IN THE SUPREME COURT OF VICTORIA
COURT OF APPEAL
(CRIMINAL DIVISION)

IN THE MATTER OF an Application for Leave to Appeal Against Sentence by Damian Honeysett

Between:

DAMIAN HONEYSETT **Applicant**

and

THE QUEEN

Respondent

OUTLINE OF SUBMISSIONS ON BEHALF OF THE VICTORIAN ABORIGINAL LEGAL SERVICE AND THE HUMAN RIGHTS LAW CENTRE

Date:	13 August 2018
Filed on behalf of:	Human Rights Law Centre and Victorian Aboriginal Legal Service
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The Human Rights Law Centre ('HRLC') and the Victorian Aboriginal Legal Service ('VALS') seek leave to appear as *amicus curiae* in the appeal of Damian Honeysett.

Basis for Application to Appear as *Amicus Curiae*

1. The Victorian Aboriginal Legal Service ('VALS') has been representing and advocating for Aboriginal and Torres Strait Islander people in Victoria since its inception in 1973. The organisation focuses on "…ensuring Victorian Aboriginal and Torres Strait Islander people enjoy and exercise their legal rights, are aware of their responsibilities under the law, and have access to appropriate legal representation in the legal system."[1] VALS purpose also includes addressing both the causes and effects of Aboriginal and Torres Strait Islander peoples' disadvantage linked to disproportionate representation in the justice system and higher rates of incarcerations.

2. The day to day work of the VALS involves, amongst many other things, the provision of advocacy, legal advice and representation to Koori offenders and their communities through the County Koori Court of Victoria ('Koori Court') and also the Koori Court division of the Magistrates' Court.

[1] Victorian Aboriginal Legal Service, Annual Report 2013 – 2014 p 1.

3. The Human Rights Law Centre ('HRLC') is an independent, not-for-profit, non-government organisation that works to protect and promote human rights in Australia and Australian activities overseas. The protection and promotion of Aboriginal and Torres Strait Islander peoples' rights, and reducing the over-imprisonment of Aboriginal and Torres Strait Islander people, is a key focus area for the Centre.

4. The HLRC has been involved, both as *amicus curiae* and a member of legal teams, in a number of superior court matters focused on the over-representation of Aboriginal and Torres Strait Islander peoples in criminal justice systems around Australia, including in the High Court of Australia.

5. The HLRC made numerous public statements and submissions about the causes and consequences of Aboriginal and Torres Strait Islander over-representation in criminal justice systems, including prisons. For example, in 2017, the HLRC co-authored the following report: *Over-represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-imprisonment*.

6. The issues raised in this matter are of particular significance to the activities, objectives and purposes of the Centre. The Centre's objects, as set out in Rule 2(a) of its Constitution, include:

    a. to promote, protect and contribute to the fulfilment of human rights in Australia, particularly the human rights of people that are disadvantaged or living in poverty; and

    b. to contribute to the harmonisation of law, policy and practice in Australia with regards to human rights.

7. In light of the work done by these organisations, the VALS and the HRLC are able to offer insight to the Court as to both the Victorian and national experiences of Aboriginal offenders in the criminal justice system, the historical issues at play, and the effectiveness and limitations of the traditional criminal justice system to address the over-representation of Aboriginal and Torres Strait Islander peoples.

Operation and Importance of the County Koori Court

8. In 1991, the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') highlighted the overrepresentation of Aboriginal Australians in the criminal justice system.

9. The RCIADIC highlighted the following:

> *"Aboriginal people are in gross disproportionate numbers, compared with non- Aboriginal people, in both police and prison custody and it is this fact that provides the immediate explanation for the disturbing number of Aboriginal deaths in custody."*[2]

10. It is well documented that this overrepresentation occurred against a backdrop of dispossession and brutality towards Indigenous people in modern Australian history.[3]

11. Despite the efforts of many, overrepresentation in the justice system has remained a very real problem. As at 2016, Aboriginal and Torres Strait Islander people were 12.5 times more likely to be imprisoned than non-Indigenous Australians.[4]

12. In 2008, then Attorney General Robert Hulls recognised these issues when he explained the need for a Koori Court as follows:

> *"Firstly, indigenous defendants often come from the most disadvantaged of backgrounds of all Australians and continue to face inequities on a daily basis.*
>
> *Secondly, there continues to be a significant overrepresentation of indigenous people in the Victorian justice system."*[5]

13. The County Koori Court ('Koori Court') was established by the County Court Amendment (Koori Court) Act 2008 and was the first sentencing court for Aboriginal persons in Australian higher courts.[6]

14. It followed the earlier creation of the Magistrates' Koori Court program, which arose out of the Victorian Aboriginal justice agreement. In 2008, then Attorney General Robert Hulls spoke of the importance of the agreement when he said as follows:

> *"This historic agreement, entered into in 2000, embodied a partnership between various Victorian government departments and a number of key Victorian Koori organisations. It was a response to the issues and recommendations raised by the Royal Commission into Aboriginal Deaths in Custody to tackle disadvantage and inequity, reduce Koori contact with the criminal justice system, and improve justice outcomes for indigenous Victorians."*[7]

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[2] Royal Commission into Aboriginal Deaths in Custody, vol 1, [9.4.1]

[3] Ibid, vol 1, [1.4.2 – 1.4.3].

[4] Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples at page 22.

[5] Above no. 3.

[6] Victoria, Parliamentary Debates, Legislative Assembly, 31 July 2008, 2878-2886 (Robert Hulls, Attorney General)

[7] Ibid

15. The Koori Court offers participants a culturally relevant experience of the criminal justice system and represents a significant departure from the mainstream judicial process.

16. An accused Indigenous person can only participate in Koori Court if they are pleading guilty and certain other criteria are met.[8]

17. The plea hearing is conducted in three stages. First, the accused is arraigned. Second, the accused participates in a sentencing conversation with the Judge, Aboriginal Elders or Respected Persons, and legal representatives. Others such as family and support persons may also contribute. Third, the accused is formally sentenced.[9]

18. The Koori Court represents an important step towards redressing the imbalance between Aboriginal and non-Aboriginal offenders in the justice system and empowering Aboriginal communities.

Significance of the Matters Raised on *Honeysett* Appeal

19. The specific relevance of participation in Koori Court to the sentencing exercise is yet to be comprehensively analysed by the Victorian Court of Appeal.

20. This was highlighted by Weinberg JA in his judgement granting the Applicant leave to appeal.

21. His Honour said:

> *"Having regard to the lack of case law dealing in an extended way with that issue, it would be useful to have this Court provide guidance as to how, precisely, the procedures adopted in the Koori Court should impact upon the overall synthesis when trial judges sentence in such cases."*[10]

22. In the year 2015 – 2016, the Koori Court dealt with a total of 52 new cases across Gippsland and Melbourne.[11] Since that time, the operation of the Court has been expanded to Mildura and Shepparton.[12]

Koori Court Participation and Established Sentencing Principles

[8] County Court of Victoria, Practice Note: Operation and Management of the County Koori Court, 8 October 2012 at paragraph 6.
[9] Ibid at paragraphs 12 – 24.
[10] Honeysett v The Queen [2018] VSCA 14 at paragraph 35.
[11] County Court of Victoria, 2015-2016 Annual Report at page 22.
[12] County Court of Victoria, Media Release, 26 July 2018.

23. The Koori Court was designed by parliament to represent "…a fundamental shift in the way in which we, as a community, deal with Indigenous defendants".[13]

24. It is submitted that positive engagement in the Koori Court process should therefore be recognised and specifically reflected in mitigation in the exercise of the sentencing discretion.

25. It is well settled in case law that a history of deprivation and dysfunction, as experienced by many Indigenous Australians, may be relevant to the sentencing exercise and operate in mitigation of any penalty imposed.[14]

26. It is submitted that positive participation in the Koori Court sentencing conversation should be given discreet consideration as a factor in mitigating sentence, within the bounds of the sentencing purposes relevant to all offenders.[15]

Just Punishment

27. The principle of just punishment speaks to the need of the community to have the balance of fairness restored and to address the injustice that flows from the offending behaviour of an accused.

28. The experience of participating in Koori Court can be confronting for an accused, and the direct dialogue with Elders may bring about a sense of shame.

29. In *R v Morgan*, their Honours said the following:

> *"As to the importance of 'shaming', the Australian Law Reform Commission referred to 'shaming' as a traditional punishment that continues to be used by Aboriginal people.[16] It is clear that this form of punishment is an important aspect of maintaining order in Aboriginal communities. It is considered to be an effective sanction where the punishment is administered by Aboriginal elders.[17]*
>
> *The 'sentencing conversation' is designed to further the reformation of an Aboriginal offender through a unique blending of Aboriginal customary law and the English common law. Participation in the process is more burdensome than appearing at a traditional plea hearing, particularly in circumstances like the present where Mr Morgan had sought reconciliation with his indigenous heritage."[18]*

[13] Ibid

[14] See *Bugmy v The Queen* [2013] HCA 37.

[15] *Sentencing Act 1991* (Vic) s 5.

[16] ALRC, The Recognition of Aboriginal Customary Laws, Report No 31 (1986), [500]-[501].

[17] LRC of WA, Aboriginal Customary Laws, Project 94 (Sep 2006), 91.

[18] [2010] VSCA 15 at paragraphs 35-36.

30. In these circumstances, is submitted that positive participation in the Koori Court process is relevant in considering the weight to be given to just punishment.

Specific Deterrence

31. The need for specific deterrence in the sentencing exercise necessarily varies from case to case.

32. It is submitted that where an accused person engages comprehensively and positively in Koori Court, the need for specific deterrence in the sentencing exercise may be reduced.

33. Further, evidence of an accused person's participation in Koori Court, and respect for the process may be reflective of genuine remorse and contrition. In such cases, the need for specific deterrence will be lessened.

Prospects for Rehabilitation

34. A willingness to submit to the Koori Court process may be demonstrative of improved prospects for rehabilitation and should be considered in that way when sentencing offenders who have engaged well.

Community Protection

35. The protection of the community has been described as "the necessary and ultimate justification for criminal sanctions".[19]

36. It is submitted that the unique and comprehensive approach of the Koori Court in requiring the active involvement of the accused and their community, may facilitate the protection of the community effectively. (stats re recidivism??)

37. Where there has been meaningful engagement, the need to emphasise this sentencing purpose may be reduced.

Conclusion

38. On behalf of the VALS and the HRLC it is submitted that participation in the Koori Court process should be specifically considered in the sentencing exercise.

39. Positive participation and thorough engagement is a matter of real significance and should be reflected accordingly in any disposition imposed.

[19] *Channon* (1978) 20 ALR 1 at 5