

The Reign of the Kangaroo Court?

Exposing Deficient Criminal Process in Australian Aboriginal Communities: Bush Court

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Most of Australia's Aboriginal people live in communities far from urban population centers. 'Bush Court' is the name given to the justice system administered to Australian Aboriginal people by a magistrate who circuits such communities intermittently. As a result of the way Bush Courts currently operate in remote regions of Australia, excesses of justice administration go unchecked. This means many Indigenous Australians are subject to a sub-class legal system. Bush Courts effectively only exercise criminal jurisdiction and these inequities take the form of lack of due process.

The sources of these problems are diverse, and include poor treatment of Aboriginal people by the Bush Court, the lack of interpreters, poor judicial education and the constraints under which legal counsel for the

Aboriginal people must work. These sources are examined in detail in this article. The paper also reveals deficiencies that still exist despite government declarations that they have now 'fixed the problem'.

The author spent six months field-researching Bush Courts as they operate in the Northern Territory and Western Australia. This article details the chasm between justice delivery in Australian town-courts and Bush Courts. This research may answer some questions regarding the hugely disproportionate Indigenous over-representation in the Australian criminal justice system.

I INTRODUCTION



Today, Indigenous people comprise 2.1 percent of the total Australian population,¹ yet they constitute 20 percent of the Australian imprisoned

1. See Chris Cunneen & David McDonald, *Keeping Aboriginal and Torres Strait Islander People out of Custody 1997: An Evaluation of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (Canberra: Aboriginal and Torres Strait Islander Commission, 1997).

population.² In Western Australia, Indigenous people are 22.7 times more likely to be incarcerated than non-Indigenous people,³ and their youth are 48 times more likely to be 'locked up' than non-Indigenous youth.⁴ Over-representation of Indigenous people in the Australian Criminal Justice system prevails in all states of Australia.⁵

Traditionally, both federal and state governments have displaced the question on to the Indigenous people themselves, implying that there must be something about Indigenous peoples backgrounds, schooling or culture that lends itself to criminality. It is only in the last 20 years that we have begun to look for the answer within the Australian policing system. However, the way our court system is administered to the Australian Indigenous population has not been considered until now.

Unlike the vast majority of Australia's non-indigenous population, who primarily occupy the major cities on the country's southeast coast, the bulk of Australia's Indigenous population live in isolated communities spread throughout the country. The communities are usually hundreds of kilometers away from other towns and other communities, throughout vast desert terrain. The Aboriginal people in these communities tend to live by their traditional culture, and speak far less English than their urban counterparts. So how do members of these communities go to court when they become involved with the law? How do they enforce their legal rights? The answer is the Bush Court.

Bush Court is a circuit court used to administer Australian law. The potential for miscarriages of justice exists at Bush Court because effectively, the rest of the Australian population is not watching. In preparing this paper, the research uncovered human rights abuses in the form of deficient criminal justice procedure in Aboriginal communities.

Due to geographical location, Aboriginal peoples are forced to deal with all legal matters via Bush Court process. Thus, if you are an Aboriginal community member, suffering these abuses is almost inescapable. Because community members are mostly unaware that they are not receiving the same sort of justice as in town courts, and because they are not alerted to avenues of complaint, there are seldom appeals made against the substandard justice administered on their behalf. Given that the Australian

2. Greg Gardiner, *Indigenous People and Criminal Justice in Victoria: Alleged Offenders and Rates of Over-Representation in the 1990s*, Criminal Justice Monograph (Melbourne: Centre for Australian Indigenous Studies, 2001).

3. *Responding to Custody Levels—Continuing Evidence of Indigenous Australians' Over-Representation in Custody*, online: Indigenous Law Resources, Reconciliation and Social Justice Library, Australian Legal Information Institute <<http://www.austlii.edu.au/au/other/IndigLRes/car/1993/6/4.html>> (date accessed 6 November 2001).

4. *Ibid.*

5. Cuneen & McDonald, *supra* note 1, c. 2 at 1.

public is largely ignorant of Bush Court and its deficiencies, there has been virtually no reform of the Bush Court system.

[I]t is impossible to devote as much time to each client as is desirable. This is compounded by the logistical difficulties of working from footpaths, on the side of dirt roads and beside rivers. Of course, we cannot carry every case, every textbook or even every statute to court. We do not have faxes or telephones. We do not speak the language. There is no opportunity to obtain a second opinion and the single lawyer will have to deal with every matter from swearing to murder committals.⁶ (North Australia Aboriginal Legal Aid Service (NAALAS) lawyer: a typical Bush Court day).

Despite the fact that Australia is a developed nation with a sophisticated legal system, aspects of legal representation and court process the Western world considers integral to justice delivery are effectively turned on their heads at Bush Court. If the manner in which legal process is executed by the Bush Court were to proceed in city courts, it would likely cause wide-scale public outcry.

The research followed the Bush Court procedure in the locations of its widest use: Northern Territory ("NT") and Western Australia ("WA"). Throughout a six-month period beginning July 2000, the author attended eight Bush Courts,⁷ in addition to observing Aboriginal Legal Service preparation and instruction taking for court day. Town and city courts⁸ that circulated the circuiting magistrates were observed for the purpose of comparing qualitative aspects and the type of justice dispensed between city courts and the Bush Court. Interviews and objective data have been collated to reinforce the author's observations.

A Why a Critique of the Bush Court System is Long Overdue

Using just the NT as an example, between 75 and 85 per cent of the incarcerated population at any one time is of Aboriginal descent.⁹ However, the Aboriginal proportion of the NT's total population in 1996-97 was 28.5

6. Interview with NAALAS Bush Court lawyer, Darwin, 8 August 2000 [copy on file with author].

7. Jabiru (Kakadu), Nguyu (Tiwi), Wadeye (Port Keats), Daly River, Oenpelli (Arnhem Land), Hermannsburg, Yuendumu and Marble Bar (north-western WA).

8. Darwin, Alice Springs, Port Hedland. Melbourne Magistrate's Court was visited for the purpose of comparing the Magistrate's Court of a *major* city, this type of Court representative of that which services the majority of Australia's white population.

9. NT Government, *Implementation Report on the Recommendations of the Royal Commission into Aboriginal Deaths in Custody 1994-1995* (Darwin: Northern Territory Government Publications, 1994-1995) c. 13 at 1 [hereinafter *Implementation Report 1994-1995*].

per cent.¹⁰ These statistics have aroused high media and political profiles, precipitating *The Royal Commission into Aboriginal Deaths in Custody Report* [“*RCIADIC Report*”].¹¹ To date, no literature assessing the Bush Court system appears to exist. However, the Royal Commission has flagged various deficiencies in remote community court process as instrumental in perpetuating the problems subject to its recommendations.¹²

60 per cent of the quoted Aboriginal population lives in remote communities.¹³ It follows, then, that 17.1 per cent of the entire NT population is subject to the deficient Bush Court process, as opposed to the kind of legal process that would be administered by city courts. Worse still, the burdens imposed on the Bush Court appear to be worsening. There is only one legal defence service provider to these Indigenous communities: Aboriginal Legal Services (“ALS”), and the demands by Aboriginal persons for legal assistance from them increased by 25 per cent in the five years between 1993 and 1998.¹⁴

“I dread that Bush Court just becomes this horrendous sausage factory,”¹⁵ comments one Central Australian Aboriginal Legal Aid Service (“CAALAS”) lawyer. This is an inevitable fear given the numerous constraints suffered by lawyers trying to obtain sufficient instructions and time in which to present their client’s case at Bush Court. In conducting the research upon which the following paper is based, it was frequently observed that as a Bush Court day progressed and the impossibility of completing the targeted caseload was realized, each case was increasingly hurried through the process by the court.

The consequences of such hasty justice administration can be far-reaching. For instance, it is highly likely that a defendant could enter the wrong plea, because time spent with their ALS lawyer was insufficient to reveal the complete fact scenario required for correct advice. Arguably then,

10. NT Government, *The Royal Commission into Aboriginal Deaths in Custody, NT Government Implementation Report 1997: A Thematic Report, Introduction and Statistical Information* (Darwin: Northern Territory Government Publications, 1997) at 1 [hereinafter *Implementation Report 1996-1997*].

11. Australian Royal Commission into Aboriginal Deaths in Custody, *The Royal Commission into Aboriginal Deaths in Custody Report* (Canberra: Australian Royal Commission into Aboriginal Deaths in Custody, 1991) [hereinafter *RCIADIC Report*].

12. See recommendations 96-104, *ibid.*

13. *Ibid.*

14. Senator John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, Statement (12 May 1998), in *Addressing Priorities in Indigenous Affairs* (Canberra: Australian Government Publishing Service, 1998) at 47.

15. Discussion with CAALAS lawyer, Yuendumu Bush Court Instruction Day, Yuendumu, 30 August 2000 [copy on file with author]. Yuendumu is an Aboriginal Community located in the Tanami Desert, northwest of Alice Springs.

a proportion of the Indigenous people processed by the Bush Court system are going to jail when they should not.¹⁶

B Research Methods

The research for this paper was conducted strictly in accordance with Monash University Human Ethics Guidelines. Consent to publication has been obtained from the parties whose opinions and quotes have been used in this article. The research comprises both qualitative and quantitative components.

Qualitative Study Undertaken

Qualitative analysis has largely been derived from the author's personal observations. Both Bush Courts and town courts were attended for the purpose of distinguishing: methods of dealing with defendants by magistrates; language barriers and level of understanding; court set-up; demeanour of defendants (*e.g.*, relative intimidation, emotional states); prosecutorial methods; and state of cooperation between defence lawyers and police. To verify observations and to cross-reference opinions, interviews with parties at different ends of the process (for example prosecutor, lawyer, magistrate and court liaison officer (CLO)) were conducted regarding the same issues. Where possible, this was then referenced against any published guidelines or legislation dealing with the issue. Often this resulted in a qualitative comparison between the published policy approach and the practice in reality.

Additionally, client interviews with defendants were observed at all Bush Courts and were compared to client interviews by duty lawyers in town courts. Where possible, Aboriginal community members were sought regarding their opinions, but several factors made this difficult. The author lacks the language skills necessary to communicate with non-English speakers, and there were often no interpreters available. Further, the concept of audio and/or audio-visual recording contravenes cultural rules in most traditional Aboriginal areas. Lastly, as a result of Australia's violent colonial history, Indigenous people, particularly in the more remote regions, are

16. This is a harrowing fact considering the recent acknowledgment by the United Nations' Committee Against Torture of some claims by Aboriginal people that they are being tortured in violent and overcrowded prisons. UN, United Nations' Committee Against Torture, *Concluding Observations of the United Nations Committee Against Torture to Australian Government* (22 November 2000) [unpublished]. See "UN Body Criticizes Jail System" *The Advertiser* [Metropolitan edition, South Australia] (23 November 2000) 7.

suspicious of white Australians, especially those with legal affiliations and those conducting research. Most previous interactions with people like police, judges and the anthropologists who conducted most of the early research resulted in reports and legislation that worked to the detriment of Australia's Indigenous people.

Acknowledging the Nature of Qualitative Research

Because the entire Bush Court process is neither documented nor a recognized 'legal institution', personally observing its operation is pivotal to ascertaining data. Further, the quality of justice delivered is not something that can be *purely* quantitatively analyzed via statistics or simply by assessing court reports or transcripts.¹⁷ Attempting to document justice-quality is undoubtedly limited by the values of the observer: however, to overcome this limitation, the perspectives of all participants in the process have been sought. To gain a holistic view of how events prior to a Bush Court sitting and the sitting itself affect all parties, it would seem the only method available is to be an outsider to the process and observe the preparations of the different participants (*i.e.* lawyers, clients, magistrates, police, CLOs). Observational data is also essential because, in conjunction with the statistics obtained, it is one of the only methods of assessing the veracity of reforms or procedures alleged to exist by the government and its agencies. Nonetheless, the author acknowledges that limitations exist upon the scope of any qualitative research and therefore, results deriving from purely qualitative analysis should not be considered absolutely conclusive.

Quantitative Study Undertaken

Of the eight Bush Courts and four town courts around the Northern Territory, Western Australia and Victoria attended by the author, statistical records were taken and evaluated regarding the following: daily caseload, number of adjournments, number of 'no-appearances', guilty pleas, scheduled hearings vis-à-vis hearings actually conducted, assault charges, imprisonments, female defendants versus male defendants, awards of Community Based Orders, domestic violence matters, number of juvenile cases, number of conflicts of interest, cases adjourned for lack of interpreter, driving offences, frequency with which court is held, number of attending lawyers and number of attending CLOs.

17. In fact, certain ALS lawyers have mentioned that when requesting copies of Bush Court transcripts to impugn judicial conduct, the statements or comments in question appear to have been 'eliminated'.

In addition, where there were published statistics available on any particular matter, they were cross-referenced. However, given that no research has yet been conducted on Bush Courts, very little information was available. Budget expenditure of particular governments was, however, obtained and analyzed with respect to various Bush Court expenses. Unfortunately, not all issues quantitatively analyzed afforded the opportunity of discussion in the present paper.

II LACK OF ANY DISCERNIBLE DISCOURSE REGARDING THE BUSH COURT BY AUSTRALIAN MEDIA AND GOVERNMENT

Despite the findings of this research and the long history of shortcomings in Bush Court procedure, there has no discernible criticism of the Bush Courts to date. It has not been an issue covered by any press releases, public statements or any media attention whatsoever. In fact, during the author's attempt to bring the issue to the fore in Australia, it became apparent that virtually all politicians and lawyers encountered had not even heard the term 'Bush Court'. It would seem the Australian public is predominantly unaware of its existence and the only people familiar with the concept are the personnel directly involved in it.

Three government reports have alluded to the existence of Bush Courts in their inquiries regarding Aboriginal interaction with our legal system, but none of the reports discuss the Bush Court system *per se*, or raise it as a specific issue. The reports simply point out that certain problems are accentuated in the remote community setting. The first report, a 1996 joint inquiry by the Human Rights and Equal Opportunities Commission ("HREOC") and the Australian Law Reform Commission ("ALRC"), entitled *Speaking for Ourselves, Children and the Legal Process*, in its criticism of the NT's lack of specialized children's courts (which are possessed by every other state in Australia), objects to the hearing of juvenile crime matters by a "generalist magistracy sitting at a children's court because of a shortage of resources" in remote areas of the NT.¹⁸ The second report, by the Queensland Criminal Justice Commission, entitled *Aboriginal Witnesses in Queensland Criminal Courts*, states that "feelings of intimidation, isolation and disorientation are common among Aboriginal people who give evidence in our courts," that the courtroom environment is a cause of this, and that this applies more particularly in remote communities

18. Australian Law Reform Commission & Human Rights and Equal Opportunities Commission, *Seen and Heard: Priority for Children in the Legal Process (Report 84)* (Canberra: Australian Law Reform Commission, 1997) at para. 18.192.

where the courtroom is most often inside the police station.¹⁹ Finally, the RCIADIC commentary on its recommendations discusses particular problems, adding that they are magnified in remote communities.²⁰

III CONTRASTING BUSH COURT OPERATION AND ORGANIZATION OF ABORIGINAL LEGAL SERVICES TO THE STANDARD COURT SYSTEM

A Differentiating the Standard 'Town-Court' System

Courts located in Australia's capital cities and major population centres are generally divided into a hierarchy of jurisdictions, whereby the town Magistrate's Court is the initial forum before cases are pursued to trial level. There is usually a separate children's court, or at bare minimum, where the same venue is used for both adult and child offenders, the court is closed to the public and the magistrate is specially qualified to hear juvenile matters. The Bush Court in the NT, however, makes no distinction in the way it treats its subjects, as discussed further below in this paper.

Unlike the city Magistrate's Court, the range of matters over which the magistrate will preside at Bush Court is virtually limitless. Bush Court will hear summary and serious indictable matters as well as committals. Where the case list content is only summary offences and basic Magistrate's Court matters, the local police officer will take the role of prosecutor, instead of the suitably and specifically qualified Crown Prosecutor that is used in the town court scenario.

A 'normal' Australian city-court is held every day of the week, and in more remote townships, a minimum of two days a week. A matter is never usually adjourned for more than two weeks. A manageable caseload is scheduled for every magistrate and, unlike the Bush Court scenario, this means that there is no need for the magistrate to conduct cases well into the night. Such courts normally run with a minimum of two magistrates, between whom the daily caseload can be divided.

Conversely, depending upon the location, the frequency with which the Bush Court sits in a given community ranges between once monthly and once quarterly. One magistrate will arrive on the day of court with two court orderlies and sometimes a police prosecutor. Therefore a matter can be adjourned for one month at least, but in reality will be postponed much longer due to the enormous caseload scheduled for the one-day court sits.

19. Queensland Criminal Justice Commission, "Aboriginal Witnesses in Queensland Criminal Courts" (1996) 1 Australian Indigenous Law Reporter (AILR) at 76.

20. For example, see recommendation 108 of the *RCIADIC Report*, *supra* note 12.

B The Unique Courtroom and Inadequate Facilities

Jabiru,²¹ a small community which is home to the uranium mine in the middle of the World Heritage listed Kakadu National Park, was the only Bush Court location observed in the NT where Bush Court took place in an intentionally built court house that in some way resembled typical courtroom construction. Perhaps not surprisingly, Jabiru was also the only Bush Court in the NT where a white population also used the facility.

The situation was vastly different at every other Bush Court. Court was conducted around a round table in the Land Council boardroom at Nguyu (Tiwi).²² At Oenpelli, a community on the border of the Aboriginal Land Trust area called 'Arnhem Land', the boardroom was cleared so that desks and chairs could be placed in the same positions personnel would assume in 'city-court'. While the informality of the courtroom may raise questions, it is arguably a suitably less intimidating and culturally better forum for Aboriginal community members who have had little or no exposure to 'usual' courtroom setting.

The tiny concrete building attached to the police station that served as a courtroom in Wadeye²³ was approximately half the size of the boardrooms mentioned. An old school bench at the back of the room seated the waiting defendants, while clients waiting to give instructions and for their case to be heard leaned against the cyclone fencing that backed the concrete path around the exterior.²⁴ In 'normal' Australian courthouses, there are several courtrooms with abundant seating (protected from the heat and rain) for clients waiting for their case to be announced.

Defendant, counsel, prosecution and magistrate find themselves at very close quarters with each other in this most common style of Bush Court courtroom, where, again, old school desks and chairs have been set up in the general positions that would accord with the established courtroom. At Daly River²⁵ the children who attend the Daly River Primary School were sent off on excursion for the day, so that their kindergarten library could host Bush

21. Jabiru Bush Court, 11 July 2000.

22. Tiwi Bush Court, 26 July 2000.

23. Wadeye Bush Court, 1, 3 and 4 August 2000. Wadeye is a central community in the Aboriginal Land Trust (reserve) known as 'Port Keats', located in the northwest of the NT. It is 300 km as the crow flies from the nearest town, but by road, would be at least one full day's drive through bush.

24. This composed the 'waiting area' at Tiwi as well. ALS clients also sat on the patches of dirt around the outside of the cyclone fencing when the concrete area was filled. Temperatures reach well in excess of 100 degrees Fahrenheit in these areas. Because of the high caseload, clients often waited like this all day (often only to find their cases were to be adjourned to the next Bush Court sitting). These wait facilities were emulated at every Bush Court attended.

25. Daly River Bush Court, 2 August 2000. Daly River is slightly northwest of the Port Keats Land Trust.

Court. The children's school cafeteria²⁶ served as makeshift client interview rooms. Tables and chairs were set up in the courtroom in the aforementioned manner and the library chairs seated the people whose cases were ready to be heard.

Maningrida is on the north coast of Arnhem Land Aboriginal Land Trust, 250km of 4-wheel-drive track from the nearest small town. Although the author did not attend a Maningrida Bush Court sitting, several interviewees explained that Bush Court is constituted by two plastic tables pushed together in the Maningrida 'hotel' breakfast room.²⁷ This courtroom structure can be very daunting to the domestic violence victim. The director of the Top End Women's Legal Service ("TEWLS") noted that the inappropriateness of Bush Court courtrooms presented inestimable obstacles to the victim of domestic violence bringing her or his claim.²⁸ She offered the image of a shy woman in a tiny courtroom giving evidence against the offender while counsel raises his or her voice at close range. "She can't talk to her Community Liaison Officer and her abuser sits only a foot away from her."²⁹ The predicament faced by victims as a result of the Bush Court courtroom set-up in Maningrida also occurs at Wadeye. The Bush Court attended in WA, at Marble Bar, inland northwestern WA,³⁰ however, was convened in a proper courthouse, built 100 years ago when the town hosted a far greater population.

C The Particulars of the Bush Court's Jurisdiction: Frequency of Exercise and Geography

The NT is divided into notional thirds, each of which possesses a Magistrates' Court circulating a magistrate to various Bush Court outposts. A considerable proportion of this research followed Bush Court proceedings in the top and lower third of the NT. The top third, known as the 'Top End', possesses the Darwin Office of Courts Administration, which sends out a magistrate to nine Bush Court locations. These nine locations are expected to serve approximately 250 remote Aboriginal communities. It is difficult to understand how these locations are considered sufficiently central to

26. This consists of a corrugated tin roof supported by several posts and sheltering a few benches and tables.

27. Separate accounts given by a NAALAS solicitor and a Top End Women's Legal Service solicitor while attending Jabiru Bush Court, 11 July 2000. Also described in an interview with a Darwin Magistrate, Darwin, 27 July 2000 [copies on file with author].

28. Interview with Director, Top End Women's Legal Service, Darwin, 14 July 2000 [copy on file with author].

29. *Ibid.*

30. Marble Bar Bush Court, 18 October 2000.

surrounding communities to cover administrative requirements,³¹ given that the 250 communities are dispersed over approximately 404,000 square kilometres. Outstations, which are ‘settlements’ that satellite each community (up to and exceeding 100 kilometres from the community itself), further distort the ratio.

Seven of these communities are visited on a monthly basis and two are visited once every three months. Defendants must be transported from the surrounding communities, which can be around 170 kilometres of dirt road away,³² into the main community, where lawyers are taking instructions. But the transportation never occurs until the day of court, thus precluding many clients from giving instructions to defence lawyers on the day allocated for this purpose, which is usually the day before court sits, when the option is even available. Defence counsel therefore requires frequent adjournments throughout the day in order to take instructions from new arrivals. Sometimes this may be only a break of three or four minutes to take full hearing instructions.

The Tiwi Islands exemplify geography defeating the proper administration of justice. The islands are a twenty-minute light-aeroplane flight northwest from the coast of Darwin, the capital city of the NT. Though it serves both Bathurst and Melville Islands, the court sits only in the community of Nguyu, at the southern end of Bathurst Island. A NAALAS lawyer described the impossibility of speaking in advance to the large proportion of clients who arrive in Nguyu on the police-organized barge from the different communities upon Melville Island³³ (for which each client is required to contribute \$5) or in cars from Ranku, located at the opposite end of Bathurst Island. Consultation prior to trial is not possible because the barge, and cars, usually arrive at nine in the morning, the same time court begins.³⁴

31. A Darwin police prosecutor suggested that the ‘centralization’ of the nine Bush Courts made justice administration possible. Interview with Russell Perry, Darwin Office of Police Prosecutions (DPP), 18 July 2000 [copy on file with author].

32. For example, the community of Yandeyarra in the Pilbara region of WA is 170 kilometres away from its nearest Court location.

33. Normally, these communities on Bathurst and Melville are all visited in one day by airplane the day before Bush Court. This itself represents a challenging task (see below), but occasionally the aeroplane service will not fly the circuit to the communities on Melville Island and then back to Nguyu, so NAALAS has no opportunity to interview these clients.

34. Tiwi Bush Court, 26 July 2000. Fortunately, on that particular day, the magistrate’s aeroplane suffered engine failure so he did not arrive to begin court until 10 am. This enabled at least some instructions to be taken. However, one defendant arriving on the barge was listed for hearing over a number of indictable charges. The NAALAS lawyer had no instructions from him as yet – and was unable to organize the transport of the relevant witnesses either.

D Majority Criminal Cases

In all of the 486 Bush Court cases witnessed,³⁵ only three were non-criminal. NAALAS' policy director explained that it is rare that genuine civil matters such as victim compensation or domestic violence are brought to the attention of the criminal lawyers sent on the Bush Court circuit. In fact, NAALAS' non-criminal branch, known as the 'Community Law Section', does not visit communities.³⁶ While this is partly a resource problem, the Community Law Section is currently considering a restructuring process entailing the delivery of non-criminal legal services to communities.³⁷ The proposed service is to include provision of advice on any civil or family matter, such as motor vehicle insurance claims or discrimination complaints.³⁸ These legal services have never been provided to remote communities in the NT to date, diminishing the ability of community members to exercise their full legal rights.

E When Justice of the Peace Courts ("JP Courts") Will be Convened for Bush Court Reasons

The usage of a JP Court is specific to WA. JP Court will be convened in two situations. First, where the sole magistrate for the region is away on Bush circuit, two Justices of the Peace ("JP") will preside over matters scheduled for that day in the court where the magistrate is usually based. Second, in a circuted township, a JP Court will hear matters until the day the magistrate arrives on circuit. In the Aboriginal community of Burringurrah,³⁹ plans are currently underway to convene a JP Court of community-member JPs, allowing the magistrate to visit only monthly. The magistrate would only adjudicate matters with which the JPs could not deal in the interim, such as matters with which they have no authority to deal or that are being appealed.

The general jurisdiction of JPs over summary offences derives from s. 20 of the *Justices Act 1902* (WA). Leave of appeal from any decision made by a JP court, to the 'proper' court, is available under s. 184 of the *Act*. There are no specific criteria as to who may be appointed by the Governor as a Justice of the Peace, per s. 6 of the *Act*. While in practice it is not common

35. Although a greater amount of Bush Court cases were in fact observed during the eight Bush Courts attended, this number represents those actually recorded.

36. Interview with NAALAS Policy Director, Darwin, 15 August 2000 [copy on file with author].

37. *Ibid.*

38. Interview with Legal Manager, Community Law Section, NAALAS, 21 August 2000 [copy on file with author].

39. This is an Aboriginal community in the Gascoyne region of WA. It is approximately 430 km inland from the nearest town, Carnarvon (mid-west coast).

for JPs to award a sentence of imprisonment, they have in fact done so previously⁴⁰ and they are technically empowered to do so under s. 150 of the *Act*. Should it be made, such a decision may be appealed.⁴¹

There is no formal training for JPs. It is the responsibility of the region's magistrate to provide some type of training. The lack of legal knowledge on the part of JPs, at least in Port Hedland, exemplifies the perils of this insufficient formal education. One ALS WA Court Officer commented that even with the most common charges he was still forced to direct JPs to the relevant legislation, and to instruct the JPs about the usual penalty.⁴²

F Difference in Provision of Legal Aid Services

Legal Aid services funded by the Commonwealth government supply solicitors free of charge to people who arrive at town and city courts without representation. When a defendant cannot afford to do so him or herself, solicitors to provide advice and long-term assistance, are offered. The services available in towns and cities are expansive, going as far as fully funded representation by a barrister. Free, suburban Legal Services provide similar services. Many city-court defendants have had several interactions with their lawyer prior to court and are familiar not only with the nature of the charges against them, but the likely outcome and the evidence, documents or references they should bring with them. Legal Aid

40. A Port Hedland ALS Court Officer recalls several JP Courts he has witnessed in the magistrate's absence where prison sentences were commonly awarded by JPs. Interview conducted 17 October 2000 [copy on file with author]. Port Hedland is the town that circulates Bush Court and ALS members throughout the Pilbara region (north-western WA), including the town of Marble Bar.

41. Frequently today, JPs will only continue the remand of a defendant until the magistrate returns. The ability of JPs to continue remand was the subject of criticism by the RCIADIC in their final report, which called for the 'phasing out' of the use of the JP Court. See Recommendation 98 of *RCIADIC Report, supra* note 12. While the lack of cultural sensitivity and absence of Aboriginal JPs was addressed by the Commission, the frequent failure of JPs to use non-custodial sentencing options exercised by judges and magistrates came under close scrutiny. Clearly the plans for Burringurrah Aboriginal Community JP Court will entail that all JPs are Aboriginal, given that the community members are all Aboriginal. The author noted no Aboriginal JPs presiding when the Port Hedland JP Court was in session. The ALS WA Court Officer for that region confirmed that there are no Aboriginal JPs in Port Hedland, despite that fact he observed that 80-85 per cent of the cases coming before the court involved Aboriginal defendants. There are no Aboriginal JPs in Carnarvon either. The JP Court in Meekatharra, which is convened until the magistrate circuits the township, now has one female Aboriginal JP.

42. For example, the author observed the JP Court attempting to award a fine in a case in which a Community Based Order is normally awarded. When the Court Officer pointed this out to the presiding JPs, they revoked their decision and applied the appropriate penalty upon his advice. In every case, the court order was consulted regarding legislation and procedure of several other matters. (Author's observation of Port Hedland JP Court, 17 October 2000.)

organizations send a number of lawyers to each city court every court day for this purpose.

The assistance available to Bush Court defendants hardly compares. Defence counsel will attempt to access community members for the purpose of advice and instruction, usually the day before court sits. However, it is often an impossible task for Aboriginal Legal Service lawyers, the only defence counsel available at all at Bush Court, to arrive anytime other than court day to take instructions and advise pleas. Throughout the seven Bush Courts observed in the NT, no more than one lawyer attended, accompanied by a Client Liaison Officer (“CLO”) who was to act as a liaison between the solicitor and the client. Only one CLO encountered in the NT could speak the local language of some of the communities he serviced.⁴³

An Indigenous ‘Court Officer’ fills the equivalent liaison position in West Australia, but under WA legislation, court officers are also empowered to conduct pleas.⁴⁴ It is thus not uncommon that the court officer will attend Bush Court alone. Western Australia is divided into seven regions, due to its area of 2,525,500 square kilometres. Many of these regions are larger than some of the eastern Australian states. Sparse supply of lawyers amongst the regions means that in an area as enormous as the Pilbara, one lawyer must service communities over terrain approximately the size of Texas.

In Melbourne Magistrate’s Court, in the capital city of the state of Victoria, between three and four duty lawyers may be sent to one court to deal with fifteen different clients daily, as opposed to Bush Court where one lawyer will be sent to deal with all cases that have accumulated over the space of a month. In the city, court is normally held in a large, established building with all the characteristics of a western adversarial courtroom. There are facilities for closed-circuit television to allow easily intimidated witnesses to provide evidence. There are interview rooms provided for duty-lawyers to take complete instructions in private. If there is not enough time to extract the complete facts of a case, either in client interview or in the courtroom, an adjournment is relatively easily obtained due to reasonable caseload size, and will never usually be scheduled for more than two weeks later. Further, in a city like Melbourne, several regional Magistrate’s Courts are provided within the city itself, to service the large population and to avoid inconveniencing defendants and claimants by compelling them to travel several suburbs to reach the court venue.

43. Client Liaison Officer located at CAALAS, Alice Springs (Central Australia).

44. See s. 48 of the *Aboriginal Affairs Planning Authority Act 1972* (WA). While the practice is generally restricted to the conduct of pleas, surrounding factors may bring about the situation where a Court Officer is the only person who can represent the defendant in a hearing. Interview with Port Hedland Court Officer, ALS WA, 4 October 2000 [copy on file with author]. Port Hedland is in northwestern Australia, approximately 600km south of Broome.

In the NT, three ALS offices must provide legal services to the 34,200 Aboriginal people living in communities.⁴⁵ The three offices represent the aforementioned thirds into which the Territory is divided. In the Top End, seven solicitors provide legal aid to the top third of the Territory, covering its approximately 250 remote Aboriginal communities. NAALAS services six of these communities for Bush Court, while a private Aboriginal Corporation, 'Miwatj', supplies its own legal service to the remainder, all of which are within the north-eastern region of Arnhem Land, a large Aboriginal Reserve to the east of Darwin.

Top End Women's Legal Service is the only legal service that attends communities for the purpose of domestic violence assistance. This service can employ only two solicitors, who are only able to visit four of the aforementioned Bush Courts in the top third. TEWLS practitioners have been obligated to act for men in some circumstances,⁴⁶ because in a specific incident of domestic violence involving the man as victim, the relevant ALS lawyer will be acting for the female accused. Thus TEWLS, as the only other available form of legal assistance in the community, will conduct the male's case.⁴⁷

The lower third of the NT (Central Australia) is serviced by the Central Australia Aboriginal Legal Aid Service ("CAALAS"). Currently there is no real equivalent of TEWLS functioning in Central Australia. Often CAALAS is unable to assist with domestic violence charges at Bush Court because it causes conflicts of interest; clearly the same lawyer cannot act for both the victim and the accused. While similar organizations have existed in Central Australia before, they are currently without funding and not in operation. CAALAS services all eight communities that host Bush Court in the lower third of the NT. These Bush Courts are listed on consecutive (and sometimes the same) days in the space of a week, at the conclusion of every 5-week period.

As mentioned, WA is divided into seven regions,⁴⁸ each being larger than several European countries. In each region there is a major town where one magistrate, who conducts the entire circuit for the area, and one ALS office, composed of one lawyer and one court officer, are based. In certain regions, Bush Court will not visit Aboriginal communities, but will instead

45. This is the substantive equivalent of the aforementioned proportion (*i.e.*, 17.1 per cent of the NT's population of 200,000)

46. As observed by one Darwin Magistrate in an interview conducted in Darwin on 27 July 2000 [copy on file with author].

47. This is due to the conflict of interest that would result from the ALS representing the man. The ALS' priority in representing the person criminally charged is explained below.

48. East Kimberley, West Kimberley, Pilbara, Gascoyne, Goldfields, Central and Southern: however, the Broome Magistrate's Court circuits both East and West Kimberley.

require Indigenous people to come to the nearest population centre. In some of these places there is no form of legal assistance other than the visiting ALS lawyers. While these centres possess a non-Aboriginal population as well, there is frequently no lawyer or Legal Aid office for hundreds of kilometres. Consequently, ALS staff can feel obliged to represent non-Aboriginal people who request their help.⁴⁹ Perhaps of most concern in regional WA is the absence of female or domestic violence legal services. This absence frequently means the mostly female abuse victims are left without representation, because ALS lawyers are required to give priority to the person criminally charged, *i.e.* the offender.

G Neglect of the Community/Cultural Context in which Bush Court Law is Administered

The need to account for the context and perspectives of the Aboriginal community in question is crucial to any attempt to deliver equal justice in the Indigenous communities. In Aboriginal communities, acceptable reasons for particular conduct can markedly differ from those of mainstream Australian society. It can thus be senseless to try to apply only mainstream Australian norms in deciding cases. A Darwin magistrate pointed out that at Bush Court, the magistrate must “move to a different point of view.”

For example, if someone’s brained⁵⁰ their mother-in-law with a frying pan, understandably passions are running quite high in the community and [I] would quite likely refuse him bail, whereas if I did that to my own mother-in-law, the rest of our own community wouldn’t be particularly outraged [and I would expect to receive bail]. But if a man did that in Port Keats (the Wadeye community), then a lot of people would be upset because he has no business having any contact like that with his mother-in-law.⁵¹

Laudably, some magistrates recognize that the delivery of justice by Bush Court, in order to have any practical effect, must be tailored to the Aboriginal community context in which it operates. It is important to note, though, that those magistrates who have sought to cater the Bush Court for the environment in which it operates have done so of their own volition. There has been no categorical recognition by the Magistracy as a whole or the Office of Courts, the administrative body which facilitates Bush Court and employs magistrates, that this is a necessity. It seems the Office of Courts adopts a precarious position by simply relying upon the individual

49. ALS staff will appear as a friend of the court in these situations. Interview with ALS WA lawyer, Carnarvon (middle of the west coast), 26 October 2000 [copy on file with author].

50. ‘Brained’ is a colloquial term for hitting someone on the head.

51. Interview with Darwin Magistrate, Darwin, 27 July 2000 [copy on file with author].

magistrate to be 'community-aware' and to change the Court communication with its subjects appropriately, for example by addressing them in language they can understand. To avoid unpredictable and insensitive judging, the Office must take responsibility for ensuring that community awareness is valued by all magistrates, and occurs universally, particularly in the area of judicial education. Otherwise, the participants in Bush Court face potentially detrimental and nonsensical treatment at the hands of magistrates who know nothing about the communities they purportedly serve.

In order to recognize community context, the factors constituting mitigating circumstances in a guilty plea must be expanded to encompass those that are relevant in the Aboriginal communities. There were encouraging instances of this observed during the research. One Alice Springs magistrate considered the active and productive role a particular member had in the community, and his involvement in aspects of traditional life, as relevant mitigating circumstances in a guilty plea. At another Bush Court, a Darwin magistrate considered the frustration suffered by a Tiwi man without money to purchase food because he had lent the money to his 'poison-cousin' (this is someone for whom it is culturally taboo to request money back or even refuse its loan) in mitigating a plea.

Magistrates are not the only group responsible for providing more appropriate justice administration in the Aboriginal communities. In order for a magistrate to constructively understand the matter and act accordingly, he or she must be audience to sufficiently informed counsel. But due to the reduced instruction time ALS solicitors have with their clients (discussed in more detail below) the amount the solicitor can present in court is limited. Without sufficient time to interview a client and understand cultural assumptions that underlie the language and information used to convey the story, individual and exceptional circumstances may not come to light.

Beyond the cultural context, a magistrate must also be aware of the practical realities of life in a remote Aboriginal community. One Darwin magistrate stated he was more liberal-minded in approaching sentencing at Bush Courts for this reason.

I have tariffs for public servants who live on a Number 10 bus route with a good job and don't need a license for work, which is different from someone who is chronically unemployed and having to earn their dole money on CDEP [Community Development Employment Programme] without any real hope of advancing. I have certain things without being needed to be told the levels of disposable income of people [at Bush Court].⁵²

52. Interview with Darwin Magistrate, Darwin, 27 July 2000 [copy on file with author].

It is commendable that some magistrates are sensitive to the community context in which their punishments will occur. For instance, according to a Darwin Police Prosecutor,⁵³ before sentencing a defendant, one Darwin magistrate gains a type of community impact statement from elders regarding the level of harm the offender's conduct has caused to the community and the effect that a particular punishment to that offender will have upon the community. Community impact statements are not explicitly provided for by NT legislation: the wording of s. 106A and s. 106B of the *Sentencing Act 1995* (NT) preclude a victim impact statement from extending to a 'community'. But s. 5(2) of the *Sentencing Act* (NT) prescribes that in sentencing an offender a court shall have regard to, per s. 5(2)(s), 'any other relevant circumstance'. Such statements are thus allowed at the magistrate's discretion. However, as one CLO explained, in reality the defendant or the community elders usually must approach the attending Bush Court lawyer to specifically request the delivery of such a statement to the court. Given the already limited time the lawyer has with each client, there is very little scope for such matters to be raised with the magistrate, or even with the lawyer. Indeed, throughout the Bush Courts surveyed, lawyers were not observed making requests for community impact statements.

Avoidable injustices often result from the failure of a magistrate to acknowledge the community context in which the law is delivered at Bush Court. 'Sorry Business' is one of the greatest commitments in Aboriginal life everywhere, but is particularly important in remote communities and outstations where traditional life is strongest.⁵⁴ Sorry Business is best equated in European culture to a funeral. However, aside from a funeral ceremony, there are several other layers to the obligation in attending it because of the performance of other necessary ceremonies. Absence from community Sorry Business is arguably tantamount to a non-Aboriginal Australian absenting himself from the funeral of his own next-of-kin. It is unthinkable; such a funeral is one of life's paramount events.

But certain magistrates will not treat Sorry Business as a legitimate justification for non-appearance in court. The decision to try to understand Aboriginal life and parallel it to known experience is entirely up to the particular magistrate. One particular magistrate has been known to issue

53. Interview with Darwin Police Prosecutor, Darwin, 18 July 2000 [copy on file with author].

54. In all communities visited and in all interviews conducted throughout both NT and WA, 'sorry business' was raised as a pivotal aspect of Aboriginal life.

executing warrants where non-appearance is due to reasons such as Sorry Business, regardless of a charge's trivial nature.⁵⁵

Simultaneously, miscarriages of justice flow from the non-consideration of Bush Court constraints themselves. One person told a story of the Ali-Curung Bush Court, where CAALAS clients had been waiting outside all day for their case to be heard. As the day was concluding it became apparent that there was simply insufficient time to hear the remaining matters. CAALAS staff informed the waiting clients that their cases would be adjourned until the next court and that they could leave the compound. The particular magistrate then ordered warrants to be issued for all those who had returned home on that advice.

As can be seen from this discussion and the examples above, there is a dire need for judicial cultural education. In order for magistrates to exercise culturally appropriate measures in applying the law, they must be suitably informed about the culture with which they are dealing. When one Darwin magistrate was asked what training magistrates had in the area, he responded: "Wouldn't it be nice if we did [have some]. It probably ought to be compulsory."

In its defense, the NT government has claimed that magistrates participate regularly in judicial education and cross-cultural awareness programs. *The Northern Territory Implementation Report on the Recommendations of The Royal Commission Into Aboriginal Deaths In Custody* stated that "[m]agistrates' training in Aboriginal culture is an ongoing process, with circuit courts [Bush Courts] incorporating consultation with communities ...".⁵⁶ But this position appears inconsistent with the facts outlined above. The alleged consultation process was neither observed by the author of the present paper, nor raised by any of the research participants when discussing judicial education and cultural awareness.

An Aboriginal and Torres Strait Islander Commission ("ATSIC") report evaluating the nationwide implementation of the RCIADIC stated that during the RCIADIC inquiry, NAALAS expressed clear need for such training and cited various examples of culturally inappropriate judicial comments. The ATSIC report continued that the NT government demonstrated "some positive resistance to the idea that judicial officers

55. See also C. Cuneen, "Judicial Racism" (1992) 58 Indigenous Law Bulletin 9. The issue in Western Australia is addressed by Q. Beresford & P. Omaji in *Rites of Passage, Aboriginal Youth, Crime and Justice* (Perth: Fremantle Arts Centre Press, 1996) at 110. See also J. McCorquodale, "Judicial Racism in Australia? Aboriginals in Civil and Criminal Cases" in K. Hazelhurst, ed., *Ivory Scales: Black Australians and the Law* (Kensington: New South Wales University Press, 1987) at 31 and 43.

56. NT Government, "Communication in the Criminal Justice System (Courts)" in *Implementation Report 1994-1995*, *supra* note 10, c. 13 at 3-4.

should receive formal training relating to cross-cultural issues” at the time of the *RCIADIC Report*, but that now, much of that earlier resistance “seems to have disappeared.”⁵⁷ The author’s observations, combined with those of the magistrates, suggest that the hearkened change has not occurred.

The necessity for tailoring the Bush Court to the community context in which it operates extends beyond merely applying the law. The Bush Court also needs to cater for Aboriginal witnesses and defendants who are intimidated by the nature of court process and their inability to understand what is taking place. These factors suppress their ability to give evidence, and hinder their ability to proceed with a matter. The Kimberley Magistrate (the region of northern-most WA) has been pro-active in executing steps towards addressing this issue. He insists on abandoning legal language in court, so that the defendant can best understand what is occurring. He has also required the painting of the Queen be removed from the Kununurra town court (a Kimberley town), and replaced with a painting completed by an Aboriginal prisoner.

Nonetheless, the lack of judicial education provided by the Office of Courts in the NT in this area is also reflected in WA. The same magistrate mentioned that all cultural training and information he has attained has been at his own instigation. The WA Office of Courts Administration has not provided any type of training or education at all.⁵⁸

H Absence of any Proper Language or Translator Service

The most persistent observation recorded during the research was the perceived lack of understanding by Bush Court subjects of events transpiring in the Bush Court courtroom. Studies lend credibility to this observation; a Northern Territory Government report has found that in excess of 95 per cent of Aboriginal people living in remote areas speak a language other than English and “approximately 33 per cent of these people self-identify as not speaking English very well.”⁵⁹ This figure likely largely underestimates the ratio of non-English speaking people generally observed in the communities visited.⁶⁰

57. Cuneen & McDonald, *supra* note 1, c. 11 at 1-2.

58. Interview with Broome Magistrate for the Kimberley Region, Broome, 4 December 2000 [copy on file with author].

59. NT Government, “Interpreter and Translator Services” in *Implementation Report 1996-1997*, *supra* note 11.

60. *Ibid.* The same report confirms that “it would seem reasonable to surmise ... that a significant percentage of Aboriginal youth who come into contact with the criminal justice system have little, if any, understanding of the language and the processes they encounter.”

Given that court proceedings are in English, most participants cannot understand them. While this is a general problem in all NT city courts (“12 of the top 15 most frequently used non-English languages in the NT courts are Aboriginal languages”⁶¹), it is of far greater relevance and magnitude at Bush Court. In several communities, English is the least spoken of six languages used.⁶² In Wadeye, few people under the age of 50 speak English fluently. English-speaking skills decrease in the younger generations, and the younger generations compose most of the Bush Court’s subjects.

The NT government established a telephone interpreter service on April 10, 2000, but numerous obstacles exist in terms of its accessibility. At the time this research was undertaken, during the latter part of 2000, ALS staff still did not use the service. ALS lawyers have no real access to telephones at Bush Court unless the local police station is willing to share its facilities. Even if the police are willing, it means the client’s instructions have to be taken inside the police station, which in community locations offers no real privacy. Without privacy, nonsense is made of any right to remain silent, or attorney-client privilege. Additionally, the organization requesting the interpreter must pay; the translator service is not a free government service. Thus, while the service may prove useful in the city setting where cases have a greater preparation time than the typical 5 to 15 minutes at Bush Court, it has mostly proven an inaccessible option at Bush Court.

IV THE IMPACT OF THE BUSH COURT SYSTEM: DISADVANTAGES TO THOSE BEFORE THE COURT

A Overloading the Bush Court

The number of cases scheduled for most Bush Court sittings well exceeds court-lists for any other normal court day. While a day attended at Darwin City Magistrate’s Court consisted of fourteen scheduled cases, the Daly River Bush Court, circuted by the same court administration, ran 40 listed cases on a single day.⁶³ The town of Alice Springs’ Magistrate’s Court had a busy morning running 29 cases, including non-appearances, while a Yuendumu Bush Court day recorded 100 listed cases.⁶⁴ A NAALAS lawyer commented that the normal caseload for a Tiwi Bush Court was about 50.

61. Interview with NAALAS solicitor, Darwin, 8 August 2000 [copy on file with author].

62. Comments of NAALAS solicitor at Tiwi Bush Court, 26 July 2000. The situation is repeated at Wadeye (where five Murin languages are spoken before English).

63. Darwin Magistrate’s Court, 18 July 2000; Daly River Bush Court, 2 August 2000.

64. Alice Springs Magistrate’s Court, 29 August 2000; Yuendumu Bush Court, 31 August 2000.

On the day this was mentioned, the caseload included five hearings. She added that a normal Darwin Magistrate's Court would hold fifteen cases a day and usually never as many as five hearings.⁶⁵ The Hermannsburg Bush Court attended⁶⁶ anticipated 70 cases. The current research suggests that Bush Court case overloading is more specific to the NT, although still apparent to some extent in WA.⁶⁷ Causes of Bush Court case overloading are numerous and its consequences are vast.

Factors such as tropical cyclones and the wet season, which affect most of the Bush Courts visited because they lie above the tropic of Capricorn, severely influence case-lists. Physical access to communities becomes restricted, rendering particular circuits inaccessible during the rains. The wet season can sometimes endure for six months, as it did in 1999/2000. A few months prior to my arrival in Alice Springs, heavy rains had washed out the dirt roads into Hermannsburg. The inaccessibility meant Bush Court was adjourned for over two months. "Now the cases from those lists still have to be heard, so they are accumulating on top of the current [fresh] matters," commented one CAALAS lawyer.⁶⁸

It would be reasonable to assume that such large caseloads would force Bush Court to sit well into the night. But funding shortfalls often prevent court from sitting past sunset. This additionally constrains the time in which the load is to be completed. At the Yuendumu Court, the presiding magistrate informed the court that, due to lack of funds provided by the Office of Courts for her airplane pilot to be 'night-licensed' (costing fifty dollars), she could not stay beyond 5:50 p.m. to hear the day's cases. At the stage this was made known, there were still approximately 70 cases on the list.

The NT Office of Courts is responsible for funding allocation. Of its approximately \$14 million 1999-2000 budget, \$5.6 million was spent on the Darwin and Alice Springs Magistrate's Courts. The same budget paper stipulates that one of the three outcomes of the Magistrate's Courts' budget is to provide the community with "[e]ffective civil and criminal court

65. NAALAS solicitor speaking at Tiwi Bush Court, 26 July 2000.

66. Hermannsburg Bush Court, 28 August 2000.

67. Western Australian Bush Courts appeared, on average, to carry a relatively similar caseload to the Magistrate's Courts in the major towns. Only 7 cases were listed for the Marble Bar Bush Court (Pilbara, 18 October 2000). The Magistrate for the Kimberley Region mentions however, that case-lists carry between 10 and 50 cases throughout the Kimberley region, most averaging about 20-25 (interview, Broome, 4 December 2000 [copy on file with author]). The ALS WA solicitor for the Gascoyne region mentioned that while he had been compelled at one stage to complete 36 fresh matters at Meekatharra, the introduction of fortnightly visits by Magistrate circuits (as opposed to monthly) has effectively alleviated that load since (interview, Carnarvon, 26 October 2000). Meekatharra is approximately 620 km's southwest of the ALS' base-town, Carnarvon (mid-west coast).

68. Hermannsburg Bush Court, 28 August 2000.

proceedings.⁶⁹ Given that Bush Court jurisdiction is applicable to the majority of the NT's Indigenous population, payment of fifty-dollar licensing fees appears 'a drop in the ocean' in comparison to the beneficial outcome that could be achieved. It is a move that would vastly increase the amount of cases capable of completion, thus progressing some way towards reducing the case overload.

B Consequent Inadequate Representation of Aboriginal Community Members

With an extremely high caseload comes the inability to satisfy many basic requirements of a lawyer's instruction taking.⁷⁰

Sparse Distribution of Advocates Reduces the Instruction-Time Available

During the ten Bush Court days observed (Wadeye Bush Court consisting of three), there were only four occasions where community members were able to give instruction to counsel on a day prior to court.⁷¹ The day prior to Yuendumu Bush Court, the CAALAS lawyer and CLO arrived at 2:00 pm. In light of the 100 clients to be consulted on the list, not including those people in custody, the lawyer reasoned that if he spent ten minutes with each, it would take him in excess of 1000 minutes (equivalent to 16 hours and 40 minutes) of instruction taking to complete his task before Court began at 10:00 am the next day.⁷² On the remainder of the days observed, the lawyer did not even have this notional time to consult. Instructions could only be taken on the day of court, while proceedings were supposed to be underway. The fact that more instruction time is required with Bush Court

69. NT Parliament, "Northern Territory Public Sector, Office of Courts Administration" *Northern Territory Budget Paper 2 (1999-2000 financial year)* (Darwin: Publication of the Northern Territory Parliament, 2000) at 49-50.

70. "[L]awyers cannot adequately represent clients unless they have adequate time to take instructions and prepare cases, and ... this is a special problem in communities without access to lawyers other than at the time of court hearings." See Recommendation 108, *RCIADIC Report*, *supra* note 12 [emphasis added].

71. Jabiru, Tiwi, Yuendumu and the day before the consecutive four-day Bush Court circuit in the Port Keats region.

72. Theoretically, starting immediately, the CAALAS solicitor would finish later than 6:00 am the next morning, if instructions were taken consecutively without any break.

clients than city clients⁷³ and the fact that numerous clients do not or cannot come to give instructions beforehand intensify this problem.

At every Bush Court observed, only one lawyer and Client Liaison Officer (or in WA, a Court Officer on his own) conducted defence services for up to 100 clients. This stands in contrast to the Melbourne City Magistrate Court where four duty lawyers shared the load of 15 clients.⁷⁴ CAALAS aims to provide two lawyers at Bush Court, but consistently maintaining a policy of “sending two lawyers where necessary”⁷⁵ is a difficult practice for the ALS to sustain. The resources to achieve this goal are mostly absent.

The Alice Springs Office of Courts structures Bush Court sittings, so that all circuits for Central Australia are conducted in the space of one week, at six-week intervals. This intensifies the lawyer-deficit at Bush Court, making it even more difficult for CAALAS to send two lawyers to the same Bush Court sitting, because each lawyer will be required at different sittings on the same day. By contrast, when city-court is conducted in Alice Springs, CAALAS is able to provide three lawyers to work with each other to complete the day’s caseload.

Ability for Advance Instruction-Taking

At best, the Bush Court lawyer is only able to obtain instructions the day before Bush Court. He or she does not visit the community earlier for this purpose largely because of the considerable workload that ALS lawyers face in their base towns.

73. “Language and cultural barriers create a situation where a lawyer actually needs to spend more time obtaining accurate and complete instructions than is necessary when dealing with English speakers [who are in the majority at city court],” in interview with NAALAS solicitor, Darwin, 8 August 2000 [copy on file with author]. The same lawyer mentioned that even when dealing with community members possessing ‘adequate’ English skills, sometimes the lawyer has the entirely incorrect perception of the client’s side of the story because their frames of reference have a totally different connotation in their English speaking – but there is no time to clarify. A CAALAS solicitor agreed that he also required more time with clients at Bush Court than those he defends in Alice Magistrate’s Court because it seems community members deliberate more before giving their answers when questioned by a lawyer (Yuendumu Instruction day, 30 August 2000).

74. Melbourne Magistrate’s Court, 7 December 2000. The Victoria Legal Aid (VLA) duty lawyer accompanying the author explained that while VLA provides three solicitors normally (as opposed to that day’s four), fifteen clients shared between that number of solicitors was the usual state of affairs.

75. Lists are apparently gauged for case list numbers so that two lawyers are sent out to a community when required. Comments at Hermannsburg Bush Court, 28 August 2000.

Further, even if lawyers were to turn up earlier, clients would or could not appear to give instructions before the very time they were summonsed,⁷⁶ due to Aboriginal community dynamics and the large geographical distances which separate Bush Court locations. Despite the huge distances, surrounding community and outstation residents must make the long journey into Bush Court. It appears most often that transport organized by varying bodies and individuals, and is generally not provided by the police or courts. This travel can often only be arranged for arrival on the day of court. It is not unusual for the bulk of defendants at a Bush Court to be such remotely located clients. Therefore, sometimes instructions for the majority of Bush Court subjects cannot be taken until the day of court.⁷⁷

Environmental factors also limit advance instruction taking. When Oenpelli Bush Court sits, Jabiru Bush Court sits the day immediately prior. This in itself prevents NAALAS from arriving earlier at Oenpelli. Though Jabiru Bush Court will normally finish mid-afternoon, NAALAS staff cannot leave straight away to collect instructions from Oenpelli clients, even though the community is only an hour's drive away, because the river crossing that must be taken between the only road from Jabiru to Oenpelli is tidal. Crossing at any other time than the lowest low tide is well known for turning trucks on their side. At the time of the Oenpelli Bush Court observation, this crossing could not take place until 8:30 the next morning, one and a half hours before court was due to begin.⁷⁸

Though it is possible to get constant temporary adjournments throughout the Bush Court day, so that the Bush Court lawyer can take instructions from clients who could not be consulted earlier, this creates "a lot of pressure [on ALS lawyers] ... to hurry to prevent a Magistrate from getting bored or restless."⁷⁹

There is damage to the integrity of the legal process as a result of the insufficient time spent with clients. As recommendation 108 of the RCIADIC noted, "lawyers cannot adequately represent clients unless they have adequate time to take instructions and prepare cases ... [T]his is a special problem in the communities."⁸⁰ Though the NT government displaced the blame in 1994-1995, responding that it was a Commonwealth

76. A Darwin Magistrate affirmed this phenomenon (interview, Darwin, 27 July 2000). Only six of the 100 defendants court-listed at Yuendumu arrived to give instructions on the allotted day before Bush Court. Some clients did not arrive to give instructions (or at court) until 7:30 pm on Court day.

77. This occurred at Yuendumu where many ALS clients come from at least three other communities/outstations: Yuelamu, Mt. Allen and Mt. Wedge.

78. Oenpelli Bush Court, 9 August 2000.

79. Interview with NAALAS solicitor, Darwin, 8 August 2000 [copy on file with author].

80. *RCIADIC Report*, *supra* note 12.

Government responsibility,⁸¹ this is an issue that can be directly combated by NT Government law reform.

A joint inquiry conducted by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission⁸² explicitly acknowledges the disadvantage suffered by children, who are equally subject to the Bush Court's jurisdiction, in the criminal process, especially where solicitors do not have the opportunity to take adequate instructions. Children have less understanding of the legal basis for a guilty or not guilty plea. Allowing a process wherein their lawyers spend little or no time with them may result in Australia breaching of its obligations under the UN Convention on the Rights of the Child.⁸³

Under current NT Bush Court process, there seems to be no alternative when a solicitor discovers there is inadequate time to take instructions from his or her client. One solicitor stated that there is always the option of adjourning a matter when insufficient time is available to assess a client's case. However, in communities like Daly River, this means prolonging a case for a minimum of another three months, assuming the next court day is not already full. More particularly, it means that the adjourned case will be added to the excessive number of cases for the following court, without any way of guaranteeing greater instruction time will be available on the next occasion. In effect, excessive Bush Court caseload perpetuates more of the same, a vicious cycle which will thus rarely ever allow the time needed.

Other Instruction-Taking Impediments

Jabiru was the only place in the NT where there was a room for interviewing clients. At Yuendumu the health clinic's residence for doctors provided the better of the instruction-taking facilities seen. The primary school cafeteria, in reality a tin shed, was the Daly River instruction-taking venue. At Wadeye and Tiwi, some time was spent taking instructions from clients on the dirt path, or on the grass outside the courthouse. This was duplicated in Hermannsburg. When the courtroom had been unlocked for court-day, lawyers would shift operations to its interior. Police continually walked through the courtroom during this time, doing away with any semblance of attorney-client privilege. They sometimes even tried to strike up a conversation with the ALS lawyer while he or she was taking instructions.

81. NT Government, "Communication in the Criminal Justice System (Courts)" in *Implementation Report 1994-1995*, *supra* note 10, c. 13 at 2.

82. Australian Law Reform Commission, *Speaking for Ourselves: Children and the Legal Process (Report 84)* (Canberra: Australian Government Publishing Service, 1996) at [18.185].

83. *Ibid.* at 92; and introductory comments to the inquiry by the then Australian Attorney-General, Michael Lavarch (28 August 1995).

At Yuendumu, I observed an instance where instruction taking had moved into the courtroom, and the desk the ALS lawyer was using was confiscated while he was using it to note instructions. The filing system consisted of files laid down in alphabetical order on the outside step of the courtroom. By contrast, the ALS in WA had negotiated interview rooms in the various police stations in the townships visited.

'Client Gathering'

Evidently, the current 'hit and miss' approach used to alert clients that an ALS lawyer is in the community to take instructions the day before Bush Court is the only available method. At Jabiru, Tiwi and Yuendumu, different people were allocated the task of tracking down clients.

At Yuendumu, a CLO explained his usual client-gathering routine: Driving around the community, as soon as he sees a group of people congregated, he stops and asks, "you know where [client x] is?" This may also involve asking for a physical description of 'client x' in order to identify him or her when found. Another technique, used both at Yuendumu and by an officer hired at Tiwi to gather clients, is to ask each person seen, "you got court tomorrow?" Whoever responds positively to either of the above questions then gets into a car driven by the CLO. Eventually, some people are collected and driven to the location in the community where the ALS lawyer is taking instructions.

Conflicts of Interest Arise Because the ALS is the only Defence Service Provider at Bush Court

"Strictly speaking, our ALS would be in conflict half the time," says one ALS WA lawyer regarding his position at Bush Court:

A lot of the assault charges are against people whom you've represented in the past. There are frequently burglary charges (especially involving juvenile offenders) where a co-accused you are also representing points the finger at another (also in your charge as the only available defence counsel), whom you would then be expected to cross-examine if it got to hearing stage. Of course it would not be possible to act for both accuseds in that situation; the matter would have to be briefed out to another lawyer. But the situation in towns like Wiluna (about 700 kilometres east of Carnarvon) or Meekatharra is exacerbated by the fact there are no resident lawyers. The only lawyers occasionally seen

have flown in from Perth or driven from Geraldton either for mining matters or to represent a specific client in a criminal matter, invariably a white client.⁸⁴

Conflicts of interest are present in other forms at Bush Court,⁸⁵ however, clearly the above-mentioned situation is unavoidable when the regional ALS is the only facility providing representation at Bush Court. Not surprisingly, conflicts persistently obstruct expeditious process of domestic violence matters. In the Gascoyne region, the ALS WA lawyer advised that there are no women's services aiding Bush Court regions. Thus Aboriginal people in remote areas are forced to instigate their own restraining order applications and assault charges via the community police, given the inevitable conflict that would arise in using the ALS.

With respect to other civil matters, although infrequent at Bush Court (as mentioned), the ALS are clearly unable to act for both parties, leaving no recourse to the party who is refused assistance.

NAALAS' policy on conflicts of interest⁸⁶ stipulates that where a lawyer has obtained confidential information by acting for 'A', he or she is not allowed to act for 'B' (where the matter is *A v. B*). "[I]f aid [is] granted, 'B' would be referred to the NT Legal Aid Commission or a private lawyer (with funding by NAALAS)."⁸⁷ The author's own observations and interviews suggest that this option, while practicable in the city, is not available to people living in remote communities, who constitute the subjects of Bush Court process.

Given these facts, it seems that access to legal advice and representation for Aboriginal community members is alarmingly less than what many would equate with basic civil rights. The administrative deficiencies in the operation of Bush Court highlight a pressing need for thorough and unconstrained legal assistance.

C Understanding Bush Court

There is even less access to interpreters at Bush Court than in NT city courts. In only two of the 486 Bush Court cases recorded, matters were adjourned for lack of an interpreter. While one might expect that calls for adjournments due to lack of interpreter would be common at Bush Court, they are not.

84. Interview with ALS WA solicitor, Carnarvon, 26 October 2000 [copy on file with author].

85. They arise particularly because there is only one lawyer there on the day. Given that no other lawyer can substitute for the case in which the conflict arises, it must be adjourned until the next sitting.

86. Based on the NT *Professional Conduct Rules* (Law Society of the Northern Territory).

87. Interview with NAALAS Legal Manager of the Community Law Section, Darwin, 21 August 2000 [copy on file with author].

One CLO argued that the infrequency of adjournments is a reflection of the widespread failure of lawyers and magistrates to call for interpreters when needed. The Officer mentioned that it is the responsibility of defence lawyers to bring to the attention of the court a client's lack of understanding. But blaming the defence counsel may be overhasty. It is possible that the excessive Bush Court caseload may prompt ALS lawyers to try and dispose of as many cases as quickly as possible, avoiding calls for interpreters and the inevitable delays and adjournments such calls would cause. Or else, as was observed most often, a court interpreter for that language may simply not exist.

The accused's lack of understanding often slows down court process. It is not uncommon for an Aboriginal defendant to enter the wrong plea because he or she does not understand the complex language in which a charge is read out. The court then pauses while defence counsel re-explains, the charge is read out again and a plea is re-entered for each separate charge. This further delays the day's train of cases to follow.⁸⁸

The ATSIC report reviewing how relevant State and Territory Governments have addressed the recommendations of the RCIADIC found that according to CAALAS, "magistrates favour the use of interpreters and the ALS want to use them, but they are simply not available." While the NT government reported that an interpreter is brought to Bush Court on the Pitjantjara circuit⁸⁹ (a Bush Court in the lower third of the NT, Central Australia), ATSIC revealed that in reality the use of an interpreter is rare.

While the court does provide an interpreter,

there are a number of constraints on the[ir] use. There are time pressures involved with long lists to be completed and consequently speed required in taking instructions. The size of the list [at Bush Court] makes it impossible for the court interpreter to see all the clients.⁹⁰

The report precedes this by acknowledging that, "[t]here are people who are pleading guilty to offences they should not be," and that the necessity of speedy instruction taking only exacerbates this.⁹¹

However, even in places where Aboriginal community members' standard of English is adequate in terms of basic communication, the problem of non-understanding endures. This relates specifically to

88. Author's observations at Daly River Bush Court, 2 August 2000; and Yuendumu Bush Court, 31 August 2000.

89. NT Government, "Interpreter and Translator Services" in *Implementation Report 1996-1997*, *supra* note 11 at 1.

90. Cuneen & McDonald, *supra* note 1. See especially "Legislation and services to ensure use of interpreters. Train and recruit court staff and interpreters" at 99-100.

91. *Ibid.*

understanding elements of court process, of which authorities assume a layperson has knowledge. The lack of Aboriginal community member's comprehension of court process, however, often extends well beyond run-of-the-mill non-understanding of legal jargon. For instance, during the morning session of a particular Bush Court there was a knock on the door and a woman entered, seating herself at the back of the courtroom. As the second case of the day concluded, she approached me. "Can I go now?" she asked. After a moment's contemplation, it occurred to me that the woman believed that by simply arriving on court day, held at the kindergarten in this instance, and sitting in a seat there, she had fulfilled what was required of her by the summons notice: she had 'been to court'. ALS lawyers present similar accounts.⁹²

NAALAS lawyers are acutely aware of clients' inability to understand at Bush Court.⁹³ Court personnel speak quickly and in complex language. The excessive case list to be completed in the space of a day prohibits ALS lawyers the time to explain the consequences of a decision to their client.⁹⁴ A NAALAS lawyer who believes "the absence of trained, professional interpreters in Aboriginal languages is a human rights abuse,"⁹⁵ commented that lack of available interpreters and adequate time are the major injustices perpetuated by Bush Court. These two features are the greatest impediments to a defence lawyer's instruction taking and provision of advice. Instruction-taking and advice shape the case presented to the court, and to the extent that they are compromised, so too is the court's ability to serve justice.

Lack of English ... means that legal concepts cannot be explained to clients. Important decisions such as whether to plead guilty or not are often imperfectly understood and more difficult concepts (such as the admissibility of evidence) are not understood at all ... many will plead guilty three or four times before the penny drops.⁹⁶

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92. "A lot of Aboriginal people get confused ... for example I say, 'hey you got this hearing coming up,' and they say, 'nah, no more court—I pleaded not guilty to that', thinking that once you plead 'not guilty', that it's finished with." Interview with ALS WA solicitor, Carnarvon, 26 October 2000 [copy on file with author].
93. Numerous lawyers and Client Liaison Officers spoke regarding this: Instruction-Taking Day at Tiwi, 25 July 2000; Wadeye, 1 August 2000; Oenpelli, 9 August 2000.
94. Hermannsburg Bush Court was the only Bush Court where a lawyer was observed taking the time to explain to every defendant what he was about to do in court and the ramifications of each decision handed down: *but* it is noted that this would be considered an extravagance by most Bush Court lawyers. The only reason this particular lawyer could avail himself of that opportunity was because in only 14 of the 70 cases scheduled on the list did the defendant appear. Consequently the absence of pressure to constantly turn over cases allowed him the time to 'reinterpret'. Hermannsburg Bush Court, 28 August, 2000 (The rainy season forestalled many cases only now having the opportunity to be heard. Many defendants were uninformed that their cases were now on.).
95. Interview with NAALAS solicitor, Darwin, 8 August 2000 [copy on file with author].
96. *Ibid.*

The absence of interpreters at each stage, but particularly during instruction taking, is blatantly prejudicial to Bush Court subjects' interests. It manifests the unfairness the *Anunga Rules*⁹⁷ sought to eliminate, but at the assistance stage, rather than the prosecution end of the process.

In one particular evidentiary hearing observed at the Wadeye Bush Court, the police record of an interview was being challenged on the basis that the defendant's English was insufficient to have understood the cautioning of the right to silence; a breach of *Anunga*. Ironically, no interpreter was requested at this hearing, or made available for the administration of the defendant's oath, or for the questions the different people in the courtroom asked him. The defendant was clearly struggling with the questions; each had to be rephrased about four times.

A resolution to this pressing problem may lie in training particular community members as interpreters in each of the Bush Court locations. However, results from the current 'Community Based Field Officers' Pilot Project in Wadeye show there may be problematic consequences for community members involved in translation. A NAALAS CLO who instigated and currently coordinates the project in collaboration with the Memlma/Thamrurr elders,⁹⁸ described one of the dilemmas. In situations where an interpreter is called upon, the person is generally asked to interpret for all the parties. This places the interpreter in a perceived conflict. When community members see their kinsman being used by the defence, the prosecution and the court, a distorted perception as to 'whose side they are on' may be conveyed. This reinforces the need for the Bush Court to train its own interpreters in Aboriginal languages.

Judicial education also has the ability to ameliorate some of the non-understanding that takes place at Bush Court. One overriding observation, confirmed by several ALS lawyers, was defendants' general incomprehension of anything the magistrate said to them. Often this inability to understand was independent of the defendant's level of English. The

97. The "*Anunga*" Guidelines evolved from the judgments of Forster C.J., Muirhead and Ward JJ. in the NT Supreme Court case *R. v. Anunga* (1976), 11 ALR 412. The guidelines were designed to ensure that Aboriginal suspects questioned in the NT were not disadvantaged in their dealings with police due to traditional or semi-traditional Aboriginal people's particular vulnerabilities in police investigation. The *Guidelines* entail requirements such as the use of an interpreter and questions phrased so that the suspect understands, and so that their non-understanding cannot be taken advantage of in recording confessions and admissions. See also "Evidence" in *Halsbury's Laws of Australia*, 1(2) (Sydney: Butterworths, 1999) at 4027 [5-1815].

98. M. Devery, *Post Workshop Assignment* (on the Community Based Field Officers' Project), May 2000, NAALAS [unpublished] at 1. The Memlma/Thamrurr elders are tribal elders of the Wadeye Community.

magistracy needs to be trained in manners of addressing its particular audience in the Bush Court context. The call for judicial education to train magistrates and judges in understanding Aboriginal responses and making themselves understood to Aboriginal subjects is explicitly addressed and supported by Mildren J. of the NT Supreme Court.⁹⁹

An important aspect of this effort must be promoting tolerance within the magistracy. Anecdotal evidence was obtained of a Western Australian magistrate who interrupted a prosecutor while he was asking a Bush Court defendant his name, aggressively demanding, “What’s your name? Well, what is it? Bill? Fred?” This impatience with an Aboriginal defendant’s non-understanding and shyness is clearly inappropriate.¹⁰⁰ The same magistrate allegedly refused the special invitation of the particular Aboriginal community in which he sits to visit the community and learn about their culture. This is profoundly disturbing. Magistrates employed to conduct Bush Court must be receptive to cultural education.

Willingness to learn about the community context in which the law operates should feature highly as a selection criterion for magistrates, especially for those magistrates selected to conduct Bush Courts. The Kimberley Bush Courts are presided over by a magistrate who shows great enthusiasm for learning about the community, but Bush Courts in another region of WA are conducted by a Magistrate who, according to the aforementioned anecdote, has little or no willingness to gain knowledge of the Aboriginal people he serves. This suggests no such criterion exists in WA.

D ‘Sausage Factory Justice’ Perpetuated by Bush Court; The Poorer Form of Australian Justice

Case overload does make me feel restricted in the kind of justice I can do. Like yesterday, after the [magistrate’s] plane was late [to Tiwi Bush Court], I felt like I was doing the sort of thing trained monkeys ought to be doing.¹⁰¹

The time pressures resulting from excessive caseload overtly distort the administration of justice. On one occasion, an ALS lawyer was beset by

99. The Honourable Justice Dean Mildren, “Redressing the Imbalance Against Aboriginals in the Criminal Justice System” (1997) 21 Criminal Law Journal 7.

100. The ALS WA Court Officer who was conducting the defence case requested a transcript of the same proceedings that evening (for the purpose of filing a complaint), only to find the relevant remark deleted. Discussions with ALS WA Court Officer during Port Hedland Justice of the Peace Court day, 17 October 2000.

101. Interview with Darwin Magistrate, Darwin, 27 July 2000 [copy on file with author]. The same magistrate’s plane had suffered engine failure the previous day at Tiwi Bush Court, constraining the time the court had available to dispose of what was already an enormous caseload.

such an inordinate number of cases to be completed within two hours that s/he simply read the complaint aloud to the defendant, who appeared not to understand much of its contents, and then advised the plea upon asking if the facts alleged were true. The defendant was then asked if he or she was on CDEP, the work-for-the-dole scheme applicable in all Aboriginal communities. Time limits meant that the matter then had to be taken straight back into the courtroom to proceed. The case presented simply ‘worked off the papers’. The solicitor did not have time to explain the consequences of each plea, or try to ascertain what exceptional factors were relevant to the plea, or even to determine whether the defendant had understood the police complaint sufficiently to be able to properly comment on its truth.

Quality of justice is compromised when solicitors are forced to work only from police papers because ‘the truth will at least lie somewhere between the police version of events and that of the defendant’s’.¹⁰² Moreover, the complaint is frequently the words of a non-police complainant, such as an alleged victim of an assault, who may give a self-serving version of how the altercation began.¹⁰³ Insufficient time with a client may not allow the necessary information to ascertain the whole story, and can result in harsh penalties being erroneously awarded.

A Darwin magistrate articulated his recognition that crucial facts are neglected in many of the cases over which he presides at Bush Court, for this very reason:

With records of interview, if there’s [cultural] men’s business involved, be sure the police aren’t going to be told the full story. If there’s [cultural] family business involved, they’re not going to be told the full story. So if the ALS lawyer is simply working off the police papers, they probably haven’t got the full story.¹⁰⁴

According to one NAALAS solicitor, Bush Court defendants actually require more time with their lawyer and in court than the general, non-Indigenous city court defendants need. The Queensland Criminal Justice Commission verifies this.¹⁰⁵ The solicitor called upon the following example to demonstrate the need for greater time in obtaining accurate and complete instructions from Bush Court clients due to the language and cultural barriers between defence counsel and community members:

102. Interview with ALS WA lawyer, Carnarvon, 26 October 2000 [copy on file with author].

103. Perspective of ALS WA solicitor, Carnarvon, 26 October 2000 [copy on file with author].

104. Interview with Darwin Magistrate, Darwin, 27 July 2000 [copy on file with author].

105. The Queensland Criminal Justice Commission’s Report, *supra* note 20, instructs that, “[i]t may often be necessary for lawyers to spend more time with Aboriginal clients ... than they might spend with most witnesses [and clients] ... particularly in remote communities, this is not happening.”

Cultural issues are not always explained because they seem self-evident to the client ... I once asked a man from Arnhem Land why he beat a strange woman. He replied, "because she went up the hill." I arranged for a psychiatric assessment.¹⁰⁶ The matter was adjourned for a couple of months to allow this to take place. In the meantime, I was advised by someone at the cultural centre that the particular hill in question is a sacred men's site. It was the woman who was suffering from a mental illness. I cancelled the appointment. There are literally hundreds and hundreds of these types of misunderstandings.¹⁰⁷

In comparison, during the day spent observing a Melbourne Magistrate's Court duty solicitor, only one client did not speak English as her first language¹⁰⁸—however, she appeared to understand advice and legal ramifications better than Bush Court clients, who live every day of their lives in a non-English speaking environment without 'constant exposure' to the 'white' legal system.

Despite their greater need for time and attention, it was observed that Bush Court defendants spend less time with their lawyer and in court compared to city court clients. Statistics recorded Bush Court instruction time as averaging 5-15 minutes, compared with the average Melbourne Magistrates' Court duty lawyer instruction time of 25-30 minutes.¹⁰⁹ It was also observed at Alice Springs (town) Magistrate's Court that each matter consisted of a far lengthier, detailed and informed plea than in Bush Court matters the author observed.¹¹⁰

Increasing the instruction time with each client in order to sufficiently obtain individual details is essential because of the fact that Aboriginal community members operate within different frames of reference to mainstream society. This is largely due to cultural and language differences and assumptions. "Simple questions such as 'how old are you,' are often met with ambiguous answers—or, if the family is present, a variety of

106. It is in fact rare that such an opportunity is available at Bush Court. A Miwatj Aboriginal Corporation solicitor revealed his constant struggle to obtain psychiatric assessments when they are integral to mitigating a plea. There is no psychiatric doctor at Nhulunbuy (which is the only town in Arnhem Land Aboriginal Trust area) to produce an assessment. There is no time available, or money to fly clients to Darwin, in order to receive assessments there. Telephone discussion, Nhulunbuy, 2 February 2001. Arnhem Land is a remote region of Northern Australia deemed 'Aboriginal Land', for which a permit must be obtained. Nhulunbuy is the community where main supplies can be bought, however the nearest town (Darwin) is 985 km away, most of which is very rough four-wheel-drive track.

107. Interview with NAALAS solicitor, Darwin, 8 August 2000 [copy on file with author].

108. Melbourne Magistrate's Court Victoria, (criminal division), 7 December, 2000.

109. Comparison made with observations of duty lawyer instruction-taking at Melbourne Magistrate's Court (criminal division), Victoria, 7 December, 2000.

110. Alice Springs Magistrate's Court, 29 August 2000.

answers,”¹¹¹ comments a NAALAS lawyer. Another ALS lawyer said he believes there is never enough time to take instructions under Bush Court conditions. More time is needed with clients because they really deliberate before they give their answers and they pause more frequently.¹¹²

Can the Bush Courts tangibly hear all the cases listed for a particular sitting? The Office of Courts must manufacture a court-list that assumes every single defendant will be present and that the list will conceivably be completed in the allocated time. But it is clear that realistically this could only be construed as an aspirational norm. Only fourteen defendants appeared of the 70 cases tabulated for Hermannsburg Bush Court. One CAALAS lawyer remarked that both he and the magistrate heavily rely upon non-appearances to be able to officially dispose of the day’s cases. However such reliance is risky when, frequently, there is not such a high proportion of non-appearances at that Bush court.

V POSSIBLE SOLUTIONS

It appears the major barriers to the administration of justice at Bush Court at present are time constraints, followed by language barriers and lack of judicial education. The time shortage is predominantly caused by the excessive caseload borne by most Bush Courts, however as mentioned, several other factors that compound time problems are practically resolvable. To do so would require implementation of the suggested solutions to caseload, such as the secondment of at least two lawyers to Bush Courts and recognition by the Offices of Courts of the need to structure circuit dates to facilitate ALS lawyers in maintaining this. Where this is not possible, the Western Australian practice of empowering Court Officers (CLOs in NT) to conduct pleas may be a plausible alternative in the NT, effectively replicating the benefits of the two-lawyer scenario.

Employing more magistrates to enable flexibility in deciding the number of days to be spent at any particular Bush Court sitting will also help stop the flood of cases. Again, the structuring of Bush Court circuit days by the Offices of Courts can also influence the potential for this flexibility.

Time constraints are further entrenched by the inability for defendants to understand the court or their lawyer. It is difficult to see how the theories underpinning the adversarial system can operate in a context whereby

111. Interview with NAALAS solicitor, Darwin, 8 August 2000 [copy on file with author].

112. This issue is specifically addressed in D. Eades, “Understanding Aboriginal Answers” in *Aboriginal English and the Law* (Brisbane: Legal Education Department of the Queensland Law Society, 1992) at 55. The Queensland Criminal Justice Commission also notes this in their report, *supra* note 20 at c. 2 (“Aboriginal People as Witnesses, Cultural Issues”).

criminal defendants are prejudiced by their inability to instruct counsel or understand the law. Therefore institution of court-trained interpreters, and rules making their attendance at Bush Court before a case can proceed mandatory, are perhaps the most urgently required reform to Bush Courts.

The problem of the lack of judicial education has been discussed at some length, but may be partially rectified by emulating the plans for the community-run court at Burringurrah in WA. This will also have a beneficial effect upon surrounding courts' caseload. However, care must be taken in convening courts of this nature. A Darwin magistrate recalled a community member who held the same jurisdiction as the Justices of the Peace will at the Burringurrah Court. The man never had the courage to preside alone at the particular Bush Court, always preferring to do so with a magistrate. In consultation with the magistrate, the man would always produce more information on each defendant than the ALS lawyer presented in court. However, more poignantly, the magistrate he accompanied subsequently discovered the man "used to get belted up for the decisions he had made."¹¹³

In the Kimberley region, the magistrate frequently sits with community members (in particular community elders) and says he has not experienced the same sorts of ramifications.¹¹⁴ Arguably the degree of success this magistrate has had is due to the different political environment within those communities and the traditional nature they retain. For example, where elders preside together with the magistrate, their decisions may not suffer backlash because their traditional role in the community always included that of arbiter in any event.

VI CONCLUSION

Effectively, the impediments upon the Bush Court lawyer's ability to undertake the most essential functions to providing proper representation translate to further disadvantages upon the Aboriginal defendant, bringing the administration of justice in Australia into disrepute. Issues such as inordinate case numbers and the absence of interpreters only lend truth to the accusation by several magistrates and lawyers that Bush Court delivers 'sausage factory justice'.

The injustices caused by current Bush Courts, particularly in their operation throughout the NT, are not presented here with the intention of

113. Interview with Darwin Magistrate, Darwin, 27 July 2000 [copy on file with author].

114. Interview with Magistrate for the Kimberley region, Broome, 4 December 2000 [copy on file with author].

provoking the abolition of the Bush Court. Its existence is a necessity. However, the criticisms posed by this article aim to demonstrate that much needs to be and can be done to raise the level of justice served at Bush Court to the equivalent of that received by non-Indigenous people in Australia's town and city Magistrates' Courts.

While devoting more funding to the institution of remote community courts would alleviate many of the current problems, increased funds *per se* is not the solution. The necessary precursor to greater budgetary contribution is a recognition by responsible government departments of the current unsatisfactory state of Bush Court justice, and acknowledgment by those government departments that Aboriginal community members are receiving a far poorer form of justice than their mainstream Australian counterparts. Government agencies must sufficiently understand where the inadequacies in justice provision lie, so as to direct funds constructively, for instance into legal aid services and interpreters. It may be argued that 'putting money into a broken system' achieves nothing, however, the conclusions of the current research reveal that it is the current deficit in these services that have been major factors in the failure of the Bush Court system to offer 'equal justice'.

It is often contended by defenders of the status quo that an unlimited injection of funds would solve most social justice issues faced by government, but an important caveat remains. As this research has attempted to show, money injections into the Bush Court, though long overdue and clearly necessary, will only ameliorate the drawbacks of certain parts of the process and, arguably, not the most fundamental. The steps toward improving the justice administered by Bush Courts mentioned in this paper require foremost an acknowledgment by the Offices of Courts Administration, and other departments, of the obstacles their policies impose to actual justice in Aboriginal communities. Australian politicians and the general Australian public are not even aware that Bush Courts exist. Without such awareness, there is no acknowledgement of the problems and thus, no impetus for change. A shift in policies and logistics would represent a significant move in the right direction.