



SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

PRACTICE DIRECTION NO 1 OF 2024

Pilot Circle Sentencing List Procedure

Preamble

1. This Practice Direction establishes an alternative procedure for sentencing proceedings (“the Circle Sentencing List”) involving eligible Aboriginal and Torres Strait Islander persons charged with criminal offences before the Supreme Court of the Australian Capital Territory.
2. Practitioners should note that this is a pilot list with finite funding. The number of applicants accepted into the list will be subject to the continued availability of that funding.

Commencement

3. This Practice Direction takes effect from 15 February 2024.

Application

4. This Practice Direction applies to matters committed for sentence or where a plea of guilty has been entered upon Arraignment after 15 February 2024.

Authority

5. This Practice Direction is made pursuant to s 20 of the *Supreme Court Act 1933* (ACT).

Introduction

6. The aims of the Circle Sentencing List are to:
 - a. increase Aboriginal and Torres Strait Islander community participation and confidence in the sentencing process;
 - b. provide culturally appropriate, restorative and effective sentencing options for Aboriginal and Torres Strait Islander persons;
 - c. reduce barriers between the ACT Supreme Court and Aboriginal and Torres Strait Islander persons;
 - d. draw upon the strengths, including cultural strengths, of Aboriginal and Torres Strait Islander offenders and their community;
 - e. facilitate a better understanding of any underlying issues which may have contributed to offending; and

- f. reduce the risk factors related to re-offending by Aboriginal and Torres Strait Islander offenders.
- 7. The Circle Sentencing List will seek to achieve these aims by:
 - a. identifying strengths;
 - b. enabling Aboriginal and Torres Strait Islander community participation in the court process and embedding Aboriginal and Torres Strait Islander voices, perspectives and experiences in the sentencing process;
 - c. utilising culturally appropriate programs and supports to address needs, promote rehabilitation and healing and address risk factors that may have an impact on an offender's continued involvement with the criminal justice system; and
 - d. facilitating court monitoring of culturally appropriate therapeutic programs to address identified needs and risk factors.

Sittings of the Circle Sentencing List

- 8. The Circle Sentencing List will operate at the ACT Supreme Court.
- 9. The Circle Sentencing List Judge is to be the Chief Justice of the ACT Supreme Court, or a Justice or Acting Justice of the ACT Supreme Court nominated by the Chief Justice.

Eligibility Criteria

- 10. To be referred to the Circle Sentencing List, an offender must:
 - a. have pleaded guilty to an offence or offences either before the ACT Magistrates Court or upon Arraignment in the ACT Supreme Court;
 - b. have signed an Agreed Statement of Facts;
 - c. be descended from an Aboriginal person or Torres Strait Islander person, identify as an Aboriginal person or Torres Strait Islander person, and be accepted as such by the relevant community;
 - d. be willing to participate in the Circle Sentencing List sentencing procedure; and
 - e. agree to participate in the preparation of an Independent Aboriginal and Torres Strait Islander Experience Report.
- 11. An offender is not eligible for referral to the Circle Sentencing List if they are charged with an offence set out in the Schedule A to this Practice Direction.

Procedure for Circle Sentencing List

Stage 1: Referral

- 12. An offender may apply for referral to the Circle Sentencing List by filing an Application for Referral to the Circle Sentencing List and serving the application on the ACT Director of Public Prosecutions. The form is found at Schedule B to this Practice Direction.
- 13. Where an Application for Referral to the Circle Sentencing List has been filed, the Registrar is to adjourn the proceedings to the next available mention date before the Circle Sentencing List Judge, after consulting with the Circle Sentencing List Judge.

14. Prior to referring the proceedings to the Circle Sentencing List, the Registrar must provide the offender with information about the Circle Sentencing Procedure and the Independent Aboriginal and Torres Strait Islander Experience Report.

Stage 2: First Mention in the Circle Sentencing List

15. The first mention in the Circle Sentencing List is to be attended by a representative for the Prosecution, the legal representative(s) for the offender, and the offender.
16. At the first mention in the Circle Sentencing List, case management orders will be made as follows:
 - The Prosecution is to serve and file the Crown bundle no later than 3 business days prior to the second mention date in the Circle Sentencing List.
17. The matter will then be referred for assessment by a panel of Elders and/or Respected Persons and adjourned for a second mention before the Circle Sentencing List Judge.

The Panel

18. The Circle Sentencing Court Co-ordinator will arrange for a panel of two Aboriginal or Torres Strait Islander Elders and/or Respected Persons to conduct assessments and attend a hearing.
19. There must be at least two and a maximum of four Aboriginal or Torres Strait Islander Elders and/or Respected Persons to conduct an assessment and participate in a hearing. The Circle Sentencing Court Co-ordinator will arrange an appropriate gender and age balance based on the individual referral.
20. Wherever possible the Aboriginal or Torres Strait Islander Elders and/or Respected Persons constituting the assessment panel will constitute the hearing panel to attend the Sentencing Conversation and the Sentence.
21. The Aboriginal or Torres Strait Islander Elders and/or Respected Persons must be notified of the offender's identity before they are appointed to an assessment panel.
22. The Court must inform the offender and the Director of Public Prosecutions of the identities of proposed Aboriginal or Torres Strait Islander Elders and/or Respected Persons before they are appointed to an assessment panel.
23. The offender may object to an Aboriginal or Torres Strait Islander Elder and/or Respected Person being a member of the assessment or hearing panel but must do so before the assessment or hearing commences, notifying the Circle Sentencing Court Coordinator as soon as practicable.
24. An Aboriginal or Torres Strait Islander Elder and/or Respected Person may be asked at any time by the Circle Sentencing Court Coordinator to cease participating in an assessment or sentencing hearing if involvement of the person is considered detrimental to the aims of the Circle Sentencing Court.
25. An Aboriginal or Torres Strait Islander Elder and/or Respected Person may excuse themselves from an assessment or hearing at any time if they consider their involvement may be detrimental to their own wellbeing, or to the aims of the Circle Sentencing Court or for any other reason.

26. Where an Aboriginal or Torres Strait Islander Elder and/or Respected Person is precluded from participating at the sentencing of an offender for any reason, the Circle Court Sentencing Co-ordinator will nominate another Aboriginal or Torres Strait Islander Elder and/or Respected Person. If a replacement cannot be found, the Circle Sentencing List Judge may proceed with the sentencing hearing with the remaining Aboriginal or Torres Strait Islander Elders or Respected Persons.

Stage 3: Assessment by panel of Elders and/or Respected Persons

27. To determine whether the offender is suitable to participate in a sentencing hearing before the Circle Sentencing List, the panel of Elders and/or Respected Persons conducting an assessment must assess:
- a. whether the offender is an Aboriginal or Torres Strait Islander person with a kinship or appropriate association with an Aboriginal or Torres Strait Islander community; and
 - b. whether the offender is willing to participate fully in the Circle Sentencing List sentencing process.
28. In assessing the offender's suitability to participate in a sentencing hearing before the Circle Sentencing List, the panel of Elders and/or Respected Persons conducting the assessment will have regard to:
- a. whether the offender accepts responsibility for committing the crime;
 - b. whether the offender will be respectful of a victim;
 - c. whether the offender will be respectful of the Elders and/or Respected Persons;
 - d. whether the offender will listen to and understand what the Elders and/or Respected Persons are communicating to them;
 - e. whether the offender wants to make amends for the crime they have committed;
 - f. the support the offender has within the community;
 - g. the impact of the offender's offending on the community;
 - h. the likely benefits of circle sentencing for the offender, the victim and the community;
 - i. any reports provided to them by the co-ordinator;
 - j. any submissions made to them by the offender, or their lawyer; and
 - k. whether the offender has unresolved alcohol and drug issues, or unresolved mental health issues to an extent that would limit their capacity to fully participate in the Circle Sentencing List.

29. If the offender is assessed as suitable to participate in a sentencing hearing before the Circle Sentencing List, the matter will be listed for a second mention in that List.

Stage 4: Second Mention in the Circle Sentencing List

30. At the second mention, the Court will determine whether to list the matter for a Sentencing Conversation.

31. Notwithstanding that an offender is otherwise assessed as suitable, the Court retains a discretion, after hearing from the parties, to decline to list the matter for a Sentencing Conversation. Reasons will be provided by the Court for any decision declining to list the matter in the Circle Sentencing List where an offender has been assessed as suitable by the panel of Elders and/or Respected Persons.
32. The matter can only be listed for a Sentencing Conversation if the offender agrees to participate in the preparation of an Independent Aboriginal and Torres Strait Islander Experience Report.
33. If the matter is not listed for a Sentencing Conversation, then the matter will be listed back in the Registrars List. If accepted into the Circle Sentencing List, the matter will progress to the Sentencing Conversation.
34. At the second mention in the Circle Sentencing List, the Prosecution bundle will be formally tendered, and case management orders will be made. The case management orders will include the following:
 - A Pre-Sentence Report is to be provided no later than 7 business days prior to the Sentencing Conversation;
 - An Independent Aboriginal and Torres Strait Islander Experience Report is to be provided no later than 7 business days prior to the Sentencing Conversation;
 - The Defence bundle, including any further psychiatric or psychological material, is to be served and filed no later than 7 business days prior to the Sentencing Conversation.
35. The Court may make any orders with respect to bail at the second mention.
36. The matter will then be adjourned for the Sentencing Conversation.

Stage 5: The Sentencing Conversation

37. The Sentencing Conversation will be facilitated by the Circle Sentencing List Judge, and is to be attended by:
 - a. the offender and the offender's legal representative(s);
 - b. the Prosecution;
 - c. two Aboriginal or Torres Strait Islander Elders and/or Respected Persons nominated by the Circle Sentencing Court Coordinator and approved by the Circle Sentencing List Judge;
 - d. the Circle Sentencing Courts Coordinator;
 - e. a support person for the offender, at the discretion of the Circle Sentencing List Judge;
 - f. any other person the Circle Sentencing List Judge considers appropriate, including but not limited to any victim(s) and their support person(s).
38. The Court is to ensure that the Circle Sentencing Court Coordinator and the Aboriginal or Torres Strait Islander Elders and/or Respected Persons are provided with the prosecution

bundle, the presentence report, the defence bundle and the Independent Aboriginal and Torres Strait Islander Experience Report prior to the Sentencing Conversation.

39. The Circle Sentencing List Judge is to brief the Aboriginal or Torres Strait Islander Elders and Respected Persons prior to the commencement of the Sentencing Conversation, including by informing them of the nature of the charges, and any issues that are likely to be raised in the Sentencing Conversation.
40. The purpose of the Sentencing Conversation is to discuss:
 - a. the nature of the offending behaviour;
 - b. the impact of that offending behaviour on the victim(s) and the community;
 - c. the offender's family and community connections and support;
 - d. the offender's background and experiences;
 - e. the offender's strengths, including cultural strengths and connections;
 - f. the offender's need for treatment and/or a rehabilitation program, and
 - g. the availability of a suitable program/s;
 - h. the offender's willingness to comply with any treatment or rehabilitation program; and
 - i. any other matter relevant to sentencing.
41. At the Sentencing Conversation, the Circle Sentencing List Judge may:
 - a. grant bail, and/or impose conditions on the offender's bail requiring the offender to submit to assessments for a rehabilitation program as required and/or to commence participation in any rehabilitation program and/or submit to drug and/or alcohol testing;
 - b. nominate support agencies and/or caseworkers to work with the offender as required;
 - c. make orders for further reports and/or updated reports; and
 - d. make any other orders considered appropriate by the Court.
42. The Sentencing Conversation is to be open to the public unless a closed court is required by law or ordered by the Circle Court Sentencing List Judge under *the Evidence (Miscellaneous Provisions) Act 1991* (ACT) (EMP Act) or other authority.
43. Because of the private nature of the information contained therein, the Independent Aboriginal and Torres Strait Islander Experience Report will typically be the subject of a non-publication order under the EMP Act and will not be accessible to the public, unless the Court considers, after hearing from the parties, that it is not appropriate for a non-publication order to be made.
44. Following the Sentencing Conversation, the Circle Sentencing List Judge may sentence the offender, or adjourn the proceedings for the offender to be sentenced on a future date, or adjourn the proceedings for a further Sentencing Conversation.

Stage 6: Sentencing

45. The Circle Sentencing List Judge is to sentence the offender in open court (unless an order is made by the Circle Sentencing List Judge for the court to be closed).
46. Where practicable, the Aboriginal or Torres Strait Islander Elders and/or Respected Persons who participated in the sentencing conversation and the Circle Sentencing Court Coordinator are to be present when the sentence is delivered.
47. The sentencing options available to the Circle Sentencing List Judge are those available at law.

Role of Elders and/or Respected Persons

48. In order to assist the Circle Sentencing List Judge in sentencing, the Circle Sentencing List Judge may grant the applications of Aboriginal and Torres Strait Islander Elders and/or Respected Persons to act as amici curiae in Sentencing Conversations.
49. Aboriginal and Torres Strait Islander Elders and/or Respected Persons may:
 - a. initiate and facilitate the sentencing conversation with the offender in collaboration with the Circle Sentencing List Judge;
 - b. provide cultural and community advice to the Circle Sentencing List Judge;
 - c. assist the Circle Sentencing List Judge to understand the offender's cultural heritage, history and experience;
 - d. offer support and advice to the Circle Sentencing List Judge on how the offender could improve connections with his or her culture and community; and
 - e. assist the Circle Sentencing List Judge to identify culturally significant issues and culturally appropriate programs or supports that might be a condition of any sentence imposed.
50. Aboriginal and Torres Strait Islander Elders and/or Respected Persons will not participate in the determination of the sentence to be imposed.

By Direction of the Judges.



Jayne Reece

Registrar

15 February 2024

SCHEDULE A

Offences not eligible for referral to the Circle Sentencing List

- Any form of homicide
- Sexual offences
- Dangerous driving causing death

SCHEDULE B

Form for Application for Referral to the Circle Sentencing List



**SUPREME COURT
OF THE
AUSTRALIAN CAPITAL TERRITORY**
Application for Referral to the Circle Sentencing List (pilot)

Please complete this form, file it with the Registry and serve a copy on the Director of Public Prosecutions.

Case Details

Matter Number:

Matter Name:

Offender's details

Name:

Date of Birth:

Age:

Legal Representative:

Custodial/Bail status:

Charges

Charge/s:

Date/s of
offence:

Date of Guilty Plea:

Date of Signed Agreed
Statement of Facts:



**SUPREME COURT
OF THE
AUSTRALIAN CAPITAL TERRITORY**

Application for Referral to the Circle Sentencing List (pilot)

Offender's confirmation and agreement to participate in the Circle Sentencing List (pilot)

I confirm that I:

- a. am descended from an Aboriginal person or Torres Strait Islander person, identify as an Aboriginal person or Torres Strait Islander person, and am accepted as such by the relevant community;
- b. am willing to participate in the Circle Sentencing List sentencing procedure;
- c. agree to participate in the preparation of an Independent Aboriginal and Torres Strait Islander Experience Report.

Offender's signature:

Name:

Date: