

The University of New England School of Law

MYALL CREEK 25TH ANNIVERSARY SYMPOSIUM ADDRESS

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“THE YOUTH KOORI COURT OF NSW”

INTRODUCTION

- 1 I am very pleased to have been invited to address you today at the University of New England School of Law Myall Creek Anniversary Symposium. Before I begin my presentation, I would like to acknowledge the traditional custodians of the land on which we gather and recognise their continuing connection to land, waters and culture.
- 2 I pay my respects to their Elders past, present and emerging, and pay my respects to any Indigenous people who are here with us today.
- 3 The overrepresentation of Indigenous children and young people in the justice system remains a blight on Australian society.
- 4 As you know, I was the President of the Children’s Court of NSW from 2012 to 2021. During my tenure, I was keenly involved in seeking to address that issue, by fostering an increased focus on prevention, early intervention, diversion and rehabilitation.
- 5 The establishment of the Youth Koori Court was an important diversionary measure in response to the historical and ongoing experiences of intergenerational trauma, institutionalisation, and colonisation impacting Aboriginal and Torres Strait Islander children.¹

¹ Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People*, Report No 133 (2018) 11.45.

BACKGROUND

- 6 While Indigenous Australians make up just 6% of the Australian population aged 10–17, just under half (48%) of all young people in detention across Australia on an average night in the June quarter of 2020 were Aboriginal or Torres Strait Islander young people.²
- 7 In 2020 Indigenous children and young people in NSW were 13 times more likely to be under court supervision orders and,³ and 16 times more likely to be in detention than non-Indigenous children.⁴
- 8 There are about 10,000 prosecutions per annum for serious offences by children. The vast majority of the children concerned are diverted, or placed under community supervision. 1,058 children on average, were under supervision in the community in 2019, that is, they were serving sentences involving community service; or they are under good behaviour bonds, probation orders or on extended bail (Griffith remands).
- 9 These children are supervised by caseworkers from Youth Justice, and many of them are undergoing drug and alcohol programs, occupational training, anger management courses, or other rehabilitation programs.
- 10 Only a very small proportion of children are sentenced by way of a control order and placed in detention. Confinement of children, however, all but precludes healthy psychological and social development.⁵ Diversion, therefore, is one key element of an enlightened youth justice system.

² Australian Institute of Health and Welfare 2021. Youth detention population in Australia 2020. Cat. no. JUV 135. Canberra: AIHW, 3 < <https://www.aihw.gov.au/getmedia/37646dc9-dc6f-4259-812d-1b2fc5ad4314/aihw-juv-135.pdf.aspx?inline=true>>.

³ Australian Institute of Health and Welfare 2020. Youth justice in Australia 2018–19. Cat. no. JUV 132. Canberra: AIHW, 9.

⁴Ibid.

⁵ Connected by 25, supra: Wald & Martinez, 2003.

DIVERSION AND REHABILITATION

- 11 Diversion of young offenders is a process which seeks to reduce re-offending by ‘intervening in the lives of known offenders.’⁶ Tertiary prevention strategies include other programs for early intervention and for diversion into community-based programs. *“We can and should be able to create a humane system that is committed to human rights norms and practice, and one which recognises the human right of young people in trouble with the law to be treated with dignity and respect and to be provided with the conditions in which they can grow and flourish and be happy, contributing and well-rounded adults - surely our responsibility as adults, and an aspiration we must have for all our children.”*⁷
- 12 One of the most effective ways of reducing youth offending is to begin prevention efforts as early as possible and to intervene aggressively with those who are already offending:
- ‘The earlier the better’ is a key theme in establishing interventions to prevent child delinquency, whether these interventions focus on the individual child, the home and family, or the school and community.”*⁸
- 13 The modern common law recognises that rehabilitation is the primary consideration in sentencing children.
- 14 These two key themes underpinned the rationale for the establishment of the Youth Koori Court on 6 February 2015 as part of the sentencing process within the Children’s Court of NSW.

⁶ ‘Approaches to understanding crime prevention’, Australian Institute of Criminology, *Crime Reduction Matters*, no. 1, Canberra, 2003 at p.1.

⁷ Juvenile Justice: Bagen J. *Reform* (92) Winter 2008.

⁸ Loeber R., Farrington D.P., Petechuk, D. ‘Child Delinquency: Early Intervention and Prevention’, *Child delinquency*, U.S Department of Justice, Office of Juvenile Justice and Delinquency Prevention, May 2003, p. 9.

ESTABLISHMENT AND DEVELOPMENT OF THE YKC IN NSW

- 15 The need for a specialised court process was well-recognised by as far back as 1991. Recommendation 62 of the report of the Royal Commission into Aboriginal Deaths in Custody stated:

“That governments and Aboriginal organizations recognise that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for governments and Aboriginal organizations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise ”.

- 16 The NSW Aboriginal Justice Plan - Beyond Justice 2004-2014 provided specifically for measures to reduce the overrepresentation of young Aboriginal people in the criminal justice system. The Plan recommended measures which included:

- ◆ the examination of options for Aboriginal community-based sanctions for young Aboriginal people who commit criminal offences.

- ◆ the development of Aboriginal crime prevention strategies that specifically provide for young Aboriginal people.

- ◆ the examination of options for community-based and operated programs that aim to provide new sentencing options as alternatives to custody.

- ◆ the introduction of specific transitional programs for young Aboriginal people in the criminal justice system to facilitate their return to their community as well as access to education and training.

- 17 In New Zealand, specialist indigenous courts had been operating since 2008, including Marae-based youth courts and a Pasifika Youth Court. These were established as an extension of current powers as an initiative of Judge Andrew Becroft, the Principal Youth Court Judge.
- 18 A Youth Koori Court was established in Victoria in 2004 by *The Children and Young Persons (Koori Court) Act 2004*, a Sentencing court that first sat at Melbourne on 6 October 2005.
- 19 The Children's Court of NSW identified that it had a role in relation to the distrust and disconnection experienced by the Aboriginal community from the criminal justice system. Although disconnection with the Court process is not uncommon for young people regardless of the cultural identity, the perception of bias and the lack of connection to the process have an historical context for the indigenous community.
- 20 Against this background, the Children's Court launched the Youth Koori Court (YKC) at Parramatta on 6 February 2015, on the initiative of the Court itself, utilising existing resources and processes, without waiting for legislative change or specific funding.
- 21 The YKC proposal recognised that if the legal process was to have any significant deterrent or diversionary effect, the involvement of Aboriginal elders and respected persons in the process was an essential requirement. The identified aims and objectives of the Court were to:
- ◆ increase Aboriginal community, including Aboriginal young people's confidence in the criminal justice system in NSW;
 - ◆ reduce the risk factors impacting on the recidivism of Aboriginal young people in NSW; and
 - ◆ reduce the rate of non-appearance and breaches of bail by Aboriginal young people.

- 22 The process developed for the YKC involved an application of the law relating to deferred sentencing pursuant to 33(1)(c2) of the *Children (Criminal Proceedings) Act 1987*, as well as an understanding of and respect for Aboriginal culture.
- 23 Mediation principles and practices were employed in a conference process to identify issues of concern for the young person, and to develop ways in which those concerns could be addressed, leading to an 'Action and Support Plan' upon which the young person could focus prior to formal sentence. The Youth Koori Court is an excellent example of a holistic process which involves interventions and collaboration amongst professionals to identify relevant risk factors which impact on a young person's continued involvement with the justice system, and actively monitors the holistic interventions implemented to address these risk factors.
- 24 Elders and other respected people from Aboriginal or Torres Strait Islander communities, and the participating agencies worked together to identify risk factors, such as homelessness, disengagement from education, drug and alcohol issues or other health issues, that may be impacting on the young person's involvement with the criminal justice system. This included the identification of programs to help the young person to reduce the risks of further offending, and relevant agencies and support people.
- 25 Elders and other respected people sat in the Youth Koori Court on a voluntary basis until 2018 when the Youth Koori Court received significant funding from the NSW Government. This enabled the employment of key people, including the Youth Koori Court Liaison Officer and the Youth Koori Court Casework Coordinator. The funding also provided for payment to Elders and Community Panel Members and provided for the expansion of the Youth Koori Court to Surry Hills Children's Court.

- 26 From 2019 the YKC operated successfully at the Parramatta and Surry Hills Children's Courts. A formal evaluation was undertaken in 2022 by the Western Sydney University Aboriginal and Torres Strait Islander Employment and Engagement Advisory Board (*Inside Policy*, 6 June 2022).
- 27 The evaluation involved a review of court files, appearance recordings, court observations, consideration of the cost-benefit analysis undertaken and BOCSAR's statistical analysis of the impact of the YKC on youth justice outcomes. Key Findings of the comprehensive evaluation report included:
- ◆ overwhelming support for the YKC from its staff and stakeholders, as well as participants and their families;
 - ◆ the perception and experience that the YKC achieves better outcomes for Aboriginal young people and for the criminal justice system, compared to the standard Children's Court process.
- 28 The ongoing success of the YKC led to its expansion to Dubbo, where it commenced sitting on 24 March 2023.
- 29 On 6 February 2024 the YKC celebrated its 10th anniversary in a formal ceremony presided over by the current President of the Children's Court and the Children's Magistrates conducting the Court. In attendance were the Attorney General, the Chief Justice, the Chief Judge of the District Court, the current Chief Magistrate, a Deputy Chief Magistrate, the Secretary of the Department, the Advocate for Children and Young People, community dignitaries, community panel members and most importantly, Youth Koori Court graduates. In particular, there were present some 19 children of these graduates.
- 30 The presence of these children, living in happy, healthy, stable families, was for me testament to the value and success of the YKC.

THE STRUCTURE AND PROCESS OF THE YKC

- 31 A referral to the Youth Koori Court can only be made on the application of the young person. Where a young person has entered a plea of guilty, or indicated an intention to plead guilty, the presiding judicial officer will refer the case to the Youth Koori Court if satisfied that the eligibility criteria are met.
- 32 Upon referral to the YKC, a panel assesses the young person's suitability in a conference process to identify issues of concern and develop an Action and Support Plan for the young person to focus on for three to six months prior to formal sentence.
- 33 This panel consists of nominated Aboriginal and Torres Strait Islander Elders or Respected Persons, the young person's legal representative and the police prosecutor. Other factors that are considered before acceptance into the YKC include the availability of suitable services in the residential area of the young person, the impact of the young person's participation on the victim or victim's family, whether the YKC has capacity to accept the young person into the program, and the availability of suitable Elders and Respected Persons.
- 34 If the young person is suitable the magistrate will formally accept the young person into the program and refer the young person to a conference, usually within 2 weeks.
- 35 Prior to the Conference the Youth Koori Court casework coordinator meets with the young person and their lawyer to identify the particular needs and interests of the young person and service providers that might be involved in a workable Action and Support Plan. Emphasis is placed on the changes and supports necessary to address the criminogenic needs of the young person involved. Consideration is also given to addressing the harm to the victim and society suffered as a result of the crime(s) committed by the young person.

- 36 The Conference is attended by the young person and his or her parent(s), Elders and respected persons, a Youth Justice representative, the young person's lawyer (ALS/CLS), a civil lawyer from Legal Aid, relevant agency representatives (eg Justice Health, Education), and the Youth Koori Court casework coordinator.
- 37 Subsequently, the judicial officer, sitting in the YKC with two Elders/respected persons, may approve the Plan (with or without amendment), following which the young person will commence work in accordance with the Plan. The plan is subject to revisions as required throughout the YKC process
- 38 The process is managed by a Youth Koori Court Casework Coordinator.
- 39 The main purpose of the Casework Coordinator is to help young Aboriginal and Torres Strait Islander people actively participate in the Youth Koori Court process, and to coordinate and oversee the delivery of support services and other agencies identified in the young person's Action and Support Plan.
- 40 The coordinator's responsibilities involve: ensuring that a screening assessment to assess a young person's suitability is undertaken; liaising with Youth Justice and community based organisations, developing and maintaining a network of appropriate service providers that can best meet the needs of Youth Koori Court participants; helping connect participants to services relevant to their needs; working closely with the Children's Court, NSW Police, Juvenile Justice, legal professionals, a range of government and nongovernment organisations and Aboriginal community controlled organisations; overseeing the implementation of the young person's Action and Support Plan including reporting back to court; and providing Youth Koori Court participants and their families with practical and cultural support.

THE INVOLVEMENT OF ELDERS AND RESPECTED PERSONS

- 41 “Most of the young people who come before the Youth Koori Court have difficult and stressful lives: they may have had few opportunities to connect with their mob and their Aboriginal heritage, missed out on educational opportunities, found it difficult to get a job, experienced violence at home, attempted self-harm, live in unsuitable housing, have accumulated debts, or have major health or disability issues. In most cases participants in the court have experienced more than one of these problems.”⁹
- 42 The first issue, and in terms of the charter of the Youth Koori Court, one of the most important issues is cultural connection. “This is in a sense a foundation for many of the other issues. Do the young people have some contact with their traditional lands and relatives, do they know their ancestral stories and clan lores, do they attend activities that bring them into closer contact with other Aboriginal and/or Torres Strait Islander people?”¹⁰
- 43 Many of the young people coming before the court had limited contact with their mob (in many cases the young person had links to several clan groups). Sometimes the lack of contact was because of the family’s migration to Sydney from the far west or south coast of the state, or disruptive family experiences. The history of forced migration of the Stolen Children generation was never far from the memory of the older family members who came to the hearings. Sometimes there were issues in the immediate family that the young person was seeking to avoid, so one of the tasks of the court was working out which family members should be involved in supporting the young person – typically grandparents or aunts

⁹ Western Sydney University Aboriginal and Torres Strait Islander Employment and Engagement Advisory Board Evaluation Report.@ p 93

¹⁰ Ibid @ p 94

44 Aunty Pearl, a participating elder, told the evaluators:

“The involvement of Elders in the processes and working with the legal people in mutual respectful relationships is an excellent example for the youth. They see that people care enough to make time to spend with them and genuinely support them to navigate the tensions of their lives and improve their quality of life. Too often our young people grow up with a negative view of the legal system and see it as being against Aboriginal and Torres Strait Islander People. This program helps them to create their own story and experience with it and this helps them change their stereotype views of the legal system which has become so engrained in their minds and they have no confidence in it. This program gives them HOPE and they can then change and develop a new narrative with respect to the legal system and correctional service. The “actions and support plans” are a great idea and the follow up and outcomes are a testimony to its success¹¹

45 “Part of the therapeutic work of a program like the Youth Koori Court is in shifting the identity young people have within the court. Most young people in the ...Youth Koori Court are familiar with mainstream sentencing procedures which spatially single out and isolate young offenders, and are strongly hierarchical. Youth Koori Court’s procedures, by contrast, temper these hierarchical relations by positioning young people around a table with other members of the court, where they are invited and encouraged to speak for themselves...”¹² Elders can greatly influence a shift in conversational tone. One Aunty often imparted a quietened, reflective shift in other participants after she spoke with the young person¹³.

¹¹ Western Sydney University Aboriginal and Torres Strait Islander Employment and Engagement Advisory Board Evaluation Report.@ p 93

¹² Ibid @ p 124

¹³ Ibid @ p 129

- 46 Another Uncle's commanding banter, which encompassed local history, information and encouragement, when addressing young people seemed like a distinct conversation dynamic unto itself within the broader Youth Koori Court.¹⁴
- 47 During the development of Action and Support plans considerable attention is paid to reestablishing (or sometimes establishing for the first time) the young person's link to country and other Aboriginal and/or Torres Strait Islander people. This is done through the work of Elders and other respected members of local Aboriginal communities, both in hearings and follow-up activities afterwards. It is done through some of the activities proposed in the Action and Support plans, particularly Aboriginal and Torres Strait Islander cultural camps and events.¹⁵
- 48 In my view, it is vitally important to examine the issue of culture when making decisions about a child or young person's care. It is critical that the Court understands and appreciates the role culture plays in the identity formation and socialisation of a child.
- 49 The following quotes assist in understanding the importance of culture in court cases: "...culture defines what is natural and expected in a given group. We all participate in multiple cultures: ethnic, national and professional, among others. We carry our cultures with us at all times and they have an impact on how we view and relate to people from our own and other cultures."; "Understanding culture helps the Court to understand that our perception of difference will often inform our interactions with others. Often, our fear of difference guides decision-making on matters involving different cultures. By acknowledging the impact of culture, we can ensure that we do not allow difference to inappropriately affect or impact upon outcomes."

¹⁴ Ibid @ p 129

¹⁵ Ibid @ p 159

CONCLUSION

- 50 The Youth Koori Court model has considerable benefit in diverting and supporting young Aboriginal offenders and addressing their risk of ongoing involvement with the criminal justice system. The model has been shown to have positive social outcomes, and is working to address the distrust and disconnection experienced by the Aboriginal community from the criminal justice system.
- 51 BOCSAR has stated: “the alternative case management approach used in the YKC is a promising model that could be adopted more widely to reduce incarceration rates of young Aboriginal people. This could be achieved either by accepting more young people at the current locations or establishing a YKC in additional CCs. The success of such a strategy would however depend on two things. Firstly, the delivery of the YKC program requires a relatively intensive level of resources. Each young person is assigned a casework co-ordinator and they are encouraged to participate in relevant support programs and provided services where needed. Were the model to be expanded to areas where support services and programs are more difficult to access or where there are limited opportunities for community engagement, employment and/or safe housing, the effectiveness of this model may be diminished. Secondly, if the YKC program is expanded to include more participants, it may not be possible to provide the same level of case management to every young person, which could lead to smaller marginal effects than reported in this study. The effect of broadening of the eligibility criteria to include young people facing less serious court sanctions would also need to be tested.¹⁶
- 52 The YKC is clearly making a difference.

¹⁶ BOCSAR Crime and Justice Bulletin No 248 April 2022

53 As reported in the Children's Court Handbook 2022¹⁷:

◆ The YKC is achieving its short-term outcomes of identifying participant needs and risk factors for offending relating to housing (home), health, employment, education and skills, safety and social/cultural outcomes. The YKC is also successful in empowering participants and the Aboriginal community through the process.

◆ For participants, the YKC is contributing to the achievement of intermediate outcomes in the areas of:

Empowerment through a high-level of engagement in the process and resulting in increasing trust in the system

Social and cultural through reconnection to and engagement with cultural supports

Safety through the reduced likelihood of reoffending and participants being 40 per cent less likely to be sentenced to a Juvenile Control Order (JCO).

◆ Participants have a clear supported journey through the process which involves regular engagement with their legal practitioner, caseworker and support services.

◆ The YKC as it currently operates returns \$2 for every \$1 invested. Expanding the YKC to one additional site would result in a benefit-cost ratio of 2:1; and estimated direct economic impact to the NSW economy of \$2.1 million and an estimated indirect impact of \$1.6 million.

¹⁷ Children's Court Resource Handbook 2024

54 The evidence in support of expanding the operation of the YKC is compelling, and I support the establishment of Youth Koori Courts in additional locations, particularly to regional and rural locations. In the first instance, I suggest Armidale as a suitable next location.