

# Diverting Aboriginal Adults from the justice system

Outcomes of the workshop of 5 October 2001

Aboriginal  
Justice  
Advisory  
Council



## **Outcomes of Diversion workshop of 5 October 2001**

### Introduction

The Aboriginal Justice Advisory Council and the Institute of Criminology, University of Sydney, have formed a partnership to closely examine particular Aboriginal justice issues with the aim of producing a set of proposals to activate real changes that often do not go further than simply good ideas. The Attorney General has agreed to the general process of the workshops to be jointly facilitated by the AJAC and IOC, which brings together a small number of academics, practitioners, policy advisers and Aboriginal community representatives.

### Adult Diversionary Practices

In looking at the over representation of Aboriginal people in the criminal justice system, and specifically those who are sentenced to prison, the AJAC and IOC felt that one particular area to be explored was the matter of diversion. The workshop examined:

- What works in diversion
- Possible standards for developing diversion programs
- Some standards for evaluating programs
- Funding and resourceing of diversion
- Establishing linkages between courts, police and diversion programs
- The legislative framework within which diversion occurs & any need for law reform

### Representation

The Workshop was opened by NSW Attorney General Bob Debus. Mr Debus', speaking notes are attached at appendix 1. Various government departments, organisations, universities, practitioners in the field as well as Aboriginal community representatives who work in the field of diversion. A list of representatives who participated in the forum are attached at Appendix 2.

### **Issues**

The workshop examined a number of specific issues relating to adult diversionary practices. Below are the outcomes of those discussions.

#### **Legal issues**

The workshop examined legal and legislative issues needed to underpin strong and successful diversionary strategies. The group felt that any legislation must establish a diversionary pathway that is Aboriginal controlled and establishes a management structure that is both rehabilitative and restorative.

Further the legislation should embody the principle of Aboriginal self determination, that supports Aboriginal values, traditional principles, aspects of Aboriginal lore. The group also noted that the legislation should specifically allow for local Aboriginal communities to control local initiatives and allow for the formal western legal system to let go of some power and recognise a decision making role for local Aboriginal people.

The workshop participants thought that while the legislation should establish a broad state wide framework for diversion. That legislation should be flexible enough to cater for the diversity of local Aboriginal communities to ensure that the approach taken

wasn't prescriptive but could be adapted for the needs of individual Aboriginal communities.

Specifically any legislation should provide courts with the flexibility at the point of sentence to divert violent offenders, specifically so that the court can work with local Aboriginal people to examine the whole need of the offender. Legislation should also allow for a narrative opportunity for communities to speak about an offender and his/her past behaviour for consideration in determining sentence or for determining the types of diversion that may be required. Courts should also allow elders or other respected local community members to spend time with an offender prior to sentence.

The legislation needs to allow local Aboriginal communities to take responsibility for offenders and set a clear understanding of the roles and responsibilities of offenders, criminal justice agencies and direct program management.

### **Funding and resources**

The workshop found a range of current problems with the funding and resourcing of diversionary programs. Principally much of the funding available to Aboriginal communities is one off and often only for pilot programs. Further funding for thorough evaluation is often not available so determining the real success of programs is often difficult.

Often priorities for funding are set centrally by government agencies and do not meet local community need. There is also a general lack of flexibility within funding guidelines and criteria that limit Aboriginal communities ability to develop innovative local solutions.

There is a lack of coordination between government agencies and at times they have funded similar initiatives or activities within the same community. There is no real strategy in place to ensure that there is a geographic spread of funding, meaning that some locations get more resources than others.

Many Aboriginal organisations are forced to seek funding from multiple sources as agencies do not always provide enough funds for programs to effectively operate. Often programs are measured on their cost and not the savings that they generate. There is also a need to balance the provision of funding to local programs and measure the cost savings gained if those programs are successful.

The workshop recommended that funding be provided triennially. It also recommended that:

- support should be provided by funding agencies to local communities to assist them in managing and acquitting funds
- funding guidelines should be amended to allow for a greater degree of flexibility so that local Aboriginal communities can change and alter programs to cater for new and arising needs.
- Government agencies should provide pooled funding based on addressing a problem rather than agency specific. An example could be a single funding source for diversionary programs taking into account funds from a range of agencies.
- Acquittal processes should be designed to measure both the costs and the broader savings of programs
- all program funding should include a component for evaluation
- provide longer term resources that can support locally developed innovative ideas

## **Community Involvement**

The workshop agreed that there was a general need to establish principles and parameters for engaging local Aboriginal communities in diversionary programs. We also need to recognise the cultural shift occurring with Aboriginal communities increasingly asking to be able to take more responsibility for their own members.

There is also a need for the formal recognition by government of the role Aboriginal communities can and do play within the criminal justice system and for allowing a greater decision making role for Aboriginal people within that system.

The workshop examined the establishment of a broad structure for community involvement in diversion and sentencing. The workshop agreed that there is a need to ensure the representation of all sections of a community including all major family groups. The specific needs of men women and young people also should be represented.

In establishing and working with Aboriginal communities government agencies and criminal justice workers need to recognise and respect the need for a negotiation and development period in the establishment of community justice bodies. Workshop participants also identified a need to build on what already exists in Aboriginal communities rather than replacing it with new structures, particularly to work with local community leadership and to enhance existing community resources.

The workshop suggested that there needs to be one single community group that works with all agencies and workers within the criminal justice system that consists of respected members of all major families and sections of a community. That group should be allowed appropriate time to develop and be assisted by government agencies with training and other resources.

There is also a need for formal recognition so that local Aboriginal groups have equal recognition with mainstream criminal justice agencies. In supporting the establishment of local community justice mechanisms criminal justice agencies should recognise the diversity of Aboriginal communities and therefore recognise the need for flexibility in structure of local groups, that each group may vary from place to place.

All criminal justice agencies should institute formal policies that encourage building relationships with local Aboriginal communities. Also all criminal justice agencies should actively engage with local Aboriginal justice groups or other bodies and allow for those groups to have a greater decision making role within the criminal justice system.

In developing local programs government agencies need to ensure that evaluations of those programs include measuring levels of community satisfaction and provide for local Aboriginal communities to have direct input into and comment on final evaluations.

Criminal justice agencies should establish formal policies to actively examine what specific assistance they can provide to local Aboriginal communities in establishing local justice mechanisms such as funding, training, orientation, evaluation, planning or other support.

## **Police Diversion**

Workshop participants examined current processes for diverting adults from the justice system. Many people knew of informal local arrangements that police have of referring people to Aboriginal Medical Services or other support programs but no formal diversion mechanism was in place.

In discussing possible diversionary measures participants felt that they should be established at both pre charge and post charge stages. There is a need to consult victims of offences, particularly where the victim and offender are Aboriginal people from the same community. This would determine the level of support from the victims for diversion and their ideas about what type of diversion may be appropriate.

There is also a need to establish direct community involvement not only in diversionary programs but within the diversionary process so that local Aboriginal people can play a decision making role in police diversion. There was an identified need to ensure that diversionary processes ensure confidentiality.

It was felt that there needed to be ongoing consultation and discussion by police with local Aboriginal communities to ensure the effectiveness and appropriateness of diversions. The workshop firmly believed that the current police discretion must be tightened and a mandatory examination of the possibility of diversion for specific charges should be established.

It was felt that prior convictions should be examined where deciding to divert but should not be determinative and that the time frame between offences be a specific factor in deciding to divert a person from further involvement with the justice system. The group also felt that very minor offences such as offensive language should be subject to mandatory diversion.

The group discussed the outline of a possible process. The process could involve an arresting officer to automatically consider diversion. If that officer make a decision not to divert then local respected Aboriginal people should be consulted about diversion possibilities and whether charges should proceed. The decision to proceed with charging should only be made by the supervising officer and must consider the wishes of local respected Aboriginal people. A magistrate should have the ability to examine each matter and refer back to police for diversion if appropriate.

### **Court Diversion**

The group agreed that formal mechanisms should be established to provide opportunities for magistrates to divert offenders, pre trial, after conviction and as part of a sentence. The group felt that there should be a greater role for local Aboriginal people or other local Aboriginal community mechanisms to provide holistic assessments of offenders and suggest diversionary options to courts. The group felt that diversionary practices must operate under the principles of restoration and rehabilitation and ensure that both principles are applied to diversionary options in practice.

There were a number of principles that the workshop believed should be established to form a basis for diversion from court. Court based diversions should be based on Aboriginal cultural values and should not be more prolonged or intense than a regular sentence; must specifically deal with the causes of offending; government agencies must provide dedicated funds for diversionary programs. All court based diversionary activities must incorporate the needs of victims and the community and must focus on providing restoration for the offence.

Participants noted that often courts do not know what diversion options are available locally and do not actively seek those options out. It was recommended that

Aboriginal Client Service Specialists (ACSS) develop and maintain local lists of programs and services that can be used as diversionary options. It was also suggested that ACSS also regularly provide feedback to magistrates as to what is happening locally, changes to services, local problems or other factors that may influence the types of diversions available.

Participants also felt that there was a need to establish mechanisms for courts to formally network with other, non criminal justice service providers, such as TAFE or medical services, to determine what options are available, what future programs or services could be developed and to cater existing services to the needs of offenders.

Finally the group felt that amendments should be made so that courts only examine criminal records of offenders not criminal histories.

### **Evaluation**

The group noted that the process of evaluation can be problematic. There is some debate about the definition of recidivism and what it actually entails. The group felt that there was a need to track offenders progress at different points to measure success of diversion. Further, they felt that any evaluation needed input from an offender's family and community. The group felt that a single evaluation framework should be developed and adopted by criminal justice agencies. A training package and resource should be developed for all criminal justice agencies to ensure consistency of quality and standards used in evaluating Aboriginal programs. That evaluation should include narrative and story telling as a key component.

Performance indicators should be negotiated for all programs at the outset and should be flexible enough to cater for new and arising issues. All evaluations should include a mixture of qualitative and quantitative information. A cross government approach should be adopted to track trends and to ensure that evaluations cater for and consider all external factors impacting on the success of a program. Any framework should ensure that local Aboriginal communities are directly involved in evaluation process not simply consulted at the end of it.

All evaluations of diversionary programs should include the specific examination of net widening and future potential for net widening.

### **Future Directions**

There are a number of actions that were recommended which can be achieved relatively quickly and some that may take more time to develop and implement. Basically the workshop identified a number of themes that could be pulled together to become an overarching diversionary framework. The framework is needed if there are moves to encourage more diversion from police and/ or courts. Fundamentally there needs to be a pathway that people are diverted to.

The framework could draw together all issues raised at the workshop and bring them together under four broad themes:

1. **Legislation:** The workshop identifies a clear need for a legislative basis for adult diversion and identified a number of specific principles that could underpin that legislation. The Attorney General noted in his opening remarks that work on this legislation is already progressing.
2. **Funding and resourcing:** The workshop identified a clear need for a more coordinated and cohesive approach to resourcing diversionary programs and strategies. Participants identified a number of possible approaches to achieving

that end, particularly pooled and coordinated funding, reducing the number of pilot programs, and evaluation funding,

3. **Program development & Evaluation:** The workshop identified a number of specific principles could for diversionary program development and evaluation standards that could be adopted by NSW agencies. This aspect of a framework could inform and guide the development of specific court and police diversions,
4. **Local coordination:** Workshops on police, courts and communities all raised issues that required greater local coordination. Discussion about police and court diversion centred around the need for those bodies to more effectively link with local Aboriginal communities and existing programs. There was an identified need to examine the establishment of possible mechanisms to involve local services and resources such as TAFEs and medical centres and other services in diversionary programs.

Appendix 1

## **Speaking notes from Attorney General, Bob Debus, 5 October 2001**

*"I would like to welcome everyone here this morning to this joint workshop which is hosted by the Aboriginal Justice Advisory Council and the Institute of Criminology of the University of Sydney.*

*Today's workshop provides a tremendous opportunity to consider the development of an effective framework for diverting Aboriginal adults from the criminal justice system. As many of you would be aware, there is a great deal of work being done in New South Wales on mechanisms to divert young people from ongoing involvement in the criminal justice system but there is a need for us to turn our attention to adults and to attempt to break the offending cycle.*

*We know that repeat offenders account for a large proportion of the offences committed in Aboriginal communities, and there is broad recognition of the need to intervene in their offending behaviour, to address patterns of criminality and break the cycle of contact with the mainstream criminal justice system.*

*Effective diversion strategies provide us with an opportunity to develop initiatives and services that can address the underlying causes of that offending.*

*There is a need to provide workable options of intervention for those people whose offences are not serious enough to warrant the full resources of the criminal justice system.*

*The current system of adult diversion provides an ad hoc approach to diverting offenders. In many cases the opportunities for involvement in diversionary schemes are affected by the availability of programs in particular geographical location. We need to effectively examine the possibilities available to provide appropriate diversionary programs that can cover a range of areas across the State.*

*We know that those programs that are developed and controlled by Aboriginal communities are the ones most likely to achieve success, and accordingly we need to focus on enhancing Aboriginal community involvement to ensure that the diversionary framework we adopt allows for the greatest degree of local Aboriginal community control.*

*It is also important for Government to recognise the need for flexibility in examining the possibilities of involving non-criminal justice services, such as TAFEs, in developing programs or initiatives that can meet the broader educational and training needs of people who come into contact with the criminal justice system.*

*It is important that we explore all the options and stages within the criminal justice system that provide an opportunity to divert offenders.*

*My Department is in the process of developing a broad framework to govern the use of diversionary schemes which will allow for a continuum of intervention by diversionary processes at different points in the criminal justice system. Ideally, such a framework should allow for referral at the following points in the criminal justice system:*

- (a) Pre-charge – This is the same point at which police currently have discretion to warn, caution, or refer to conference under the Young Offenders Act (YOA).*

- (b) Pre-sentence – Judicial officers would be empowered to refer offenders to restorative justice processes after conviction and before sentence, as they can under the YOA.

There are two ways of proceeding at this stage – (i) the whole sentencing phase is referred to the diversionary forum, which determines the sentence itself (eg circle sentencing) or (ii) the offender is referred to the forum, which decides an outcome, and the matter only goes back to the judicial officer for sentencing if that outcome is not complied with.

- (c) Post-sentence – As part of the sentence, the judicial officer could include a requirement for the offender to attend, for example, a restorative justice process.

In the course of preparing the diversionary framework, my Department is paying close attention to the use of restorative justice mechanisms overseas – in New Zealand and Canada in particular. Although great care must be exercised in applying overseas experiences in dealing with local issues, it may be that there are valuable lessons to be learnt from the New Zealand and Canadian experiences.

As I have mentioned above, the success of any framework depends upon the level of involvement of Aboriginal communities in the development and operation of diversionary schemes, and the extent to which these schemes are adopted by these communities.

Today's workshop provides a valuable opportunity for all of you here today to contribute to the development of more comprehensive and effective approach to the diversion of Aboriginal adults from the criminal justice system, and I wish you well in your deliberations."

Appendix 2.

**Workshop Participants**

Winsome Matthews	Aboriginal Justice Advisory Council
Rowena Lawrie	Aboriginal Justice Advisory Council
Larry Towney	Aboriginal Justice Advisory Council (Narromine)
Lenny Frail	Probation Service (Bourke)
Chris Cunneen	Institute of Criminology
Stan Jarrett	Local Courts
Dennis Roach	ATSIC
Alex Shehadie	Department of Aboriginal Affairs
Rosemary Caruana	Probation Service
Debbie McDonald	Indigenous Services Unit Dept of Corrective Services
Debbie Swan	Yulawirri Nurai Aboriginal Corporation
Michelle Knight	Yulawirri Nurai Aboriginal Corporation
Brad Freeburn	Redfern Aboriginal Medical Service
John Boersig	Coalition of Aboriginal Legal Services
Michelle Huntsman	Criminal Law Review Division
Carolyn Marsden	Legislation & Police Division
Patrick Shepherdson	Crime Prevention
Gareth Seymour	Crime Prevention
Nichole Hertogs	Attorney General's Office
Alastair McConnachie	Attorney General's Office
Claire McWilliams	The Cabinet Office
Brendan Thomas	Aboriginal Justice Advisory Council
Maureen Tagney	Legislation & Policy Division
Tessa Boyd-Caine	Institute of Criminology
Carmen Parter	Aboriginal Health Branch