

Magistrates Early Referral into Treatment (MERIT)

Participation of Aboriginal people in the MERIT program



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Executive Summary

The Magistrates Early Referral Into Treatment (MERIT) Program was developed in response to the NSW Drug Summit and diverts adult defendants with primary drug problems on bail from Local Court to a three-month intensive drug treatment program. On completion of the drug treatment, defendants return to court for sentencing. MERIT is a joint initiative between the criminal justice and health sectors that aims to break the drug-crime cycle through addressing the underlying factors associated with criminal behaviour.

The NSW Attorney General's Department has a strong commitment to equity in the justice system. Monitoring of equity issues regarding access and participation in criminal justice programs is essential. As the lead agency, the Department has undertaken an examination of access to and participation in MERIT by Aboriginal defendants.

The study population consisted of 6219 persons referred to MERIT between 2 July 2000 and 31 October 2004. Of these persons, 13.7% (853) identified themselves as Aboriginal and/or Torres Strait Islander.

Aboriginal persons consistently made up a higher proportion of MERIT referrals than would be expected from their share in finalised appearances before the Local Court (13.7% versus 8%). Aboriginal persons were slightly less likely than non-Aboriginal persons to decline an invitation to be assessed for participation in the program once they had met with the MERIT counsellor for assessment purposes.

In this study period a total of 3454 persons referred to MERIT were accepted into the Program. Aboriginal persons were less likely than non-Aboriginal participants to be accepted into MERIT following assessment for eligibility and suitability (63% versus 73%). Aboriginal participants were more likely than non-Aboriginal persons to be referred to the MERIT program by solicitors (39.3% versus 28.9%), but less likely to self refer (4.7% versus 8.2%), or be referred by Magistrates (40.2% versus 44.7%).

Following the submission of a MERIT assessment report fewer Aboriginal defendants were considered by the Magistrate as unsuitable for the program (8.5%) than non-Aboriginal defendants (12%), suggesting that the Courts are attempting to accommodate as many Aboriginal persons as possible in the MERIT program.

There has been some variability on the proportion of Aboriginal persons accepted into MERIT during the operational period studied. While acceptances for non-Aboriginal participants have remained relatively stable over time, there has been a general decline in Aboriginal acceptances into MERIT from the start of 2002. It is likely that the *Bail Amendment (Repeat Offenders) Act 2002* which reduces the availability of bail for some classes of repeat offender has had an impact on acceptance rates for Aboriginal participants into MERIT.

Of the 3454 persons accepted into MERIT, 2020 persons completed the three-month program. Aboriginal participants had a lower completion rate (50%) than non-Aboriginal participants (60%).

For all MERIT participants the main reason for not completing the program was being breached by the MERIT team. Aboriginal participants were somewhat more likely than non-Aboriginal participants to be found in breach of program requirements (65% versus 60%). However Aboriginal participants were less likely to be removed from the program by the court and less likely to voluntarily withdraw from the program. The reasons behind being breached by the MERIT team or removed from the program by the court include the person (re)offending whilst on the program or otherwise breaking bail conditions.

Aboriginal participants were more likely to be referred to residential treatment programs (48%) than non-Aboriginal participants (18%).

Regional differences were noted in referral, acceptance and completion rates for Aboriginal and non-Aboriginal participants.

Aboriginal participants were more likely than non-Aboriginal participants to be younger, female, married and/or living with family, unemployed, have lower education and have served time in prison.

Aboriginal persons were twice as likely to be referred to MERIT on charges relating to assaults, justice offences, malicious damage and offensive behaviour than non-Aboriginal persons. Aboriginal persons were less likely than non-Aboriginal persons to be referred to MERIT for charges relating to drug offences and acquisitive crimes such as stealing, burglary and fraud.

Aboriginal participants were more likely than non-Aboriginal participants to have cannabis as the principal drug of concern but were less likely to note heroin or benzodiazepines as primary drug problems.

The findings suggest that Aboriginal participants are referred to MERIT at a rate equal to or at times better than non-Aboriginal participants. However, Aboriginal participants are less likely to be accepted and are less likely to complete the program than non-Aboriginal participants.

Differences in the nature of referrals, acceptances, completions, and, individual characteristics provide potential explanations for the findings. Factors highlighted as affecting the participation of Aboriginal defendants include differences between regions, between referral sources, in rates of offending while on the program, and particular treatment plans.

This study has investigated the access of Aboriginal defendants to drug crime diversion program MERIT. The high referral rate for Aboriginal people is clearly encouraging in terms of access to this diversion program within the criminal justice system. The challenge now is to develop strategies to build on this foundation and increase both acceptance and completion rates for Aboriginal defendants in the MERIT program.

1. INTRODUCTION

In May 2000, the Prime Minister and New South Wales Premier issued a Joint Statement announcing that the Federal and NSW Governments had signed a bi-lateral agreement committing funding and arrangements for the establishment of five drug diversion initiatives across NSW as part of the Council of Australian Governments' (COAG) *Illicit Drug Diversion Initiative*. The Magistrates Early Referral Into Treatment (MERIT) Program was one of these five initiatives.

As stated in the Joint Statement, the aim of these drug diversion initiatives was to:

“(Give people) who are caught using drugs the option of undertaking treatment and/or education aimed at helping them to stop using drugs, rather than getting caught up in the criminal justice system”.

The introduction of MERIT and other drug diversion programs received strong community support and bi-partisan endorsement at the 1999 NSW Drug Summit. A principal advocate for drug diversion initiatives was Major Brian Watters, Chairman of the Australian National Council on Drugs (ANCD). In relation to the set of diversion initiatives introduced under the COAG agreement, Major Watters stated in an ANCD Press Release (25 May 2000) that:

“The movement of some people using drugs from the criminal justice system to the health system for treatment will not only provide real benefits to the individual concerned, but just as importantly, to their family and wider community. The Tough on Drugs Strategy has always been about being tough on the drugs and not the people, as this Diversion Initiative clearly demonstrates”.

MERIT first commenced as an early court intervention pilot operating solely out of the Lismore Local Court. Currently, MERIT operates out of 53 Local Courts distributed across NSW and covers all Area Health Services. MERIT is now showcased as a successful drug diversion programs operating in NSW. At the launch of MERIT at the Downing Centre in November 2004, the NSW Attorney General, the Hon. Bob Debus MP stated:

“MERIT is a great example of the way that the Courts can work in close partnership with police, health services and non-government agency partners to reach individuals with drug problems who might not otherwise have received treatment, helping them and the communities in which they live. We know that MERIT has proven successful in getting many offenders into formal drug treatment for the first time in their lives. Equally encouraging is the fact that people who complete MERIT have a much lower likelihood of re-offending”.

The basis of this Report is to examine whether or not the MERIT Program is reaching Aboriginal people. That is, are Aboriginal people offered the same opportunities to participate in the MERIT program as other community groups? This question needs to be examined in the context of the continued level of over-representation in the NSW criminal justice system. It also needs to be examined in the context of any characteristics in drug-related offending or illicit drug use that may differentiate Aboriginal persons from other persons referred to MERIT.

1.1 AIM AND STRUCTURE OF THE REPORT

This report provides:

- An overview of Aboriginal over-representation in the criminal justice system.
- An overview of issues regarding the access of Aboriginal persons to court diversion options and, more specifically, drug diversion programs.
- Background information on the Magistrates Early Referral Into Treatment (MERIT) Program including the process by which persons are accepted into this program.
- An analysis of the participation of Aboriginal people in the three stages of the MERIT Program, namely:
 1. Referral to MERIT (for assessment of program suitability)
 2. Acceptance into and participation in the MERIT Program
 3. Completion of the requirements of the MERIT Program.
- An examination of the characteristics of Aboriginal persons accepted and declined at each stage of MERIT.

1.1.1 Use of statistics: Chi-squared tests

Chi-squared tests were performed to highlight differences between demographic groups and changes over time. The chi-squared test is a non-parametric test that examines whether there is a significant relationship between two or more categorical variables expressed in terms of frequency data. All of the chi-squared tests in the present report were two-way, that is, conducted between two variables. Results based on the chi-squared test are indicated in the text.

All of the significant chi-squared tests reported in the text are statistically significant at the 0.01 level. Given that this report is written for a non-technical audience, the chi-squared scores, associated degrees of freedom, and significance levels are not reported in the text.

For a detailed description of the chi-squared test, see Siegel and Castellan (1998).

1.2 OVER-REPRESENTATION OF ABORIGINAL PEOPLE IN THE CRIMINAL JUSTICE SYSTEM

Over-representation of Aboriginal and Torres Strait Islander people is the most significant and enduring problem for the justice system in Australia. It also remains as the single greatest challenge to the evolution of a fair and equitable system of criminal justice in the 21st century.

According to the NSW Aboriginal Justice Advisory Council (2003), the most fundamental problem is the rate at which Aboriginal people come into contact with the criminal justice system, which is out of all proportion to their share in the general population. Where objective and reliable evidence exists, Aboriginal people – adult and juvenile, male and female – are shown to appear in large and disproportionate numbers at every level of the criminal justice system.

Furthermore, Aboriginal people receive harsher options at every point of the system, which has been seen as the principal reason for their over-representation (see Royal Commission on Aboriginal Deaths in Custody, 1991; Green Paper on Juvenile Justice in NSW, 1993; National Inquiry Into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, 1997). In fact, it has not gone unnoticed that the level of Aboriginal over-representation increases at the “deep end” of the system (United Nations, 2004):

“Since 1997, Aboriginal prisoners regularly constitute over 20 per cent of the total prison population of the country, although Aboriginals make up only 2.4 per cent of the total population. The situation is even worse in women’s and youth facilities, where the number of indigenous women is 20 times that of non-indigenous women”. (p.10)

Not only are the numbers of Aboriginal persons in the criminal justice system disproportionately high, but their profile in terms of police arrests, court appearances, bail refusals and prison sentences does not always mirror their seriousness as offenders, even when their prior offending history is taken into account (International Commission of Jurists, 1990; Luke and Cunneen 1995; Cunneen and McDonald 1997).

Harsh and discriminatory practices by criminal justice players early in the system have been found to adversely affect later criminal justice outcomes (Gale, Bailey-Harris & Wundersitz, 1990; Luke and Cunneen, 1995; Cunneen and McDonald, 1997). To bear out this point, the following section presents evidence on the level of over-representation of adult Aboriginal persons at each stage of the criminal justice system. This may help to demonstrate the compounding effect that decisions early in the justice process can have on later criminal justice outcomes, such as decisions to remand Aboriginal persons in custody.

The impact of such decisions obviously will be reflected in the numbers of Aboriginal persons in custody. Less evident will be the lost opportunities for Aboriginal offenders to participate in drug diversion programs such as MERIT where release into the community on bail is a prerequisite of program entry.

1.2.1 Level of Aboriginal over-representation in the NSW criminal justice system

Adult Aboriginal people are over-represented at each level of the criminal justice system in NSW. By comparison with their non-Aboriginal counterparts, Aboriginal people are:

- More likely to be arrested by police.¹
- Less likely to benefit from police discretion in terms of available pre-court diversions.²
- More likely to appear before a criminal court.³
- More likely to reappear regularly before the courts.⁴
- Over-represented in court appearances relating to charges involving public disorder, offensive language, and offences against other persons, including domestic violence, common assault and assault police.⁵
- Appearing before the courts at a higher rate for property offences (eg break & enter) and other acquisitive crimes (eg stealing and shoplifting).⁶
- More likely to be convicted.⁷
- Likely to receive more severe sentencing outcomes and harsher penalties.⁸
- More likely to receive court sentences that skip available sanctions on the sentencing ladder.⁹
- Vastly over-represented in NSW prisons (as is the case in all other Australian States and Territories) and the level of over-representation appears to be increasing rather than decreasing in recent years.¹⁰
- Most over-represented in prison in terms of offences involving violence, theft, justice matters, property damage, driving and public order (Baker, 2001).
- More likely to have served one or more previous terms in prison.¹¹

The over-representation of Indigenous persons in the criminal justice system certainly is not a problem unique to Australia. Countries such as the United States of America, Canada and New Zealand experience disproportionately high rates of Indigenous persons in their criminal justice and prison populations. For example:

- Canadian Aboriginals make up 16% of the prison population but only two per cent of the country's population; they are incarcerated at 8.5 times the rate of non-Aboriginals, their arrest rate is nearly double, and the rate of incarceration nearly four times the national average (United Nations, 2004).
- In general, for the whole of the USA, custody rates for Native Americans are 2.5 times the custody rate of white Americans (*'And Justice for Some'* website, 2005). In Alaska, Native people are incarcerated at a rate more than three times higher than that of white Alaskans (United Nations, 2004).
- New Zealand Maori are over-represented in criminal justice statistics. For instance, Maori represent 14% of the general population in New Zealand but represent 51% of the prison population (Cunneen, 2001).

Notably, all three countries, like Australia, are colonised industrial nations with a history of long and enduring conflict with their Indigenous peoples.

1.2.2 Reasons for Aboriginal over-representation

According to Cunneen and McDonald (1997:42), adequate explanations of Aboriginal over-representation need to take into account “interlocking issues which include historical and structural conditions of colonisation, social and economic marginalisation, and systemic racism; while at the same time considering the impact of specific (and sometimes localised) practices of criminal justice and related agencies”.

It is beyond the scope of this study to examine the many factors that may account for Aboriginal over-representation in the criminal justice system. Detailed treatments of the issues may be found within the following references:

- the Royal Commission into Aboriginal Deaths in Custody Report (1991);
- Cunneen and McDonald (1997);
- Hunter (2001);
- Weatherburn, Lind & Hua (2003), and
- the United Nation’s (2004) Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People.

1.3 THE MERIT PROGRAM¹

1.3.1 Background

The Magistrates Early Referral into Treatment (MERIT) program was developed following a recommendation of the NSW Drug Summit in 1999. MERIT is a court based diversion initiative that is aimed at addressing both the health and criminal justice issues of adult offenders who present at participating Local Courts and who have a demonstrable drug problem. The program was modelled on the Court Referral & Evaluation for Drug Intervention Treatment (CREDIT) diversion scheme that was piloted in the Melbourne Magistrates Court in 1998, and subsequently expanded across Victoria (Barnes & Poletti, 2004).

MERIT initially commenced as a trial in the Northern Rivers area of NSW in July 2000 and was expanded to local courts in the Illawarra and South-West Sydney in 2001.² Following the initial promise of these trials, the NSW Government with Commonwealth funding approved a staged rollout of MERIT. Between 2002 and 2003, MERIT became operational in 50 local courts across NSW. 2004 was mainly a year of consolidation for MERIT, although the program did expand into a small number of additional Courts, including Broken Hill, the Downing Centre (Sydney City) and Blacktown at time of writing.

1.3.2 The MERIT courts

The decision to implement MERIT in a Local Court is driven by a number of factors. Important to the selection process is the volume of criminal matters the Courts deal with. MERIT has been established to operate out of metropolitan and heavily populated urban areas. Where it is located in rural areas, MERIT is centred on country towns with high volume criminal courts.

Other considerations when deciding a MERIT Court location include: the presence of existing treatment services to support MERIT, the projected cost-effectiveness and efficiency savings derived from expansion, the capacity to work in partnership with local non-government organisations that support the implementation of MERIT, the availability of after-care services to support MERIT participants following completion of the program and the number of Aboriginal defendants eligible for MERIT (2004 MERIT Annual Report).

¹ Information in these sections is reproduced, in large part, from the *MERIT Program Operational Manual* (NSW Health, May 2002) and the *2003 MERIT Annual Report* (NSW Attorney General's Department, November 2004).

² Involving the Northern Rivers Local Courts at Lismore, Casino, Kyogle, Ballina and Byron Bay from 2 July 2000; the Illawarra Local Courts at Wollongong, Albion Park, Port Kembla and Kiama from 1 June 2001; and Liverpool Court from 2 July 2001.

1.3.3 The MERIT Process

The target population of MERIT consists of adult defendants appearing at participating Local Courts who have a demonstrable drug problem. Persons need to be eligible and suitable for release on bail, and be motivated to engage in treatment and rehabilitation for their illicit drug problems:

The eligibility criteria for MERIT, which were framed to be intentionally quite broad, are:

- adult
- suitable for release on bail
- demonstrable illicit drug problem (excluding alcohol as the primary presenting problem)
- not involved in offences related to significant violence or sexual assault, or matters that will be heard in the District Court
- not involved in pending matters of a significant violent or sexual assault nature
- deemed suitable for drug treatment and have a treatable problem
- approved to participate in the program by the Magistrate
- willing to give informed consent to participate in a drug treatment program, and
- reside where they are able to participate in treatment programs as required.

Participants are not required to be drug dependent to enter the program. However, they should have an illicit drug use 'problem' which is sufficient to justify the significant treatment interventions available through MERIT.

MERIT is designed so that agreement to become involved in the program is not an admission of guilt for the offence(s). MERIT allows defendants to focus on treating their drug problem in isolation from their legal matters. Generally, participation commences prior to any pleas being made, with the adjournment of court matters until the completion of the program, which is usually a period of three to four months.

Magistrates, NSW Police, Probation and Parole, the Legal Aid Commission, solicitors and private legal practitioners operating in the participating courts may refer potential clients. Persons may also 'self refer' or be referred by family or friends. Receiving bail (initially police bail and then court bail) is a condition of entry into MERIT. Persons who are refused bail and persons who are released into the community without bail are not eligible to participate in the MERIT Program.

Each Area Health Service has a MERIT Team, consisting of a number of alcohol and drug caseworkers, often servicing multiple Courts. The number of caseworkers in each MERIT Team varies according to the volume of referrals expected from Courts in that Health Area.

When a MERIT Team receives a referral, they undertake a thorough clinical assessment of the person. The assessment covers:

- drug use behaviours
- drug use problems
- family relationships and family drug history
- social situation
- legal issues
- medical problems associated with drug use
- mental health
- motivation for change, and
- potential to engage in treatment for drug use problems.

As there is typically a three to four-week period between the charging of a person by police and the initial court appearance, the defendant may agree to participate in a drug treatment program after the assessment but before being formally accepted into the MERIT Program.

The MERIT Team provides a written report to the Magistrate at the next court hearing. The report is based on the clinical assessment and recommends whether or not the defendant should enter the MERIT Program. The Magistrate has discretion to determine whether any given defendant is accepted into MERIT. If the defendant is accepted, participation in MERIT is included as a condition of bail and the MERIT Team receives a copy of the Bail Order.

Participants are matched to appropriate illicit drug treatments, including detoxification, pharmacotherapies (eg. methadone, buprenorphine, naltrexone), residential rehabilitation, community outpatient services, individual and group counselling, and case management.

In addition to the specialised drug treatment services, a wide range of ancillary services may be accessed as appropriate. These include specialist and primary health care services, accommodation and housing, employment and vocational services, education and training, family counselling, and psychiatric and psychological interventions.

Magistrates are encouraged to undertake an increased level of judicial supervision of participants as a core element of the MERIT Program. Typically, this judicial supervision involves an additional 'mention' or two to establish how a defendant is progressing. This allows the Magistrate the opportunity to offer encouragement, as appropriate. On the other hand, if a defendant is not going well, judicial supervision can have a salutary effect in emphasising the consequences of non-compliance with the Program.

Where possible, the same Magistrate deals with the defendant throughout the bail period. The greater involvement of the magistracy - and a consistent voice - adds an important element to the management of offenders and is a key element in the

MERIT Program. The Magistrate may remove the defendant from MERIT for non-compliance with program conditions, and may withdraw bail for commission of further offences or for failing to appear in Court.

As a voluntary (“opt-in”) program, defendants may decline to participate in MERIT and have their case determined by the Court without prejudice. Similarly, a person participating in the MERIT Program may withdraw at any stage without prejudice. This is different to the operation of other drug diversion programs, particularly NSW Drug Courts (see Barnes & Poletti, 2004).

Completion of the MERIT Program, generally, coincides with the final Court hearing and the sentencing of the defendant. Wherever possible, the MERIT case manager contacts the person by telephone to arrange an appointment prior to the sentencing hearing. The Magistrate receives a detailed report from the MERIT Team containing information on the defendant's participation in drug treatment and any further treatment recommendations. A member of the MERIT Team may attend the sentencing hearing, if requested by the Magistrate. Also, the defendant may ask a member of the MERIT Team to attend Court in a support role.

1.4 DRUG DIVERSION PROGRAMS AND THE ABORIGINAL COMMUNITY

Court diversionary programs for offenders with illicit drug problems are a relatively new feature on the Australian criminal justice landscape. It has been only a decade since the piloting of a number of drug diversion programs in Victoria and, in NSW, a number of drug diversion programs were introduced in 2000 as a result of the NSW Drug Summit and COAG Illicit Drug Diversion Initiative.

A number of bodies have investigated the issue of drug diversion programs and their connection (or lack thereof) with the Aboriginal community. For example, highlighted in a 2001 House of Representatives Standing Committee report was that equitable access to treatment for substance abuse is a major service delivery issue.¹² The Inquiry into substance abuse in Australian Communities found that the problems of access to substance abuse treatment were worse for Indigenous Australians and people living in rural and remote areas, as well as young people and people suffering from mental illness. This finding has implications for the selection of MERIT courts.

The small scale of demand in rural and regional areas frequently adversely affects the efficient resourcing and delivery of both court-based programs and alcohol and other drug treatment services. This point has been recognised by the NSW Attorney General (*Judicial Officers' Bulletin*, March 2005, vol.17(2)) who stated that:

“It is an undeniable practical and economic fact that all sentencing alternatives are not available in every remote part of the State. The tyranny of distance is still something we are grappling with in modern day New South Wales.” (p.16).

Furthermore, drug diversion programs should use the full range of treatments and intervention types to ensure that the treatment and rehabilitation needs of *individual* drug users are appropriately addressed. However, the Aboriginal Justice Advisory Council (2004) has commented on the general lack of alcohol and other drug

treatment and rehabilitation available in country NSW – a situation they see as worse in remote areas of the State where there are high Aboriginal numbers. Hall (1997) has also commented on the further stretching of scarce drug treatment services as ‘coerced’ drug referrals compete with voluntary treatment placements.

The National Drug Research Institute (2002) commented on the small number of drug treatment and rehabilitation options available for Indigenous people relative to the size of their substance abuse problems and their numbers in the criminal justice system. This was viewed by the Australian National Council on Drugs as a key factor in Aboriginal over-representation (Siggins Miller Consultants, 2003):

“The absence of practical options for drug diversion could result in (Aboriginal people) being ‘pushed up the sentencing tree’.” (p.119)

Even where alcohol and other drug services are available, the cultural appropriateness and relevance of such services for Aboriginal people has been questioned (AJAC, 2004). Furthermore, magistrates may not always know “what diversion options are available and do not always seek these options out” (AJAC, 2001:4). This issue may be more of a problem where magistrates are on court circuit in courts in country NSW although, in relation to MERIT, it must be acknowledged that the dedicated team of drug and alcohol caseworkers would be advising magistrates of the availability and suitability of drug treatment services in their area.

Diversion programs that operate by screening potential participants on the basis of criminal antecedents or past ‘violent’ offences may disproportionately exclude Aboriginal people from participating (Spooner, *et al*, 1999; Taplin, 2002; Siggins Miller Consultants, 2003). Therefore, the framing and application of program eligibility criteria must be mindful of the already disadvantaged and disenfranchised nature of Aboriginal people in the criminal justice system.

Furthermore, there are some indicators that Aboriginal people use illicit drugs at a higher rate than the general population. For example, the National Drug Strategy Household Survey 1994 showed a higher prevalence of lifetime and past-year illicit drug use among urban Aboriginals compared with the general population. The lifetime prevalence for urban Aboriginal people was 50 per cent compared with 38 per cent for the general population and the proportion of urban Aboriginals who had used illicit drugs in the past 12 months was 24 per cent compared with 15 per cent in the general population. Also, three per cent of Aboriginals indicated that they had injected illegal drugs in their lifetime compared with two per cent of the general population. In addition, two percent of Aboriginal respondents indicated that they currently injected compared with 0.5% of the general population (MCDS, 2003).

Effective drug diversion has the ability to reduce the over-representation of Aboriginal people in the criminal justice system. It also has the potential to decrease Aboriginal over-representation in custody, which is the most visible problem of the relationship between Indigenous people and the criminal justice system (AJAC, 2004). Down the track, the value of MERIT and other drug diversion programs may be measured along these lines. However, the current worth of the MERIT program may be gauged by examining the level at which Aboriginal persons are provided with opportunities to participate in this form of drug diversion.

1.5 DATA USED IN THIS STUDY

The MERIT Information Management System (MIMS) is a purpose-designed database used to record information on participation in the MERIT Program. It was designed to be both an operational management system and a means of collecting quantitative data for the ongoing monitoring and evaluation of the Program.

Data are collected at Area Health Service level and downloaded centrally by the Centre for Drug and Alcohol (NSW Health) for monitoring and evaluation purposes. For this study, MIMS data from sixteen health areas covering the period from 3 July 2000 to 31 October 2004 (the latest data available and verified at the time of this study) were extracted and read into the SPSS statistical package.

There are a large number of data items collected on MIMS. *Appendix A* lists those select variables downloaded from the MIMS database that were used in this study. Aboriginal status is a self-identified item³.

As one would expect, more detailed information was available for persons who participated in MERIT compared with persons who were referred but not accepted into the Program. In the main, this reflects the greater opportunity to collect this information.

The unit for analysis is a 'completed' contact with the MERIT Program. This could represent a person referred to, but not accepted into, the Program. It also includes those persons who were accepted into the Program, and finished their involvement with the program, whether they did or did not meet the program's requirements. This is an operational definition reflecting the concept of a 'closed treatment episode' with defined dates of commencement and cessation. This is the standard used in the MERIT Annual Reports for 2002 and 2003 and is the basis for reporting to the Australian Government Department of Health and Ageing⁴.

This study also used the 2000 to 2003 NSW Criminal Courts Statistics Reports published by the NSW Bureau of Crime Statistics & Research. At the time of this study, 2004 Local Court Criminal Statistics were not available.

Aboriginal and Torres Strait Islander population figures for each Area Health Service were provided by the NSW Health's Centre for Epidemiology and Research and are based on the Australian Bureau of Statistics 2001 Census (Estimated Residential Population).

³ "An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he or she lives." (MIMS Data Dictionary, *MERIT Operational Manual*, 2002, Appendix, p.30).

⁴ See for example, *Australian Institute of Health and Welfare (2002), Alcohol and Other Treatment Services in Australia 2000-01 – First Report on the National Minimum Data Set*.

1.5.1 Definitions used in this report

In this report, the definitions contained in Table 1 are used to identify each of the three stages of involvement with the MERIT Program.

Table 1: Definition of MERIT Terms

Term	Definition
Referral	<p>Refers to the initial stage in the MERIT process where the person has been invited to attend the MERIT Team for assessment of their problem, regardless of whether or not the person:</p> <ul style="list-style-type: none">- attends the assessment session- is assessed as eligible/suitable for the program- agrees to participate in the program.
Acceptance	<p>Refers to the intermediate stage in the MERIT process where a person has been assessed as suitable for the program by the MERIT Team, and the Magistrate has decided to allow the person to participate in the program.</p> <p>The terms “accepted into program” and “program participant” have similar meanings.</p>
Completion	<p>Refers to the final stage in the MERIT process where the person has completed the MERIT Program, regardless of whether or not, in the view of the MERIT Team or the Magistrate, the person has satisfied all program requirements.</p>

2. RESULTS

2.1 GENERAL TRENDS

In the period from 2 July 2000 to 31 October 2004, there were a total of 6219 persons referred to the MERIT Program. The number of persons referred to MERIT is not equally spread across the four years, which largely reflects the staged rollout of the MERIT Program across NSW.

2.1.1 Participation of Aboriginal people in MERIT

The 6219 referrals to MERIT during the period from July 2000 to October 2004 is made up of the following:

- 4242 non-Indigenous persons (68.2%);
- 1124 persons whose Indigenous status was not stated or otherwise not known (18.1%); and,
- 853 persons who identified themselves as Aboriginals and/or Torres Strait Islanders (13.7%).

The Aboriginal⁵ group is comprised of

- 813 persons identifying as “Aboriginal but not Torres Strait Islander origin” (95.3%);
- 22 persons identifying as “Aboriginal and Torres Strait Islander” (2.6%); and,
- 18 persons identifying as “Torres Strait Islander but not Aboriginal origin” (2.1%).

As the basis of this study is to examine participation of Aboriginal people in the MERIT Program, the valid comparison is between the Aboriginal group and the non-Aboriginal group. The group containing those of unknown Aboriginal status cannot be used in any comparisons, as this group is likely to contain a number of persons who actually are of Aboriginal origin. Either they did not attend for assessment and so the opportunity to identify their Aboriginality was lost or did not wish to volunteer their status as an Aboriginal at time of referral⁶.

Figure 1 provides a breakdown by Aboriginal status of persons participating in the MERIT Program from 2000 to 2004 and the comparisons and analyses undertaken in this study.

⁵ Data pertaining to Aboriginal and Torres Strait Islander people have been aggregated in this report and consequently the term “Aboriginal” refers to both groups.

⁶ It has been suggested that Aboriginal persons are advised by the Aboriginal Legal Service not to answer police questions or admit to any criminal matter until they have received legal advice (Coumarelos, *et al*, 2002; Baker, 2004). As a MERIT referral does not require an admission of guilt, it is possible that police will refer a defendant to MERIT who has not admitted an offence but, nonetheless, has been charged and bailed. Some such defendants may not have identified their status as an Aboriginal person.

2.2 ABORIGINAL REFERRALS TO MERIT

Aboriginal persons represented 13.7 per cent (853 of 6219) of referrals to the MERIT Program in the 2000 to 2004 period. Based on Census estimates this group make up less than two percent of the NSW resident population. The remaining referrals involved persons identifying as being non-Aboriginal (68.2%) or whose indigenous status was not stated or otherwise unknown (18.1%).

Table 2 shows the number of Aboriginal persons referred to the MERIT Program in each year compared to the total number of referrals. Aboriginal persons made up between 11.9% and 14.3% of referrals to MERIT across the five calendar years.

Table 2: Aboriginal persons – MERIT referrals and NSW Local Court appearances

Year ^a	All Referrals	Aboriginal Referrals		ATSI ^b CAs
	N	N	%	% of all CAs
2000	81	11	13.9	8.8%
2001	460	55	11.9	8.9%
2002	1300	178	13.7	9.0%
2003	2749	393	14.3	8.3%
2004	1629	216	13.3	<i>Not available</i> ^c
Total	6219	853	13.7	8.7% ^d

^a Aboriginal and Torres Strait Islander (ATSI) is used by the NSW Bureau of Crime Statistics & Research (BOCSAR) to refer to Indigenous Australians in their collections and reports.

^b NSW Criminal Court Statistics for 2004 not available at the time of writing.

^c This average is based on the numbers of CAs for each year from 2000 to 2003.

Source: MIMS and NSW Criminal Courts Statistics (BOCSAR).

Figure 1: MERIT Flow Chart

MERIT PROGRAM

July 2000 to
October 2004

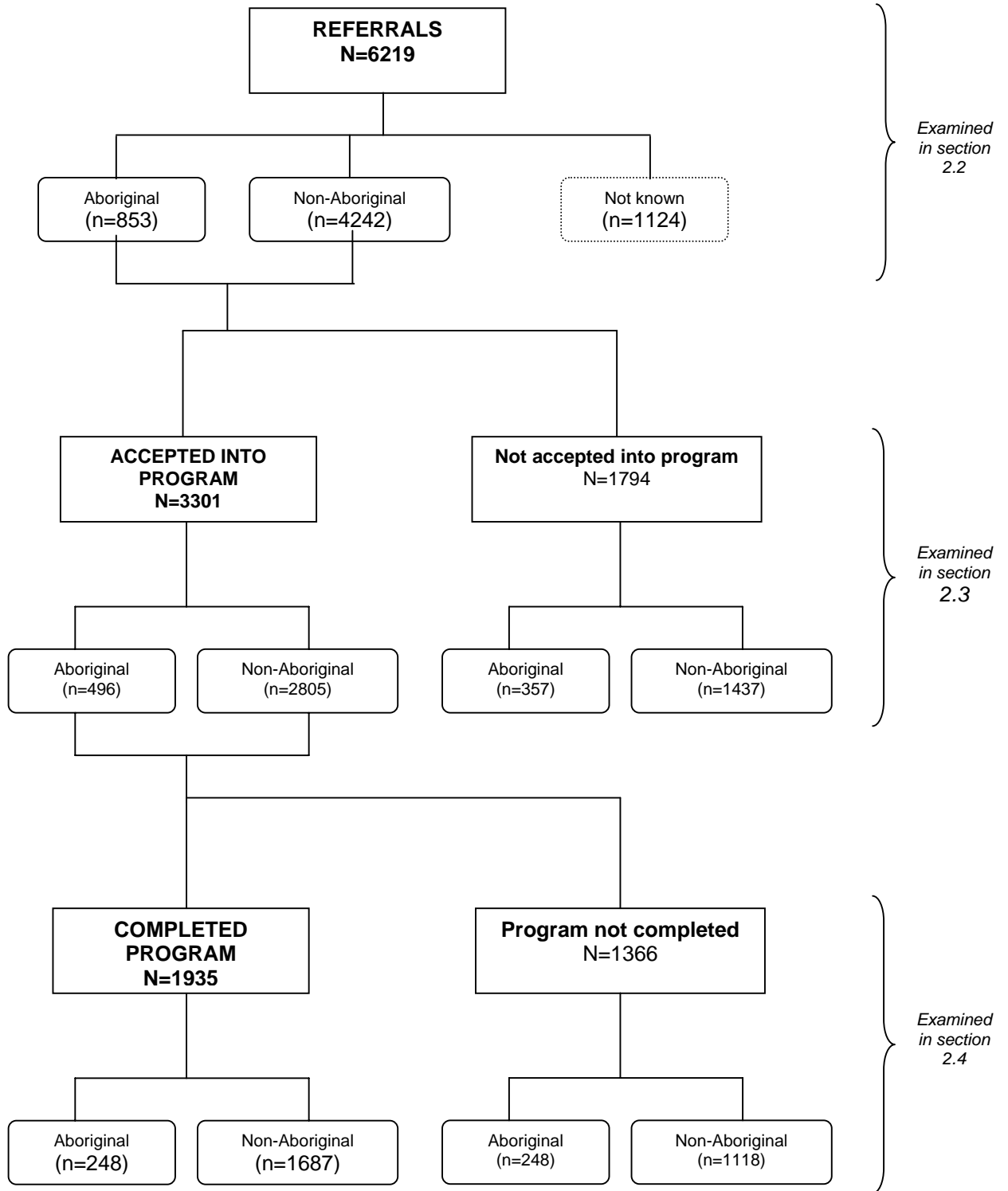
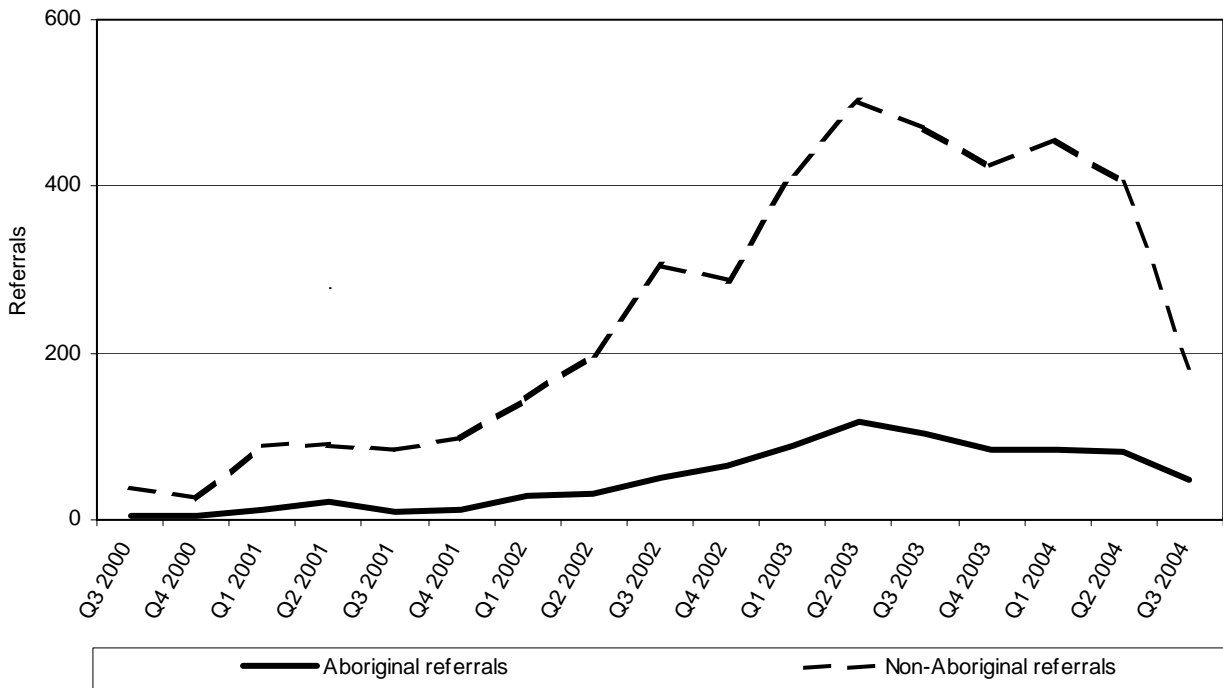


Figure 2: Number of Aboriginal and non-Aboriginal persons referred to MERIT by quarter (July 2000 to October 2004)

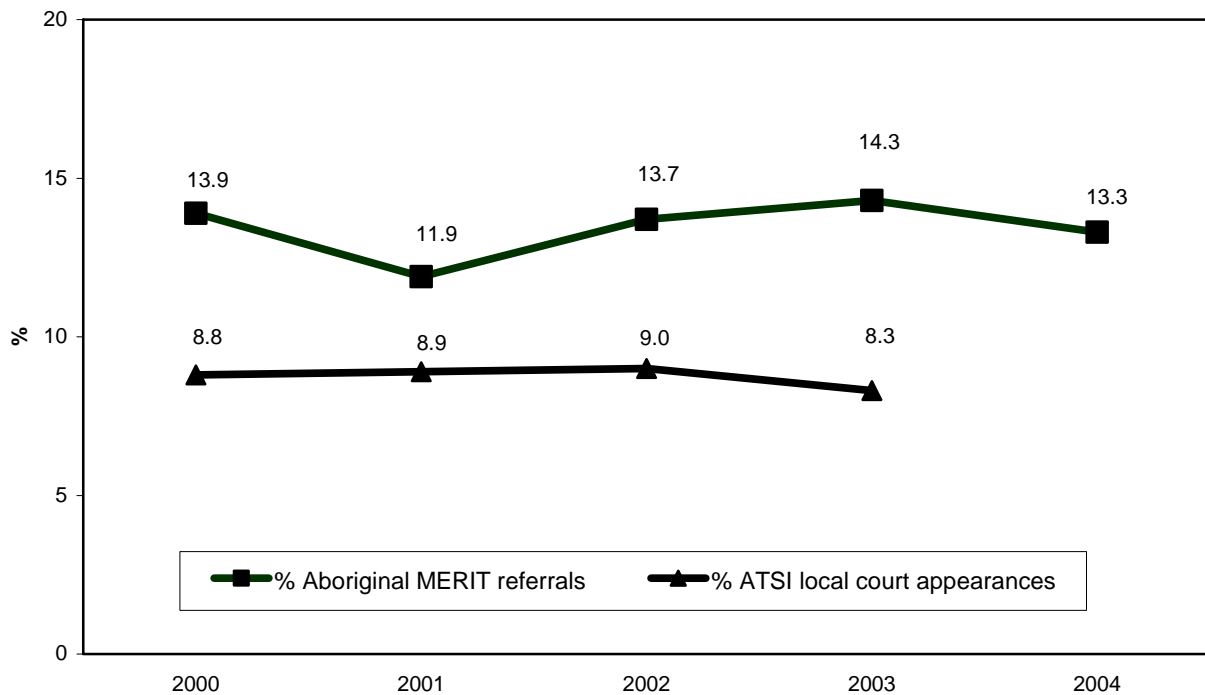


Note: Q4 in 2004 not displayed as referrals for full quarter not collected in this study.
 Source: MIMS.

The pattern of MERIT referrals across the period examined is shown in Figure 2. It reveals that the quarterly number of referrals for both Aboriginal and non-Aboriginal persons peaked in mid-2003 following a strong rise in the number of referrals from the end of 2001. Aboriginal and non-Aboriginal referrals have been in decline since mid-2003.

Comparing MERIT referrals with persons appearing before the Local Court, it may be seen that Aboriginal persons consistently make up a higher proportion of MERIT referrals than expected from their share in finalised appearances before the Local Court. This relationship is displayed in Figure 3.

**Figure 3: Aboriginal MERIT referrals and court appearances
(all NSW Local Courts)**



Note: 2004 Local Court Criminal Courts Statistics not available at time of study.
Source: MIMS and BOCSAR NSW Criminal Courts Statistics.

2.2.1 Charges

The 6219 persons referred to MERIT between 2000 and 2004 were charged with 14888 offences. The 853 identified Aboriginal persons referred to MERIT were charged with 2399 offences or an average of 2.8 charges per person (Table 3).

The 4242 non-Aboriginal persons referred to MERIT were charged with 10922 offences, which, at 2.6 charges per person, was a slightly lower average rate than for the Aboriginal group. An even lower rate, 1.4 charges per person, was registered for persons whose Aboriginal status was not stated or otherwise not known.

Table 3: Number and rate of charges for Aboriginal and non-Aboriginal persons referred to MERIT

MERIT Referrals	Aboriginal N	Non- Aboriginal N	Not stated/ not known N	All N
Charges	2399	10922	1557	14888
Number of persons	853	4242	1124	6219
Average charge rate	2.8	2.6	1.4	2.4

Source: MIMS.

Charges for “theft offences” (36.9%) and “(illicit) drug offences” (25.6%) together made up just fewer than two-thirds of all charges for persons referred to MERIT. The only other offence category in the double-figures for all persons referred to MERIT was “driving offences”, which comprised 12 per cent of charges (Table 4).

Table 4: Types of charges for Aboriginal and non-Aboriginal persons referred to MERIT

Offence Category (charge)	Aboriginal %	Non- Aboriginal %	Not stated/ not known %	All %
Theft offences (includes “Break & enter” and “Fraud”)	33.7	37.8	35.4	36.9
Drug offences	15.7	27.4	28.4	25.6
Driving offences	13.5	11.8	11.4	12.1
Assault	11.8	5.8	5.7	6.8
Against justice procedures	11.8	6.9	7.1	7.7
Malicious damage to property ^a	5.1	2.8	3.0	3.2
Offensive behaviour ^b	2.1	0.9	1.3	1.1
Weapons offences	2.0	2.6	2.8	2.5
Robbery & extortion ^c	0.7	0.8	1.7	0.9
All other offences ^d	3.6	3.2	3.2	3.2
Total ^e	100.0	100.0	100.0	100.0

^a Includes 1 charge of arson.

^b Includes 11 charges of prostitution.

^c Involved the charges of: robbery with a firearm (2); robbery with non-firearm weapon (10); robbery without weapon (80); and, demand money with menaces (40).

^d Includes the charges of: indecent assault/act of indecency (10); culpable driving causing death (25); and, abduction (1).

^e See Table 4 for number of charges for each group.

Source: MIMS.

Almost one in every eight (11.8%) Aboriginal persons referred to MERIT were charged with “Assault”. A similar proportion of Aboriginal referrals were charged with “Offences against justice procedures”, which includes the offences of breach bail and fail to appear at court.

Aboriginal persons were twice as likely to be referred to MERIT on charges relating to assaults and justice offences than non-Aboriginal persons. Similarly, Aboriginal persons were twice as likely than non-Aboriginals to be referred to MERIT on charges of malicious damage or offensive behaviour.

Aboriginal persons were less likely than non-Aboriginal persons to be referred to MERIT for charges relating to the commission of actual drug offences (15.7% vs. 27.4%). Aboriginal persons referred to MERIT were slightly less likely than non-Aboriginal persons (33.7% vs. 37.8%) to be charged with acquisitive crimes such as stealing, burglary and fraud.

2.2.2 Illicit Drug Use

As defined by the MERIT Program Guidelines, “the principal drug of concern” is the main problem drug for persons involved in the MERIT Program.

As the MERIT Program’s primary concern is with the relationship between illicit drugs and crime, only illicit substances should be recorded on the MIMS database as a principal drug of concern. Licit drugs such as alcohol, tobacco and prescription medicines – while possibly presenting as problematic substances for persons involved in the MERIT Program – are recorded elsewhere on MIMS, generally under a listing of “other substances” used by the individual. A complete list of substances used by the person allows the MERIT Team to comprehensively assess the person’s needs in relation to their use of both illicit and licit drugs.

As Table 5 shows, heroin (35.8%), cannabis (33.1%), and amphetamine type substances (23.5%) were most commonly recorded as the principal drug of concern⁷. Almost four out of every ten (38.6%) Aboriginal persons referred to MERIT indicated that cannabis was their main problem drug. This was slightly higher than for non-Aboriginal persons referred to MERIT.

Heroin was identified as the principal drug of concern for one in every three referrals for Aboriginal persons. For non-Aboriginal persons, the proportion concerned with using heroin was slightly higher at 36 per cent.

⁷ Principal drug of concern was missing for 12 per cent of MERIT referrals. In general, these reflect cases where the referred person did not attend for assessment. For 10 additional referrals, it was recorded that there was “No (other) drug of concern”. The principal drug of concern was recorded as “Inadequately described” for a further 371 referrals. Alcohol or tobacco was recorded as the principal drug of concern in 146 referrals. These 1352 records represent 20% of the total referrals for the period examined. They have been excluded from the analysis of illicit drug use.

Amphetamine type substances, which include ‘speed’, ‘ice’ and methamphetamines, were the principal drug of concern for almost one in every four persons referred to MERIT, and this appeared to be the case regardless of Aboriginality.

The other popular psychostimulant drugs – ecstasy and cocaine – were infrequently identified as the principal drug of concern by persons referred to MERIT. Together these two drug types make up less than two per cent of drug types of concern to persons referred to MERIT, although they do appear to be slightly more problematic drugs for non-Aboriginal persons than for Aboriginal persons.

Another small difference in terms of principal drug of concern is that Aboriginal persons identified benzodiazepines as a problem drug at a lower rate than non-Aboriginal persons (2.2% vs. 3.8%).

Table 5: Principal drug of concern for Aboriginal and non-Aboriginal persons referred to MERIT

Principal drug of concern	Aboriginal %	Non- Aboriginal %	Not stated/ not known %	All %
Cannabis	38.6	32.5	28.1	33.1
Heroin	33.1	35.9	39.3	35.8
Amphetamine Type Substances	23.4	23.3	24.7	23.5
Benzodiazepines	2.3	3.8	3.6	3.6
Methadone	1.1	1.9	2.4	1.8
Cocaine	0.5	0.7	0.5	0.7
Ecstasy (MDMA)	0.1	0.8	0.5	0.7
Morphine	0.3	0.3	0.5	0.3
Other substances	0.6	0.8	0.4	0.5
Total^a	100.0	100.0	100.0	100.0

^a Excludes a total of 1352 referral records (20%) in the MIMS database that had a licit drug recorded or missing / unknown values for illicit drugs, namely:

- 146 referrals that recorded the principal drug of concern as ‘alcohol’ (143) or ‘nicotine’ (3);
- 371 records that indicated the drug was ‘inadequately described’;
- 10 referrals that recorded ‘no other drug of concern’; and,
- 825 referrals with no drug type recorded (i.e. blank).

Source: MIMS

2.2.3 Aboriginal referrals by Area Health Service

Up to 31 October 2004, the largest numbers of Aboriginal persons referred to MERIT occurred in the Northern Rivers and Illawarra Area Health Services, with 161 and 122 referrals, respectively. However, an examination of the *number* of MERIT referrals must take into consideration the staggered nature of the rollout of the MERIT Program, as MERIT became operational in each of the Area Health Services at different times (see Table 6).

Also, not all courts located within an Area Health Service were selected to operate as MERIT Courts and, selected courts within an AHS did not commence operating MERIT at the same time. For example, MERIT was initially launched in the Northern Rivers Local Courts of Casino, Kyogle, Lismore, Ballina and Byron Bay on 2 July 2000. Within the same AHS, MERIT was extended to the Mullimbimby, Murwillumbah and Tweed Heads Local Courts on 17 June 2002. Finally, it was rolled out to the remaining Local Courts in the Northern Rivers (Maclean and Grafton) on 3 March 2003.

Therefore, comparison of MERIT statistics with local court statistics and population demographics must allow for the different time periods each AHS, and individual courts within each AHS, have been operating MERIT.

A more accurate picture emerges in considering the *proportion* rather than the number of Aboriginal persons referred to MERIT in each Area Health Service (AHS). Far West AHS had the highest proportion of referrals involving Aboriginal persons (85.7%), but also has been operating the shortest time and, thus, had the lowest total number of referrals of any area. Still, six of the seven referrals to the MERIT Team in the Far West AHS involved Aboriginal persons.

Of the more established MERIT Teams, the Macquarie AHS had the highest proportion of Aboriginal referrals (48.8%), followed by Mid West AHS (31.8%) and New England AHS (31.5%). Other Area Health Services with Aboriginal referrals higher than the State average include Mid North Coast (23.6%), Southern (23.2%), Northern Rivers (17.6%), Greater Murray (17.1%), and Illawarra (15.3%).

Low levels of Aboriginal referrals were observed for MERIT Teams in the Northern Sydney (0.9%), SW Sydney (4.0%) and SE Sydney (5.0%) Area Health Services.

Naturally, the level of Aboriginal referrals increases when only persons with identified status as Aboriginals and non-Aboriginals are considered. Across all MERIT sites, the percentage of known Aboriginal referrals as a function of all referrals with identified Aboriginality is close to 17 per cent.

In many respects, MERIT referrals reflect the characteristics of both the offender population in the area and the general population residing in the catchment areas for each AHS. Therefore, a comparison of Aboriginal referrals for each of the MERIT Teams/AHS should take into consideration the demographics of the population within that area and also, more specifically, the characteristics of those appearing before Courts within that area.

Table 6: Aboriginal referrals by NSW Area Health Service

Area Health Service (AHS) ^a	First date MERIT operational	All Referrals		Aboriginal Referrals	
		n	n	%	% of known ^b
Northern Rivers	02/07/00	917	161	17.6	(18.3)
Illawarra	05/02/01	800	122	15.3	(16.3)
South Western Sydney	02/07/01	733	29	4.0	(6.6)
Mid West NSW	07/01/02	258	82	31.8	(37.3)
Hunter	11/02/02	667	55	8.2	(10.4)
Greater Murray	22/04/02	199	34	17.1	(18.8)
Central Coast	20/05/02	331	45	13.6	(15.9)
Macquarie	27/05/02	127	62	48.8	(65.3)
Mid North Coast	15/07/02	280	66	23.6	(24.0)
Northern Sydney	05/08/02	343	3	0.9	(1.7)
Southern NSW	02/09/02	142	33	23.2	(24.8)
South Eastern Sydney	25/11/02	377	19	5.0	(5.3)
Western Sydney	27/11/02	326	30	9.2	(11.5)
New England	09/12/02	127	40	31.5	(41.7)
Central Sydney	20/01/03	382	42	11.0	(17.7)
Wentworth	05/03/03	203	24	11.8	(13.9)
Far West	30/06/04	7	6	85.7	(85.7)
State	-	6219	853	13.7	(16.7)

^a The order of the Area Health Services in this table reflects the date MERIT first commenced operating in a court or courts within that AHS. This order will be maintained in all tables detailing the operation of MERIT Courts in the Area Health Services.

^b Percentages in this column reflect the number of identified Aboriginal referrals as a proportion of all referrals where Aboriginal status was recorded.

Source: MIMS.

Table 7 provides a breakdown by Area Health Service of the number of Aboriginal persons referred to MERIT compared with the recorded number of Aboriginal persons appearing before the Local Courts on finalised matters for a period equivalent to the time MERIT was operating in each AHS. Local Court statistics were provided by the NSW Bureau of Crime Statistics & Research in response to a structured inquiry specifying the different operating periods for each MERIT court.

Overall, the share of Aboriginal persons in MERIT referrals across NSW (13.7%) is greater than their share in local court appearances (8.0%) when equivalent operating periods are considered for the relevant courts. While the implications of this finding

will be treated in the Discussion section, on face value, it would appear that MERIT is providing opportunities for Aboriginal offenders to have their drug problems addressed outside the traditional system of court and correctional justice.

In all areas, MERIT Teams registered a rate of Aboriginal referrals higher than what would be expected from the proportion of court appearances involving ATSI peoples in those areas. Notably:

- The level of Aboriginal referrals to MERIT in Central Coast AHS (13.6%) was more than four times higher than the percentage of ATSI persons appearing before participating Local Courts in that area (3.1%).

It should be noted that Central Coast AHS initially appeared to have a modest level of Aboriginal referrals at just below the State average. However, in taking into account the low level (3.1%) at which ATSI persons appeared before participating courts in this area during the period that MERIT was operating it may be seen that a Aboriginal referral rate of 13.6% is exceptional.

- The level of Aboriginal referrals to MERIT in South Eastern Sydney AHS was 3.6 times higher than expected given the percentage of ATSI persons appearing before courts in that areas. The level of Aboriginal MERIT referrals appears to have been quite low in South Eastern Sydney (5.0%); in fact, its Aboriginal referral rate is one of the lowest at around one-third the state average. Nonetheless, only slightly more than one per cent of persons appearing before participating courts in South Eastern Sydney AHS are ATSI and, consequently, an Aboriginal referral rate of five percent is high by comparison.
- Macquarie AHS had the second highest proportion of Aboriginal referrals with almost one in every two MERIT referrals involving an Aboriginal person. However, considering that 41 per cent of persons appearing before participating courts in that area were ATSI, the high Aboriginal referral rate to MERIT in Macquarie AHS appears to reflect a high share of Aboriginals before its courts more than any strong preference to include Aboriginal persons in MERIT.

Across the whole State, Aboriginal MERIT referrals represented just under six per cent of finalised court appearances involving identified Aboriginal and Torres Strait Islander persons. This figure may be used to reflect on the performance of MERIT stakeholders in each AHS in terms of providing opportunities for Aboriginal persons to be involved in the program.

However, it should be remembered that MERIT has a set of eligibility criteria that would exclude a fair proportion of persons appearing at court from being involved. In particular, MERIT targets defendants with an illicit drug problem and operates through the provisions of bail. Defendants who do not have an identified drug problem and persons who are not on conditional bail are *not* eligible for the program (as are persons who are bail refused and remanded in custody awaiting their court hearing – see page 9 for full list of MERIT eligibility criteria).

Table 7 shows that Aboriginal MERIT referrals are not uniformly spread across the state, nor do Aboriginal referrals appear to be a direct function of the number of Aboriginal persons appearing before the courts operating MERIT in each AHS.

In particular, Table 7 shows that:

- Southern NSW AHS had the highest rate of Aboriginal referrals relative to the number of Aboriginal persons appearing before MERIT courts in that area. Around 15 per cent of Aboriginal persons appearing before participating courts in that AHS were referred to MERIT.
- Central Coast and Far West had Aboriginal referral rates that represented more than ten per cent of their respective court appearances for Aboriginal persons.

Table 7: Aboriginal referrals and finalised court appearances for the corresponding period when MERIT was operating in each Court

Area Health Service (AHS)	Aboriginal MERIT referrals		ATSI Court Appearances (CAs)		MERIT referrals as % of CAs	
	n	%	n	%	ATSI	Non-ATSI
Northern Rivers	161	17.6	3203	13.4	5.0	4.7
Illawarra	122	15.3	1931	8.7	6.3	4.0
South Western Sydney	29	4.0	1186	4.4	2.4	1.9
Mid West NSW	82	31.8	1019	15.4	8.0	3.5
Hunter	55	8.2	1302	6.4	4.2	3.1
Greater Murray	34	17.1	634	12.9	5.4	4.8
Central Coast	45	13.6	351	3.1	12.8	3.0
Macquarie	66	48.8	1398	41.0	4.7	2.6
Mid North Coast	62	23.6	877	19.2	7.1	7.9
Northern Sydney	3	0.9	108	1.0	2.8	2.0
Southern NSW	33	23.2	223	8.4	14.8	5.5
South Eastern Sydney	19	5.0	214	1.4	8.9	3.8
Western Sydney	30	9.2	1347	6.2	2.2	1.4
New England	40	31.5	479	19.4	8.4	3.6
Central Sydney	42	11.0	504	4.0	8.3	1.9
Wentworth	24	11.8	24	4.0	100.0 ^a	41.6
Far West	6	85.7	60	26.8	10.0	0.4
State	853	13.7	14860	8.0	5.7	3.1

^a This figure is likely to indicate that a number of persons were not identified as "ATSI" at time of finalisation of their court appearance but their status as an Aboriginal was recorded on their MERIT files.

Source: MIMS and NSW Bureau of Crime Statistics and Research (Inquiry reference: vk052841)

- SW Sydney and Western Sydney recorded levels of Aboriginal referrals which represented less than three per cent of Aboriginal court appearances for these areas. In SW Sydney AHS just 29 Aboriginal people were referred to MERIT despite the fact that almost 1200 Aboriginal persons appeared in participating courts in the same period. Similarly, in Western Sydney AHS, only 30 Aboriginal people were referred to MERIT from a total pool of over 1300 Aboriginal court appearances.

The far right column in Table 7 indicates the level of non-Aboriginal MERIT referrals as a function of non-ATSI court appearances for those courts in the same period. It shows that:

- In general, Aboriginal MERIT referrals ran at a level higher than non-Aboriginal MERIT referrals when each is expressed as a proportion of court appearances for their group;
- Aboriginal persons appearing before MERIT courts in the Central Coast AHS and Central Sydney AHS were four times more likely to be referred to the MERIT program than non-Aboriginal persons appearing before the same courts (Note: these differences may be a function of the types of offences, drug use problems or bail conditions of the respective groups).
- In the Far West AHS, MERIT courts appeared to be strongly favouring Aboriginal people in terms of MERIT referrals, with 10 per cent of ATSI persons appearing before the courts referred to MERIT compared to less than one half of one per cent of non-ATSI persons appearing before the same courts being referred to MERIT. (Keeping in mind that, at the time of this study, MERIT had been operating in Broken Hill for less than a year).

Table 8 presents a summary view on the rate at which Aboriginal persons appearing before participating in MERIT Courts are being referred to the program. Overall and across all participating courts for the period examined, the total number of MERIT referrals comprised a little over three per cent of all court appearances. Relatively speaking, Aboriginal persons were almost *twice as likely* to be referred to MERIT than non-Aboriginal persons appearing before participating MERIT courts.

Table 8: MERIT referrals and court appearances for Aboriginal and non-Aboriginal persons before participating MERIT courts

	Aboriginal	Non-Aboriginal	Not stated/ not known	All
MERIT referrals	853	4242	1124	6219
Court appearances (CAs)	14860	135192	40397	190449
MERIT referrals as % of CAs	5.7%	3.1%	2.8%	3.3%

Source: MIMS and NSW Bureau of Crime Statistics and Research (Inquiry reference: vk052841).

The proportion of Aboriginal persons represented in MERIT referrals for each MERIT Team may also be compared with the base population of Aboriginal people in each AHS.

Table 9 shows that, in broad terms, Aboriginal persons are appearing in MERIT referrals at a rate that is seven times higher than expected given that they make up less than two per cent of the NSW population (i.e. 13.7% to 1.9%, or a State ratio of 7.2 to 1). Without exception, every MERIT Team registered a rate of Aboriginal referrals higher than what would be expected from the proportion of ATSI people residing in the base population of the respective AHS.

Table 9: Aboriginal referrals and estimated ATSI population for each Area Health Service

Area Health Service (AHS)	Aboriginal MERIT referrals	Average annual ATSI referrals ^a	ATSI pop. (2001 census estimate)	% ATSI pop. in AHS	Aboriginal referral rate per 1000 ATSI ^b
	%	N	N	%	Rate
Northern Rivers	17.6	50	7878	2.9	6.3
Illawarra	15.3	36	6969	2.0	5.2
South Western Sydney	4.0	13	10573	1.3	1.2
Mid West NSW	31.8	39	6231	3.8	6.3
Hunter	8.2	28	10413	1.9	2.7
Greater Murray	17.1	16	7170	2.8	2.2
Central Coast	13.6	22	4158	1.4	5.3
Macquarie	48.8	27	9496	9.2	2.8
Mid North Coast	23.6	29	8794	3.3	3.3
Northern Sydney	0.9	2	2013	0.3	1.0
Southern NSW	23.2	15	4139	2.2	3.6
South Eastern Sydney	5.0	11	5612	0.7	2.0
Western Sydney	9.2	16	9347	1.3	1.7
New England	31.5	21	12578	7.4	1.7
Central Sydney	11.0	24	5222	1.1	4.6
Wentworth	11.8	14	5215	1.6	2.7
Far West ^c	85.7	18	7937	16.8	2.3
State	13.7	381	123745	1.9	3.1

a Average annual number of ATSI referrals calculated from the total number of ATSI referrals for each participating court within each AHS divided by the number of days MERIT was operating in each court converted to years.

b Average annual number of ATSI referrals per 1000 ATSI population.

c For Far West AHS, the average annual number of ATSI referrals was Projected from a four-month period of operations.

Source: MIMS and Centre for Epidemiology and Research (NSW Health) based on Australian Bureau of Statistics 2001 Census (Estimated Residential Population).

The State ratio of 7.2 to 1 provides a yardstick for comparing each MERIT Team in terms of Aboriginal referrals once base Aboriginal populations are taken into consideration. On this basis, it may be observed that:

- Central Sydney, with a ratio of 16 to 1 (i.e. 17.7% to 1.1%) had the highest rate of MERIT referrals involving Aboriginal persons once the base population of Aboriginals residing in that AHS was considered.
- The level of Aboriginal referrals to MERIT in Central Coast AHS and Southern NSW AHS was 11 times higher than expected given the percentage of Aboriginal persons residing in the intake area.

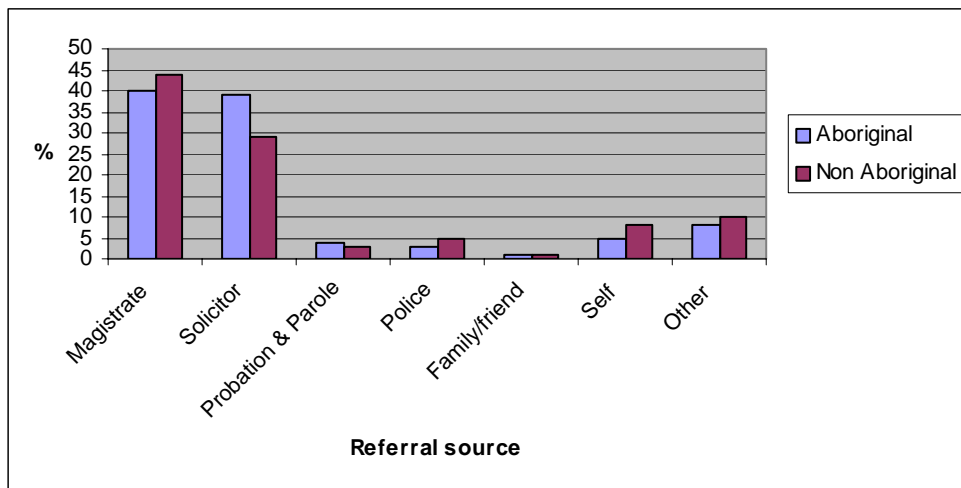
When Aboriginal referrals are expressed as a rate per 1000 ATSI persons, it may be seen that a state average of just over three Aboriginal persons per 1000 relevant population were referred to MERIT in each year the program was operating. Notably, higher rates of Aboriginal MERIT referrals were recorded for the Aboriginal populations residing in the Northern Rivers (6.3 Aboriginal referrals per 1000 ATSI), Mid West (6.3 per 1000) Central Coast (5.3 per 1000), Illawarra (5.2 per 1000), Central Sydney (4.6 per 1000) and Southern NSW (3.6 per 1000) Area Health Services.

2.2.4 Characteristics of Aboriginal persons referred to MERIT

Aboriginal persons were mainly referred to MERIT by a Magistrate (40.2%) or solicitor (39.3%). These are, in fact, the main sources of MERIT referral for *both* Aboriginal and non-Aboriginal persons. Figure 4 shows the sources of referral for both Aboriginal and non-Aboriginal recommended to MERIT.

Aboriginal persons were significantly more likely than non-Aboriginal persons to be referred to the MERIT Program by a solicitor (39.3% vs. 28.9%) or Probation and Parole officer (3.8% vs. 2.8%). On the other hand, Aboriginal persons were less likely to self-refer (4.7% vs. 8.2%). They were also less likely to be referred by the Police (3.3% vs. 4.6%) or a Magistrate (40.2% vs. 44.7%).

Figure 4 Source of MERIT referrals for Aboriginal and non-Aboriginal persons



Demographics

Age: The median age of Aboriginal persons referred to MERIT was 27 years, one month. Just under half (42.3%) of Aboriginal referrals were less than 25 years of age with just under two-thirds (64.3%) aged less than 30 years. The median age of non-Aboriginal persons referred to MERIT was 27 years 10 months. There were proportionally fewer non-Aboriginal persons aged below 25 years (35.8%) and fewer aged below 30 years (59.8%).

Sex: Males make up more than 70 per cent of all referrals to MERIT, which mirrors the disproportionate involvement of men in criminal matters more generally (Weatherburn *et al*, 2003). Notably, Aboriginal females (26.8%) make up a higher proportion of MERIT referrals than non-Aboriginal females (20.4%). For both groups of females, however, their share in MERIT referrals is higher than expected given that females make up around 18 per cent of Local Court finalised appearances. This also means that males are somewhat under-represented in MERIT referrals compared with their share in Local Court finalised appearances (81.9%).

Nonetheless, it was Aboriginal males rather than non-Aboriginal males who were under-represented in MERIT referrals. Males made up 73 per cent of Aboriginal persons referred to MERIT, compared to 80 per cent of males of non-Aboriginal background. This difference is statistically significant.

Of the total number of persons referred to MERIT between July 2000 and October 2004 whose Aboriginal status was known, Aboriginal males made up 12.3 per cent of the total, Aboriginal females 4.5 per cent of the total and non-Aboriginal males and females 66.2 per cent and 17 per cent, respectively.

Marital status: Where marital status was recorded, persons referred to MERIT generally were not and had never married (54 per cent of Aboriginal persons and 62 per cent of non-Aboriginal persons were identified as single). However, a significantly higher percentage of Aboriginal persons referred (34.1%) were married or in a de facto relationship compared with non-Aboriginal persons referred (24.7%)

Living arrangements: In terms of known living arrangements, Aboriginal persons referred to MERIT were more likely than non-Aboriginal persons referred (32.7% vs. 25.5%) to be living with their own family (i.e. with their spouse/partner or spouse/partner and children). On the other hand, Aboriginal persons were less likely to be living with their parent(s) (20.9% vs. 27.6%) or alone (9.5% vs. 16.6%). Almost double the proportion of Aboriginal persons (13.4% vs. 7.1%) identified that they were living with another relative at the time of referral to MERIT. The differences in living arrangements mirrors the general differences between referred Aboriginal and non-Aboriginals in terms of their marital status.

Type of accommodation: Just under two-thirds of persons referred to MERIT resided in a rented house or flat (public or private), with this type of living arrangement somewhat more common for Aboriginal than non-Aboriginal persons (71.6% vs. 61.8%). A significantly higher proportion of Aboriginal persons either were homeless (4.6% vs. 2.1%) or were being detained in a prison or remand centre (2.4% vs.

0.5%). Similarly, fewer Aboriginal persons were living in their 'own' house or flat (12.2% vs. 27.3%) at time of the MERIT referral.

Principal source of income: In general and where identified, the principal source of income for Aboriginal and non-Aboriginal persons referred to MERIT was similar, with the exception of full-time employment. For both Aboriginal and non-Aboriginal groups, unemployment benefits featured heavily (60.3% and 54.6%, respectively). So too did pension benefits (24.6% vs. 21.9%). While full-time employment was not common in either group, income from this source was much less likely for Aboriginal persons (2.8% vs. 8.5%).

Education: The Aboriginal referrals were also statistically different to the non-Aboriginal group in terms of their level of education. Aboriginal persons tended to have a lower level of education, whether that was expressed in terms of years of schooling, tertiary education or trade experience (including TAFE education).

Prison (served time in custody): A high percentage of individuals referred to the MERIT program had previously served time in prison. Where this information was recorded, over 68 per cent of Aboriginal persons and 56 per cent of non-Aboriginal persons referred to MERIT had previously served time in custody.

Aboriginal persons referred to MERIT were significantly more likely to have served time in prison. Notably, it was Aboriginal males rather than Aboriginal females who were statistically more likely to be ex-prisoners than their non-Aboriginal counterparts. This pattern of differences is presented together with other notable contrasts for MERIT referrals in Table 10.

Table 10: Characteristics of persons referred to MERIT ^a

Characteristic	Aboriginal persons (N=835) %	Non-Aboriginal persons (N=4242) %
Referral source		
<i>Magistrate</i>	40.2	44.7
<i>Solicitor</i>	39.3	28.9
<i>Probation & Parole</i>	3.8	2.8
<i>Self</i>	4.7	8.2
<i>Police</i>	3.3	4.6
Gender		
<i>Female</i>	26.8	20.4
<i>Male</i>	73.2	79.6
Age		
<i>Average</i>	27 years 10 months	29 years 3 months
<i>Under 25 years</i>	42.3	35.8
<i>Under 30 years</i>	64.3	59.8
<i>30 years and over</i>	35.7	40.2
Marital status ^b		
<i>Single/never married</i>	54.1	61.5
<i>Married/de facto</i>	34.1	24.7
Living arrangements ^c		
<i>With spouse/partner/(children)</i>	32.7	25.5
<i>With parent(s)</i>	20.9	27.6
<i>With friend(s)</i>	18.5	19.4
<i>With other relative</i>	13.4	7.1
<i>Alone</i>	8.2	16.6
Type of accommodation ^d		
<i>Rented house/flat</i>	71.6	61.8
<i>Privately owned house/flat</i>	12.2	27.3
<i>Prison/remand centre</i>	2.4	0.5
<i>Homeless/no usual residence</i>	4.6	2.1
Principal Income ^e		
<i>Unemployment benefits</i>	60.3	54.6
<i>Pension</i>	24.6	21.9
<i>Full-time employment</i>	2.8	8.5
Education ^f		
<i>Year 10 or less</i>	85.2	72.1
<i>Year 11 or 12</i>	9.1	17.2
<i>TAFE/Trade</i>	4.9	8.2
<i>Tertiary</i>	0.8	2.5
Served time in prison ^g		
<i>Males</i>	72.3	59.1
<i>Females</i>	55.8	45.3

^a This table does not always present all categories/values for each characteristic. Therefore, figures may not total to 100 per cent.

Percentages calculated excluding values recorded as 'inadequately described', 'not known' or missing:

^b Marital status – 20.3% missing/unknown for Aboriginal referrals; 15.7% for non-Aboriginal referrals.

^c Living arrangements – 13.6% missing/unknown for Aboriginal referrals; 11.1% for non-Aboriginal referrals.

^d Accommodation type – 16.2% missing/unknown for Aboriginal referrals; 12.1% for non-Aboriginal referrals.

^e Principal income – 13.6% missing/unknown for Aboriginal referrals; 12.4% for non-Aboriginal referrals.

^f Education level – 26.4% missing/unknown for Aboriginal referrals; 24.1% for non-Aboriginal referrals.

^g Time served in prison – 29.9% missing/unknown for Aboriginal referrals; 34.2% for non-Aboriginal referrals.

Source: MIMS.

2.3 ABORIGINALS ACCEPTED INTO MERIT

For the period from July 2000 to October 2004, a total of 3454 persons referred to MERIT were accepted into the Program. Given that 6219 persons were referred to MERIT, this represents an overall program acceptance rate of 55.5 per cent

However, just less than ten per cent of persons were labelled as 'referral only' – that is, they had been referred to MERIT but had *not* attended for assessment by a MERIT Team. In most cases referrals included under this category represent referred defendants who the MERIT Team could not contact or who failed to attend one or more scheduled assessment sessions. A further five percent of referrals were transferred from another MERIT Team – that is, already in the program.⁸ The level of acceptance into the MERIT Program increases to almost 65 per cent when referrals categorised under these two groups are removed.

Persons whose Aboriginality was not stated (or otherwise unknown) had the lowest level of acceptance into the MERIT Program at just over 21 per cent.⁹ Many such persons would have appeared at court *without* attending the MERIT assessment session.

Generally, Aboriginal persons were less likely to be accepted into MERIT following assessment for eligibility and suitability. Just under 63 per cent of Aboriginal persons referred to MERIT were accepted into the program compared to just over 73 per cent for non-Aboriginal persons. This difference is statistically significant.

Aboriginal persons were slightly less likely than non-Aboriginal persons to decline an invitation to be assessed for participation in the program once they had met with the MERIT counsellor for assessment purposes. For both groups, the proportion declining to be assessed was less than five per cent.

Aboriginal persons were more likely than non-Aboriginal persons not to be accepted into the program. Overall, one in every three (33.4%) Aboriginal persons were not accepted into MERIT compared to two in every nine (22.3%) non-Aboriginal persons (Table 11).

As previously identified (see Figure 3), the main sources for referral for both Aboriginal and non-Aboriginal persons were magistrates and solicitors. Aboriginal

⁸ It is possible that this group contains a small number of referrals transferred to another MERIT Team for the purposes of program assessment.

⁹ Demographic/personal details, including Aboriginality, for persons in this group may not have been collected because the MERIT Team had 'pre-assessed' the person as ineligible, say, due to a disqualifying offence (eg murder) or bail status (eg on remand) or because there was only limited (eg telephone) contact with the person. Some identified reasons for the lower level of acceptance for this group of referrals included higher than average numbers of persons:

- ineligible for bail
- with a strictly indictable offence
- without a demonstrable drug problem, and
- residing outside the effective treatment area.

persons *not* accepted into MERIT were more likely to have been referred by a solicitor (39.8%) followed by a referral by a magistrate (38.7%). However, a smaller share of non-Aboriginal persons excluded from MERIT had been referred by a solicitor (30.6%), although the percentage rejected that had been referred by a magistrate (37.5%) was comparable to Aboriginal persons.

Table 11: Acceptance into MERIT (%) – Aboriginal and non-Aboriginal persons

	Aboriginal %	Non-Aboriginal %
Accepted into program	62.8	73.1
Not accepted into program	33.4	22.3
Declined to be assessed	3.8	4.6
Total	100.0	100.0

Source: MIMS.

The pattern of MERIT assessments and acceptances into the Program has been variable during the operational period studied. Figure 5 indicates that the number of Aboriginal persons assessed for MERIT rose steadily, particularly from the start of 2002, and peaked in the second quarter of 2003. In large part, this pattern reflects the progressive roll-out of the program from 13 courts operating MERIT in the first quarter of 2002 to 50 MERIT courts by the second quarter of 2004. Since then, the number of Aboriginals assessed for the MERIT Program has fallen away and appears to have levelled off at around 75 persons per quarter.

There has been a degree of variability in the proportion of Aboriginal persons accepted into MERIT. In general, MERIT acceptances for Aboriginal persons have run at between 50 and 75 per cent per quarter. However, from the start of 2002 there is evidence of a downward trend in Aboriginal acceptances into MERIT, particularly since the third quarter of 2003. At the same time, acceptances for non-Aboriginal persons have remained relatively stable over time at around the 75 per cent mark.

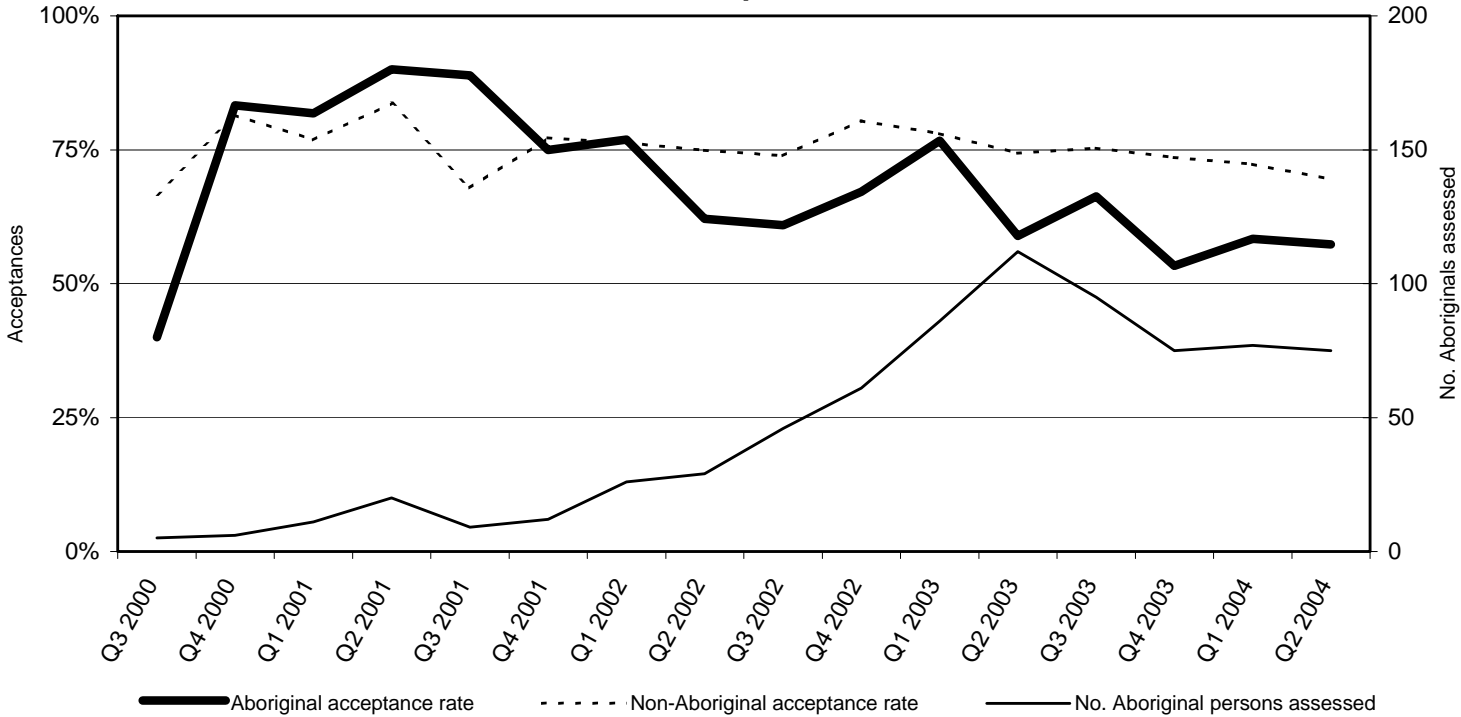
A study by the NSW Bureau of Crime Statistics that examined the impact of the NSW *Bail Amendment (Repeat Offenders) Act 2002*, which was introduced to reduce the availability of bail for some classes of repeat offender, found that:

“The bail refusal rate for Indigenous adults increased 14.4 per cent, which is greater than the increase for non-Indigenous adults (up 7.0%). This may be due to the high proportion of Indigenous defendants who have a prior conviction.”

(Fitzgerald & Weatherburn, 2004:1)

Between April 2002 and July 2004, there was a trend for Aboriginal persons to be accepted into the MERIT Program at a substantially lower rate than for non-Aboriginal persons. However, prior to the second quarter of 2002, Aboriginal acceptances were generally running at a higher level than non-Aboriginal acceptances.

Figure 5: Aboriginal persons assessed and Aboriginal and non-Aboriginal MERIT acceptance rates



Note: Q3 and Q4 in 2004 not displayed as figures for these periods do not give a true indication of acceptance levels. Insufficient time for assessments to be conducted for all MERIT referrals in these periods.

Source: MIMS.

Thus, it would seem that, at least in part, the introduction of the *Bail Amendment (Repeat Offenders) Act 2002* has lowered the rate at which Aboriginal persons are given bail, which is one of the main eligibility criteria of the MERIT program.

Acceptances into MERIT for Aboriginal and non-Aboriginal persons also have varied by area (Table 12).

Table 12: Acceptance into MERIT (%) by Area Health Service

Area Health Service (AHS)	Aboriginal acceptances	Non-Aboriginal acceptances
	%	%
Northern Rivers	66.0	73.9
Illawarra	81.5	81.4
South Western Sydney	68.0	79.8
Mid West NSW	40.8	54.5
Hunter	57.4	76.1
Greater Murray	52.9	55.1
Central Coast	66.7	81.1
Macquarie	54.1	78.1
Mid North Coast	63.6	61.9
Northern Sydney	33.3	89.6
Southern NSW	72.7	76.0
South Eastern Sydney	50.0	57.3
Western Sydney	80.0	69.6
New England	41.7	48.1
Central Sydney	65.9	80.4
Wentworth	63.2	68.8
Far West	100.0 ^a	100.0 ^b
State	62.8	73.1

a Five from five Aboriginal persons accepted into MERIT.

b One from one non-Aboriginal person accepted into MERIT.

Source: MIMS.

An examination of the acceptance rates for Aboriginal and non-Aboriginal persons across the different Area Health Services shows that:

- In only two AHS were Aboriginal persons accepted into the MERIT Program at a higher rate than non-Aboriginal persons. In Western Sydney, the higher acceptance rate appeared to be substantial (80.0% vs. 69.6%) whereas in Mid North Coast the difference was marginal (63.6% vs. 61.9%).

- In the Illawarra, Greater Murray, Southern NSW and Wentworth AHS, Aboriginal persons appeared to have roughly the same opportunities for being accepted into the MERIT Program as non-Aboriginal persons.
- Lower acceptance rates for Aboriginal persons were noted for a number of MERIT Teams including:
 - Hunter and Macquarie, where Aboriginals were around 20 per cent less likely to be accepted into the program than non-Aboriginal persons; and,
 - Mid West, Central Coast and Central Sydney where Aboriginals were around 15 per cent less likely than non-Aboriginals to be accepted into MERIT.

In considering the atypically high and low levels of MERIT acceptances for Aboriginal persons in Far West and Northern Sydney, respectively, caution needs to be exercised. For these two AHS, the Aboriginal acceptance rate may be an artefact of the small number (i.e. five or less) of Aboriginal persons assessed.

2.3.1 Reasons for non-acceptance into MERIT

Following assessment by a MERIT Team, individuals may not be accepted into the MERIT Program for one of two broad reasons. Assessed individuals either:

- failed to meet one (or more) of the program's eligibility criteria; or,
- were deemed unsuitable for the program by the MERIT worker or the Magistrate.

There was no significant difference in the number of Aboriginal and non-Aboriginal persons excluded from the MERIT Program due to assessed ineligibility. Similarly, there was no difference between these groups in exclusions based on assessed unsuitability for the program.

Table 13 shows the main reasons why assessed persons were excluded from the MERIT Program.

Approximately one in every six individuals was assessed as ineligible for MERIT because they failed to meet the Program's bail requirements. This was the case regardless of Aboriginality.

Similarly, for both Aboriginal and non-Aboriginal groups, one in six assessed referrals were identified as not demonstrating an illicit drug problem. This does not necessarily mean that the person was not using illicit drugs, but rather that his or her drug use was assessed as not being linked to current or past offending, or that the use of illicit drugs was assessed as not requiring treatment.

Also, a person assessed as ineligible for the program, because the MERIT Team ascertained that there was 'no demonstrable drug problem', may have a significant problem, say, with alcohol, and their alcohol use may be a reason for their offending.

In terms of unsuitability, an unwillingness to be further involved in the MERIT Program was the most common reason why both Aboriginal and non-Aboriginal persons were not accepted into the MERIT Program. Over a quarter of all persons

assessed by MERIT staff as suitable for the program declined to proceed further to drug treatment or other intervention as recommended by the MERIT Team. This finding and, in particular regional differences in willingness to participate in MERIT, is examined more fully in section 2.3.2.

Table 13: Reasons for non-acceptance into MERIT (%) – Aboriginal and non-Aboriginal persons

Reason not accepted	Aboriginal %	Non-Aboriginal %
<i>Ineligible</i>		
Not eligible for bail	17.0	15.7
No demonstrable drug problem	15.8	17.4
Strictly indictable offence(s)	3.9	4.7
Already in court-ordered treatment	1.2	1.5
Sub-total	37.9	39.3
<i>Unsuitable</i>		
Unwilling to participate in program	25.9	27.3
Program entry not endorsed by magistrate	8.5	12.0
Mental health problem	4.2	4.5
Resides outside effective treatment area	1.9	4.7
Sub-total	40.5	48.5
<i>Other</i>	21.6	12.1
Total	100.0	100.0

Source: MIMS.

One in every eight (12.0%) non-Aboriginal persons was considered as unsuitable for the program by the Magistrate following the submission of a MERIT assessment report. This is higher than for Aboriginal persons (8.5%) and may provide some indication that the Courts are attempting to accommodate as many Aboriginal persons as possible in the MERIT Program. This finding, including any regional differences in the court's decision to decline entry into MERIT, is examined further in section 2.3.3.

For many Aboriginal persons not accepted into MERIT following assessment, the reason recorded in the MERIT database was "Other". In fact, this is the second most common recorded 'reason' given for non-acceptance of Aboriginal persons into the MERIT Program. "Other" is also listed as a common reason for non-acceptance into the MERIT Program for non-Aboriginals (12%) but runs at around half the rate for Aboriginal non-acceptances (22%).

It is beyond the scope of this evaluation to investigate the actual set of reasons categorised under "Other" by the different MERIT Teams in reporting non-acceptance. However, discussions with the MERIT Database Management &

Support Officer and a number of individual MERIT Teams would tend to indicate that “Other” is often used to refer to exclusions based on current or pending offences of a violent or sexual nature.

As discussed in the section on over-representation in the criminal justice system, many Aboriginal persons are charged with common assault, assault police and domestic violence. It is possible that a proportion of Aboriginal (and non-Aboriginal) referrals are being excluded from participating in the MERIT Program because of these types of offences against the person.¹⁰

2.3.2 Regional differences in unwillingness to participate in MERIT

There may be many underlying reasons why persons assessed as suitable declined to participate in a drug diversion program like MERIT and it is beyond the scope of this evaluation to examine such reasons.

However, Table 14 lists the five Area Health Services where eligible and suitable Aboriginal offenders were unwilling to participate in the MERIT Program at a level higher than the state average.

Table 14: AHS where eligible and suitable Aboriginal persons were unwilling to participate in MERIT at a rate higher than the NSW average^a

AHS	Aboriginal	Non-Aboriginal
	%	%
Central Sydney	63.6	53.1
Macquarie	42.9	71.4
Greater Murray	40.0	16.4
Mid West	30.8	34.0
Mid North Coast	23.8	29.5
State average	25.9	27.2

^a Two selection criteria were applied – a total of ten or more persons not willing to participate in MERIT and at least ten Aboriginal persons not accepted into the program for any reason.

Source: MIMS.

¹⁰ A preliminary analysis of the offence characteristics of persons excluded from MERIT on the basis of “Other” reasons was undertaken. This analysis provided some evidence that ‘offences against the person’ do make up a substantial proportion of charges for those Aboriginal and non-Aboriginal persons not accepted into MERIT for non-specified reasons. For all persons in the ‘other’ category, around 29 per cent of charges involved an assault, breach AVO or other offence involving violence. For Aboriginal persons excluded from MERIT on the basis of non-specified reasons, this set of ‘violent’ offences made up 41 per cent of their charges compared to only 24 per cent of charges for non-Aboriginals. However, the breakdown of violent offences did not differ markedly for the two groups, with assaults representing around two-thirds (65%) of violent offences for both groups. Breach of AVO and other person offences made up between ten and twenty per cent of violent offences for each group.

In the Central Sydney area, almost two-thirds (64%) of Aboriginal persons assessed as suitable for MERIT chose not to participate in MERIT. A similarly high but slightly lower proportion (53%) of non-Aboriginal referrals also were unwilling to participate further in the program.

In the Macquarie and Greater Murray areas of country NSW, around two in every five Aboriginal persons assessed as suitable for MERIT were unwilling to participate. However, there is a major difference between these two areas. In Macquarie AHS, Aboriginal persons were choosing to be involved in MERIT at a much higher rate than non-Aboriginal persons, whereas in Greater Murray AHS, Aboriginal persons were almost 2½ times *more* likely than non-Aboriginal persons to choose not to participate in MERIT.

In three areas of NSW, Aboriginal persons appeared to be not only willing to participate in the MERIT Program, but also more willing to participate than non-Aboriginal persons:

- Illawarra AHS, where only seven per cent of Aboriginal persons were unwilling to participate in MERIT. By comparison, non-Aboriginal persons were almost twice as likely (13.7%) to reject an offer to participate in the MERIT program.
- Northern Rivers AHS, where just over seven per cent of Aboriginal persons were unwilling to participate in MERIT (compared to 11.7% of non-Aboriginal persons).
- In Central Coast AHS, fewer than one in every ten (8.3%) Aboriginal persons were not willing to participate in MERIT, and this was more than three times lower than for non-Aboriginal persons (28.2%).

Interestingly, but perhaps not surprisingly, these three AHS have been operating MERIT amongst the longest. Northern Rivers was the original trial site, Illawarra was the next trial site chosen for MERIT, and Central Coast was amongst the first six MERIT sites.

2.3.3 Regional differences in Court endorsed participation in MERIT

In only four Area Health Services did the Courts not endorse MERIT participation for ten or more persons assessed as suitable for the program. The following analysis is, therefore, restricted to these AHS.

There were two AHS where Courts were declining Aboriginal persons entry into the MERIT program entry at a significantly higher rate than the State average of 8.5 per cent. Also, in both these areas, Aboriginal persons were being declined entry into MERIT at a rate much higher than for non-Aboriginal persons appearing before the same Courts.

- In Hunter AHS, Magistrates in participating courts declined program entry to seven of 17 (41.2%) Aboriginal persons assessed as suitable. Compared to the State figure for this group, Aboriginal persons in the Hunter area were five times more likely to be denied program entry by a magistrate. By contrast, just 27 per cent of non-Aboriginal persons were denied entry to the program by a Hunter

Magistrate. Nonetheless, this is more than double the State average (12%) for this group.

- Within the Central Coast AHS, Magistrates declined 7 of 12 (58.3%) Aboriginal persons entry into the MERIT Program, compared to 36 per cent of non-Aboriginal persons. This means that Aboriginal persons in the Central Coast area, compared to the rest of the State, were seven times less likely to be accepted into MERIT based on a Magistrate's decision. Non-Aboriginal persons in the Central Coast AHS fare only slightly better, but were still 3½ times less likely to be accepted into MERIT by the court compared to the rest of the State.

There is a third AHS – Illawarra – where Aboriginal persons were being declined entry into MERIT by the Courts at a rate higher than the State average. However, Aboriginal persons were less likely to be declined entry into MERIT than non-Aboriginal persons (21.4% and 24.7%, respectively).

In the Northern Rivers AHS, a total of 13 Aboriginal persons were not accepted into MERIT during the period examined. However, not one of these individuals had been denied participation in the MERIT program by a magistrate. This AHS also had a low rate (10%) at which non-Aboriginal persons were declined entry into the MERIT program by presiding magistrates.

2.3.4 Differences between persons accepted and persons not accepted into MERIT

Statistical tests were undertaken to examine differences in program acceptance on the basis of available demographic variables.

A difference in acceptance rates was found for Aboriginal persons only in relation to Marital Status. While there is no overall difference in acceptance into MERIT based on marital status, significantly more Aboriginal persons who were married or in a de facto relationship were accepted into MERIT than Aboriginal persons who had never married.

Differences were found for non-Aboriginal persons in relation to a number of demographic variables: age, living arrangements type of accommodation, and education.

Age: The average age of non-Aboriginal persons accepted into MERIT (28 years, 10 months) is younger than those not accepted (29 years, 5 months). Also found was that persons over 35 years of age were less likely to not be accepted.

Living Arrangements: Significantly more persons accepted into MERIT were living with their parent(s) or with friends. Persons not accepted into MERIT were significantly more likely to be living with another relative or living in some other unspecified arrangement.

Type of Accommodation: Significantly more persons residing in a rented or privately owned house, flat or even on-site caravan were accepted into MERIT than were persons whose current accommodation was supported housing, hostel, refuge or shelter. Similarly, persons who were homeless or had no usual place of residence were relatively unlikely to be accepted into MERIT. Persons in prison (including those on remand) were also unlikely to be accepted into MERIT, although this is predictable given that conditional bail is one of the main conditions for program entry.

Education: While not statistically significant, there was evidence that more persons who had achieved at least a Year 11 or 12 education were accepted into MERIT.

Differences in program acceptance rates were found for both Aboriginal and non-Aboriginal in relation to Referral Source and gender.

Referral Source: Significantly more MERIT referrals made by a Magistrate resulted in program acceptance, while significantly fewer referrals made by Solicitors resulted in program non-acceptances.

Sex: Converse differences were found for women referred in relation to acceptance by Aboriginality. While significantly more female non-Aboriginal women referred were accepted into MERIT, significantly fewer Aboriginal women referred were accepted.

No relationship was found between the persons principal source or income, or whether they had served time in custody and acceptance into MERIT. This held for both Aboriginal and non-Aboriginal participants.

2.4 ABORIGINALS COMPLETING MERIT

During the period examined, of the 3454 persons accepted into the MERIT Program, 2020 program participants went on to complete the 12-week MERIT Program.¹¹ That is, the completion rate for MERIT is approximately 58 per cent of all persons accepted into the program.

Aboriginal participants have a lower completion rate than non-Aboriginal participants. Exactly 50 per cent of Aboriginal persons accepted into the MERIT program went on to complete the program compared to just over 60 per cent of non-Aboriginal persons. This difference in completion rates is statistically significant.

There has been a degree of variability in the completion rate of persons participating in MERIT during the operational period studied, particularly for Aboriginal participants. Figure 6, which is not dissimilar to Figure 5 in the patterns observed, shows that the number of Aboriginal persons accepted into the MERIT program rose steadily, particularly from the start of 2002, and peaked in the second quarter of

¹¹ In addition there were 340 persons still engaged in the program at the end of the study period. These records were removed when the data was extracted and, therefore, were not considered in this study.

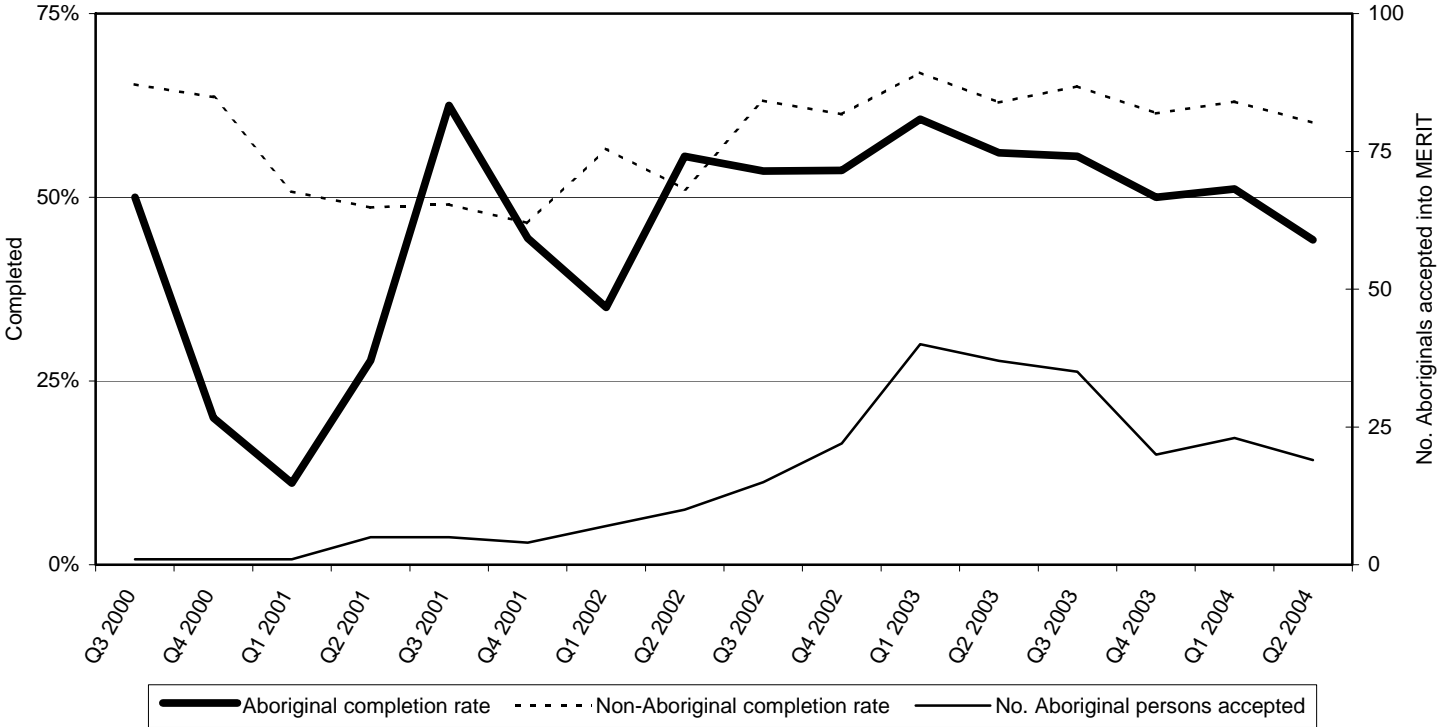
2003. The program completion rate, particularly from quarter 1 of 2002, seems to reflect the quarterly trend in MERIT acceptances.

The volatility in Aboriginal completion rates during the early period of MERIT operations is likely to be a function of the small numbers of Aboriginal program participants during these quarters. After quarter 4 of 2001, the number of Aboriginal participants increased, providing a larger base from which to calculate completion rates.

On the whole, Aboriginal completions have run at a lower level than non-Aboriginal completions. From the start of 2002, the completion rate for Aboriginal participants in MERIT has run at about ten percentage points lower than for non-Aboriginal participants. The average completion rate for the ten quarters from the start of 2002 to the second quarter of 2004 has averaged at 51 per cent for Aboriginal persons and 61 per cent for non-Aboriginal persons.

Towards the end of the period studied, there was an observable decline in the quarterly completion rates for all MERIT participants, slightly more so for Aboriginal participants.

Figure 6: Number of Aboriginal persons accepted into MERIT and percentage of Aboriginal and non-Aboriginal persons completing program



Note: Quarterly completion rates based on total number of persons in MERIT at the end of each quarter including persons still engaged in program at that time.
 Q3 and Q4 for 2004 not displayed as figures for these periods do not give a true indication of completion rates - insufficient time for participants to complete program requirements.

Source: MIMS

2.4.1 Reasons for not completing the MERIT program

For all MERIT participants, the main reason for not completing the program was being 'breached' by the MERIT team. Aboriginal participants were more likely than non-Aboriginal participants to be found in breach of program requirements (Table 15). On the other hand, Aboriginal participants were less likely to be removed from the program by the court and also less likely to voluntarily withdraw from the program.

Table 15: Reasons for non-completion – Aboriginal and non-Aboriginal persons

Reason	Aboriginal %	Non-Aboriginal %
Breached by MERIT team	65.7	60.1
Removed by court	14.9	19.1
Withdrew voluntarily	15.3	18.9
Died	0.8	0.3
Other	3.2	1.5
Total	100.0	100.0

Source: MIMS.

The reasons behind being 'breached' by the MERIT team or removed from the program by the court are not recorded in the MERIT database. However, it is probable that many such actions are in response to the person (re)offending whilst on the program, otherwise breaking bail conditions, or failing to comply with the requirements of recommended drug treatment.

2.4.2 Regional differences in MERIT completion rates

Table 16 shows that in some areas, Aboriginal MERIT participants are completing the program at a higher level than the State completion rate of 50 per cent:

- In two AHS – New England and Central Coast – the Aboriginal rate of completion exceeds not only the State average for Aboriginal completions, but also is higher than the completion rate for non-Aboriginal participants within that AHS.
- In the Mid West AHS and SE Sydney AHS the Aboriginal rate of completion is higher than the State average for this group, but lower than the comparative level of non-Aboriginal completions within those AHS.
- Central Sydney AHS had the highest level of completions for Aboriginal persons participating in MERIT (70.4%), and the rate of Aboriginal and non-Aboriginal completions were comparable.
- SW Sydney had the lowest recorded level of MERIT completions for Aboriginal participants of any AHS. The completion level for Aboriginal participants in this

AHS was almost 25 percentage points lower than for non-Aboriginal persons (at 35.3% and 59.7%, respectively).

- Mid North Coast AHS also has a lower level of Aboriginal completions (47.6%) relative to the level of non-Aboriginal completions (72.0%) in that AHS.

Table 16: MERIT completion rates by Area Health Service

Area Health Service (AHS)	Aboriginal persons (%)	Non-Aboriginal persons (%)
Northern Rivers	40.0	53.7
Illawarra	50.0	42.7
South Western Sydney	35.3	59.7
Mid West NSW	58.1	74.0
Hunter	51.9	57.1
Greater Murray	44.4	48.1
Central Coast	69.2	64.3
Macquarie	48.5	48.0
Mid North Coast	47.6	72.0
Northern Sydney	- ^a	69.9
Southern NSW	50.0	64.0
South Eastern Sydney	55.6	61.2
Western Sydney	50.0	56.4
New England	60.0	46.2
Central Sydney	70.4	72.0
Wentworth	50.0	70.5
Far West	- ^a	- ^a
State	50.0	60.2

^a Insufficient numbers (i.e. 5 cases or fewer) to allow valid estimation of completion rate.

Source: MIMS.

2.4.3 Referred treatment and intervention services for MERIT participants

As would be expected, persons participating in the MERIT program generally receive a substantial level of support and case management from their MERIT Team. Overall, 92 per cent of program participants were engaged by way of a case plan. The remainder are recorded as either receiving information and education on drugs (1.4%) or assessment only (6.6%), which may reflect undeveloped case plans, poor recording practices or both. There was no difference between Aboriginal and non-Aboriginal participants in their level of support by way of case management.

However, of those persons who did not complete the MERIT program only 85 per cent received support by way of case management. This lower figure is likely to reflect early exit from the program due to program non-compliance, breach of bail or voluntary termination. Once again, Aboriginal and non-Aboriginal 'non-completers' appeared to be treated similarly.

Where the case plan involved referral to an external agency, non-government organisation or other service, program participants were in the main referred to:

- non-residential alcohol and other drug treatment services (45.6%); or,
- residential alcohol and other drug treatment services (18.6%).

Referral of MERIT participants to other services included:

- non-residential community health centres (8.5%);
- non-residential community mental health centres (3.9%);
- general practitioner, medical specialist or hospital (7.3%);
- psychiatric hospital (1.0%);
- residential community care/mental health centre (1.0%); or,
- other non health service or agency (eg TAFE, Community Services, Housing (6.4%).

One major difference between Aboriginal and non-Aboriginal participants in the type of treatment service they are referred to whilst on the MERIT Program. *Residential* AOD treatment was actually the most common type of referred treatment for Aboriginal participants, representing almost 48 per cent of treatment referrals compared to only 18 per cent of treatment referrals for non-Aboriginal participants. Residential AOD treatment even edged out non-residential AOD treatment (43.0%) as the most common form of intervention for Aboriginal participants in the period examined.

2.4.4 Differences between persons who completed and persons who did not complete the MERIT program

While not statistically significant, some differences in relation to program completion were found for non-Aboriginal persons only on the basis of age, gender, living arrangements

Age: Non-Aboriginal persons completing MERIT were typically older than those who did not complete the program. The average age of persons completing MERIT was 29 years. The age group most likely not to complete MERIT was the 18 to 24 year olds.

Sex: Non-Aboriginal females were less likely to complete MERIT than males.

Living Arrangements: Non-Aboriginal persons who were living alone, with their parents or own family (eg spouse/partner, children) were more likely to complete the MERIT program. Persons who were living with friends or a (non-direct) relative were less likely to complete the program.

Type of Accommodation: Fewer non-Aboriginal persons completed MERIT if their accommodation was of a less stable nature, such as a boarding house, shelter, or caravan. Persons who were homeless or had no usual place of residence were the least likely to complete MERIT. Persons whose usual accommodation was prison (including those placed on remand) were also less likely to complete

Principal source of income: Non-Aboriginal persons with no income or who were unemployed were less likely to complete MERIT treatment. Conversely, persons with regular income, including those dependent on others, fared best in terms of completing the MERIT program.

Prison (served time in custody): Non-Aboriginal persons who had previously served time in custody were significantly more likely not to finish the MERIT program.

2.5 OVERVIEW OF ABORIGINAL PARTICIPATION IN MERIT

As persons move through the MERIT processes of referral, assessment and program participation to program completion, it is to be expected that a degree of attrition will occur. Table 17 shows the number of Aboriginal persons in MERIT at the various stages of program operation.

At the initial operational stage – the level of referral to MERIT – Aboriginal people make up just under 14 per cent of all persons referred, whereas non-Aboriginals make up over 68 per cent of MERIT referrals. The remaining 18 percent of referrals were made up of individuals whose Aboriginal status was not identified or otherwise not known.

At the second operational stage – the level of assessment and acceptance into MERIT – Aboriginal people make up just over 14 per cent of all persons assessed and accepted into MERIT, whereas the proportion of non-Aboriginal persons at this operational level rises to over 81 per cent. Not surprisingly, the percentage of persons whose Aboriginal status was unknown dropped to just over four per cent as a consequence of the information gathering aspects of the MERIT assessment session.

By the conclusion of the MERIT Program, around one in eight (12.3%) persons completing the program were Aboriginal compared with almost 84 per cent being non-Aboriginal persons.

What is evident is that the proportion of identified Aboriginals relative to the proportion of identified non-Aboriginals decreases with each successive stage of MERIT operations. At time of referral, the ratio of Aboriginals to non-Aboriginals was just under one to five. After assessment, the ratio of Aboriginals accepted into MERIT relative to non-Aboriginals accepted into the program was lower at close to one Aboriginal person for every six non-Aboriginal persons (i.e. a ratio of 1 to 5.6). Finally, by the time MERIT program requirements had been completed, for every one Aboriginal person completing almost seven non-Aboriginal persons had completed the MERIT Program (i.e. a ratio of 1 to 6.8).

Table 17: Participation at the various MERIT stages for Aboriginal and non-Aboriginal persons

	Aboriginal	Non-Aboriginal	Not stated/ not known
Operational stage	%	%	%
Referral	13.7	68.2	18.1
Acceptance	14.4	81.2	4.4
Completion	12.3	83.5	4.2

Source: MIMS.

Table 18 shows the same information in a different form, allowing one to see the level of attrition at each stage of MERIT for each group. Around 42 per cent of Aboriginal people referred to MERIT are removed at the acceptance stage of the program and, of those that were accepted into MERIT, only half again progressed to complete the program.

Table 18: Attrition in MERIT participation for Aboriginal and non-Aboriginal persons – all referrals^a

Operational stage	Aboriginal	Non-Aboriginal	Not stated/ not known
	N (% remaining)	N (% remaining)	N (% remaining)
Referral	853 (100.0)	4242 (100.0)	1124 (100.0)
Acceptance	496 (58.1)	2805 (66.1)	153 (13.6)
Completion	248 (50.0)	1687 (60.1)	85 (55.6)
Completion as % of referrals	29.1	39.8	7.6

^a In this table, all referrals regardless of category were considered. Therefore, this table includes “Referrals only” and referrals categorised as “Transferred from another MERIT Team”. If these referrals were excluded, the acceptance rate for Aboriginals would be 62.8%, for non-Aboriginals 73.1%, and 21.2% for the unknown group. See section 2.3 for additional detail.

Source: MIMS.

This contrasts with the group of non-Aboriginal people referred to MERIT where, from the original pool of referrals, 34 per cent are removed at the acceptance stage. Of those that did participate in the MERIT Program just over 60 per cent completed.

Of those persons participating in MERIT whose Aboriginal status was not identified, almost 56 per cent went on to complete the program, although the relative proportion progressing to program acceptance from referral was quite small (13.6%). As mentioned earlier the lack of information regarding the Aboriginal status of this group of offenders generally reflects their non-attendance at the MERIT assessment session.

Table 18 also indicates the number of persons completing as a percentage of the original number referred to MERIT. Across all groups, the MERIT completion rate is just under 33 per cent. That is, for every three offenders originally referred to MERIT one offender goes on to complete the program requirements. Non-Aboriginal offenders referred to MERIT were relatively more likely to complete the program, with four in every 10 non-Aboriginal referrals completing the program compared to fewer than three in every 10 Aboriginal referrals.

3. DISCUSSION

Prior to this study, there were two evaluations of the operation of the MERIT Program in NSW. The Northern Rivers University's Department of Rural Health (2003) conducted an evaluation of the operation of the MERIT Program in the Lismore area, the original site of the MERIT Program in NSW. The Judicial Commission of NSW surveyed Magistrates on their views to the MERIT Program, in particular, their views on the effectiveness of this form of therapeutic jurisprudence (Barnes and Poletti, 2004).

Neither of these evaluations considered, to any large degree, issues relating to the participation of Aboriginal people in the MERIT Program. As the purpose of drug diversion programs such as MERIT is to treat the drug use problems of offenders outside the traditional adversarial system of criminal justice, access to drug diversion programs is especially important for Aboriginal persons given their level of over-representation in the court and prison systems. For example, Weatherburn *et al* (2003) identified that the level of contact between the Indigenous population and the court system was 4.4 times higher than the NSW population as a whole and their contact with the NSW prison system was 16 times higher than the NSW population as a whole.

Available evidence suggests that the prevalence of illicit drug use among Aboriginal and Torres Strait Islander people is higher than the general population (MCDS, 2003). In addition, there is a strong link between the use of illicit drugs and drug crimes that goes beyond drug use offences per se (Spooner, Hall & Mattick, 1999). For instance, Makkai (1999) found that 63 per cent of prisoners and 75 per cent of ex-prisoners reported committing property offences to support a drug habit; and Kevin (1992, cited in Spooner *et al*, 1999) found that illicit drug users committed more property crimes than other property offenders. Therefore, even small gains from the diversion of Aboriginal illicit drug users into drug treatment could reduce the number of Aboriginal people re-appearing before the court and sentenced to prison. As Spooner *et al* (1999:15) summed up:

“Addressing drug use is likely to reduce crime levels and recidivism, even if it doesn't eliminate crime”.

This report has shown that MERIT, in its first four years of operation, has provided significant numbers of Aboriginal persons with illicit drug problems an alternative to the traditional prosecution-sentencing-correctional process. Just under 14 per cent of persons referred to MERIT self-identified as Aboriginal. The percentage of Aboriginal people referred to MERIT is likely to be higher in reality given that 18 per cent of persons referred to MERIT did not state one way or the other whether they were Aboriginal. This level of missing values is largely the result of persons who were referred to MERIT not attending for assessment, plus perhaps a degree of reluctance to identify as an indigenous person by some Aboriginals.

At each stage of MERIT – referral, acceptance and completion – a significant proportion of participants were found to be Aboriginal. At initial referral just under 14 per cent were Aboriginal, after assessment just over 14 per cent of persons accepted

into the MERIT Program were Aboriginal, and just over 12 cent of persons completing MERIT were Aboriginal.

These operational indicators of the participation of Aboriginal people in MERIT may be compared to some more general population and criminal justice indicators for this group:

- Indigenous persons make up around two per cent of the NSW population.
- Indigenous persons represent around nine percent of finalised Local Court appearances in any year.
- Each year more than two percent of the total NSW Indigenous population is given a custodial sentence (Weatherburn *et al*, 2003).

In general, Aboriginal offenders are referred to MERIT for either drug offences or acquisitive crimes (such as break & enter, stealing and fraud) or driving offences. The pattern of offences for non-Aboriginal referrals is similar, although Aboriginal persons are less likely than their non-Aboriginal counterparts to be referred to MERIT for drug offences and more likely to be referred for an offence involving assault, vandalism and offensive behaviour. AJAC (1999) found that Aboriginal people were grossly over-represented in criminal proceedings for offensive language and offensive conduct charges and that more than a quarter of Aboriginal people charged with offensive language/conduct were also charged with an offence against police – either resist arrest or assault police.

Notably, Aboriginal persons referred to MERIT were twice as likely as non-Aboriginals to have been charged with an offence against justice procedures, which includes resist arrest, and the offence of assault subsumes the charge of assault police. On this issue, AJAC (1999:8) has cautioned of a:

“direct connection ... between the policing and prosecution of public order type offences and the likelihood of more serious and prolonged involvement in the criminal justice system”.

The diversion of Aboriginal persons charged with less serious assaults, offensive conduct and justice offences - who also have an illicit drug problem - should be seen as a positive feature of the MERIT Program.

Consistent with the findings of the Alcohol and Other Drug Treatment Services National Minimum Data Set (AIHW, 2004), cannabis and heroin were the two main illicit drugs of concern for offenders referred to MERIT. Amphetamine type substances was recorded in both the NMDS and MIMS collections as the third most common principal illicit drug of concern for diverted offenders.

The level of Aboriginal referrals in different parts of the State reflect a number of different factors – the base Indigenous population in the area, the prosecution of

offences committed by Aboriginal people¹², the preparedness of stakeholders and defendants to make use of MERIT, and the period of time that the MERIT Program has been operating in the area. While Aboriginal referrals vary from less than two per cent for courts in the North Sydney Area Health Service to over 65% in the Macquarie AHS, all courts demonstrate a willingness to maximise opportunities for Aboriginal offenders to be diverted to health services for treatment of their illicit drug problems. In all areas where MERIT has been operating, the proportion of Aboriginal referrals exceeded the proportion of Aboriginal court appearances. Furthermore, when expressed as a percentage of relevant court appearances, the level of Aboriginal referrals exceeded the level of non-Aboriginal referrals in all Area Health Services with one exception where the level was comparable. Overall, Aboriginal persons were almost *twice* as likely to be referred to MERIT than non-Aboriginal persons based on court appearances for the period the program was operating.

A number of commentators have identified the time needed to consolidate the operation of drug diversion initiatives (Spooner *et al*, 1999; Coumarelos *et al*, 2002; Baker, 2004). In relation to diversions available under the *Young Offenders Act 1997* – which it should be noted preceded adult diversion programs in NSW by some three years – an uneven application of available diversionary options for Aboriginal young people was progressively addressed over time consistent with “the government’s intention of establishing ... a court-alternative which considers the offender’s race and culture” (Trimboli, 2000:65).

It may be suggested that a degree of unfamiliarity with the aims and parameters of the MERIT Program may be influencing acceptances into MERIT. Overall, solicitors have one of the highest levels of referral, second only to Magistrates, and Aboriginal persons were referred to MERIT by a solicitor at a higher level than is the case for non-Aboriginal offenders (40% vs. 30%, respectively). Unfortunately, Aboriginal persons referred by solicitors have one of the lowest rates of acceptance into MERIT with fewer than four in ten Aboriginals referred by a solicitor progressing to participate in MERIT. Solicitors of non-Aboriginal referrals have a higher acceptance rate with around one in three solicitor-referred clients not accepted into MERIT. So, not only were the majority of Aboriginal persons not accepted into MERIT referred by solicitors but legal professionals supporting Aboriginal clients were not as successful as legal professionals supporting non-Aboriginal clients in terms of having their clients accepted into the MERIT Program. The more serious criminal records and offence profiles of Aboriginal persons, generally, may explain some of these differences.

It has been extensively documented that the policies and practices of police and Magistrates do have a significant influence on the numbers of Aboriginal persons diverted at each point in the criminal justice system (Cunneen & McDonald 1997; Spooner, *et al* 1999). So too will the policies and practices of key legal service providers such as the Legal Aid Commission, Aboriginal Legal Services and private

¹² “The over commission of offences by Aboriginal people and over policing are not separate issues but indeed feed off one another as part of a continuum” (Cunneen and Robb “*Criminal Justice in North West NSW*, 1987 cited in AJAC, 1999).

solicitors. Perhaps the NSW Government could consider the development of a set of tailored resources on the MERIT Program for solicitors employed by the Legal Aid Commission and the Aboriginal Legal Service. These information resources could outline the aims, principles and eligibility criteria of the MERIT Program. Private solicitors should be able to access these resources too through their local court. This may assist solicitors to have a better understanding of the conditions, the purpose and the operation of MERIT as a diversionary program, which may result in more appropriate referrals to MERIT.

Aboriginal persons referred to MERIT tend to be younger and less educated than their non-Aboriginal counterparts. They are also more likely to be receiving unemployment or other government assistance benefits and living in a rented rather than self-owned house or flat. These findings are consistent with the general level of social and economic disadvantage experienced by Indigenous Australians (Steering Committee for the Review of Government Service Provision, 2003). The current study has also found that Aboriginal persons referred to MERIT were *more* likely to be married or in a de facto relationship and be residing living with their partner and any children¹³.

Females made up a higher proportion of Aboriginal persons referred to MERIT, and both Aboriginal males and females referred to MERIT were more likely to have served time in prison than non-Aboriginal persons. Once again these findings mirror more general trends in the NSW criminal justice system. For example, Weatherburn *et al* (2003: 8) identified that Aboriginal males and females sentenced to prison, “who had *not* received a prison sentence in the preceding five years, constituted a minority”. Nonetheless, the high percentage of referrals with a prison record (68% for Aboriginals and 58% for non-Aboriginals) is perhaps surprising given the original intent of the MERIT program was to provide a scheme of early intervention for relatively minor drug offenders who were motivated to seek treatment (*NSW Drug Summit: Government Plan of Action*, 1999).

The acceptance rate for persons – Aboriginal and non-Aboriginal – referred to MERIT has, in general, been in decline since the second quarter of 2002. In particular, this decline stands out against an increase in the number of Aboriginal persons assessed for participation in the MERIT Program. As offenders cannot be considered for MERIT unless they receive bail, the *Bail Amendment (Repeat Offenders) Act*, introduced to reduce the availability of bail for repeat offenders, has evidently adversely affected the level of MERIT referrals and acceptances. Notably, Fitzgerald & Weatherburn (2004) found that:

¹³ Putt, Payne & Milner (2005) identified similar demographics and characteristics in their survey of male adult prisoners (the Drug Use Careers of Offenders Project) and data from persons in police custody (the Drug Use Monitoring in Australia or DUMA program). These authors report that: “Indigenous male offenders are younger, more likely to be married, less educated and mostly unemployed. This underlines the importance of efforts to address the underlying factors that lead to substance abuse and offending, as well as programs that provide educational and vocational opportunities for Indigenous offenders, and assistance for their families and with stable living arrangements.” (p.5)

“Prior to the bail amendment, 17.3 per cent of indigenous adults were refused bail. In the 18-months following the commencement of the amendment, this figure had increased to 19.8 per cent; an overall increase of 14.4 per cent ... (and) the increase in the bail refusal rate for Indigenous adults was significantly greater than the increase for non-Indigenous adults”. (p.5)

As MERIT is a bail contingent diversion program, it is hardly surprising that this legislative change to bail provisions has disadvantaged Aboriginal persons in their access to MERIT. Court appearances and prior imprisonment are valid proxies for repeat offending, and Aboriginal persons do have a higher level of court appearances and prison sentences than the NSW population as a whole (Weatherburn *et al*, 2003). Not being eligible for bail is the main reason why Aboriginal persons were assessed as ineligible to participate in MERIT. One in every six Aboriginal referrals failed to meet the bail requirements of the program, with non-Aboriginal persons ineligible on this basis at a slightly lower level.

Refusing Aboriginal people bail escalates their involvement in the criminal justice system and exacerbates Aboriginal over-representation in custody. It also substantially reduces the opportunities for Aboriginal persons to participate in court-based drug diversion programs such as MERIT.

For both Aboriginal and non-Aboriginal persons referred to MERIT, a lack of willingness to participate in the program – that is, refusing to be assessed for the program or refusing to participate after being assessed as eligible for the program – is the main reason for not progressing to drug treatment under MERIT. Self-exclusion was the reason why one in every four individuals was removed from MERIT at the assessment stage.

In certain areas where MERIT is operating, Aboriginal persons were 2.5 times more likely than non-Aboriginal persons to *choose* not to participate in the MERIT Program even where they have been *assessed as eligible and suitable*. Regional differences in the willingness of eligible and suitable offenders to participate in the MERIT Program may provide some insight into not only how the program is operating in a particular area but also how it is being promoted to offenders, the broader community and stakeholders.

Whilst it was beyond the scope of this study to identify local factors that may explain the lack of Aboriginal willingness to participate in MERIT, the statewide and local administrators of MERIT could investigate this issue in the near future. Notably, in areas where MERIT has been operating the longest, only small numbers of Aboriginal persons are choosing not to participate in MERIT once assessed as eligible and suitable. This may indicate that Aboriginal communities need time to develop trust and confidence in diversion programs, and/or that with time and experience the court and drug treatment services offered by MERIT become more attuned to the needs and expectations of Aboriginal people with illicit drug problems.

Despite the more extensive criminal profiles (i.e. more charges, more prison sentences) of Aboriginal referrals, magistrates appeared to be more likely to allow Aboriginal people into the MERIT Program. Aboriginals were around 50 per cent more likely than non-Aboriginals to have their entry into the program endorsed by the Magistrate following the provision of an assessment report and treatment plan by the

MERIT Team. Judicial bias has been raised in relation to Aboriginal over-representation in the criminal justice system, with some criminologists arguing that the courts “remain in a position to legitimate a range of racist concepts concerning indigenous people” (Cunneen, 1993: 131), whilst others claim of equal or, indeed, more favourable treatment of Aboriginal people by the courts (e.g. Walker, 1987).

Certainly, recent studies of diversionary programs operating in NSW suggest a degree of favourable treatment for Aboriginal people, particularly in the relaxing of eligibility criteria that would otherwise disqualify individuals from participating in the diversionary option (Coumarelos *et al*, 2002; Baker, 2004). A similar degree of positive discrimination may be operating in relation to Aboriginal persons referred to MERIT who are not necessarily assessed as eligible/suitable but are extended an opportunity by the Court to participate in the MERIT program in order to receive treatment for their drug problems. The evaluation of the Lismore MERIT Pilot Program (Northern Rivers University of Rural Health 2003: 97) certainly found that “efforts to retain Aboriginal participants often led to ‘bending the rules’ more so than for their Aboriginal counterparts”.

Nonetheless, some MERIT courts appeared to be treating Aboriginal persons less favourably than non-Aboriginal persons in terms of endorsing entry into MERIT following an assessment report. While caution needs to be exercised given the relatively small number of cases, it would be worthwhile to examine why, in some of these courts (which happen to be high volume courts operating in regional areas of NSW), Aboriginal persons are five to seven times less likely than non-Aboriginal persons to be granted entry into the MERIT program.

Once involved in the 12-week MERIT Program, Aboriginal persons are less likely to complete the program. One in two Aboriginal program participants fail to complete the program compared to 40 per cent of non-Aboriginal program participants. In general, completion rates for Aboriginal participants run at around 10 per cent lower than for non-Aboriginal participants.

For both groups, being breached by the MERIT Team is the main reason participants don't complete the program, with almost two-thirds of Aboriginal participants being removed from the program for breaches. Although, the MERIT database does not record the nature of such breaches, given the nature of the program, it is likely that breach actions were carried out in relation to non-compliance with drug treatment. Further offending whilst on MERIT and other breach of bail conditions are also likely to result in participants being removed from the program.

Interestingly, a lower percentage of Aboriginal participants were removed from the program by the court, possibly suggesting treatment by Magistrates favouring Aboriginal participants. Also, once at this stage of the program, Aboriginal participants are *less likely* than their non-Aboriginal participants to withdraw from MERIT on a voluntary basis. This is an interesting ‘about-turn’ from what was observed at the assessment stage. It also suggests that every effort should be made by MERIT stakeholders to encourage Aboriginal persons to participate in the program.

The vast majority of MERIT participants, Aboriginal and non-Aboriginal, were engaged by way of a caseplan and referred to a non-residential or residential alcohol

and other drug treatment service. A large and significant difference exists in the type of service that Aboriginal and non-Aboriginal participants were referred to for treatment of their drug problem. *Residential* AOD treatment was the most common form of treatment intervention organised for Aboriginal participants in MERIT. Almost half of the Aboriginal participants were engaged in a residential treatment program compared to just 18 per cent of non-Aboriginal participants.

There are a number of implications arising from this finding. Firstly, residential treatment programs tend to be more onerous than non-residential treatment programs in terms of participation and compliance. For a start, there is the requirement to reside and stay on the premises for the duration of the prescribed treatment. Secondly, there must be recognition of differences in family, culture and community ties and responsibilities, which may make compliance with residential treatment more difficult for Aboriginal people (Ministerial Council on Drug Strategy, 2003). As AJAC (2004) has noted, Aboriginal people have strong cultural and historical ties with particular locations and, combined with strong extended family ties and responsibilities, need to be considered when the court makes bail decisions and account for numerous breaches of bail. Both the *“Bringing Them Home”* report (HREOC, 1997) and the Royal Commission into Aboriginal Deaths in Custody spoke of the implicit risks of separating Aboriginal persons from their families and communities.

The high level of residential treatment arranged for Aboriginal participants in MERIT may, in part, explain the lower completion rates for Aboriginal people participating in MERIT. Should an Aboriginal person be removed from their family, community and culture to participate in a residential drug treatment program, there is the real prospect that the person will leave and return to his family and community before the completion of drug treatment. A number of points bear on this issue including:

- the importance but recognised shortage of Indigenous community-controlled diversion¹⁴ and residential treatment programs (National Drug Research Institute, 2002);
- the motivation of offenders who agree to residential treatment to avoid criminal sanctions who are then obliged to mix with more motivated voluntary clients (Northern Rivers University, 2003);
- the appropriateness of mainstream residential treatment services for Aboriginal people (Ministerial Council on Drugs Strategy, 2003);
- a general lack of residential AOD services in rural NSW meaning that bed spaces are at a premium¹⁵ and MERIT participants may need to be placed further afield than would otherwise be desired.

¹⁴ In his speech to open the joint AJAC and Institute of Criminology Workshop on Diverting Aboriginal Adults from the Justice System, the NSW Attorney General stated: “We know that those programs controlled by Aboriginal communities are the ones most likely to achieve success, and accordingly we need to focus on enhancing Aboriginal community involvement to ensure that the diversionary framework we adopt allows for the greatest degree of local Aboriginal community control.” (AJAC 2001: Appendix 1).

The disadvantages and concerns of using residential drug treatment for Aboriginal persons must be balanced with the need to protect the interests, health and well-being of family members living with drug users. Especially where there is a history of family violence and abuse, residential treatment may be the preferred form of treatment of a caseplan developed through consultation with the offender and the offender's family. In particular, the Aboriginal Justice Advisory Council (2002: 5) has noted that "initiatives to divert offenders from prison, may make Aboriginal communities less safe for victims of violence". Therefore, residential treatment, like custody, may provide partners and families of drug offenders with a period of relief from the dangers and difficulties of living with a person who has problems with illicit drugs:

Healing for victims (of family violence) is separate to the offender's intervention and can involve their family, community or general support system. Again, the content is based on healing aspects, as well as enabling them to rebuild their lives. (p.11)

On this basis, the identified high level of residential treatment for Aboriginal participants in MERIT may be a positive feature of MERIT's application to Aboriginal offenders and may simply express the needs of drug users, their families and communities to protect the interests of all parties, especially the family victims of drug abuse and domestic violence.

In conclusion, the overall findings of this study are encouraging. MERIT is founded on an effective partnership between the justice and health systems (Scantelton, Linden, Boulton & Didcott, 2002; Barnes & Poletti, 2004), and as an exercise in therapeutic jurisprudence it appears to be treating Aboriginal persons *at least* equally as well as non-Aboriginal people.

While there is no doubt that improvements in the operation of the program may be achieved in certain areas of the State, Aboriginal (and non-Aboriginal) people are being provided with valuable opportunities to be diverted from a purely criminal justice regime and to have their illicit drug problems dealt with *prior* to the determination of their sentence. Successful completion of a drug treatment program may result in more favourable sentencing outcomes for Aboriginal people with illicit drug problems.

There are also some clear indicators that the criminal justice and health players involved in MERIT are attempting to maximise the number of Aboriginal people referred to and participating in MERIT. A degree of greater flexibility in program requirements for Aboriginal people may be necessary given the criminal antecedents of many otherwise suitable Aboriginal offenders. This was noted for the Lismore trial (Northern Rivers, 2003) and has now been noted generally for MERIT as it operates across the greater part of NSW.

¹⁵ For example, Connie (1998, cited in Spooner *et al* 1999) surveyed residential alcohol and drug treatment services in NSW and found that only 32 per cent of people seeking admission were actually admitted. Further, in 2001, the NSW Government sought to address the shortage of placements in residential services by purchasing 70 additional beds from community and non-government operated residential alcohol and drug treatment services to accommodate MERIT participants.

Aside from providing a valuable means of breaking the drug-crime cycle, the MERIT Program may well represent an important in-road for reducing the level of Aboriginal people in the NSW court and prison systems.

Appendix A: MIMS variables used in this study

ID number (unique identifying number)

Date of birth

Sex

ATSI status

Living arrangements

Type of accommodation

Marital status

Principal income

Education level

Served time in custody

Offence(s)

Principal drug of concern

Agency code (Area Health Service)

Referral date

Referral source

Referring court

Date eligible

Eligibility

Suitability

Reason not accepted

Program entry date

Program status

Main service provided

Referral to care (type)

Exit status

Exit data

Completion status

Reason for termination

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NOTES

- ¹ “The (1994) National Aboriginal and Torres Strait Islander Survey informs us that about one in five Indigenous Australians were arrested at least once in the five years before the survey” (Hunter, 2001: 12). Also, Broadhurst (1997: 417) argued that there is “clear statistical support for the proposition that ‘race’ or Aboriginality increases the risk of arrest”.
- ² A NSW Police study of the first year of the Cannabis Cautioning Scheme (CCS) found that ATSI persons received relatively fewer cannabis cautions than did non-ATSI persons, although this was primarily because their criminal histories disqualified them from receiving a caution, and not because police were more reluctant to issue cautions to them (Coumarelos, Cain, Forell and Ryan, 2002). Examining the first three years of the CCS, Baker (2004:viii) identified that “while the Scheme has successfully diverted many Indigenous persons from court, it has not been as effective for Indigenous persons compared with non-Indigenous persons. Indigenous persons (11%) were much less likely than non-Indigenous persons (31%) to be cautioned under the Scheme, primarily because they failed to meet the eligibility criteria. As a consequence Indigenous persons have been diverted from the court system at a lower rate than non-Indigenous persons, somewhat increasing the degree to which Indigenous persons are over-represented in the court system.”
- ³ Weatherburn, Lind & Hua (2003:9) found that “the level of Indigenous contact with the court system is 4.4 times higher than for the population as a whole – with more than a quarter of the NSW Indigenous population appearing in court between 1997 and 2001. The figures are even more disturbing among young Indigenous people. More than 40 per cent of Indigenous males and about 14 per cent of Indigenous women aged 20-24 appeared in a NSW court in 2001 charged with a criminal offence”.
- ⁴ Weatherburn *et al* (2003:5-6) found that “frequent previous contact with the court system was much more common amongst Indigenous people than among the population as a whole. About 27 per cent of Indigenous males and about 17 per cent of Indigenous females who had appeared at least once in 2001, had appeared in court more than five times in the five years prior to their 2001 court appearance”.
- ⁵ A study by AJAC in 1999 found that on a statewide basis Aboriginal people are over-represented at a rate 15 times the general population for offensive language and offensive behaviour charges offences. However some local government areas recorded rates above 80 times the state average for these offences. The study also found that more than a quarter of all offensive language and offensive behaviour charges against Aboriginal people were accompanied by a more serious charge of assaulting police or resisting/hindering arrest. More recently, Weatherburn *et al* (2003:4) identified that “Indigenous people are more likely to turn up in court for offences related to violence and public order”.
- ⁶ Weatherburn *et al* (2003:3) also identified that Aboriginal persons had a higher profile across all acquisitive crimes (i.e. robbery, unlawful entry, theft offences) with the exception of deception (i.e. fraud) offences (re Table 3).
- ⁷ Baker (2001) found that the Aboriginal persons made up 10 per cent of Local Court and Higher Court convictions or “5 times higher than what would be expected given the relative size of their population”.
- ⁸ Baker (2001:4) identified that “non-custodial sanctions are used less frequently with indigenous offenders (as implied by their higher imprisonment rates) ... Fines, recognizances and ‘other’ types of penalties are more likely to be handed down to non-indigenous persons than indigenous persons.”
- ⁹ A study by the NSW Law Reform Commission, *Sentencing Disparity and the Ethnicity of Juvenile Offenders* (1998), found that there were statistically significant differences in the penalties received by the Aboriginal and Torres Strait Islander group and their Anglo-Australian counterparts, with the Aboriginal and Torres Strait Islander offenders receiving more community service orders and supervised orders. Both penalties are at the more severe end of the penalty hierarchy. BOCSAR’s examination of indigenous representation at successive stages of the court system in 1999 found that indigenous persons represented ‘19 per cent of those sentenced to

imprisonment, and 17 per cent of those sentenced to imprisonment for long terms (i.e. 6 months or more)." (Baker, 2001:2)

- ¹⁰ Aboriginal people constitute approximately 19% of all people in prison in NSW (an increase from 12% in 1991). Aboriginal women constitute approximately 30% of all women in NSW prisons (AJAC, 2003). The "Indigenous imprisonment rate has increased during the 1990s and in some States more quickly than the overall imprisonment rate" (Cunneen, 2001:8)
- ¹¹ "Only a minority of Indigenous offenders sentenced to prison in 2001 had not previously been imprisoned in the preceding five years. Seventeen per cent of Indigenous males and 15 per cent of Indigenous females imprisoned in 2001 had been given a custodial sentence more than three times in the five years prior to their first custodial penalty in 2001." (Weatherburn *et al*, 2003:9)
- ¹² See House of Representatives Standing Committee on Family and Community Affairs, (2001) "Where to next – a discussion paper", *Inquiry into Substance Abuse in Australian Communities*, 17 September, Canberra.