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Indigenous Participation in Sentencing Young Offenders: Some Findings from an Evaluation of the Children's Koori Court of Victoria

Allan Borowski PhD FASSA
Professor of Social Work and Social Policy
La Trobe University, Melbourne, Victoria

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Background

- Royal Commission into Aboriginal Deaths in Custody (RCIADIC) (1991) highlighted overrepresentation (OR) of Indigenous Australians in the criminal justice system.
- Many of the strategies to address OR that were precipitated by the Royal Commission have focussed on **systemic bias** as a major cause of OR, i.e., prejudice and discrimination of the law, of the police in the exercise of discretion and in the operation of the criminal justice system.
- Two decades and \$400 million (Biles 2010) later OR nevertheless remains a significant problem.
- Indigenous people are 13 times more likely than non-Indigenous people to be in detention.
- Nationally, Indigenous youth aged 10-17 years are 28 times more likely to be in detention. In Victoria, they are 16 times more likely to be in detention than non-Indigenous youth.
- An important strategy for addressing OR has been to foster Indigenous participation in sentencing procedures. (Others include use of imprisonment as a last resort, alternatives to police custody, decriminalization of public drunkenness and other alcohol-related offences.

Reasons for Indigenous Participation in Sentencing

- Serves to address “the negative human experience which is the reality behind the statistics on Aboriginal overrepresentation” (RCIADIC 1991)—an experience steeped in the alienation and inaccessibility of the conventional adversarial court (Mavec 2008:7).
- Enhances the court’s perceived legitimacy and hence offenders’ responsiveness to it.
- Empowers and strengthens the Indigenous community, e.g., through enhancing authority of Elders and thereby facilitating the restoration of Indigenous mechanisms of social control.
(Note that shaming, a feature of court proceedings, is an important aspect of maintaining order in Aboriginal communities.)
- Helps transform Indigenous communities’ relationships with White society.
- Helps reduce recidivism and, in turn, OR (assuming sizeable proportion of Indigenous offenders are processed and decreases reoffending).

The Children's Koori Court of Victoria

- In June 2000 the Victorian Government and representatives of the Indigenous community became parties to the Victorian Aboriginal Justice Agreement (VAJA). The peak body responsible for overseeing the implementation of the VAJA is the Aboriginal Justice Forum (AJF). In late 2003, the AJF determined that a joint project between DoJ, DHS and the Koori Caucus be developed to consider the establishment of a Children's Koori Court (Criminal Division) in Victoria.
- The development of the Court was overseen by a State-wide Reference Group that developed the Children's Koori Court Model and the *Children and Young Persons (Koori Court) Act 2004*.
- The legislation was passed in late 2004. The Act received Royal Assent on 7 December 2004. The Court began operating in October 2005 on a two-year pilot basis that was subsequently extended.

The Children's Koori Court of Victoria: Criteria for Exercise of Jurisdiction

- Defendant must be descended from, identify as and be accepted as ATSI by an ATSI community.
- Offences must be within the jurisdiction of the Criminal Division of the Children's Court of Victoria. Thus, the CKC can hear summarily all offences except murder, attempted murder and manslaughter, culpable driving causing death and arson causing death. Sexual offences are excluded from the CKC (and the Magistrates Koori Court).
- Age jurisdiction is 10 - <18 at time of alleged offences committed and <19 when proceedings commence before the CKC.
- Defendant must intend to plead guilty or have been found guilty in a mainstream Children's Court.

The Children's Koori Court of Victoria: Sentencing Powers

Same as those that may be imposed on defendants who appear before a mainstream Children's Court.

Supervised order (probation and youth supervision orders) and those involving detention are administered by Department of Human Services' Youth Justice section.

The Children's Koori Court of Victoria: Type of Court

- Not adversarial. Solely a sentencing court.
- Premised on the notion that the sentencing hearing process + services to which defendants may be linked as part of court disposition can influence future behaviour of defendants.
- Most important benefits flow from the “sentencing conversation.” The court as a therapeutic dramaturgical arena in which reintegrative shaming takes places.
- Is a “specialist” court with *some* problem-solving and therapeutic overtones (Freiberg 2001) or a “specialty” court given the new and innovative court practices that it incorporates.
- Marchetti and Daly (2004, 2007) argue such courts are in a category of their own given “the role of the Indigenous community is a key influence in correcting and modifying established criminal processes in ways that are less apparent to relevant ‘communities’ in other specialized courts,” e.g., conferencing. Further, they are ultimately concerned with transforming racialised (Indigenous-White) relationships and communities.
- Atmosphere of court is relatively informal.

The Children's Koori Court of Victoria: Some Characteristics

- Male or female magistrate sits with two Aboriginal Elders or Respected Persons (ERPs), most often one male and one female. Magistrate is the sentencing authority.
- Hearing is held around an oval bar table in a special courtroom that has been smoked, has Aboriginal, Torres Strait Island and Australian flags as well as Aboriginal art work on the walls.
- Hearing participants (members of the “courtroom workgroup”) also include uniformed police prosecutor, defence lawyer (usually from VALS), CKC Worker, Koori Youth Justice Worker, defendant (who sits opposite the magistrate), family member(s) and sometimes an additional professional, e.g., Disability Services Worker, if germane to the case.
- Hearings range from 25 to 120 minutes in duration.
- Sits on a Thursday morning fortnightly. Is a “low volume” court.

Major Goals of the Children's Koori Court

Operational Goal

To reduce the over-representation of Koori youth in Victoria's juvenile justice system.

Community-Building Goal

Increase Indigenous ownership of the administration of the law.

Objectives of the Children's Koori Court

Goal 1: Reduce over-representation

Objective 1a: Reduce the failure-to-appear rate by Koori youth

Objective 1b: Reduce the court order breach rate

Objective 1c: Reduce the rate & seriousness of re-offending

Objective 1d: To build a culturally-responsive juvenile justice system for Koori youth

Goal 2: Increase Indigenous ownership of administration of the law

Objective 2a: Increase positive participation by Koori youth, their families and their community in the Court

Objective 2b: Increase accountability of the Koori community for Koori youth

Objective 2c: Promote/increase Koori community awareness of community codes of conduct/standards of behaviour

Research Questions

Outcome Evaluation Question

1. To what extent have the CKC's objectives been realized?

Process Evaluation Questions

2. Does the CKC serve those it is intended to serve-- its target population?
3. Has the CKC been implemented in accord with its design?
4. How do court actors ***and defendants and their families*** experience the CKC?

Formative Evaluation Question

5. What improvements should be made to the CKC?

Defendants' Characteristics

Table 2.1: Number and Gender of Defendants by Dates of First Scheduled CKC Appearance (N = 72) and Duration of Tracking (N = 62)

First Appearance before the CKC	Total	Males	Females	Duration of Data Tracking
October 2005 – May 2006	24	17	7	24 – 30 months to May 2008
June – November 2006	14	9	5	18 – 24 months
December 2006 – May 2007	11	8	3	12 – 18 months
June – November 2007	13	12	1	6 – 12 months
December 2007 – May 2008	10	9	2	Not applicable
Total	72	54 (75%)	18 (25%)	

Table 2.2: Age and Gender of the Defendants

Age at First Scheduled CKC Appearance	Total	Males	Females
12 years	1	1	
13 years	6	4	2
14 years	11	7	4
15 years	18	13	5
16 years	9	4	5
17 years	13	13	
18 – 19 years	13	11	2
Unknown	1	1	
Total	72	54 (75%)	18 (25%)

Table 2.4: Overview of Offending History Prior to First CKC Appearance

Prior histories recorded for each young person	Total	Males	Females
No history of cautions or prior offences	11 (18%)	8	3
Cautions or diversions only	26 (42%)	18	8
Prior offences proven in Children's Courts in Victoria without history of caution or diversion	6 (10%)	4	2
Prior offences proven in Children's Courts in Victoria with history of cautions or diversion	19 (31%)	16	3
Total	62	46	16

Table 2.5: CKC Dispositions

Dispositions - First CKC Appearance	Total	Males	Females
Charges Dismissed	3 (4%)		3
Accountable undertaking	8 (11%)	5	3
Good Behaviour Bond	23 (32%)	17	6
Probation Order	18 (25%)	14	4
Youth Supervision Order	5 (7%)	4	1
Youth Training / Residential Centre Order 	7 (10%)	7	
Adjourned for contested hearing	1 (1%)	1	
Failure to appear – warrant executed, outcome unknown	1 (1%)	1	
Initial appearance adjourned – outcome unknown at time of data collection	6 (8%)	5	1
Total	72	54	18

Table 2.7: Defendants with a Prior Involvement with the Department of Human Services

	Total	Males	Females
Youth Justice, Child Protection and Disability Client Services Histories			
Prior DHS Youth Justice History (N=62)	17 (27%)	15	2
Child Protection (CP) History* (N=72)	19 (26%)	10	9
Registered Disability Services (DS) Clients* (N=72)	5 (7%)	5	
*Includes Dual CP and DS clients	(4)	(4)	
Total	41 (33%)	30	11

Failure to Appear, Breaches of Court Orders and Recidivism and its Seriousness

Table 3.1 Gender of Defendants and Period of Tracking

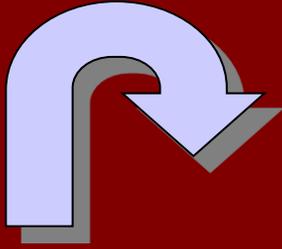
First Appearance Scheduled (6-month Cohorts)	Total	Males	Females	Duration of Data Tracking
October 2005 – May 2006	24 (39%)	17	7	24 – 30 months to May 2008
June – November 2006	14 (23%)	9	5	18 – 24 months to May 2008
December 2006 – May 2007	11 (18%)	8	3	12 – 18 months to May 2008
June – November 2007	13 (21%)	12	1	6 – 12 months to May 2008
Total	62	46 (74%)	16 (26%)	

Table 3.2: Failure-to-Appear by Tracking Cohort and Gender

	Total	Male	Female
First Appearance Scheduled (x 6-month Cohorts)			
October 2005 – May 2006 (n=24)	6	3	3
June – November 2006 (n=14)	1		1
December 2006 – May 2007 (n=11)			
June – November 2007 (n=13)			
Total:	7 (11%)	3	4

Table 3.3 Breach of CKC-Ordered Probation or Youth Supervision Order Heard at the CKC by Tracking Cohort and Gender

First Appearance Scheduled (x 6-month Cohorts)	Totals	Male	Female
October 2005 – May 2006 (n=24)	4	3	1
June – November 2006 (n=14)	3	2	1
December 2006 – May 2007 (n=11)	1	1	
June – November 2007 (n=13)			
Total	8 (13%)	6	2



Measuring Recidivism

The “indicator events,” i.e., the events determining and qualifying for inclusion in assessments of reoffending, can include:

- (1) charges proven in further court appearances,
- (2) re-arrest and/or subsequent charges being laid and
- (3) coming to the attention of the police.

Table 3.4 Offending Histories Subsequent to Initial CKC Appearance

Subsequent Offending Histories	Total	Males	Females
Subsequent offences proven at a court appearance	37 (60%)	30	7
Record of further charges pending at 31 May 2008	8 (13%)	4	4
Record of a single subsequent court appearances where all charges were struck out/withdrawn	4 (6%)	4	
No subsequent offences recorded	13 (21%)	8	5
Total	62	46	16

Table 3.5 Subsequent Offending History by Tracking Cohort

	Duration of data tracking to May 2008				Total
	24 – 30 months	18 – 24 months	12 – 18 months	6 – 12 months	
Subsequent histories recorded for the young people in each six-month cohort					
Subsequent offences proven at a Court appearance	18 (75%)	9 (64%)	4 (36%)	6 (46%)	37 (60%)
Further charges pending at 31 May 2008	1	3	1	3	8 (13%)
Single subsequent Court appearances where all charges were struck out/withdrawn	1		2	1	4 (6%)
No record of subsequent offences recorded	4	2	4	3	13 (21%)
Totals for each cohort	24	14	11	13	62

“Comparative” Recidivism Rates

Two previous studies that employed charges proven in further court appearances as the indicator event .

DHS (2001) = 65 per cent

Smith and Jones (2008) = 78.4 per cent

CKC evaluation = 60 per cent*

*Likely to be slightly overstated because some offences proven at a subsequent court hearing could have been as a result of offences committed prior to initial CKC hearing. Research Advisory Committee believes recidivism more likely to be a few percentage points lower. However, had the “follow-up” period been longer, it is highly likely, based on previous NSW BOCSAR research, that the recidivism rate would be higher still.

Table 3.7: Offence Seriousness Ratings for Principal Offences Proven at Prior, Initial CKC and Any Subsequent Court Hearings

National Offence Index (NOI) Seriousness Rating and Australian Standard Offence Classification (ASOC) Categories		Principal Prior Offence Proven in Court	Principal Offence at Initial CKC	Principal Subsequent Offence
NOI Rating	Aggregated Offence Categories			
0 - 9	1. Homicide & related offences			
10 - 35	2. Dangerous & negligent acts endangering persons	15	23	18
36 - 61	3. Non-aggravated robbery, threatening behaviour, weapons offences, intent/burglary	4	18	11
62 - 92	4. Fraud & deception (except fare evasion), theft & motor vehicle offences	3	9	4
93 - 103	5. Property damage & transport offences (including fare evasion)		9	2
104-127	6. Public health & safety, escape custody & illicit drug offences	1	1	
128-137	7. Trespass, offensive behaviour & public order offences	2		1
138	8. Theft from retail premises		2	
139-155	9. Resist or hinder official, driving, parking, pedestrian & miscellaneous			
156-157	10. Not known			1
	Total	25	62	37

Table 3.8 Offence Seriousness Compared: Initial CKC Hearing Offences Relative to those Subsequently Proven in Court Reappearance

	Totals	Less serious	No change	More serious
Subsequent Offence(s) Proven Relative to Initial CKC Offence(s)	37	16	9	12
Percentage of re-offenders (N=37)	100	43	24	33

Observations of CKC Hearings

Observations of CKC hearings demanded by study's effort to address:

- RQ1: Extent to which objectives 1d -2c had been realized (outcome evaluation):
 - Objective 1d: To build a culturally-responsive juvenile justice system for Koori youth
 - Objective 2a: Increase positive participation by Koori youth, their families and their community in the Court
 - Objective 2b: Increase accountability of the Koori community for Koori youth
 - Objective 2c: Promote/increase Koori community awareness of community codes of conduct/standards of behaviour
- RQ3: Has the CKC been implemented in accord with its design? (One of the process evaluation questions.)
- RQ4: What improvements should be made to the CKC? (The formative evaluation question.)

Observations of CKC Hearings

- Data saturation reached after 19 hearings across 11 sittings (22 weeks) of the CKC. Each hearing was observed by two observers. Observations notes were recorded on Court Observation Schedule (COS) which then served as the basis for preparing a more detailed report on each hearing based on the structure of the COS. The report was normally completed within two days of the hearing and thematically analyzed. Each observer shared his findings with the other observer for discussion and confirmation—a form of *peer debriefing* designed to foster the *credibility* of their analyses.
- 14 hearings were new cases, 5 were continuing ones (had been previously adjourned). The observed hearings involved 18 males and 1 female (latter therefore underrepresented) who were variably connected to the Koori community.
- All defendants legally represented. (Mainly by VALS lawyers.)
- 12 of 19 defendants appeared in court were accompanied by one or more family members.
- Indigenous service agency representatives were present at 10 of 19 hearings.

Observations of CKC Hearings: Select Findings

- Relatively little interaction between magistrates and ERPs.
- All of the magistrates sought to directly engage with the defendant. Though variable, degree of engagement was greater than that either normally attempted or seen in the mainstream Children's Court.
- Magistrates often expressed disappointment that the youngster was once again appearing in a Children's Court.
- Hearings were highly supportive and caring and affirmed or validated the young defendants (but not their behaviour).
- Sentence and its rationale were slowly and clearly explained.
- Cultural dimensions of the court received little attention by magistrates other than in opening remarks (Welcome to Country).
- The extent of the ERPs' interactions with defendants and also the extent to which they made explicit reference to matters cultural were variable.
- ERPs also invariably underscored the gravity of the offences, the impact of the defendant's behaviour on victims.
- Greater interaction often occurred where at least one of the ERPs had some knowledge of the defendant and/or his/her "mob."

Observations of CKC Hearings: Select Findings

- ERPs engaged in reintegrative shaming. Forceful admonitions (when ERPs were most likely to make explicit cultural references) were tempered by positive affirmation. Importance of respect was made considerable issue of.
- Family members' engagement with court actors was generally quite limited.
- Koori Court Worker usually did not actively engage in the discussions around the oval bar table during the hearings.
- Many of the questions which the magistrates directed to the lawyers could, at least in the first instance, have been directed to the defendant.
- Lawyers generally prepared their cases carefully and provided the court with considerable information on their clients. Also typically made strenuous representations on behalf of their clients.
- Police prosecutor's role much less circumscribed than in mainstream Children's Court. Proactively contributed to deliberations.
- Proceedings were usually directed by the magistrate with a "gentle, dignified hand."
- Proceedings were less formal than those in the mainstream Children's Court.

Observations of CKC Hearings and Outcome Evaluation Questions

Objective 1d:

To build a culturally-responsive juvenile justice system for Koori youth

Indicators include participation of Elders and/or Respected Persons (ERPs) in the hearing process through providing advice to the magistrate and the magistrate conferring with the ERPs about appropriate sentences or conditions to be attached to the sentence.

ERPs participated in all hearings. Degree of participation was variable. A function of, e.g., presiding magistrate's "hearing management style," verbal skills of both defendant and defendant's family members, and extent to which defendant and family were known to the ERPs.

As the magistrate is the sentencing authority, magistrate did not confer with ERPs re most appropriate sentences. Magistrate did consider advice occasionally offered by ERPs re appropriate support services. However, ERPs often elicited additional information (from defendant and family members re background, attachment to Koori community, motivation for offending, peer influences, sporting activities, work experience/preferences, plans for future, etc.) which may have informed magistrate's decision-making.

Observations of CKC Hearings and Outcome Evaluation Questions

Objective 2a:

Increase positive participation by Koori youth, their families and their community in the CKC

Indicated by the active participation of ERPs in the hearing process and the informality and comprehensibility of the proceedings to participants.

Participation of ERPs already mentioned.

Hearings were relatively informal.

Comprehensibility emphasized. Manifest in early part of order of proceedings when nature of court explained. Meaning of sentence, its implications and rationale carefully explained.

Family member(s), Koori community agency representatives, other members of Koori community often attended court. Always respectfully greeted and invited to contribute by magistrate and then often did so proactively.

Observations of CKC Hearings and Outcome Evaluation Questions

Objective 2b:

Increase accountability of Koori community for Koori youth

Indicators include ERPs conveying the message that the defendant's crimes are condoned by neither the Indigenous nor non-Indigenous communities and support for the defendant, family members and community members to address the CKC.

ERPs also invariably underscored the gravity of the offences and the impact of the defendant's behaviour on victims.

Elders did not resile from being quite forceful in the way they delivered admonitions.

A theme throughout many hearings was the importance ERPs attached to defendants being respectful: Offending behaviour was presented as a manifestation of disrespect to parents, ERPs and the Koori community and a failure by the defendant to meet his/her obligations to them.

As noted previously, defendants, and family members engaged much more actively in proceedings than in mainstream Children's Court. This was especially so for Koori community members. Not only was this participation encouraged by magistrates but Koori participants in the hearing – seated both at oval table and in public gallery – felt comfortable in doing so.

Observations of CKC Hearings and Outcome Evaluation Questions

Objective 2c:

Promote/increase Koori community awareness of Indigenous & community codes of conduct/standards of behaviour

Indicators include family members reinforcing ERPs' expectations of defendants while on sentence and participation by the Koori community in the court process, the latter also reflecting an increased sense of ownership of the administration of the law by that community.

Family members' reinforcing ERPs' expectations while defendant on sentence could not be determined in this study because of the inability to recruit interviewees utilizing the stringent protocol laid down by ethics committees.

The active participation by the Koori community in the court process indicates a high sense of ownership of the CKC approach to the administration of justice.

Interviews with Court Actors and External Stakeholders

Interviews with court actors and external stakeholders were demanded by the study's effort to address:

- RQ1: Extent to which objectives 1d -2c had been realized (outcome evaluation):
 - Objective 1d: To build a culturally-responsive juvenile justice system for Koori youth
 - Objective 2a: Increase positive participation by Koori youth, their families and their community in the Court
 - Objective 2b: Increase accountability of the Koori community for Koori youth
 - Objective 2c: Promote/increase Koori community awareness of Indigenous and community codes of conduct/standards of behaviour
- RQ3: Has the CKC been implemented in accord with its design? (second process evaluation question)
- RQ4: What improvements should be made to the CKC? (formative evaluation question)

Summary of Findings

Outcomes

Operational Goal

- Failure to appear rate was very low
- Court order breach was very low
- Recidivism rate was high but lower than that found by other studies. Most likely higher with a longer follow-up period.
- Offences committed by offenders were often less serious than principal offence heard at initial CKC hearing and, for most, no more serious.

Community-Building Goal

- The CKC is a culturally-responsive institution within Victoria's juvenile justice system
- It has fostered positive participation by Koori youth, their families and their community in the Court
- It has fostered increase accountability of the Koori community for Koori youth
- It has fostered increased Koori community awareness of Indigenous and community codes of conduct/standards of behaviour

Process

- The CKC served its target population.
- The CKC model was implemented in accord with its design.

Formative

- Greater resourcing for Indigenous community service agencies and service delivery protocols needed.
- Further communications skills training for magistrates and ERPs

Discussion and Conclusion

- CKC is an expression of a cooperative partnership between the Koori community and Victorian government to develop more culturally-appropriate court processes. Recognizes importance of Koori community's involvement in addressing the OR problem and its capacity to do so.
- Re operational goal, unrealistic to expect that Indigenous sentencing courts will result in major reductions in recidivism and, in turn, the overall level of OR, at least in the short term.
 - **Reason 1:** CKC processes a small proportion of young Indigenous offenders.
 - **Reason 2:** A large proportion CKC defendants reoffend.
 - **Reason 3:** The CKC, as a response to systemic bias, is unable to address OR arising from high rates of Aboriginal crime. Decreasing OR arising from high crime rates will require targeting the factors that contribute to high Indigenous crime, e.g., socio-economic disadvantage family dissolution, substance abuse, unemployment— in a word, structural change.
- Nevertheless, the CKC is an important vehicle for processing young offenders, satisfying demands of the Indigenous community for a more effective legal system, empowering & strengthening Indigenous communities and transforming their relationships with White society.

The End

Hooray!

