

Circle Sentencing in New South Wales

A Review and Evaluation



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Published in Sydney by —

Judicial Commission of New South Wales
Level 5, 301 George Street
Sydney NSW 2000

DX 886 Sydney

GPO Box 3634
Sydney NSW 2001

www.judcom.nsw.gov.au

Printed October 2003
ISBN 0 7313 5604 7

Cover painting: Robert Bolt

Robert Bolt, the first person to be sentenced in a circle sentencing trial, is using his art to help him find a new direction in life. The painting reproduced on the cover symbolises the changes he is trying to make in his life. Robert explains that he used to be like one of the jellyfish shown in the middle scene of the painting, swimming with the crowd, until he became like the stronger fish swimming in the opposite direction, finding its own way. In the bottom panel, the people are shown as all travelling in the same direction, following their hearts. The top panel, in contrast, shows a person travelling in a direction of their own choosing, guided by both their heart and mind.

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Designer: Lorraine Beal

Contents

Executive Summary	iv
Introduction	1
Part 1 OVERVIEW OF CIRCLE SENTENCING IN NSW	3
History of circle sentencing	3
Circle sentencing model in NSW	4
Objectives of the trial	4
Eligible offences for circle sentencing	5
Management of the process	5
PART 2 REVIEW OF CIRCLE PROCEEDINGS	9
Overview of cases	9
Analysis	9
Case examples	10
PART 3 A SURVEY OF THE KEY PARTICIPANTS IN CIRCLE SENTENCING	39
Expectations	39
Satisfaction	39
Circle make-up	40
Shared justice	41
Experience	42
Discussion and decision-making	43
Importance of Elders	44
Visibility of support	46
Behavioural changes	46
Effects on victims	47
Community empowerment	48
PART 4 CONCLUSION	51
NSW Magistrates Conference, 2003	54
Appendix	
Table 1: Case examples discussed in the report	57
Table 2: All offenders participating in the trial	60
Select Bibliography	63

Executive Summary

Circle sentencing was introduced in New South Wales on a trial basis at Nowra in February 2002. This report reviews and evaluates the first 12 months of the trial's operation. The Judicial Commission of New South Wales and the NSW Aboriginal Justice Advisory Council have worked together to produce this monograph with a view to describing the nature of circle sentencing, how it operates in practice, and the impact it has had on the cases dealt with by the circle court.

The evaluation reveals that circle sentencing at Nowra has succeeded on a number of levels. For example, this novel procedure:

- reduces the barriers that currently exist between the courts and Aboriginal people
- leads to improvements in the level of support for Aboriginal offenders
- incorporates support for victims, and promotes healing and reconciliation
- increases the confidence and generally promotes the empowerment of Aboriginal persons in the community
- introduces more relevant and meaningful sentencing options for Aboriginal offenders, with the help of respected community members
- helps to break the cycle of recidivism.

The penalties imposed by the circle are no less onerous than those imposed for similar offences in conventional courts. However as the procedure is less formal, the offender is more likely to “sit up and take notice” and appreciate the harm caused to the victim. In this regard there is generally an acceptance of responsibility as well as an apology for the offending behaviour — a platform upon which rehabilitation can be built.

Members of the community participate, not only in the sentencing decision, but with a preparedness to assist offenders develop pride in their culture and confidence in themselves long after they leave the circle.

A survey of the key participants (offenders, victims, lawyers, community representatives and support persons) revealed a high level of satisfaction with circle sentencing.

Ultimately, circle sentencing provides a recipe for changing offending behaviour and reclaiming offenders who might otherwise pursue a life of crime.

Having succeeded in Nowra it seems appropriate that circle sentencing should now be expanded to other regions of the State where there are viable Aboriginal communities and offenders with ties to those communities.[†]

[†] The first circle sentencing case to be convened outside Nowra, was heard on 26 August 2003 in Dubbo, NSW.

Introduction

Circle sentencing is an initiative currently being piloted by the Local Court in Nowra, NSW, with the aim of finding a better way of dealing with the sentencing of Aboriginal offenders. Over-representation of Aboriginal people in the criminal justice system, particularly in our gaols, is a recognised fact and government initiatives thus far do not seem to have made significant progress in addressing this problem. Circle sentencing has a number of aims, including to:

- ❑ empower Aboriginal communities in the sentencing process by reducing the barriers that currently exist between courts and Aboriginal people
- ❑ provide more relevant and meaningful sentencing options for Aboriginal defendants, including more effective community support for them when serving their sentences
- ❑ improve the support provided to victims of crime and promote healing and reconciliation
- ❑ break the cycle of recidivism, the revolving door that has characterised the relationship of many Aboriginal persons entering the criminal justice system.

It is clear that this new sentencing procedure is both radical and controversial, and for these reasons it is important to monitor and assess its implementation and further development.

This review and assessment of the first 12 months of circle sentencing is broken into four parts:

- ❑ Part 1 outlines the background of circle sentencing and more fully describes its objectives and the procedures
- ❑ Part 2 provides an analysis of the transcripts and other documentation relating to the process, and endeavours to demonstrate how the system operates in practice
- ❑ Part 3 presents the results of a survey of key participants in circle sentencing undertaken to determine what they think of the process and generally gauge their level of satisfaction with it
- ❑ Part 4 provides an assessment of circle sentencing in terms of its potential contribution to the administration of criminal justice in NSW.

This monograph is the result of co-operative work between the Judicial Commission of NSW and the NSW Aboriginal Justice Advisory Council (AJAC). AJAC has been responsible for the analysis of interviews with circle sentencing participants in Nowra and the Judicial Commission of NSW has analysed transcripts of cases with a view to highlighting how the system operates in practice, as well as identifying any perceived strengths and weaknesses. In this regard the authors of this work are particularly appreciative of the co-operation and assistance provided by the Elders of the Nowra Aboriginal community, the presiding Magistrate, Mr Doug Dick, and Ms Gail Wallace, Aboriginal Project Officer. All survey participants are also thanked for their time and contribution.

Overview of Circle Sentencing in NSW

History of circle sentencing

Circle sentencing is a concept that originated in Canada in 1992 for the sentencing of 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, background and consequences of the offence, and to jointly derive a sentence appropriate for that offender. The model is not specifically a gaol diversionary program as gaol is still an option available to the group. The process of circle sentencing appears to have achieved considerable success in the Indigenous communities where it has operated.

Following its success in Canada, judicial officers in NSW showed an interest in the possible adaptation of the Canadian model for use with Australian Aboriginal communities. In 1995, the Judicial Commission of NSW hosted a Circle Sentencing Seminar for judicial officers presented by Judge Heino Lilles,¹ who discussed his experiences as a judge presiding over Circle Courts in the Yukon. In 1997, an article by a judge from Saskatchewan, Canada, appeared in the *Judicial Officers Bulletin*,² outlining and advocating the use of circle sentencing proceedings in sentencing Aboriginal offenders in Canada.

It is claimed that the first Indigenous magistrates court session in Australia was held in June 1999 in South Australia. Known as the “Nunga Court” (there are now four of these), it discards the formality of the magistrate’s court, and an Aboriginal Elder and the offender’s family participate in the sentencing process. Since then Queensland, Western Australia and Victoria have experimented with similar courts. For example, the Victorian Koori Court was piloted successfully in Shepparton in October 2002 and is now also operating in Broadmeadows, a Melbourne suburb.³

AJAC explored the concept of circle sentencing and put a proposal in 2002 to the Standing Committee of Criminal Justice System Chief Executive Officers to examine the development of a circle sentencing model for NSW. The Standing Committee established a working party to develop a model for a possible circle sentencing trial in NSW. The working party was chaired by AJAC and consisted of representatives of the Office of the Director of Public Prosecutions, the Attorney General’s Department, NSW Police Service, Police Ministry, Department of Corrective Services, Department of Juvenile Justice and the Judicial Commission of NSW.

A model for the circle sentencing trial was developed in late 1999 and the trial commenced in Nowra in February 2002.

While the NSW model most resembles the Canadian model of 1992, it is unique in that it has drawn upon a number of sources, including a discussion paper on conferences for adult offenders,⁴ NSW young offenders legislation,⁵ guidelines for conducting Aboriginal Community Justice Groups and an AJAC discussion paper on circle sentencing.⁶ Credit needs to be given to the Elders of the Aboriginal communities who were also involved in shaping the process, and to the magistrate, prosecutor and solicitor who facilitated the development of this initiative in Nowra.

Circle sentencing model in NSW

AJAC adapted the international circle sentencing model so that it was suitable for the needs of Aboriginal people in NSW. AJAC advocated an alternative model of sentencing that could actively engage the Aboriginal community in the sentencing process, reduce the number of people coming into contact with the criminal justice system, and involve victims of crime in the process.

The flexible framework of the model was designed to reflect the diversity of Aboriginal communities in NSW and to allow for local community control of the process. Specifically the model was designed to allow local Aboriginal communities to adapt processes to meet their own local culture and experiences.

Before the trial commenced operating in Nowra, AJAC hosted a customary law forum in Nowra with local Elders and community representatives. The purpose of this forum was to generate discussion and reinvigorate customary law practices and principles. The forum discussed sentencing, specifically the circle sentencing concept. AJAC concluded that the involvement of Aboriginal Elders in the sentencing process and the imposition of community sanctions on Aboriginal offenders would have an impact on further offending and demonstrate support for victims of crime.

AJAC managed the overall implementation of the circle sentencing trial in NSW. However, the presiding magistrate is in ultimate control of the actual process and ensures that the principles of natural justice are observed, that the proceedings are relevant to the issues to be determined, and that the sentence imposed upon the offender is neither excessively severe nor unduly lenient, having regard to all the circumstances of the particular case. Penalties imposed are consistent with the principles and practice of the Local Courts.

Objectives of the trial

Circle court deliberations are typified as power-sharing arrangements. It is recognised that if the community does not have confidence that the power-sharing arrangements will be honoured, the prospect that circle sentencing will be successfully implemented is likely to be diminished. The fundamental premise underlying the philosophy of circle sentencing is that the community holds the key to changing attitudes and providing solutions. With this in mind, the objectives of the circle sentencing trial are to:

- (a) include members of Aboriginal communities in the sentencing process
- (b) increase the confidence of Aboriginal communities in the sentencing process
- (c) reduce barriers between Aboriginal communities and the courts
- (d) provide more appropriate sentencing options for Aboriginal offenders
- (e) provide effective support to victims of offences by Aboriginal offenders
- (f) provide for the greater participation of Aboriginal offenders and their victims in the sentencing process
- (g) increase the awareness of Aboriginal offenders of the consequences of their offences on their victims and the Aboriginal communities to which they belong
- (h) reduce recidivism in Aboriginal communities.

Eligible offences for circle sentencing

The category of offences that are eligible for circle sentencing 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 guilty, make application for the matter to proceed by way of circle sentencing.

Management of the process

An Aboriginal Community Justice Group has been established to oversee much of the circle sentencing process. The group consists exclusively of respected members of the Aboriginal community in each area covered by the current trial. In the Shoalhaven district the Aboriginal communities which are part of the circle sentencing catchment area are Jerrinja, South Nowra, Bomaderry, Dhawaral, Ulladulla, Nowra and Wreck Bay. These communities are all part of the Yuin nation. The Aboriginal Community Justice Group oversees aspects of the gate-keeping function of the trial.

Role of the Aboriginal Project Officer (Circle Sentencing Trial)

The Aboriginal Project Officer is employed by AJAC to manage the trial locally. The project officer at Nowra operates from the Nowra Court House. The Aboriginal Project Officer plays a vital role in assisting the Aboriginal Community Justice Group in operating the circle sentencing trial. He or she provides contact with the local Aboriginal community and facilitates the organisational side of circle sentencing. The project officer's role is essentially to assist the magistrate and Aboriginal Community Justice Group establish and manage circle sentencing.

The Aboriginal Project Officer also:

- assists in establishing the Aboriginal Community Justice Group
- contacts the Aboriginal Community Justice Group regarding defendants
- contacts the victim/s
- informs the defendant of the process
- informs the victim/s of the process
- contacts interested community members
- organises the venue for the circle to be held
- provides any follow-up requested during the circle.

Role of the magistrate

The magistrate plays a pivotal role throughout the proceedings. He or she ensures that the matter is a suitable one to be referred for consideration to the Aboriginal Community Justice Group in order for it to determine whether the offender is an acceptable

candidate for circle sentencing. He or she presides over the proceedings, ensuring that it is conducted fairly, that all players are given an opportunity to participate, and that the participants themselves remain focused on the issues at hand. While the principles underlying the circle involve a sharing of authority, the magistrate is there to ensure that the law is applied. For example, the magistrate outlines the sentencing alternatives available to the circle and ensures that the sentences imposed by the circle are within current sentencing guidelines.

Gate-keeping

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.

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.

Thus, 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.

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
- ❑ 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
- ❑ the potential benefits to the offender, victim and community of the circle sentencing process.

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.

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.

Defendant preparation

To ensure the defendant is committed to the process, prior to the circle the defendant is asked to identify support people within the community. The defendant notifies the Aboriginal Community Justice Group of the people who will support him or her in the circle and in completing any sentence arrived at in the circle.

Who attends the circle?

The circle is presided over by the responsible magistrate and includes:

- the defendant with support people or family member(s)
- the victim or victims and support people or family members
- a prosecutor
- the defendant's legal representative
- Elders from the community
- other community members affected by the offence
- service providers who may be required to provide services to the defendant or victim
- the Aboriginal Project Officer.

Attendees at each circle vary and are selected to cater for the particular offence committed and the particular offender. The Aboriginal Project Officer has the responsibility of ensuring that appropriate people know about the circle sentencing time and place, and the Aboriginal Community Justice Group also plays a role in determining who might be invited to attend.

Process during the circle

Below is an outline of the general process for conducting circle sentencing proceedings. However, there is no set formula and specific Aboriginal communities may wish to alter or change that process in certain respects.

1. The magistrate welcomes all participants to the circle and formally opens proceedings.
2. Participants introduce themselves, explain who they are, their relationship with the defendant or victim, or their interest in the offence.
3. The magistrate explains the role of the circle, that it is a court and functions as a court.
4. The magistrate explains methods of proceeding in circle, circle guidelines and the rules of conduct within the circle, then begins by outlining the facts.
5. The defendant will make comments regarding the offence and his or her commitment to rehabilitation. The solicitor for the defendant may outline any mitigating features.
6. The victim or a representative of the victim may make a statement regarding the impact of the offence.

7. Circle discussion: the prosecutor, offender, victim and community representatives are all provided with an opportunity to speak. The discussion can cover the offence, its impact on the victim and community, what needs to be done to right the wrong (what sentence should be imposed), and what support may be available for the defendant and victim. The circle should try to achieve a consensus on the outcome. During this time the magistrate outlines the available sentencing alternatives, because crucially, sentencing must fit within acceptable sentencing policies.
8. The magistrate provides a summary of the circle discussion and decisions reached.
9. The magistrate determines sentence, handing down the order of the court.
10. A date for review is set.
11. Closing remarks, magistrate formally closes the circle.

Endnotes

- 1 H Lilles, "Circle sentencing, A Canadian approach to community justice", 15 June 1995, Judicial Commission of NSW Seminar Paper.
- 2 J Nightingale, "Community based sentencing of Aboriginal offenders" (1997) 9(7) *Judicial Officers Bulletin* 49.
- 3 A Morton, "Revolution in Aboriginal Justice", *Canberra Times*, 12 July 2003.
- 4 NSW Attorney General's Department, *Community Justice Conferences for Adult Offenders*, Discussion Paper, Legislation and Policy Division, May 2001.
- 5 *Young Offenders Act 1997* (NSW).
- 6 B Thomas, *Circle sentencing: Involving Aboriginal communities in the sentencing process*. Discussion Paper, 1998, Aboriginal Justice Advisory Council, Sydney.

Review of Circle Proceedings

Overview of cases

The Judicial Commission analysed 13 matters determined by the circle sentencing court at Nowra between 5 February 2002 and 4 March 2003.⁷ There were 11 male and two female offenders. All but one of the offenders came before the court having pleaded guilty to multiple offences,⁸ usually including driving or violent offences.

Offences

Eight of the offenders came before the court charged with driving offences, the most common of which were drive whilst disqualified and prescribed concentration of alcohol (PCA) offences. Of the eight offenders charged with driving offences, six came before the circle charged with multiple driving offences.

Seven offenders came before the circle facing charges for violent offences — three were charged with resisting or assaulting police officers and six were charged with common assault.

Four offenders were charged with property offences. One person was charged with multiple offences relating to two incidents of break, enter and steal. A female offender was charged with stealing and the other two offenders were charged with malicious damage when they caused damage to property during assaults.

Subjective circumstances

All 13 offenders had previous convictions. The length of their criminal records varied, with some offenders having only one prior conviction for a minor offence and some having up to 161 previous convictions. Three offenders were known to have been previously imprisoned.

Three of the offenders were in breach of bail at the time they committed the offence for which they came before the circle. One of those offenders was also in breach of three good behaviour bonds.

Only one of the offenders who came before the circle was charged with a drug-related offence, although 11 admitted to having alcohol problems and all but two of the offenders were intoxicated by alcohol at the time of one or more of their offences. In four cases the offender was suffering from a mental illness or disability.

Analysis

Eight circle sentencing proceedings were selected for analysis in this report, with a view to providing some insight into how the system operates in practice.⁹ The cases studied were decided during the first 12 months following the commencement of the circle sentencing trial in NSW.

Each circle was presided over by Magistrate Doug Dick. He is referred to as “the magistrate” or “the presiding magistrate”. The composition of circles varied to reflect the offender’s community group and the individual needs of participants.

Some of the most notable characteristics that set these proceedings apart from traditional court proceedings are discussed below.

1. The use of colloquial language in place of complicated terms and legal jargon was striking. Such language facilitated communication within the circle, as the majority of participants in each circle would be lay persons, unfamiliar with legal terms. The use of plain language also reinforced the culturally neutral nature of the proceedings and served to distance them from court proceedings. It placed the magistrate and the legal representatives on a more equitable footing with the community representatives, the victim and the offender as compared to the hierarchical nature of traditional court proceedings.
2. Victim participation in circle proceedings differed markedly from traditional offender-focused court proceedings in which victims of crime may not even be present, or may only have a place as a silent observer. Victim participation is central to the concept of restorative justice and its objective of obtaining an outcome that is satisfactory to all parties. In circle proceedings the victim had an opportunity to confront the offender, providing a visual reminder to the offender of the consequences of their actions. In many circles, the victim received a spontaneous apology from the offender, thereby demonstrating the offender's genuine remorse, their acceptance of responsibility for the harm caused, and the beginning of the process of rehabilitation.
3. The collaborative approach to sentencing offenders in circle proceedings represents a stark contrast to traditional proceedings, where legal representatives may make submissions, but ultimately the sentence and its structure rests with the magistrate alone. Certainly there is no place for community or health professionals to make recommendations about the structure of a sentence. Although in the circle the magistrate could ultimately refuse to endorse an unsuitable sentence, the determination of appropriate sentences represents a co-operative effort between all parties in the circle. This increased community and victim satisfaction that justice was served, and ensured that the sentence was the most appropriate one in light of the offender's circumstances. In some cases, sentences were highly structured in a way that magistrates in conventional courts would simply not have the time nor the resources to do.

Case examples

EXAMPLE 1

On 5 February 2002 the first circle sentencing hearing was convened in NSW. The offender was a 27-year-old male with an extensive criminal record. He had 58 previous convictions, 32 of which involved violence and 27 of which involved sentences of imprisonment. The offender was serving a sentence of periodic detention when he was brought before the circle court, having pleaded guilty to the following offences:

- assault — *Crimes Act* 1900, s 61
- maliciously damage property — *Crimes Act* 1900, s 195(A)
- failure to comply with bail conditions (2 counts) — *Bail Act* 1978, s 50(1).

Circumstances of the offences

The notes of the presiding magistrate indicate that on 22 December 2001 the offender was drinking at a bar. He approached a man who was playing one of the poker machines and drinking a beer. The offender told the victim to buy him a beer or he would be punched. The victim responded by telling the offender to leave him alone, upon which the offender punched the victim on the chin. Bar staff then intervened.

The proceedings

The transcript began with the prosecutor asking the offender why he had committed the crime. The initial response was that he didn't know. Discussion later moved to the issue of alcohol and the effects it had on the offender. It was clear that both offences were carried out while under the influence of alcohol.

Representative: Why do they keep feeding him grog if they can see he's drunk?

Magistrate: It happens, we all know that, it's unfortunate but once again I'll remind you we are not here to solve liquor licensing offences.

Early in the proceedings, the offender readily admitted that he had a drinking problem that he needed to overcome:

Offender: I need help, I blame myself. I'm doing weekends but that still gives me 5 days to get on the grog, I need to get off the grog.

The representatives then turned to discuss the effect of the offender's behaviour on his children and family:

Representative: Do you want the little fellows coming to the gaol to visit you, is that what you want, you want them to follow in your footsteps, you want them to come to the gaol?

...

You should be looking after your Nan, what if she dies while you're in gaol. You should be alongside her, she needs you now, she doesn't need you in gaol.

During the proceedings the circle representatives made numerous offers to help the offender, although not on an unconditional basis:

Representative: We are here to help, and we can help.

Representative: I'll help but you'll have to spend time with me.

Offender support: You got to be proud, we can help but you got to be proud.

Despite the potential benefits of victim involvement for offender and victim respectively, victim participation in proceedings may have unpredictable results. For example, as these proceedings unfolded, the victim support person actually pointed out that the offender was much younger and stronger than the victim was. Her comments that the victim was physically unfit, however accurate, could be found insulting by a victim.¹⁰ This exchange also illustrates the use of colloquial language that may be lacking in a more formalised system of justice:

- Victim support:* You're a big strong fellow, what are you 6'2", fit and strong?
- Offender:* Yeah.
- Victim support:* Well look at him (victim) he's a 53-year-old and have you ever seen a bloke more out of nick than him?
- Victim:* I'm 52.
- Victim support:* Maybe but you're still out of nick.

The victim, however, did have the opportunity to ask the offender why he committed the offence. This time the offender proffered an explanation:

- Victim:* ...I don't know you, I've never laid eyes on you before, we didn't even exchange glances, I've never uttered a word to you, why me?
- Offender:* I had family problems, recently attended a funeral, got some bad news that my Nan was sick and my wife left me and took the kids.

Later, the victim support person interjected:

I can't see how what you do is the Koori way, maybe (victim) has family problems too.

At the conclusion of the proceedings the offender apologised to the victim of the assault.

Sentence

Assault:

- 3 months home detention.

Malicious damage:

- 9 months good behaviour bond on the following conditions:
 1. Attend anger management course.
 2. Accept the supervision of one of the Elders.

Progress report

Six months later the Aboriginal Project Officer, Ms Gail Wallace, presented a progress report to the presiding magistrate. She had interviewed both the offender and his grandmother and supplemented her report with a report from the Home Detention Officer, Wollongong Home Detention Unit.

In summary the report was very impressive, outlining that the offender had adopted a positive attitude toward life and his family. He had commenced employment for three days per week. He had been tremendously successful in the production and selling of his artwork, and had spent profits wisely, paying off a large portion of his fines and purchasing furniture for the home he plans to set up with his de facto partner. The offender had not used alcohol or drugs since commencing his home detention and had completed ten weeks of an anger management course. Additionally, he had provided counselling to cousins, received counselling, provided constant care for his grandmother, and presented talks to

judicial officers at seminars conducted by the Judicial Commission of NSW, an Aboriginal community panel, a circle sentencing panel and a Community Justice Group.

The report stated:

“The progress [the offender] has made in the past five months is more than he has in the whole of his life. His confidence has improved — I personally find him highly intelligent, and consider he has the potential to be successful in all areas of his life — he possesses interpersonal skills that would help him gain employment in variety of areas — particularly in the area that requires public relation skills...His artwork has great potential — it could take him a long way if he puts his mind to it...

He maintains that circle sentencing has helped him get his life into perspective and is looking forward to a life without crime — considering his previous criminal record this will be a big task but one that he maintains will succeed.”

EXAMPLE 2

On 19 February 2001, a circle sentence hearing was convened to consider the case of a 24-year-old male offender living in Nowra. He was brought before the circle court on the following charges:

- drive on road when licence cancelled — *Road Transport (Driver License) Act 1998*, s 25A(3)(a)
- operate vehicle so driving wheel/s lose traction (burnout) — *Road Transport (Safety and Traffic Management) Act 1999*, s 41(1).

Circumstances of the offences

The offender, whilst unlicensed, used his car to do a burnout.

The proceedings

In this case the offender, although Aboriginal, did not belong to the local Aboriginal community of Nowra. These proceedings raise the question whether circle sentencing is suitable where the offender is unknown to the Aboriginal Elders who take part in the process.

The circle representatives commented that the offender did not appreciate their efforts and respect was lacking. The offender similarly told the magistrate that he was dissatisfied with the circle, felt that all members were against him and that he would not participate in a circle sentencing proceeding if given the opportunity again. At one stage the offender told an Elder to stop talking down to him. Of all cases analysed in this study, this is the only one that could be regarded as a failure or unsuccessful. The offender committed further offences following the circle hearing.

The fact that the offender and Elders felt no link seemed to undermine the success of the circle in this instance. The offender was not being punished by his own community. The Elders were not familiar with him. Furthermore, it appears that there was no sense of equality between the participants.

When compared with other circle hearings, the members of the circle seemed to be antagonistic rather than supportive when dealing with the offender, as the following extracts reveal:

Solicitor: I have explained the seriousness of this to my client, in mitigation he didn't appreciate it was so serious.

Prosecutor: I find that hard to believe, he was sentenced to 50 hours community service for a similar offence in 2000.

Representative 4: How do you know a little kid is not going to come out of a house in front of your car? How do you know?

Representative 3: You're going to ruin your life and possibly someone else's.

Representative 1: How sorry are you?

And later,

Representative 1: If you go to gaol you'll tear your mum apart.

Representative 2: I think you are brainless, you lose control and you can't stop what's going to happen.

...

Representative 2: My son was a ratbag like you, he got out of gaol at Christmas...

These proceedings demonstrate that where a vital ingredient of circle sentencing is absent, namely socially relevant Aboriginal community involvement in determining a culturally acceptable punishment, the full benefits of the circle cannot be realised.

Sentencing considerations

In considering the penalties, the magistrate determined that the offender's car was to be impounded, despite the storage costs involved for the offender and the fact that the offender's wife advised the circle that she required the car to look for work. One of the representatives then questioned whether gaol was appropriate, another suggested that he should be made to spend hours dragging bodies out of car wrecks. Others suggested community service with the ambulance service and visiting schools to advise students not to do what he had done. The proceedings lacked the suggestion of spiritual help or guidance that seemed to characterise outcomes in many other circle sentencing proceedings.

Sentence

Drive on road when licence cancelled:

- 300 hours community service order
- serve Traffic Offenders Program
- licence disqualification for 2 years.

Operate vehicle so driving wheel/s lose traction (burnout):

- 2-year good behaviour bond
- fine
- motor vehicle impounded for 3 months.

Progress report

Six months later on 9 August 2002, the Aboriginal Project Officer, Ms Gail Wallace, presented a progress report to the magistrate. In the report she detailed the efforts made to assist the offender following the community representatives' recommendations and the offender's level of compliance.

The report outlined the areas in which the offender did not comply with the sentencing recommendations. In regard to presenting talks to high school students, a mentor (a condition of this recommendation) was not found and the offender had refused to comply. In relation to carrying out the community service order at the ambulance service, the original purpose was to give the offender an appreciation of the types of injuries involved in vehicle accidents, however this proved impossible because liability laws prevented the offender travelling in the ambulance. The offender instead chose to carry out his community service obligations with the South Coast Aboriginal Cultural Centre. The project officer noted that the offender had not attended the Traffic Offenders Program, nor did he present a talk to juvenile offenders.

The offender had completed 92 hours of community service at the Aboriginal Cultural Centre, and the administrator was pleased with his performance and described him as an enthusiastic worker with exceptional catering skills.

The report concluded that the offender's progress since the circle was disappointing. He had been caught driving whilst disqualified on 22 March 2002 and charged with possession of prohibited drugs on 30 May 2002.

In the report, possible reasons for the failure of the circle were suggested. They included the fact that the offender was not a member of the local Aboriginal community and was unknown to Aboriginal community representatives.

The community representatives commented that all areas of assistance were explored on the offender's behalf but the offender appeared reluctant to accept the assistance and advice afforded to him. As mentioned, the offender told the magistrate that he was never happy with the circle and would not participate again in such proceedings.

As a result of this case the Aboriginal Community Justice Group in Nowra changed the process they use to assess the acceptability of defendants for circle sentencing. Defendants now meet face to face with Group members to discuss the issues determining their acceptability for circle sentencing.

EXAMPLE 3

On 7 May 2002 a circle sentencing hearing was convened for a 28-year-old male offender who lived in Nowra. He had previously been convicted of driving under the influence of alcohol while disqualified and resisting police at time of arrest, and was subject to three good behaviour bonds in respect of those offences when charged with the following further offences that eventually brought him before the circle court:

- behave offensive manner — *Summary Offences Act* 1988, s 4(1)
- use offensive language — *Summary Offences Act* 1988, s 4a(1)
- assault police in the execution of duty — *Crimes Act* 1900, s 58
- common assault — *Crimes Act* 1900, s 61.

Circumstances of the offences

The notes of the presiding magistrate indicate that on 22 October 2001 the offender was behaving in an offensive manner after consuming alcohol. When police attended the scene, they were abused. Further, the offender head-butted the police car and threatened suicide. Instead of arresting the offender the police took him to his maternal grandmother who agreed to look after him. When one of the police officers described this relative as an aunt the offender reacted by head-butting him on the pretext this person was his Nan not his aunt. As the police were leaving the scene the offender spat on the window of the police vehicle.

A further assault occurred on 8 March 2002 when he was on bail for the previous offences. This time, again while highly intoxicated, he attended the home of his de facto wife where he verbally abused her and threatened her with a corkboard before ultimately punching her in the mouth. He continued to threaten and abuse her for the next hour before she managed to escape to a relative's home. Meanwhile the offender walked the streets yelling out for her.

Both the incidents described above constituted breaches of the good behaviour bonds imposed for the driving and surrounding offences noted earlier. The domestic violence assault also constituted a breach of bail.

The proceedings

During the course of the proceedings the offender's solicitor began by explaining that the offender suffered from depression, alcohol abuse and substance abuse to which one of the community representatives of the circle replied "we know about his childhood. We've known him since he was born."

The prosecutor told the circle that the offender had a history of traffic, violent and other offences most of which were alcohol-related. The solicitor interjected by pointing out that the offence occurred when his client had run out of medication.

Further subjective features of the case revealed that the offender was a childhood victim of domestic violence. He suffers from a psychiatric illness as a result of brain damage following a brutal assault. He had a significant criminal record including seven convictions for offences involving violence.

The following extract illustrates the nature and form of the proceedings. This interchange may be contrasted with traditional Local Court proceedings. In such proceedings, typically the offender says very little, questions and submissions are almost exclusively in the hands of the legal representatives (prosecutor and solicitor for the accused), and the magistrate alone decides on penalty. The impartiality and objectivity of traditional court proceedings are replaced by counselling and advice proffered by circle representatives from the offender's community.

Representative 1: Is this the first episode of domestic violence?

Offender: Yes.

Victim support: Wrong.

Victim: That's not true, he has struck me before and not always when he was intoxicated.

Representative 2: Domestic violence is not a part of Aboriginal culture.

During the proceedings, the victim gave a detailed account of a previous incident when she was the victim of a serious offence (not involving this offender) where the perpetrator was sentenced to five years gaol and was due for release very soon. The transcript continued:

Victim: I want to work out my problems myself...I can't forget about it. How would you like to be taken out into the bush and told to dig your own grave?

Representative 4: I need to sit down with you...and talk about a lot of things I know about that are not before this court.

Offender: I know.

Representative 4: You let yourself down son, don't blame anyone else. If you were running low on medication you should have done something about it.

Solicitor: He wasn't taking his medication because his relationship with Mental Health is not good.

Magistrate: Let's not lose sight of who is the victim here. It is not (the offender).

...

Representative 2: [The victim] has considerable emotional baggage, she'd been kidnapped.

Offender: I only tried to help her with her problems.

Representative 3: You're not a counsellor how can you help her?

NO ANSWER

Representative 3: Well?

NO ANSWER

Offender: There's no trust between either of us, I have no support from Mental Health. There is no plan in place, I'd run out of medication, I hit her out of frustration.

Later, the circle representatives frankly discussed the offender's alcohol problems and the future of his relationship with the victim.

Representative 1: You have respect for the Elders, you should respect your partner, this can't go on. Stop climbing into a bottle. You must realise the temptation will always be there to drink, but you have to resist.

Representative 4: I don't see a future in this relationship.

Victim: I agree, I can't put up with it any more. I love you, but I can't put up with it.

Magistrate: The circle should consider an AVO.

Victim support: Yes.

Offender: I know it's over.

These proceedings provide a good example of the manner in which the offender is brought to recognise and accept responsibility for his behaviour. The following extract relating to the assault police offence also illustrates the aspect of restorative justice or "the healing process" that is part of the aim of circle sentencing. Initially, discussion focused on the offender's behaviour and the influence of alcohol.

Solicitor: What the circle should know is that the client was acting irrationally; he had smashed a glass on his own head earlier that day. He doesn't dispute the facts because he cannot remember what occurred. He has a total blackout.

Representative 1: How long had you been drinking?

Offender: I don't know. I'd been drinking from a keg.

Representative 2: Alcohol is the devil in a bottle, but you can't keep blaming the grog.

Offender: When I smashed the glass on my head I thought the police were ambulance and they didn't take me to hospital, they took me to my Nan's.

Later, the reason for the offender's animosity towards the police emerged. The offender had spoken of two occasions where the police were reluctant to assist him. One incident involved a gun pointed at his head and a second when he had been brutally beaten by two bouncers at a local hotel. The offender considered the police did nothing to protect him when he needed help. The interchange with the police victim of the assault eventually resulted in an apology and reconciliation.

Offender: The police never done anything for me, I've rung them and they haven't done anything for me, I feel like I've got no rights whatsoever. I got hit over the head with a bar stool and they did nothing for me.

Solicitor: A person was charged, but the case dismissed.

Victim: Look, cops have baggage too, I've policed for 15 years and I don't have a heavy hand. My dealings with you have probably not been a good relationship, but I was giving him a lift home.

...

Representative 4: I was a hot head as a young bloke, I haven't fallen in love with the Police Force. You get good police and bad police, but you have to accept that they have a difficult job.

Representative 3: Previous assault on you by others was not by the police, you shouldn't take it out on all the police.

Representative 4: You can't dwell on the past for other injustices.

Victim: You are an angry man, you should get to appreciate that not all cops are a problem for you. You showed considerable respect for your Nan...I thought it was a huge imposition on her having regard to your intoxication, we were only too happy to take you to hospital but you didn't want to go.

Victim support: We always take injured to hospital.

...

Prosecutor: You were a danger to the police, Parliament has recognised that police are a special class of victim. Police don't enjoy being vulnerable.

Offender: I'm sorry, I'm sorry to you and I'm sorry for my Nan.

Victim: I accept your apology.

TRADITIONAL HANDSHAKE TAKEN IN CENTRE OF CIRCLE

Sentence

Common assault:

- 200 hrs community service — lawn mowing, gardening, attend counselling
- 2 year AVO.

Assault police:

- Imprisonment for 6 months and 1 week, suspended on the following conditions:
 1. To attend substance abuse counselling with an Elder chosen by the Nowra Aboriginal community.
 2. To attend anger management counselling as directed by an Elder chosen by the Nowra Aboriginal community.
 3. Accept supervision and actively participate in counselling and consultation with an Elder chosen by the Nowra Aboriginal community.
 4. Accept supervision and guidance of maternal grandmother.
 5. Not to consume intoxicating liquor for any reason whatsoever.
 6. Not to enter premises in which alcohol is sold.

Progress report

Three months after sentencing, the Aboriginal Project Officer presented a progress report. She had interviewed both the offender and his grandmother and supplemented her report with written references from individuals responsible for supervising the offender.

In summary the report was very positive indicating that the offender's life had changed for the better. His grandmother reported that she was pleased with his progress and that he assisted her around the house. He had remained drug and alcohol free. He had completed 120 hours of community service. He attended TAFE and was enrolled in a computer course. He was involved with organising a cultural program to teach local Aboriginal youth traditional dance and was working towards recording local Aboriginal sacred sites. As part of his community service, the offender took clients of Oolong House on bush walks, informing them about local Aboriginal culture, resulting in employment prospects at Oolong House.

The report also referred to the offender's relationship with the victim of the domestic assault, stating that he had moved on after coming to the conclusion that this relationship proved futile and both were better off going their separate ways.

The report indicated that what impressed the offender the most about circle sentencing proceedings was the ability to express himself freely in Aboriginal English, rather than the language used in other courts. The offender appreciated receiving a second chance by not being sent to gaol as this helped him gain a little more faith in the criminal justice system. He also appreciated being dealt with by people he knew and respected, who demonstrated that they cared about him and who assisted him in determining his future.

The nature of the sentence carried out by the offender in this case illustrates how circle sentencing, and particularly local Elders, try to incorporate aspects of local Aboriginal culture and benefit to the local Aboriginal community into the sentences. The offender's community service involved him passing his Aboriginal cultural knowledge onto other young Aboriginal people. The sentence places a strong value on the use of Aboriginal culture as a strong reinforcing element in the healing of the offender.

EXAMPLE 4

On 21 May 2002, a 27-year-old male appeared before the circle sentencing court on a number of charges relating to offences committed in a single evening. Eleven people attended the proceedings including the victim of the crime. The offender had pleaded guilty to the following offences:

- ❑ drive unregistered vehicle — *Road Transport (Vehicle Registration) Act* 1997, s 18(1)
- ❑ drive uninsured vehicle — *Motor Accidents Compensation Act* 1999, s 8(1)
- ❑ high range PCA — *Road Transport (Safety and Traffic Management) Act* 1999, s 9(4)
- ❑ drive whilst disqualified — *Road Transport (Driver Licensing) Act* 1998, s 25A(1)(a)
- ❑ illegal use of motor vehicle — *Road Transport (General) Act* 1999, s 52(1).

Circumstances of the offences

The notes of the presiding magistrate described the circumstances of the offences. On the evening in question, the offender was observed by police riding a stolen motorbike.

A passenger was riding on the handlebars. Neither was wearing a helmet. The offender, a disqualified driver, admitted to having consumed 20 beers. Breath analysis revealed a blood alcohol reading of 0.160.

The offender had a prior record including 12 offences of dishonesty, numerous driving offences and three prior convictions for PCA offences. At the time of the offences, he was disqualified from driving until August 2003. The offender was on medication for schizophrenia at the time of the offence.

The offender admitted to having had an alcohol problem his entire life and to being highly intoxicated at the time of the offences. At the outset of the proceedings, the prosecutor highlighted the risks involved in the conduct of the offender

Prosecutor: Not registered, no lights, indicators, etcetera?

Victim: That's right, we use it for competition on weekends.

Prosecutor: Well I see that as aggravating, because here he is riding around with someone sitting on the handlebars, no lights. It's 9.30 at night and he's got no lights the potential for disaster was real.

The magistrate gave some illustrations of the penalties that may have been incurred if someone was hurt or killed in the accident.

During proceedings, it emerged that the motorbike ridden by the offender was a lightweight child's racing bike belonging to the victim's eight-year-old son. The bike was extensively damaged as a result of being ridden by two adults.

The magistrate asked the victim about his son, and how he had felt about the theft.

Victim: He races it every weekend. We put it on a trailer and take it out for races. He was so upset that he vomited and cried. He couldn't understand why someone took his bike.

Representative 1: Imagine how the young bloke felt, it was a kid's bike, not an adult's bike. Why didn't you tell (co-offender) to take it home? Or at least have nothing to do with it?

Offender: I wasn't thinking, it was just a joy ride.

Victim: But you didn't see what it did to my son, and what about me? I've had to renew all the fences around my home and I've had alarms installed because we're not there all the time, we have to work. We can't afford to take the risk. At the time it destroyed my son. What really concerns us is that we were at home at the time and yet you came into the garage and took it.

...

Representative 2: We're being hard on you because we want to put you on the straight and narrow.

In this way, the gravity of the offence was brought home to the offender. The parties at the circle proceedings directly challenged his view that it was "just a joy ride". The victim had an opportunity to show how the offence had affected both him and other members of his family.

Sentencing considerations

The offender was suffering from a mental illness, and this was taken into account when the circle was deciding on a sentence. Offender support provided the following information:

Solicitor: He's also starting employment in three weeks

Offender support: That's right, it's at the new farm in Tomerong. Depending on what happens here today, we'll give him accommodation and when he has to come into town for medication we'll transport him and stay with him. Our aim would be to keep him out of town.

Later, when the circle representatives emphasised the need for the offender to seriously address his alcoholism and mental health issues, the offender support informed the circle that they intended to keep the offender away from town in a drug and alcohol free environment, and to monitor his medication.

These proceedings illustrate the marked difference between the collaborative approach adopted in the circle proceedings and the approach taken in conventional sentencing proceedings. Harm minimisation appeared to be a priority for all parties concerned.

When discussing the sentence to be imposed, the offender himself suggested that in addition to his penalty he should also pay compensation for the cost of the bike repairs, indicating that he had taken responsibility for his actions and illustrating the restorative character of the proceedings.

In sentencing the offender, a circle representative made the following remarks to the offender:

Representative 3: You've got to be made to pull up. We have to be firm. You've been getting away with it for far too long. I expect you to pay the compensation before the sentence is passed as a sign of goodwill. Your apology has been accepted but you still have to pay the compensation up front.

Sentence

High range PCA, disqualified driver and illegal use of motor vehicle:

- 12 months imprisonment suspended on the following conditions:
 - 1 Attend the Traffic Offenders Program.
 - 2 Continue to actively participate in counselling for schizophrenia, drug and alcohol issues at the Aboriginal Medical Service.
 - 3 Submit to urine analysis as directed by the Aboriginal Medical Service.
 - 4 Not to consume intoxicating liquor for any reason whatsoever.
 - 5 Not to administer non-prescribed drugs for any reason whatsoever.

Drive unregistered and uninsured vehicle:

- rising of the court.

All offences:

- licence disqualified 3 years.

Progress report

On 2 August 2002, the magistrate received a progress report written by the Aboriginal Project Officer. Interviews with the offender and his family revealed that the offender felt that the circle sentencing experience assisted him in regaining respectability through taking responsibility for his past actions and reconstructing his life, and he now had a much more positive outlook than at the time of the proceedings.

The officer reported that the offender had made considerable progress thanks to the constant support from his family. The offender reported that although he suffered from occasional paranoia and cravings for alcohol, the constant support and supervision of his family was keeping the problems under control. This case is an example of the benefit of actively engaging with an offender support person during the sentencing process. The sentencing process directly engaged the broader kinship network available to the offender as a strong support mechanism for him in completing his sentence and in monitoring his behaviour while he completed his sentence. This is a further example of the circle sentencing process incorporating existing Aboriginal cultural values and structures within the development and implementation of the sentence itself, as well as the follow-up support of the community.

The offender had paid full compensation to the victim for the motorbike repairs. His uncle provided supervision and a paid job, working seven days a week in a drug and alcohol free environment, where he was apparently making good progress, having built a bridge and a walkway.

The offender had partial custody of his infant son and was supported by his mother in this respect.

The report indicated that the offender's post sentencing progress had the potential to reduce the risk of his re-entering the criminal justice system.

This case also demonstrates a further strength of circle sentencing, that is, the involvement of the victim in the process. The victim in this case was able to demonstrate the full effects of the offence on himself and also on his family; it was clear that the offence had caused his family serious concern and directly affected their sense of personal safety. By engaging with the offender through the circle process, the victim was able to redress his concerns for his family's safety.

EXAMPLE 5

On 16 July 2002, the circle convened to consider the case of a series of offences committed by the offender, who lived in the Nowra area. The offender had a criminal record including a previous conviction for break, enter and steal. Following the offences, he embarked upon a program of rehabilitation for drug and alcohol addiction. He was brought before the circle court on the following charges:

- break, enter and steal (2 counts) — *Crimes Act 1900*, s 112
- illegal use of motor vehicle — *Road Transport (General) Act 1999*, s 52(1)
- malicious damage to motor vehicle — *Crimes Act 1900*, s 195(a)
- false information to pawn broker (2 counts) — *Pawnbrokers and Second Hand Dealers Act 1996*, s 15(4)
- stealing — *Crimes Act 1900*, s 117.

Circumstances of the offences

The notes of the presiding magistrate indicate that at 11 pm on 16 July 2001, the offender used a metal grate from a drain to smash a window of the premises of a car dealership. He stole a small motorcycle and then a quad runner, and took these to Nowra Fair. Others later drove these vehicles to the southern end of Nowra Fair. The offender later returned to the dealership and drove a Ford utility motor vehicle through the plate glass window causing extensive damage to both vehicle and building. He drove the ute to Nowra Fair car park and did a number of “burnouts”. As police approached the scene they saw the offender and another person jumping on the bonnet of the vehicle and kicking in the windscreen before they decamped. Two days later, the offender and a co-offender broke into an electrical store and stole Nintendo games, which they later pawned.

While on bail for the above offences, the offender went to his cousin’s house in breach of his bail curfew and stole her mobile telephone and charger.

During the circle proceedings the offender’s solicitor told the circle that since these events the offender had taken steps towards addressing his alcohol and drug problems.

Two of the victims of these offences were present at the hearing. One of them, together with the circle representatives, attempted to press home to the offender the dangerous nature of his actions at the car dealership and the fact that someone could have been killed when he drove the car through the window. The victim of that offence also stressed the cost to the community of the break in — that because of these incidents he was unable to sponsor a local sporting team or to hire an apprentice.

Victim 2: At the time of the offence on my place, I had been subject to a long series of break ins, this was the 8th one that year. The amount of damage and glass was unbelievable. A huge display cabinet was destroyed. I can tell you I felt so aggro about it, every time I lodge an insurance claim, I have to pay an excess of \$1,000. I’ve paid \$8,000.00 in excess in the last year and you wouldn’t believe how much this year’s premiums have gone up because of my record of claiming.

The following extract illustrates the recriminations faced by the offender when confronting the victims and the circle representatives:

Representative 1: You've got a family, a wife and a two-month-old. You better change your ways.

Victim 1: We put two apprentices on every year, but not this year, I can't afford it. That's the first time I've never put an apprentice on.

Representative 2: One of his past apprentices was a Koori lad and he's going real well.

Victim 1: Yes he is.

Representative 2: He's up at [a named car dealership] now isn't he?

Victim 1: That's right, but there's no sponsorship or apprentices this year.

Representative 3: What about if we give him some community service?

Victim 1: I won't have him doing community service at my car yard. I don't want him anywhere near my car yard.

Representative 3: You've destroyed your local community, you've hurt local people and local business.

Offender: Back then I was getting stoned or drunk whenever I could.

When asked how he could afford to pay compensation for the damage caused, the offender answered that he would get work. A little later the issue of remorse was raised and the possibility of imprisonment was considered:

Representative 3: What do you think should happen to you today?

Offender: Probably get locked up.

Representative 3: Gaol's no place to be. You don't want to go to gaol. When I was visiting gaols, a fella got stabbed to death, and it was a case of mistaken identity.

Following further discussion relating to rehabilitation and some remarks by victim 1 concerning the likelihood of enforcing any order for compensation, the circle returned to a consideration of the intrinsic wrongfulness of the offender's behaviour. The following exchange took place:

Representative 2: One thing that bugs me is you blame drugs and alcohol, that's a stupid excuse. That excuse gives me the shits. What if your cousin needed to use the phone in an emergency? It's a low act to steal off your family.

Representative 1: It's a low act to steal from anyone.

Victim 1: What I don't understand is you didn't steal it for any reason, you didn't steal it to keep it, you just smashed it up.

Offender: I'm truly sorry.

Magistrate: How do we know you are genuinely sorry?

Offender: I just am. I want to do something with my life, I've got a baby, I see a counsellor once a week and have urine tests at random.

Sentencing considerations

The magistrate outlined to the circle the available penalties and the sentencing considerations relevant to these offences. The circle spent some time deliberating on the penalty to be imposed.

One circle representative expressed the view that the circle should not be too lenient because young people like the offender were giving Aboriginal people a bad name.

Finally, when there appeared to be agreement in the circle that the two main offences should attract sentences of imprisonment to be served by way of periodic detention for two years, the magistrate asked the victims what they thought of that sentence.

Addressing the offender, victim 1 said: "You can turn your life around, you can do anything in this country, all you got to do is try. I did want to see you locked up, but I see you have a wife and child. It's up to you to turn your life around. I'd like to see rehabilitation as well."

Another circle representative suggested that the offender should also attend Oolong House for at least four months, to which the magistrate replied that this could be incorporated into the order for periodic detention. When the magistrate asked the second victim to comment, the latter replied: "Prior to today and circle court, I wanted to see him locked up for a very long time, but now there appears to be some hope."

This case illustrates the healing element of restorative justice at work. The offender was able to see, by exposure to the views of each victim, the impact of these offences upon them. Through victim 1's inability to sponsor a local sporting team or to employ an apprentice as a result of the costs incurred because of the offence, the circle was also able to understand the broader consequences of the offence for the community. The offender appeared to become truly sorry for what he had done, influenced by the views expressed by the community representatives in the circle and a fuller appreciation of the consequences of his actions on the victims and the broader community.

The victims also found a forum in which to express their anger and disappointment in the offender. They had the opportunity to participate directly in proceedings and more so than in a conventional court. The victims also appear to have softened, during the course of the proceedings, in their attitude towards the offender, with a resulting hope that he could be successfully rehabilitated.

Sentence

All offences:

- 2 years periodic detention on the following conditions:
 - 1 That the offender actively participate in rehabilitation program at Oolong House for a period of 4 months.
 - 2 That he submit to urinalysis as directed.
- Compensation payments to victims totalling \$37,983.

(No progress report was attached to the papers for this offender.)

EXAMPLE 6 — Two offenders

On 29 August 2002, the first offender came before the circle for sentencing on a number of matters concerning some phone calls to police and their subsequent attendance at her house. She had 14 prior convictions with three being for assaulting police. The hearing proceeded for some time before it emerged that the circle would be best served by a joint hearing involving the offender and her brother, the second offender, who was also involved in the offences. The hearing was adjourned until 22 October 2002, when both offenders attended and were sentenced by the circle. They came before the sentencing court on the following charges:

First offender

- use telephone to menace — *Crimes Act* 1914 (Cth), s 85ZE(1)(a)
- resist officer in the execution of duty (2 counts) — *Crimes Act* 1900, s 58
- assault police officer in the execution of duty — *Crimes Act* 1900, s 60(1)
- common assault — *Crimes Act* 1900, s 61.

Second offender

- common assault — *Crimes Act* 1900, s 61.

Circumstances of the offences

According to the notes of the presiding magistrate, on 13 November 2001, 13 calls were made to 000 from a single address, the offenders' home. On some of the calls a female voice was heard to ask for police before hanging up, on others no-one spoke. Police visited the house a number of times and spoke to the offender and her brother, who denied making the calls. Police issued each with a warning about misuse of telecommunication services and observed them to be intoxicated. When police returned to the house at 3.20 am, the second offender indicated that it was the first offender who had made the calls. The first offender became hostile in her denial of those claims. When she was arrested, she swore at police and punched an officer twice in the chest.

On 29 April 2002, police attended the offenders' home at 10 pm following a 000 call. The first offender denied making the call, although admitted that she had called earlier in the evening. Her brother tried to calm her down, however she became increasingly hostile towards him and the police officers, swearing at them and abusing them loudly, causing a neighbourhood disturbance. She was arrested, and continued her verbal abuse while struggling with police.

On 20 August 2002 police attended the offenders' home following a telephone call. Both offenders appeared to have been drinking. When police inquired why they had been called to the house, the offenders accused each other of making the telephone calls. The second offender became violent and punched the victim to the side of the face with a closed fist, knocking her to the ground.

On 30 August 2002 at 1.30 am, police arrived at the offenders' house following a 000 call. The offender was yelling at her brother, throwing things, raising her fists and threatening to kill him. She punched her victim twice in the chest before being restrained by police where she continued to struggle violently.

Background reports

Reports were provided to the circle from a counsellor at the South Coast Medical Service Aboriginal Corporation regarding each offender. The report disclosed that the second offender had a difficult upbringing and suffers from a mild to moderate intellectual disability. The counsellor was of the opinion that both offenders were subject to “a campaign of victimisation and racial vilification from a number of nearby households in their street”.

A report from the Department of Ageing, Disability and Home Care provided recommendations from a counsellor about community-based programs, which would be of benefit to the first offender. This report also disclosed difficulties that the department had in encouraging the first offender to attend the various counselling sessions and activities arranged by the service because she said that she had been advised by police not to leave her house.

General deterrence, mental health and drug abuse

The notes of the presiding magistrate indicate that the protection of police is an important priority and those who make the job of police more difficult by resisting arrest or assaulting officers cannot expect leniency from the courts. He indicated that sentences handed out for violent attacks must have a strong element of personal and general deterrence.

In response, the solicitor representing the first offender submitted that general deterrence was not as important in this case because of her special circumstances. On the other hand the prosecutor pointed out to the circle that hoax 000 calls cause police a lot of trouble in time wasted, and in the risk that police may not respond urgently to a genuine 000 call from the same address in the future.

The proceedings seemed to be extremely collaborative, with representative 2 giving the circle a background on the first offender’s life history and family situation. Representative 3 was the mental health caseworker for the first offender and her brother.

The circle environment provided an opportunity for representative 3 and the victim to discuss the offence in terms of the wider history of the offender. The following exchange took place early in the proceedings:

Representative 3: I’m the mental health caseworker for both offenders. I know their neighbours cause them a lot of trouble. Do police look at who’s hassling them?

Victim: The neighbours were not an issue on this occasion. You have to understand the number of calls police get from this address. I got called out again last Tuesday and I’m not really interested in who made the call, I’m more concerned with the problem, and is there a police response necessary.

The circle representatives seemingly sympathised with the offender, because they were well aware of her difficulties and had known her for a long time.

The offender explained that her brother, who was not present at this initial hearing, became violent when he was drinking, and that he told her to call the police because he wanted her locked up, and the proceedings took on a more investigatory tone, with

parties questioning the offender in an attempt to understand her situation and find a solution for her behaviour.

Representative 1: How often does [her brother] drink?

Offender: When people come to the house.

Representative 1: If you ring police, you have to tell police what's happened so that the police can take him away; that might just stop him from hitting you.

Offender: But I don't want to live alone, because I couldn't cope by myself.

Representative 2: We can't separate them. They can't live by themselves. They have never separated in their entire life. Their neighbours are a problem. They harass them a lot, call them names, stand in the front yard waving sticks and say that they don't want blacks in our street.

Representative 4: When [her brother] makes these calls, maybe in her mind, she's in fear of her life. When [her brother] hits you, do you hit him back?

Offender: No.

Representative 2: Then why hit the police?

Offender: I don't know.

Representative 2: Maybe it's because they won't hit back.

Representative 1: Do you know that 000 calls are recorded and police know who makes the calls?

Victim: These two have been tying up police resources for far too long. We get there and they don't want us. I'm in emergency response and I've been called to their last 4 addresses over the last 6 years. As a result of the 000 calls on this evening, not only were police attending, but fire and ambulance as well went to the house.

Later, the offender tried to explain her actions:

Offender: I drink, but not as heavy as [her brother]. I ring police to stop [her brother] from belting me. [Her brother's] bigger than me and when he's had a few, he just goes off. Sometimes I tell police what happened and they lock me up and not him, when I'm in the right and not him, when I've been assaulted.

After some discussion, the solicitor informed the circle "we have a plan, but it involves her brother too. At this stage, when [her brother] drinks, the offender might be finding somewhere to live for just those couple of days for when [her brother] is drinking."

Magistrate: If that is the case and [her brother] contributes to the offending behaviour, perhaps the court might consider adjourning these matters and inviting her brother to appear before the same community reps to his fresh matters, depending of course on him entering a plea of guilty.

The proceedings recommenced on 22 October 2002 with the same circle representatives attending but this time with the first offender's brother (the second offender) also in attendance.

The solicitor for the first offender began by submitting that the circle should remember the problems caused by the neighbours. The first offender responded that she no longer wanted to go outside.

Representative 2: The neighbours are the problem and those problems are not solvable by this court because they harass...everyone.

It emerged that the first offender was effectively refusing to leave the house and, owing to the open and collaborative nature of the proceedings, participants were able to resolve that problem through co-operation and negotiation with the offenders.

Sentencing considerations

This was a particularly unusual and difficult set of circumstances for the circle to understand and deal with. The situation would have been very difficult to understand or resolve in a conventional local court setting, because of the nature of those proceedings.

Support person: Activity programs for the first offender are not being attended because she is under the wrong impression as to police advice.

Victim: I told the first offender to go inside to avoid conflict with the neighbours. I didn't mean for her to become a prisoner in her own home. I haven't had much to do with the neighbours but I understand there is a problem.

Support person: If the first offender will go, I will take her and provide the transport so that she can attend development programs and other courses of interest.

Representative 1: If we arrange door to door transport, would you go?

First offender: Don't know.

Representative 1: Why not?

First offender: I just don't know

Second offender: I'll go to the programs if I get picked up and dropped back home.

Support person: First offender, will you go if second offender goes?

First offender: Yes

Representative 2: The no alcohol ban must continue and it must not be for a short time. It must be a long time.

Representative 3: That's right.

The theme of general deterrence and the appropriate penalty to be imposed were raised for consideration:

Solicitor: General deterrence isn't as important today having regard to their specific disabilities.

Representative 4: If we put them on a fine isn't that showing them that they've done something wrong?

Representative 1: They know that they have done something wrong.

The transcript of proceedings relating to the second offender's sentencing revealed more collaboration between all parties involved in order to arrive at a consensus on what conditions or restrictions might be imposed on the offenders as part of their sentence:

Representative 1: Where do you get the alcohol?

Second offender: From...He is a problem, he buys alcohol for us.

Representative 4: Do you buy alcohol for yourself?

Second offender: No.

Representative 2: Wasn't...supposed to have been told to keep away?

Prosecutor: ...has been spoken to by police and asked not to associate with both offenders.

Second offender: But he keeps ringing us up.

Representative 1: What for?

Second offender: To ask the first offender to come to his place.

Representative 1: Do you want anything to do with this?

Second offender: No.

Representative 2: Then we should keep him away.

Magistrate: The circle can make non-association a condition of a sentence imposed.

Representative 2: What about the neighbours?

Solicitor: The neighbours are a problem but something is happening on that front in relation to racial discrimination.

During the discussions regarding the appropriate sentence for the second offender, his solicitor emphasised that the reason that he was involved in the circle proceedings was because of the matters involving his sister.

The circle representatives stressed to the second offender that he was expected to take care of his sister and not hit her.

Representative 2: You've got to look after your sister. You've got to walk away. You're the man of the house, you don't go hitting your sister.

Following further deliberations as to penalty the offenders were sentenced to highly structured and supervised sentences, with multiple conditions. It is questionable whether conventional Local Court proceedings would have derived such an appreciation of the underlying social problems that were manifested in this case, nor arrive at such a complex range of conditions attaching to the sentences ultimately imposed. The circle process allowed for the participants to gain a full understanding of the mental health problems involved in the offences and to gain a full understanding of the social environment that the offenders were living in that obviously affected their behaviour. The circle participants were also able to discuss the possible program options that were available to the offenders

and to develop a range of solutions to redress the problems that the offenders were experiencing. The participants were also able to engage local Aboriginal community organisations in developing aspects of the sentence.

Sentence

First offender

All matters:

- s 9 bond for 12 months on the following conditions:
 - 1 To attend Links House counselling as arranged by Links House.
 - 2 To attend women's camp as arranged by the Aboriginal Medical Service or Waminda.
 - 3 To attend anger management, drug and alcohol counselling as directed by Aboriginal Medical Service or Waminda.
 - 4 To continue to administer medication as prescribed.
 - 5 To attend personal development program as directed and arranged by
 - (a) Life without Barriers; and
 - (b) Department of Ageing, Disability and Home Care.
 - 6 Not to associate with...
 - 7 Not to consume intoxicating liquor.

Second offender

- s 9 bond for 12 months on the following conditions:
 - 1 To attend men's camp as arranged by Aboriginal Medical Service.
 - 2 To attend anger management, drug and alcohol counselling as directed by Aboriginal Medical Service.
 - 3 Continue to administer medication as prescribed.
 - 4 To attend personal development program as directed and arranged by:
 - a) Life without Barriers; and
 - b) Department of Ageing, Disability and Home Care.
 - 5 Not to associate with...
 - 6 Not to consume intoxicating liquor.

(No progress report was attached to the papers for these offenders.)

EXAMPLE 7

On 19 November 2002, a circle sentencing hearing was convened at the Nowra Aboriginal Cultural Centre to consider the case of a female offender brought before the circle court for the following offences:

- drive whilst disqualified — *Road Transport (Driver Licensing) Act* 1998, s 25A(1)
- stealing (2 counts) — *Crimes Act* 1900, s 117.

Circumstances of the offences

On 13 October 2001, police stopped the offender driving while disqualified in Narooma. On 30 July 2002, the offender entered a supermarket, placed four jars of food into her handbag, proceeded to the checkout and paid for the items in her trolley but not those in her handbag. When questioned she replied that she only had \$13 to her name. Soon after on the same day, she entered a Go-Lo store and placed four dress bags, three packets of chocolate biscuits, three milky bar chocolates, eight packets of kit-kats and seven bags of lollies into various plastic bags and climbed over a closed checkout counter. The total value of the items taken was \$98. The offender failed to attend court for the above offences and a warrant was issued for her arrest.

The offender had previous convictions for two driving offences, assault and malicious damage, nine property offences and ten dishonesty offences:

- fines had been imposed for the assault and malicious damage offence and goods in custody offence
- for seven stealing offences and ten dishonesty offences she had received concurrent sentences of imprisonment for eight months with a two-month non-parole period
- she received the same sentence for a later stealing offence and a two-month suspended sentence for a further stealing offence.

Relevantly, her driving offences comprised driving while suspended, for which she received a \$500 fine and licence disqualification for one year, and low range drink driving, for which she received a \$650 fine and licence disqualification for one year.

Sentencing considerations

During the course of the proceedings, the offender's solicitor advised that the offender had three children (aged 14 years, 11 years and 15 months), the youngest of whom suffered serious medical problems. He explained that the offence of driving while disqualified had been committed when the youngest child's father had driven the offender and two others to visit her youngest child in hospital who had serious heart problems. On the way there, they stopped for a drink, and he refused to drive the rest of the distance to the hospital. The offender had driven the rest of the journey by herself.

One of the representatives asked if it would be very difficult for the offender to pay a fine and suggested that she could get the fine directly withdrawn from her Centrelink payment. The offender explained that most of her driving offences had been brought about by trying to assist others:

Offender: I lost my licence for a \$68.00 fine that I didn't pay. Most of my trouble involving driving has been because I had to help out others. The last time I got caught, my younger brother called and asked me to pick him up because he was involved in a brawl and was scared. I had no one to turn to. I'm always helping out others.

The representatives confirmed that they would be there to help her if she needed them.

In regard to the stealing offences, the offender's solicitor explained to the circle that she had no money, a large electricity bill to pay and no family support structure. The offender told the circle that she had now found support from DOCS and an Aboriginal organisation. She revealed that she was having trouble with her 15-year-old daughter who refused to go to school.

During the proceedings, the community representatives focused their attention on the needs and concern for the well-being of the offender's children as a method of convincing the offender to change her behaviour:

Representative 2: Your teenager is rebelling because of what you did and now we need to impose a sentence that will help you to stop it.

Representative 3: If we give you a gaol sentence, you're not the only one going to suffer.

Representative 2: You need to look after your little fellows. If you stuff up, they suffer.

When the offender's solicitor suggested that the circle should direct its attention to attempting to help the offender, the presiding magistrate intervened by reminding the participants of their main role:

Magistrate: This is a circle court not a circle of counselling. You need to remind yourselves that this court is primarily focused on breaking the cycle of offending and protecting the community. We are not here to act as counsellors.

The offender then expressed her remorse and the suitability of the various penalties was discussed in the circle, the offender indicating her objection to gaol, based on the impact it would have on her children:

Offender: I could do gaol standing on my head. That's not a problem, but I won't do that to my kids. They need me, my baby needs me. My baby has a chronic lung disease and is often flown to hospital.

The representative then warned the offender that she will only get one chance to change her ways and that her sins will find her out.

At this stage a support person requested to tender a report by a service which had been prepared to assist the offender with her substance abuse. It was the first time during the proceedings that substance abuse was raised as an issue. At that point, the offender confessed that drugs have been a big problem for her. However the magistrate rejected the offer of the treatment service on the grounds that very little was known about the service and because it appeared to deal with and focus on current abuse, rather than previous abuse.

In this case the community members participating in the circle were able to understand some of the difficulties experienced by the offender and to begin to discuss ways of helping her in the future, such as by providing her with transport thus reducing the possibility of her reoffending.

Sentence

Driving whilst disqualified and stealing:

- 250 hours community service order
- recommend work at Rose Mumbla Retirement Village:
 - 1 Probation and parole supervision for such time as deemed necessary.
 - 2 Attend anger management family support and financial management counselling as arranged by probation and parole service.
 - 3 Accept guidance of Aboriginal Elders.
- licence disqualified for 2 years. Habitual offender declaration quashed.

(No progress report was attached to the papers for this offender.)

EXAMPLE 8

On 4 February 2003, a circle sentencing hearing was convened to consider the case of a male offender living in a domestic relationship with one of the victims. The offender had assaulted his de facto partner and, some two months later, had assaulted his partner, two of her children, a friend of his partner and a police officer who was called to the scene. The offender's mother was present at the proceedings in the role of support person for the offender. A support person also accompanied the victim. The offender came before the circle on the following charges:

- common assault (5 counts) — *Crimes Act*, s 61
- assault police officer in the execution of duty — *Crimes Act*, s 58.

Circumstances of the offences

The notes of the presiding magistrate indicate that the first assault occurred on 1 June 2002. The offender arrived home at 2.30 am in an intoxicated state. During an argument, the offender grabbed his de facto partner and threw her to the floor. When she telephoned police, he tore the phone from the wall. He pulled the victim's arm behind her back causing her considerable pain. When police arrived, the offender had already left the home.

Some two months later, on 2 August 2002, the offender spent an entire day drinking before returning home, intoxicated, at 8 pm. His partner was in the house with a female friend. Following a short argument, the offender began punching holes in the wall, then brandished a baseball bat with which he smashed a coffee table and threatened the victims, hitting his partner across the leg and her friend on the shoulder. Two of his partner's children (aged 5 and 7 years respectively) got out of bed and entered the lounge room

where they were threatened by the offender. His partner's friend took the children from the house and contacted police. When they arrived, the offender and his partner were still inside. The offender threatened police with the bat and refused to put it down. He struck the door of the house to prevent an officer entering, almost hitting him, and his partner was able to grab the bat while the officer tackled the offender.

The offender had a record of numerous prior convictions for offences of dishonesty, assault and malicious damage. During the last five years, he had been convicted of assault occasioning actual bodily harm, high range PCA, drive whilst cancelled, assault and breach AVO. He was serving a suspended sentence at the time of the first assault.

The presiding magistrate indicated that some of the sentencing considerations regarded as relevant to the circumstances of this case included the emotional harm done to the victims. He also informed the circle that a merciful attitude by the victim of an offence should not influence the circle any more than an unforgiving attitude ought to do so.

Early in the proceedings it was clear that members of the circle were seeking an explanation and a solution to the offender's problem.

Representative: We know what you've been through. Kooris have been through a lot. Whiteman forced two tribes to live together on this mission. We have a long association with the land, but we have lost our identification with the land. What you need is good spiritual wellbeing.

The offender's solicitor informed the circle that the appellant had completed the Oolong House rehabilitation program. On the other hand, the prosecutor highlighted the seriousness of assaulting police, who enter dangerous situations as part of their employment. Victim support emphasised the need to stamp out domestic violence.

Sentencing considerations

The notes of the presiding magistrate indicate that an important sentencing principle in this instance is that violent attacks in domestic settings must be treated with real seriousness. Emphasis was also placed on the need to protect officers in the execution of their duty and that police are entitled to look to the circle for protection when going about their lawful duties.

The offender's mother informed the circle that she raised the offender in a household where she herself was regularly a victim of domestic violence. The offender witnessed his mother being "bashed black and blue". The offender told the circle that he could remember what his father had done to his mother, and added that in his own situation "this only occurs when I'm paralytic".

The victim appeared to agree with this statement adding "...he starts drinking and when he's been drinking he responds in the way he was taught". Later in the proceedings, she said, "He wasn't angry with me. We didn't even have a cross word. He just exploded and the kids saw it and they were really scared. It's something they will never forget."

Highlighting the need for the circle to be a collaborative sentencing process, one of the representatives said "You need help and you've got to want to get help. Behaviour like this is bringing us all down. If he doesn't want help then the circle can't help him."

A little later, in the course of discussing a suitable sentence for the offender, circle representatives expressed the following views, including suggestions as to what they would be prepared to contribute to ensuring that the offender's rehabilitation prospects were advanced:

Representative 1: CSO would be a good idea if it's properly monitored. I'm prepared to supervise him in my job with National Parks.

Representative 4: I'll supervise him with fishing for the community co-op.

Representative 3: We should put him to work on the home here. They need a lot of attention and I'll make sure he works. Don't worry, he'll be supervised.

Representative 2: We've got to stop sending them to gaol. Doing time, coming out and doing time again doesn't work. Sometimes the problem is not what's around you but you yourself.

Representative 3: I've seen this lad grow up and he has seen a lot of things that he shouldn't. Those things shouldn't have occurred and neither should these. Are you feeling any remorse?

Offender: (nods head)

Representative 3: Nobody deserves to get assaulted. You've got assaults on record; we're not going to help you by feeling sorry for you. If you stuff up on the CSO my boy, you're going to the big house.

At that point, the victim intervened by observing that the offender was "no good to anyone in gaol".

Although the attitude of the victim of domestic violence is not generally regarded as relevant when determining an appropriate sentence for such an offence, in this case the victim was an important participant in the circle. This illustrates another important difference between the circle sentencing environment and traditional sentence proceedings where the victim is unable to voice an opinion on a suitable penalty.

The following extract illustrates the community's preparedness to participate in reforming the offender through the imposition of culturally appropriate punishment. The offender and his family may more readily accept such punishment.

Representative 4: We can show (the offender) a good road, we can't sit back and let it continue. Here in this circle we have to set a good example.

Offender support: I want the Elders to take him and take responsibility for him.

Representative 1: Being punished by us carries a deal of shame.

Representative 4: Do you know what to expect?

Representative 1: He needs more than physical labour, he needs to spend time with his people.

Again the wishes of the victim were considered:

Victim: I don't want him doing CSO where his mates can lead him astray.

The discussions occurring during this circle illustrate the strength of the participation of the community members in ensuring that the offender fully understands the consequences of his actions. Particularly the discussion about the “shame” of being sentenced by one’s own community. Again it shows the circle members crafting a sentence that incorporates the local Aboriginal community and acts to provide benefit to the local community as well as a sanction for the offender’s actions.

Sentence

All offences:

- 500 hours community service, with a recommendation that the work be performed at the Jerrinja Reserve maintaining community housing.

(No progress report was attached to the papers for this offender.)

Endnotes

- 7 See Table 2, appendix for details of all offenders analysed.
- 8 The offender, who was charged with only one offence, appeared at the request of the circle in order to assist in dealing with a related offender, his sister.
- 9 See Table 1, appendix, for details of these eight offenders.
- 10 Note that the Charter of Victims Rights under s 6 of the *Victims Rights Act* 1996 (NSW) provides that “A victim should be treated with courtesy, compassion, and respect for the victim’s rights and dignity”. This may be difficult to achieve in a circle sentencing proceeding where lay people are free to express their views. No doubt the presiding magistrate would ensure that individual participants do not become abusive or unduly critical of victims who freely participate in the circle.

A Survey of the Key Participants in Circle Sentencing

Participants who had a role to play in circle sentencing matters throughout 2002 were surveyed in order to provide an assessment, amongst other things, as to whether they considered the system operated in a satisfactory manner. Specifically surveyed were defendants, victims, and support persons for both defendants and victims. In addition, community members who participated in circles were surveyed along with defence solicitors, police prosecutors and the magistrate who presided over all these cases. The surveys were conducted by a local Aboriginal person employed for this purpose. In total 42 circle sentencing participants were surveyed, including eight defendants, eight victims and 26 other circle participants.

The participants were asked a number of questions about their expectations of circle sentencing, their level of satisfaction, their ability to communicate in the circles, the circle decision-making process, the impact of their involvement, behavioural changes and the role of various participants, as well as their overall impressions of the circle sentencing process.

Expectations

Part of the survey aimed to measure the overall levels of satisfaction of participants with the circle sentencing process. Specifically participants were asked about their expectations of the circle and whether their experience differed from their expectations.

Overall, circle sentencing participants stated a high level of satisfaction with the process. Of the victims that attended circles just under half said it met their expectation and half said it was a better experience than they expected. Only one victim stated that the experience of circle sentencing was worse than expected. When asked about expectations before the circle, one victim stated that “honestly, I thought it would be a waste of time — a slap on the wrist type of feeling”. However after the circle that same victim stated that he was very satisfied with the process.

Indeed there appears to be a common level of agreement among all participants, regardless of the reason for their participation, that the process met their expectations.

Satisfaction

Circle sentencing participants were asked to rate their overall level of satisfaction with the process, from *very satisfied*, *satisfied*, *not satisfied*, to *very unsatisfied*. All participants stated that they were either satisfied or very satisfied with the circle sentencing process. Indeed of those community members who attended circles, more than two-thirds stated that they were *very satisfied* with the circle sentencing process.

It is clear from the responses that there is a very high level of satisfaction with the circle process among participants. Indeed, it appears that a number of people, particularly victims of crime, come to the circles with some scepticism and a concern that it will be a soft option for the offender. However, all except one of those victims left the circle feeling highly satisfied with the process and with those initial concerns extinguished.

Given the high degree with which the circles seem to have met the expectations of participants, there appears to be a relatively high level of uncertainty among participants as to what would happen during the circle.

Participants were asked about their level of understanding of the circle process and what would occur:

- 49% of all participants said that they had a clear understanding
- 31% of all participants stated that they did not have a clear understanding
- 20% of all participants said that they had a partial understanding.

Further separating the responses of participants reveals:

- half of the defendants surveyed stated that they were confident that they knew what would occur during the circle while just under half stated that they did not have a clear understanding of what would occur
- the majority of the victims stated that they were not sure of what was going to happen during the circle
- approximately two-thirds of the general community members stated that they did not know or only had a partial idea of what would occur during the circle.

In responding to this question quite a number of participants commented on the emotional nature of the circle. It appears that many of the circle participants were not prepared for the level of discussion that occurs during circle sentencing. While most participants understood the technical procedure of what would occur, many were not prepared for the emotional intensity of the process. In discussing their understanding of what would occur during the circle, a number of people commented on the emotional “intensity” of the circles and how draining it was.

When asked if they understood what would occur during the circle one participant stated “yes...procedurally...commitment and intensity — no”.

From the responses it is clear that participants need to have a greater understanding of what is required of their participation. Specifically it appears that they need to be informed of the potentially emotional nature of the circle discussions. Furthermore, there may be a need to give circle sentencing representatives an opportunity for debriefing after a circle is closed. This is particularly so where the circumstances of the proceedings have been emotionally charged.

Circle make-up

Circle participants were asked for their views of the general circle make-up. Overall, people who participated in circle sentencing felt that the level of participation and those attending were appropriate.

- The overwhelming majority (93%) of offender support people were satisfied that the people who attended the circle were appropriate. Only one circle member felt that some specialised people could attend the circles to provide expert information to the circle on programs and services that may be useful: “workers should also attend — to provide other support and give a bit more insight on what’s happening to the victims and offenders.”
- The victim support people were generally pleased with the level of representation at the circle and only one person said that other people should have attended the circle: “some (of the people were appropriate)...I guess being the support person for the victim, I felt that no support came from the panel for the victim.”
- Approximately 86% of circle members were satisfied that the people who attended the circle were appropriate. Two members commented that: “yes...I felt that the people who attended the circle were appropriate.”

Some participants stated a need to include a larger number of Aboriginal women on the circle, especially when discussing domestic violence matters. For example one of the victim’s support people suggested “a women’s panel for domestic violence problems... maybe one each for either male or female”.

Another circle member raised the issue of equal gender participation to give the circles a greater balance of experience and cultural understanding, stating “I don’t mind sitting with two women—two men to each have their say”.

While overall participants were satisfied with the composition of the circle members, there is a need, based on responses from circle participants, to consider the gender make-up of circles, particularly where women are either the victim or the offender. This highlights the need not only to strive for equal gender representation but to ensure that participants are particularly sensitive to the feelings of victims and offenders, and that they have an adequate awareness of the dynamics of domestic violence.

The Aboriginal Project Officer is largely responsible for organising the appropriate representation on the circle, in particular the composition of Aboriginal Elders. She states: “In choosing our Elders and reps we also have to be aware of factions within the Aboriginal communities. You would not invite a community member onto the panel if they were feuding with either the offender or the family of the offender. This would create friction within the circle rather than the level of co-operation and respect that is required.”

It is clear that particular attention is given to the make-up of circles to ensure that the membership of each circle is selected to obtain the most satisfactory outcome. No disputes or outside community factors appear to have influenced any circle discussion to date.

Shared justice

Building on the strengths of circle participation, one common theme that emerged from participants’ comments was the importance of having a shared goal. A strong feeling was expressed that members within the circle all contributed to the process of justice and to achieving a final outcome acceptable to all. From the responses, circle participants firmly view this as one of the most important and significant aspects of the circle sentencing process.

Offenders were asked if they felt that the outcome of the circle was fair. All except one of the defendants felt that the outcome of the circle was fair. While some felt that the sentences might have been hard they felt, given the circumstances, that the sentence was appropriate. One offender commented that “yes...it was a pretty hard sentence...it pulled me into line”. Another stated, when asked if the sentence was fair, that “yes...at first I was not happy with the sentence, but I was glad the Elders were there for support, and the victim had more of an understanding of me”.

Many offenders commented on the fairness of having a role in the outcome. For example, one defendant said, “the outcome of the circle was fair because I feel the sentence I got was appropriate because I had a choice in it”.

Victims were asked about their level of satisfaction with the final outcome. Overwhelmingly they stated that they were satisfied. All victims except one stated that they were either greatly or very satisfied with the outcome of the circle. In commenting on their satisfaction one victim said they were “very satisfied...the community chose the sentence in light of the defendant’s attack on the community”. Another victim stated that they were “greatly satisfied...the result is that the defendant moved forward...should be no animosity” and another victim stated that they were “very satisfied...the offender has become a better person with the knowledge he lacked before”.

The general circle members were asked firstly if they felt that the outcome was fair on the offender, and secondly if it was fair on the victim. When asked if the outcome was fair on the offender, 77% said that they were either very or greatly satisfied that the outcome was fair on the offender. All except one circle participant felt satisfied that the outcome of the circle was fair on the offender.

When asked about the outcome and its fairness to the victims all except one circle participant felt that the outcome was fair for the victim of the offence. Clearly from the responses from all participants — offenders, victims and other circle members — there is a general belief that the sentences developed through the circle sentencing process are appropriate and fair, both in relation to the offender and to the victim of the offence.

One factor that many of the participants commented on was that the sentence that was developed through the circle was not light but that it was acceptable to all parties and that the defendant felt it was reasonable for the crime committed.

Only one of the defendants felt that the outcome of the circle was not fair and only one victim felt that it was only partly fair. In general there was a sense of acknowledging wrong or criminal behaviour in a comfortable and open environment. There was also a strong sense of a greater understanding, both of the offender by the circle and by the offender of their actions and the consequences of those actions. The responses indicated that there was a clear sense of satisfaction with an outcome developed collectively by all present in the circle and fully informed by both the victim’s needs and concerns, and the circumstances of the offender and of the offence itself.

Experience

Generally participants were overwhelmed with the impact that the circle sentencing process had on them. One offender commented: “everyone was so overwhelmed...it

was so emotional. I went straight home and my solicitor rang me to see how I was...it felt so good to have so many people concerned about me...it made me think." Another offender stated: "It had a good impact on me...it made me sit up and take notice...made me see more clearly."

When asked about their strongest experience during the circle sentencing process, the offenders overwhelmingly described the impact of being with people from their own community who they respected, and being sentenced by those people. They stated that the most powerful aspect of circle sentencing was having to face people from within their own community, people that they had known their whole lives. One offender said the strongest experience for him was "when the Elders reprimanded me one after the other and speaking to the victim". Another offender stated that his strongest experience was "when an Elder started to rip me...I think it was what I needed".

The other circle members also felt that the most positive aspect of the process was the impact of having open discussion with the offender and victim about the offence. One circle member stated that "it had a great impact because he (the victim) had the opportunity to ask why you did this to me and also an opportunity to give his comments on the sentence". Another stated: "I think it was great that they (the defendant) could talk to us, in a white man's court they just clam up."

People also felt comfortable talking to offenders that they knew well. One stated: "I felt I knew these kids (defendants)...I felt I had no limit to speak to these kids...I spoke from the heart because I knew the parents of these kids and have helped them all through their lives." Another said, in relation to the offender: "I think he felt that the Kooris are not afraid to speak in judgment of their own people because he could see that we were not afraid to speak in front of him or the judge."

Participants also felt that one of the strengths of the process was the fact that defendants have to face the victim of their offence and discuss what has happened. One circle member stated that "it has a positive impact they have to face the effect of actions on the victim" and "the process was extremely hard hitting yet supportive...offenders are forced to accept their own action".

Discussion and decision-making

To assess the strength of the circle itself participants were asked about their ability to openly communicate during the circle. All except two of the people surveyed felt that they were able to openly communicate during the circles, and all except two people felt that their concerns were listened to and taken account of during the circle proceedings.

Generally the participants felt that they were able to openly discuss the offence and its impact on the victim. As commented by one victim's support person, "you can use your own language and the panel (other circle members) know what you mean or understand, and most importantly you are respected for who you are at the same level". The only real concern about the level of communication in the circle was that some non-Aboriginal participants felt that discussions sometimes went off track.

Clearly all types of participants were extremely supportive of the open format of circle discussions and the strength of the process in making the offender face, not only the

victim of their offence but also respected members of his or her own community. Most participants felt that this process was more appropriate for these defendants than a regular sentencing court and that the impact experienced not only by the defendant but also the victim was far greater than that which could be achieved in a traditional court setting.

One of the strong themes to emerge from the survey responses was that participants felt that the consensus decision-making approach encouraged by the circle was a great strength. Generally people felt that one of the most positive aspects of the circles was that both the offender and the victim were able to discuss the offence and, more specifically, to discuss the sentence and together reach a common goal.

Many participants commented on the inclusiveness of the circle and that each person was equally respected and valued for their own contribution to the process. All except one of the victims expressed a sense of visibility in the sentencing process and that they were given equal opportunity to speak during the discussions and participate. One victim commented that “everyone was interested in each other’s opinion” and another said “everybody had a chance to have a say...it was comfortable and relaxed...it was all fair and good”. At least 71% of circle members felt there were no limitations to communication in the circle. One circle member commented that “when the circle is broken...it can create a problem (in limiting communication)” and another said that “unfamiliarity and shyness” can limit communication during the circle.

The visibility of the victims and their support people during circle sentencing is vastly different from a traditional courtroom setting. A defence lawyer will not often enter into a relationship that suggests a great deal of empathy with the victim nor does the police prosecutor regularly hold much sympathy for the defendant’s experiences. However, the structure of the circle and the process ensures a great deal of respect for all participants, and their roles are further validated by the presence and role of the Aboriginal Elders and the magistrate.

One circle member commented that “it’s a unique court structure that facilitates the victims’ opportunity to air their grievances and to observe the Elders in action” and another said “victims want to be heard and they’re not just after a pound of flesh”.

Importance of Elders

Participants commented on the importance of the involvement of both the Aboriginal Community Justice Group and the Aboriginal Elders in the circle. It is the involvement of these Aboriginal people that fundamentally differentiates this court structure and process from ordinary courts. Participants expressed a great sense of respect and confidence that the Aboriginal Elders provide both discipline and guidance to the process and, in particular, to the offenders.

Participants often earmarked the strong advice and cultural knowledge of Aboriginal Elders as the greatest strength of the circle sentencing process. Simply, the presence of the Elders ensured a renewed sense of respect for the sentencing process and a strong level of confidence in the process from the Aboriginal community. For example, one circle member stated that the circle was strong because the “Elders were there” and often it was their presence that covertly demanded respect within the circle setting. One victim

acknowledged that it was the Elders who hold a real authority over guiding the actions and future actions of offenders, saying that the “greatest strength of the circle is that the Elders can put the wind up defendants”.

In fact, it is the authority of Aboriginal Elders within the circle that is vastly different from the traditional sentencing court. The values and morals the Elders instil in the process and the understanding they have of the offenders, victims and dynamics of the community, provide a greater sense of legitimacy and authority to the process according to the majority of the participants. It is this specific aspect of the process that participants repeatedly stated was its greatest strength.

Some of the comments from circle participants include: “Koori Elders are given real authority and power inside the judicial system in deciding the fate from members of their own community...not white man’s law” and “being judged by your own people” is one of the greatest strengths of the circle process.

The voluntary contribution of the Aboriginal Elders signifies a great deal of support from the local community for the circle sentencing process and a general awareness that the Elders are actively engaged in providing ongoing support and guidance to offenders and in some cases victims. Defendants in particular noted that the support and guidance of Aboriginal Elders did not stop at the sentence determination but continued while they were completing sentences and once they had finished their sentence. One defendant’s response about support was in the following terms: “the Elders have given me support... and the community have given me moral support.” It appears to add to the strength of the circle process, that Elders are able to provide visible signs of support within a community setting, and the defendants repeatedly stated that this sends a message of acceptance and encouragement to them and to the broader Aboriginal community.

Participants have stated that the circle process is the first of its kind to demonstrate this aspect of law and justice, for example, “I think it’s imperative that it be on a national level...it’s probably the first system that solves a 200-year-old problem”. Another circle member stated they would be involved in circle sentencing again because “it’s a positive initiative and it’s culturally appropriate...the Elders make them (defendants) feel that they should not be here in front of us for this crime they committed against others. It gives them (defendants) the opportunity to seek relevant professional help to assist and alleviate any of their problems.”

The Elders who were surveyed talked about choosing to become involved because they were often in a position to understand the full dynamics of the offence and they want to “have an input into what is happening in this community”. One Elder said “It is a positive program...if I could stop one Koori from going to gaol...I have achieved something”. Another Elder commented that “circle sentencing has worked well in the community...it gives our kids a chance to change and let them know we care”.

The Aboriginal Elders are also able to contribute to the circle and give background information to the procedure that normally wouldn’t be heard in a traditional courtroom. The representatives have an acute knowledge of the offender, and often of the victim, which provides real insight in determining an appropriate sentence.

Visibility of support

Circle participants were surveyed about the support they received both within the circle and after the circle was completed. Participants noted that the support received once the circle was completed was important in gaining access to services and staying out of trouble.

Support persons were present during the circle sentence to offer support for the offender. All except one of the defendants said they had received support during the circle and all except two said they had received follow-up support after the circle. One defendant stated that “I had the support of Elders...being judged by them and not just through the courts”. One suggested that the greatest strength of the circle is “the availability of support people, especially after circle sentencing... (there) are more resources for offenders and victims (have) constant support”.

Victims were also asked about support both during and after the circle process. All except one of the victims said they had received support during the circle process. One victim said “allowing me to have a support person was good and that they listened to me without interruption”. Two of the victims said they had also received support after the sentence and one said it “was not needed” after the circle process.

None of the victim’s support people said that there were any limitations to communicating within the circle. One of the victim’s support people said that the circle could be improved by ensuring gender was considered especially for domestic violence assaults: “women panel for domestic violence problems... maybe one each for either male or female.” Generally victim support people were pleased with the outcomes and the level of support offered to victims during the circle sentence as one suggested “I believe there is a really high need to keep it going... I feel strongly it would be a success if loose ends were tied up”.

Overall, participants were satisfied with the level of follow-up support offered by the circle sentencing process both during and after the circle had been completed. An issue for further consideration in the development of circle sentencing is the continuation of the high level of support, particularly once a sentence has been completed, and whether a further circle should be held to note that a sentence has been completed.

Behavioural changes

One of the key elements of the circle sentencing model is its attempt to address the underlying causes of offending behaviour among those defendants who nominate to enter the process. All the defendants questioned stated that their behaviour has changed in some way since they attended the circle:

- “it had a positive impact on me... I have settled down.”
- “I stay home more... feel more secure... my relationship has developed and I have more interaction with my children.”
- “I’m happier staying out of trouble... the thought of bad behaviour has not crossed my mind.”

Another offender stated that he was able to think more clearly about his life since the circle: “it’s not so much my behaviour (that has changed) however it has with my decision-making... with being able to look for other options.”

Alcohol was a factor in many of the offences dealt with through the circles. Some defendants stated that their drinking habits have changed since attending the circles: “I don’t drink and drive any more...it has changed my life...I’m more work oriented than I was before.” Another defendant stated that his experience in the circle has led him to understand the consequences of his actions more clearly: “I don’t drink any more...I think about what will happen if I do.”

As the experience of circle sentencing was still very recent for most of the defendants, detecting longer term changes in behaviour is not possible at this stage. Their responses indicate, however, that the experience of circle sentencing is giving them a greater understanding of the consequences of their actions, and a greater appreciation of their communities and families.

Their experience of being involved with respected people from their own communities in a predominantly Aboriginal setting has given them a greater understanding of and value for their own cultural heritage. For many defendants it highlighted positive aspects of Aboriginal culture and helped them to understand their own culture in a positive light rather than in the negative stereotypes that they often see. One defendant stated that being in the circle made him more aware and appreciative of Aboriginal culture. He stated that as a result of his experience “I got more support from the community...cultural support...I will be teaching my children about Aboriginal culture”.

The community members were asked what effect they felt the circle had on the offender. The Aboriginal community members unanimously felt that the process had a strong impact on the offenders and that it went some way to redress their offending behaviour. In particular the Aboriginal community members stressed the impact of an offender being sentenced by respected members of their own community and the sense of shame involved in having to confront one’s own Elders. One stated “it had a great impact — he felt shame...being told off in front of the Elders”. Another stated “I think it’s good — they (the offenders) think it’s an easy road...but they get shamed out”.

Aboriginal community members also strongly felt that facing the victim in the circle helped make the offenders accept their own actions and responsibility for their behaviour. One Elder stated “it has a positive impact because they have to face the effect of actions on the victim”. Another stated “extremely hard hitting yet supportive...impact are the offenders are forced to accept their own actions”.

Effects on victims

The majority of victims reported positive experiences of being involved with circle sentencing. All but one of the victims surveyed stated that they felt they could speak openly during the circle. Only one victim was concerned about seeing or being in the presence of the offender during the circle, stating that there was a “fear of reprisals if the defendant was not committed to the process”. However that victim reported that after the circle that fear had been removed and they were no longer concerned about seeing or being in the presence of the offender.

When asked about the level of support received during the circle all the victims except one stated that they had received appropriate support. The victims who attended the

circles felt well supported and, in particular, they were comfortable about being able to bring a support person. One victim stated, “allowing me to have a support person was good and they listened to me without interruption”.

Other circle members were asked what impact they felt the process had on the victims. The circle members overwhelmingly felt that the experience was positive for the victims. One stated “it had a positive impact and a significant one on the victim...he got to confront the offender, it gave the victim an opportunity to confront the offender...it’s a unique court structure that facilitates victim’s opportunity to air their grievances and to observe the Elders in action”.

Community empowerment

The involvement of the Aboriginal Elders combined with the role of the magistrate and other legal representatives in an alternative sentencing format has impacted more broadly on the local Aboriginal and broader community. One circle member commented that they were “concerned about the welfare of offenders...it’s something to do with the community...it empowers the community”.

Community empowerment is one aspect of the trial that has encouraged grass roots involvement in the improved operation of justice. One circle member said “basically it’s people’s law...not white man’s law...community attitude is being widened...the victim and the offender is supported”. Participants expressed that it is not just rules and regulations that discipline, deter and stop people from committing crimes, but people. Circle sentencing builds upon the principle of self and community determination to make a difference and find solutions, and it demonstrates what community empowerment can look like. It is an example of combining Aboriginal practices and values with existing justice functions in a way that enables the Aboriginal community to make a difference.

This aspect has had an impact on offenders and given them a renewed appreciation of their own culture and heritage. Because the justice procedure has meant something to them, it has stopped a relentless search for crime and criminal behaviour, and thus a return to prison.

One offender said that his experience in the circle was greatly different from his experience in the regular justice system and that “I got more support from the community...cultural support...I will be teaching my children about Aboriginal culture”. Basically, individual empowerment can be a demonstration of how other people who are not following their cultural paths, can get their lives back on track, through the learning and utilisation of their culture and heritage.

Circle sentencing has encouraged Aboriginal community and local business involvement in other programs, and has highlighted gaps in service delivery. Anecdotally, the Aboriginal community and specifically the Elders are branching into more community work, especially concerning offending and disputes within communities. An example of this is at the Jerrinja Aboriginal community, where local Aboriginal Elders have established a “mini circle” to address and resolve family conflicts.

The Aboriginal cultural values of caring and sharing which are illustrated in the circle are having a greater impact on community relationships both within and between the local Aboriginal and non-Aboriginal communities. The Aboriginal community is able to walk proudly knowing the difference they are making in people's lives. They have also gained respect from various sectors of the community, that were previously unaware of the knowledge they have held for such a long time. The local Magistrate, Doug Dick has said that he now will often sit down with the Elders and members of the Aboriginal community to listen to their advice and negotiate resolutions. There is a great shift in community attitudes occurring at the local level and this is a realistic demonstration of reconciliation between the local Aboriginal and non-Aboriginal communities.

Conclusion

It seems clear that this trial of circle sentencing has been a success. Although the number of cases was small (during the trial it averaged one case per month), the survey of participants records a high level of satisfaction with the process. The cases reviewed demonstrate the way in which members of the Aboriginal community can play an active and constructive part, not only in contributing to the determination of the sentence imposed on an Aboriginal offender but in providing support and supervision of the offender after he or she has left the circle.

In reviewing the effectiveness of circle sentencing it has been difficult to find any real deficits. There is, however, an important consideration, which relates to judicial resources. Ordinarily, sentencing in the Local Court can be a very quick process, even when an offender's liberty is at issue. While it is difficult to generalise, the vast majority of sentencing hearings are dealt with in a matter of minutes, often in less than half an hour. On the other hand, circle sentencing cases involve a hearing process in which many participants are expected to play an active part. As a consequence, many of these cases require a whole day of hearing before the sentence is handed down. The question is, what price justice? If circle sentencing reduces future offending, there will be considerable benefits in terms of quality of life for the offender and for the community at large. Further, a reduction in future offending entails considerable savings to the criminal justice system in terms of police, courts and corrections. Circle sentencing may be seen as providing additional resources at one point in time in exchange for long-term benefits.

One of the aims of circle sentencing is to empower Aboriginal communities in the sentencing process. Clearly the current trial has achieved this — a considerable number of Aboriginal people from the Nowra community have been directly involved in circle sentencing both as victims and offenders, but also as Aboriginal community representatives, support people for victims and offenders, and service providers assisting in the implementation of sentences. The sentences that are developed are clearly developed as a collaboration between the court and the local Aboriginal community, and are increasingly involving local community resources and elements of local Aboriginal culture. Local Aboriginal people are involved in supervising the sentences that circles have developed and the sentences are being crafted in ways to directly benefit local Aboriginal communities. The survey responses clearly indicate the circle process is actively recognising traditional Aboriginal authority structures in the local area and engaging those structures in sanctioning offenders and in attempting to reduce future offending.

The participation and contribution of respected local Aboriginal people enhances confidence in the criminal justice system generally and in sentencing decisions in particular. Circle sentencing is adding to the perceived legitimacy of sentences because penalties handed down will no longer be seen (in so far as they are so seen) as white man's law rather than Aboriginal community law. As circle sentencing gains increased acceptance by the community it is more than likely to assist in reducing the tensions and barriers that currently exist between Aboriginal communities and the criminal justice system generally.

The participation of Aboriginal representatives in the sentencing process also enables creative sentencing options to be implemented. This is because members of the community have a unique understanding of the offender's problems and are best placed to assist with a solution after they leave court. Local community members also have a greater understanding of the availability and suitability of local Aboriginal community resources when developing sentences, and in utilising services and resources for sentencing that otherwise would be overlooked, such as local community farms, fishing co-operatives and cultural education programs. Further, as both the cases and the survey of participants demonstrate, circle sentencing provides effective support for Aboriginal and other victims of crime during the sentencing process and beyond.

Unlike traditional sentencing, where the emphasis is often on the punishment of the offender, community participation in decision-making ensures that the social dimensions relating to the offending behaviour are addressed. This in turn means that the chances of recidivism are reduced. The presence of the offender's family and members of their community in the circle results in wider community awareness and support for the offender as well as more accountability for the offender while serving the sentence and beyond. Rather than merely being held accountable to the court and law enforcement, these offenders are accountable to their whole community.

Another feature of circle sentencing is that both the offender and the victim take an active part in the process. As we have seen in many of the cases discussed earlier, the effect of this is that offenders come to accept responsibility for their offences and are prepared to apologise to their victims. Conversely, we also see victims more ready to forgive the offender than might otherwise be the case. As the vast majority of survey respondents reported, including victims and offenders, the sentences imposed by the circle were either fair or very fair. A very high level of satisfaction with circle sentencing overall was reported.

Circle sentencing is a clear example of how the court can share its authority with the local Aboriginal community, and how the traditional justice system and Aboriginal cultural practice and values can be successfully merged.

For many, the real test of circle sentencing will be whether it can reduce the rate of recidivism amongst Aboriginal people. This is not, nor should it be, the only criterion of success or failure but it is nevertheless a primary indicator. While it is premature, owing to the small number of cases and the relatively short time frame of the trial, to make any firm claims in this regard, early indications are very promising. The survey reported positive changes in behaviour in all but one of the offenders and a reduction of alcohol abuse by many of the defendants sentenced by the circle.

For maximum effect, it is important that there are adequate treatment facilities available in the community, because without alcohol and other drug rehabilitation opportunities, as well as options available for addressing issues of domestic violence, the potential benefits of circle sentencing are likely to be diminished.

Fundamentally the strongest aspect of the circle sentencing process, as clearly enunciated by the offenders themselves, is the involvement of the Aboriginal community in the sentencing process. Facing one's own community — respected people who have known the offender his or her entire life — is the most powerful aspect of this process. Many of

the offenders state that the circle sentencing process is much more difficult to face than a traditional court. For all the offenders, the realisation that their own community don't accept their offending, but are prepared to help them stop it, is the basis of the success of circle sentencing. Circle sentencing is an example of an Aboriginal community-based justice mechanism that is actively redressing the offending problems being experienced by that community.

Circle sentencing operates on the philosophy that the local Aboriginal community is best placed to solve its own problems. The responsibility of reducing the level of violence, substance abuse, domestic violence and crime rests with the community itself. The process provides a mechanism where local Aboriginal 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 Aboriginal people, a benefit not restricted solely to the Aboriginal community itself but shared by the wider community.

As noted earlier, and despite the small number of cases determined so far, circle sentencing has already produced a significant shift in community attitudes at the local level and is a working demonstration of reconciliation between the local Aboriginal and non-Aboriginal communities. It has both political and criminal justice benefits for the whole of society. The circle sentencing process is beginning to influence other aspects of Aboriginal community life in the South Coast area. One local area has reported on a circle being established in a local school to constructively deal with behavioural problems by engaging Aboriginal students themselves to resolve those problems. Discussions are also occurring for the establishment of a circle or committee to assist offenders re-entering the community after serving prison sentences.

At the time of writing, reports relating to the progress of those sentenced by the circle show that only one offender had reoffended. That was the case of Example 2, discussed above, where the offender had no ties to the Aboriginal community in Nowra. This highlights an important consideration in circle sentencing in that before it can be successful there needs to be community ties and mutual respect between the offender and the community representatives.

To date, it would appear that the Nowra circle sentencing trial has proven its credentials. It has established that circle sentencing works in Nowra, it has the potential to empower the Aboriginal community, and it benefits the administration of justice in the Nowra region. However, as Magistrate Dick recently commented:

“It is important that the Shoalhaven model cannot be considered as a panacea for Aboriginal justice concerns. Aboriginal cultures are not all the same. There is a huge difference between urban, rural and remote communities. Consideration of the possible expansion of circle sentencing in NSW must have regard to the make-up and state affairs of individual communities. One matter which must remain common to all is the eligibility test.”

It is clear therefore, that the expansion of circle sentencing to other areas must be approached with caution as its future success is dependent on a suitable Aboriginal community as well as a committed magistrate, prosecutor and legal representative for the

defendant, all of whom share the same aims and objectives. Offenders who participate in circle proceedings must have strong community ties and must be truly committed participants in the process. The magistrate must have a particular ability to engage with all participants and a willingness to share his or her authority with the Aboriginal community. Indeed the full potential of circle sentencing cannot be attained unless all participants work as a team. Each must make a constructive contribution to finding an outcome that satisfies the need to impose a sentence of appropriate severity to punish the offender as well as the need for retribution and community protection. At the same time, the sentence should provide the best prospects for the offender's rehabilitation so that all participants may ultimately be satisfied not only that justice has been done but that the risk of future offending is diminished.

NSW Magistrates' Conference, 2003

On Thursday 3 July 2003, at the Local Courts Annual Conference in Sydney organised by the Judicial Commission of NSW, a group of circle sentencing participants from Nowra shared their experiences with the NSW magistracy. This was achieved in a presentation on circle sentencing conducted by a panel of speakers consisting of Mr Doug Dick, the presiding Magistrate, a defence legal representative, a prosecutor, the Aboriginal Project Officer, two Aboriginal Elders from the Nowra community, two offenders sentenced by the circle, and a victim who attended the circle.

Together, they presented a very moving account of the experience of circle sentencing in the Nowra community and a brief review of this presentation is instructive.

The legal representative for the defence spoke about the problems experienced by Aboriginal people in dealing with the trappings, formalities and symbols of the Western legal system. The circle restores an equitable power relationship through its culturally neutral atmosphere, particularly the absence of barriers such as desks and magistrate's robes, which help put all parties on an equal footing. He also highlighted the effect upon the offender of having to face the victim, so that the harm caused is visually acknowledged and responsibility for the offence is more readily sheeted home to the offender. He referred to the removal of the filters inherent in traditional legal proceedings, such as the right to silence, which protect offenders from scrutiny by their victims and the community. He also spoke of the effectiveness of the Elders in refusing to allow offenders to hide behind past injustices.

The prosecutor spoke of the historically hostile relationship between Aboriginal people and police, and expressed the opinion that the circle sentencing court had left him with a positive impression. He spoke of his role in proceedings to ensure that the considerations of punishment and community protection were not eclipsed by considerations of rehabilitation. He felt that the magistrate played an important role in ensuring the integrity of the proceedings despite their informal nature and that all present were fully aware of the legal requirements. He said that the Elders who acted as community representatives in the circle showed their preparedness to make tough decisions and focus on punishment,

abiding by the range of penalties set by parliament. He mentioned the way in which this method of sentencing empowered the community through the participation of community representatives in sentencing decisions, as an Elder said: “This is not white man’s law any more. This is the people’s law.”

The Aboriginal Project Officer spoke of the importance of ensuring the right composition of the circle, citing the six distinct communities in the region. An Aboriginal Community Justice Group was established, drawing on the wealth of local knowledge possessed by Elders of the various communities.

The Aboriginal Project Officer explained that the attendance of the community representatives at the proceedings addressed the historical fear and mistrust felt by many members of the Aboriginal community towards the justice system and enabled community representatives to learn about the law. She spoke of the experiences of the Aboriginal Community Justice Group in using knowledge gained in circle proceedings to formulate effective local methods of crime prevention and identify gaps in resources.

Two Elders who participated in circle proceedings spoke of their experiences growing up on Aboriginal missions, living their entire lives in the South Coast region, and having known many of the offenders and their families from childhood. They dwelt on the impact of Aboriginal criminality upon the wider community, the high population of Aboriginals in prisons, and their fears for the future of Aboriginal Australians if the trend were not reversed. They spoke of the circle breaking the cycle of offending and assisting the community in learning how to prevent crime.

Two offenders gave moving accounts of how circle sentencing had enabled them to turn their lives around. They both cited the presence of their Elders judging them as forcing them to take responsibility for their criminality in a way that was absent from traditional court proceedings. They both said that they found appearing in the circle far more difficult than court appearances because they never really had to face their victims or their community in court. They felt that the circle had given them a chance to be useful members of the community and to make their families proud. Both offenders expressed the opinion that for circle proceedings to be successful offenders must truly accept responsibility for their actions. They must be willing to change their ways.

Despite their extensive criminal records, neither offender had reoffended following the circle proceedings. Each had addressed their alcoholism and found employment. It emerged during the presentation that other offenders had also gone on to find full-time employment, and one had attended a subsequent circle as a support person for his nephew who was being sentenced.

One victim who had taken part in a circle presented his experience to the Magistrates’ Conference. He said that before he went to the circle he was very pessimistic about the proceedings, feeling that it would be a waste of time and that the circle would focus on rehabilitation and finding the penalty that would pose the least inconvenience to the offender.

Contrary to expectations, he said he was very impressed with the manner in which the proceedings progressed. Although he entered the circle feeling very angry towards the offender, by the end of the proceedings, he felt that the offender was truly remorseful and that there was some hope of rehabilitation. He felt that the magistrate and the Elders were not at all lenient, but really forced the offender to face up to the consequences of his actions. He said that he left the circle feeling satisfied that justice had been done.

The assembled circle participants represented the circle process as a viable alternative to traditional court proceedings for appropriate cases. They illustrated the holistic nature of the circle, involving the community in the punishment and prevention of crime, and providing the victim with a chance to freely participate in proceedings. The magistrate and the Elders highlighted the positive effects of the circle as involving the empowerment of the community in dealing with crime, fostering greater communication and understanding between the community and the justice system. The offenders showed that circle proceedings might provide an opportunity to break the cycle of offending in the Aboriginal community. The victim eloquently expressed the function of circle proceedings in giving victims of crime a voice and a role which is absent from traditional criminal proceedings, which is also a form of community empowerment leading to understanding of and greater community satisfaction with the justice system. They presented a powerful case for the expansion of the program into other suitable communities as being in the best interests of the administration of justice in NSW.

Table 1: Case examples discussed in the report

Example	Date	Offence	Priors	Objective facts	Subjective features	Sentence
1	05/02/02	<ul style="list-style-type: none"> assault maliciously damage property fail to comply with bail conditions 	58: <ul style="list-style-type: none"> 32 violent offences 27 sentences of imprisonment 	The offender approached the victim at a bar and punched him on the chin.	<ul style="list-style-type: none"> aged 27 alcohol addiction talented artist offence in breach of bail 	Assault: 3 mths home detention <i>Malicious damage</i> : 9 mths s 9 good behaviour bond under supervision
2	19/02/02	<ul style="list-style-type: none"> drive whilst license cancelled operate vehicle so driving wheel/s lose traction (burnout) 	unknown	unknown	<ul style="list-style-type: none"> aged 24 	Cancelled driver: 300 hrs community service; 2 yr licence disqualification <i>Burnout</i> : 2 yr good behaviour bond; fine; vehicle impounded for 3 mths
3	7/5/02	<ul style="list-style-type: none"> behave in offensive manner use offensive language assault police in execution of duty common assault 	38: <ul style="list-style-type: none"> driving (x 15) violent (x 7) dishonesty (x 6) alcohol (x 5) antisocial (x 4) other not previously imprisoned 	After consuming alcohol, the offender behaved in an offensive manner, then abused police, head-butted a police car and a police officer, and spat on the car. Later, when highly intoxicated, the offender attended the home of his de facto wife, verbally abused her, threatened her with a corkboard and punched her in the mouth.	<ul style="list-style-type: none"> aged 28 offences in breach of bail and 3 good behaviour bonds alcohol and substance abuse childhood victim of domestic violence brain damage and depression 	Common assault: 200 hrs community service; 2 yrs AVO Assault police: 6 mths 1 week suspended sentence on conditions
4	21/05/02	<ul style="list-style-type: none"> drive unregistered vehicle drive uninsured vehicle high range PCA drive whilst disqualified illegal use of motor vehicle 	29: <ul style="list-style-type: none"> dishonesty (x 12) driving (x 12) PCA (3) other (x 2) 	The offender, a disqualified driver, was observed riding a stolen motorbike with a passenger sitting on the handlebars. He admitted to having consumed 20 beers.	<ul style="list-style-type: none"> aged 27 alcohol abuse highly intoxicated at time of offence mental illness: schizophrenia 	High range PCA, drive whilst disqualified, illegal use of motor vehicle: 12 mths suspended sentence on conditions Driving unregistered vehicle, uninsured vehicle: Rising of the court All matters: 3 yrs licence disqualification

PD – periodic detention

PCA – prescribed concentration of alcohol

AVO – apprehended violence order

Example	Date	Offence	Priors	Objective facts	Subjective features	Sentence
5	16/07/02	<ul style="list-style-type: none"> ■ break, enter and steal (x 2) ■ illegal use of motor vehicle ■ malicious damage to motor vehicle ■ false information to pawn broker (x 2) ■ stealing 	Priors including: <ul style="list-style-type: none"> ■ break, enter and steal ■ assault ■ property (x 2) ■ malicious damage ■ previously imprisoned (PD) 	The offender smashed a window of a car dealership, then stole a motorcycle and a quad runner. He later returned to steal a utility vehicle, in which he did a number of "burnouts" and damaged before being apprehended by police. Two days later the offender broke into an electrical store and stole computer games which he pawned. He also visited his cousin's house, in breach of his bail curfew, and stole a mobile phone and charger.	<ul style="list-style-type: none"> ■ alcohol and drug abuse 	<i>All matters:</i> 2 yrs PD on conditions; \$37,983 compensation
6	29/08/02 22/10/02	<i>Offender 1</i> <ul style="list-style-type: none"> ■ use telephone to menace ■ resist/assault officer in execution of duty (x 3) ■ common assault 	14: <ul style="list-style-type: none"> ■ malicious wounding ■ offensive conduct ■ carry cutting weapon (x 2) ■ offensive behaviour ■ malicious damage (x 3) ■ offensive language (x 2) ■ AOABH ■ assault police (x 3) ■ not previously imprisoned 	On 3 occasions the offender made a series of calls to 000. When police attended they found the offender and her brother intoxicated and on each occasion she abused police and resisted arrest. She also assaulted a police officer and her brother. (see offender 2 below)	<ul style="list-style-type: none"> ■ mild to moderate intellectual disability ■ alcohol abuse 	<i>All matters:</i> 12 mths s 9 good behaviour bond on conditions

AVO – apprehended violence order PCA – prescribed concentration of alcohol PD – periodic detention

Example	Date	Offence	Priors	Objective facts	Subjective features	Sentence
		<i>Offender 2</i> Common assault	14: <ul style="list-style-type: none"> offensive language/manner (x 3) assault (x 3) breach avo public order (x 2) use telecommunication to harass (x 3) not previously imprisoned 	Police investigating some 000 calls, found the offender with his sister intoxicated arguing about who had made the calls. The offender became violent and punched his sister in the face. (see offender 1 above)	<ul style="list-style-type: none"> mental health problems alcohol abuse 	12 mths s 9 good behaviour bond on conditions
7	19/11/02	<ul style="list-style-type: none"> drive whilst disqualified stealing (x 2) 	21: <ul style="list-style-type: none"> driving offences (x 2) assault malicious damage property offences (x 9) dishonesty offences (x 10) 	Police stopped the offender driving whilst disqualified. Subsequently, the offender entered 2 stores and stole several items.	<ul style="list-style-type: none"> mother of 3 children, youngest of whom suffered serious medical problems no family support 	For both offences: 250 hrs community service on conditions; 2 yrs licence disqualification <i>Habitual traffic offender declaration:</i> quashed
8	04/02/03	<ul style="list-style-type: none"> assault (x 5) assault police malicious damage 	22: <ul style="list-style-type: none"> goods in custody offensive behaviour high range PCA cancelled driver malicious damage break, enter and steal aid and abet steal AOABH breach AVO (x 5) assault (x 9) 	While intoxicated the offender assaulted his de facto partner. Two months later the offender, again intoxicated, brandished a baseball bat, smashed a coffee table and hit his de facto partner and her friend. He then threatened his children. When police arrived, he also threatened them with the bat.	<ul style="list-style-type: none"> alcohol abuse domestic violence during childhood 	All matters: 500 hrs community service

PD – periodic detention

PCA – prescribed concentration of alcohol

AVO – apprehended violence order

Table 2: All offenders participating in the trial

Date	Offence	Subjective features	Sentence
05/02/02	<ul style="list-style-type: none"> ■ assault ■ maliciously damage property ■ fail to comply with bail conditions 	<ul style="list-style-type: none"> ■ aged 27 ■ alcohol abuse ■ talented artist ■ offences in breach of bail ■ priors: 58 ■ violent offences (x 32) ■ 27 sentences of imprisonment 	<i>Assault</i> : 3 mths home detention <i>Malicious damage</i> : 9 mths 9 good behaviour bond under supervision
19/02/02	<ul style="list-style-type: none"> ■ drive whilst license cancelled ■ operate vehicle so driving wheel/s lose traction (burnout) 	<ul style="list-style-type: none"> ■ aged 24 ■ priors: not specified 	<i>Cancelled driver</i> : 300 hrs community service; 2 yrs licence disqualification <i>Burnout</i> : 2 yr good behaviour bond; fine; vehicle impounded for 3 mths
07/05/02	<ul style="list-style-type: none"> ■ behave offensive manner ■ use offensive language ■ assault police in execution of duty ■ common assault 	<ul style="list-style-type: none"> ■ aged 28 ■ offences in breach of bail and 3 good behaviour bonds ■ alcohol and substance abuse ■ childhood victim of domestic violence ■ brain damage and depression ■ priors: 38 ■ driving (x 15) ■ violent (x 7) ■ dishonesty (x 6) ■ alcohol (x 5) ■ antisocial (x 4) ■ other ■ not previously imprisoned 	<i>Common assault</i> : 200 hrs community service; 2 yrs AVO <i>Assault police</i> : 6 mths 1 week suspended sentence on conditions
21/05/02	<ul style="list-style-type: none"> ■ drive unregistered vehicle ■ drive uninsured vehicle ■ high range PCA ■ drive whilst disqualified ■ illegal use of motor vehicle 	<ul style="list-style-type: none"> ■ aged 27 ■ alcohol abuse ■ highly intoxicated at time of offence ■ mental illness: schizophrenia ■ priors: 29 ■ dishonesty (x 12) ■ driving (x 12) ■ PCA (x 3) ■ other (x 2) 	<i>High range PCA, drive whilst disqualified, illegal use of motor vehicle</i> : 12 mths suspended sentence on conditions <i>Driving unregistered vehicle, uninsured vehicle</i> : rising of the court <i>For all matters</i> : 3 yrs licence disqualification
04/06/02	<ul style="list-style-type: none"> ■ high range PCA ■ drive whilst cancelled 	<ul style="list-style-type: none"> ■ good work history and supportive family ■ priors: 1 juvenile conviction ■ licence cancellation (fine default) ■ previously imprisoned (PD) 	<i>All matters</i> : 12 mths suspended sentence; 2 yrs licence disqualification

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PCA – prescribed concentration of alcohol

PD – periodic detention

Date	Offence	Subjective features	Sentence
18/06/02	<ul style="list-style-type: none"> ■ unregistered vehicle ■ uninsured vehicle ■ drive whilst disqualified/ cancelled (x 2) ■ mid range PCA ■ low range PCA 	<ul style="list-style-type: none"> ■ alcohol and drug abuse ■ priors: 8 ■ unlicensed driving (x 6) ■ PCA (x 2) ■ not previously imprisoned 	<i>All matters:</i> 12 mth s 9 good behaviour bond (x 3); 2 yrs licence disqualification; \$250 fine for each offence
16/07/02	<ul style="list-style-type: none"> ■ break, enter and steal (x 2) ■ illegal use of motor vehicle ■ malicious damage to motor vehicle ■ false information to pawn broker (x 2) ■ stealing 	<ul style="list-style-type: none"> ■ alcohol and drug abuse ■ one offence in breach of bail ■ priors: ■ break, enter and steal ■ assault ■ property offence (x 2) ■ malicious damage ■ previously imprisoned (PD) 	<i>On all matters:</i> 2 yrs PD on conditions; \$37,983 compensation
29/08/02 22/10/02	<ul style="list-style-type: none"> ■ common assault 	<ul style="list-style-type: none"> ■ mental health problems ■ alcohol abuse ■ priors: 14 ■ offensive language/ manner (x 3) ■ assault (x 3) ■ breach AVO ■ public order (x 2) ■ use telecommunication to harass (x 3) ■ not previously imprisoned 	12 mth s 9 good behaviour bond on conditions
29/08/02 22/10/02	<ul style="list-style-type: none"> ■ use telephone to menace ■ resist/assault officer in execution of duty (x 3) ■ common assault 	<ul style="list-style-type: none"> ■ mild to moderate intellectual disability ■ alcohol abuse ■ priors: 14 ■ malicious wounding ■ offensive conduct ■ carry cutting weapon (x 2) ■ offensive behaviour ■ malicious damage (x 3) ■ offensive language (x 2) ■ AOABH ■ assault police (x 3) ■ not previously imprisoned 	<i>All matters:</i> 12 mth s 9 good behaviour bond on conditions

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Date	Offence	Subjective features	Sentence
29/08/02	<ul style="list-style-type: none"> ■ contravene AVO (x 2) ■ possess prohibited drug (cannabis) ■ use unregistered motor vehicle ■ uninsured motor vehicle ■ high range PCA ■ unlicensed driver 	<ul style="list-style-type: none"> ■ alcohol abuse ■ priors: 32 ■ dishonesty (x 6) ■ domestic violence (x 3) ■ traffic (x 7) ■ assault (x 10) ■ drug offences ■ sexual intercourse without consent ■ malicious damage 	<p><i>Contravene AVO:</i> 2 x 12 mths 9 good behaviour bond under supervision</p> <p><i>Possess prohibited drug:</i> \$250 fine</p> <p><i>High range PCA:</i> 170 hrs community service; 2 yrs 6mths licence disqualification</p> <p><i>Unlicensed:</i> \$450 fine</p> <p><i>Unregistered/uninsured:</i> \$350 fine</p>
29/08/02	<ul style="list-style-type: none"> ■ assault ■ fail to leave licensed premises ■ disqualified driver ■ high range PCA 	<ul style="list-style-type: none"> ■ alcohol abuse ■ talented artist ■ priors: 161 (120 of which were as a juvenile) ■ break, enter and steal (x 35) ■ steal (x 23) ■ steal motor vehicle (x 23) ■ driving offences (x 32) ■ violent offences (x 15) 	<p><i>All matters:</i> 12 mths PD</p> <p><i>Assault:</i> Attend drug/alcohol and anger management courses; rehabilitation</p> <p><i>Fail to quit licensed premises:</i> rising of the court</p> <p><i>Drive whilst disqualified:</i> 2 yrs licence disqualification; attend traffic offenders program</p> <p><i>High range PCA:</i> 5 yrs disqualification</p> <p><i>Habitual traffic offender declaration:</i> 5 yrs disqualification</p>
19/11/02	<ul style="list-style-type: none"> ■ drive whilst disqualified ■ stealing (x 2) 	<ul style="list-style-type: none"> ■ mother of 3 children, youngest of which suffered serious medical problems; no family support ■ priors: 21 ■ driving offences (x 2) ■ assault; malicious damage; property offences (x 9); dishonesty offences (x 10) 	<p><i>All matters:</i> 250 hrs community service on conditions; 2 yrs licence disqualification.</p> <p><i>Habitual traffic offender declaration:</i> quashed.</p>
04/03/03	<ul style="list-style-type: none"> ■ assault (x 5) ■ assault police ■ malicious damage 	<ul style="list-style-type: none"> ■ alcohol abuse ■ domestic violence during childhood ■ priors: 22 ■ goods in custody offensive behaviour ■ high range PCA ■ cancelled driver ■ malicious damage ■ break, enter and steal ■ aid & abet steal ■ AOABH ■ breach AVO (x 5) ■ assault (x 9) 	<p><i>All matters:</i> 500 hrs community service</p>

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