
SPEAKING UP TO THE SILENCES

VICTORIAN KOORI COURTS AND THE COMPLEXITIES

OF INDIGENOUS FAMILY VIOLENCE

by Dr Kyllie Cripps

INTRODUCTION

'One of the greatest difficulties one faces in life is to speak up against the 'silence of acceptance' that allows the muted tones of someone who is being violated, abused, raped or belted within an inch of their life to go unheeded... The silence is deafening'.¹

In 2003, the Victorian Indigenous Family Violence Task Force ('Task Force') reported its findings to the Victorian community. They reported that the level of violence was increasing, estimating that '1 in 3 Indigenous people were the victims, have a relative who is a victim or witness an act of violence on a daily basis in communities across Victoria.'² Responding to the violence begins, as the Task Force has illustrated, with speaking up, breaking the 'silence of acceptance' that allows the violence to continue unchecked. Speaking up involves not only exposing the violence taking place in our homes and our communities, but exposing the abusers who are often family members and who may be respected within the Indigenous community. The courage and strength of victims and bystanders to take a stand against violence should never be underestimated or taken for granted. Moreover, their stories and their experiences should never fall on deaf ears. There is an expectation that, in speaking up, the voices of victims will not go unheeded; indeed the voices of victims on issues pertinent to their experiences should be sought and carefully considered by services, advocacy groups, government departments their agencies and consultative groups.

This article explores the extent to which this ideal is practiced in the Victorian Indigenous context, examining the Koori Court and its engagement with family violence related matters as a case study. This case study has been chosen given the media controversy relating to the Victorian Court of Appeal decision in *R v Morgan*.³

THE VICTORIAN KOORI COURT

The Victorian Koori Court model arose as an initiative of the original Victorian Aboriginal Justice Agreement ('AJA1'), signed by State government departments and key

Victorian Indigenous organisations in 2000. The purpose of AJA1 was to minimise Indigenous over-representation in the criminal justice system by improving accessibility, utilisation and effectiveness of justice-related programs and services in partnership with the Indigenous community.⁴ The agreement did not commit explicitly to establishing a Koori Court, but rather, proposed that parties to the agreement consider a project that would replicate with cultural adaptation the Nunga Magistrates' Court of Port Adelaide, South Australia.⁵ Restorative justice mechanisms were also proposed for consideration as they might apply to juveniles in the first instance.⁶ The Koori Court pilot was created by the passing of the *Magistrates' Court (Koori Court) Act 2002*. At that time, the Attorney General Rob Hulls remarked that the passing of the legislation illustrated the government and Indigenous communities' commitment to 'experiment with inclusive, innovative, culturally appropriate and modern approaches to strategically reduce Aboriginal overrepresentation within the criminal justice system'.⁷ The Koori Court, it was said, represented a fundamental shift in the way Indigenous offenders were to be dealt with; in effect, providing an alternative way of administering sentences.⁸ It was believed that in many instances the Koori Court would offer an opportunity to divert Aboriginal offenders away from prison (where appropriate), promoting instead rehabilitation via a variety of community-based diversionary orders.⁹ The practices and processes of the Koori court were and continue to be aimed at reducing perceptions of intimidation and cultural alienation experienced by Aboriginal offenders¹⁰; interestingly, little has been said, however, about the perceptions of intimidation and cultural alienation experienced by the *victims* of Indigenous offenders, particularly in the context of family violence.

The Koori Court legislation provides that proceedings are to be conducted with as little formality and technicality as possible, with all parties, including the Magistrate being seated around an oval table; the focus of the proceedings is on the offender and his conduct.¹¹ The parties typically involved in the proceedings include the Magistrate, the Elders or Respected Persons, the Koori Court Officer,

the offender, the offender's solicitor, and the police prosecutor. A representative from correctional services and support services involved in the rehabilitation of the offender is also invited to attend. The offender is free to invite a member of his or her family or a support person to assist them in the proceedings.¹² The Koori Court operates from the basis that the involvement of the victim in the proceedings is not integral to the process. Anecdotal evidence from the community relating to this issue, in addition to the formal evaluation, indicates that victims are not typically involved in proceedings.¹³ Services representing victims' interests, such as Aboriginal Family Violence Prevention Legal Services recognising this anomaly, have in recent times sought to fill this gap by supporting their clients where possible to attend and/or to supply the court with victim impact statements. However, there is no formal evidence to determine how many courts or services are involved in this practice and the success or otherwise of their efforts in getting victims more involved in the Koori Court process remains unevaluated.

Participants in the Koori Court evaluation reported that they felt that there was a lack of resources and awareness within the community about the function and purpose of the Court. Victims in particular have attended court seeking retribution and been disappointed that the court was not able to deliver this type of justice. When this message has been more broadly discussed amongst the community, it has inhibited other victims' involvement in the court.¹⁴ These issues raise more fundamental questions that are yet to be addressed and that need careful consideration, particularly if the Koori Court is genuinely interested in speaking up to the 'silences of acceptance' that permeate victims' experiences of family violence. These questions include: What can the Koori Court offer victims of violence? How is this communicated to them? And how will they be supported and by whom?

THE KOORI COURT AND FAMILY VIOLENCE

The commonly-held belief in Victorian Indigenous communities until recently was that the Koori Court did not deal with family violence or sexual assault related matters. This knowledge was largely garnered from public announcements at the launch of the Koori Court, when the then Attorney General, Rob Hulls, introduced the *Magistrates' Court (Koori Court) Bill 2002* to Parliament. In the report, he stated that offenders would be excluded from the Koori Court where the offence committed was one of family violence or a sexual offence, given the complexity of the issues and services required.¹⁵ This statement was taken on face value; community members had no reason to explore the actual provisions as outlined

in the Act. However, had they done this, they would have realised the Act *did* allow family violence matters to be heard in the Koori Court, but with one exception: that being, any offences involving a breach of family violence related intervention orders¹⁶. The latter raises significant issues about the awareness amongst Indigenous women of the implications of this Act, because in effect if Indigenous women do not apply for an intervention order before a family member assaults them, the matter (with the offender's consent and guilty plea) could be heard in the Koori Court. Indigenous women do not have a say in this process. Is this an outcome that is beneficial for both parties?

In the above mentioned circumstance the Aboriginal Legal Service will more than likely represent the offender's interests, but who will represent the Aboriginal victim's interests? Will this process identify and respond to the different needs of the victims/offenders? Will it address the contributing factors that produced the violent incident that took place today, which might take place again tomorrow or next week? These are important questions because women need to be aware of the options available to them, as do those who are providing assistance to them. This provision in the Act effectively offers the possibility that Indigenous family violence offenders could be treated differently to non-Indigenous family violence offenders. This is particularly pertinent given recent changes in the Victorian legal response to family violence.

Little is known about how the Koori Court engages with family violence related matters. We do know from available data that the Koori Court for the period 2004 to 2010 dealt with a total of 890 cases.¹⁷ Approximately 20.4 per cent or 180 cases, related specifically to the following offences: causing injury recklessly, unlawful assault, and causing injury.¹⁸ Family violence matters will be amongst this cohort of cases as specific family violence charges have not existed until recent times or have not been commonly laid against offenders. This has been in some instances a consequence of the mismatch between commonly-held definitions of domestic and family violence used by Police and Courts and definitions of family violence held by Indigenous familial and community kinship. For the record, the Victorian Indigenous Family Violence Task Force Report clearly defined family violence as:

An issue focused around a wide range of physical, emotional, sexual, social, spiritual, cultural, psychological and economic abuses that occur within families, intimate relationships, extended families, kinship networks and communities. It extends to one-on-one fighting, abuse of Indigenous community workers as well as self harm, injury and suicide.¹⁹

A CASE STUDY: *R v MORGAN*

Another insight into the Koori County Court and its engagement with family violence is via an examination of the case *R v Morgan*. The details of this case have already been discussed in this *Indigenous Law Bulletin* ('ILB') edition by Professor Marchetti. The message I wish to convey is that many Victorian Indigenous community members were unaware that family violence matters were being heard before this court until the publicity surrounding the Court of Appeal decision in *R v Morgan*.²⁰ This case was frightening for a number of reasons. These included: the level of intimidation and violence that clearly fitted the above definition of family violence; the age of the victim at the time of the offences (15 years) as contrasted with that of the offender (24 years); and that the offender, despite the victim's age and laws relating to the age of consent in Victoria, was not charged with any sexual offences which would have effectively excluded the case from being heard in the Koori Court.

Also when reviewing the court transcripts further questions arose as to what extent the court sought the advice and support of specialist family violence services or indeed child protection services in the consideration of this case. The *Magistrates' Court (Koori Court) Act 2002* provides that the court may inform itself in any way that it thinks fit,²¹ and does not set a limit on who or how it may obtain information that could ultimately be of benefit to the development of a rehabilitative plan for both the offender and the victim.²² What this case exemplified is that in many ways the Koori Court sits outside other government integrated family violence frameworks when it should be incorporated within them.

The above comment is not a new observation. In fact, the Task Force alluded to this back in 2003 when it expressed a particular interest in the relationship, if any, that may have existed between the Koori Court, and family violence strategies promoted by the various government departments.²³ This was reinforced again in 2005 when the Victorian Government announced, in responses to the Task Force report, that it intended on establishing a Family Violence Division of the Magistrates' Court ('FVD') aimed at making the court process more explicable, accessible and responsive to those experiencing family violence.²⁴ The fine print, however, made clear that whilst this new division was not specifically targeted to Indigenous communities, a core component of the 'new' FVD Project was to ensure that training, recruitment, court processes and interagency protocols would provide a court service that could respond to the nature, needs and expectations of Victoria's diverse community including the Indigenous

community.²⁵ Like the Koori Court, the FVD would be carefully evaluated to establish whether the model developed met the needs of the Indigenous Community. The evaluation would then inform future policy about the most effective way for courts to respond to family violence in Indigenous communities.²⁶ Whilst evaluations have been commissioned to assess the effectiveness of the FVD, to date these evaluations have not been made public, and information about its effectiveness or indeed its appropriateness for Indigenous victims and/or offenders as an alternative to the Koori Court in dealing with family violence matters is still to be determined.

CONCLUSION

In light of the Indigenous community's public outcry to *R v Morgan* it is time for critical reflection. The little available evidence relating to the Victorian Koori Court and its engagement with family violence indicates that the court alienates and intimidates victims – that it isn't a place or process that has thoughtfully engaged them in any meaningful way. Policy-makers may feel comfortable with this: the original intent of the court in 2002 was to respond to offenders, but nearly ten years later, attitudes have changed. I would urge the courts and policy-makers to reconnect with Indigenous communities, in particular with Indigenous victims of family violence; to hear their voices, to be inspired to reinvigorate the courts with victims' experiences and to posit safety as the centre piece.

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- 1 Victorian Indigenous Family Violence Task Force, Final Report (2003) 3.
- 2 Ibid 123.
- 3 *R v Morgan* (2010) 24 VR 230.
- 4 Victorian Department of Justice, Victorian Aboriginal Justice Agreement (Victorian Department of Justice, 2000) 25.
- 5 Ibid 43.
- 6 Ibid 45.
- 7 Victoria, Parliamentary Debates, Legislative Assembly, 22 April 2002, 1128 (Rob Hulls, Attorney General).
- 8 Ibid.
- 9 Ibid 1129.
- 10 Rudolph Kirby, 'Koori Courts a view from Victoria' (Speech delivered at the Third National Indigenous Justice CEO Forum, Brisbane, 21-22 November 2007) <http://www.indigenousjustice.gov.au/resources/2007_NIJF/12_kirby.pdf>.
- 11 Mark Harris, 'A Sentencing Conversation' Evaluation of the Koori Courts Pilot Program October 2002 – October 2004 (Department of Justice, 2006) 18.
- 12 *Magistrates' Court (Koori Court) Act 2002* s 4G (3).

13 Ibid 123.

14 Ibid.

15 Above n 7 1131.

16 Above n 12 s 4 F(1)(b)(ii).

17 It should be noted that this data only relates to cases heard in the Koori Magistrates' Court, it does not include data from the Children's Koori Court which was established under the *Children, Youth and Families Act 2005* or data from the Koori County Court established under the *County Court Amendment (Koori Court) Act 2008*.

18 Sentencing Advisory Council. *Sentencing in the Koori Court Division of the Magistrates' Court A Statistical Report* (Sentencing Advisory Council, 2010) 30.

19 Above n 1 123.

20 Norrie Ross, 'Attacker gets Koori reprieve', *Herald Sun* (Melbourne) (23 February 2010).

21 Above n 12 s 4G (3)

22 Ibid

23 Above n 1 90.

24 Department of Victorian Communities, *Victorian Government Response to the Victorian Indigenous Family Violence Task Force Final Report* (Victorian Government, 2005) 7.

25 Ibid 7 10.

26 Ibid.

Old Camp Part 5 2006

Dorsey Smith

Wood burning on plywood
610mm x 610mm

