

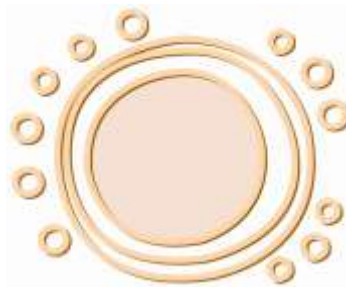


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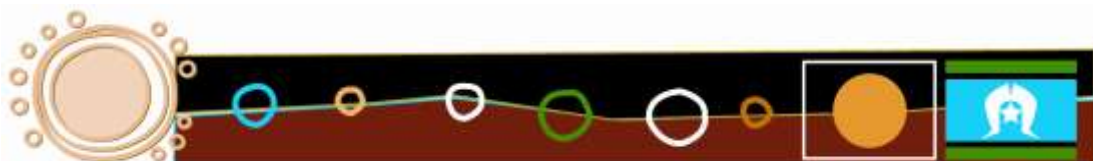
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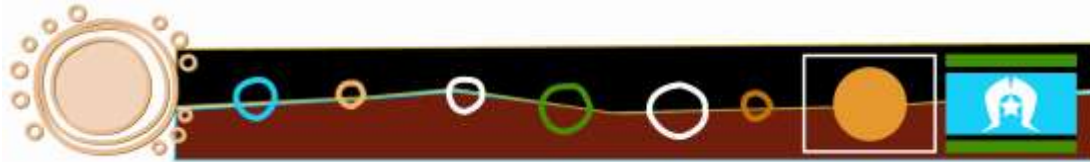


# Strengthening the Ngambra Circle Sentencing Court



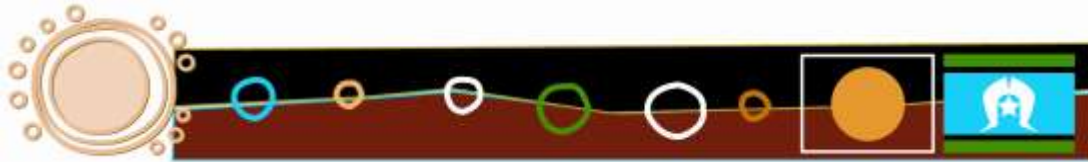
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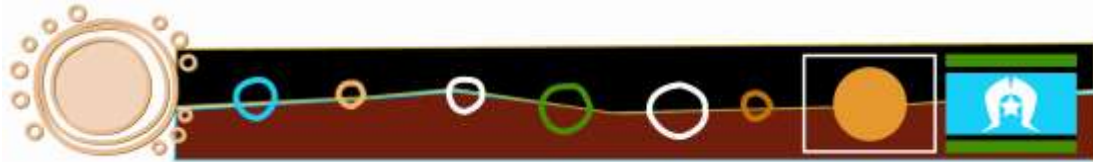


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## SUMMARY OF OPTIONS

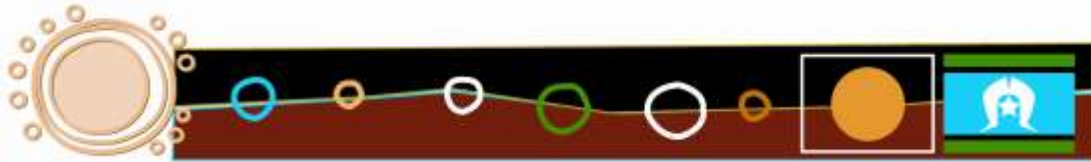
### Options

#### *Aims and Objectives*

1. Do the current aims and objectives of the Circle Court adequately describe its purpose, practice and processes?
2. Are there additional aims or objectives that need to be incorporated?

#### *Role and responsibilities of panel members*

3. Should the Circle Court consider adopting the following suitability assessment criteria for panel members and Elders:
  - a. To challenge the behaviour of the defendant;
  - b. The defendant be required to accept responsibility for his or her crime;
  - c. To assess a defendant's capacity and willingness to listen to panel members and or Elders;
  - d. To assess a defendant's level of remorse;
  - e. To assess if a defendant has capacity to make amends to a victim;
  - f. To assess the impact of the offence on the victim and community;
  - g. To assess the potential benefits to the victim and community of the Circle Court process;
  - h. Should panel members/Elders, the Coordinator or the prosecutor seek the views of the victim and their perception as to whether the defendant is suitable for Circle?
4. Alternatively, should the RJU suitability tools to assess a defendant's suitability be adopted into Circle Court processes?
5. Define the role and responsibilities of panel members and Elders to include:
  - a. To challenge the behaviour of the defendant;
  - b. To assist the Magistrate to determine an appropriate sentence;
  - c. To provide any relevant cultural advice to the Magistrate;
  - d. To provide background information established during the assessment phase;
  - e. To look for culturally appropriate rehabilitative options for a defendant;



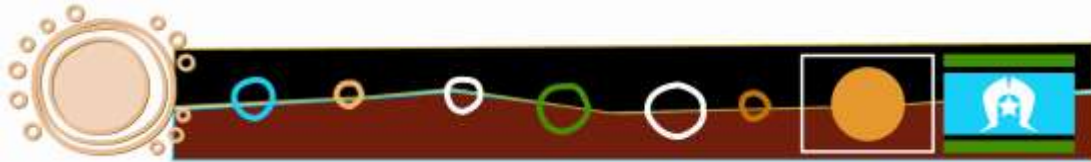
- f. To ensure the needs of a victim are heard and respected in the Circle Court process;
  - g. To assist a defendant to make amends to a victim.
6. Consider adopting a Code of Conduct similar to the Koori Court model for the Ngambra Circle Court.
7. Develop an operational manual that defines the roles and responsibilities of panel members and Elders. This manual should form part of the training program.

#### *Role of Victims*

8. Should the role of a victim in Circle Court be confined to what is contained in a under the Crimes Sentencing provisions for a VIS?
9. Should the role of a victim be based on:
- a. the model that was adopted by the VoCC during the pilot?
  - b. The victim model in the RJU process?
10. What supports and information should be made available to victims and who is best placed to provide this level of service delivery?

#### *Operational issues*

11. Should the Aboriginal Justice Centre (AJC) working in collaboration with ACT Corrective Services (ACTCS) take a more proactive role in monitoring and coordinating post sentence supports?
12. Should the Circle adopt a model similar to the RJU model to monitor a defendant's post sentence compliance?
13. Noting the limitations, should the role of panel members and Elders include monitoring a defendant's compliance with their sentence?
14. Should the Circle Coordinator be responsible for the monitoring of a defendant and his or her compliance with a sentence (similar to the NSW and Victorian models)?
15. Should the selection process for panel members and Elders developed by the A&TSI Court reference group, be adopted?
16. Should the Court solidify its relationship with Relationships Australia (ACT) in the form of an MoU to provide ongoing counselling to Elders and panel members.
17. How many panel members or Elders should be present at:

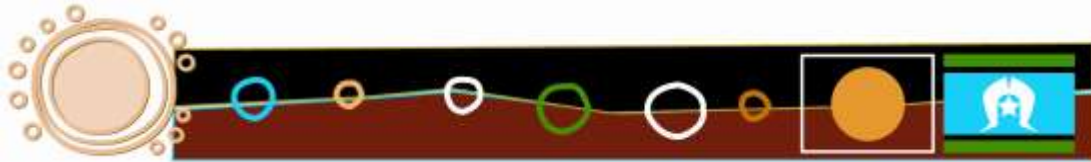


- a. the assessment stage; and
- b. the sentencing stage?

18. Should the Circle Court sittings return to Yarramundi Reach; or an alternative location?
19. Should the Circle Court continue to sit in a hearing room at the ACT Magistrates Court?
20. If yes, should a dedicated hearing room be decorated at the Magistrate's Court with appropriate furnishings, cultural insignia and paintings etc (similar to the Koori Courts)?
21. Should consideration be given to alternating Circle Court sittings between Yarramundi Reach and the hearing room at the Magistrates Court?
22. Should the Circle Court panel members and Elders be paid for their time?
23. If yes, what is an appropriate level of remuneration?
24. Should the Circle Court be evaluated?
25. If yes, what measures should be evaluated?
26. Should family violence matters be included in the Circle Court processes?
27. If yes, what arrangements need to be put in place to ensure victims are adequately protected?
  - Should the VoCC guidelines be adopted and adhered to in full?
  - Should consideration be given to adopting a victim's model similar to the RJU model (see discussion under role of victim's below)?
28. Should the Circle Coordinator remain working for the Court, with a change in the supervision arrangements to the Circle Magistrate?
29. Should the Circle Court Coordinator be co-located with the ACT Restorative Justice Unit?
30. If so, should the Circle Court remain a separate entity from other restorative justice processes?

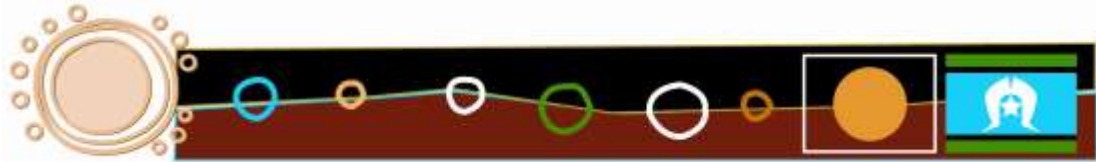
***Expansion of Circle Court***

31. In the long term, should less serious sexual assault offences be included in Circle Court processes?
32. If yes, what arrangements need to be put in place to ensure that a victim is adequately protected and supported in the process?



- 33. Should consideration be given to expanding the Circle Court to the ACT Supreme Court jurisdiction in the long term?**
- 34. If yes, what arrangements are considered necessary to facilitate this?**
- 35. As a long term measure, should the Circle Court evolve into a process similar to the RJU model where panel members and Elders conduct the Circle process and report back to a Judge/Magistrate?**
- 36. Should defendants who have limited or no connection to the ACT A&TSI community be able to participate in Circle Court?**
- 37. Should the Circle Court be expanded to include the Jervis Bay Territory in the long term? If yes, what arrangements and resources need to be put in place to facilitate this expansion?**
- 38. Should all A&TSI defendants who appear before the ACT Magistrates Court referred for assessment to Circle Court?**
- 39. Should the Circle Court be extended to youth in the short, medium or long term?**
- 40. Should the Circle Court Coordinator be co-located with the RJU, and the role expanded to facilitate diversion measures for young A&TSI offenders?**
- Legislative basis***
- 41. Should the ACT adopt an ‘overarching’ legislative model for the Circle Court that names the Circle Court and identifies its aims and objectives?**
- 42. Should the ACT adopt a model similar to the Koori Court legislative model utilised in Victoria?**

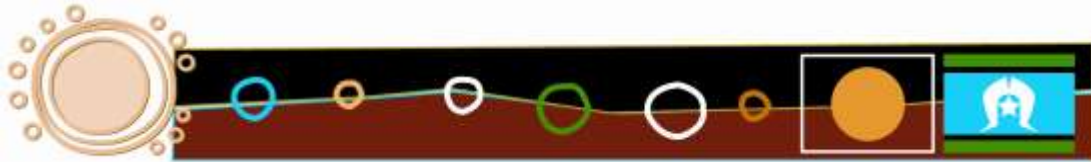




**TABLE of ABBREVIATIONS**

<b>NCSC</b>	<b>Ngambra Circle Sentencing Court</b>
<b>Aboriginal and Torres Strait Islander</b>	<b>A&amp;TSI</b>
<b>Aboriginal Justice Centre</b>	<b>AJC</b>
<b>ACT Corrective Services</b>	<b>ACTCS</b>
<b>ACT Council of Social Services</b>	<b>ACTCOSS</b>
<b>Domestic Violence Crisis Service</b>	<b>DVCS</b>
<b>Relationships Australia</b>	<b>RA</b>
<b>Restorative Justice Unit</b>	<b>RJU</b>
<b>Office of Director of Director of Public Prosecutions</b>	<b>DPP</b>
<b>Canberra Institute of Technology</b>	<b>CIT</b>
<b>ACT Department of Justice and Community Safety</b>	<b>JACS</b>
<b>Victims of Crime Coordinator</b>	<b>VoCC</b>
<b>Aboriginal Legal Service</b>	<b>ALS</b>
<b>Legal Aid</b>	<b>LA</b>
<b>Chief Executive</b>	<b>CE</b>
<b>Victim Impact Statement</b>	<b>VIS</b>





## **MINISTERIAL FORWARD**

The ACT Government is committed to reducing the over representation issues that have plagued Aboriginal and Torres Strait Islander communities since the time of colonisation. At the heart of this Government's raft of initiatives to address this issue, lies the specialist Indigenous Sentencing Court called the Ngambra Circle Sentencing Court.

Since its inception in 2004, Ngambra Circle Court has become a permanent fixture in the ACT criminal justice system. Ngambra Circle Court sits on the periphery of a restorative justice response to Aboriginal and Torres Strait Islander offending and gives the Aboriginal and Torres Strait Islander community an opportunity to have a 'voice' in how an Aboriginal and Torres Strait Islander defendant's can be best understood and dealt with by the ACT criminal justice system.

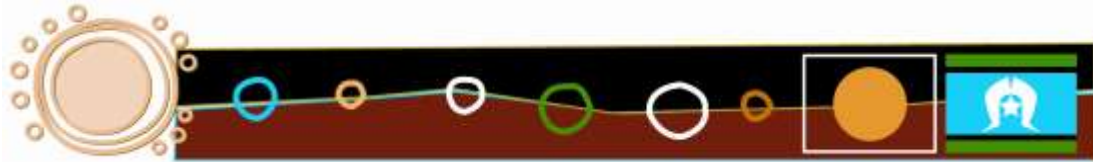
Ngambra Circle Court relies on the commitment of panel members and Elders, who are respected members from the Aboriginal and Torres Strait Islander community. Panel members and Elders sit alongside the Circle Magistrate and provide both cultural insight and advice in the sentencing of Aboriginal and Torres Strait Islander defendants.

This options paper canvasses a range of options to strengthen the current operation of the Ngambra Circle Court. It also addresses many of the issues that have been raised by the Aboriginal and Torres Strait Islander community and stakeholders since its establishment.

The strengthening project will bring the Ngambra Circle Court to the forefront of best practice specialist Indigenous Sentencing Courts in Australia. It will also provide support and opportunities for those dedicated and respected panel members and Elders. It gives the non Indigenous community the opportunity to learn and empathise with issues specific to Aboriginal and Torres Strait Islander persons; an opportunity most of us can learn a great deal from. The Ngambra Circle Sentencing Court Strengthening Project is a major initiative under the development of the ACT Aboriginal Justice Agreement.

I take this opportunity to thank those committed to supporting Ngambra Circle Court, both past and present. In particular I extend my personal gratitude to the Aboriginal and Torres Strait Islander Reference Group, who have provided insight into what the Aboriginal and Torres Strait Islander community wish to see delivered under the strengthening project.

Simon Corbell MLA  
Attorney General



## SUMMARY

1. The ACT Government is seeking feedback on options to strengthen the current operations of the Ngambra Circle Sentencing Court (the Circle Court).

## AIMS OF THE NGAMBRA CIRCLE COURT STRENGTHENING PROJECT

- To ensure that the Circle Court provides the ACT Aboriginal and Torres Strait Islander (A&TSI) community with access to a culturally sensitive sentencing process in the ACT criminal justice system.
- That the practices and processes of the Circle Court reflect 'best practice' in specialist A&TSI sentencing courts;
- That panel members and Elders have clear guidance on their roles and responsibilities and access to training; and
- That the ACT A&TSI community continues to develop trust in, and play a pivotal role in the sentencing of A&TSI defendants in the ACT criminal justice system.

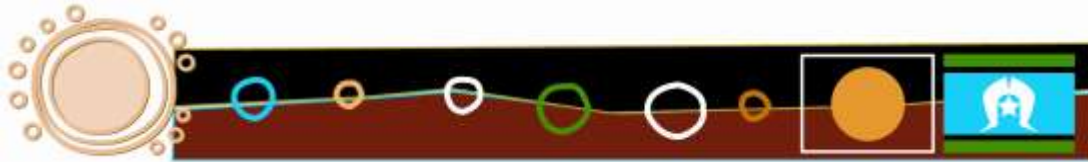
## INTRODUCTION

2. 'Circle sentencing' is a concept that originated in Canada in 1992 for the sentencing of Canadian Indigenous offenders. The Canadian model involves convening the sentencing court in a community setting. The community members and the presiding judicial officer sit in a circle to discuss the offence, the offender's background and the consequences of the offence. Together they jointly derive a sentence appropriate for that offender. The model is not specifically a gaol diversionary program but gaol is still an option available to the group.<sup>1</sup>
3. It is claimed that the first A&TSI Magistrate's court session in Australia (known as the Nunga Court), was held in June 1999 in South Australia. Since this time, Circle Courts have been introduced in most Australian jurisdictions in recognition of the over representation issues affecting A&TSI people in the criminal justice system.
4. A&TSI people make up 1% of the total population in Canberra.<sup>2</sup> The *Circles of Support* report prepared by ACTCOSS and the Aboriginal Justice Centre

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<sup>1</sup> Circle Sentencing in NSW – A Review and Evaluation - Ivan Potas, Jane Smart and Georgia Brignell, *Judicial Commission of New South Wales* October 2003.

<sup>2</sup> Chief Minister's Department, *A Social and Cultural Profile of Aboriginal and Torres Strait Islander People in Canberra*, 2004 at 5.

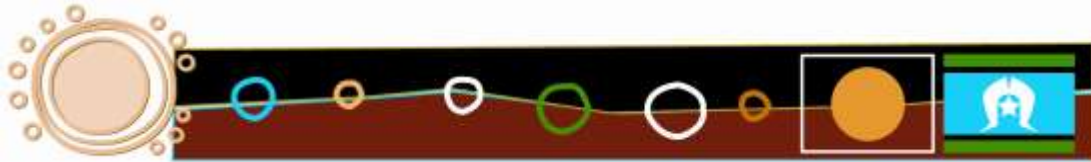


(AJC) identified the following breadth of A&TSI over representation and poor outcomes in the ACT justice system:

- A&TSI people make up one in ten arrests in Canberra, despite comprising only 1% of the population;
  - The rate of imprisonment of Indigenous people in the ACT was the second lowest in Australia, but A&TSI adults were still 12 times more likely to be imprisoned than the rest of the Canberra population;
  - The number of A&TSI prisoners has increased dramatically over the past ten years –between 1995 and 2002) increasing by 17% per year;
  - The ACT has the highest reported population of A&TSI victims of physical violence in 2001/02 with more than 33% reporting physical violence or threats in the last year compared with 24% nationally;
  - Low income A&TSI people (those in the lowest quintile) had higher rates of arrests, imprisonment and physical violence;
  - About a fifth (19.4%) of Indigenous people in the lower quintile reported that they had been arrested in the last 5 years, compared to 8.5% of those to the third to fifth quintile;
  - Almost half of the A&TSI males in Canberra have been charged by police for an offence at some time in their lives, nearly one in five before they were 17 years of age.<sup>3</sup>
5. Specialist A&TSI Courts give the criminal justice system and the A&TSI community the opportunity to collaboratively and effectively deal with A&TSI offenders' criminal behaviour. This occurs within the context of the underlying disadvantage and oppression experienced by many A&TSI people within the criminal justice system. Specialist A&TSI courts provide scope to decide how best to deal with offending behaviour and may identify options aimed at reducing future offending. Specialist A&TSI Courts have scope to accommodate the needs of victims and the community in the sentencing process. The Circle Court has the capacity to grant substantive justice to A&TSI offenders in the criminal justice system and can lead to enhanced relationships between the A&TSI community and the ACT criminal justice system.

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<sup>3</sup> Circle of Support- Towards Indigenous Justice: *Prevention, Diversion & Rehabilitation* ACTCOSS and the Aboriginal Justice Centre July 2008

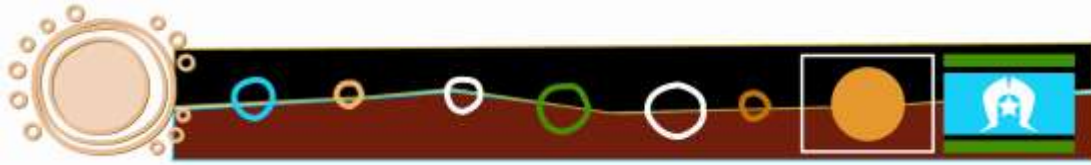


### **Ngambra Circle Court**

6. The ACT Circle Court is a culturally sensitive and specialist sentencing process for eligible A&TSI defendants within the ACT Magistrate's Court. It is best conceptualised as a 'step in the sentencing proceeding' rather than as a stand alone court. The Circle Court was introduced in the ACT 2004 and it attempts to address offending behaviour within a culturally sensitive framework that recognises the ongoing disadvantage experienced by many A&TSI people on a daily basis.
7. Selected members of the A&TSI community (known as panel members, or Elders),<sup>4</sup> play an integral role in the Circle Court process and sit alongside the Circle Magistrate and other key personnel. Panel members and Elders bring an A&TSI perspective to the process and are able to communicate their views directly to a defendant.
8. The cultural expertise brought to the process by the panel members and Elders provides the Court with a unique insight into the factors that may have contributed to a defendant's criminal behaviour. The input of panel members and Elders can provide the Court with added capacity to tailor responses to a defendant's individual needs. The Circle Court has scope to provide a more holistic, restorative response to defendants, victims and the A&TSI community.
9. Panel members and Elders have performed the following functions during the Circle Court:
  - challenged the criminal behaviour of a defendant;
  - identified rehabilitative options for him or her;
  - monitored an offender's compliance with his or her sentence; and
  - made sentencing recommendations to the Magistrate.
10. However, the Magistrate remains the ultimate decision maker in the final determination of a defendant's sentence.

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<sup>4</sup> Note that *panel member* describes A&TSI person who sits in the Circle Court. Panel members are not Elders and are generally not of an age where the term "Elder" is considered to be appropriate. Panel members are respected members of the Indigenous community who are recognised as having skills and experience that is useful in Circle processes. The terms 'panel member' and 'Elder' are used through this document.

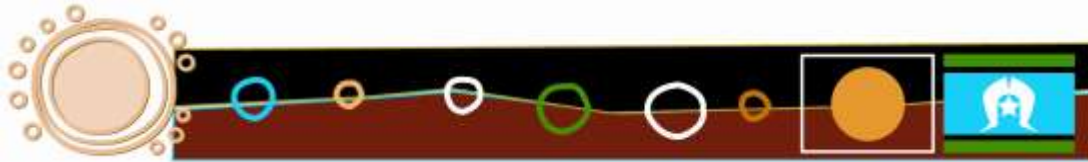


## **BACKGROUND**

11. The Circle Court commenced as a six month pilot in May 2004. The Circle Court is regulated by a Practice Direction and is modelled on the Circle Sentencing Court in Nowra, NSW. Since the Circle Court commenced in May 2004, it has dealt with approximately 70 defendants. Typical matters dealt with in the Circle Court include: public order offences, domestic violence offences, burglary, traffic matters, failure to appear, breach of bail and assaults.
12. Since its inception the Circle Court has been reviewed twice.

### ***The Review of the Pilot Circle Court***

13. The first review was informal and was conducted by Department of Justice and Community Safety (JACS) at the completion of the initial six month pilot. This review incorporated a number of submissions from stakeholders involved in the Circle Court pilot. These submissions, although generally supportive of a specialist A&TSI Court, highlighted the need for:
  - strict adherence to the Practice Direction;
  - set objectives in the short, medium and long term;
  - further discussion as to whether the Circle Court could (and should) be integrated with the Restorative Justice Unit;
  - clarification of the role of the victim;
  - clear guidelines on the role of the Circle Court Coordinator;
  - strengthened referral processes;
  - enhancement of the assessment process undertaken; and
  - clarification of the role and responsibilities of the panel members and Elders.
14. Following this review, the ACT Government committed \$100,000 in recurrent funding to support the operation of the Circle Court. This funding contributes to the Circle Court Coordinator's salary and a proportion of the costs associated with convening the Circle Court. Additional operational costs are borne by the ACT Law Courts and Tribunals. This funding does not account for the time and goodwill contributed by other justice agencies and organisations, such as the Aboriginal Legal Service, Legal Aid ACT, the Office of the Director of Public Prosecutions, Victim Support ACT, ACT Corrective Services and community organisations including the Domestic Violence Crisis Service, Relationships Australia, and the Aboriginal Justice Centre.



### ***Marchetti/Daly Review***

15. The ongoing nature of criticisms of the Circle Court provided impetus for a further review in 2008. The Department of Justice and Community Safety (JACS) engaged independent experts, Elena Marchetti and Kathleen Daly, to conduct a process review on how to strengthen the current operations of the Circle Court. Their report was presented to the Department in August 2008 and made a number of recommendations.<sup>5</sup> The report was critical of some aspects of the Circle Court. It recommended the immediate formation of a task force to explore ways to strengthen the Circle Court. A departmental reference group, comprising key stakeholders, has met since early 2009 and has overseen the progression of a number of the recommendations from the Marchetti/Daly review.
16. Importantly, the report identified that stakeholders were supportive and wished to see the Circle Court thrive and grow.

#### **Strengths identified in the review**

- Involvement with the community and access to untapped resources (particularly victims and community members).
- A better understanding by the Circle Court Magistrate and other officials of what is occurring in the A&TSI community.
- Airing of concerns of Elders, victims and offenders in the sentencing process.
- Assisting Elders and panel members to gain some confidence in the ACT criminal justice system.

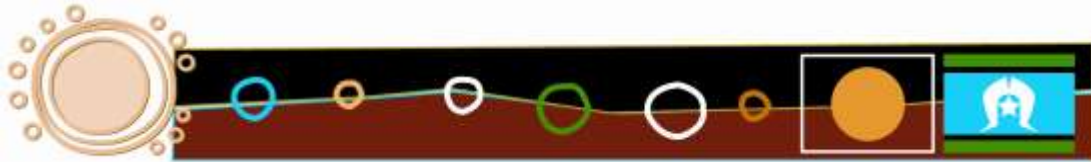
#### **Weaknesses identified in the review**

- The lack of systemic and institutional commitment by service providers and key stakeholders and lack of coordination, communication, and information sharing among them as to their roles and responsibilities in the process.
- The lack of Magistrates Court Registry support and effective management and understanding of the Circle Court.
- The lack of an appropriate legislative framework to regulate the Circle Court processes.
- The lack of a procedural manual, particularly in stipulating victim involvement.
- Inconsistency in compliance with the Practice Direction.
- The views of Elders and panel members were not always respected.
- No debriefing process was available for Elders and panel members after the sentencing process.

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<sup>5</sup> Marchetti, E., and Daly K., (2008) Strengthening the Ngambra Circle Sentencing Court – Final Reports 1-4 - Australian Capital Territory, Department of Justice and Community Safety.





- Insufficient understanding in the wider community about the Circle Court and its role.
- Misinformation about the Circle Court by Magistrates, solicitors and the DPP.
- Insufficient understanding of what being an A&TSI person involves.

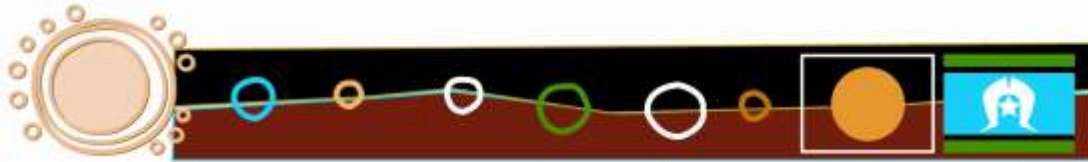
#### Threats identified in review

- The lack of a proactive role and internal management support by the Court Registry.
- Widespread perceptions of the costs involved in conducting the Circle Court, based on economic rationalist ideas: 'it costs \$10,000 to do one circle'.
- The reluctance of the DPP to refer cases because of the perception that the Circle Court is too lenient.
- The amended *Children's and Young People's Act*, which has the effect of increasing the jurisdiction and case load of the Children's Court, thus potentially affecting the Magistrate's availability to manage and adjudicate in the Circle Court.
- The Circle Court case load may increase as a result of changes in penalty structure.

#### Opportunities identified

17. Opportunities identified in the review include the potential for the Circle Court to be expanded to youth, and an enhanced role for victim involvement.
18. The review also highlighted that the following areas will need to be considered in order to strengthen the Circle Court:
  - Identification of the purpose of the Circle Court. The review identified a degree of confusion and disagreement about the purpose of the Circle Court, as to whether it was offender-centred, or whether it should involve both victims and offenders.
  - How can (or should) victims be brought into the Circle, and clarification of what role the victim has in the Circle Court process.
  - The Circle Court needs to be promoted for both A&TSI people and throughout the wider community.
  - There is a need to involve young A&TSI offenders in the Circle Court.
  - There is a need for better communication between service providers and defendants.
  - The Circle Court needs to be strengthened, with appropriate legal and managerial structures to sustain it. A lack of resources places its future at risk. The review concluded that the current practice direction was not sufficient to drive the Circle Court, but that the Circle Court needed to be regulated by statute and required a better managerial structure.
  - Consideration should be given as to integration of the Circle Court with the Restorative Justice Unit.
  - Further support and infrastructure should be allocated to the Circle Court





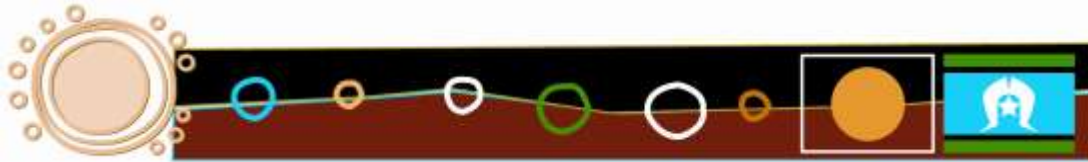
Coordinator.

- Clarification of the role of the Coordinator in the Circle Court process.
- Consideration should be given to extending the Circle Court to offenders who reside in Yass, Queanbeyan and Jervis Bay;
- Increased compliance with the terms of the Practice Direction (or other regulating instrument which may replace the Practice Direction) is required.
- The need for the development of guidelines for the assessment and referral of persons to the Circle Court and for post sentence processes.

19. Both reviews (the informal review conducted post pilot and the Marchetti/Daly review), form the basis for setting future priorities to strengthen the Circle Court. The department has recently undertaken the following preliminary work to progress these recommendations. It is acknowledged that much of this work is still to be consolidated.

### ***Strengthening Work Already Undertaken***

- JACS applied for, and was granted, funding under the special projects funding for a Senior Indigenous Policy Officer. This officer progressed a number of initiatives during January 2008 to June 2009;
- A variety of community consultations with the A&TSI community on the review of the Circle Court, establishing an A&TSI Courts Reference Group comprising representatives of a cross section of ACT A&TSI community organisations. This group have provided essential A&TSI input into the strengthening project, including the refining of the selection process for panel members and Elders, and content of the training package;
- As an interim measure, the Magistrates Court is currently reviewing the Practice Direction to ensure that it aligns with current practice;
- Preliminary work has been undertaken to identify the advantages associated with adopting a legislative model;
- Consideration has been given as to whether there are benefits in integrating the administration of the Circle Court with the ACT Restorative Justice Unit (RJU). Some benefits already identified in integration include increased efficiency in resourcing (including the possibility of using Circle Court panel members in RJU processes to facilitate engagement with A&TSI offenders) and enhanced support from RJU staff for the Circle Court Coordinator.
- Development of a training program for panel members and Elders in partnership with Canberra Institute of Technology (CIT) and the Aboriginal Justice Centre (AJC);
- Development of a partnership between Relationships Australia and the Circle Court to provide panel members and/or Elders access to counselling for vicarious trauma, and
- Development of post sentence support for A&TSI offenders participating in the Circle Court by ACT Corrective Services and the AJC.



## EFFECTIVENESS OF CIRCLE SENTENCING PROCESSES

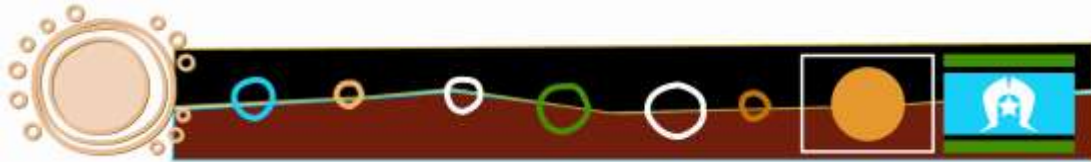
20. The processes and practices of the Circle Court have attracted some criticism from members of the community and some legal practitioners. Questions have been raised about the effectiveness of the Circle Court and, more generally, the evolving specialist A&TSI Court models that operate throughout Australia. Some critics see specialist A&TSI Courts as a 'soft option', a way for A&TSI people to minimise or excuse criminal behaviour. These comments sit in stark contrast to the challenging reality experienced by A&TSI defendants who appear before panel members and Elders at Circle Court. Interestingly, the review of the Nowra Circle Court pilot identified that the penalties imposed were no less onerous than those imposed for similar offences in conventional courts.<sup>6</sup> Other critics question why a separate sentencing system is needed for A&TSI defendants. Others express concern about the lack of structure around the role victims have in the specialist A&TSI Courts and the potential compromises that may occur for their safety, particularly in family violence matters. Others complain of the resource intensiveness of the Circle Court and say that unless it is adequately funded it will not work as intended. It is true that matters dealt with in contemporary courts take a fraction of the time that the more intensive Circle Court matters take.
21. Evaluations of specialist A&TSI Courts operating in NSW and Victoria, show mixed results as to reduction in repeat offending behaviours (in NSW, there has been no marked reduction in recidivism,<sup>7</sup> whereas in Victoria, recidivism has reduced measurably in some circumstances).<sup>8</sup>
22. Recidivism is not considered to be the only criteria on which to measure the success of Circle Courts. Although the ACT Circle Court has not been formally evaluated, its effectiveness should also be measured through its acceptance by the local A&TSI community. Other specialist A&TSI Courts operating in other Australian jurisdictions (such as Nowra in NSW and Shepparton in Victoria) cite the following reasons for why Circle Sentencing processes work well in their respective communities:
- decision making is more effective through increased communication between A&TSI panel members and criminal justice system representatives;

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<sup>6</sup> Circle Sentencing in NSW – A Review and Evaluation - Ivan Potas, Jane Smart and Georgia Brignell, Judicial Commission of New South Wales October 2003.

<sup>7</sup> BOSCAR. (May 2008) Jacqueline Fitzgerald. Does circle sentencing reduce Aboriginal offending?

<sup>8</sup> Victorian Department of Justice and Dr Mark Harris (La Trobe University), "A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program – October 2002-October 2004", *Victorian Aboriginal Justice Agreement*



- the process allows for a better consideration of the circumstances that led to the offending behaviour;
- the capacity of panel members to understand the A&TSI context that led to the offending behaviour;
- the process leads to increased trust between members of the A&TSI community and criminal justice representatives;
- the process is more transparent and better understood by the A&TSI community;
- the process has resulted in an increased level of respect in the community for A&TSI panel members;
- the process provides scope to identify the underlying causes of offending behaviour;
- the process provides offenders with enhanced access to support programs; and
- the process has led to reduced levels of recidivism in some circumstances.

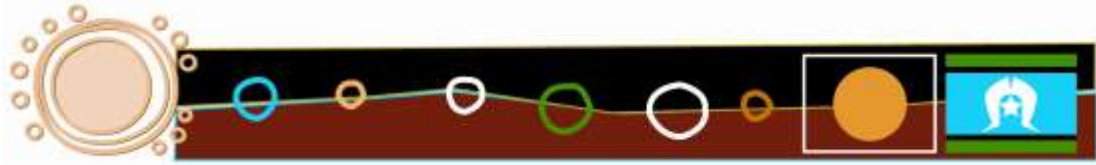
23. Between 2002 and 2004, the Victorian Department of Justice conducted a detailed evaluation of the Koori Courts at Shepparton and Broadmeadows.<sup>9</sup> The evaluation concluded that the Koori Courts had produced the following benefits:

- a marked reduction in the levels of recidivism amongst defendants over the 2 year period of the evaluation;
- reductions in the breach rates for Community Corrections Orders, and in the rates of defendants failing to appear in court;
- an increased level of Koori community participation in, and ownership of, the administration of law;
- Koori Courts provided defendants with a forum that was less alienating for them than the “mainstream” criminal justice system;
- Koori Courts provided a mechanism that better allowed for cultural considerations to be taken into account in the sentencing process;
- the system developed a particularly effective means of integrating various service providers who would potentially have a role in the tailoring of Community Based Orders;
- the system reinforced the status and authority of Elders/Respected Persons; and
- Koori Courts effectively broadcast their vision in the media and in the community, such that they have received support from sectors that had previously been resistant to initiatives like Specialist Indigenous Courts.<sup>10</sup>

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<sup>9</sup> Victorian Department of Justice and Dr Mark Harris (La Trobe University), “A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program – October 2002-October 2004”, *Victorian Aboriginal Justice Agreement*

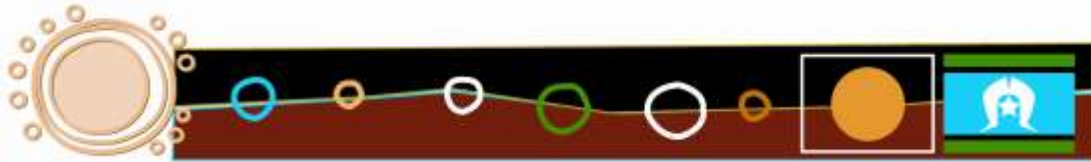
<sup>10</sup> *ibid*



24. Concern about the limited number of defendants being dealt with at Circle (historically this has been approximately 10 defendants per year), has raised economic rationalist concerns that one Circle costs \$10,000. Cost benefit analyses conducted of Specialist Courts from other jurisdictions indicate that such programs are generally no more expensive than Supreme Court sentencing processes, and significant cost savings can be achieved with reductions in imprisonment rates.<sup>11</sup>

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<sup>11</sup> Bartels, L., Challenges in Mainstreaming Speciality Courts. Trends and Issues in Crime and Criminal Justice . Australian Institute of Criminology. No: 383. October 2009



## **AIMS and OBJECTIVES of CIRCLE COURT**

25. Marchetti and Daly suggest that it is crucial that the *purpose* of the Circle Court is clearly defined. The review identified a degree of confusion and disagreement about the purpose of the Circle Court, and whether it was an offender-centred process, or whether it should involve both victims and offenders.<sup>12</sup>
26. The aims and objectives of the Circle Court should clearly articulate its purpose. The aims and objectives of the Circle Court are currently described in the Practice Direction as follows:

### Primary aims of the Circle Court:

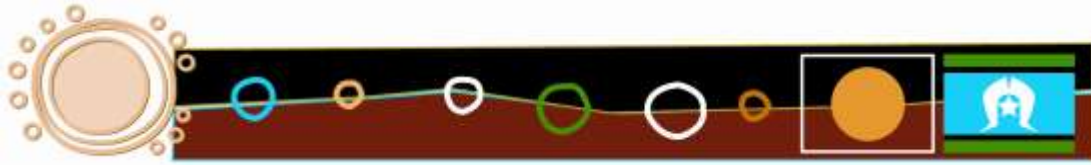
- (1) to involve Indigenous communities in the sentencing process;
- (2) to increase the confidence of Indigenous communities in the sentencing process;
- (3) to reduce barriers between Courts and Indigenous communities;
- (4) to provide culturally relevant and effective sentencing options for Indigenous offenders;
- (5) to provide the offender with support services that will assist him or her to overcome his or her offending behaviour;
- (6) to provide support to victims of crime and enhance the rights of victims in the sentencing process; and
- (7) to reduce repeat offending in Indigenous communities.

### Objectives of Circle Court:

- (1) provide effective and restorative processes for the criminal justice response to, and community involvement in, the management of Indigenous offenders and their victims;
  - (2) maintain consistency and certainty in the practice of the Circle Court; and
  - (3) ensure the transparency and accountability of the processes of the Circle Court.
27. It is understood that the aims and objectives for the Circle Court were adopted from the Circle Court model in Nowra. It is essential that the ACT A&TSI community and stakeholders have a sense of ownership over the aims and objectives of Circle Court and consider them to be relevant and meaningful. There is also potential that the aims and objectives will form part of a future legislative basis for the Circle Court.

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<sup>12</sup> Marchetti, E., and Daly K., (2008) Strengthening the Ngambra Circle Sentencing Court – Final reports 1-4 - Australian Capital Territory, Department of Justice and Community Safety.



28. The Victorian Koori Court aims and objectives use different terminology and introduce additional concepts such as the acceptance of responsibility, than what currently exists in the ACT model.

### ***Victorian Koori Court Model***

29. The aims and objectives of the Victorian counterpart of the ACT Circle Court are to:

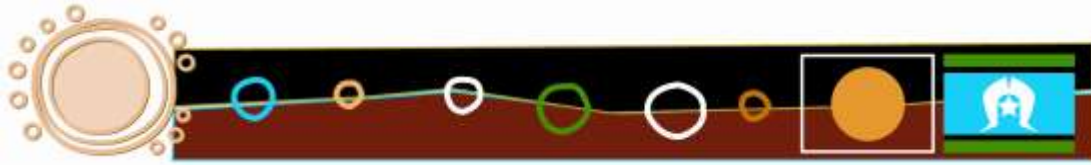
- (1) improve justice outcomes for the Koori community;
- (2) improve the defendant's understanding of the court;
- (3) encourage defendants to take responsibility for their actions and recognise the consequences of their behaviour;
- (4) create a court system that is culturally responsive; and
- (5) ensure greater participation of the Aboriginal community in the sentencing process.

30. In meeting these aims and objectives, the Koori Court model has a number of criminal justice and community building aims. The criminal justice aims of the Koori Court are to:

- (1) tailor sentences appropriate to defendants needs;
- (2) reduce failures to appear;
- (3) decrease breaches of court orders;
- (4) reduce recidivism;
- (5) provide general deterrence;
- (6) increase community safety;
- (7) increase Koori participation in the administration of the law;
- (8) increase positive participation by Koori defendants and their community;
- (9) increase the accountability of the Koori community, families and defendants;
- (10) promote and increase community awareness about community codes of conduct and standards of behaviour; and
- (11) promote and increase community awareness about the Koori Court generally.

<b>Options 1 and 2</b>
<b>1. Do the aims and objectives of the Circle Court adequately describe its purpose, practice and processes?</b>
<b>2. Are there additional aims or objectives that need to be incorporated?</b>





## ROLE AND RESPONSIBILITIES OF PANEL MEMBERS

31. The informal review conducted post pilot identified the need to clarify the role and responsibilities of the panel members and Elders. The Marchetti/Daly review highlighted that confusion exists about what role a panel member and Elder has in the Circle Court.
32. Section (1) of the Practice Direction states that the role of a panel member and Elder is:

### Panel Members

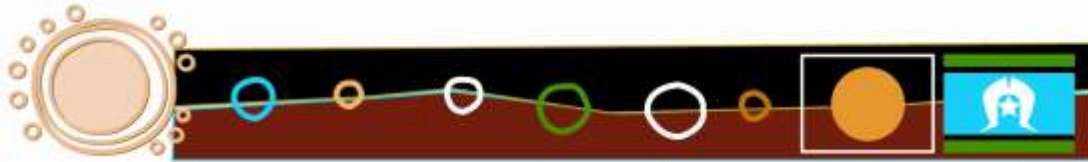
- 1) The Coordinator will appoint members of the Aboriginal and Torres Strait Islander community as may be willing and able to assist defendants, through participation in the sentencing *process to assist the Court when sentencing a defendant and at the direction of the Court to monitor any sentence imposed, including by providing appropriate support and guidance to the defendant.*
33. The role of an Elder or panel member needs to be considered in the following three phases of the Circle Court process:
  1. Assessment phase;
  2. Circle Court phase; and
  3. Post sentence phase.
34. The review conducted on the circle sentencing processes in NSW clearly articulated the centrality of the role of panel members and Elders in sentencing of A&TSI offenders:

“Circle sentencing operates on the philosophy that the local A&TSI community is best placed to solve its own problems. The responsibility for reducing the level of violence, substance abuse, domestic violence and crime therefore rests with the community itself. The role of panel members in Circle Court provides a mechanism where local A&TSI people can actively take responsibility for their own local problems, where they are given authority to make decisions about solutions to their problems and are empowered to implement them. By empowering the community, circle sentencing provides an opportunity to raise the dignity, self-esteem, pride and integrity of A&TSI people, a benefit not restricted solely to the A&TSI community itself but shared by the wider community”.<sup>13</sup>

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<sup>13</sup> Circle Sentencing in NSW – A Review and Evaluation - Ivan Potas, Jane Smart and Georgia Brignell, Judicial Commission of New South Wales October 2003.





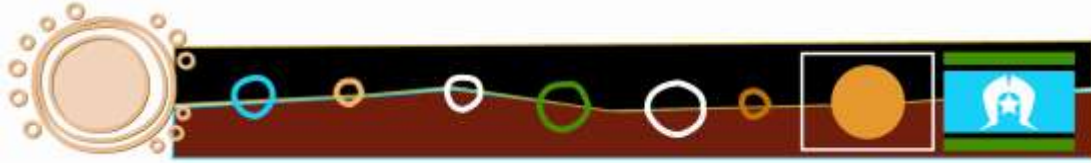
35. The role of Elders and panel members in Circle Court imbues an authority to speak on behalf of community. This authority continues to be recognised and respected in the ACT.
36. There is some confusion in the criminal justice sector, and between panel members/Elders, about the role they have in Circle Court. The Practice Direction gives limited guidance and different expectations from different panel members and Elders have, at times, resulted in inconsistency and uncertainty. As a consequence stakeholders have also experienced a loss of confidence in the effectiveness of the Circle Court. Should panel members be passive participants who provide cultural insight and advice at the bequest of a Magistrate? Should panel members play a more active role in the process, challenging the behaviour of the defendant and suggesting ways in which the defendant could rehabilitate? What role should panel members take in the monitoring of post-sentence supports? What is the purpose of the assessment process – is it to determine the suitability of a defendant for Circle? Clarification on the role, combined with a training program that can reinforce the role and responsibilities of a panel member, is considered essential to the future success of the Circle Court.

### **1) Assessment Phase**

37. In order to appear before the Circle Court an A&TSI person, who has been charged with and has pleaded guilty to an offence in the Magistrates Court jurisdiction, may be referred for an assessment. A defendant must consent to his or her matter being referred to the Circle Court before an assessment is conducted. The assessment process is conducted by four panel members and/or Elders. Attempts to have the same panel members/Elders at the assessment and the Circle Court are not always achieved. Currently, the assessment process is largely undefined and operates according to individual panel members' understanding of what the Circle Court is about. Depending on the skills and focus of panel members, the assessment process can fluctuate between a focus on the eligibility of a defendant, to what is essentially a mix of *eligibility* and *suitability* considerations.

#### Eligibility

38. In order to be *eligible* for referral to the Circle Court, the Practice Direction stipulates that the following criteria must be satisfied:
1. the offence is within the jurisdiction of the ACT Magistrates Court and the defendant consents to the jurisdiction of the Magistrates Court;
  2. the offender has pleaded guilty to the offence(s) with which he or she has been charged;
  3. the offender identifies as an Indigenous person and claims kinship or association with the ACT Indigenous community; and



4. the offender consents to being assessed and agrees to fully participate in the Circle Court.<sup>14</sup>

### Suitability

39. The Practice Direction states that the *suitability* of a defendant for participation in the Circle Court is a separate step in the assessment process and should incorporate the following:

- 1) In order to determine whether the defendant is suitable for sentencing by the Court the Panel will:
  - i) confirm that the defendant is an Indigenous person with a kinship or appropriate association with the ACT Indigenous community, and (*eligibility*)
  - ii) assess whether the defendant is likely to *effectively participate* in the sentencing process and benefit from it.
- 2) In assessing the defendant's suitability for the Circle Court, the assessment panel shall have regard to the following:
  - i) *the willingness* of the defendant to participate actively in the sentencing process,
  - ii) *the support* the defendant has within the ACT and surrounding areas, and
  - iii) *any reports* provided to them by the Coordinator along with any submissions made to them by the defendant, by his or her legal representative and the prosecution.<sup>15</sup>

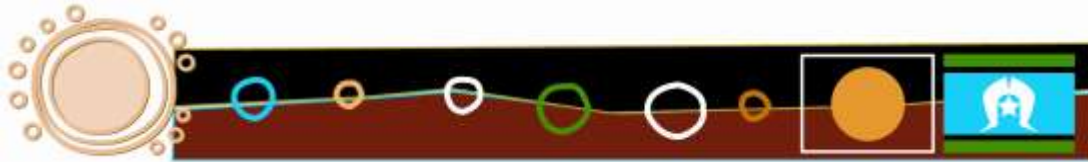
40. Currently, panel members and Elders who make an assessment as to a defendant's *suitability* for Circle Court do so with limited guidance. The Practice Direction mentions a defendant's 'willingness' and ability to 'effectively participate' as the only measures necessary to assess a defendant's suitability. Previously, only a small number of defendants have been found unsuitable to attend Circle Court by panel members and Elders. There is no record of why the panel members and Elders found a defendant unsuitable in these matters. At the completion of the assessment process the Circle Coordinator is responsible for informing the Circle Magistrate on the recommendation made on the defendant's suitability to attend the Circle Court. There is no mention that a defendant needs to demonstrate remorse, has a capacity to make amends to a victim and/or community and is able to comply with a sentence imposed by the court (as is the case in the ACT Restorative Justice model).

41. In practice, some panel members have challenged the offending conduct of the defendant during the assessment process; have tested his or her capacity to engage in the Circle sentencing process; have made an assessment as to whether there is any level of remorse etc. On occasions, panel members have attempted to link the defendant to support services in

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<sup>14</sup> Ngambra Circle Sentencing Practice Direction section:12

<sup>15</sup> Ngambra Circle Sentencing Practice Direction sections: 25 to 29



the A&TSI community with a view to support him or her to avoid future criminal behaviour.

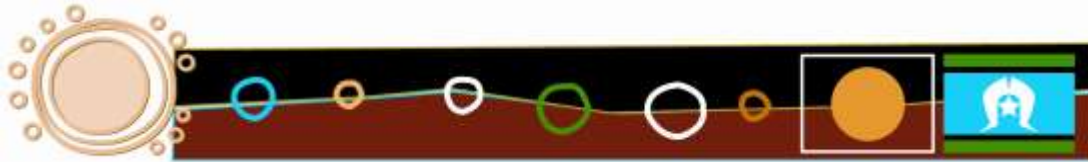
42. Consideration as to what does or doesn't make a defendant *suitable* in the Practice Direction is minimal and is at times confused with *eligibility* criteria. Clear structure and consideration of what constitutes a defendant's *suitability* and how this assessment is to be conducted, and who is responsible for making the final determination on suitability, is required.

### ***Nowra Model – Eligibility and Gateway to Circle***

43. The category of offences that are eligible for circle sentencing in Nowra has been kept as broad as possible. An offence is *eligible* if it can be finalised in a Local Court, carries a term of imprisonment and a term of imprisonment is judged by the magistrate as a likely outcome. Strictly indictable offences, sex offences or strictly indictable drug offences are ineligible. Thus, subject to compliance with other criteria, offenders who have been charged with eligible offences may, on entering a plea of guilty or *after a finding of guilt*, make application for the matter to proceed by way of circle sentencing.<sup>16</sup>
44. Entry into circle sentencing is by application to the court by the defendant after he or she has either pleaded guilty or been found guilty of an offence in the Local Court.
45. There are **two tests** for acceptance to circle sentencing. First, a *suitability* test by the court, and secondly an *acceptability* test by the Aboriginal Community Justice Group. Unless the defendant passes both these tests, his or her case will not be dealt with by way of circle sentencing.
46. The judicial officer determines whether the offence meets the criteria for circle sentencing and is suitable for that process, that is, whether it is a matter as defined in the *Criminal Procedure Amendment (Circle Sentencing Intervention Program) Regulation 2003*, where a term of imprisonment would be a possible outcome for that offender. If it does not meet the criteria, the offender is sentenced in a regular court following conventional practices. If the offence meets the criteria, the application is forwarded to the Aboriginal Community Justice Group to determine the acceptability of the offender.
47. The Aboriginal Community Justice Group then assesses whether they view the offender as acceptable for circle sentencing. In determining this issue, the Group considers:
  - the offence;

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<sup>16</sup> Circle Sentencing in NSW – A Review and Evaluation - Ivan Potas, Jane Smart and Georgia Brignell, Judicial Commission of New South Wales October 2003.



- whether the offender is part of the community or has strong links with the community in the trial location;
- the willingness of the offender to be an active part of the process and the support the offender has in the community;
- the impact of the offence on the victim and the community; and
- the potential benefits to the offender, victim and community of the circle sentencing process.

48. As part of the *acceptability* test, the views of the victim or victims of the offence are sought regarding their perception of the acceptability of the offender for circle sentencing. While the Aboriginal Community Justice Group considers such views, they are not determinative of the issue of acceptability. Nor are victims compelled to participate. However, the Group vets and evaluates the offender's bona fides and makes sure that he or she is eligible to participate.

49. Ultimately, the Aboriginal Community Justice Group makes a recommendation to the Magistrate concerning the acceptability of the defendant and provides clear reasons for accepting or rejecting the defendant's application. If the Group rejects the defendant's application, the matter will be returned for sentencing in a regular court.<sup>17</sup>

### ***Restorative Justice Unit (RJU) Suitability Model***

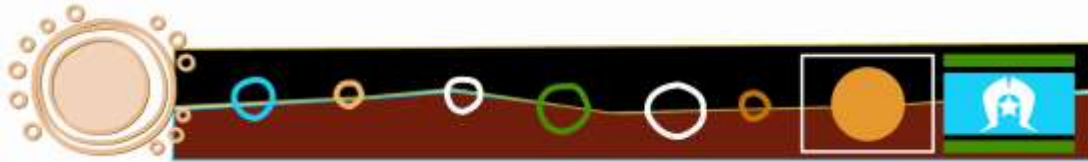
50. In the ACT Restorative Justice Unit, clear delineation between the *eligibility* and *suitability* of a defendant to participate in a restorative justice process is achieved under the *Crimes (Restorative Justice) Act 2005*.

51. The *suitability* assessment tools used by the RJU assist convenors to determine whether an offender has any contrition or remorse for the offence; identifies whether the offender has personal characteristics that are conducive to a restorative justice process; assesses the offender's motivation for taking part in restorative justice and assesses the impact of the offence as perceived by the offender, and whether the offender has capacity to make amends to the victim.

52. Key aspects to any restorative justice model include a defendant accepting responsibility for the offence as a condition of access to the program; and the capacity of an offender to consider the victim's needs. Both of these elements are currently absent from the Circle Court assessment phase.

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<sup>17</sup> Circle Sentencing in NSW – A Review and Evaluation - Ivan Potas, Jane Smart and Georgia Brignell, Judicial Commission of New South Wales October 2003.



### ***Other jurisdictions***

53. In Queensland and Victoria, the Elders conduct assessments to determine whether an offender has the requisite degree of remorse and acceptance of responsibility (it is also noted that a plea of guilty can be entered without acceptance of responsibility).
54. Currently, there is limited guidance given to panel members in the Practice Direction regarding how to determine a defendant's suitability for the Circle Court. Consideration as to what makes a defendant suitable for the Circle Court must also take into account what role a victim has in the Circle. For example, if it is decided that a victim is to have a full role in the Circle then the suitability of a defendant to respond appropriately and effectively to that victim becomes crucial (see discussion on role of victims at page 47).

#### **Options 3, 4 and 5**

**3. Should the Circle Court consider adopting the following suitability assessment criteria for panel members and Elders:**

- a. To challenge the behaviour of the defendant;
- b. The defendant be required to accept responsibility for his or her crime;
- c. To assess a defendant's capacity and willingness to listen to panel members and or Elders;
- d. To assess a defendant's level of remorse;
- e. To assess if a defendant has capacity to make amends to a victim;
- f. To assess the impact of the offence on the victim and community;
- g. To assess the potential benefits to the victim and community of the Circle process;
- h. Should panel members/Elders, the Coordinator or the prosecutor seek the views of the victim and their perception as to whether the defendant is suitable for Circle.

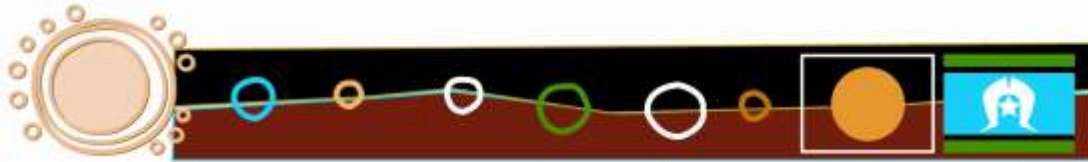
**4. Alternatively, should the RJU suitability tools to assess a defendant's suitability be adopted into Circle Court processes?**

**5. Develop an operational manual that defines the roles and responsibilities of panel members and Elders. This manual should form part of the training program.**

### **2) Circle Court Phase**

55. The following people must participate in the Circle Court:

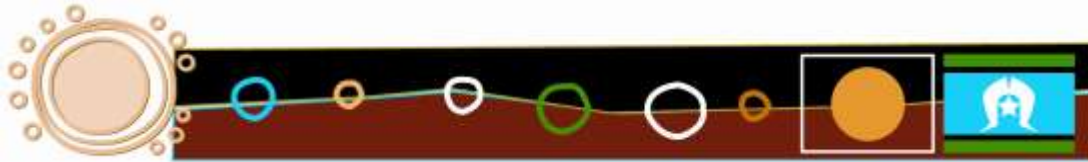




- the Circle Court Magistrate;
  - the defendant;
  - a prosecutor from the Office of the Director of Public Prosecutions;
  - the legal representative for the offender;
  - a minimum of four members of the A&TSI community as panel members; and
  - the Circle Court Coordinator.
56. The following people may participate in the Circle Court:
- a member of the offender's family or a support person for the offender;
  - any victim or a person chosen by the victim as a representative or a support person, or
  - a support person or persons for the victim; and
  - ACT Corrective Services.
57. Generally, four panel members and/or Elders sit on the Circle Court along with the Circle Magistrate. The Circle Magistrate works collaboratively with the panel members and Elders to determine an appropriate sentence. Generally after the parties have made their submissions, the panel members and Elders confer in isolation to decide on a recommendation on sentence. Once the Circle Court reconvenes this recommendation is given to the Magistrate in the presence of all other participants. The Magistrate generally disbands the Circle Court at this stage and adjourns to a court room. The final sentence is handed down in the court room and generally this is in the absence of the panel members and Elders. The Magistrate nearly always adopts the recommendation of panel members and Elders in handing down this sentence but retains the discretion to not adopt this recommendation when appropriate.
58. The Practice Direction states that the role of a panel member and Elder is: *to assist the Court when sentencing a defendant and at the direction of the Court to monitor any sentence imposed.*<sup>18</sup>
59. The Marchetti/Daly review highlighted that confusion exists about what role a panel member and Elder has in the Circle Court. The review highlighted that the A&TSI community raised concerns that the Circle Magistrate did not always adopt the recommendation/s for sentencing suggested by the panel members. The perception that a panel member or Elder makes the final determination on sentence illustrates that the role and responsibility (at least at this stage of the process), is not clearly defined or understood. As previously mentioned, some panel members and Elders challenge the behaviour of a defendant during the Circle Court but there is currently limited guidance in the Practice Direction as to whether this is permissible. It is also considered to be essential that in developing a framework for the roles and responsibilities of panel members and Elders is linked back to the aims and

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<sup>18</sup> Ngambra Circle Sentence Court – Practice Direction (section 50)



objectives of the Circle Court.

#### Role of victim

60. Also at issue is what role a panel member or Elder has in relation to a victim who attends at Circle Court. Can they ask questions of the victim? If so, what form should those questions take? Again this is undefined in the Practice Direction. Consideration of the role a victim has in Circle Court is discussed further at page 47.

#### Conflict of Interest

61. Concerns have previously been raised regarding conflict of interest issues for panel members and Elders, and how this can be difficult to address without any guidance on what may constitute a conflict, and a lack of procedure or guidance in which to resolve it. A Code of Conduct has been developed in Victorian Koori Courts to assist in addressing conflict of interest concerns and defining the role and responsibilities of panel members and Elders. The Koori Court Code of Conduct includes: the need for panel members and Elders to be impartial; circumstances that give rise to when a panel member or Elder should be disqualified from sitting; and the need to consider confidentiality issues (this is of particular significance if the Circle Court is expanded to young people). See Koori Court Code of Conduct page 31 for further details.

#### Koori Court Model - role and responsibility of Elders and Respected Persons

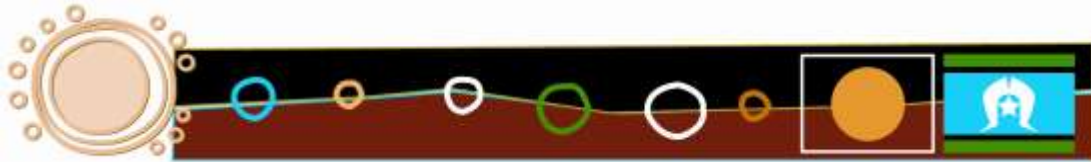
62. The *Magistrates (Koori Court) Act 2002* provides for the appointment of Aboriginal Elder or Respected Persons to sit with the Koori Court and advise the Magistrate on cultural issues relating to a defendant and his or her offending behaviour. Participation by the Elder or Respected Person sends the message to the defendant that the offence(s) committed is not condoned by either Koori or non-Koori communities.

63. The contributions made by the Elder or Respected Person will vary from case to case. They may be required to offer advice regarding cultural practices, protocols and perspectives. For example, they may need to describe the cultural significance of men's or women's business to the Court, or provide the Court with a background explanation of underlying issues resulting from colonisation and how they may be related to the defendant's behaviour. The Aboriginal Elder or Respected Person may also choose to reflect on their personal experiences in the context of the case.

#### Koori Court - Code of Conduct

64. The Koori Court Code of Conduct outlines expectations about roles and responsibilities and includes provisions that relate to the personal proprietary behaviour of the Elders and Respected Persons. It includes guidance as to impartiality, disqualification from the Circle in circumstances where a conflict of interest exists and restricts Elders or Respected Persons from providing legal advice to a defendant. Elders and Respected Persons are appointed





as employees of the Victorian Department of Justice and as a consequence, are also bound by the Victorian Public Service Code of Conduct (Koori Court Code of Conduct excerpt is extracted below):

- Aboriginal Elders and Respected Persons are to maintain and promote such standards of conduct that are likely to uphold the integrity and independence of the office of Aboriginal Elders and Respected Persons and the Koori Court Division.
- Aboriginal Elders and Respected Persons are to always act impartially.
- The Koori Court Code of Conduct provides the following guidance on the role of Elders and respected persons:
- Aboriginal Elders and Respected Persons are to respect and comply with the law and conduct themselves in a manner to promote public confidence in the integrity and independence of the office of Aboriginal Elders and Respected Persons. They are to avoid behaviour, which might bring the office into disrepute or undermine the impartiality, fairness or character of Aboriginal Elders and Respected Persons.
- Personal proprietary behaviour of the Elders and Respected Persons.<sup>19</sup>

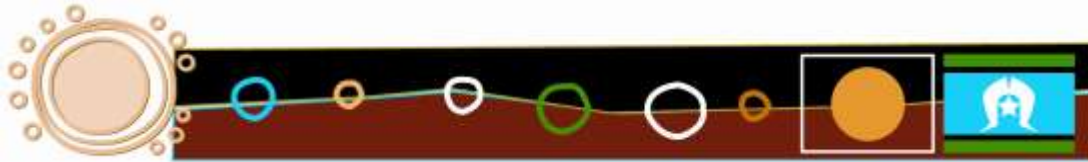
#### Koori Court - Conflict of Interest

- Aboriginal Elders and Respected Persons are not to convey, or permit others to convey, the impression that they are in a special position of influence.
- Aboriginal Elders and Respected Persons are to disqualify themselves from any proceedings in which their impartiality might reasonably be questioned. This includes instances when a defendant raises concerns about an Aboriginal Elder and Respected Person's impartiality.
- If it is seen that a conflict of interest may arise, Aboriginal Elder and Respected Persons must disclose all actual and potential conflicts of interest known to the Aboriginal Elders and Respected Persons.
- However where a conflict of interest occurs it should always be resolved in favour of the public interest rather than your own.
- Aboriginal Elders and Respected Persons must not give any legal advice to any person whatsoever.<sup>20</sup>

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<sup>19</sup> Operational Manual for Victorian Koori Court – Conduct for Aboriginal Elders or Respected persons ( p 20) and Conflict of Interest (20)

<sup>20</sup> ibid



## Options 6 and 7

### **6. Define the role and responsibilities of panel members and Elders to include:**

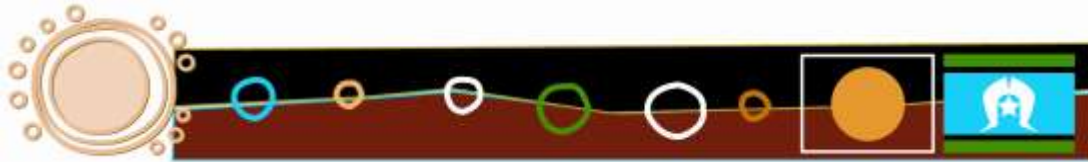
- a. To challenge the behaviour of the defendant;**
- b. To assist the Magistrate to determine an appropriate sentence;**
- c. To provide any relevant cultural advice to the Magistrate;**
- d. To provide background information established during the assessment phase;**
- e. To look for culturally appropriate rehabilitative options for a defendant;**
- f. To ensure the needs of a victim are heard and respected in the Circle Court process;**
- g. To assist a defendant to make amends to a victim.**

### **7. Adopt a Code of Conduct similar to the Koori Court model for the Ngambra Circle Court.**

## **3) Post Sentence Support Phase**

65. Consideration needs to be given to how the post-sentence supports offered to defendants can be strengthened. Post-sentence support is seen as crucial in enabling an A&TSI offender to comply with his or her sentence. Research demonstrates that A&TSI over-representation issues are exacerbated by non-compliance with sentences. With enhanced post-sentence supports, jurisdictions such as Victoria have witnessed significant improvements in a defendant's ability to comply with the requirements of his or her sentence. It is also noted that the capacity of the RJU to monitor a defendant's compliance with his or her restorative justice outcome agreement has resulted in an unprecedented high compliance rate (92.7%).<sup>21</sup>
66. Historically, the post-sentence supports offered to Circle Court defendants have been provided by ACT Corrective Services (ACTCS). Recently, the ACTCS and the Aboriginal Justice Centre (AJC) have been working together to identify ways that each organisation can cooperate to provide enhanced post-sentence supports to offenders.
67. An example of how post-sentence support is crucial to the compliance of court orders is demonstrated in the following case study (Although this case involved an A&TSI defendant being released on conditional bail, it remains illustrative of the need for enhanced levels of post-sentence supports for A&TSI defendants to comply with court orders):

<sup>21</sup> Statistical data provided by the ACT Restorative Justice Unit November 2009



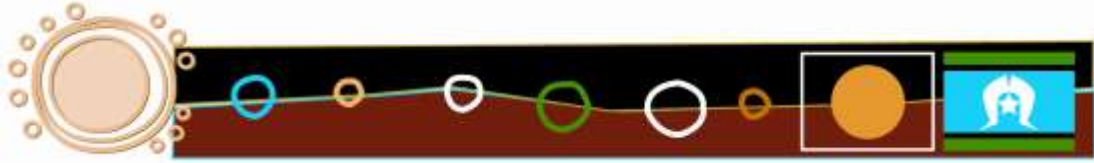
An A&TSI offender was recently released from custody on bail upon a condition that he report to an interstate rehabilitation centre within 24 hours of his release. No support was offered to the defendant, to facilitate transport interstate. The lack of transport resulted in the defendant breaching his bail conditions and being rearrested within 48 hours. If transport could have been located for the defendant this may have led to a very different outcome for that individual.<sup>22</sup>

### Options

68. Consideration could be given to the Aboriginal Justice Centre (AJC) working in collaboration with ACT Corrective Services (ACTCS) to take a more proactive role in monitoring and coordinating post sentence supports. The department is currently working with ACTCS and the AJC to strengthen the interagency collaboration to enhance post sentence supports for Circle Court defendants. It is hoped that this ongoing work will strengthen the practical supports available for defendant's to assist them to comply with sentence outcomes.
69. The role of a convenor in the RJU involves the monitoring of restorative justice outcomes to ensure that offenders comply with their agreements. It is possible that the Circle Coordinator could perform a more substantial monitoring role, similar to that of an RJU convenor in the future. This would require appropriate training, support and an enhancement of relationships with key service providers.
70. In addition it is noted that a key aspect to an RJU process is to ensure that a defendant accepts responsibility for their actions and makes amends to a victim. An outcome from a restorative justice process is agreed to by all participants (including the defendant and his or her support people) and is closely monitored by convenors. These crucial elements are considered to result in high level of defendants' compliance (92.7%) with outcome agreements.<sup>23</sup> This level of coordination and support for a defendant is currently missing from the Circle Court process.
71. Despite the Practice Direction stipulating that panel members and Elders play a role in supervising or monitoring a defendant post sentence. In reality this infrequently occurs. In addition, questions have been raised as to the appropriateness of such an arrangement and the capacity of panel members to facilitate such monitoring. It should also be noted that panel members and Elders do not receive any payment for post sentence support.
72. An option exists for the Circle Coordinator to take on a more formal monitoring role (as is the case in NSW and Victoria). The Coordinator for the Nowra Specialist Indigenous Court has a substantial involvement in the follow-up support of offenders after court – they not only coordinate any community service hours the offender is required to complete, but also visit

<sup>22</sup> Pers comm. Ngambra Circle Sentence Coordinator November 2009

<sup>23</sup> Statistical data provided by the ACT Restorative Justice Unit November 2009



the offender one month after the sentencing proceedings to ascertain how they are going.

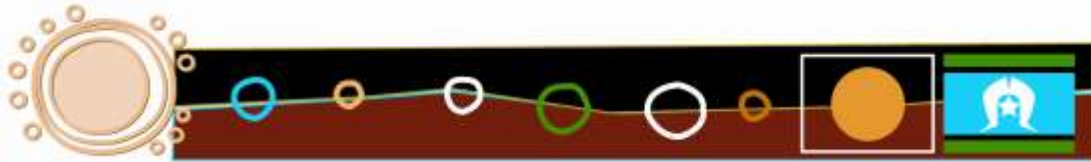
**Options 8, 9, 10 and 11**

**8. Should the Aboriginal Justice Centre (AJC) working in collaboration with ACT Corrective Services (ACTCS) take a more proactive role in monitoring and coordinating post sentence supports?**

**9. Should the Circle adopt a model similar to the RJU model to monitor a defendant's post sentence compliance?**

**10. Noting the limitations, should the role of panel members and Elders include monitoring a defendant's compliance with their sentence?**

**11. Should the Circle Coordinator be responsible for the monitoring of a defendant and his or her compliance with a sentence (similar to the NSW and Victorian models)?**



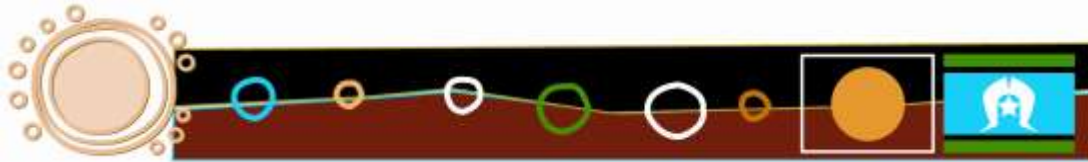
## **OTHER WORK BEING UNDERTAKEN TO CLARIFY THE ROLE OF PANEL MEMBERS AND ELDERS**

### ***Training of Panel Members***

73. The Marchetti/Daly review identified the need to train current and prospective panel members and Elders in the workings of the Circle Court; the criminal justice system; the role and responsibilities of panel members/Elders; and to foster an understanding of post-sentence supports. The A&TSI Court's Reference Group has had significant involvement in identifying the training needs of panel members and has made significant contributions to what the draft training manual should include.
74. The department in collaboration with the Canberra Institute of Technology (CIT) and the AJC is developing an accredited training package for panel members and Elders. The department has had a series of meetings with the manager of the Yurauna Centre at CIT and the CEO of the AJC. A training package for panel members is currently being drafted and will be available for comment shortly. CIT have requested that the department and court staff contribute to the draft training package. It is intended that any agreed outcomes resulting from this options paper will be incorporated in the training package. CIT are also keen to have key personnel presenting different aspects of the training package. It is planned that the first training course for panel members will be held in early 2010. The CIT and AJC have indicated that they will financially support the first training course. It is hoped that the majority of panel members will be able to attend this training. The new selection process for panel members will stipulate that attendance at training is a prerequisite for appointment to a Circle Court panel member or Elder. The training package will be evaluated and this will inform future training programs. It is further noted that additional training courses will have resource implications and a funding source will need to be identified to progress this training into the future. This training package will be the first of its kind in Australia.

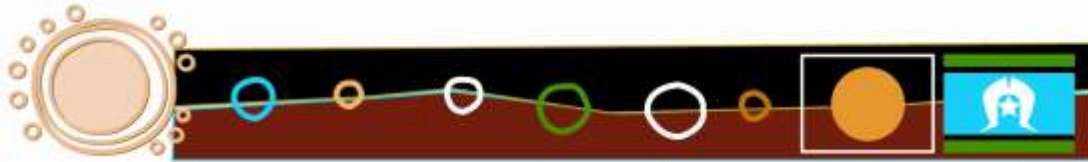
### ***New Selection Process for Panel Members***

75. In addition to training concerns, both reviews identified concerns about which A&TSI persons were appointed as panel members and whether consideration was given to their suitability for the role and capacity to influence change in a defendant's behaviour.
76. Currently the Circle Coordinator facilitates who is to sit as an Elder or panel member during the assessment phase and on the Circle Court. Sometimes the availability of people is the only criteria applied to this process.



77. Other specialist A&TSI Courts in Australia identified that a previous criminal conviction should not automatically disqualify a person from appointment as a panel member. In fact it was found that in many cases persons who had first hand experience in the criminal justice system often had the most influence on a defendant. The insight and wisdom that can be gained from such an experience is difficult to assess, but when the experience is shared and used to reinforce a message of deterrence and/or rehabilitation this has proved highly persuasive to a defendant.
78. The A&TSI Court Reference Group considered that the fact that a panel member has a criminal conviction should not exclude that person from performing the role. Instead, the Reference Group considered that a panel member's suitability should be determined on their current standing and influence in the community.
79. In developing a new appointment process for panel members and Elders, these issues were given extensive consideration. It was also considered necessary that panel members be required to attend the training course before their appointment was finalised. The selection process developed by the A&TSI Courts Reference Group includes the following steps:
1. Advertise for panel members.
  2. Applicants to complete a simple application form (a pro forma application is provided) to be lodged with the Circle Court Coordinator.
  3. A panel comprising a community member, a departmental member and the Circle Court Coordinator to meet to consider the eligibility of applicants against the following key selection criteria:
    - the applicant must be A&TSI;
    - the applicant must have significant ties with the ACT A&TSI community;
    - the applicant must have good standing within the A&TSI community;
    - the applicant should have knowledge of, or a capacity to acquire knowledge of, local A&TSI organisations;
    - any prior convictions must be taken into consideration in relation to the appropriateness of the appointment;
    - the applicant must be willing to complete the training;
    - the applicant must be available for assessments and Circle Court proceedings; and
    - the applicant is known to the community.
  4. Interviews to be offered to eligible applicants.
  5. Police checks are completed (mandatory but don't preclude appointment).
  6. Interviews to be held by the selection panel.
  7. Applicants to be recommended for appointment.
  8. Reports on recommended applicants to be submitted to the delegate (e.g. the CEO of the Department).





9. The Delegate to agree or disagree with the recommendations and is to sign the report.
10. Applicants to complete the training course.
11. Applicants to be appointed as panel members.

#### **Option 12**

**12. Should the selection process for panel members and Elders, developed by the A&TSI Court Reference Group, be adopted?**

#### ***De-briefing for Panel Members and/or Elders***

80. The involvement of panel members and Elders in the Circle Court can often be intensive and highly personal and this has resulted in some panel members and Elders experiencing different levels of vicarious trauma. The A&TSI Court's Reference Group, in collaboration with the Circle Court Coordinator, has formed an ongoing partnership with Relationships Australia ACT, to establish an ongoing counselling (de-briefing) service for panel members and Elders to assist them to cope with this trauma. Relationships Australia counsellors attend each Circle Court and are available for de-briefing immediately after the Circle Court. Where appropriate, counsellors will arrange further counselling off site for panel members. This initiative has been well received by the panel members and will be finalised in a Memorandum of Understanding in the near future.

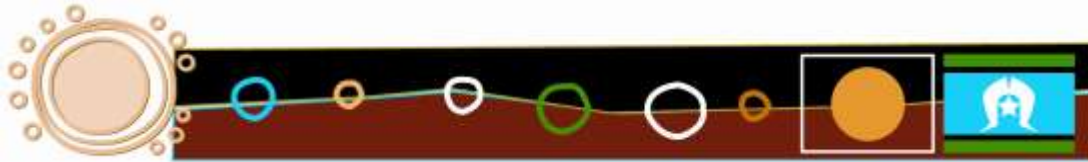
#### **Option 13**

**13. Should the Court should solidify its relationship with Relationships Australia (ACT) in the form of an MoU to provide ongoing counselling to Elders and panel members.**

#### ***Number of Elders and/or Panel Members***

81. Currently, section 25 of the Practice Direction stipulates that unless otherwise approved by the Circle Magistrate, four panel members are required to participate at both the Circle Court and the assessment process. The pool of Circle Court panel members is currently approximately 25 persons. The Circle Court Coordinator is responsible for organising the panel members and Elders to attend both the assessment and the Circle sentencing processes. All attempts are made to achieve continuity between the assessment and Circle Court sentencing process by involving the same panel members at both stages; however this does not always eventuate.<sup>24</sup> It

<sup>24</sup> Section 25 Practice Direction – Unless otherwise approved by the NCSC Magistrate an assessment panel shall be constituted by two female and two male members of the local Aboriginal and Torres Strait Islander community.



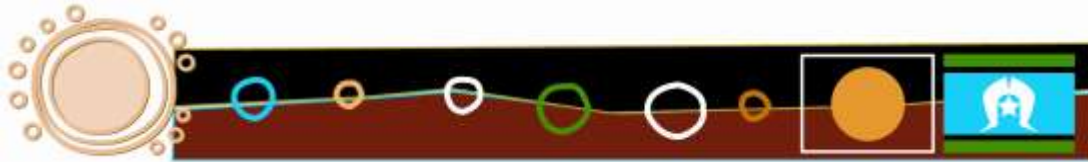
is also considered to be best practice to have a gender balance (two men and two women) of panel members. Again, this is not always possible due to the small pool of available panel members and competing commitments. In Victoria, the Koori Courts require two panel members to sit in the sentencing process. In Queensland and South Australia, the Specialist Indigenous Courts require between one and four panel members. Only in NSW and the ACT is there a stipulation that four panel members must be present during the process.

#### **Option 14**

- 14. How many panel members or Elders should be present at:**
- **the assessment stage; and**
  - **the sentencing stage?**

#### ***Location of the Hearing***

82. Previously, the Circle Court was convened at the cultural centre at Yarramundi Reach, a place of significance to the ACT A&TSI community. This informal setting provided an alternative environment from the regular court precinct in which to conduct the Circle Court sentencing proceedings. However, the costs associated with holding the proceedings at Yarramundi Reach exceeded the current funding allocated to operate the Circle Court. These costs included the employment of a security guard and transport costs for all personnel (including the Magistrate, prosecutor, defence lawyer, defendant and his or her support persons, panel members, victims and their support people). Security concerns about transporting defendants who were in custody to this location proved problematic, as were the more general inconveniences associated with travel away from the court precinct.
83. Since 2008, the Circle Court has been held in a hearing room at the ACT Magistrates Court building. This has led to some limited savings in expenditure. With the relocation of the ACT Tribunals to new premises in November 2009, an opportunity exists for a hearing room at the Magistrates Court to be refurbished to meet the needs of the Circle Court. Currently the Circle convenes in hearing room 10 of the ACT Magistrates Court. It is noted that other non Circle matters are dealt with and will continue to be dealt with in this hearing room. Magistrate Dingwall (the current Circle Magistrate) has indicated that he is open to the refurbishment of a hearing room at the Magistrates Court to create an informal and friendly setting. Consideration could also be given to making the room culturally significant through the use of an appropriate A&TSI ceremony. Any refurbishment of the hearing room will have resource implications and funding will need to be identified to progress this further.

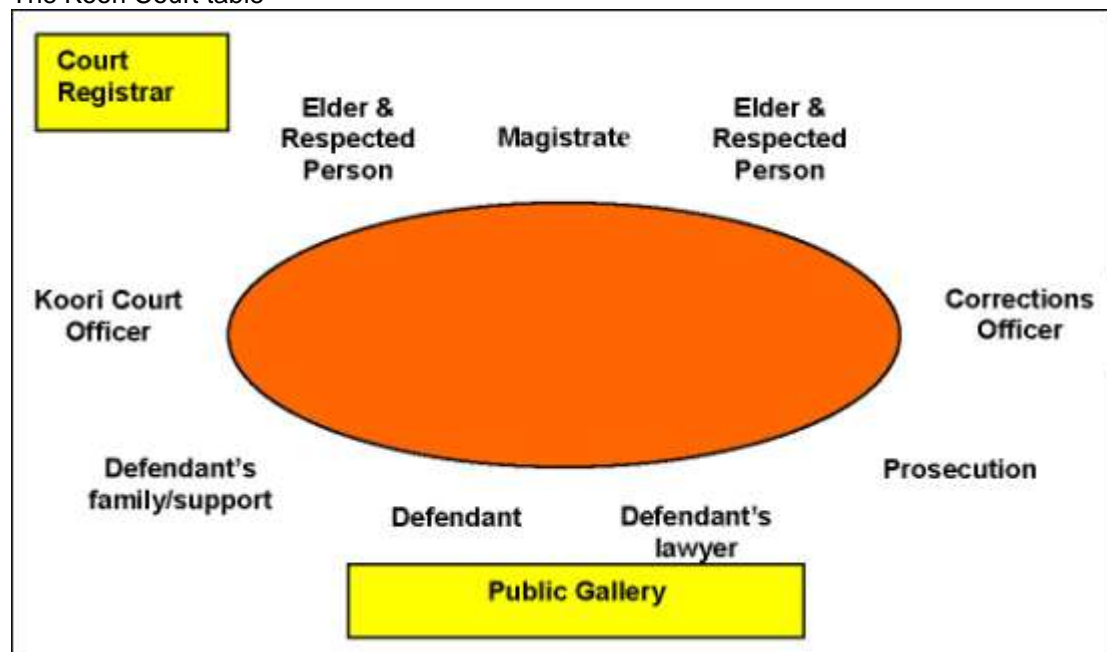


84. Magistrate Dingwall has expressed a willingness to sit at both Yarramundi Reach and the Magistrates Court for Circle matters. It may be possible to alternate between both locations.
85. In Queensland, Victoria and South Australia, Specialist A&TSI Courts have purpose built courtrooms which include A&TSI insignia and paintings.

Koori Court Room Set Up

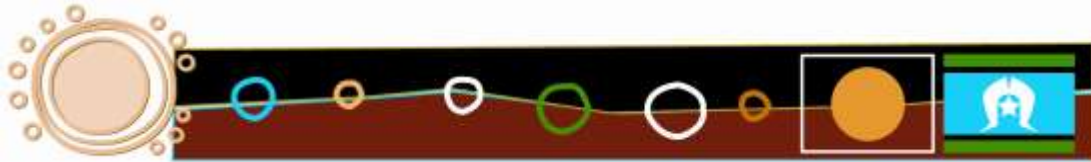
86. The Koori Courtrooms are positioned in 11 locations through Victoria and are situated in mainstream court precincts. The Koori Court has a number of features that differentiate it from a regular courtroom. Perhaps the most significant is the oval table around which the participants in the Court sit. A representation of who sits around the table is provided below:

The Koori Court table



87. Seating the Koori Court participants around the same table represents a fundamental departure from mainstream Courts and is part of making the process more informal and easily understood by all in the courtroom. Having the Aboriginal Elders and Respected Persons seated beside the Magistrate also affirms the message that the Koori Court values and respects the input of Koori people.
88. In recognition of A&TSI culture, the courtroom displays the Aboriginal and Torres Strait Islander flags and the artwork of local Koori artists is hung on the walls.

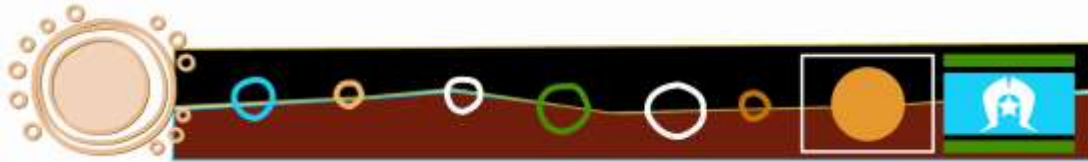
**Options 15, 16, 17 and 18**



- 15. Should the Circle Court sittings return to Yarramundi Reach; or an alternative location?**
- 16. Should the Circle Court continue to sit in a hearing room at the ACT Magistrates Court?**
- 17. If yes, should a dedicated hearing room be decorated at the Magistrate's Court with appropriate furnishings, cultural insignia and paintings etc (similar to the Koori Courts)?**
- 18. Should consideration be given to alternating Circle Court between Yarramundi Reach and the hearing room at the Magistrates Court?**

### ***Remuneration of Panel Members***

89. Currently, panel members and Elders receive \$50 for conducting assessment/s and \$100 for each sentencing day in which they participate. Assessment per defendant generally takes two hours and a sentencing proceeding can take up to four hours. Recently, the Circle Court Magistrate has listed several defendants to the Circle Court on the one day. It is not unusual for a number of assessments to also occur on the same day.
90. The current remuneration does not recognise the increasing workload of panel members and Elders. There is a perception by some members of the A&TSI community that the current fees are tokenistic and do not financially recompense panel members for their time and expertise. A less prevalent view is that panel members do not sit in the Circle Court for payment, but that they do so for the good of their community and as part of their role as community leaders. The difficulty associated with these polarised views is not easy to reconcile. It should, however, be noted that all other personnel present at the assessment and Circle Court are paid for their time.
91. In addition, the training package and new selection process will further professionalise the role of panel members and Elders. If panel members and Elders are to take on an enhanced role in monitoring a defendant's compliance post sentence this will also have cost implications. These factors should also be recognised in any future consideration of remuneration levels.
92. Consideration needs to be given to whether panel member and Elders should be paid for the time they spend at Circle Court, or if they should be paid on a daily rate. The level of remuneration also needs to be determined.
93. Other jurisdictions pay their panel members and Elders at the following rates:



- Murri Elders (Qld) are paid a flat rate of \$36.80 per day.
- Koori Court Elders (Vic) are paid \$320.00 for a full day and \$160.00 for a half day.
- Nunga Court Elders (S.A.) are paid \$100.00 for a full day and \$50.00 for a half day.

94. The ACT Tribunals have the following pay rates to part time *ordinary members*

Remuneration

- Remuneration at the rate of \$875 per day for a part-time Senior Member.
- Remuneration at the rate of \$400 per day for a part-time Ordinary Member.

Note :The daily rate includes a period of in excess of three hours.

**Options 19 and 20**

**19. Should the Circle Court panel members and Elders be paid for their time?**

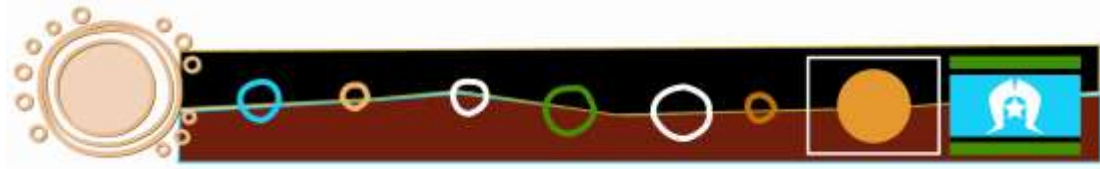
**20. If yes, what is an appropriate level of remuneration?**

***Evaluation of the Court***

95. Marchetti and Daly recommended that the Circle Court undertake research, with a selected set of evaluation questions.<sup>25</sup> Such an approach would contribute knowledge to the emerging field of specialist A&TSI sentencing courts and relate the Circle Court’s practices to those operating in other Australian jurisdictions. Addressing specific evaluation questions has value in monitoring what the Circle Court is doing, against certain goals or expectations for the Court. Marchetti and Daly comment that any evaluation of the Circle Court should focus on process and outcome.

96. Any recidivist data would be difficult to assess on the basis of the small number of defendants currently being referred to the Circle Court and the lack of comparative data. While lowering recidivism is still considered to be an objective of the Circle Court, it should not be measured in isolation from its other aims and objectives. The provision of a culturally sensitive sentencing option for A&TSI defendants and the involvement of the A&TSI community in the criminal justice system, are considered to be as equally important as any demonstrated reduction in recidivism.

<sup>25</sup> Marchetti, E., and Daly K., (2008) Strengthening the Ngambra Circle Sentencing Court – Final reports 1-4 - Australian capital territory, Department of Justice and Community Safety.



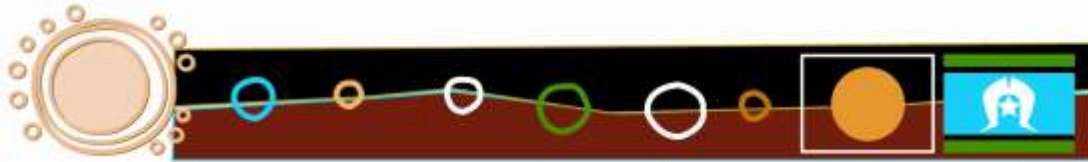
97. Evaluating the Circle Court will require the department identifying a funding source.

<b>Options 22 and 23</b>
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<b>21. Should the Circle Court be evaluated?</b>
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<b>22. If yes, what measures should be evaluated?</b>
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## **SUPPORTS AND WORKPLACE INFRASTRUCTURE FOR THE CIRCLE COURT**

98. It was also identified in the Marchetti/Daly review that the role of the Circle Court Coordinator is not understood or appreciated by some court staff.<sup>26</sup> The Circle Court Coordinator is currently based in the Magistrates Court Registry. The Circle Court Coordinator is an identified A&TSI position in the ACT Government. This position has been filled since 2004 by five different persons. The Circle Court Coordinator works in physical isolation from the Circle Court Magistrate and his Associate and has a direct reporting line to a supervisor situated in the Registry.<sup>27</sup>
99. The level of attrition in the Circle Court Coordinators is in part considered to be a consequence of the isolation of the Coordinator from other Registry staff and in part because of the isolation experienced being an A&TSI person in a predominately non-A&TSI workforce. Concerns have also arisen in the past about the lack of effective mentoring and supervision provided to the Coordinator. It is acknowledged that attempts to rectify these concerns have been implemented by court staff in recent times.

### **Options**

#### ***Strengthen Support Structure at ACT Magistrates Court***

100. It is feasible that the current isolation experienced by the Circle Coordinator could be alleviated if the position was relocated to a physical locality that is in close proximity to the Circle Magistrate and Associate. The Magistrate could then be the direct line supervisor for the position. Such relocation would facilitate communication between the Circle Coordinator and the Circle Magistrate.
101. In addition, consideration could be given to creating a position for an identified ASO2/3 position to work alongside the Circle Coordinator and assist with the growing demands of the Coordinator. Two A&TSI staff working together in a small team environment may assist in alleviating some of the isolation issues previously experienced by persons performing the Circle Coordinator role.

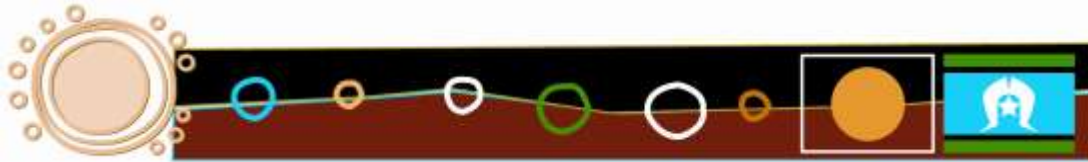
#### ***RJU Model***

102. An opportunity exists to transfer the management of the Circle Coordinator to the ACT Restorative Justice Unit (RJU). The RJU has been in operation in the ACT since early 2005 and operates under the *Crimes (Restorative*

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<sup>26</sup> *ibid*

<sup>27</sup> Marchetti, E., and Daly K., (2008) Strengthening the Ngambra Circle Sentencing Court – Final reports 1-4 - Australian Capital Territory, Department of Justice and Community Safety.



*Justice) Act 2004 (ACT)*. The objects of the Restorative Justice Act are found in section 6:

- a) to enhance the rights of victims of offences by providing restorative justice as a way of empowering victims to make decisions about how to repair the harm done by offences;
- b) to set up a system of restorative justice that brings together victims, offenders and their personal supporters in a carefully managed, safe environment;
- c) to ensure that the interests of victims of offences are given high priority in the administration of restorative justice under this Act;
- d) to enable access to restorative justice at every stage of the criminal justice process without substituting for the criminal justice system or changing their normal process of criminal justice; and,
- e) to enable agencies that have a role in the criminal justice system to refer offences for restorative justice.

103. The Restorative Justice Act, currently in phase one, augments the criminal justice response to young offenders in the ACT. Phase two will expand the current scheme to adult offenders who are charged with serious offence. The purpose of the restorative justice scheme in the ACT is to:

- provide victims with an opportunity to talk about how the offence has affected them and others close to them;
- provide young offenders with an opportunity to accept responsibility for their actions;
- provide young offenders with an opportunity to repair the harm done by the offence; and
- provide victims, young offenders and supporters an opportunity to meet to discuss the harm and what may be done to repair the harm.<sup>28</sup>

104. Parallels exist between the philosophical approaches taken by the Circle Court and the restorative justice processes outlined above. In fact, both processes can be conceptualised as restorative processes. These similarities include the capacity to take a more holistic view of the defendant's criminal behaviour; identify ways for the defendant to take responsibility for his or her behaviour; victim involvement and the exploration of ways in which he or she can repair the harm.

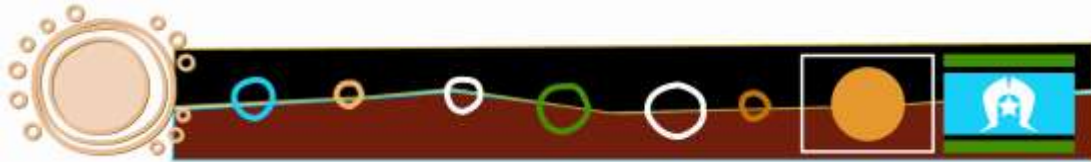
105. The RJU has established a professional and effective service to victims and young offenders in the ACT. Many of the processes currently utilised in the RJU processes (referral, assessment, and monitoring) have the potential to influence and inform practices of the Circle Court.

106. There are, however, differences between the Circle Court and the restorative justice practices which include:

- The focus on A&TSI issues in the Circle Court;

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<sup>28</sup> [http://www.jcs.act.gov.au/restorative\\_justice/ACTScheme.htm](http://www.jcs.act.gov.au/restorative_justice/ACTScheme.htm) accessed on 9 December 2009



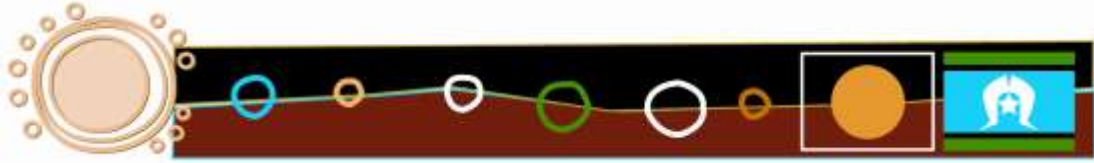
- The RJU operates under a prescriptive legislative model and the Circle Court does not;
- The use of panel member's and Elders in the Circle Court and the role they play in the process;
- The Circle Court is a sentencing process within the court system, whereas RJU sits on the periphery of the court process. The RJU has the capacity to influence court outcomes; and
- The Circle Court currently deals with adult offenders and family violence matters whereas RJU deals with young people and less serious offences (family violence and sexual offence are currently excluded until the commencement of phase two).

107. It is feasible that the Circle Court and RJU could coexist under the same management structure, whilst maintaining their separate functions. A co-location of the Circle Coordinator within the RJU would provide that person with a small supportive team environment; would allow for backfilling during times of absence; would provide support from colleagues who understand restorative justice processes; would give greater consideration and support to victims; has the potential to professionalise assessment processes and Circle Court outcomes; would provide improved accountability and monitoring of a defendant's post-sentence compliance and would provide benefits to the RJU with its increased engagement with the ACT A&TSI community.

108. The potential additional bonus of an RJU and Circle Coordinator co-location could result in increased usage and confidence of the A&TSI community with the RJU. The co-location could also enhance the ability of the RJU to build relationships and networks with the A&TSI community, creating scope for further development of diversionary measures for young A&TSI offenders, potentially resulting in fewer A&TSI youth being charged with and convicted of criminal offences.

### **Risks**

109. Some concern has been expressed that a co-location of the Circle Coordinator into the RJU would result in the Circle Court process becoming subsumed into the RJU, potentially losing its A&TSI focus. These concerns can be appeased if the Circle Court structure is largely maintained as it is presently and the management of the Circle Coordinator is transferred to the RJU. Others have raised concern that the Circle Court belongs with the Court and should operate on court premises. It is essential that the unique features of the Circle Court and its cultural focus are maintained if a co-location of the Circle Court Coordinator within the RJU is to occur.

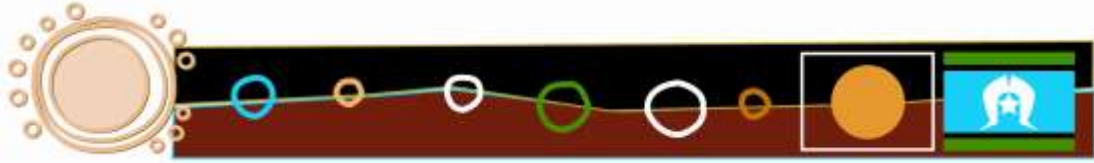


**Options 23, 24 and 25**

**23. Should the Circle Coordinator remain working for the Court, with a change in the supervision arrangements to the Circle Magistrate?**

**24. Should the Circle Court Coordinator be co-located with the ACT Restorative Justice Unit?**

**25. If so, should the Circle Court remain a separate entity from other restorative justice processes?**



## THE ROLE OF THE VICTIM IN THE CIRCLE COURT

110. An area that requires further consideration is clarification on the role of victims in the Circle Court process. The revised Practice Direction currently stipulates the following aim and object relating to victims:

### Aims

- (vi) to provide support to victims of crime and enhance the rights and place of victims in the sentencing process.

### Objects

- i. provide effective and restorative processes for the criminal justice response to, and community involvement in the management of, Aboriginal and Torres Strait Islander defendants and their victims<sup>29</sup>

111. The Practice Direction provides the following information relating to victim support in the Circle Court:

- a. The Court recognises that participation by victims in sentencing matters can be stressful for victims and requires sensitivity and special training.
- b. The prosecution will make initial contact with victims of defendants referred for assessment for suitability for sentencing by the Court, and
  - i. explain the Court's processes to them
  - ii. invite their participation
- c. identify persons or agencies from whom they may obtain assistance in preparing for participation in the sentencing and support during the process, and
- d. with their consent, notify the Victims of Crime Coordinator of their contact details.

112. There is limited guidance in the Practice Direction about what role a victim has in Circle Court and this has led to uncertainty for all parties on the role of victims and the information and supports they need to participate safely and effectively in the process. There is also an absence of procedural guidance relating to the preparation and assessment of a victim to ensure that their expectations, safety and support needs are met.

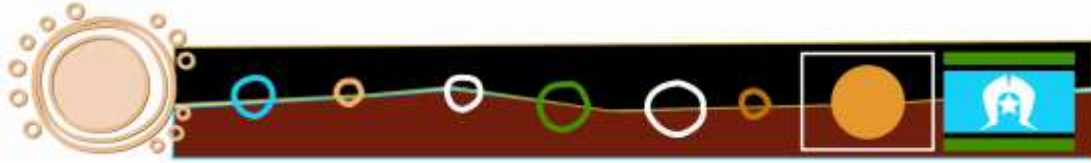
### Options

#### ***Victim Impact Statements***

113. Certain categories of victims are authorised to make a victim impact statement under Part 4.3 of the *Crimes (Sentencing) Act 2005*. A victim impact statement (VIS) can be made orally or in writing by a victim of the

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<sup>29</sup> Ngambra Circle Sentencing Court –Practice Direction s 4 and 7



offence; a person who has parental responsibility for a victim of the offence; a close family member of a victim of the offence; a carer for a victim of the offence; and a person with an intimate personal relationship with a victim of the offence. A VIS can be used in the sentencing of a defendant for an indictable offence or a series of other named offences under the *Crimes Act 1900*.

114. In practice the role of a victim in the Circle Court has been much broader than the giving of a victim impact statement under the *Crimes (Sentencing) Act 2005*. For example, any victim or victim representative may participate in the conversations during the 'less formal' Circle Court proceedings. This option is not generally available to victims in contemporary court proceedings. Stakeholders have indicated in both reviews that this enhanced role of a victim in the Circle Court should continue and should not be confined to the requirements set out for a VIS. From a victim's perspective, their inclusion in the Circle Court is more akin to that of victim's involvement in the restorative justice model than the traditional role of a victim in court proceedings. It is also noted that Circle will deal with 'victimless' crimes from time to time.

115. There is some detailed consideration given on the role of a victim in the Circle Court from the Victims of Crime Coordinator's report (compiled at the completion of the pilot) and from the retired Circle Magistrate, Mr Shane Madden.

#### ***VoCC report – role of the victim during pilot***

116. The Office of the VoCC undertook the preparation for, liaison with and support of victims in the Circle Court process for the duration of the Circle Court pilot. The liaison and support offered was for all stages of the process: pre-sentence, during the proceedings and post-sentence throughout the period of statutory supervision of the offender. The VoCC stated in her Report on the Review of the Circle Court, that, "*in the main, the Circle Court has enhanced the rights of victims of crime in the sentencing process.*"<sup>30</sup>

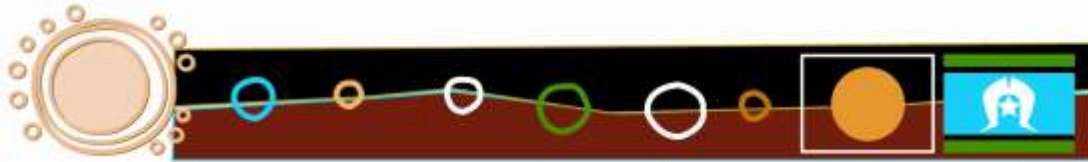
117. A procedure for victim contact and liaison for the Circle Court was drafted by the Victims of Crime Coordinator (VoCC) at the completion of the pilot but was not formally finalised with the Director of Public Prosecutions.

118. The VoCC made the following observations of the role of a victim in the Circle Court process at the completion of the pilot:

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<sup>30</sup> Ngambra Circle Sentencing Court – Report on the Pilot Initiatives from the Victims of Crime Coordinator – November 2004.





The Circle Court has presented victims of crime in the ACT with an opportunity for a greater level of acknowledgement than is usual in the criminal justice system. This opportunity brings options that the victim may voluntarily seek to take up for:

- Direct and indirect participation;
- Verbal and/or written submission as to impact of the offence;
- More information about the offender and the context for the offence;
- Direct and reasonably unconstrained communication with the offender, the Magistrate and others;
- Challenging the offender's perspective of the offence and the offending;
- Hearing other Indigenous community members and the prosecutor challenge the offender's perspective of the offence and the offending.

The initiative also brings some critical dilemmas for victims and victim advocates. The Circle Court lies on the cusp of a restorative justice intervention and a normal sentencing court. As such it has neither the equity and openness of process of the former, nor the constrained but protective certainties of the latter.<sup>31</sup>

119. The retired Circle Court Magistrate, Shane Madden, described the role of a victim in the Circle Court as:

One primary aim of the Circle Court is to facilitate victims of crime being able to advance their particular concerns in the sentencing process and to recognise that their rights have perhaps been violated by the offender. The Practice Direction facilitates the Director of Public Prosecutions or the Victims of Crime Co-ordinator making an initial contact with the victim or victims to determine whether they wish to be involved in the Circle Sentencing Process. The objective is to explain the process, invite participation, identify a person or agencies from whom assistance may be provided and with the consent of the victim, notify the Victims of Crime Co-ordinator of the contact details. It has been the experience of Ngambra Circle Sentencing Court that in a number of domestic violence matters and criminal assault charges, the complainants have elected to be part of the Circle process. These victims include husbands, wives, partners, and members of the public and even police officers.<sup>32</sup>

120. The Marchetti/Daly review identified that stakeholders wanted victims to have a 'full' role in the Circle Court process, in circumstances where the victim had consented to being involved.<sup>33</sup>

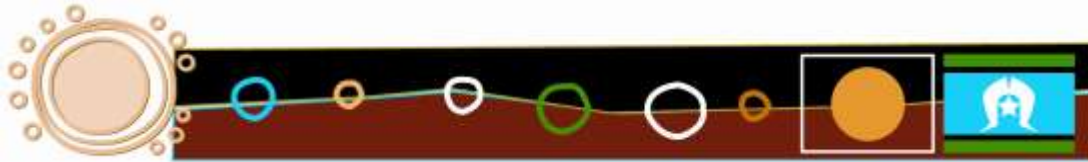
121. The level of support provided to victims by the VoCC during the pilot was commendable but was only a short term measure and this level of support has not consistently been applied since the completion of the pilot.

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<sup>31</sup> Ngambra Circle Sentencing Court – Report on the Pilot Initiatives from the Victims of Crime Coordinator – November 2004.

<sup>32</sup> Magistrate Shane Madden – presentation to conference at Albury in 2006 – The Circle Court in the ACT – An overview and its future.

<sup>33</sup> Marchetti, E., and Daly K., (2008) Strengthening the Ngambra Circle Sentencing Court – Final reports 1-4 - Australian Capital Territory, Department of Justice and Community Safety.



Fragmentation and ad hoc victim support for the Circle Court has been the experience of Circle Court victims since this time. There is an urgent need to re-establish an appropriate victim support model for Circle Court matters.

### ***Restorative Justice Victim Model***

122. An existing 'role of a victim' model exists under the *Crimes (Restorative Justice) Act 2005*. The RJU's primary objective is to provide restorative justice to members of the ACT community who have been affected by an offence in a forum that provides:

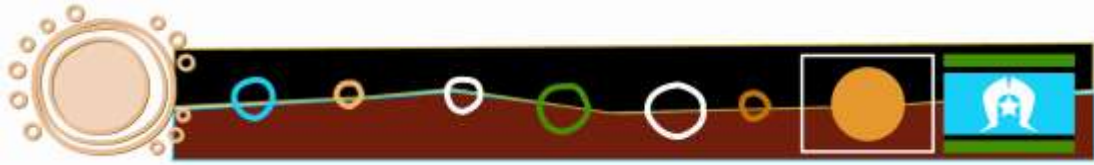
- victims with an opportunity to talk about how the offence has affected them and others close to them;
- offenders with an opportunity to accept responsibility for the actions;
- offenders with an opportunity to repair the harm done by the offence; and
- victims, offenders and supporters an opportunity to meet to discuss the harm and what needs to be done to repair that harm.

123. Once a matter is referred to the RJU, and a defendant has been found suitable to participate, a victim is contacted by a convenor and the restorative justice process is explained to them. They are invited to participate in the process (this is a consensual process). Convenors conduct interviews with victims to ensure that they have a thorough understanding of the process; the convenor identifies the expectations of a victim and explores ways in which the victim wants the offender to make amends. A convenor provides information to the victim about what the likely outcomes of the process might be. Victims can be actively involved in the process; can participate through indirect methods; are given an opportunity to explain the impact the crime; can ask questions of the offender and can make suggestions on what the offender can do to repair harm. A victim may be found 'not suitable' for the process if the power dynamics are considered to be significant between the parties, or the expectations of the victim are unrealistic. However a high percentage of victims (67%) consent to be involved in the RJU process and evaluations strongly suggest that victims are satisfied by their participation in the process (88%).<sup>34</sup> It is feasible that a model similar to the RJU victim model could be adopted to ensure the needs of victims are met at the Circle Court.

124. It is noted that until phase two of Restorative Justice Act commences, the RJU is not permitted to conference family violence or sexual assault matters. The timing for the commencement of phase two has been delayed in part due to community concerns about the safety implications for participating victims (this does not create a barrier to family violence matters being heard at the Circle Court, as it is not proposed to bring Circle Court practices under the Restorative Justice Act). The RJU has conducted extensive consultation with the domestic violence and sexual assault sectors and has developed

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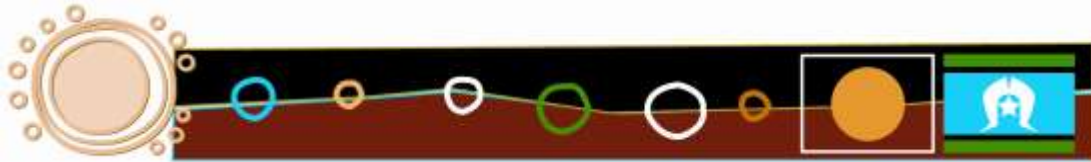
<sup>34</sup> Data provided by the Restorative Justice Unit on 23<sup>rd</sup> November 2009



draft guidelines in which to conduct family violence conferences. These guidelines will be adhered to on commencement of phase two. If the Circle Court Coordinator was to co-locate with the RJU, these guidelines could also inform how to safely manage victims' interests in Circle Court processes.

125. If a restorative justice model was to be adopted for Ngambra Circle Court, the role of the victim would need to be more clearly defined and their rights clearly identified than has been the case to date. This should also be extended to the role of any victim's representative that may be chosen by a victim to represent their interest at Circle Court.

<b>Options 26, 27 and 28</b>
<b>26. Should the role of a victim in Circle Court be confined to what is contained in a VIS?</b>
<b>27. Should the role of a victim be based on:</b> <ul style="list-style-type: none"><li>• the model that was adopted by the VoCC during the pilot?</li><li>• the victim model used in the RJU?</li></ul>
<b>28. What supports and information should be made available to victims who are involved in Circle Court and who is best placed to provide this level of service delivery?</b>



## **TYPES of MATTERS DEALT WITH AT CIRCLE COURT**

126. The jurisdiction of the ACT Magistrates Court is dealt with in Part 3.2 of the *Magistrates Court Act 1930 (ACT)* which provides:

### **Section 19 - Jurisdiction of court**

If, by any law in force in the ACT, any offence is punishable on summary conviction or any person is made liable to a penalty or punishment or to pay an amount for any offence, act or omission, and no other provision is made for the trial of the person committing the offence, the matter may be heard and decided by the court in a summary way under the provisions of this Act.

127. Amendments to the *Magistrates Court Act 1930 (ACT)*, which commenced in May 2009, increased the sentencing threshold of the ACT Magistrates Court to: a penalty of 5 years imprisonment or a fine of \$15,000 or both (previously 2 year's imprisonment or a fine of \$5,000 or both). The Circle Court, as a part of the Magistrates Court, has the same sentencing threshold.

128. A single judge of the ACT Supreme Court of Appeal has recently considered the operation of the Ngambra Circle Sentencing Court under the current Practice Direction. Justice Penfold commented on the importance of section 4 of the Ngambra Circle Sentencing Practice Direction and stated that the Practice Direction does not purport to, and nor could it, establish a court with an identity and jurisdiction separate from that of the Magistrates Court. Section 4 of the Practice direction states:

Nothing in this Practice Direction is to be taken to remove or limit the judicial discretion of a Magistrate to impose a lawful sentence that is considered just and appropriate.<sup>35</sup>

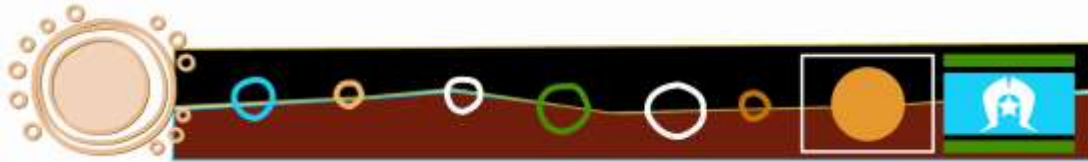
### **Family Violence**

129. Family violence offences, which often involve difficult and challenging power dynamics, have not been excluded from hearing at the Circle Court. A substantial percentage of family violence matters have been dealt with at the Circle Court since it commenced in 2004. The inclusion of family violence offences in the Circle Court has been controversial and has been the subject of significant criticism in the sector. Currently, Victoria is the only jurisdiction that specifically excludes family violence offences from its specialist A&TSI courts. The Marchetti/Daly review commented that the exclusion of family violence from the Circle Court would result in the exclusion of a large number of defendants from the process.

130. A&TSI people are over represented in all aspects of the criminal justice system, both as victims and offenders.<sup>36</sup> Family violence is a prevalent

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<sup>35</sup> *Okwechime v Sindel* [2009] ACTSC 162



social problem in many communities throughout Australia. The ACT has the highest recorded number of A&TSI victims of family violence in Australia, with more than 33% reported physical violence or threats in the last year.<sup>37</sup>

131. The ACT Victims of Crime Coordinator detailed the following safety implications for victims of family violence that arose during the pilot Circle Court proceedings:

Family violence matters are notoriously volatile with many hidden undercurrents. Inevitably, victims are juggling a number of different issues such that an emphasis or decision one day can change in the next. Decision-making on staying in a relationship or leaving permanently or temporarily can be a day by day thing.

Family violence is commonly characterised by a significant degree of attack on a person's sense of self worth, self esteem and sense of competence. Therefore victims are highly attuned to direct or indirect comment that suggests that they are somehow at fault or contribute to the defendant's violence against them.

Likewise a victim is commonly highly attuned to the defendant's capacity for threat and intimidation or indeed that person's capacity to appear to be remorseful. This was a feature in five of the family violence matters. Indeed, in one matter, the drawn out process of the Circle Court appeared not only to add to the tension of the relationship, but also increased the risk of further harm to the victim.<sup>38</sup>

132. The VoCC recommended that the following principles be adhered to when a victim of family violence agrees to participate in the Circle Court:

- priority should be placed on the safety of the victim and any children;<sup>39</sup>
- only specialised prosecutors should appear in the Circle Court; (i.e. a specialist family violence prosecutor);
- a defendant's preference to continue to reside with a victim should be opposed in bail proceedings, at least until after the first sitting of the Circle Court;
- it should be mandatory that 48 hours notice be given of applications to vary or revoke bail;
- the Domestic Violence Crisis Service (DVCS) must be actively involved; and
- there must be strict adherence to family violence protocols within ACTCS.<sup>40</sup>

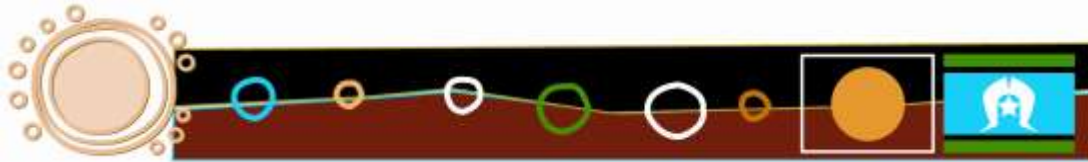
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<sup>36</sup> Inquiry into Access to Justice. Australian Human Rights Commission Submission to the Senate legal and Constitutional Affairs. 20<sup>th</sup> October 2009 r

<sup>37</sup> A Social and Cultural Profile of Aboriginal and Torres Strait Islander people in Canberra, at 65

<sup>38</sup> Ngambra Circle Sentencing Court – Report on the Pilot Initiatives from the Victims of Crime Coordinator – November 2004.

<sup>39</sup> New Zealand best practice similarly recommends safety is prioritised for all parties. *Ibid.*, p17.



133. Guidelines were developed by the VOCC post pilot but were not adopted in full by the DPP. The reasons for this are not clearly known, but could in part be associated with general concerns about the negative impact Circle Court could have on a victim (particularly a family violence victim) and the lack of a systemic and coordinated response to facilitate support for victims in Circle Court matters.
134. Qualitative feedback on the current role of victims in the Circle Court and the principles to be adopted by agencies to ensure victim safety indicates that at best, a victim's ability to participate in a positive and safe way is limited, depending on the expertise and support offered by key personnel.
135. The resource implications for support of victims for Circle Court is not currently considered to be overly burdensome due to the small number of matters being progressed per annum (approximately 10 matters). The current lack of cohesive support for victims, in particular victims of family violence, is considered to be a significant gap in the ability of the Circle Court to deliver on its aims and objectives and could potentially place victims at risk.
136. Currently (and until such time as phase two commences), family violence and sexual assault matters are excluded from the restorative justice scheme in the ACT. The conferencing of these types of matters is highly controversial, with some critics arguing that the risks of participation by victims are unacceptably high.
137. However, some community support does exist for the conferencing of family violence matters. It is considered that in circumstances where a victim wants to participate and the safety implications have been considered and minimised, a fully informed and consenting victim should be given the opportunity to communicate with the offender in a safe and supported forum. In addition, the A&TSI community recognises the impact of family violence on their community and they see Circle Court as providing scope for panel members and/or Elders to hold defendants accountable for their use of violence.

<b>Options 29 and 30</b>
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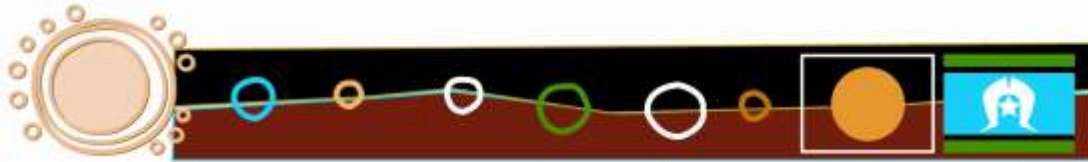
<b>29. Should family violence matters be included in the Circle Court processes?</b>
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<b>30. If yes, what arrangements need to be put in place to ensure victims</b>
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<sup>40</sup> Ngambra Circle Sentencing Court – Report on the Pilot Initiatives from the Victims of Crime Coordinator – November 2004.





are adequately protected?

- **Should the VoCC guidelines be adopted and adhered to in full?**
- **Should consideration be given to adopting a victim's model similar to the RJU model (see discussion under role of victim's below)?**

### ***Sexual Offences***

138. Sexual offence matters are excluded from the Circle Court under section 12 of the Practice Direction.<sup>41</sup>

139. Currently only less serious sexual offences fall within the jurisdiction of the Magistrates Court. One rationale for the exclusion of sexual offences from Circle Court is on the basis of the seriousness in which such offences are held in society. A second basis for exclusion is due to the differentiation in power dynamics that can exist between a victim and an offender and fears that a Circle Court sentencing process may replicate those power dynamics (these are similar concerns to what exist in family violence matters).

140. It is noted that sexual assault offences do not always occur in a family violence context and some advocate that lower end sexual assault matters (such as indecent assault) may be properly dealt with in the Circle Court. Concerns from stakeholders about the capacity of Circle Court to effectively deal with these dynamics is highly relevant to whether they are included in the short to medium term. It is not however recommended that any expansion to sexual offences occur until the strengthening project is complete.

### **Options 31 and 32**

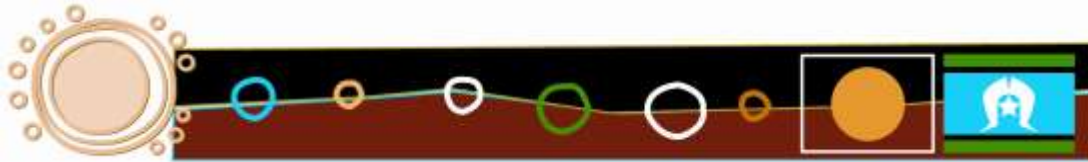
**31. In the long term should less serious sexual assault offences be included in Circle Court processes?**

**32. If yes, what arrangements need to be put in place to ensure a victim is adequately protected and supported in the process?**

### ***More Serious Offence Types and Commonwealth Offences***

141. Currently Part 3.2 of the *Magistrates Court Act 1930* creates a limitation on the Circle Court from dealing with more serious offence types. Serious offences' are most often finalised in the ACT Supreme Court. Therefore no specialised culturally appropriate sentencing option is available for A&TSI

<sup>41</sup> Section 12 Ngambra Circle Sentencing Court Practice Direction. A defendant charged with a sexual offence is not eligible for referral to the Court.



defendants who have pleaded guilty to a serious offence, or who have not consented to the jurisdiction of the Magistrates Court (where applicable) and have been committed to the Supreme Court.

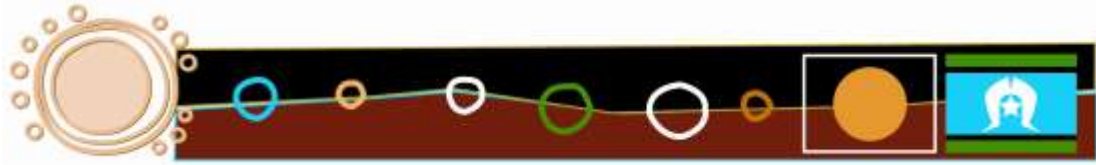
142. The resource implications of an expansion of the Circle Court as an adjunct to the Supreme Court are substantial and have not been fully explored to date. If the Circle Court continued to convene in its current configuration, a judge would be required to oversee the process.
143. Victoria is the only jurisdiction that has scope to consider higher end matters within the Circle Court sentencing process.
144. In addition, a submission received post pilot from the Office of the Commonwealth DPP suggests that it is not appropriate that Commonwealth offences be included within the sentencing regime of the Circle Court. The sentencing regime in Part 1B of the *Crimes Act 1914 (Cth)* is not considered to have scope to expand to include considerations relevant to sentencing in Circle Court processes.<sup>42</sup> There is no demand to include Commonwealth offences at this time and it is not recommended that an expansion to Commonwealth offences be considered during this review.

### ***Long Term Measures to Extend Circle Court***

145. Another option would be a model where the Elders and panel members convene the Circle is similar to the model used in the ACT Restorative Justice Unit. This model would require the panel members and Elders to assume a role similar to that of an RJU convenor. Developing such a model for the Circle Court is a long term measure and would require significant training and a consolidation of the necessary skill set before it could be achieved.
146. If, however, as a long term measure the Circle Court were to develop to a point where the Elders and panel members could conduct a process in the absence of a judicial officer, and subsequently provide feedback to the court on the outcomes of the process, to be taken into account in the sentencing of a defendant. The resource implications with this type of model would be significantly reduced.
147. It is not recommended that the Circle Court be altered to reflect the RJU model at this time. The ACT A&TSI community appreciate the presence, guidance and expertise of the Circle Magistrate. It is further recognised that significant training and a consolidation of panel members and Elders expertise would need to occur before this could happen. The additional demands such an expansion would place on the Circle Coordinator would

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<sup>42</sup> Letter sent to Magistrate Madden from the Commonwealth Office of Director of Public Prosecutions 15 May 2006 re: Revising the Practice Direction.



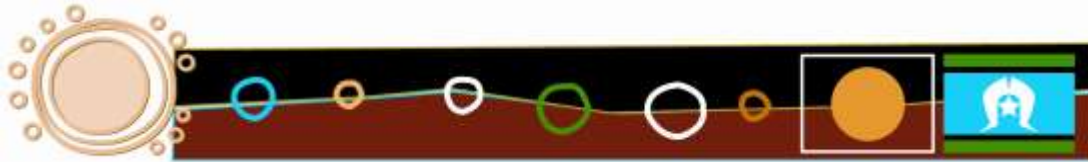
also need to be carefully considered and may give rise to further resource implications.

**Options 33, 34 and 35**

**33. Should consideration be given to expanding the Circle Court to the ACT Supreme Court jurisdiction in the long term?**

**34. If yes, what arrangements are considered necessary to facilitate this?**

**35. As a long term measure, should the Circle Court evolve into a process similar to the RJU model where panel members and Elders conduct the Circle process and report back to a Judge/Magistrate?**



## **EXTENDING THE CIRCLE COURT TO DEFENDANTS FROM YASS, QUEANBEYAN and JERVIS BAY.**

148. The Marchetti/Daly review identified that consideration be given to extending the Circle Court to Yass, Queanbeyan and Jervis Bay A&TSI communities. The Queanbeyan and Yass districts have significant numbers of A&TSI people, with a high level of transiency occurring across the border into the ACT.

149. The Practice Direction (s 11 (iii)) currently places the following limitation on a defendant's eligibility for Circle Court:

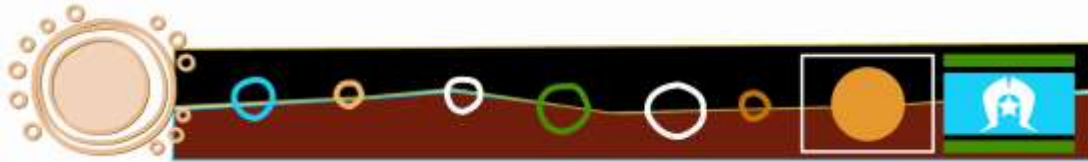
*the defendant identifies as an Aboriginal or Torres Strait Islander person and claims to have kinship or association with the Canberra Aboriginal or a Torres Strait Islander community.*

150. This eligibility requirement has been largely ignored in practice. Many defendants with limited connection to the ACT have been dealt with at the Circle Court. The transient nature of some A&TSI defendants in the ACT, and the loss of connection with their own communities, has not resulted in an exclusion from the Circle Court. The presence of Elders or panel members on the Circle Court and their capacity to influence change in a defendant's future behaviour, has been recognised as sufficient, even in circumstances where no association with the local A&TSI community is present.

151. The role of an Elder and his or her authority to speak for community is of fundamental importance to A&TSI communities. This authority is recognised and respected in the ACT. The authority of an Elder or panel member to challenge the criminal behaviour of a defendant who has committed a crime on traditional lands is considered by many to be sufficient to influence an A&TSI defendant. Some members of the ACT A&TSI community consider that it is not always necessary that the defendant have a close link or connection with the ACT. The local A&TSI community have said that the capacity of a defendant to listen to Elders and/or panel members can be instead assessed during the suitability assessment process.

### ***Territorial Jurisdiction***

152. The territorial jurisdiction of the ACT Magistrates Court is limited to crimes committed within the ACT. Any crime committed in Yass NSW, must be dealt with by the Courts in NSW. However, if a defendant who lives in Yass but has committed a crime in the ACT, the matter has potential to be dealt with at the Circle Court (if the eligibility stipulation in the Practice Direction is ignored). The assessment stage of the Circle Court provides an additional opportunity for panel members to ascertain whether there are any concerns



about a lack of respect for, or connection with the ACT that may detract from a defendant's suitability for participation in the Circle Court.

#### Jervis Bay

153. The Jervis Bay community is subject to ACT law and the jurisdiction of the ACT Magistrates Court. Currently, no Circle Court is available to the Jervis Bay community but there is no existing legal impediment to such an expansion occurring. The A&TSI community at Jervis Bay need to be consulted about whether they would like to have access to a Circle Court sentencing process. Considerations need to include whether the Circle Court can be adapted to meet the particular needs of the Jervis Bay community, whether the Circle Court would need to relocate to Jervis Bay for the sentencing process and whether Jervis Bay Elders and panel members would be prepared to participate. The physical distance between communities and the resource issues this raises pose challenges in expanding the Circle Court to the Jervis Bay Territory at this time.

#### Referral of A&TSI defendants to Circle Court

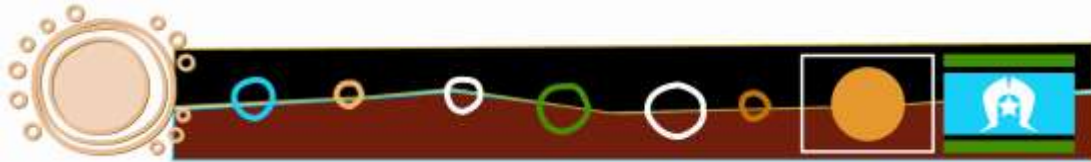
154. The A&TSI community have indicated a preference that all A&TSI persons who appear before the ACT Magistrates Court should be referred for an assessment to Circle Court, regardless of their connection to community. The capacity of a defendant to listen to Elders and or panel members can be assessed during the suitability assessment process. Barriers that currently impact on this happening relate to how the Circle Court is perceived in the sector, and a reluctance of some legal personnel to refer defendants. Extending the availability of Circle Court to all A&TSI defendants for an assessment may not be advisable until the strengthening project is underway or completed.

#### **Options 36, 37 and 38**

**36. Should defendants who have limited or no connection to the ACT A&TSI community be able to participate in Circle Court?**

**37. Should the Circle Court be expanded to include the Jervis Bay Territory in the long term? If yes, what arrangements and resources need to be put in place to facilitate this expansion?**

**38. Should all A&TSI defendants who appear before the ACT Magistrates Court be referred for assessment to Circle Court?**



## EXTENDING THE CIRCLE COURT TO YOUNG DEFENDANTS

155. There has been a clear mandate from the A&TSI community to extend the Circle Court to young offenders. A&TSI youth continue to be over represented in the ACT criminal justice system, with almost half of all A&TSI males in Canberra being charged by police for an offence at some stage in their lives, nearly one in five before they are 17 years of age.<sup>43</sup> Over representation issues, particularly those relating to youth are of significant concern to the A&TSI community.
156. There is currently no legal impediment to extending the Circle Court to youth. However, concerns exist that to do so before the strengthening project is complete could prove detrimental. It is recognised that young people need clear support structures in place to facilitate their compliance with court orders. This is an area that needs further development within the Circle Court strengthening project. It is also considered necessary that efforts be put into identifying appropriate and culturally sensitive diversionary options for A&TSI youth, to keep them out of the court system whenever possible (Circle Court is recognised as not providing a diversion from the criminal justice system).
157. Recent research conducted by the Australian Institute of Criminology provides a clear indication that recidivism does not vary between juveniles who receive a custodial penalty and those who receive non-custodial sentences. The adverse effects of incarceration on juveniles, together with an absence of evidence that custodial penalties act as a deterrent for future juvenile offending, suggests that custodial penalties ought to be used sparingly for juvenile offenders.<sup>44</sup> These findings are supported in section 133C of the *Crimes (Sentencing) Act 2005*, which stipulates that a court must promote *rehabilitation* of a young offender above other sentencing considerations.
158. Children and young people (under the age of 18) who commit a crime in the ACT are sentenced under the sentencing regime stipulated in the *Crimes (Sentencing) Act 2005*:

### **Section 133C Young offenders—purposes of sentencing**

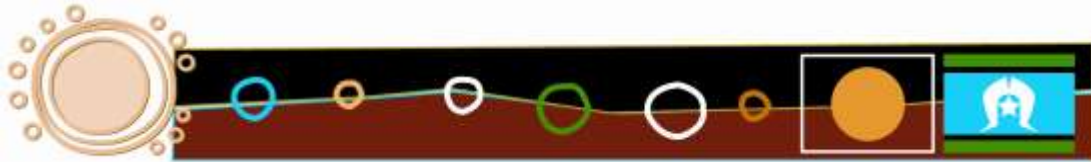
(1) Despite section 7 (2), in sentencing a young offender, a court must consider the purpose of promoting the rehabilitation of the young offender and may give more weight to that purpose than it gives to any of the other purposes stated in section 7 (1).

(2) Also, in sentencing a young offender, a court must have particular regard to the common law principle of *individualised justice*.

<sup>43</sup> Australian Bureau of Statistics, National Aboriginal and Torres Strait Islander survey, 2007.

<sup>44</sup> Weatherburn, D., Vignaendra, S. and McGrath, A., (2009) The specific deterrent effect of custodial penalties on juvenile reoffending. The Australian Institute of Criminology. Canberra. Accessed on 23<sup>rd</sup> September 2009 at <http://www.aic.gov.au>





159. The concept of *individualised justice* recognises that in determining an appropriate sentence for an individual offender, ‘one size does not fit all’. In *R v Whyte*, Spigelman CJ said:

“The maintenance of a broad sentencing discretion is essential to ensure that all of the wide variations of circumstances of the offence and the offender are taken into account. Sentences must be individualised.”<sup>45</sup>

160. Applying the concept of *individualised justice* to the sentencing of young A&TSI defendants in the ACT gives the Court scope to consider particular individual characteristics of defendants and the offences they commit. These considerations can occur in the context of a defendant’s cultural background, over representation and colonisation issues and other considerations such as poverty and family dysfunction that may impact on a person’s criminal behaviour. The use of panel members and Elders in the sentencing process of young A&TSI defendants may in fact support the Court to take into account particular and individual and cultural needs of an A&TSI young person.

161. In addition, section 72(k) of the *Court Procedure Act 2004* permits the Court to allow persons involved in a circle sentencing process in a criminal proceeding to enter what is normally a ‘closed’ Children’s Court.

162. Currently, Queensland has the largest number of A&TSI juvenile courts. The Children’s Court models used in Queensland, South Australia and Victoria are similar to their adult A&TSI Courts, although some variations do exist between the jurisdictions. For example, in some court sites, more panel member/Elders are used in the Children’s Court than in adult courts.

### ***Diversion as a Priority***

163. The Daly/Marchetti review recommended that, in considering the establishment of an A&TSI children’s sentencing process, specific consideration should be first given to greater utilisation of the restorative justice model currently available in the ACT for juvenile offenders.<sup>46</sup>

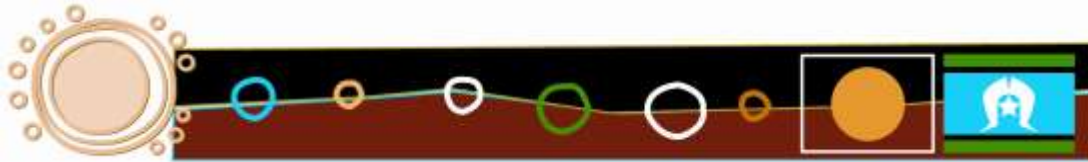
164. Other options currently available to address the overrepresentation of A&TSI youth include:

- Enhancing the ability of the Restorative Justice unit to respond to A&TSI youth;
- Exploring specific A&TSI diversionary programs that are being developed or are in existence; and

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<sup>45</sup> *R v Whyte* [2002] NSWCCA 343 (20 August 2002)

<sup>46</sup> Marchetti, E., and Daly K., (2008) Strengthening the Ngambra Circle Sentencing Court – Final reports 1-4 - Australian Capital Territory, Department of Justice and Community Safety.



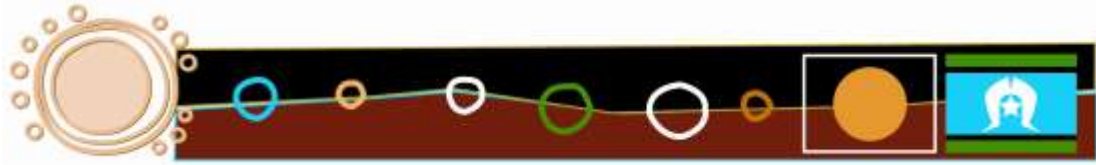
- Exploring options to enhance the current police cautioning scheme for Indigenous youth.

### ***RJU Model***

165. There is scope within the restorative justice scheme in the ACT to focus on diversion of A&TSI youth from the criminal justice system. It is important that young A&TSI offenders have diversionary measures in place to avoid the risk of getting caught up in the court system. These diversionary measures need to occur at an earlier stage than the sentencing stage (preferably at the time of interaction with police). The scope of the Circle Court to facilitate the diversion of young A&TSI offenders is stymied by the fact that it is a sentencing court and not a means of diversion from the criminal justice system.
166. The Restorative Justice Unit (RJU) in the ACT is considered to have a strong and successful framework in place to deal with young offenders and with victims of their crimes. The RJU considers matters at various points in time including, prior to charges being laid, during court processes or post sentence. It therefore has scope to respond to the needs of the A&TSI community to divert young offenders from the criminal justice system.
167. Some concern exists in the A&TSI community that the RJU caters for 'white kids' only. The RJU is keen to work closely with the A&TSI community to improve diversionary outcomes for A&TSI children and young people. The RJU is currently seeking funding to employ an Indigenous Guidance Partner to facilitate engagement with the A&TSI community. Efforts are required to promote the RJU and facilitate a greater engagement with the A&TSI community. Currently the RJU does not have any A&TSI staff and this is believed (at least to some extent) to impact on its ability to engage with, and create enduring and successful restorative justice outcomes for, A&TSI youth.

### ***Co-location of Circle Coordinator at Restorative Justice Unit (RJU)***

168. A co-location of the Circle Court Coordinator with the RJU may assist in facilitating relationships between the RJU and the A&TSI community, enhancing diversionary measures for youth, as well as providing a supportive and structured environment for the Circle Court Coordinator. A co-location would also have the added bonus of facilitating the involvement of panel members and Elders in restorative justice processes with youth.
169. It is an unfortunate fact, however, that in some circumstances diversionary measures may be exhausted and an A&TSI youth may end up before a sentencing court. In these circumstances, it is considered to be appropriate that a young defendant should have access to a culturally appropriate Circle Court. The question remains as to when the Circle Court should be extended

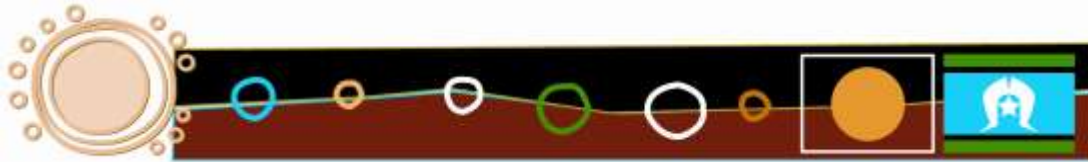


and whether this should occur prior to the strengthening process being completed or whether it should occur in conjunction with it.

**Options 39 and 40**

**39. Should the Circle Court be extended to youth in the short, medium or long term?**

**40. Should the Circle Court Coordinator be co-located with the RJU, and the role expanded to facilitate diversion measures for young A&TSI offenders?**



## LEGISLATIVE MODEL

170. The need to strengthen the current model through the creation of a legislative basis was identified as necessary in the Marchetti/Daly review, as the Practice Direction was considered to be insufficient to drive the Circle Court. The authors did not precisely prescribe how the legislation should be drafted.<sup>47</sup> Some concern has been expressed in the A&TSI community that the Circle Court is at risk of being abolished. These concerns arise from economic rationalist ideas that 'one Circle costs \$10,000' and that, in financially difficult times, the Circle Court may be perceived as a luxury the community cannot afford. Members of the A&TSI community believe that the Circle Court will have a more solid basis in the ACT if it is named in legislation.

171. Currently the sentencing process conducted under the Circle Court derives its existence pursuant to section 309 of the *Magistrates Court Act 1930*:

### **Directions about procedure etc**

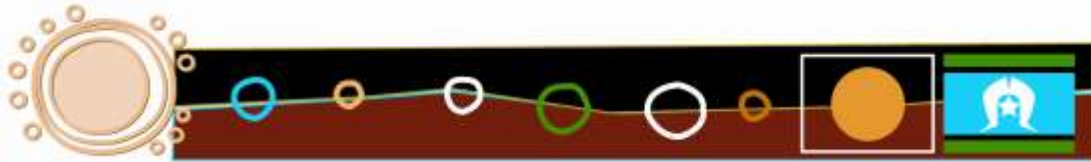
- (1) If the procedure for taking a step in a proceeding is not set out in this Act or the law under which the step is to be taken, the court may give a direction in relation to—
  - (a) the procedure to be followed in relation to the step; and
  - (b) any other relevant matter in relation to the step.
- (2) *Without limiting subsection (1), the court may give a direction in relation to the procedure to be followed in relation to circle sentencing for certain Aboriginal or Torres Strait Islander offenders, and any other relevant matter in relation to circle sentencing.*
- (3) To remove any doubt, a direction mentioned in subsection (2) is not taken to—
  - (a) establish a court; or
  - (b) limit the Magistrates Court's discretion in sentencing an offender.
- (4) In this section:  
*Aboriginal or Torres Strait Islander offender* means an offender who—
  - (a) is a descendant of an Aboriginal person or Torres Strait Islander; and
  - (b) identifies as an Aboriginal person or Torres Strait Islander; and
  - (c) is accepted as an Aboriginal person or Torres Strait Islander by an Aboriginal or Torres Strait Islander community.

**circle sentencing** means the step in a sentencing proceeding for involving members of the Aboriginal or Torres Strait Islander community and others in relation to the sentencing by the court.

172. At the time of the Circle Court's establishment, it was envisaged that it would operate in a similar manner to the Specialist Indigenous Courts operating in NSW. The Practice Direction developed for the Circle Court was modelled

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<sup>47</sup> Marchetti, E., and Daly K., (2008) Strengthening the Ngambra Circle Sentencing Court – Final reports 1-4 - Australian Capital Territory, Department of Justice and Community Safety.



on the Nowra model. However, the practices of the ACT Circle Court have evolved and, in some instances moved away from the original vision.

173. The need to comply with the Practice Direction was also identified as necessary in the initial review. As a short term measure the ACT Magistrate's Court staff have revised the original Practice Direction to better reflect current practice. The revised version is awaiting clearance by the Chief Magistrate at the time of writing this paper.

### **Circle Court Legislative Models from Other Jurisdictions**

174. There are currently five Australian jurisdictions that have adopted a general 'overarching' legislative model for Specialist Indigenous Courts:

- NSW: *Criminal Procedure Regulation 2005* and *Criminal Procedure Act 1986*;
- SA: *Criminal Law (Sentencing) Act 1988*
- WA: *Sentencing Act 1995* and *Magistrates Court Act 2004*;
- QLD: *Penalties and Sentences Act 1992* and *Juvenile Justice Act 1992*;
- NT: *Sentencing Act 1995* and *Youth Justice Act 2004*.

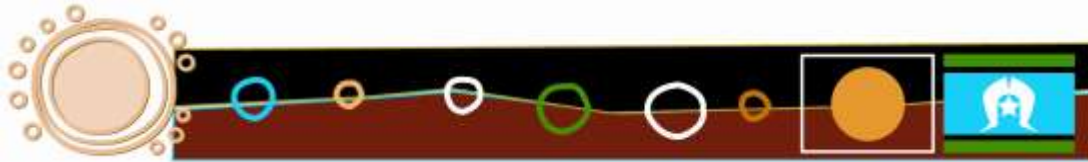
### **Overarching Legislative Basis**

175. An idea put forward during the Marchetti/Daly review was that an overall framework should be placed in legislation with the operational activities of the Circle Court being prescribed in the Court Procedure Rules. This 'overarching' model would allow flexibility for changes as the Circle Court evolves. It would also provide a legislative framework to regulate Circle Court processes, as well defining the purpose of court in relation to victims and offenders, as identified in the Marchetti/Daly review.

176. An overarching model adopted for the ACT would name the Ngambra Circle Sentencing Court in legislation, along with identifying its aims and objectives. The operational aspects of the Circle Court would then form part of the Court Procedure Rules. Naming the Circle Court and identifying its objectives would reassure the A&TSI community that the ACT Government is supportive of the Circle Court, whilst allowing flexibility for it to continue to evolve and grow. The costs to develop this model will be minimal and can be absorbed into current JACS funding. This option would use far less departmental resources than would be required for a more prescriptive legislative model.

### **Koori Court Legislative Model**

177. Victoria Circle Courts operate under two legislative instruments; The *Magistrates' Court (Koori Court) Act 2002* creates a Koori Court division of the Magistrates Court for adult A&TSI defendants and the Children and



*Young Persons (Koori Court) Act 2004* is utilised for A&TSI children and young defendants.

178. Before the introduction of this legislation, the Koori Courts operated under general sentencing provisions and Practice Directions, in a manner similar to the ACT Circle Court.

179. The Koori Acts outline the circumstances in which the Court can deal with certain offences, including eligibility criteria and provisions for the exclusion of certain offences (sexual offences and family violence). The Koori Acts prescribe who can participate and outlines the process of appointment of Elders and Respected Persons. The Koori Acts provide that other operational issues are to be included in the Rules of the Court.

180. The objectives of the Koori Court are stipulated in the legislation and are to ensure greater participation of the Aboriginal community in the sentencing process of the Magistrate and Children's Courts and by providing that an Aboriginal Elder or respected person can assist in achieving more culturally appropriate sentences for young Aboriginal people.

181. This model is still considered to be an overarching model that allows for flexibility in changing operational aspects of the Court. Its main difference from the overarching model described above is that it provides slightly more structure. The *Magistrates Court (Koori Court) Act 2002* is provided for consideration at Attachment A.

#### Advantages

182. Advantages of overarching models include:

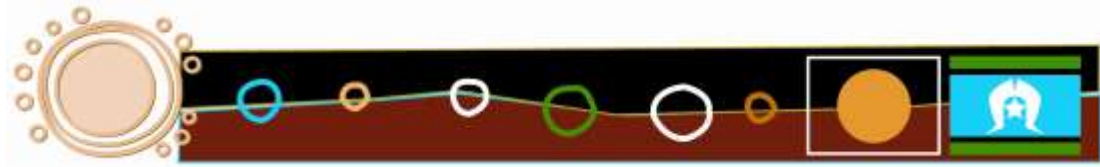
- it creates some structure for the court;
- it creates a clear understanding of how the court's processes are to be conducted;
- it leaves less scope for offenders to appeal decisions, because the Magistrate's role and powers are clearly defined and sanctioned; and
- it aligns with other court processes.

#### Disadvantages

183. Disadvantages of overarching models include:

- it is crucial that the right balance is achieved between creating a model that provides legitimacy whilst maintaining enough flexibility to allow the Circle to adapt to evolving needs; and
- similarity with "mainstream" legislation may not be accepted by the A&TSI community.





**Options 41 and 42**

**41. Should the ACT adopt an 'overarching' legislative model for the Circle Court that names the Circle Court and identifies its aims and objectives?**

**42. Should the ACT adopt a model similar to the Koori Court legislative model utilised in Victoria?**