groups, the Tatura Business Women's group, the Women of Euroa, North-East Victoria Young Lawyers, were accepted by Kate Auty and Daniel Briggs. At those discussions the Koori Court proposal, issues of equity and discrimination, and access to justice were opened up for consideration, providing people with opportunities to ask questions about how the system would operate and why it was perceived to be necessary, in a non-confrontational environment. Careful attention was given to ensuring that the general public had the proposal explained to them. In-services for lawyers, court user groups, and court staff were and continue to be held at the behest of individual local legal practitioners and Daniel Briggs in his role as Aboriginal Justice Officer. Opposition to the proposal on the basis outlined by David Galbally, that it should be available for Macedonians and Turks etc, has evaporated in some quarters where such views were plainly problematic. And opposition to the proposal amongst Aboriginal people in the region has also evaporated as a result of these discussions and, in some instances, participant observation from the floor of the court.

At the conclusion of these initial negotiations other bodies/committees were established and, at various levels, charged with the delivery of the terms of the Agreement, all of which were oversighted by the Aboriginal Issues Unit of the Department of Justice, headed up by a senior Yorta Yorta man who is a public servant. These layers of agencies included a high level interdepartmental Aboriginal justice forum; an Aboriginal justice agreement working party; departmental committees; and, the agencies most connected to the local and regional Aboriginal communities — the statewide RAJACs comprised of local Aboriginal cooperative members, local police, office of corrections staff and a local magistrate.

To facilitate the establishment of the Koori Courts reference groups were formed and coordinated initially through Shepparton and then Broadmeadows courts. These reference groups drew into the frame local victims support groups, police, solicitors, and Aboriginal people from the RAJAC, the Aboriginal Legal Service, the Aboriginal Cooperative and Aboriginal Community Justice Panel members. The regional RAJAC continued to meet and discuss overarching concerns while the reference groups worked on developing the court process.

Although seemingly bureaucratic and hierarchical this network of committees has worked effectively to achieve the goals set in the Agreement. Success has been achieved because grass roots Aboriginal people and their community organisations were actively included, and included themselves, in all discussions. The sophistication Aboriginal people have developed over the years in their dealings with government agencies and initiatives was exploited to good effect by Aboriginal people and their agencies in embracing the initiative. Further, the notion that the initiatives were community owned was not only not discouraged nor actively encouraged by those non-Aboriginal people and agencies involved, but, rather, simply treated as a 'fact'. Previously powerful players did not adopt paternalist positions because the parties involved in the meeting and discussion process were too acutely aware of the problems of agenda-capture and too vigilant to allow this to happen. In some respects the conservative politeness and hypersensitivity of local solicitors and senior police to the need not to patronise

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or assume control also promoted evenhandedness in the process. To some extent it might also be argued that no one wanted to capture the agenda because the Koori Court was 'risky business' and no one really wanted to control the process in the event it might comprehensively and flamboyantly fail. Finally, there was genuine good will to establish the court because people, including police, justice agencies and court staff, thought the problems too significant and the issue 'too important'. Motivations for all participants varied, and for those Aboriginal people involved, the primary impulse was expressed again and again as the 'future of our kids'. Such concern caused even those who might dispute other issues within the community to work together for solutions. Most importantly, however, from the point of view of the court, was the fact that those who volunteered to act as elders and respected persons attached to the court did so with real determination, in spite of some insipient sniping, and in defiance of the doomsayers. As the project unfolded it became apparent that a certain confidence about the court developed separate from government agency pushing or pulling. And, finally, it may be that those Aboriginal people involved drew a new confidence from the exposure of the stolen generations policies which meant that people could explain some of what happened to their families as the outcomes of such government policies, not personal idiosyncrasies and 'shortcomings', and they could do so with confidence.

This combination of factors positioned the committee and reference groups comfortably and interactively. Mindful that the foregoing is not an analysis of why the committee structure seems to have worked at this early stage it is important to note that our mechanical processes seem to have avoided some of the pitfalls outlined in studies of 'development praxis/discourse' (Porter et al 1991, Escobar 1995, Croll & Parkin 1992). This can be explained superficially as local solutions for local problems, as bottom up not top down processes, and the encouragement of a conversation about what we were doing, with all its inherent interruptions.

The proposed working model for the Koori Court, developed in the formal conferencing process, was taken back to Aboriginal com-

munities through their RAJACs and through informal discussions which our court held with local Aboriginal cooperatives. In Shepparton the local cooperative organised a discussion with the elders group. Local bureaucrats in corrections and juvenile justice were also canvassed for their views and had the proposal explained to them. Models which had been suggested but rejected, such as the circle sentencing format adopted in First Nations countries (and in Nowra, New South Wales in Australia), were also discussed and parties advised of the reasons for rejection. Even the site of the proposed court was discussed at the local level and the legal constraints imposed upon us as a court were explained as reasons for why the court should remain in the current courthouse. Siting the court at a cooperative was rejected because of the court's obligation to tape-record hearings which would prove difficult at any other site. There were also concerns expressed about maintaining the court as a forum open to the scrutiny of the broader community. Interestingly, maintaining the court *building* as our site has resulted in much more Aboriginal traffic in the court, and adoption of the court by local Aboriginal people than might have been the case if a community venue was adopted. In some ways we have provided an opportunity for Indigenous people to colonise the court by this means.

The model

The current working model will be evaluated after two years of operation. The Koori Court is to sit and conduct its business 'with as little formality and technicality, and with as much expedition, as the requirements of this Act and the *Sentencing Act* 1991 (Vic) and the proper consideration of the matters before the court permit' (*Magistrates Court (Koori Court) Act* section 4D(4)). The present arrangement is that the court will hear only guilty pleas. Each case which comes before the Koori Court will, in the initial stages at least, have gone through the mention system, and each Indigenous defendant will be explicitly asked to elect to proceed before the Koori Court. At the insistence of Aboriginal negotiators and community groups matters involving sexual assaults and breaches of intervention orders are beyond jurisdiction in the pilot years. Interestingly, at a recent forum about the Queensland

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proposal for a Murri Court in Brisbane, concerns of one forum participant evaporated when advised these two types of offending could be and in Victoria, were, excluded.

The magistrate retains the ultimate power and discretion about the sentence imposed, subject to commentaries from the elder or respected person at the hearing. Indigenous people's concerns about payback for sentences of imprisonment had been one of the considerations which led to this decision. Sentencing options remain exactly the same for both the Koori Court and the 'mainstream' matters. Whilst the court has a strong philosophical commitment to using alternatives to imprisonment, gaol does remain an option, as a sentence of last resort, just as is the case for non-Aboriginal defendants. One elder or respected person sits with the magistrate in each case but at this stage we are retaining two elders at each hearing to provide for alternative benches in the event of a conflict of interest. It also provides the court with some gender equity as we have been asking a male and a female elder or respected person to sit together.

The court is mandated to adopt informal processes but not abandon the principles of natural justice. To fulfil these statutory obligations the court convenes around an oval bar table at which all parties sit. Formalities such as standing and bowing are dispensed with. The clerk of courts may sit at the bar table with all the other participants.

The court does not formally extend its jurisdiction to Children's Court matters, but if youths and family members request the case proceed in the Koori Courtroom with elders and community members present this is accommodated. A number of Children's Court matters have been dealt with in this fashion. One young person has re-attended the court a number of times, but not for new matters, and been asked to volunteer progress reports which he has done, initially appearing quite reserved, but latterly with alacrity.

Personnel

Elders or respected persons

The changes to court personnel include the incorporation of Aboriginal elders or respected persons who take a position on the bench and engage in the hearing process with the magistrate. Those who sit with the court in this capacity are described as ‘an Aboriginal elder or respected person is a person who holds office’ under the *Magistrates Court (Koori Court) Act*. One elder or respected person sits on each case, but as it is our current practice to ask two elders to assist the court each day, they both sit at the bar table on either side of the magistrate.

The elders and respected persons undertook a training course, delivered in a narrative and collaborative manner, introducing procedural matters, relevant legislation and participants’ responsibilities. As with the Aboriginal bail justice training package role plays and general discussion answering queries formed a significant part of the process. The local prosecutor, the magistrate and the senior registrar at the court took the participants through the role plays. The University of Melbourne criminology department was engaged to produce materials and deliver the formal legal component in a culturally appropriate way. On the day the program commenced the Aboriginal Justice Officer commenced employment with the court, attending the training program with the elders and respected persons.

Over the final day of the training program the local police prosecution service and court staff undertook a cultural awareness training course. The senior prosecutor regarded the training program as stimulating, informative and challenging. He was exposed to considerable interrogation by the elders and respected persons about the police service, its obligations and its perceived shortcomings. A very useful exchange of views took place between all parties and the understanding of the functions and processes of the Koori Court was sharper and clearer. Although there has been no formal evaluation of the training program it is conceivable that the participants gained insights into the legal system similar to those of the Aboriginal Bail Justices as outlined above.

Aboriginal Justice Officers

The Aboriginal Justice Officer (AJO) position is another novel position in the court structure. The position was created in section 4 of the *Magistrates Court (Koori Court) Act* and the Justice Officer is a person who is employed under Part 3 of the *Public Sector Management and Employment Act 1998* (Vic) and exercises powers or performs functions in relation to the Koori Court Division of the Court. The AJO is a court employee who sits with, and as a part of, the court. In Shepparton Daniel Briggs as the AJO advises the bench before, during and after court cases. He makes his own inquiries about matters, which inquiries are located in and intimately connected to the Aboriginal community in the region. Local community services, including non-Aboriginal groups, are drawn into the court process by the AJO. He confers with the defendant and his or her solicitor; and discusses matters with the local police and the Office of Corrections staff. The AJO and the court's forensic psychiatric liaison officer share office space to facilitate collaboration in the court environment about matters as diverse as mental health, residential programs, drug and alcohol rehabilitation and social and cultural concerns. They work in an ethically collaborative fashion discussing rehabilitation options in consultation with other justice bureaucracies and legal personnel. The office of the AJO, situated in the library of the Shepparton courthouse, is conducted as an open door policy and court staff can often be found directing people to the AJO room. Frequently community consultations are undertaken there with those from local cooperatives, and the community more generally, and the AJO is effectively on call to attend community meetings and discussions about various matters of concern.

The AJO has a paralegal and outreach role and is actively involved in gaining feedback from the local community about the operations of the court. The role of the AJO includes roster coordination of the elders and respected persons who attend court. Local knowledge of the Yorta Yorta and Bangerang communities ensures a cultural and specialist understanding of the potential for conflicts of interest. Negotiations with the Aboriginal Legal Service, organisation of court lists, and

extended family attendances at hearings, further extends the ambit of the AJO position, as does liaison with the Sheriff's office about outstanding fines. The AJO has a role in speaking to those involved in disability and child and adolescent mental health service, the Thomas Embling Psychiatric Prison and community health services. An early AJO (Shepparton) report provides some insight into how the position commenced and the potential inherent in the position:

... the opportunity and encouragement for people to participate has really given our community a sense of control and ownership about issues over which we had little say before. This gives us hope ... the chance to achieve goals ... [and] ... address and push boundaries on other issues ... [which] ... in some way or another impact on the community (Briggs 2002).

The choice of words in this report — our community — illustrates the position of the AJO in respect of the local Aboriginal community — these are not empty words. The AJO position is unique in that the role involves a marked connection with the defendant additional to his or her engagement with the solicitor instructed. The AJO has commenced a process of developing a case history about a defendant in consultation with family, solicitors and defendants themselves. The innovation involved in incorporating an Indigenous person in the court processes as a specialist results in a greater level of judicial understanding about some matters particular to the local Aboriginal community and defendants.

The site and space

In Shepparton one small court conducive to the atmosphere which we wanted to create has been refurbished for the Koori Court. This was done in consultation with senior Aboriginal people. We discussed the layout of the room and the furnishings and the courtroom is now lined with the Aboriginal, the Torres Strait Islander and the Australian flags and displays of local Aboriginal people's art work. The prosecutor has remarked that there is a signal power in the display of the Koori flag which is eye-catching upon entry into the hearing room. Inquiries were

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initially made by a visiting non-Aboriginal judicial officer about how the Australian flag came to be displayed in the court. It is there at the request of the elders who were involved in the design, and no one thought to exclude it.

All parties assume a place at the oval bar table which has been specially fitted to provide for the connection of the court computer, a laptop which folds down out of view. The courtroom will continue to be used for cases in the ordinary jurisdictions, including the Victorian Civil and Administrative Tribunal and other tribunals. The interior retains a fixed bench behind the oval table which can be used for the ordinary or mainstream jurisdictions.

Space is an important issue in the design of courtrooms² and it is notable that this court lacks any familiar ceremonial dimensions. There is no elevation of any personnel. Defendants sit opposite the elder or respected person and next to the Aboriginal Justice Worker or a family member (or members). The magistrate sits next to the elder or respected person. It is important that the defendant and elder sit opposite each other. We noticed in one hearing, where the defendant and elder were diagonally opposite each other, that the powerful dynamic which the face to face contact generates was dissipated. In spite of the lack of the usual ceremonial or distancing dimensions there have been no ‘security’ problems in our court.

Since we commenced the court we have also been given a painting by a group of young men who are currently undertaking a job training scheme. This painting has been accepted as an exhibition piece but remains the property of the artists. Young people who come into the court are advised of its significance.

Procedure

The Koori Court day commences when the first case is called by the clerk of courts. The magistrate and elder or respected person will usually already be at the bar table. The clerk does not ask the parties in the court to ‘rise’ — although we had to break the clerks of this routine in the first few sittings! A brief informal discussion might take place

between the parties in the court and at the bar table. The uniformed police prosecutor sits at the end of the table next to the Office of Corrections personnel. On the other side of the prosecutor is the defendant's lawyer — most often, but not always, the Victorian Aboriginal Legal Service. The defendant sits next to the lawyer and is flanked by family, extended family or spouse or partner. Children of all ages have participated when a father or mother attends the court. Other family members can sit at the bar table if there is space but they mostly find seating around the court room. Some defendants and family members have expressions of wary apprehension when they first enter the court and some seem quite shocked by the changed dynamics. Others who have been asked to come back on diversions or deferrals appear to be increasing in confidence at each sitting.

If no family are present the defendant will be asked if he or she wishes to have some time for them to attend, or elect some other party to sit with them. It has been rare to have a person attend without any family member. All the parties in the court then identify themselves. If people appear to have difficulty with this the magistrate can, and sometimes does, conduct the introductions. Elders and respected persons have been advised that if they wish to do so they should feel free to identify themselves as part of particular Aboriginal country and that acknowledgment of country is perfectly acceptable. The matter then proceeds with the defendant being asked if he or she is aware that the case is before the court as a plea of guilty. An affirmative answer results in the following procedure.

The magistrate will acknowledge Aboriginal custodianship and pay respect to both Yorta Yorta and Bangerang people. The defendant is also advised at the beginning of the hearing that the court was smoked by a senior Yorta Yorta man before it was opened and that this was done to pay respect to Aboriginal culture. The police prosecutor will read the charges and provide a summary. The text is adopted by the lawyer for the defendant, and prior convictions, if there are any, are either read out, or tendered. The lawyer will then provide an outline of the defendant's situation. The magistrate or respected person may interrupt and ask questions as this plea is proceeding. Daniel Briggs in

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the role of the AJO will then speak about the inquiries he has made and advise the court of other matters relevant to the defendant. He will also advise about the possibility of programs for the defendant and ask people in the court, say, the Community Health Worker, the Drug and Alcohol worker from the local Aboriginal cooperative, or housing or other workers, if they have some things they wish to tell the court. He, the magistrate, or the elders, will also invite family to speak if they wish to at this time. As it is the intention to empower senior Aboriginal people and the AJO in this process we have been developing our process as we increase our experience of running the court. The magistrate then asks the elder or respected person if he or she wishes to say anything to the defendant. This may occur at any time throughout the hearing.

Family members and other members of the Aboriginal community present will be asked if they wish to make a contribution to the hearing. The victim may also speak on invitation. The prosecutor has always advised the magistrate and the solicitor for the defendant if a victim wishes to attend.

Comment from the floor of the court occurs fairly regularly and may be either supportive or chastising, or both. Sometimes people who wish to comment do not wait to be invited to speak. This is taken as an indication of the confidence parties are gaining about the procedure. On occasion Aboriginal people who have a reputation for reticence have felt comfortable to comment in this forum. Sometimes people are halting in their delivery, but if the court waits quietly even the most reserved people can be heard to speak. No one is made to speak if they do not wish to — and this includes the defendant. People in the court will generally decline an invitation to speak if they feel they have a conflict. This is self-policed.

The defendant is then asked to respond to the community and also whether he or she has anything to say to the elder by way of respect. Often a defendant will apologise and sometimes he or she is just silent and seemingly remorseful at this time. Those of us involved in the court have often been surprised about the depth of responses of defendants to their community, and the expressions of remorse or shame

can be quite overwhelming, as can be acknowledgments of respect for those elders or family members who have spoken. The fact that a senior community member knows an older relative of the defendant who disapproves of the conduct alleged, and says so, can be quite disarming for a defendant who would in the ‘mainstream’ court be able to remain anonymous and avoid family disapproval.

After these exchanges the elder or elders speak to the defendant about the conduct before the court, the impact it has upon the community and victims, and the Indigenous Community Code of Conduct. As an indication of the variety of responses, in one particular case, one elder shared a history of (remedied) alcohol abuse with a defendant whilst another spoke of ‘two laws’ — white and Aboriginal — and the need to comply with both.

On occasion a defendant is reminded that the offending has been committed in another person’s traditional country and that this demonstrates a lack of respect. Defendants are invariably reminded that they not only offend against the imposed law but also against the Aboriginal people whose country this is. If a defendant has stolen a car from Wurundgeri country, driven it through Tungerung country and into Bangerang and Yorta Yorta country and thereby offended all those people who adhere to a community code of conduct and cultural issues, that defendant may be reminded of this. Where a defendant acknowledges culture as a significant part of his or her life this has been picked up by people in the court and used as a means to remedy conduct. In some respects this hearing process develops Native Title issues in that it certainly relocates defendants in ‘place’, reignites the importance of cultural connection, and recognises it in a non-judgmental fashion. It is remarkable to observe the power of an Aboriginal defendant simply stating ‘I am Barkinji’ when he or she appears otherwise disempowered by circumstances.

The elder dealing with the case and the magistrate then confer about rehabilitation, community and family considerations and penalty at the bar table, audibly and openly. If the matter is very complex, or if there are particular concerns, such as with health or housing, that need

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resolving, the matter will be adjourned for further hearings or reports. If sentence is imposed on the day of hearing and it involves a community-based order of some kind the defendant will have those requirements explained directly after the hearing.

Women who have appeared before the court have been connected with senior women mentors. Those who struggle with alcohol or drug issues are referred to services and given opportunities to engage in self-motivated rehabilitation if they have previously failed to comply with formal orders. This reflects the view of many people involved with the court that a person has to personally desire change for rehabilitation to work. If there are housing difficulties the AJO will connect the person or family members with service providers. We have recently been advised that the community health service worker who provides drug rehabilitation for younger people has noticed a marked improvement in demeanour of those referred to her by the Koori Court compared with those referred through mainstream courts.

The interest in the operations of the court is intense and many people and services have attended as observers. Interestingly, once parties have either attended the court or a discussion forum, interest increases in extending the process to ‘mainstream’. Feedback on the Koori Court to date has been overwhelmingly positive. Some scepticism was expressed within the Indigenous and non-Indigenous communities about the possibility of the Koori Court providing a soft option for Koori defendants, however, this has not been the experience of those who have attended the hearings.

One of the most notable points of feedback from defendants is that they and their family members are markedly engaged with the process. They participate and ‘have a say’ in the hearing. People often acknowledge that the defendant, family and community would not be given the opportunity to participate in a mainstream court as occurs in the Koori Court.

Anecdotally it appears that defendants are benefiting from exposure to the critical and also reinforcing comments of their elders and community members. We have already noticed a reduction in breaches

of bail by failure to appear on court dates. We have adjourned hearings to allow defendants to continue with self-initiated drug rehabilitation and been pleased to observe voluntary rehabilitation continuing and working. The vigilance of community members as a result of their knowledge of the defendant's appearance in court means that we are sometimes in receipt of very good information about compliance or breaches. We have all been moved by some of the stories which have been told in the courtroom about homelessness, about the loneliness of being out of gaol and losing kids, about difficulties with substance abuse, and about incidents of self harm. Those stories are simply not told to the same effect when filtered by lawyers. And, sometimes those stories are not told at all.

What is impressive about the court at this early stage is that many Aboriginal people have found their voice in it. We wait and take time, we invite rather than compel engagement, we back-track and re-enter dialogue from other places. We are listening to what we are told. We listen to aunts and uncles, to mothers of young babies, and to young men who have committed a criminal offence but who defer and show respect to their elders. The hearing process is anything but a soft option. On occasion a defendant who commenced the hearing in an off-hand fashion concluded it close to tears.

Equally as important as other aspects of the Koori Court is the commitment from community agencies, service providers and individual members of the local community. Their attendance enhances the Koori Court's ability to put together meaningful sentencing options and strengthens the Koori Court's status, credibility and relevance in the community.

Other Aboriginal court initiatives

The Koori Court initiative is not isolated. South Australia has been operating Aboriginal Sentencing Courts for about three years in the metropolitan districts of Port Adelaide, Port Augusta, and Murray Bridge, with another planned for Ceduna. The model there is not the subject of legislation as is the case in Victoria but provides the template

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for culturally inclusive courts in southern and metropolitan regions. The South Australian model, whilst not formally evaluated, demonstrates that Aboriginal people are more willing to attend these courts reflected in a reduction in the number of people failing to appear — from 50 per cent to 20 per cent. This figure translates into a reduction of ‘failing to answer bail’ charges as prior convictions which lessens ‘flight’ risk opposition to bail applications. There is also anecdotal information that there has been a reduction in breach rates in community orders.

Queensland has recently initiated a Murri Court in Brisbane pursuant to the powers outlined in the *Penalties and Sentences Act 1992* (Qld) section 9, which provides for community justice groups of Indigenous people to assist the court by advising at sentencing hearings.

The Magistrates Court at Nowra in New South Wales is conducting a circle sentencing court for serious recidivists. The philosophy behind circle sentencing is that prison sentences do not deter crime, prisons make people worse not better, and there is an essential imbalance in a procedure which excludes victims from expressing their views or concerns. Circle sentencing is described as a means to ‘restorative justice’ in that it provides for shared responsibility for resolving offending patterns. Informal community mechanisms can be of assistance in this process, and crime is conceived as an ‘injury’ not just an infraction against someone else’s ‘law’. The circle is said to reflect concern about community or holistic ‘health’ and attempts to make the offender more conscious of the impact of his or her actions. The model works towards re-integrative shaming but it is not without its detractors in North America and criticisms include the lack of informed consent to the process, the potential for sentencing disparity, the need for guidelines and procedures, the potential for power imbalances to result in injustices, the place for such models in urban settings, and the blurring of lines between social work and law enforcement.

Conclusion

It is only in comparatively recent times that the need for Indigenous culturally appropriate innovation in legal and court practices or court culture has been recognised in the more closely occupied, southern, and metropolitan, parts of this country (Queensland Criminal Justice Commission 1996, Cunneen 2001). It is in these areas that we have persistently heard ‘there aren’t any Aborigines’. The more accurate position, which suggests the continuity of Aboriginal cultural norms and practices in the ‘south’, builds upon the pioneering work of linguists such as Diana Eades (1982, 1988) and Liberman (1985), and collections such as that by Ian Keen (1988) about Aboriginal people in ‘settled’ Australia, and is finding voice in the Koori Courts where culture and connection to country and place is plainly evident.

The Australian Aboriginal Reconciliation movement has suggested a groundswell of support for the incorporation of Aboriginal people’s knowledge, skills, values, cultural beliefs and practices into the dominant society’s processes, practices and norms, of which the legal system is one. In establishing and running Koori Courts we are showing that we can embrace reconciliation and partnerships in diverse ways. These Indigenous sentencing courts will encourage, from the inside, our imposed legal system to recognise the continuity of difference, the significance of kin, the meaning of sharing, and the methods by which this is culturally undertaken, and allow for attribution of appropriate weight to these factors when sentencing Aboriginal people. We are embarked upon a paradigm shift, blending disciplines and cultures in real partnerships which would have been unthinkable 10 years ago.

In embarking on this journey we have started a debate about what it is we are doing — openly and in small circles. We have started to talk about how the ‘culture’ of our legal system and our courts need to change to more comprehensively serve a group in the community whose understanding of justice has always been, since colonisation, from the ‘outside’. This discussion is still inchoate in that it takes time for us to understand that we are talking about our ‘culture’ in the courts and in

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the justice system. We are talking about taking risks with our processes and making ourselves vulnerable to both rational criticism and intemperate harangue. More than just the built environment of our small third court at Shepparton is under scrutiny, and more than the shape of the bench is being changed.

Notes

- 1 This article is based on a paper presented at the 7th Colloquium of the Judicial Conference of Australia in Darwin, 30 May to 1 June 2003. The views expressed are those of the authors and should not be attributed to the Koori Court.
- 2 The University of Melbourne Architecture faculty has requested graduate students attend the court and it is envisaged they will develop court interiors as part of their thesis requirements.

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