



Evaluating Circle Sentencing (A)

In May 2008, New South Wales Attorney-General John Hatzistergos received a report evaluating the achievements of the Circle Sentencing process, designed to involve the indigenous community in the administration of justice. The 90-page report,¹ prepared by the Cultural and Indigenous Research Centre Australia (CIRCA) described a number of positive outcomes, some of them unexpected, since the introduction of “circle” in 2002. The findings largely endorsed earlier reports, all of which, including a widely-viewed television documentary, highlighted the positive impact of circle sentencing on the community where it was trialled. However, data analysed by the Bureau of Crime Statistics and Research (BOCSAR), included as an appendix to the report, demonstrated that, for one of its key targets, reducing re-offending, circle sentencing had achieved little or nothing. BOCSAR had publicised its findings ahead of the full CIRCA report, and had generated a number of mainly negative headlines. The parliamentary opposition had called for an urgent review of the initiative, now operating at nine locations. Only one percent of Aboriginals appearing before the local courts had been able to take part in the circle process, which compared to regular procedures was slower and much more resource-intensive.

Bringing the community into the circle

Circle sentencing was introduced in New South Wales in 2002 in an attempt to tackle the Australia-wide problem of indigenous people being over-represented in jail. Initiatives to introduce elements of indigenous culture into the court system were already under way in South Australia, Queensland, Western Australia and Victoria.

This case was written by Janet Tyson, Australia and New Zealand School of Government, for Dr George Argyrous, University of New South Wales, as a basis for class discussion rather than to illustrate effective or ineffective handling of a managerial situation. The assistance of Jacqueline Fitzgerald and Anne Redman is acknowledged with appreciation, however responsibility for the content of this case rests with the author.

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¹ Cultural and Indigenous Research Centre, 2008: NSW Attorney General’s Department Evaluation of Circle Sentencing Program Report (hereafter CIRCA)

Indigenous people in NSW, two percent of the general population, accounted for 20 percent of the jail population. The state's rate of reoffending (recidivism) was the highest in Australia, at 50 percent. Few indigenous people had positive experiences with the justice system, with many going out of their way to avoid passing a court house or encountering a police officer.

Circle sentencing was introduced in an attempt to reverse these negative attitudes and outcomes. Its fundamental premise was that the community holds the key to changing attitudes, and finding solutions. Circle sentencing was a means to break down barriers by giving local communities a greater say in and understanding of court processes. It was a bold attempt to merge the values of indigenous people with the structures of the western justice system. While the court would learn more about the whole community, the community could help to arrive at workable sentencing solutions. The collective community responsibility for outcomes that would develop should extend well beyond the day in court. ²

The original concept came from Canada, where circle sentencing for indigenous offenders was introduced in the early 1990s, with the sentencing court convened in a community setting. All participants in the process could "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."³

A New South Wales justice sector working party, chaired by Brendan Thomas of the Aboriginal Justice Advisory Committee (AJAC), worked from the Canadian concept to develop a circle sentencing model flexible enough to meet the needs of diverse Aboriginal communities.

Circle sentencing was only to be offered to an offender who had either pleaded guilty or been found guilty of an offence in the Local Court. It would not be available for the most serious indictable offences such as murder or sexual assault.

Before being invited to take part in a circle, offenders had to pass two tests, first having to meet a suitability test, applied by a judicial officer, to ensure that their offence met legislative criteria. The names of those who qualified went forward to the Community Justice Group representing elders from the local region. The Group made the final decision whether an offender was eligible for the circle. They would take into account the offender's willingness to be an active part of the process, as well as the victim's views and other criteria including tribal links to the local community and available support.

Circle sentencing was not intended to be a "soft" option or a jail diversion scheme. Though the emphasis was on sentencing people to projects that would benefit their community, some offenders might also serve time in prison.

The Nowra trial

In New South Wales, the circle could be convened almost anywhere except in a traditional courtroom, and could include twelve or more people: three to four Elders, the Magistrate, the Police Prosecutor, the Project officer, the offender and the offender's solicitor, the victim and

² Cited in CIRCA p19

⁴ CIRCA p29

their support person, and sometimes the victim's solicitor.⁴ In contrast to the formal courtroom, all participants sat at an equal level.

The prosecutor, offender, victim and community representatives could all speak during the circle discussion which would cover the offence, its impact on the victim and the community, and what needed to be done to right the wrong (what sentence should be imposed). The magistrate advised the Elders, who determined the sentence, which the magistrate then handed down as an order of the court. The process might take most of a day to conclude.

The first trial of circle sentencing took place in the south coast town of Nowra, in February 2002. It followed extensive consultation with the local indigenous community, including a customary law forum hosted by the AJAC. An Aboriginal Community Justice Group, with membership from all the Yuin nation communities in the catchment for the Nowra Court, was established to oversee the court procedures. Local Court official Gail Wallace was appointed as the Project Officer. The Project Officer was the central figure in arranging the circle process and acting as liaison between community representatives and the magistrate. At Nowra, the local magistrate, Doug Dick, was a strong supporter of the circle sentencing concept, as was Wallace. NSW Police prosecutor Craig Veness was sceptical but prepared to give it a trial.⁵

Eight objectives

As eventually formalised in Section 4 of the *NSW Criminal Procedure Regulation 2005* the eight objectives for Circle Sentencing were to:

- Include members of Aboriginal communities in the sentencing process
- Increase the confidence of Aboriginal communities in the sentencing process
- Reduce barriers between Aboriginal communities and the courts
- Provide more appropriate sentencing options for Aboriginal offenders
- Provide effective support to victims of offences by Aboriginal offenders
- Provide for the greater participation of Aboriginal offenders and their victims in the sentencing process
- Increase the awareness of Aboriginal offenders of the consequences of their offences on their victims and the Aboriginal communities to which they belong
- Reduce recidivism in Aboriginal communities.

In October 2003, what became known as the Potas Report⁶ published an evaluation of the first twelve months of the new sentencing procedure. The report, a collaboration between the Judicial Commission of New South Wales and AJAC, revealed that “circle sentencing at Nowra has succeeded on a number of levels” with a positive impact on each of the eight aims of the trial, including helping to break the cycle of recidivism. Offenders were more likely to “sit up and take notice” in the less formal sentencing surroundings, while members of the community were proud to participate. Offenders, victims and a range of other participants were all very satisfied with the procedure, the report noted, with “positive changes in

⁴ CIRCA p29

⁵ Australian Broadcasting Corporation, Four Corners, Transcript of Jonathan Holmes' report “Inside the Circle” broadcast 10-10-2005. (Hereafter Four Corners). Downloaded from <http://www.abc.net.au/4corners/content/2005/s1479031.htm> on 1-03-2010.

⁶ Potas, I et al, Circle Sentencing in New South Wales: a review and evaluation, October 2003, <http://www.austlii.edu.au/au/journals/AILR/2004/16.html> downloaded 12/1/2010 (Potas)

behaviour in all but one of the offenders and a reduction in alcohol abuse by many of the defendants sentenced by the circle.”⁷

“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.”⁸

On page 8 the report noted that one case per month, on average, went through the procedure...and that, “of those sentenced by the circle, only one offender has reoffended.”

High hopes and limited data

At the New South Wales Bureau of Crime Statistics and Research (BOCSAR), the Potas Report was initially welcomed, as a rare example of evaluation being carried out in the criminal justice sector. The Bureau’s Deputy Director Jackie Fitzgerald hoped it would be realised that the claims about breaking the cycle of recidivism were based on very limited data over a short period of time. If the writers of the Potas report had consulted BOCSAR, the only agency from which data on reoffending was available,⁹ it would have been clear that the only data on circle sentencing related to four people over six months. Only one of the four reoffended over this period.

However, the Potas Report’s “only one person has come back” was building a powerfully positive reputation for circle sentencing, which was progressively being rolled out to other centres: Armidale, Bourke, Brewarrina, Dubbo, Kempsey, Lismore and Walgett – all rural sites, and also Mount Druitt, which is a poor outer suburb of Sydney.

As the concept spread, claims of its success were also multiplying. However Jackie Fitzgerald knew that nobody – including BOCSAR itself – had properly examined the data to see if the data backed up the claims; nobody had in fact asked for or been provided with the data.

By 2005, she was advising BOCSAR Director Don Weatherburn that the image being built up for circle sentencing was “not consistent with the data.” Nowra magistrate Doug Dick wrote about the program in the *Judicial Review*¹⁰ where he again highlighted its success in reducing recidivism. New South Wales Chief Justice Spigelman picked up the theme in the 2005 Charles Perkins Memorial Oration delivered at the University of Sydney. In October 2005, the ABC’s *Four Corners* program went “inside the circle” at Nowra and at Dubbo and emerged with high praise for the process.

The program emphasised that the circle was not a soft option, but prompted soul-searching on the part of many of the elders involved, as well as the offender. Nowra offender Robert

⁷ Potas (Executive Summary) p9

⁸ Potas p2

⁹ From BOCSAR’s Reoffending Database. BOCSAR is part of the New South Wales Attorney-General’s Department, but has a long-established reputation as an independent authority for crime and criminal justice information, being unafraid to speak out publicly even if figures might prove unpalatable politically.

¹⁰ Dick, D, 2004, ‘Circle Sentencing and Aboriginal Offenders: Victims have a Say’ *The Judicial Review*, vol 7, no 1, pp 57-72.

Ardler, making his second appearance in the circle after successfully completing an alcohol rehabilitation course, called the circle “harder than the courts...because everything’s all put on you. Like, everything’s on your shoulders. All eyes are on you, everything’s directed at you.”¹¹

Police Prosecutor Craig Veness said he had been cynical but the process “does make a difference, it actually does. They really don’t seem to come back.” Presenter Jonathan Holmes said that a mere four out of 50 offenders who had been through the Dubbo circle in two years had reoffended. As he pointed out, this was rare good news about Aboriginal incarceration rates, and “vindicated those who pushed for the experiment for years.” The then Attorney-General Bob Debus described circle sentencing as “a marvellously effective system.”¹²

BOCSAR’s Jackie Fitzgerald, watching the *Four Corners* program with mounting concern, noted that some participants, in their enthusiasm, overlooked evidence they should have been aware of about increased re-offending amongst circle-sentenced offenders. There was little mention of the short time the project had been running, and the small numbers so far involved.

Fitzgerald knew it was time to check the data thoroughly, and she began to prepare an internal report. “We soon found there was very little to support the claims about reduced reoffending,” she recalled. Some of her superiors were startled when she told them the data showed the numbers of recidivists increasing – among them one offender who, claiming to have forsaken crime for art, had sold a painting to the department. BOCSAR was already investigating data relating to circle sentencing, when a decision to fully evaluate the program gave greater impetus to their work.

A comprehensive evaluation

In 2006 the New South Wales Attorney-General’s Department called for tenders to carry out a comprehensive evaluation of Circle Sentencing. A prime mover for the work to be done was Aboriginal lawyer Brendan Thomas, one of the authors of the Potas Report, and formerly with AJAC but now part of the Department. By 2006, 231 out of the 2270 Indigenous people with proven offences had attended Circle Sentencing in the nine locations where it had been in operation for more than a year.¹³

CIRCA, the Cultural and Indigenous Research Centre Australia, won the tender. CIRCA’s researchers had over 20 years of experience with qualitative evaluations, and had worked extensively with indigenous communities. As a pro bono activity, CIRCA was carrying out evaluations of Midnight Basketball, an inner-city initiative to give Sydney’s immigrant and indigenous youth some useful learning as well as a diversionary sporting challenge. CIRCA was asked to assess whether the Circle Sentencing program was achieving the stated objectives; to assess the program’s effectiveness in reducing reoffending; to identify any unintended positive or adverse effects of the approach; identify any factors influencing acceptance and non-acceptance within local Aboriginal and non-Aboriginal communities; and suggest ways to improve the effectiveness and cost-efficiency of the program.¹⁴

¹¹ Reference the four corners transcript

¹² Four Corners transcript, p3

¹³ CIRCA p 32

¹⁴ CIRCA, page 4-5

The evaluation methodology included a comprehensive qualitative approach, the analysis of existing data on Circle Sentencing offenders and Local Court data, and a literature review of Australian trends with regard to Indigenous sentencing programs and existing evaluations. Quantitative evaluation would come from BOCSAR.

Observation and interviews

As BOCSAR was working in its Sydney office analysing court appearance data, CIRCA's researchers were out and about observing and interviewing. The qualitative evaluation included visits to each of the nine sites, observations of ten circle courts in operation at Nowra, Lismore, Dubbo, Mt Druitt and Kempsey, and in-depth interviews or group discussions involving 115 people. Each member of the team of five researchers visited at least two communities so they could take a comparative view.

Their brief was to work through the local Project Officer, to find representatives of all participants in the sentencing process to interview, from the police and the magistrate and the offender, through to the victim, their families and local Elders, whether or not closely associated with the circle system.

CIRCA devised a framework for the interviews, and a checklist of areas to be covered, but, following the method they had found to work in other indigenous situations, the face-to-face encounters were more like conversations than interrogations. As people told their stories, most questions were covered, and if any areas were missed there could be a follow-up at the end. In its final report CIRCA acknowledged the possibility of a "positive bias" because those interviewed were volunteers, sourced through the Project Officer.

CIRCA prepared detailed reports on the operation of circle sentencing in each community, identifying a large number of local differences and inconsistencies as they did so. For instance, providing in-court and follow-up support posed much greater difficulties for a remote place like Bourke.

Although the intent was to offer circle sentencing to offenders convicted of all but the most serious indictable crimes, some individual courts were very selective about the types of crime that would be approved to go forward for circle sentencing. One court focused almost entirely on traffic offences. At some sites, offenders remained in the circle while sentencing deliberations took place, while at other courts, they left until the decision had been made.

Outcomes – intended and unintended

CIRCA's detailed reports were then summarised in a 90-page report giving an overview of the evaluation findings. The report found that, based on the qualitative analysis, circle sentencing was meeting each of the eight objectives for increased community involvement in and trust of court processes – with the one exception of reducing recidivism.

“For most of the people involved in the evaluation, confidence in the sentencing process is high. Elders, Project Officers and offenders also indicated that barriers between Aboriginal

people and the courts have reduced to some extent, and that the sentencing outcomes are culturally appropriate when compared to the Local Court.”¹⁵

The most dramatic unintended consequence of circle sentencing was the impact on Elders, CIRCA noted. “Many of the Elders included in the research had a strong sense of achievement as a result of their participation, with discussions about the impact on their levels of pride, confidence and community status.”¹⁶ The most significant factors in acceptance of circle sentencing were the skills and commitment of the project officer, and the support and attitude of the magistrate.

Counterbalancing these very positive findings, the report pointed out that the process was still in its very early stages, and that minimal numbers of some groups, for example victims, were able to be interviewed. In some areas, Elders were seen to be “pushing their own personal views” on to offenders. A list of recommendations addressed general concerns about the level of resourcing, including the amount of responsibility placed on one individual, the Project Officer. There was also concern about the adequacy and availability of support services to follow up on related issues such as alcohol abuse and family violence, identified during the sentencing process.

“No effect on re-offending”

BOCSAR’s Jackie Fitzgerald knew there had been glowing reports of the impact of the changes brought about by the circle. She had heard the story of the local Elder, once deliberately crossing the road to avoid the courthouse because of the injustices done to her relatives, who now made a point of calling in, to see who was there and what was going on.

However, Fitzgerald’s analysis of crime statistics told a very different story to the largely positive qualitative report. It found no difference between circle-sentenced offenders and others: “circle sentencing has no effect on the frequency, timing or seriousness of offending.

“Of the 153 people circle sentenced, 61 or 40 percent had reoffended by June 2007. Of the 21,324 people in the control group, 8250 or 39 percent had reoffended. For 56 percent of the circle sentence group who reoffended, the next offence was less serious than the reference offence, compared with 45 percent of the control group. This difference was not statistically significant.”¹⁷

To ensure the integrity of the data, BOCSAR had analysed two comparison groups, matched for a number of factors such as age and gender, one of circle offenders and the other of Aboriginal offenders in the local court system. Using statistical tools, they were able to adjust the data for the short time it had been recorded and the small number of circle offenders – 1 percent of the total Aboriginal population in the justice system – to give valid comparisons with the other 99 percent. To evaluate the time before reoffending, they used survival analysis, more commonly used in health, to assess the time after sentencing “treatment” before coming before court again. “The analysis had to be watertight,” Jackie Fitzgerald said.

In such comprehensive and in-depth analyses, “even little differences normally show up as quite significant,” she said. “The remarkable thing in this case was that there was NO

¹⁵ CIRCA p6

¹⁶ CIRCA p7

¹⁷ Fitzgerald, p 6

difference.” The rates of recidivism by those who had gone through the circle system were virtually identical with those in the general justice system.

This was at odds with the perceptions of stakeholders interviewed for the qualitative report, CIRCA pointed out, in section 7.2 of its report, which included the BOCSAR analysis as its Appendix 2. The gap between the community’s perception that circle sentencing reduced recidivism, and the statistical “facts”, might arise because elders were not informed of the outcomes for offenders over time, CIRCA suggested. As well, the circle cause had some ardent local “champions”, spreading their view that the process would have a dramatic influence that would go beyond reoffending.

“Circle isn’t about getting a sentence, it isn’t about finishing a sentence, it’s about changing lives. You won’t see results of Circle until a few years down the track.” (Elder, Armidale).¹⁸

What the data say

Early in May BOCSAR took the unilateral step of releasing its findings to a well-attended media conference. Jackie Fitzgerald outlined the methodology of the BOCSAR evaluation in an article published as Number 115 of BOCSAR’s *Crime and Justice Bulletin*.

Asking, “does circle sentencing reduce Aboriginal offending?” the article in effect answered, “not according to available evidence”. The influential Potas evaluation, published after a year of the Nowra trial, was “based on only eight circle sentencing case studies. Furthermore, information about reoffending was available for only four of these eight cases.” The follow-up period was necessarily short, and there was no control group. “It would seem premature to conclude on the basis of this evidence that circle sentencing helped ‘break the cycle of recidivism.’”¹⁹

Fitzgerald pointed out that the data should not be used to conclude that circle sentencing has no value at all, or that it is not meeting the seven other objectives for which it was set up. Circle sentencing in its current form was not designed or equipped to generate the behaviour changes necessary for ongoing reduction in recidivism, and the Government might consider how circle sentencing could be combined with other programs such as behavioural therapy or remedial education, to achieve this, the article concluded.²⁰

Opposition politicians seized on the BOCSAR findings as demonstrating that circle sentencing did not work and was an expensive and ineffective tool. The shadow Attorney General issued a media release saying the government should “make the program a success before they call it a success” and reassess the operation of the program, “or work out other means of reducing indigenous re-offending.”²¹

There was little fanfare – or political response – when CIRCA’s full report, with BOCSAR report as an appendix, was released later in May, a press release announcing its availability on the Attorney General’s department website.

¹⁸ CIRCA page 43

¹⁹ Fitzgerald, J, 2008, Does circle sentencing reduce Aboriginal offending? *Crime and Justice Bulletin*: contemporary issues in crime and justice, New South Wales Bureau of Crime Statistics and Research, no 115, p 2.

²⁰ Fitzgerald, p 7.

²¹ Smith, G, , Liberal MP for Epping, Media Release, ‘Time for Review of Circle-Sentencing in Wake of Bocsar evaluation,’ 16-7-2008 downloaded from <http://www.epping.electorate.com.au> on 12-01-2010.

The department now had detailed – but in one key area conflicting - data with which to decide, and recommend to the Attorney-General, whether to proceed with the program, and if so, whether any changes might need to be made.

Exhibit 1

How a circle sentencing process works

There is no set formula for the circle sentencing process. The venue can be in a town hall or even outside under a tree. In contrast to the formal environment of a court, all participants are seated at the same level. The following elements usually apply:

1. **Welcome:** Aboriginal elders welcome all participants, then the magistrate formally opens proceedings.
2. **Introduction:** 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 the circle, the guidelines and the rule of conduct within the circle, then outlines the facts.
5. **Defendant statement:** The defendant will make comment regarding the offence and his or her commitment to rehabilitation. The solicitor for the defendant may outline any mitigating features.
6. **Victim statement:** The victim or a representative of a 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 (that is, what sentence should be imposed), and what support may be available for the defendant and victim.
8. The magistrate provides a summary of circle discussion/decisions reached
9. **Sentencing:** Based on the discussions, the magistrate determines the sentence.
10. **Support discussions** (introduced following the CIRCA review) Intervention plan and formal support group for the defendant is established..
11. Support and support group for victim established..
12. **Date for review** set
13. **Closing remarks**, magistrate formally closes the circle.
- 14.

Source: Adapted from POTAS, p 16 and 17 and 'Aboriginal Circle Sentencing', <http://www.creativespirits.info/aboriginalculture/law/circle-sentencing.html> accessed 3-07/2012

Exhibit 2: Differences between formal and circle courts:

What does the room look like?	Cold and impersonal	Aboriginal art work and flags
Who attends?	Justice system professionals	Elders, magistrate, police, community members
What decides the sentence	Legal principles and precedents	Offender's situation, victim's comments
Who talks most	Lawyers	Those directly or indirectly affected by the crime
What is the result?	Convictions and criminal records, jail time	Convictions and criminal records, community work

Source: 'Aboriginal Circle Sentencing', <http://www.creativespirits.info/aboriginalculture/law/circle-sentencing.html> accessed 3-07/2012

Exhibit 3

Circle Sentencing in New South Wales *A Review and Evaluation*

Ivan Potas, Jane Smart and Georgia Brignell, *Judicial Commission of New South Wales*

Brendan Thomas and Rowena Lawrie, *NSW Aboriginal Justice Advisory Council*

With survey conducted by Rhonda Clarke

October 2003

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.^[4]

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.

Part 1: 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.

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Part 4: 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. ... 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 makeup 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.

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The full text of this report is available online at

<<http://www.lawlink.nsw.gov.au/ajac.nsf/pages/reports>>.

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

[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.

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