



# **DELOITTE – FUTURE OF CRIMINAL JUSTICE POLICY ROUNDTABLE**

**Wednesday 14 September 2022  
Level 9, Grosvenor Place 225, George St Sydney**

**HIS HONOUR JUDGE PETER JOHNSTONE  
CHIEF MAGISTRATE OF NSW**

**‘KEYNOTE ADDRESS: PRIORITIES OF THE LOCAL COURT AND THE FUTURE  
OF CRIMINAL JUSTICE’**

## **INTRODUCTION**

- 1 I am honoured to have been invited to present the keynote address at the Deloitte Future of Criminal Justice Policy Round Table.<sup>1</sup>
- 2 Before I begin my presentation, I would like to acknowledge the Traditional Custodians of the land upon which we meet today, the Gadigal people of the Eora Nation, and recognise their continuing connection to land, waters and culture. I pay my respects to their Elders past and present and pay my respects to any Aboriginal or Torres Strait Islander people who are present here today.

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<sup>1</sup> I acknowledge the considerable help and valuable assistance in the preparation of this paper by my Associate, Astrid von Drehnen.

- 3 I would like to recognise the over-representation of Aboriginal and Torres Strait Islander people in the Local Court's jurisdiction and acknowledge that this over-representation is deeply intertwined with historical and ongoing experiences of intergenerational trauma, institutionalisation, and colonisation.<sup>2</sup>
- 4 The Local Court is committed to making a positive contribution to the work being done in relation to the Closing the Gap Targets.
- 5 On 6 September 2021, I was honoured to be appointed to the role of Chief Magistrate of the Local Court of NSW. In this presentation, I will distil some of the observations that I have made during my first year as Chief Magistrate of NSW in relation to the overarching purpose of the Local Court. I will then turn to outline some of the key priorities and projects of the Local Court that are relevant to this evening's discussion around the future of criminal justice in NSW.

## THE ROLE OF THE LOCAL COURT

- 6 Any consideration or discussion concerning the Local Court should be undertaken against the background of the Court's fundamental purpose.
- 7 The purpose of the Local Court is the summary disposal according to law of a very large and varied caseload in as just, fair, efficient and timely manner as possible.
- 8 The *Acts Interpretation Act 1901* (Cth) defines a court of summary jurisdiction as 'any justice of the peace, or magistrate of a State or Territory, sitting as a court of summary jurisdiction.'<sup>3</sup> The summary jurisdiction of the Local Court is comprised of three distinct jurisdictions as set out in section 9 of the *Local*

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<sup>2</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People*, Report No 133 (2018) 11.45.

<sup>3</sup> *Acts Interpretation Act 1901* (Cth) Part 2 2B.

*Court Act 2007* (NSW) (the '*Local Court Act*'), these are: a civil jurisdiction, a special jurisdiction and a criminal jurisdiction.<sup>4</sup>

- 9 Just disposal of cases requires the application of the law, that is, the common law as modified (extensively) by statute, in accordance with the rules of evidence and the relevant rules of practice and procedure.
- 10 Fair disposal involves the application of the rules of procedural fairness, the onus of proof and extending courtesy and consideration to the parties, and their legal representatives.
- 11 Efficient disposal involves the identification of, and the giving of attention to, the real issues in dispute while minimising legal technicality and formality to the extent permitted by the circumstances of the individual case. In this instance, minimising formality refers to placing an emphasis on substance rather than form where appropriate and reducing complexity through limiting the use of unnecessary 'legalese' and archaic conventions. In my view, such an approach is necessary in order to promote pragmatism and improve the accessibility of the court process which is important in light of the nature of proceedings in the Local Court and the number of matters that come before the Court which involve self-represented litigants.
- 12 Timely disposal involves the resolution of cases as quickly and as cheaply as possible balanced against the countervailing considerations already discussed.
- 13 The four principles that I have just enunciated, namely, the just, fair, efficient and timely disposal of cases are in my view, fundamental to the administration of justice in the Local Court.
- 14 In addition to these principles, the concept of therapeutic justice is critical to the jurisdiction of the Local Court.

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<sup>4</sup> *Local Court Act 2007* (NSW) s 9.

- 15 Therapeutic justice means that considerations of punishment, denunciation and deterrence should be balanced against an analysis of the root causes of offending behaviour and involves a consideration of what opportunities exist for addressing these factors through diversion, treatment and rehabilitation.
- 16 In the Local Court, therapeutic justice is currently embodied by the MERIT Program, the Traffic Offender Intervention Program and diversion under Part 2 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW). The implementation of these initiatives which reflect the principles of therapeutic justice are a unique feature of the Local Court's jurisdiction and highlight a distinction between the options available in the Local Court as a court of summary jurisdiction when compared to other jurisdictions such as those which are conferred on the District and Supreme Courts.
- 17 As I noted in the introduction to my presentation, the Local Court is committed to making a positive contribution to the work being done in relation to the Closing the Gap Targets. In addition to the fundamental purpose of the Local Court that I have just articulated, I am of the view that the Local Court also has a role to play in addressing the over-representation of First Nations people in the justice system and in ameliorating structural inequalities experienced by First Nations people.

## **PRIORITIES AND PROJECTS**

- 18 Broadly speaking, the current priorities of the Local Court which intersect with the criminal justice system can be categorised into three key areas. These are as follows:
- (1) The reduction of the backlog of hearings due to Covid-19
  - (2) Innovation and Improvement
  - (3) Expansion of therapeutic and restorative justice initiatives

- 19 I would also like to note that the Local Court will commence work on preparing a Strategic Plan in October of this year. The purpose of creating a Strategic Plan is to develop an overarching direction for the jurisdiction and outline the priorities for the Local Court over the next three years.
- 20 I will now outline some of the key projects of the Local Court which are relevant to tonight's discussion in more detail.

## **EXPANDING THERAPEUTIC AND RESTORATIVE JUSTICE INITIATIVES**

- 21 The concepts of diversion and rehabilitation should inform the development of any future criminal justice policy as it relates to the jurisdiction of the Local Court.
- 22 In my view, expanding the therapeutic and restorative justice options which are available in the Local Court's jurisdiction is critical to improving service delivery and outcomes for those involved in proceedings including for defendants, victims and complainants. The two main projects that the Chief Magistrate's Office are currently working to progress in this area are the expansion of Circle Sentencing and the expansion of the MERIT Program.

### **Expansion of the Circle Sentencing Program**

- 23 Since being appointed Chief Magistrate in September 2021, I have introduced various measures designed to reduce the over-representation of First Nations Peoples in the Local Court. These strategies form part of an essential paradigm shift in the way that the Court engages with First Nations people.
- 24 I have convened a First Nations Committee chaired by his Honour Magistrate Mark Douglass. This committee comprises experienced magistrates including his Honour Magistrate Doug Dick who was influential in establishing Circle Sentencing in NSW. I am hoping to revitalise and expand Circle Sentencing, a program that has been impacted by the Covid-19 pandemic.

- 25 Circle Sentencing is a restorative justice approach and an alternative sentencing option for Aboriginal defendants who meet a specific set of criteria.<sup>5</sup> Circle Sentencing involves the full sentencing power of a traditional court, and importantly, involves local members of the Aboriginal community in the decision-making processes.<sup>6</sup> Usually, during Circle Sentencing, the presiding Magistrate works with a group of Aboriginal Elders and respected community members, the victim and their representatives, and the defendant and their family to determine an appropriate sentence.<sup>7</sup>
- 26 The objectives of the Circle Sentencing Program are set out in Clause 39 of the *Criminal Procedure Regulation 2017* (NSW) and are as follows:
- (a) to include members of Aboriginal communities in the sentencing process,
  - (b) to increase the confidence of Aboriginal communities in the sentencing process,
  - (c) to reduce barriers between Aboriginal communities and the courts,
  - (d) to provide more appropriate sentencing options for Aboriginal defendants,
  - (e) to provide effective support to victims of offences by Aboriginal defendants,
  - (f) to provide for the greater participation of Aboriginal defendants and their victims in the sentencing process,

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<sup>5</sup> Steve Yeong and Elizabeth Moore, Circle Sentencing, Incarceration and Recidivism (BOCSAR Crime and Justice Bulletin No 226, April 2020) 2 < <https://www.bocsar.nsw.gov.au/Publications/CJB/2020-Report-Circle-Sentencing-incarceration-and-recidivism-CJB226.pdf>>.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

(g) to increase the awareness of Aboriginal defendants of the consequences of their offences on their victims and the Aboriginal communities to which they belong,

(h) to reduce recidivism in Aboriginal communities.<sup>8</sup>

27 In 2020, BOCSAR conducted an evaluation of the Circle Sentencing Program, which aimed to investigate the relationship between Circle Sentencing and the likelihood of incarceration and recidivism.<sup>9</sup> This study examined the probability of imprisonment, the probability of at least one reoffence within 12 months and the number of days between sentencing and the offender's first reoffence for those who participated in the Circle Sentencing process.<sup>10</sup>

28 The study showed positive results, and found that when comparing Aboriginal defendants sentenced using traditional sentencing methods, to those who participated in the Circle Sentencing process, defendants who participated in Circle Sentencing:

- Are 9.3 percentage points less likely to receive a prison sentence.
- Are 3.9 percentage points less likely to reoffend within 12 months; and,
- Take 55 days longer to reoffend if they do.<sup>11</sup>

29 Whilst the BOCSAR Evaluation of the Circle Sentencing Program notes that the results of the study should be treated with caution due to limitations in the

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<sup>8</sup> *Criminal Procedure Regulation 2017* (NSW), cl 39.

<sup>9</sup> Steve Yeong and Elizabeth Moore (n 5), 1.

<sup>10</sup> NSW Bureau of Crime Statistics and Research, *New Circle Sentencing Evaluation Find Positive Results* (Web Page, 26 May 2020)

<[<sup>11</sup> \*Ibid\*; Steve Yeong and Elizabeth Moore \(n 5\), 1.](https://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2020/mr-circle-sentencing-cjb226.aspx#:~:text=New%20Circle%20Sentencing%20Evaluation%20finds%20positive%20results&text=A%20new%20study%20by%20the,sentenced%20in%20the%20traditional%20way.>.</a></p></div><div data-bbox=)

available data, there are additional qualitative benefits of Circle Sentencing which must be considered.<sup>12</sup>

30 The value of Circle Sentencing was recently discussed by Vanessa Edwige, a Ngarabal woman and registered senior psychologist, and Dr Paul Gray, a Wiradjuri man and Associate Professor at the University of Technology Sydney Jumbunna Institute of Indigenous Education and Research in their expert report the 'Significance of Culture to Wellbeing, Healing and Rehabilitation' that was commissioned by the Bugmy Bar Book.

31 Significantly, in this report, the authors articulated that:

*'Circle Sentencing facilitates culturally appropriate ways of working with Aboriginal people to reduce the likelihood of reoffending. The process reaffirms the importance of Elders within communities. Aboriginal offenders are sentenced via a discussion with local Elders and family. Seeing Aboriginal Elders guiding decisions in the context of sentencing is powerful and highlights the importance of our cultural practices. It reduces the impact of cultural bias and this has a positive impact on accountability.'*<sup>13</sup>

32 I am strongly supportive of the expansion of Circle Sentencing and am committed to exploring culturally appropriate ways of involving First Nations community members in the decision-making processes of the Local Court as in my view, this is an important part of addressing the over-representation of First Nations people in the justice system.

33 I was very pleased to hear of the announcement made by the Attorney General in July of this year relating to an investment of \$4.2 million to expand the Local Court's Circle Sentencing Program from 12 to 20 high priority courts

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<sup>12</sup> Steve Yeong and Elizabeth Moore (n 5), 4, 11.

<sup>13</sup> Vanessa Edwige and Dr Paul Gray, 'Significance of Culture to Wellbeing, Healing and Rehabilitation' (2021) Bugmy Bar Book Project Committee Expert Report, 33 <[https://www.publicdefenders.nsw.gov.au/Pages/public\\_defenders\\_research/bar-book/culture-report.aspx](https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book/culture-report.aspx)>.



as a part of a \$20 million investment in Aboriginal justice initiatives.<sup>14</sup> The Chief Magistrate's Office and the Local Court's First Nations Committee are working collaboratively with the Aboriginal Services Unit at DCJ to progress this project.

### **Expansion of the MERIT Program**

- 34 The Magistrates Early Referral into Treatment program (MERIT) is a voluntary pre-plea 12 week program that operates in the Local Court for adults who have issues related to their alcohol and other drug use.<sup>15</sup> Through providing access to a wide range of alcohol and other drug treatment rehabilitation services, MERIT aims to assist defendants to address the underlying causes of drug-related offending with a view to improving health and social outcomes, reducing recidivism and preventing individuals from becoming enmeshed in the justice system.<sup>16</sup>
- 35 The MERIT Program was established in 2000 is currently available at 62 of the 137 Local Courts in NSW. However, it is important to note that only eight of the MERIT sites, namely, Bathurst, Broken Hill, Coffs Harbour, Dubbo, Orange, Wellington and Wilcannia currently offer Alcohol MERIT which focusses on assisting participants in circumstances where alcohol is the principal drug of concern.<sup>17</sup>
- 36 In my view, the MERIT should be expanded to ensure equitable access to this valuable program is available across the state. On 30 June 2022, I wrote to the Attorney General to express my support for expanding the MERIT program, including Alcohol MERIT, to all of the 137 Local Court sites across

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<sup>14</sup> NSW Government, *\$20 million boost for Aboriginal justice initiatives* (Web Page, 18 July 2022) <[>.](https://www.dcj.nsw.gov.au/news-and-media/media-releases/2022/-20-million-boost-for-aboriginal-justice-initiatives.html#:~:text=Circle%20Sentencing%20is%20an%20alternative,to%20determine%20an%20appropriate%20sentence.>)

<sup>15</sup> Local Court of NSW, *The Magistrates Early Referral into Treatment (MERIT) Program* (Web Page, 8 April 2021) <<https://localcourt.nsw.gov.au/local-court/sentencing-orders-and-appeals/sentencing-in-criminal-cases/diversion-programs/the-merit-program.html>>.

<sup>16</sup> *Ibid.*

<sup>17</sup> The Local Court of NSW, *2021 Annual Review* (Annual Review, 2021), 38.

NSW in line with Recommendation 13 handed down by the Special Commission of Inquiry into the Drug 'Ice' (the 'Ice Inquiry').<sup>18</sup>

- 37 I am also supportive of a specialised MERIT Program being developed for the Children's Court jurisdiction, as issues relating to alcohol and drug use are not unique to adults. In my view, such an approach would be beneficial as it would enable the Children's Court to better fulfil its mandate of rehabilitation, and importantly, would provide greater access to vital support services for the children and young people who come into contact with the justice system as a result of issues related to their alcohol and other drug use.

## **INNOVATION AND IMPROVEMENT**

- 38 Following my appointment as Chief Magistrate last year, I established various new Local Court Committees, including, the Innovations Committee, the Legislative Reform Committee, the First Nations Committee, the Well-being Committee and the Family Violence Committee for the purposes of advancing a program of improvement and innovation in the Local Court.
- 39 Today I will discuss three key proposals relating to innovation and improvement in the criminal justice sphere. These are: the creation of a 'Fourth Tier', promoting an increase in the utilisation of technology and improving the disposal of Domestic and Family Violence (DFV) matters.

### **The Fourth Tier**

- 40 Each year the Local Court's workload increases in terms of complexity, volume and jurisdiction. The increase in the workload of the Local Court can be attributed a multitude of factors including legislative reform and changes, population growth, an increase in policing and police resourcing and an

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<sup>18</sup> State of NSW, Special Commission of Inquiry into the Drug 'Ice' *Report of the Special Commission of Inquiry into crystal methamphetamine and other methamphetamine-type stimulants* (Report ¼, 28 January 2020), lix < <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/The-Drug-ice-1546/02-Report-Volume-1a.pdf>>.

increase in the number of matters which are transferred from the District Court to the Local Court.

- 41 This growth in the Court's workload and the increase in the complexity of the matters that come before the Court have not always been met with a proportional increase in the number of judicial officers (together with the necessary auxiliary supporting court staff).
- 42 In light of these considerations, the Local Court must find a way to insulate itself and its judicial officers from the pressures of the steady increase to both its jurisdiction and caseload, whilst ensuring access to justice is delivered in a fair and timely way.
- 43 I therefore propose that a paradigm shift is required to reorient judicial resources, namely, the creation of a 'Fourth Tier' of the justice system. I suggest that this will focus valuable and expensive judicial resources on matters that exclusively require judicial decision making.
- 44 In my view, such a shift is also essential in order to safeguard the well-being of the judicial officers of the Local Court. I will discuss the topic of judicial well-being in more detail later on in this presentation.
- 45 I outlined my proposal for the creation of a 'Fourth Tier' of the NSW justice system in my foreword to the 2021 Local Court Annual Review which was published in June of this year. In this foreword, I articulated that:

*"I have asked the Government to consider a review of the jurisdiction of the Local Court, with the goal of identifying what kinds of quasi-judicial matters may be delegated to appropriate quasi-judicial roles. Traffic offences, many of which are strict liability offences and licence appeals, occupy a significant amount of Court resources, and I intend to reorient the work and attention of Local Court magistrates away from acting as an arm of government administration.*

*It is my strong view that the expertise of the judicial officers in this jurisdiction should be focused on decision-making, not administration.*

*Registrars and assessors should be entrusted to make decisions where it is appropriate for a function to be delegated.”<sup>19</sup>*

## **Utilisation of Technology**

- 46 Promoting an increase in the utilisation and availability of technology is interconnected with my proposal for the creation of a ‘Fourth Tier’ of the NSW justice system; and, is central to increasing efficiency and accessibility in the Local Court’s jurisdiction.
- 47 An example of a recent innovation in this area is the Virtual Traffic Court Pilot conducted by Sutherland Local Court which aimed to ameliorate hearing backlogs by dealing with defended traffic matters using an online platform.<sup>20</sup> This pilot has yielded positive preliminary results with the pilot achieving its aim of reducing time listed in the court’s hearing diary.<sup>21</sup> Importantly, participants also reported that they felt satisfied with the online court process.<sup>22</sup> This pilot was conducted using a very small sample size, and I am of the view that it would be beneficial to explore and evaluate this concept on a larger scale.
- 48 Another important issue which I am keen to see progress, and which I am advocating for, is the roll out of AVL facilities across New South Wales as this would increase timely access to justice for those living in regional areas by enabling the Court to deal with a greater number of matters remotely if appropriate when considering the circumstances of the case.

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<sup>19</sup> The Local Court of NSW (n 17), 3.

<sup>20</sup> Virtual Traffic Court Pilot Brief Summary.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

## Improving Practices and Procedures in DFV Matters

- 49 One of the key priorities and focus areas for the Local Court is enhancing the Court's practices and procedures to improve the way in which it deals with DFV matters.
- 50 Progressing this priority is imperative as anecdotal evidence suggests that DFV matters make up around 50% of the Court's overall hearing caseload. Additionally, DFV matters, which are particularly time sensitive, have been impacted by delays which have occurred as a result of the Covid-19 pandemic. Addressing this issue is particularly pertinent in light of a 2020 study conducted by the Australian Institute of Criminology which found that the Covid-19 Pandemic coincided with the onset or escalation of family violence and abuse experienced by women.<sup>23</sup>
- 51 To further this objective, I established the Local Court Family Violence Committee which is convened by her Honour Deputy Chief Magistrate Freund to whom I have allocated responsibility for the area of domestic and family violence within the Local Court. The creation of the Family Violence Committee is significant as it represents a cultural shift in terms of the way in which the Court's DFV caseload is approached and demonstrates that the Local Court is committed to taking the issue of domestic and family violence seriously.
- 52 The Local Court meets regularly with stakeholders including DVNSW, NSW Police and Legal Aid NSW and is currently in the early stages of developing a DFV Case Management Plan with a view to ensuring that DFV matters are dealt with in a timely, culturally respectful and trauma-informed way.

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<sup>23</sup> Hayley Boxall, Anthony Morgan and Rick Brown, *The prevalence of domestic violence among women during the Covid-19 pandemic* (Statistical Bulletin 28, July 2020) Australian Institute of Criminology, 1  
< [https://www.aic.gov.au/sites/default/files/2020/07/sb28\\_prevalence\\_of\\_domestic\\_violence\\_among\\_women\\_during\\_covid-19\\_pandemic.pdf](https://www.aic.gov.au/sites/default/files/2020/07/sb28_prevalence_of_domestic_violence_among_women_during_covid-19_pandemic.pdf)>.

- 53 I am of the view that there is merit in undertaking a high-level review of how family and domestic violence disputes are dealt with in the justice system; with a view to developing a system that better integrates the various agencies involved, reduces duplication across jurisdictions and which is centred on meeting the needs of victim-survivors while holding perpetrators of DFV to account.
- 54 Another issue in the DFV space which I believe could benefit from further consideration is the development of a mechanism which would provide a voice to victim-survivors in DFV proceedings. Currently, complainants in DFV matters are not parties to the court proceedings and, consequently, do not have the same legal obligations and entitlements to participate as those to whom party status is conferred. This means in practical terms, that complainants are not legally represented in DFV cases, and as a result, have limited agency throughout the court process which can further exacerbate pre-existing power imbalances.
- 55 I would be supportive of further exploring the idea of implementing a model of legal representation for complainants in DFV proceedings such as that of the best interest model of representation which operates in the Children's Court of NSW. In my view, such an approach could assist to empower complainants to meaningfully participate in proceedings which ultimately have a direct and significant impact on their lives.

## **CONCLUSION**

- 56 Thank you for inviting me to present today as a guest speaker at this event. I hope this presentation has been useful in outlining some of the Court's priorities which are relevant to the criminal justice sphere.
- 57 I look forward to working with you all in a collaborative way and thank you all for your hard work, commitment and dedication to improving the NSW justice system.