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**THE APPROPRIATE PLACE OF INDIGENOUS  
SENTENCING COURTS IN THE AUSTRALIAN  
CRIMINAL JUSTICE SYSTEM**

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## INTRODUCTION

The experience of Indigenous defendants in criminal courts is rarely a positive one. Crimes dealt with by the lower tier of the court system (the various Local or Magistrates courts) are, in the vast majority of cases, disposed by way of guilty plea and sentence is imposed based on snippets of information obtained from the submissions of legal counsel which rarely last more than a few minutes. This process, which is in many ways a relic of a 'culture remote in time and place',<sup>1</sup> ignores, excludes and degrades the Indigenous defendant who is being sentenced. Linguistic, cultural and social barriers all prevent Indigenous defendants from feeling they have been heard or that they are valued by the court. The result is a court process that fails to address the underlying issues motivating criminal behaviour and instead operates on a model where 'wrong doers are punished, a sentence is passed and a pattern of reoffending is invariably put in place.'<sup>2</sup> In recent years a new court process has been developed to address these failings. Indigenous sentencing courts involve Indigenous leaders from the local community in the sentencing process and enable them to convey both disapproval and supportiveness to defendants. The court also operates in a manner that is more accessible to Indigenous defendants – formality is removed from language and dress, physical surroundings are adapted to convey the equal status of participants, and an emphasis is placed on broad discussion of the issues surrounding the offence and sentence rather than ploughing directly towards a result. The courts have had a transformative effect on some defendants, reversing lifelong

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<sup>1</sup> Michael S King and Kate Auty, 'Therapeutic Jurisprudence: An Emerging Trend in Courts of Summary Jurisdiction' (2007) 30 *Alternative Law Journal* 69, 74.

<sup>2</sup> Douglas R Dick, 'Circle Sentencing of Aboriginal Offenders: Victims Have a Say' (2004) 7 *The Judicial Review* 57, 57; Sue Woods, 'Sistas: Koori Women in Custody' (1999) 4 *Indigenous Law Bulletin* 28, 29.

trends of criminal and self-destructive behaviour.<sup>3</sup> Writing of a similar initiative in Canada, Ross Gordon Green has noted that if supported by adequately-funded rehabilitative services, Indigenous sentencing courts 'may create a real opportunity for beginning to break deviant cycles of behaviour among repeat offenders.'<sup>4</sup>

In light of their great potential, Indigenous sentencing courts have been established in most Australian jurisdictions but many controversies and uncertainties still surround their operation. One such controversy is whether Indigenous sentencing courts are suited to dealing with all offences. Sexual offences are excluded from the mandate of most of the courts, with justifications for this decision varying between jurisdictions. Another issue that constantly surfaces each time the use of Indigenous sentencing courts is widened is the concern that Indigenous sentencing courts distinguish defendants based on their race, and thus violate the principle of equality before the law. As use of these courts becomes more widespread, it is important that fundamental questions such as these are considered, to ensure that the courts take their appropriate place in the Australian criminal justice system.

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<sup>3</sup> New South Wales Attorney General's Department, *Crime Prevention: Circle Sentencing* (2007) <[http://www.lawlink.nsw.gov.au/lawlink/cpd/ll\\_cpd.nsf/vwFiles/Circle%20Sentencing\\_feb07.pdf/\\$file/Circle%20Sentencing\\_feb07.pdf](http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/vwFiles/Circle%20Sentencing_feb07.pdf/$file/Circle%20Sentencing_feb07.pdf)> at 14 July 2008.

<sup>4</sup> Ross Gordon Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (1998) 19.

## CHAPTER 1: THE NATURE AND PROCEDURE OF THE TRADITIONAL COURTS

Indigenous sentencing courts developed as a response to the alienating, confusing and meaningless experience of most Indigenous people required to appear before a lower tier criminal court. This failing of the criminal justice system was noted by the Royal Commission into Aboriginal Deaths in Custody, which stated 'throughout Australia there was a common thread of Aboriginal opinion which demonstrated the negative human experience which is the reality behind the statistics of Aboriginal over-representation in the criminal justice system.'<sup>5</sup> It is worth noting that negative experiences of the court process are not limited to Indigenous defendants. Contrary to the idealised theoretical view of criminal justice where the court process should be a minimally intrusive and neutral method for determining issues of guilt and punishment,<sup>6</sup> the operations of the lower courts are understood by most defendants as a degrading and personally meaningless experience that inflicts, as well as precedes, punishment.

The summary criminal process is employed as a 'degradation ceremony'<sup>7</sup> which imposes a lowered social status on a defendant and subjects him or her to a shaming and disempowering experience. The perceived triviality of the offences dealt with by the court is seen as justifying a minimum of judicial interest and procedural protection.<sup>8</sup> Matters are generally resolved with extreme brevity and sentences are often imposed within minutes of the defendant's entry to the courtroom.<sup>9</sup>

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<sup>5</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, National Report (1991) ('RCIADIC') vol 3 [22.4.2].

<sup>6</sup> David Brown et al, *Criminal Laws: Material and Commentary on Criminal Law and Process of New South Wales* (4<sup>th</sup> ed, 2006) 121; Malcolm M Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (1979) 199-201.

<sup>7</sup> Harold Garfinkel, 'Conditions of Successful Degradation Ceremonies' (1956) 61 *American Journal of Sociology* 420, 422-3; Pat Carlen, *Magistrates Justice* (1976) 23-4.

<sup>8</sup> Doreen J McBarnet, *Conviction: Law, the State and the Construction of Justice* (1981) 143-7.

<sup>9</sup> See generally, Carlen, above n 7, 24-8.

The quality of communication in the court is low due to the rushed pace, the positioning of participants and attendant poor acoustics, and the prevalence of legal terminology and court shorthand. These insular practices mean that only regular actors such as the Magistrate, prosecutor and defendant's lawyer are in a comfortable environment, and thus transactions between these people dominate the proceedings.<sup>10</sup> The business of the court is conducted between these three actors, with the participation of the other attendees periodically demanded to allow the process to continue to its conclusion.<sup>11</sup>

The net result of these factors is that the traditional court process is alienating and inaccessible to outsiders, including visitors<sup>12</sup> and even regular attendees such as court reporters.<sup>13</sup> The negative aspects of the process are most keenly felt by the defendant whose liberty is the subject of the proceedings and who will likely leave the court unsure why the particular result was reached. This inaccessibility is even more pronounced for Indigenous defendants, whose cultural background is even further removed from the specialised and formal culture of the traditional court process than non-Indigenous defendants. The Indigenous cultural norm is to avoid direct confrontation or disagreement in oral communication.<sup>14</sup> Diana Eades describes the effects of this cultural disparity in ordinary conversation:

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<sup>10</sup> Ibid 21-3, 37-8.

<sup>11</sup> Michael King, 'What Can Mainstream Courts Learn From Problem-Solving Courts?' (2007) 32 *Alternative Law Journal* 91, 91.

<sup>12</sup> McBarnet, above n 8, 144.

<sup>13</sup> Daniel Briggs and Kate Auty, 'Koori Court Victoria - Magistrates Court (Koori Court) Act 2002' (Paper presented at the 18th International Conference of the International Society for the Reform of Criminal Law, Montreal, 8-12 August 2004) 3.

<sup>14</sup> Diana Eades, 'They Don't Speak an Aboriginal Language, or Do They?' in Ian Keen (ed), *Being Black: Aboriginal Cultures in 'Settled' Australia* (1988) 97, 105.

Aboriginal speakers often feel they are not given enough time to speak, and to develop their viewpoint. As well they often feel that non-Aboriginal participants are confrontational in the way they present their ideas. Non-Aboriginal speakers often feel that Aboriginal speakers are not clear in expressing their views – Aboriginal indirectness and circumspection is often interpreted as inarticulateness and the lack of a logical argument.<sup>15</sup>

This problem can be further exacerbated by the method of examination of witnesses employed in court based on direct questioning and refutation of a witness' assertions. The height of the Magistrate's physical positioning, which is intended to signify his or her authority, instead conveys an intimidatory posture to Indigenous defendants.<sup>16</sup> Other examples of cultural disadvantage include the way in which the rushed pace of proceedings fails to account for the high value placed on silence as a means of communication in Indigenous culture,<sup>17</sup> and the inverted connotations of eye contact in European and Indigenous cultures – for an Indigenous defendant, making eye contact with an authority figure is considered disrespectful, while Europeans see failure to make eye contact as an indication of untrustworthiness.<sup>18</sup> Indigenous defendants who primarily speak their traditional language can have extremely low levels of comprehension of the language used in court.<sup>19</sup> These cross-cultural problems are exacerbated by the low numbers of Indigenous people working in the criminal justice system.<sup>20</sup> Finally, Indigenous defendants may well be apprehensive

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<sup>15</sup> Ibid 106.

<sup>16</sup> Mark Harris, "A Sentencing Conversation": *Evaluation of the Koori Courts Pilot Program October 2002 – October 2004* (2006) 31.

<sup>17</sup> See *Stack v Western Australia* (2004) 29 WAR 526, 537-9 [46], [49]-[50]; Eades, above n 14, 107; King and Auty, above n 1, 70.

<sup>18</sup> Linda Daniele (ed), *Equality Before the Law Bench Book* (2006) 2305; RCIADIC vol 3 [22.4.5]–[22.4.6]. It should be noted that this is not the case in all Indigenous cultures: see Jewel Topsfield and Marc Moncrief, 'Tough Justice or Soft Touch in Koori Court?', *The Age* (Melbourne), 4 September 2004 <<http://www.theage.com.au/articles/2004/09/03/1093939133358.html>> at 25 September 2008.

<sup>19</sup> Aboriginal Resource and Development Services Inc, *An Absence of Mutual Respect* (2008).

<sup>20</sup> Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Report No 94 (2006) 83.



of the courts due to their historical role in the implementation of racially discriminative government policies.<sup>21</sup>

The failings of the traditional court process and the disjunction between Indigenous and non-Indigenous cultures combine to prevent the defendant from being able to portray to the court the full context of the circumstances of the offence, the defendant's position in his or her community and his or her potential for rehabilitation, all of which will be relevant to the sentence imposed.<sup>22</sup> Instead, the court makes a decision based on incomplete information, thereby delivering a lower standard of justice. Further, the inaccessibility of the court process for lay attendees at the court impacts on the perception that justice has been done. The failure to convey the appearance of justice is clearly evident when it is considered that the court process is perceived negatively by both the defendant and his or her victim.

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<sup>21</sup> Bridget McAsey, 'A Critical Evaluation of the Koori Court Division of the Victorian Magistrates' Court' (2005) 10 *Deakin Law Review* 654, 683; Green, above n 4, 139-40; Mark Harris, 'From Australian Courts to Aboriginal Courts in Australia – Bridging the Gap?' (2004) 16 *Current Issues in Criminal Justice* 26, 27.

<sup>22</sup> *Crimes Act 1914* (Cth) s 16A; *Crimes (Sentencing) Act 2005* (ACT) s 33; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A; *Sentencing Act 1995* (NT) s 5; *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5; *Sentencing Act 2005* (WA) s 6.

## CHAPTER 2: AUSTRALIAN INDIGENOUS SENTENCING COURTS

### The development of Indigenous sentencing courts

The special disadvantage suffered by Indigenous defendants in relation to the criminal justice system was publicly recognised in 1991 by the Royal Commission into Aboriginal Deaths in Custody, which found that although Aboriginal people are not more likely to die while in custody than non-Aboriginal detainees, they die in much higher numbers due to their massive proportionate overrepresentation in all areas of the criminal justice system.<sup>23</sup> The findings of the Royal Commission raised awareness of the need to make reforms across the entirety of the criminal justice system to reduce the rate at which Indigenous people come into contact with it. To the great discredit of all governments since the Royal Commission, implementation of many of the report's recommendations has been tokenistic at best,<sup>24</sup> with the result that the proportion of Indigenous people in prisons has continued to rise and at 30 June 2006 was 16 times greater than the proportion of incarcerated non-Indigenous people.<sup>25</sup> However, some concrete steps have been taken, such as the creation of Aboriginal Justice Councils, which allow Aboriginal people to have input into criminal justice policy formulation.<sup>26</sup> Indigenous sentencing courts have developed in this context of awareness of the need to adapt the criminal justice system to improve its accessibility to Indigenous offenders and to address the shockingly high imprisonment rates described above.

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<sup>23</sup> RCIADIC vol 1 [1.3.1]–[1.3.3]. Indeed, Victorian Attorney-General Rob Hulls has stated that 'per head of population Aboriginal Australians are the most jailed race in the world' (ABC Television, 'Koori Division of Victorian State Court Established', *The 7:30 Report*, 20 August 2008 <<http://www.abc.net.au/7.30/content/2008/s2341721.htm>> at 26 August 2008).

<sup>24</sup> William Jonas, *Social Justice Report 2001* (2001) Human Rights & Equal Opportunity Commission 17-19 <[http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport01/sjreport.pdf](http://www.hreoc.gov.au/social_justice/sj_report/sjreport01/sjreport.pdf)> at 29 August 2008.

<sup>25</sup> Australian Institute of Criminology, *Australian Crime: Facts and Figures 2007* (2008) 87, and see RCIADIC vol 1 [9.3.1]–[9.3.4].

<sup>26</sup> Jonas, above n 24, 11.

The first Indigenous sentencing court to emerge was the initiative of South Australian Magistrate Chris Vass.<sup>27</sup> Magistrate Vass engaged in 'several years of discussions'<sup>28</sup> with various governmental and Aboriginal bodies, although he avoided consultation at the ministerial level, commenting that 'if we had consulted with the government we'd still be consulting [three years later]'.<sup>29</sup> The key goal of the Nunga<sup>30</sup> Court (as it became known)<sup>31</sup> was to enable the Aboriginal community to have input into the sentencing of Aboriginal offenders. Respected members of the community were invited to attend sentencing hearings, advise the Magistrate on what sentence to impose, and discuss the offence with the defendant.<sup>32</sup> This new form of proceeding was inspired by the method of Aboriginal dispute resolution observed in the Pitjantjara Lands, where group discussion without any time pressure was used to comprehensively deal with issues surrounding the commission of an offence.<sup>33</sup> It is notable that the Nunga Court was able to begin operation without any legislative or financial support. The former was possible due to the majority of the court's procedure being within the court's own power to modify at will, rather than being prescribed by legislation.<sup>34</sup> The latter was possible due to the selflessness of the

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<sup>27</sup> John Tomaino, *Aboriginal (Nunga) Courts* (2004) 2.

<sup>28</sup> *Ibid* 2.

<sup>29</sup> *Ibid* 12.

<sup>30</sup> Nunga is an Aboriginal term which denotes Aboriginal people from South Australia: New South Wales Department of Health, *Communicating Positively: A Guide to Appropriate Aboriginal Terminology* (2004) 13.

<sup>31</sup> Tomaino, above n 27, 2.

<sup>32</sup> Harris, 'From Australian Courts', above n 21, 31.

<sup>33</sup> *Ibid* 31. This is an interesting parallel to the Canadian experience, where the 'circle sentencing' initiative (discussed below) was loosely inspired by the justice practices of the indigenous Canadian Cree and Ojibway tribes: Green, above n 4, 32-3. There is, however, an orientalist tendency to overemphasise the traditional roots of such initiatives (Kathleen Daly, Hennessey Hayes and Elena Marchetti, 'New Visions of Justice' in Andrew Goldsmith, Mark Israel and Kathleen Daly (eds) *Crime and Justice: A Guide to Criminology* (3<sup>rd</sup> ed, 2006) 439, 446-7): see, eg, ACT Chief Minister Jon Stanhope's comment that 'although circle sentencing [is] new to the ACT, it was an ancient tradition for Australia's Aboriginal and Torres Strait Islander people' (*Circle Sentencing Introduced in ACT* (2004) FindLaw <<http://www.findlaw.com.au/news/default.asp?task=read&id=20287&site=LE>> at 9 September 2008).

<sup>34</sup> Although the position is the opposite with regard to the substantive sentencing law applied: Tomaino, above n 27, 2.

respected members of the community who were prepared to act voluntarily for the good of their community.<sup>35</sup> After an initial trial at a single location (Port Adelaide), other Nunga Courts were created around South Australia.<sup>36</sup>

2002 saw the establishment of Indigenous sentencing courts in three other Australian jurisdictions: New South Wales, Queensland and Victoria. The New South Wales initiative was based on a procedure called circle sentencing that had been used in Canada since the early 1990s and involved meeting in a community setting to discuss an appropriate sentence with all community stakeholders.<sup>37</sup> The New South Wales Aboriginal Justice Advisory Committee presented a proposal for the use of circle sentencing with Aboriginal offenders, and a trial of the program commenced in Nowra.<sup>38</sup> In Queensland, the Chief Magistrate initiated a program to emulate the South Australian Nunga Court. After securing the support of the Brisbane Community Elders group, and consulting with local rehabilitative services providers, the Brisbane Murri<sup>39</sup> Court was established.<sup>40</sup> The Victorian court developed from the Victorian Aboriginal Justice Agreement, which was adopted in May 2000 and committed to 'replicating with cultural adaptation' the Nunga Court.<sup>41</sup> Wide-ranging consultation with all local groups (Aboriginal and non-Aboriginal) with any potential

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<sup>35</sup> These laudable motivations do not, of course, deny the fact that remuneration should be provided for the expert services rendered by the respected community members. This was only partially recognised in the review of the Queensland Indigenous sentencing court, where the recommendation for a quite modest expense allowance (\$36.50 per day) was supported by the Government and implemented in the 2006-07 Budget: Queensland Department of Justice and Attorney-General, *Report on the Review of the Murri Court* (2006) 34-5.

<sup>36</sup> See Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review* 415, 417-18 Table 1.

<sup>37</sup> Ivan Potas, Jane Smart and Georgia Brignell, *Circle Sentencing in New South Wales: A Review and Evaluation* (2003) 3.

<sup>38</sup> *Ibid* 3.

<sup>39</sup> Murri is an Aboriginal term which denotes Aboriginal people from Queensland and north-west New South Wales: New South Wales Department of Health, above n 30, 13.

<sup>40</sup> Queensland Department of Justice and Attorney-General, above n 35, 13.

<sup>41</sup> Victorian Department of Justice, *Victorian Aboriginal Justice Agreement* (2000) 43 [4.10].

relevance to the court was conducted.<sup>42</sup> After the enactment of supporting legislation, the first Koori<sup>43</sup> Court was established in Shepparton.<sup>44</sup>

The next court to be established was in the Australian Capital Territory in 2004. The Ngambra<sup>45</sup> Circle Sentencing Court was heavily based on the New South Wales model<sup>46</sup> and was established through a Practice Direction of the Magistrates Court after consultation with local Aboriginal groups, service providers and criminal justice agencies.<sup>47</sup> It was initially created for a trial period of six months but following this period was immediately extended into a permanent institution of the Magistrates Court.<sup>48</sup>

The Northern Territory created the Community Court in 2005. It was established by way of a set of guidelines by the Magistrates' Court. Uniquely among the Indigenous sentencing courts discussed here, the Community Court is available to non-Indigenous defendants as well, although the vast majority of defendants appearing before the court have been Indigenous.<sup>49</sup> This characteristic was seen to be necessitated by the lack of a legislative foundation for the court.<sup>50</sup> By this stage, Indigenous sentencing courts were so well-accepted as a part of the Australian criminal justice landscape that there was no provision for a trial period.

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<sup>42</sup> Kate Auty and Daniel Briggs, 'Koori Court Victoria: Magistrates Court (Koori Court) Act 2002' (2004) 8 *Law Text Culture* 7, 20.

<sup>43</sup> Koori is an Aboriginal term which denotes Aboriginal people from Victoria and some parts of New South Wales: New South Wales Department of Health, above n 30, 13.

<sup>44</sup> See *Magistrates Court (Koori Court) Act 2002* (Vic).

<sup>45</sup> Ngambra is an Aboriginal term which refers to the area in and around Canberra: Shane Madden, 'The Circle Court in the ACT – An Overview and its Future' (Paper presented at the AIJA Indigenous Courts Conference, Mildura, 5 September 2007) 2.

<sup>46</sup> *Ibid* 2; Michael Dawson and Robyn Holder, "'It's Harder Than It Looks'": Specialised Indigenous Courts & Victims of Crime' (Paper presented at the 'Positive Ways: An Indigenous Say' - Victims and Justice Issues in an Indigenous Context Conference, Marrara, 13 September 2007) 12.

<sup>47</sup> Shane Madden, above n 45, 2.

<sup>48</sup> *Ibid* 1-2.

<sup>49</sup> Dawson and Holder, above n 46, 13.

<sup>50</sup> Marchetti and Daly, 'Indigenous Sentencing Courts', above n 36, 431.

The Western Australian adoption of Indigenous sentencing courts began with negotiations between individual communities and their circuit Magistrates. In 2001, after consulting with the local police and Aboriginal leadership, the court at Wiluna began to operate as an Indigenous sentencing court.<sup>51</sup> A similar investment in consultation led to the creation of the Yandeyarra Circle Sentencing Court in 2003.<sup>52</sup> More institutionalised Indigenous sentencing courts were implemented in Western Australia in 2006 for a 2-year trial period. Following consultation with local communities, the towns of Norseman and Kalgoorlie were chosen to host the pilot courts.<sup>53</sup>

Before discussing the nature of the procedure in Indigenous sentencing courts, a few comments can be made. Firstly, community consultation is absolutely crucial. This applies not only upon the establishment of a new model of court, but also to every new *location* in which an Indigenous sentencing court is established.<sup>54</sup> Each location's procedure should be tailored individually based on the wishes of stakeholders in the covered area – most notably the Indigenous community, but also the police, the court staff and local rehabilitative services. The latter are particularly important, as the presence of an Indigenous sentencing court can significantly increase demand for support services.<sup>55</sup> Regard must also be paid to the potential

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<sup>51</sup> Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Discussion Paper No 94 (2005) 147.

<sup>52</sup> *Ibid* 146.

<sup>53</sup> *Kalgoorlie-Boulder Community Court* (2006) Department of the Attorney General <[http://www.justice.wa.gov.au/\\_files/Aboriginal\\_Community\\_Court\\_brochure.pdf](http://www.justice.wa.gov.au/_files/Aboriginal_Community_Court_brochure.pdf)> at 8 September 2008; *Norseman Community Court* (2006) InterSector <[http://intersector.wa.gov.au/article\\_view.php?article\\_id=738&article\\_main=53](http://intersector.wa.gov.au/article_view.php?article_id=738&article_main=53)> at 8 September 2008.

<sup>54</sup> See Douglas R Dick, 'Circle Sentencing of Aboriginal Offenders' (Paper presented at the Sentencing: Principles, Perspectives & Possibilities Conference, Canberra, 10-12 February 2006) 7.

<sup>55</sup> Harris, 'Evaluation of the Koori Courts', above n 16, 63-9; Victims of Crime Support Program, *Annual Report 2004/2005* (2005) 20.

presence of multiple Indigenous communities within the affected area, each with its own leaders and views on how the court process could best be adapted to suit Indigenous defendants. If effective consultation is not undertaken, there is a risk that the central objective of the Indigenous sentencing courts – the empowerment of the Indigenous community and transformation of its relationship with the non-Indigenous community in the area<sup>56</sup> – will be undermined right from the beginning, by failing to acknowledge that the primary determinants of the court process should be the Indigenous people for whom it is being designed.<sup>57</sup>

A corollary of the importance of local consultation and direction of the development of each court is that there will inevitably be a level of variance between each Indigenous sentencing court, reflecting the variety in the desires, attitudes and opinions of the different Indigenous communities the courts serve.<sup>58</sup> One example of these variations is that of the Rockhampton, Townsville and Mt Isa Murri Courts, which buck the trend among Indigenous sentencing courts for the Magistrate to adopt a less formal style of dress and have instead had the judge retain the traditional wig and robe. This was due to a request from Indigenous Elders sitting with these courts, who felt that the judge's casual attire failed to impress the seriousness of the proceedings upon defendants.<sup>59</sup> There are many other variations between the Australian Indigenous sentencing courts; however it is still possible to distil the essential elements of an Indigenous sentencing court so as to distinguish it from the traditional sentencing process, as well as other recent experiments in restorative and therapeutic processes.

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<sup>56</sup> Marchetti and Daly, 'Indigenous Sentencing Courts', above n 36, 429-30.

<sup>57</sup> Chris Cunneen, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30 *Australian and New Zealand Journal of Criminology* 292, 300-3.

<sup>58</sup> Auty and Briggs, above n 42, 22.

<sup>59</sup> Queensland Department of Justice and Attorney-General, above n 35, 20.

## **The nature of Indigenous sentencing courts**

To be eligible to be sentenced by an Indigenous sentencing court, a defendant must be Indigenous, plead guilty and give his or her consent.<sup>60</sup> In addition, some jurisdictions use a panel of Elders to assess defendants for suitability.<sup>61</sup> Before further discussing the nature of these new courts in detail, it will be helpful to consider a summary description of the Indigenous sentencing court process (taken from the review of the Queensland Murri Court):

Whilst the Murri Court is physically similar to other court rooms, it is decorated with the work of Indigenous artists (paintings and artefacts) and some Murri Courts are adorned with Aboriginal and Torres Strait Islander flags.

The offender is not handcuffed or placed in the dock even if on remand. Instead, the offender sits at the bar table with all the other court participants.

At the commencement of the sentencing hearings for the day, the Magistrate shows respect for the Elders and families of the offenders present in the court room by introducing himself or herself. The Magistrate explains the charges against the offender in simple language. The offender then enters a plea of guilty for those offences, after acknowledging that the charges and offences have been understood.

The Magistrate encourages the offender to speak directly and openly to the court and the Elders (rather than speaking through their legal representative as in the general Magistrates Court). The Magistrate may admonish the offender and ask them to acknowledge the impact that their offending behaviour has had on the victim. The offender may be questioned about why he or she has offended, and encouraged to talk about the problems they have experienced that led to their offending behaviour. Should family members or friends of the offender be present, they will often be invited to speak.

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<sup>60</sup> Jason Payne, *Specialty Courts in Australia* (2005) 39-41.

<sup>61</sup> Potas, Smart and Brignell, above n 37, 6.



The Magistrate will ask the Elders if they wish to speak and then defers to them, allowing each of them to address the offender in turn. The Elders may challenge the offender, usually in a gentle way, and explain to the offender about the impact of their offending on their community, their family and themselves. Elders may address the cultural/lifestyle issues relevant to the offender, challenge the offender to take control of their lives and even offer them practical advice in that regard.<sup>62</sup>

At the end of the process, the sentencing discretion is exercised solely by the Magistrate according to the ordinary sentencing law of the jurisdiction, although with regard given to the opinions of the Elders and any information that has become apparent during the proceeding.

The major innovations of the Indigenous sentencing courts are the involvement of Indigenous personnel, the adaptation of the physical and temporal setting, the inclusion of a wider range of people with a stake in the sentence to be imposed and an emphasis on comprehensible and in-depth communication about all the circumstances surrounding the offence and the offender. These elements are linked by a desire to make the sentencing process culturally relevant so that it can be constructive rather than degrading; informed rather than efficient.

The most critical feature of an Indigenous sentencing court is the placement of Indigenous personnel in significant roles in the court process. This is the fundamental innovation of the courts. Most of the courts add two new actors to the court process: the Elder/Respected Person and the Indigenous Court Officer.<sup>63</sup> Both are extremely

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<sup>62</sup> Queensland Department of Justice and Attorney-General, above n 35, 17-18.

<sup>63</sup> The title of the Indigenous Court Officer varies between jurisdictions: Ngambra Circle Sentencing Court Coordinator (ACT), Aboriginal Project Officer (NSW), Community Court Officer (NT), Murri

important for the transformation of the sentencing process. An Elder or Respected Person is appointed for their highly esteemed position in one of the local Indigenous communities. The formal description of their role is the provision of 'assistance and advice to the presiding Magistrate on Aboriginal cultural and community matters for Aboriginal defendants',<sup>64</sup> but this fails to capture the full significance of an Elder or Respected Person's contribution. Elders and Respected Persons have huge social (and in the case of Elders, spiritual) authority in the Indigenous community of which they are a part. Respect for Elders is a very highly held value for most Indigenous people. This is in stark opposition with the level of respect generally held for justice system personnel, including judicial officers.<sup>65</sup> A further reason for the Elders' importance is their deep involvement with their communities. This manifests in an intimate knowledge of the defendant, or at the least of a close relative. In some cases the Elder has known the offender since birth.<sup>66</sup> This pulls a defendant out of the anonymity of being just another black person in a white courtroom into a situation where they are confronted by people who know them intimately. Finally, Elders' intense involvement in caring for and supporting their communities give them an excellent skill-set for encouraging Indigenous defendants to want to rehabilitate and improve their lives. They can be harsh when necessary because they have a lifetime of giving to their community that proves that they are being harsh out of love rather than disrespect.

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Court Liaison Officer (QLD), Aboriginal Justice Officer (SA) and Koori Court Officer (VIC). The position does not exist in Western Australian Indigenous sentencing courts.

<sup>64</sup> Harris, 'Evaluation of the Koori Courts', above n 16, 42.

<sup>65</sup> Ibid 41-2; RCIADIC vol 3 [22.4.1]–[22.4.2].

<sup>66</sup> Potas, Smart and Brignell, above n 37, 16.

The review of the New South Wales Circle Sentencing Court considered that it was only appropriate for Elders to deal with offenders from their own community.<sup>67</sup> This view arose from an incident in which the circle sentencing of an Aboriginal defendant with no ties to the local community resulted in an antagonistic exchange between the Elders and the defendant; neither party seemed to feel that they were receiving the respect they were due. The defendant was not satisfied with the process, failed to comply with the sentence imposed and committed further offences not long after the sentencing hearing.<sup>68</sup> The review of the Koori Court has noted, however, that commonality of life experience, rather than any explicit cultural or communal links, can often be a sufficient basis for the Elders to connect with the defendant.<sup>69</sup> The authority relationship between a defendant and an Elder from an unrelated community can be likened to that between a retail employee and the manager of a different store location – there is no direct relationship of authority but there is certainly a difference in hierarchical position. It is suggested that if Elders are aware of this dynamic and refrain from asserting direct authority over a recalcitrant defendant then they would still be able to counsel and shame such a person by reference to their shared values. This strategy is consistent with the approach adopted in New South Wales, where each candidate for circle sentencing meets individually with a panel of Elders to discuss their suitability.<sup>70</sup> A further strategy that allows Elders to assert the legitimacy of their authority with offenders from an unrelated community has been employed in the Circle Sentencing Court in Dubbo. There, Elders point out that the offender is a visitor to their land and is thus bound to respect their customs and law.<sup>71</sup>

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<sup>67</sup> Ibid 14.

<sup>68</sup> This incident is outlined *ibid* 13-15.

<sup>69</sup> Harris, 'Evaluation of the Koori Courts', above n 16, 41-2.

<sup>70</sup> Ibid 15.

<sup>71</sup> ABC Television, 'Inside the Circle', *Four Corners*, 10 October 2005; see also Briggs and Auty, above n 13, 13.

The Indigenous Court Officer is also appointed from the local Indigenous population. He or she is appointed to act as a cultural liaison between the court and the community. This is a task that requires delicacy and sensitivity to the cultures of both the non-Indigenous and Indigenous communities served by the court. A key duty of the Indigenous Court Officer is to decide which of the available Elders should be assigned to sit on a particular case. This requires a detailed awareness of the current state of relations between the various local Indigenous communities and families (particularly as to which are currently on hostile terms). This highly specialist knowledge would otherwise be unavailable to the court and would lead to a host of difficulties involving conflicts of interest for Elders.<sup>72</sup> The Indigenous Court Officer also performs a variety of tasks aimed at making the court and its process more comprehensible and accessible to the defendant, including performing independent investigations of the defendant's general background, inviting appropriate support services to attend hearings and even facilitating parts of the sentencing hearing.<sup>73</sup>

Physical modifications to the court are made for both symbolic and pragmatic reasons. The introduction of Indigenous flags and artwork expresses the Indigenous sentencing court's preparedness to share authority with Indigenous people and to respect their culture. Removal of formal trappings such as the judge's wig and robe, seating all participants at the same level (many Indigenous sentencing courts also use a specially-built oval table), and restraint in the use of formal language are designed to prevent alienation of participants uncomfortable with the traditional court environment. This, along with allowing the defendant to be accompanied by support persons, promotes

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<sup>72</sup> Auty and Briggs, above n 42, 26; Potas, Smart and Brignell, above n 37, 41; King and Auty, above n 1, 69-70; Harris, 'From Australian Courts', above n 21, 35.

<sup>73</sup> Briggs and Auty, above n 13, 10, 12; Magistrates' Court of Victoria, *2004-05 Annual Report* (2005) 46.

an honest dialogue that is comprehensible to all parties. Seating participants closer together also addresses the acoustic problems that often characterise traditional proceedings. A final important change that promotes effective dialogue is the inclusion of all the people who have information or expertise relevant to finding the most appropriate sentence, such as rehabilitative service providers, corrections officers and the defendant's family and community.

It should be noted that while the victim is nominally entitled to attend the proceedings of all the Indigenous sentencing courts, it is only encouraged in courts based on the circle sentencing procedure (those in New South Wales, the Australian Capital Territory and the Northern Territory).<sup>74</sup> This has translated into low rates of victim attendance at Indigenous sentencing courts other than these three.<sup>75</sup> Indigenous sentencing courts are directed more at reforming the defendant's experience of the court process rather than the victim's – a feature that distinguishes these courts from restorative justice initiatives.<sup>76</sup>

Another significant change made to the sentencing procedure is the removal of any sense of time-related pressure. This modification, which would clearly aid communication in any cultural context, is particularly helpful as it acknowledges the importance of silence as a means of communication for Indigenous participants in the process. Kate Auty vividly described the place of silence during her time as Magistrate of the first Koori Court:

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<sup>74</sup> Marchetti and Daly, 'Indigenous Sentencing Courts', above n 36, 430; Dawson and Holder, above n 46, 7-8, 12-13; Harris, 'Evaluation of the Koori Courts', above n 16, 56.

<sup>75</sup> Marchetti and Daly, 'Indigenous Sentencing Courts', above n 36, 437.

<sup>76</sup> Ibid 439.

On occasion the court would sit still and listen to silence. A defendant may take some time to find his or her voice. He or she may not find it at all. No one felt pressured to break this silence - it was infinitely poised. On occasion it felt like minutes had passed. Silence was approved.<sup>77</sup>

These changes reflect a modification in the overall goal of the sentencing procedure. Rather than seeking to rush to a result, the Indigenous sentencing court process seeks to discuss the cloud of issues that surround the offence such as the proximate and underlying causes of the offending, the circumstances and impact of the offence, and the appropriate penalty for the offence, as well as mapping a path forward for the defendant. The discussion occurs in a context that seeks to promote, rather than suppress, the perspective of the Indigenous community, as represented by the attending Elders. The overall effect is to make Indigenous sentencing courts a place where defendants face the censure of a combined partnership of the Indigenous community and the Western criminal justice system.

### **The impact of Indigenous sentencing courts**

Analysis of the impact of Indigenous sentencing courts has been limited to date. Most analyses have been made one or two years after the establishment of a pilot court and have had to rely on anecdotal evidence due to the low volume of statistical data available. Analyses of this kind are also obviously unable to assess long-term impacts. However, one result that has been clearly demonstrated is that participant satisfaction with the Indigenous sentencing court process is extremely high, despite Elders' tendency to recommend sentences that lie on the more severe end of the appropriate

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<sup>77</sup> Kate Auty, 'We Teach All Hearts to Break – But Can We Mend Them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts' (2006) 1 *Murdoch University Electronic Journal of Law Special Series* 101, 120.

range.<sup>78</sup> This breaking down of entrenched Indigenous hostility towards the court system shows the extent of the positive transformation of the sentencing process.

Inclusion of Elders in the process achieves two closely-related aims: giving Elders a share of authority in the sentencing of criminal offenders enhances their authority in the Indigenous community, which in turn leads to an increase in the effectiveness of the social sanction and shaming imposed on defendants appearing before the court. In this way an Indigenous sentencing court can operate to strengthen and restore the Indigenous communities it serves by promoting and supporting the social authority of Elders.<sup>79</sup> This is a welcome benefit for Elders, who bear responsibility for the welfare of their communities.<sup>80</sup> Allowing Elders to advise on sentence means that their knowledge and expertise is utilised. This knowledge not only encompasses sensitivity to the vastness of the cultural divide between the Magistrate and defendant but also, in many cases, insight into the defendant's character, motivations and personality. This allows for a much more intelligently crafted rehabilitative sentence, for example, by requiring the defendant to accept the supervision of an Elder with whom he or she has a positive relationship.<sup>81</sup>

The lack of prescription regarding the conduct of proceedings and, in particular, the role of the Elders, leaves space for Indigenous social authority to be expressed and exercised. The process becomes infused with 'power ... on a spiritual or emotional

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<sup>78</sup> Potas, Smart and Brignell, above n 37, 39-40, 42; Harris, 'Evaluation of the Koori Courts', above n 16, 90-3.

<sup>79</sup> ABC Television, 'Inside the Circle', above n 71; New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report No 96 (2000) [4.4].

<sup>80</sup> Daniele, above n 18, 2203; Chris Birdsall, 'All One Family' in Ian Keen (ed), *Being Black: Aboriginal Cultures in 'Settled' Australia* (1988) 137, 148.

<sup>81</sup> Potas, Smart and Brignell, above n 37, 12.

level' as well as legal significance.<sup>82</sup> Elders are able to appeal to the legitimacy of their authority as respected members of the defendant's community rather than merely asserting an imposed authority, as the Magistrate sitting alone must do. Further, the partnership between Elders and Magistrate promotes the legitimacy of the Magistrate's role in sentencing.<sup>83</sup> It also gives individual Magistrates an opportunity to earn the respect of the local Indigenous communities by demonstrating respect and cultural sensitivity during sentencing hearings. Concern has been expressed that the removal of traditional formal aspects of the sentencing process may not be an entirely positive change. Jelena Popovic has noted that formality is an important way of signifying the seriousness of criminal proceedings.<sup>84</sup> Some cognisance of this can be seen in the decision, noted above, to preserve the use of formal attire by the Magistrate in some Indigenous sentencing courts. However, if cultural differences prevent formality from conveying the seriousness of the process, then a more appropriate method should be used to convey this message. Being 'ripped into' by a respected member of an Indigenous defendant's community is an extremely serious and significant experience.<sup>85</sup> By contrast, being confronted by a strangely dressed man or woman who ignores the defendant and communicates mostly through legal jargon is an experience that obscures rather than highlights the importance of the proceedings. This example illustrates that although Indigenous sentencing courts share the core values of the standard courts, these values may be expressed in markedly different ways due to the differing cultural context.

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<sup>82</sup> Annette Hennessy, 'The Rockhampton Murri Court' (2006) 27 *Queensland Lawyer* 14, 16.

<sup>83</sup> Although the converse also applies; Magistrates would do great damage to the legitimacy of the court if they refused to consider and respect Elders' views (Mark Harris, 'The Koori Court and the Promise of Therapeutic Jurisprudence' (2006) 1 *Murdoch University Electronic Journal of Law Special Series* 129, 133-4).

<sup>84</sup> Jelena Popovic, 'Court Process and Therapeutic Jurisprudence: Have We Thrown the Baby Out With the Bathwater?' (2006) 1 *Murdoch University Electronic Journal of Law Special Series* 60, 66.

<sup>85</sup> ABC Radio National, 'Shepparton's Koori Court', *The Law Report*, 3 February 2004 <<http://www.abc.net.au/rn/lawreport/stories/2004/1035995.htm>> at 9 July 2008; Dick, 'Victims Have a Say', above n 2, 68.



The changed sentencing process transforms the nature of the shaming imposed on defendants. Rather than operating to degrade and condemn the defendant, the offending *behaviour* is the target of opprobrium. The defendant is treated with respect, allowed to tell his or her story and is encouraged to share in the censure of the offending behaviour.<sup>86</sup> John Braithwaite's distinction between stigmatising and reintegrative shame<sup>87</sup> neatly captures the changed nature of the shaming imposed on a defendant. Braithwaite argues that the strongest deterrent for criminals is 'fear of shame in the eyes of intimates'.<sup>88</sup> The traditional process often allows offenders to hide their wrongdoing from their community.<sup>89</sup> By exposing defendants to the censure of their family and Elders – people they respect and care for – Indigenous sentencing courts can be seen to make great use of this principle.<sup>90</sup> Magistrate Doug Dick has captured the extent of the accountability felt by defendants with his description of the Nowra Circle Sentencing Court as a 'room of mirrors'.<sup>91</sup>

It is worth considering whether this reintegrative approach has led to a reduction in short-term recidivism. The reviews of the trials of the New South Wales Circle Sentencing Court and the Victorian Koori Court presented positive indications regarding the rates at which offenders sentenced by the trial process re-offended. The circle sentencing review based this assessment on an examination of only eight case studies;<sup>92</sup> however, the Koori Court review took a more rigorous approach by examining rates of re-conviction of every offender sentenced by the Koori Courts

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<sup>86</sup> Kate Auty et al, 'The Koori Court – a Positive Experience' (2005) 79 *Law Institute Journal* 40.

<sup>87</sup> John Braithwaite, *Crime, Shame and Reintegration* (1989) 100-1.

<sup>88</sup> *Ibid* 81.

<sup>89</sup> Chris Birdsall, above n 80, 149-50; Dick, 'Circle Sentencing', above n 54, 5.

<sup>90</sup> McAsey, above n 21, 664-5.

<sup>91</sup> Dick, 'Victims Have a Say', above n 2, 64.

<sup>92</sup> Potas, Smart and Brignell, above n 37, 53.

located at Shepparton and Broadmeadows in a two-year period.<sup>93</sup> This analysis revealed rates of re-offending of 12.5% and 15.5% respectively, and was contrasted with the state-wide re-offending rate of 29.4%.<sup>94</sup> Unfortunately, this extremely favourable analysis has been subjected to serious methodological critique by the New South Wales Bureau of Crime Statistics and Research (BOCSAR), which noted that the state-wide rate used in the Koori Court review encompassed offenders who have committed more serious crimes and was also based on a longer follow-up period.<sup>95</sup> BOCSAR presented its own study of re-offending rates, which compared 68 offenders sentenced by the circle sentencing process with a control group of Indigenous offenders sentenced by the traditional court process.<sup>96</sup> Each member of the control group was chosen to substantially match a member of the circle sentenced group in attributes such as age, gender, offence committed, and criminal history.<sup>97</sup> This analysis revealed that there was no difference in the number of offences committed by the two groups in the 15 months subsequent to their sentencing hearing.<sup>98</sup> The study also found no significant improvement attributable to the circle sentencing process on the time delay before re-offending or the seriousness of the subsequent offence.<sup>99</sup>

Some preliminary statistics have also been gathered for the Queensland Murri Court: although 91.5% of offenders sentenced by that court had a criminal record before their Murri Court sentencing hearing, only 31% have subsequently re-offended.<sup>100</sup> While the BOCSAR study did not directly comment on these statistics, many of the

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<sup>93</sup> Harris, 'Evaluation of the Koori Courts', above n 16, 85.

<sup>94</sup> Ibid 85.

<sup>95</sup> Jacqueline Fitzgerald, *Crime and Justice Bulletin Number 115: Does Circle Sentencing Reduce Aboriginal Offending?* (2008) 2.

<sup>96</sup> Ibid 3.

<sup>97</sup> Ibid 3.

<sup>98</sup> Ibid 4.

<sup>99</sup> Ibid 4–6.

<sup>100</sup> Annette Hennessy, 'Indigenous Sentencing Practices in Australia' (Paper presented at the International Society for Reform of the Criminal Law Conference, Brisbane, 4 July 2006) 13.

criticisms made of the Koori Court review are pertinent here as well: the follow-up time for determining recidivism has not been stated and there is no control group against which to compare the effect of a traditional sentencing hearing. As was shown by the BOCSAR study, any sentencing hearing (whether traditional or innovative) is effective in reducing short-term recidivism rates.<sup>101</sup> The real question is whether Indigenous sentencing courts reduce these rates *more* than the traditional sentencing process, and at present, unfortunately, the evidence suggests that this is not the case. However, it should be noted that due to the widespread use of flawed statistical reasoning in analyses so far, the BOCSAR study of circle sentencing in Nowra is the sole authoritative piece of research to have been produced so far. More rigorous research in other jurisdictions would be valuable and might paint a different picture of the effectiveness of Indigenous sentencing courts in reducing recidivism. Rehabilitation will inevitably require more extensive reintegration into the community than a single hearing and sentence could possibly provide for, meaning that the sentencing process cannot be the sole answer to the need to rehabilitate offenders.<sup>102</sup> In addition, the BOCSAR study showed that the Circle Sentencing Court was *just as* effective as the standard courts in reducing recidivism,<sup>103</sup> and also produced a myriad of other benefits, including leaving participants satisfied that justice had been done.<sup>104</sup> These benefits should not be trivialised by overemphasising the importance of reducing recidivism.<sup>105</sup>

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<sup>101</sup> Fitzgerald, above n 95, 4, 6.

<sup>102</sup> Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005) 244; Marchetti and Daly, 'Indigenous Sentencing Courts', above n 36, 422-3.

<sup>103</sup> See also Green, above n 4, 135.

<sup>104</sup> See above n 78-83 and accompanying text.

<sup>105</sup> This appears to be a view supported by the New South Wales Attorney-General: *State to Bolster Nowra Initiative* (2008) South Coast Register <<http://nowra.yourguide.com.au/news/local/news/general/state-to-bolster-nowra-initiative/845006.aspx>> at 22 September 2008. See also Richard Edney, 'The Koori Court Division of the Magistrates Court of Victoria: Philosophy, Aims and Legislative Scheme' (2003) 3 *Criminal Law News Victoria* 50.

## The jurisdiction of Indigenous sentencing courts

Most Indigenous sentencing courts have substantially the same jurisdiction as the standard lower-tier courts. The one exception is sexual offences, which are typically excised from their jurisdiction. This is the case in Victoria,<sup>106</sup> New South Wales,<sup>107</sup> Western Australia,<sup>108</sup> the Australian Capital Territory<sup>109</sup> and the Northern Territory.<sup>110</sup> Even the upcoming mid-tier Koori County Court in Victoria will not be able to deal with sexual offences, despite having a jurisdiction encompassing manslaughter and armed robbery.<sup>111</sup> By contrast, the courts in South Australia<sup>112</sup> and Queensland<sup>113</sup> have no limits on their jurisdiction beyond those applicable to the lower-tier courts. Some other limitations exist in various jurisdictions: in Victoria, breaches of domestic violence intervention orders are excluded (as well as any offence arising out of the conduct that constituted the breach),<sup>114</sup> in New South Wales the court cannot deal with indictable offences,<sup>115</sup> and in the Australian Capital Territory a defendant is ineligible if they suffer from an addiction to any illicit drug other than cannabis.<sup>116</sup> The Northern Territory guidelines recommend caution in accepting defendants who have committed crimes of violence or where the victim is a child.<sup>117</sup> This miscellany of exceptions can mostly be explained by considerations relating to the structure of the court institutions in the jurisdiction. The New South Wales limitation reflects the

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<sup>106</sup> *Magistrates' Court Act 1989* (Vic) s 4F(1)(b)(i).

<sup>107</sup> *Criminal Procedure Act 1986* (NSW) s 348(2)(b).

<sup>108</sup> Marchetti and Daly, 'Indigenous Sentencing Courts', above n 36, 421.

<sup>109</sup> ACT Magistrates Court, *Final Interim Practice Direction: Ngambra Circle Sentencing Court* (2004) [15].

<sup>110</sup> Magistrates Court of the Northern Territory, *Community Court Darwin: Guidelines* (2005) [14].

<sup>111</sup> County Court Amendment (Koori Court) Bill 2008 (Vic) s 6; *County Court Act 1958* (Vic) s 36A.

<sup>112</sup> Elena Marchetti and Kathleen Daly, *Indigenous Courts and Justice Practices in Australia* (2004) 6.

<sup>113</sup> Queensland Department of Justice and Attorney-General, above n 35, 19-20; Annette Hennessy, 'Indigenous Sentencing Practices in Australia', above n 100, 8.

<sup>114</sup> *Magistrates' Court Act 1989* (Vic) s 4F(1)(b)(ii).

<sup>115</sup> *Criminal Procedure Act 1986* (NSW) s 348(1); Potas, Smart and Brignell, above n 37, 5.

<sup>116</sup> ACT Magistrates Court, above n 109, [14].

<sup>117</sup> Magistrates Court of the Northern Territory, above n 110, [14].

Local Court's inability to exercise non-summary criminal jurisdiction<sup>118</sup> and the Victorian exclusion is related to the creation of a specialist Family Violence Division of the Magistrates' Court.<sup>119</sup> The Australian Capital Territory exclusion is based on a view that addicts are 'particularly difficult to manage and not suitable for ... [the Circle Sentencing Court] environment'.<sup>120</sup> There is a pre-sentencing diversionary drug treatment program available for defendants in the Australian Capital Territory,<sup>121</sup> which means that defendants who wish to participate in the Ngambra Circle Sentencing Court have the opportunity to resolve their drug dependency beforehand. The Northern Territory recommendation of caution is appropriate and underscores the importance of carefully assessing the appropriateness of using an Indigenous sentencing court in a given case, particularly by reference to the attitude of the defendant and the need to properly protect and support the victim, if he or she will be attending.

The exclusion of sexual offences from the courts' jurisdictions warrants closer examination. The first point that must be made is that the removal of this exclusion should only occur with the consent and support of the Elders attached to the court.<sup>122</sup> The review of the Victorian Koori Courts found that most Elders supported the exclusion of sexual offences from the court's jurisdiction.<sup>123</sup> The reasons underlying this view were not described by the report, but it is to be hoped that the following

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<sup>118</sup> See *Criminal Procedure Act 1986* (NSW) ss 7, 46.

<sup>119</sup> Harris, 'Evaluation of the Koori Courts', above n 16, 123-4.

<sup>120</sup> Evidence to Standing Committee on Legal Affairs, Legislative Assembly for the Australian Capital Territory, Canberra, 10 November 2005, 80 (Bruce Kelly).

<sup>121</sup> *Health Services - Alcohol & Other Drugs* (2007) ACT Health <<http://www.health.act.gov.au/c/health?a=da&did=10038160&pid=1058841259>> at 23 September 2008.

<sup>122</sup> Law Reform Commission of Western Australia, above n 20, 131.

<sup>123</sup> Harris, 'Evaluation of the Koori Courts', above n 16, 123.

discussion will cover issues that are relevant to both Indigenous and non-Indigenous stakeholders.

The widespread blanket exclusion of sexual offences indicates that there is something inherently different about these offences that causes offenders to be inappropriate participants in the Indigenous sentencing court process. Reasons for this view were unable to be found for most jurisdictions.<sup>124</sup> The only exception was the review of the Victorian Koori Court, which gave two reasons for the exclusion: the complexity of cases involving sexual offences, and the inevitability of introducing an element of conflict into the proceedings.<sup>125</sup>

It should be made clear what is being disputed here: the *blanket* exclusion of all sexual offenders. Certainly, some sexual offenders will not be suitable for the Indigenous sentencing courts, for example due to their unrepentant attitude or the unavailability of any Elders who do not regard the victim as close kin. Also, the level of outrage provoked by some sexual offences may be so great that Elders feel unable to bring themselves to interact with the offender in a therapeutic as well as condemnatory manner. In these unfortunate cases, the traditional process is available to be used instead.

The view that sexual offences are prohibitively complex is a surprising one, given that an underlying principle of the Indigenous sentencing courts is that every case is complex and requires detailed examination of the offender's motivations and future

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<sup>124</sup> See, eg, NSW Aboriginal Justice Advisory Council, *Circle Sentencing: Involving Aboriginal Communities in the Sentencing Process* (1999) 10, which simply notes that the New South Wales trial would exclude sexual offences without explaining why this decision was made.

<sup>125</sup> Harris, 'Evaluation of the Koori Courts', above n 16, 122-3.

prospects, rather than a five minute formal hearing. In a procedural sense, most of the extra complexity introduced would seem to revolve around protection and support for the victim and ensuring that power imbalances are addressed to the fullest extent possible.<sup>126</sup> In most of the Indigenous sentencing courts, where victims rarely attend, this problem does not arise. Where a victim does attend, trained victim support personnel could accompany the victim and inject the necessary expertise into the proceedings.

There is some evidence that Elders do not consider themselves to be sufficiently well-trained to deal with sexual offenders. This highlights a more general issue: the desirability of making relevant professional development opportunities available to Elders. However, even in the absence of such training, it would be worth asking Elders whether they would be prepared to attempt to interact therapeutically with sexual offenders through the sentencing process, for the reason that however many difficulties Elders face in attempting to help offenders to reform, the traditional process will likely be even less effective.

This has been the approach in the Canadian community of Hollow Water, where it is estimated that 75% of the population have been victims of sexual abuse and 35% have committed a sexual offence.<sup>127</sup> This community seeks to avoid custodial sentences for sexual assault, a decision that emanated out of an awareness that offenders regarded serving their jail term as being a fair price for getting caught rather than a

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<sup>126</sup> Carol Nader, 'Koori Court Won't Hear Sex Charges', *The Age* (Melbourne), May 6 2008 <<http://www.theage.com.au/news/national/koori-court-wont-hear-sex-charges/2008/05/05/1209839553597.html>> at 9 July 2008.

<sup>127</sup> Green, above n 4, 86.

reason to not commit further sexual assaults in the future.<sup>128</sup> The response of the Hollow Water community, through its sentencing circles, has been to impose probationary sentences requiring the defendant to attend a specially-developed holistic community-based treatment program for sexual offenders.<sup>129</sup> In the Australian context, where such programs are not available, jail terms are still a more likely sentencing result (especially given Elders' tendency to impose sentences in the mid-high range).<sup>130</sup> However, it is important to recognise (as has been done in Canada) that sexual offenders are as vulnerable to community disapproval and support as other Indigenous offenders. Given the gravity of sexual crimes and the desirability of deterring and rehabilitating offenders, Elders should be enabled to bring their wisdom and community knowledge (even if it is untrained) to bear on this problem.

The second concern expressed regarding the impossibility of an atmosphere of collaboration seems to be premised on the notion that there is a qualitative difference in the moral gravity of sexual offences. Whether or not this is so, the description of the courts' approach as 'collaborative' should not be understood to mean that Elders in any way condone or support the defendant's criminal acts. To the contrary, defendants are bluntly confronted with their wrongdoing and how poorly it reflects on them. Magistrate Ann Collins recounts one example of this approach, where a defendant's wrongdoing was equated with being ashamed of his Aboriginality.<sup>131</sup> The imperative for the defendant to rehabilitate is made quite clear by the Elders. It is hard to see how this approach would be precluded in the case of sexual offences. In

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<sup>128</sup> Ibid 83-4, 88.

<sup>129</sup> Ibid 86-8.

<sup>130</sup> ABC Radio National, above n 85; McAsey, above n 21, 682; Marchetti and Daly, 'Indigenous Courts and Justice Practices', above n 112, 5; Dick, 'Circle Sentencing', above n 54, 6.

<sup>131</sup> Harris, 'Evaluation of the Koori Courts', above n 16, 29.



Canada, where the principles of eligibility for circle sentencing are determined by the common law, the Saskatchewan Court of Appeal saw no reason to exclude sexual offences outright; rather, it saw the willingness of community members to participate as the key determinant.<sup>132</sup> It should also be noted that conflict is being increasingly recognised as an acceptable element of Indigenous sentencing courts; this can be seen in the ability to appeal from sentencing decisions of the Koori Court to the Koori County Court.<sup>133</sup>

Finally, Marchetti and Daly suggest an underlying desire to avoid controversy engulfing the decisions of the Indigenous sentencing courts.<sup>134</sup> While this may be a politically pragmatic decision, it is suggested that, given the accepted position of Indigenous sentencing courts across mainland Australia and the significant funds invested in these courts, they are now entrenched to an extent that will allow them to endure the controversy of a 'prominent case of recidivism'.<sup>135</sup> Elders and governments should consider removing the blanket restriction on sexual offences so they can begin to explore which of these cases are amenable to the therapeutic power of the Indigenous sentencing process. All violent offences are damaging to victims and to the communities in which they occur. Sexual offences are even more so. The leadership of the Indigenous sentencing courts should be open to the possibility of being able to have an impact upon those who commission these offences. A category of crime as grave as sexual offences should not be abandoned to the ineffective traditional sentencing process.

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<sup>132</sup> *R v Taylor* (1997) 163 Sask R 29, 50-2.

<sup>133</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 31 July 2008, 2885-6 (Rob Hulls); County Court Amendment (Koori Court) Bill 2008 (Vic) s 4D.

<sup>134</sup> Marchetti and Daly, 'Indigenous Sentencing Courts', above n 36, 422.

<sup>135</sup> Green, above n 4, 135.

### CHAPTER 3: INDIGENOUS SENTENCING COURTS AND THE EQUAL TREATMENT OF CRIMINAL DEFENDANTS

Indigenous sentencing courts have not been free from criticism. Some commentators regard the existence of a court that is restricted to a particular racial group as violative of the principle of equality before the law.<sup>136</sup> Concerns have been raised that Indigenous sentencing courts will result in Indigenous offenders receiving less severe sentences for the same crimes than non-Indigenous offenders.<sup>137</sup> More fundamentally, the incorporation by the legal system of a significantly different sentencing regime for one racial group raises the threat of systemic unfairness for defendants on different sides of the racial divide. This chapter will consider these issues to determine whether Indigenous sentencing courts, despite their effectiveness in improving satisfaction with the court process and the benefits for the communities in which they are placed, are an inappropriate aberration when viewed in the broader context of the Australian criminal justice system. The touchstone for this analysis will be the concept of equality. The claim that all people should be treated equally by the criminal justice system would likely receive universal support; however the precise values which underlie this statement are more elusive and variable.

#### Perspectives on equality

The principle of equality before the law is usually regarded as flowing from the related principle of the rule of law.<sup>138</sup> It can be easily accepted that the rule of law is a

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<sup>136</sup> See, eg, David Galbally, 'Koori Court Tips Scales', *Herald Sun* (Melbourne), 13 March 2003, 18; David Galbally, 'Koori Court Divisive' (2003) 77 *Law Institute Journal* 10; Peter Faris, 'Kooris' Court a Waste of Money', *The Australian* (Sydney), 9 May 2008

<<http://www.theaustralian.news.com.au/story/0,,23666993-17044,00.html>> at 9 July 2008; Chris Merrit, 'Plan for Separate Court for Aborigines', *The Australian* (Sydney), 6 May 2008 <<http://www.theaustralian.news.com.au/story/0,,23652077-17044,00.html>> at 9 July 2008.

<sup>137</sup> Faris, above n 136.

<sup>138</sup> Merrit, above n 136.

value that inheres in the Australian legal system.<sup>139</sup> However, it is not necessarily the case that a useful theory of equality can be deduced from the nebulous requirements of the rule of law. The classic liberal statement of the rule of law was expounded by Dicey, who named equality before the law as one of the three principal elements of the doctrine.<sup>140</sup> He described this aspect of the rule of law as 'the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts'.<sup>141</sup> At first glance, the latter part of this description might appear to have serious conflicts with the institution of Indigenous sentencing courts. However, this is not the case for two reasons. The first is that while it is a convenient shorthand to refer to Indigenous sentencing courts as separate institutions, they are institutionally extremely closely related to the standard criminal courts. They share the same judicial officers with their institutional protections of impartiality, who exercise the same legal role as they do in standard criminal matters. Indeed, the Indigenous sentencing courts are all operated as organisational divisions (whether official or de facto) of the standard courts. Finally, the substantive sentencing law applied by the courts is identical to that applied in mainstream courts. As discussed above, the major differences in Indigenous sentencing courts are the extra time taken to hear a variety of voices on the matters relevant to sentencing, and the introduction of powerful social regulation through the authority of Elders. In an institutional sense, however, the court is substantially unchanged. The second reason is that the focus of Dicey's conception of the rule of law is on the restraint of government power, rather than ensuring equality in the criminal processes used with heterogeneous defendants from the general citizenry. Dicey's comments on the principle of equality make this focus clear; he

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<sup>139</sup> See *A v Hayden* (1984) 156 CLR 532, 540 (Gibbs CJ), 580 (Brennan J).

<sup>140</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> ed, 1959) 202-3; see also Robin L West, *Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights and the Rule of Law* (2003) 2, 7-8; Julius Stone, *Social Dimensions of Law and Justice* (1966) 619.

<sup>141</sup> *Ibid* 202.

contraposes 'the equal subjection of all classes' with exemptions from the criminal law for public officials,<sup>142</sup> and 'the ordinary law courts' with administrative tribunals whose independence from the executive is open to question.<sup>143</sup> Concerned as he is with the restraint of government power, Dicey's conception of the rule of law does not found a view of equality that is helpful in resolving questions of comparative justice for different racial groups. Sir Ivor Jennings has noted the limited extent to which the rule of law can inform views of equality. It does not endorse equality of material resources, nor does it support a claim to formal equality – that all people should be treated identically regardless of how they differ.<sup>144</sup> Jennings' view is that the rule of law instead requires that 'among equals the laws should be equal and should be equally administered, that like should be treated alike.'<sup>145</sup> This view of equality appears at first glance to be simple and clear. However, it ultimately only restates the question: what things (and which people) are sufficiently 'like' that they should be 'treated alike'? The most that can be gleaned from this restatement is an implicit denial of the formal equality claim that all people are so similar they should be treated identically in all situations. Ultimately, as Joseph Raz and Julius Stone conclude, the rule of law, while demanding equal treatment of the subjects of law, does not provide much insight into the nature of the equality it requires.<sup>146</sup>

The question of the precise nature of the principle of equality before the law has been considered in the context of international human rights law. In the *South West Africa Cases*, Tanaka J rejected the idea of formal equality, and echoed Jennings in saying

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<sup>142</sup> Ibid 202-3.

<sup>143</sup> Ibid 203.

<sup>144</sup> Sir Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> ed, 1972) 50.

<sup>145</sup> Ibid 50.

<sup>146</sup> Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *The Law Quarterly Review* 195, 195-6, 208, 210-11; Stone, above n 140, 620-1.

that equality required one 'to treat equally what are equal and unequally what are unequal.'<sup>147</sup> He notes that failure to acknowledge difference evokes inequality just as strongly as differential treatment in identical situations.<sup>148</sup> Tanaka J also proposes that decisions as to how to respond to difference and sameness must be just or reasonable, which he contrasts with arbitrary responses that bear no relationship to the relevant difference they purport to address.<sup>149</sup> In the case of Indigenous sentencing courts, the relevant point of difference is a defendant's race. Brennan J has noted that legal measures that seek to redress 'political, economic, social [or] cultural' inequalities suffered by a particular racial group fall within the area of reasonable responses to difference.<sup>150</sup> Ultimately, however, there is scope for considerable difference of opinion as to whether a particular measure is a reasonable response to disadvantage suffered by a racial group. The resolution of such disputes should occur through a careful examination of the nature, rationale and effects of the differing treatment – not by simplistic claims of the paramount importance of equal treatment for all.

### **Equality-based objections to Indigenous sentencing courts**

The concerns raised by commentators can be distilled into a number of claims of inequality. The first is the claim for formal equality, such as the assertion made by Peter Faris that '[w]e are all equal under law in Australia and we should all have the

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<sup>147</sup> *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)* [1966] ICJ Rep 6, 305-6 (Tanaka J).

<sup>148</sup> *Ibid* 306.

<sup>149</sup> *Ibid* 306; see also United Nations Human Rights Committee, *General Comment No 18: Non-Discrimination* (1989) [8]-[10], [12].

<sup>150</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 128, 130 (Brennan J). This principle is recognised explicitly as an exception to the requirement of equality before the law in Victorian human rights law: *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(4); see also Law Reform Commission of Western Australia, above n 20, 10.

same courts.<sup>151</sup> As discussed above, when deployed in this context these claims serve purely ideological functions. They mask economic, social and political disadvantage behind an assertion of the fundamental kinship of all humanity. Such claims can be discarded as intellectually inadequate and entirely out of touch with the Australian and international commitment to recognising and redressing situations of pervasive disadvantage. The second claim made is that the standard of justice (particularly the penalties imposed) differs between Indigenous sentencing courts and the traditional courts. The third claim is that initiatives to address Indigenous inequality should be applied across the entire court system rather than by creating a new racially-defined court institution. The fourth claim made is that there is no justification for providing special courts for one minority group – Indigenous defendants – and not for others (such as those with poor English skills or Muslims). The merits of each of these arguments will be considered in turn.

### **Differing standards of justice**

This claim is often composed of both substantive and procedural elements.<sup>152</sup> The substantive element is the assertion that defendants sentenced by Indigenous sentencing courts will receive lower penalties than defendants who commit comparable crimes and are sentenced in the standard courts. While there have been no empirical studies that might shed light on this proposition, some observations can be made. The first is that the benchmark standard is that imprisonment should be an option of last resort.<sup>153</sup> If an Indigenous sentencing court is able to devise a creative sentencing option that is appropriate for the crime and the offender and thereby avoid

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<sup>151</sup> ABC Television, 'Koori Division Established', above n 23. See also Faris, above n 136: 'A long time ago, when I went to law school, we were taught that everybody was equal before the law. It didn't matter what your colour or religion was, you got a fair go in Australian courts.'

<sup>152</sup> ABC Television, 'Koori Division Established', above n 23; Merrit, above n 136.

<sup>153</sup> McAsey, above n 21, 682. See also RCIADIC vol 5, Recommendation 92.

imposing a custodial sentence, then as a matter of sentencing principle this is a preferable situation. Secondly, the Magistrate ultimately makes the sentencing decision and is thus able to ensure that any sentence imposed is within the range of penalty that would ordinarily be imposed.<sup>154</sup> Finally, a number of commentators involved with the operation of Indigenous sentencing courts have anecdotally observed that sentences tend to fall in the more severe end of the appropriate penalty range.<sup>155</sup>

The procedural element of this assertion is that it is unfair for Indigenous defendants to be sentenced by a procedure that is substantially better than that used with other defendants. If it is unfair that Indigenous defendants are substantially disadvantaged relative to non-Indigenous defendants by the traditional sentencing process, then it would seem to also follow that it is unfair if Indigenous defendants able to take advantage of an Indigenous sentencing court process are in an advantageous position relative to non-Indigenous defendants. However, it must be recognised that such an argument seeks to ignore the wider context of the criminal justice system. The courts are only one of many areas of the criminal justice system in which Indigenous people are more adversely affected than non-Indigenous people. This systemic disadvantage is reflected in the extreme variation in proportionate rates of imprisonment between Indigenous and non-Indigenous people.<sup>156</sup> Further, the major improvement of the Indigenous sentencing courts that would be transferable to the traditional process (the extra time taken to hear different stakeholders' perspectives) is unavailable for a systemic reason – the unwillingness to increase funding for the lower tier of the criminal courts in order to reduce time pressures in court hearings. When this wider

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<sup>154</sup> Dick, 'Circle Sentencing', above n 54, 4.

<sup>155</sup> See above n 130.

<sup>156</sup> See above n 25.

perspective is considered, any perceived preferential treatment of Indigenous defendants can be better seen as a targeted allocation of resources within the system with the intention of ameliorating the widespread disadvantage that Indigenous defendants experience.

### **Systemic change or separate institutions?**

The institutional separation of Indigenous sentencing courts from their parent courts has raised widespread concern. David Galbally has been the most vociferous critic of this aspect of the introduction of Indigenous sentencing courts, arguing that the use of a separate court 'will be seen by the community to be giving a special favour to a group of people and not to the wider community.'<sup>157</sup> As mentioned above, the institutional separation between the mainstream courts and Indigenous sentencing courts is in many ways more apparent than real. Decisions are made on the same substantive sentencing law by the same judicial officer. Indigenous sentencing courts are legally constituted as nothing more than an administrative division of the standard lower-tier criminal courts – for example, the 'Nunga Court' is in reality simply the South Australian Magistrates Court that on some days chooses to schedule only Indigenous defendants who have plead guilty for hearings and which adopts a different procedure on those days. The only legal point of separation is the different procedure by which sentencing hearings are conducted. Furthermore, the traditional court process itself incorporates a level of flexible modification where necessary to ameliorate the effect of disadvantages that arise from a court participant's ethnicity, religion, sexuality, age, disability or gender.<sup>158</sup> If the need for modification of the court process in this way is accepted, then an Indigenous defendant's decision to be

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<sup>157</sup> Galbally, 'Koori Court Tips Scales', above n 136.

<sup>158</sup> See Daniele, above n 18.



sentenced by an Indigenous sentencing court can be seen as a request to adopt a more appropriate court process. When it is recognised that the Indigenous sentencing courts in reality have no existence as separate institutions, but are entirely defined by the different process adopted, complaints about the separate institution are reduced to the assertion that the court process should not be adapted to take account of different defendants. This is not accepted practice in the standard criminal courts,<sup>159</sup> and is also an argument that relies on a claim of formal equality, which has been rejected above.

Galbally's argument can be alternatively understood as being primarily concerned with public perceptions of the administration of justice. The apparent institution of separate courts for Indigenous defendants might lead the public to assume they are being more leniently treated, or judged by reference to Indigenous rather than mainstream Australian legal norms. This argument is predicated on an assumption that public perception will be ruled by superficial and misleading stereotypes rather than the actual facts about the nature of the Indigenous sentencing courts. Whatever the extent to which this is currently true, there is certainly no reason not to continue to improve public awareness of the nature of Indigenous sentencing courts.<sup>160</sup> Of itself, the existence of misinformed public perception of any initiative is not a reason to reject the initiative. There is also a subtle benefit to the perceived separation between Indigenous sentencing courts and the standard courts: it gives potential for Indigenous communities, normally extremely disaffected with the legal system,<sup>161</sup> to feel that

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<sup>159</sup> Ibid.

<sup>160</sup> Victorian Attorney-General Rob Hulls has been particularly active in defending the Victorian Koori Courts by combating misinformation: see Rob Hulls, 'Koori Courts Help Cut Repeat Offences', *The Australian* (Sydney), 16 May 2008 <<http://www.theaustralian.news.com.au/story/0,25197,23704323-5013479,00.html>> at 23 September 2008; ABC Television, 'Koori Division Established', above n 23.

<sup>161</sup> Aboriginal Resource and Development Services Inc, above n 19, 14-15.

they have a stake in the justice process.<sup>162</sup> This sense of community ownership is an important precursor to the engagement between the Indigenous and non-Indigenous communities that occurs during the sentencing process.<sup>163</sup> Were some level of institutional separation not maintained, this process of engagement would instead have to occur throughout the court system, requiring major systemic change. Given the failure to implement changes of this nature in the seventeen years following the Royal Commission into Aboriginal Deaths in Custody, Indigenous sentencing courts represent a cost-effective method of encouraging Indigenous engagement with the criminal justice system.

### **Failure to provide specialist courts for other racial groups**

The final argument of inequality is that Indigenous defendants are given the option of a more culturally-appropriate sentencing process, while defendants from other minority racial groups are not. It should be noted that this is not an argument for the abolition of Indigenous sentencing courts; it implicitly accepts that the courts are beneficial and desirable and then asks why they should not be available to other groups. As discussed above, it is more cost-effective to specialise in Indigenous sentencing courts rather than to reform the entirety of the court system.<sup>164</sup> If this holds true for other racial groups, there is no reason not to develop specialist courts for these groups. However, there should be awareness of some factors that make Indigenous peoples particularly suited for a specialist jurisdiction. The clear and substantial disadvantage that Indigenous defendants experience in the standard

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<sup>162</sup> Annette Hennessy, 'Indigenous Sentencing Practices in Australia', above n 100, 2; King, 'What Can Mainstream Courts Learn', above n 11, 93-4; Auty and Briggs, above n 42, 21, 27, 35.

<sup>163</sup> Auty and Briggs, above n 42, 20-3.

<sup>164</sup> Specialisation is being increasingly recognised as an effective means of improving the overall standard of justice delivered by the criminal justice system: see Arie Freiberg, 'Problem-Oriented Courts: An Update' (2005) 14 *Journal of Judicial Administration* 196, 196-7; Payne, above n 60, 11-12.

criminal courts is an indicator that they are receiving a standard of justice far lower than that of other groups.<sup>165</sup> This suggests that they should be in receipt of specialist measure to remedy this inequality. The high value generally placed on kinship and community by Indigenous people<sup>166</sup> means that if appropriately responsible and law-abiding Elders can be found, they will be a powerful resource for subjecting defendants to reintegrative shaming. The social, cultural and emotional power of community leaders may not be as strong in less communal cultures. Finally, there is acceptance among Indigenous people that the Australian legal system is distinct from and reflects different values to the Indigenous legal system.<sup>167</sup> There is thus no imperative to administer a wholly different system of law in the specialist court as, for example, in an Islamic Sharia court. With due consideration to the above-discussed factors, if a compelling case were to be made that a specialist court for a non-Indigenous racial group would be an effective method of reducing disadvantage in the criminal process for that group, there is no reason why such a court should not be established.

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<sup>165</sup> McAsey, above n 21, 683; Richard Edney, 'Just Deserts in Post-Colonial Society: Problems in the Punishment of Indigenous Offenders' (2005) 9 *Southern Cross University Law Review* 73, 104-5.

<sup>166</sup> Daniele, above n 18, 2203; Ian Keen, 'Introduction' in Ian Keen (ed), *Being Black: Aboriginal Cultures in 'Settled' Australia* (1988) 1, 13-14.

<sup>167</sup> Harris, 'Evaluation of the Koori Courts', above n 16, 99-100.

## CONCLUSION

All criminal defendants deserve a sentencing process that respects them, takes the time to fully hear their case, and leads to a sentence that maximises their prospect for rehabilitation and treats imprisonment as a last resort. The limited resources of the criminal justice system mean that inevitably this ideal will not be met. However, the standard of justice delivered to Indigenous defendants has been consistently lower than that provided to non-Indigenous defendants. Indigenous sentencing courts remedy this disadvantage by including Elders from the defendant's community, who give the proceedings deep significance for defendants. Their presence also provides a cultural bridge that helps to ensure that the defendant feels that he or she has been treated fairly and respectfully.

Indigenous sentencing courts appear to breach the principle of equality before the law by only accepting defendants with an Indigenous background. This is not the case. The disadvantage suffered by Indigenous defendants justifies their differential treatment, and systemic issues of efficiency justify the use of a specialised process for Indigenous defendants. Given the Indigenous sentencing courts' acceptability and the benefits they have produced for defendants and communities, they should be further implemented across the States and Territories so that all Indigenous people can access this alternative sentencing procedure. One important caveat is the need for a sufficiently healthy Indigenous community that is able to provide the key personnel for the courts: the Elders.<sup>168</sup> If the community's Elders are not widely respected or are unwilling to participate in the Australian criminal justice system, the powerful social and cultural pressures that Indigenous sentencing courts rely upon will not be present.

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<sup>168</sup> Dick, 'Circle Sentencing', above n 54, 7.

However, when considering this issue, non-Indigenous policy-makers should be wary of the tendency to underestimate the strength and cohesion of Indigenous communities, particularly in urban areas.<sup>169</sup>

There is no compelling reason to make an a priori exclusion of particular categories of crime from the courts' jurisdiction. As confidence grows in the process, Elders should be encouraged to consider bringing their wisdom to bear on defendants who have committed sexual offences. Whatever their crime, all defendants should be carefully assessed for eligibility and willingness to undergo the emotionally intense and personally challenging sentencing process, and particular caution should be exercised where defendants have committed crimes of a violent or sexual nature. The opening of the first mid-tier court – the Koori County Court – will provide further insight into whether more serious crimes are suitable for the Indigenous sentencing court process.

It is also to be hoped that the successful innovations encompassed by the Indigenous sentencing courts such as the presence of respected members of the defendant's community, the hearing of all stakeholders' views on the offence and the imaginative use of sentencing options might be integrated into the procedure of the mainstream courts.<sup>170</sup> The standard court process should reject the confines of traditionalism and accept the imperative to be culturally responsive and empowering to every criminal defendant it deals with. Perhaps there will come a day when the standard courts have earned the respect and acceptance of the Indigenous peoples of Australia to an extent that the Indigenous sentencing courts can be absorbed back into their parent courts, and justice delivered with equal responsiveness to every defendant.

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<sup>169</sup> McAsey, above n 21, 671, 675.

<sup>170</sup> Marchetti and Daly, 'Indigenous Courts and Justice Practices', above n 112, 6; Robin Inglis, 'Koori Court Beneficial' (2003) 77 *Law Institute Journal* 10, 10.

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