

FINAL

INTERIM PRACTICE DIRECTION

NGAMBRA CIRCLE SENTENCING COURT

Purpose

1. The purpose of this Practice Direction is to establish procedures for the Magistrates Court of the Australian Capital Territory when it sits with the Ngambra Sentencing Circle when it shall be known as the Ngambra Circle Sentencing Court.
2. A 6-month trial of the Ngambra Circle Sentencing Court will commence in the Australian Capital Territory on 5 May 2004.
3. The aims that are to guide the operation of the Ngambra Circle Sentencing Court are as follows:
 - (i) to involve Aboriginal and Torres Strait Islander communities in the sentencing process;
 - (ii) to increase the confidence of Aboriginal and Torres Strait Islander communities in the sentencing process;
 - (iii) to reduce barriers between Courts and Aboriginal and Torres Strait Islander communities;
 - (iv) to provide culturally relevant and effective sentencing options for Aboriginal and Torres Strait Islander offenders;
 - (v) to provide the offender concerned with support services that will assist the offender to overcome his or her offending behaviour;
 - (vi) to provide support to victims of crime and enhance the rights and place of victims in the sentencing process; and
 - (vii) to reduce repeat offending in Aboriginal and Torres Strait Islander communities.
4. Nothing in this Practice Direction is to be taken to remove or limit the judicial discretion of a Magistrate to impose a lawful sentence that is considered just and appropriate.

Commencement

5. This Practice Direction will commence on 21 April, 2004.

Objects

6. The objects of the procedures contained in this Practice Direction are:
 - (i) to provide effective and restorative processes for the criminal justice response to, and community involvement in the management of, Aboriginal and Torres Strait Islander offenders and their victims;
 - (ii) to maintain consistency and certainty in the practice of the Ngambra Circle Sentencing Court ; and
 - (iii) to ensure the transparency of the process of circle sentencing.

Application

7. This Practice Direction applies to any application for referral to the Ngambra Circle Sentencing Court made after the commencement of this Practice Direction.
8. The Ngambra Circle Sentencing Court will be held in locations designated by the Ngambra Circle Sentencing Court Magistrate.

Application for Referral for Assessment for Circle Sentencing

9. Subject to this Practice Direction, Aboriginal and Torres Strait Islander persons who have been charged with and pleaded guilty to an offence that may be heard and determined in the Magistrates Court of the Australian Capital Territory may make an application, orally or in writing, for referral for assessment for Circle Sentencing for that offence.
10. An application for referral of an offender who is an Aboriginal or Torres Strait Islander person for assessment for Circle Sentencing may be made by the prosecution.
11. Any Magistrate may, in the exercise of his or her discretion, consider an application for referral for assessment for Circle Sentencing. A Magistrate may make a referral of his or her own motion.
12. The legal representatives of defendants who may wish to seek referral for assessment for Circle Sentencing are expected to discuss the application carefully with their clients.

13. Subject to this Practice Direction, a referral for assessment for Circle Sentencing shall only be made if each of the following criteria are satisfied, namely that:
 - (i) the offence is within the jurisdiction of the Magistrates Court of the Australian Capital Territory and, if only with the defendant's consent, that consent is formally given;
 - (ii) the offender has pleaded guilty to the offence or offences for which he or she is before the Court;
 - (iii) the offender identifies as an Aboriginal or Torres Strait Islander person and claims to have kinship or association with the Canberra Aboriginal or Torres Strait Islander community; and
 - (iv) the offender consents to being assessed and agrees to participate fully in the Ngambra Circle Sentencing Court.
14. For the purposes of the trial, an offender who, in the opinion of the Magistrate, has an unresolved addiction to illicit drugs (other than cannabis) is not eligible for Circle Sentencing.
15. For the purposes of the trial, an offender who has been charged with a sexual offence is not eligible for Circle Sentencing.
16. An application for referral for assessment for Circle Sentencing shall be made in open Court and both the prosecution and the defendant may make submissions on the application.
17. The Magistrate, when referring the offender for assessment or when making any post assessment referral, may order a pre-sentence report or other reports, such as CADAS or mental health reports, which may, with the consent of the offender, be put before the Circle.
18. Pre-sentence reports will, unless ordered to be provided in accordance with Division 15.2 of the *Crimes Act 1900*, be provided in a short form which will address
 - (i) the offender's previous history with ACT Corrective Services;
 - (ii) the circumstances of the offence and the attitude of the offender to the offence;
 - (iii) recommended programs or assessments; and
 - (iv) comments on sentencing options.
19. Any reports prepared by ACT Corrective Services will be provided, with the consent of the offender, to the Ngambra Circle Sentencing Court Coordinator who shall provide them to the Elders Panel, if they are able to be provided in time, and who shall provide them to the Ngambra Circle Sentencing Court

Magistrate, the prosecutor and any legal representative of the offender prior to the date on which the Circle is convened. All reports prepared for the purpose of the Circle Court processes are to be returned to and retained in the custody of the Magistrates Court.

20. If it appears to the Magistrate that the offender is not eligible or his or her application for Circle Sentencing is otherwise denied, the Magistrate shall proceed to hear and determine the sentence in the usual way.

Procedure after Referral

21. The assessment of the offender's acceptability for Circle Sentencing shall be conducted in custody or in the community if the offender is on bail. If the offender is on bail or is granted bail at the time of referral, the Magistrate will impose the following conditions of bail: i) that the offender submit to an assessment of his or her acceptability for Circle Sentencing and ii) that the offender shall appear at Court on any date notified by the Ngambra Circle Sentencing Court Coordinator.
22. Upon the Court making an order for referral for assessment for Circle Sentencing, the offender shall complete a consent form. The consent form is to be forwarded to the Ngambra Circle Sentencing Coordinator.

Ngambra Circle Sentencing Court Coordinator

23. The Ngambra Circle Sentencing Court Coordinator shall be responsible for:
 - (i) convening the Elders Panel to determine the acceptability of the offender for the Ngambra Circle Sentencing Court;
 - (ii) providing to the Ngambra Circle Sentencing Court Magistrate recommendations of acceptability made by the Elders Panel;
 - (iii) co-ordinating the Circle Sentencing process generally by liaising with the Ngambra Circle Sentencing Court Magistrate on a hearing date and location;
 - (iv) in consultation with the Elders Panel, selecting members of the Community Panel to participate in a Circle and arranging for their attendance;
 - (v) liaising with the legal and other service providers, including those assisting the victims;

- (vi) ensuring that all programs required to implement the sentence recommended by the Circle are in place;
 - (vii) where ACT Corrective Services are not responsible for supervision of the offender or the sentence imposed, reviewing, together with the relevant members of the Community Panel, the offender's compliance with any sentence imposed ; and
 - (viii) where ACT Corrective Services are not responsible for supervision of the offender or the sentence imposed, informing the Director of Public Prosecutions promptly of an offender's failure to comply with the sentence.
24. In order to discharge these responsibilities, the Ngambra Circle Sentencing Court Coordinator will liaise regularly with the Ngambra Circle Sentencing Court Magistrate, legal and other service providers and the offender during the sentencing process.
25. The Ngambra Circle Sentencing Court Coordinator will meet with the offender and take the necessary details for preparation of a report to the Elders Panel and collect such additional reports as may be ordered by the Court or otherwise appropriate for submission to the Panel and the Circle.

Victim Support

26. It is recognised that the approach to and preparation of victims for participation in Circle Sentencing can be stressful for the victim and must be approached with sensitivity and special training.
27. The prosecution will make initial contact with the victim or victims of a person who has been referred for assessment for Circle Sentencing and
- (i) explain the process;
 - (ii) invite their participation;
 - (iii) identify persons or agencies from whom they may obtain assistance in preparing for participation in the circle and support during the process; and
 - (iv) with the victim's consent, notify the Victims of Crime Coordinator of the contact details of the victim.

Assessment as to Acceptability

28. The Elders Panel shall comprise members or representatives of the local community who are appointed by the Attorney-General, on the recommendation of the Aboriginal Justice Advisory Committee, for this purpose.
29. The Ngambra Circle Sentencing Court Coordinator will notify each member of the Elders Panel of the name of each offender referred for assessment and invite them to participate in the meeting to discuss the offender's acceptability for Circle Sentencing.
30. When the report or reports about the offender have been prepared, but in any event within 14 days of the Court order for referral, the Ngambra Circle Sentencing Court Coordinator will convene a meeting of at least 4 members of the Elders Panel having regard to any representations by the offender. The meeting shall consider whether the offender is acceptable for Circle Sentencing.
31. In order to determine whether the offender is acceptable for Circle Sentencing the Elders Panel will
 - (i) confirm that the offender is an Aboriginal or Torres Strait Islander person with a kinship or appropriate association with the Canberra Aboriginal or Torres Strait Islander community; and
 - (ii) decide that if an outcome is achieved at Circle Sentencing, the offender and the outcome is likely to be able to be managed for the benefit of the offender and the community.
32. In assessing the offender's acceptability for Circle Sentencing, the Elders Panel shall have regard to the following:
 - (i) the willingness of the offender to participate actively in Circle Sentencing;
 - (iii) the support the offender has within the community;
 - (iv) the impact of offending on the community;
 - (v) the likely benefits of Circle Sentencing for the victim(s), the offender and the community; and
 - (vi) the report of the Ngambra Circle Sentencing Court Coordinator and any reports he or she has obtained.
33. If the Elders Panel assesses the Offender as acceptable, the Ngambra Circle Sentencing Court Coordinator shall advise the Ngambra Circle Sentencing Court Magistrate who will then decide whether, in all the circumstances, it is appropriate that the defendant be dealt with by the Ngambra Circle Sentencing Court.

34. If the Ngambra Circle Sentencing Court Magistrate is satisfied that it is appropriate that the defendant be dealt with by the Ngambra Circle Sentencing Court and subject to this Practice Direction, the Ngambra Circle Sentencing Court Magistrate may convene the Ngambra Circle Sentencing Court on a date and at a location to be notified to all relevant persons in writing. In particular, the Ngambra Circle Sentencing Court Coordinator shall notify the offender of the date in accordance with the bail conditions referred to in paragraph 21.
35. If the offender is in custody, he or she may apply for bail to attend the Ngambra Circle Sentencing Court. If the offender does not apply for bail or bail is not granted, the Ngambra Circle Sentencing Court will be held in the Magistrates Court building.
36. If the Elders Panel assesses the Offender as not acceptable, the Ngambra Circle Sentencing Court Coordinator will advise the Ngambra Circle Sentencing Court Magistrate of the reasons why the Offender has been assessed as unsuitable and the charges will then be re-listed before the Ngambra Circle Sentencing Court Magistrate. The Ngambra Circle Sentencing Court Coordinator shall notify the offender of the date in accordance with the bail conditions referred to in paragraph 21. The Ngambra Circle Sentencing Court Magistrate may direct that the Offender be dealt with in the Magistrates Court or may direct that the Offender be dealt with by the Ngambra Circle Sentencing Court notwithstanding the assessment of the Elders Panel if the Ngambra Circle Sentencing Court Magistrate is satisfied that the Offender meets the criteria for acceptance.

Community Panel

37. The Aboriginal Justice Advisory Committee will appoint members of the Aboriginal and Torres Strait Islander community as may be willing, able and necessary to assist offenders, through participation in the Circle and at the direction of the Court to monitor any sentence imposed, including by providing appropriate support and guidance to the offender.
38. Members of the Elders Panel may also be members of the Community Panel.
39. The Ngambra Circle Sentencing Court Coordinator shall, in consultation with the Elders Panel which assesses an offender's acceptability for Circle Sentencing, invite four members of the Community Panel to attend and participate in the Circle – established for the offender.

Participants in Circle Sentencing

40. (1) The following persons shall participate in the Circle:
- (i) the Ngambra Circle Sentencing Court Magistrate;
 - (ii) the offender;
 - (iii) the prosecutor;
 - (iv) four members of the Community Panel ; and
 - (v) the Ngambra Circle Sentencing Court Co-Ordinator.
- (2) The following persons may participate in the Circle:
- (i) a member of the offender's family or a support person for the offender;
 - (ii) any legal representative of the offender;
 - (iii) any victim, or a person chosen by the victim as a representative of the victim; and
 - (iv) a support person or persons for the victim;
41. Other persons, such as the authors of reports presented to the Circle, may be invited by the Ngambra Circle Sentencing Court Magistrate to participate in the Circle either generally or for a specific purpose or time, to assist it with its deliberations.

Representation at the Circle

42. (1) The offender, who is before the Ngambra Circle Sentencing Court, may be advised by his or her legal representative.
- (2) The victim of the offence or offences may choose a representative to attend and participate at the Ngambra Circle Sentencing Court instead of the victim.

Conduct of Circle

43. The Ngambra Circle Sentencing Court aims to achieve community involvement in the sentencing process and to broaden the sentencing process so that the Circle can examine the underlying issues of offending behaviour and consider the needs of victims of crime. All participants, including the victim and other members of the community, have a chance to

be heard about the offending behaviour. The Circle should be conducted in a way that is not unduly formal and encourages and enhances the reaching of an agreement about a sentence to be imposed on the offender.

44. The seating of the participants is to be arranged in a circle.
45. The Circle shall begin by the Ngambra Circle Sentencing Court Magistrate opening the Court and welcoming all participants to the Circle.
46. The participants in the Circle shall all introduce themselves, explain who they are, their relationship with the offender or victim and their interest in the offence or how the offence has affected them.
47. The Ngambra Circle Sentencing Court Magistrate shall explain the Circle to the participants and inform the participants how the Circle shall be conducted including the following:
 - (i) only one person at a time shall speak;
 - (ii) any threat to any participant will result in the termination of the Circle.
48. The prosecutor shall present the facts of the offence and the offender's antecedents to the Circle.
49. The Ngambra Circle Sentencing Court Magistrate will decide the order of proceedings thereafter, having regard to any wishes expressed by the participants.
50. The offender shall comment on his or her offence, his or her self and his or her commitment to rehabilitation.
51. The victim or victims or their representative shall explain how the offence or offences affected them.
52. The Ngambra Circle Sentencing Court Coordinator shall, during the Circle, notify the participants of the views of any person invited and entitled to attend the Circle but unable to do so, if the Ngambra Circle Sentencing Court Coordinator is aware of those views.
53. The Ngambra Circle Sentencing Court Magistrate may adjourn the Circle from time to time although it is not expected that any adjournment will extend over more than one day and may terminate the Circle at any time.
54. At the end of the discussion, the participants at the Circle may recommend any sentence they see fit. The participants may recommend, as they think fit, that the offender be incarcerated or may agree to a range of goals for the offender to achieve. Any recommended sentence is, if possible, to be determined by a consensus of all the participants, but must be consented to by the offender.

55. If the participants determine that a custodial sentence is an appropriate sentence, any sentence imposed must not be more punitive than that which may have been imposed by the Court had the offender not participated in the Circle and shall comply with the requirements of the *Crimes Act 1900* and any other relevant legislation.
56. A sentence recommended by the Circle must:
- (i) contain goals that are realistic and appropriate and that are not more punitive than those that might have been imposed by a Court when sentencing the offender in the usual way for the offence(s);
 - (ii) set out times for the implementation and completion of the goals;
 - (iii) not recommend community service work or periodic detention that exceeds the period prescribed by applicable legislation and
 - (iv) provide for its monitoring and regular review.
57. Where the offender consents to the sentence recommended by the Circle, the Ngambra Circle Sentencing Court Magistrate shall remand the offender for sentence in the Magistrates Court.
58. If a Circle is terminated, the charges will be referred back to the Magistrates Court to be dealt with in the Court in the usual way.
59. The proceedings of the Circle shall be recorded but not transcribed or published except for the purposes of any appeal or as directed by the Court.

Failure to Reach Decision

60. If the participants at the Circle are unable to agree on a recommendation or decision or are unable to agree on a recommendation that complies with this Practice Direction, or the offender does not consent to the sentence recommended by the Circle, the Ngambra Circle Sentencing Court Magistrate shall terminate the Circle and refer the charges back to the Magistrates Court to be dealt with in the usual way and remand the offender to appear at that Court on the remand date.

Non-Attendance at the Circle

61. If the offender fails, without reasonable excuse, to attend the Circle, the Ngambra Circle Sentencing Court Magistrate shall terminate the Circle and refer the charges back to the Magistrates Court to be dealt with in the usual way. The Ngambra Circle Sentencing Court Coordinator shall notify the

offender of the date to which the charges have been referred in accordance with the bail conditions mentioned in paragraph 21.

Record of the Circle

62. The Ngambra Circle Sentencing Court Magistrate must cause a record to be made of any Circle held. The record is to contain the following matters:
- (i) name, address, gender and date of birth of the offender;
 - (ii) the offence;
 - (iii) names of the participants and the capacity in which they participated;
 - (iv) the date, and place where the Circle was held;
 - (v) particulars of the sentence recommended by the Circle;
 - (vi) persons responsible for the monitoring of any sentencing plan;
 - (vii) the date to which the proceedings have been referred to the Magistrates Court; and
 - (viii) any other matters the Ngambra Circle Sentencing Court Magistrate thinks relevant.
63. The Ngambra Circle Sentencing Court Coordinator shall make a record of the outcome of the Circle and advise the Registrar of the Magistrates Court of the outcome no later than 10 am on the day following the Circle.

Sentencing after the Circle

64. (1) The date to which the offender has been remanded under paragraph 57 is referred to in this paragraph as the sentencing date.
- (2) On the sentencing date, the Magistrate shall advise the offender of the sentence recommended by the Circle and ask him or her if he or she consents to it.
- (3) Subject to this paragraph, the Magistrate shall impose the sentence recommended by the Circle only if the offender consents.
- (4) If the offender does not consent, the Magistrate shall, subject to this paragraph and paragraph 69, proceed to sentence the offender in the usual way. Such a sentence may be similar to that recommended by the Circle but will not involve the Community Panel.
- (5) This paragraph is not intended to remove or limit the Magistrate's discretion and the Magistrate

- (i) may accept or reject the recommendation made by the Circle;
and
- (ii) shall only impose a lawful sentence which complies with the relevant legislation including Part 15 of the *Crimes Act 1900*.

Completion of Sentence

65. Where ACT Corrective Services have in the sentence been required to supervise the offender or the sentence imposed, the relevant officer of ACT Corrective Services will liaise with the Ngambra Circle Sentencing Court Coordinator throughout the period of the sentence and, in accordance with a Memorandum of Understanding between ACT Corrective Services and the ACT Magistrates Court, seek the advice of the members of the Community Panel who participated in the Circle where the offender appears to have breached the terms of a sentence in considering whether to take action for the breach.
66. If ACT Corrective Services is not responsible for supervision of the offender or the sentence imposed, the Ngambra Circle Sentencing Court Coordinator shall supervise the implementation, monitoring and completion of the sentence and will give the Ngambra Circle Sentencing Court Magistrate written notice as to whether or not the sentence has been satisfactorily completed by the offender.
67. If ACT Corrective Services is not responsible for the supervision of the offender or the sentence imposed and if the Ngambra Circle Sentencing Court Coordinator is advised or suspects that the offender has failed to comply with his or her sentence, he or she shall give written notice to the Ngambra Circle Sentencing Court Magistrate and the prosecution. The prosecution may then commence breach action against the offender.
68. On the hearing of any breach of a sentence imposed under the procedures set out in this Practice Direction, the Ngambra Circle Sentencing Court Magistrate, if satisfied that the offender has breached the sentence;:
- (i) may decide to take no action with respect to the breach;
 - (ii) may take such other action as may be available in law to be taken; or
 - (iii) may direct that the Circle be reconvened for the purpose of reconsidering the offender's behaviour.

Court To Take Matters Into Account

69. In sentencing an offender after participation in the Ngambra Circle Sentencing Court, whether an outcome is achieved or not, the Magistrate shall take into account:
- (i) the fact that the offender has participated in the Circle; and

- (ii) anything done by the offender in compliance with any sentence imposed as a result.

Review Mechanism

70. The practice introduced by this Practice Direction will be reviewed at the end of 6 months.

Dated 20th day of April 2004.

Chief Magistrate
Mr R J Cahill

Mr S. G. Madden

Mr M. A Somes

Mrs L. E Campbell

Mr P. G. Dingwall

Mrs M. K Doogan

Mr J. D Burns

Mr G. C Lalor

Ms K. M Fryar