ABORIGINAL PEOPLE AND THE COURTS

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Aboriginal Assistants to the Courts

This is a proposal which attempts to provide a scheme for the trial of Aboriginal people in criminal proceedings. There should be created a position, designated "Aboriginal Assistant to the Court"; "court" should be defined to mean Magistrates' Court, District Court, Supreme Court and the Court of Criminal Appeal. The proposals are confined to Queensland, but they may find favour with the law makers and be translated to a national scale.

One of the major problems confronting the administration of criminal justice in Queensland is physical. It is the tyranny of distance. The most convenient division of the state, for present purposes, would be the adoption of the existing Magistrates' Courts Districts.

The Attorney-General should appoint an advisory committee of three for each district. Two of the three should be Aboriginal people of good standing in their community. The third should be a non-Aboriginal, preferably a cleric or a social worker. The composition of the committee, once appointed, should be published. The term of appointment should be no more than three years.

The prime function of the committee is to advise the Attorney-General on suitable persons for appointment to the position of Aboriginal Assistant to the Court. Only Aboriginal people should be recommended to the Attorney-General. The qualifying criteria for recommending a particular person should include:

n His/her good training in the community at large, and, in particular, the Aboriginal community of that district. It is of paramount importance that he/she should have the confidence and respect of the Aboriginal community in which he/she lives;
n His/her knowledge and appreciation of Aboriginal customary law and practice and all, or most, of its ramifications;

n Literacy (although not essential);

n A willingness to serve on a paid part-time basis as required as an assistant to the court involving the trial or sentence of an Aboriginal person.

A list of five suitable names should be furnished to the Attorney-General by the district advisory committee. The Attorney-General should appoint three as Aboriginal assistants to the court of the district.

In every case involving the trial or sentence of an Aboriginal person, at least one Aboriginal assistant to the court should be present in court during the whole of the hearing of an Aboriginal criminal litigant's case.

The Aboriginal assistant should not sit on the bench unless invited by the magistrate or the judge for a particular purpose. He/she should sit below the judge in the position presently occupied by the judge's associate or clerk.

An Aboriginal assistant's function in court should include:

n explaining to the litigant the nature of proceedings and his/her legal and constitutional rights. This should, of course, only be necessary if the Aboriginal litigant is not legally assisted. Nowadays, almost without exception, in the District and Supreme Courts, Aboriginal people are legally represented pursuant to a Legal Aid Scheme;

n Helping litigants express themselves in a way which is both fair to them and intelligible to the court (See, in this connection, the remarks made by Wells J. in the Queen v Williams (1976) SASRI, at pp. 6 and 7);

n Taking his/her own notes on evidence;

n Listening to the evidence with particular regard to the discovery of possible causes of the offence with which the litigant is charged. These may be directly or indirectly referable to Aboriginal customary law, practice or attitudes;

n With the leave of the judge, putting questions to witnesses, including the accused, immediately relevant to customary law. These questions and answers will constitute a part of the record;

n In the trial or sentence matter in the Magistrate's Court, retiring with the magistrate before he/she gives a decision and advising on any aspect of customary law relevant to the case. A note of such advice should be taken and should constitute an integral part of the record of proceedings;

n In the trial matter in the District Court or Supreme court, retiring with the judge before summing up and advising the judge on any aspect of customary law or practice relevant to the case. A note of such advice should be taken and should constitute an integral part of the record of proceedings;
n In a sentence matter in the District Court or Supreme Court, retiring with the judge before passing of sentence, and advising the judge on any aspect of Aboriginal customary law or practice relevant to the case. A note of such advice should be taken and should constitute part of the record of proceedings;

n In an appeal matter before the Court of Criminal Appeal, if invited, retiring with the Court before it pronounces judgment and advising the Court on any aspect of Aboriginal customary law or practice affecting the case, whether on conviction or sentence, or both.

The foregoing is not intended to diminish the right of either party to litigation, in an appropriate case, to call expert evidence on Aboriginal customary law or practice. Nor is it intended to preclude the judge, in a suitable case, from calling an expert on customary law to assist in deliberations. Presumably anthropologists will be called upon from time to time for this purpose.

A note of the assistant's advice to the judge should be made. The judge may accept or reject the advice. The judge should state in open court, at the appropriate time, whether advice has been given, and whether it is accepted or rejected and the reasons. Generally, such advice will go in mitigation of sentence. Where the advice goes to substantive issues, it is probable in most cases, that other expert evidence will vary from case to case, but presumably, in many cases, the evidence will be given by anthropologists who have done considerable field work.

It is realised that in many instances there will be no element of Aboriginal customary law involved. However, the visible presence in court of an Aboriginal assistant, with the powers above, would be tangible evidence to the Aboriginal people of their own kin participating in the judicial process of the law. Such visible participation should inspire greater respect and confidence in the criminal justice system as it impinges upon Aboriginal people.

The scheme the author has devised is not put forward as a panacea. However, it may amongst other things, have at least the incidental and good effect, of reducing the painful hostility of the Aboriginal people to the established system.

It may be impracticable to implement the proposed scheme in its entirety in that court. Some accommodation or modification to the peculiar requirements of the Magistrate's Court may be necessary.

Here we have the visible presence of a person who, by law, is entitled to advise the judge.

This will require a period of experimentation. In Queensland, if the scheme is not to be implemented as a whole, towns like Mt Isa and Cairns may be good starting points, where a large proportion of the criminal litigants comprise Aboriginal people. Improvements or modifications can be made in the light of experience.

**Legal Representation—Legal Aid System**

The whole concept of the Legal Aid system in Queensland concerning Aboriginal representation needs to be addressed.
The current system is inadequate and has little input or involvement by Aboriginal Legal Service representatives, acting for or on behalf of an Aboriginal person before the courts. The Aboriginal Legal Service engages a solicitor or firm of solicitors to act on behalf of Aboriginal people before the courts. These firms of solicitors act for Aboriginal people mainly in the Magistrates' Courts on minor matters, such as remands, pleas of guilty and committal proceedings on minor offences. For serious offences the Public Offenders Office would take over the case and act for the accused at the committal and subsequently at the trial.

The major problems with this system are that there is no Aboriginal involvement or input in these cases at the committal proceedings or at the trial. There is also the problem of the Public Defenders Office engaging a Junior Counsel less experienced in Criminal Law.

There are two proposals which may resolve this problem. The first is that the firm of solicitors engaged by the Aboriginal Legal Service could act as agents for the Public Defenders office. The Public Defender would then brief the matter back to the firm of solicitors engaged by the Aboriginal Legal Aid Service and this would enable the Aboriginal Legal Service to be involved throughout the case.

The other alternative is that Queensland should be brought into line with other States where the Aboriginal Legal Services may employ barristers to work in their offices. This would enable these barristers to represent Aboriginal people throughout the entire legal proceedings.