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Indigenous Sentencing Courts

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Introduction

This brief focuses on Indigenous sentencing courts, which operate in all Australian states and territories except Tasmania. These courts have been established according to protocols and practices, and can be distinguished from more informal practices that occur in remote areas where judicial officers travel on circuit. The first court was established in Port Adelaide on 1 June 1999. Indigenous sentencing courts do not practise or adopt Indigenous customary laws. Rather, they use Australian criminal laws and procedures to sentence Indigenous offenders who have either pleaded guilty or been found guilty, but they allow Indigenous Elders and Respected Persons to participate in the process, thereby creating a more culturally appropriate forum for sentencing Indigenous offenders (Auty 2004).

Currently there are over 50 adult and children's Indigenous sentencing courts in Australia, operating under varied legislative frameworks and with differing eligibility criteria. A list of adult Indigenous sentencing courts, their establishment dates and their legislative frameworks appears in Table 1 (adapted from Marchetti & Daly 2007). Indigenous sentencing courts arose first in magistrates' or local courts, but are now part of the youth (or children's) courts in Queensland and Victoria, and the County Court in Victoria. In South Australia, criminal courts at all levels can now convene an Aboriginal Sentencing Conference prior to sentencing, pursuant to section 9C of the *Criminal Law (Sentencing) Act 1988*. The judicial officer, legal representative, prosecutor, offender and victim, if the victim chooses to be present, must attend the conference. The conference may also include an Indigenous Elder or community representative. An Aboriginal Conference, which is convened out of court (following a plea of guilty in court) and does not include the presence of a judicial officer, is being piloted in Port Lincoln, South Australia. Parties attend court two days later for sentencing with a report containing recommendations from the Aboriginal Conference.

Indigenous sentencing courts have emerged mainly from the efforts of individual magistrates and Indigenous community members, but are becoming recognised as a legitimate forum for sentencing Indigenous offenders, with the enactment of legislation to validate their operation. Only the Victorian Koori courts are established under a separate legislative framework. New South Wales and South Australia have amended their criminal court procedure and sentencing Acts to formally recognise their Indigenous sentencing court processes. Prior to these amendments the courts were operating under general sentencing provisions and certain practice directions which place an obligation on a court to have regard to any cultural considerations and community submissions when sentencing an Aboriginal or Torres Strait Islander person. This is still the case with the Queensland Murri courts, the Australian Capital Territory Ngambra circle sentencing court, and the Northern Territory and Western Australian community courts.

Despite their legitimisation, however, the number of offenders sentenced in these courts in most jurisdictions is still quite low compared with Indigenous offenders processed via mainstream courts. Their purpose is often described as being to address the overrepresentation of Indigenous people in the criminal justice system; increase the participation of Indigenous people in the justice system; and complement Justice Agreements which have been entered into in some Australian states and territories (Auty 2004, Blagg 2008, Briggs & Auty 2003, Magistrates' Court of Victoria 2003, McAsey 2005, Potas et al. 2003, Hennessy 2006). Despite the fact that primarily, the stated aims or goals of the courts have a criminal justice focus, Magistrate Chris Vass established the first court in Port Adelaide to "gain the confidence of Aboriginal people … and encourage

them to feel some ownership of the court process" (Marchetti & Daly 2007: 434).

This brief firstly describes the practices and philosophy underpinning Australian Indigenous sentencing courts. It then summarises the main findings of the few evaluations that have been conducted.

Practices of the courts

Practices among the courts vary, but in all courts the magistrate retains the ultimate power in sentencing the offender. An offender must have entered a guilty plea or have been found guilty in a summary hearing, and must consent to having the matter heard in the Indigenous sentencing court. In all except Northern Territory courts, the offender must be Indigenous or, in some courts, Indigenous or South Sea Islander. The charge must also be one that falls within the jurisdiction of the mainstream court of equivalent level.

The courtroom setting is quite different from mainstream courts, with most jurisdictions having remodelled or built new courtrooms to house the courts. There is more focus on dialogue, resulting in most magistrates sitting in a circle or at an oval bar table with the offender, their support person (if one has attended), Elders/Respected Persons, the prosecutor and defence lawyer. The involvement of the Elders or Respected Persons varies between courts, but in all courts they speak frankly with the offender. All courts now employ Indigenous court workers, within their own court administration or via the related justice agency, who organise Elders or Respected Persons to appear at the hearings, liaise between the offender, prosecutor and victim (if they agree to participate), and sometimes monitor an offender's progress after the hearing.

Victoria, New South Wales, Western Australia, and the two territories limit the types of offences that can be heard in their Indigenous sentencing courts, although there is no explanation for these limits in the legislation or procedural guidelines. Sexual offences are excluded in all five of these jurisdictions. Family violence is excluded in Victoria, and the Northern Territory's guidelines recommend the court exercise caution when dealing with cases involving violence, domestic violence or where the victim is a child. New South Wales and the Australian Capital Territory exclude certain drug offences and offenders who are addicted to illicit drugs, respectively. Certain violent offences, stalking, offences involving the use of a firearm, and offences relating to child prostitution or pornography are also excluded in New South Wales (Marchetti & Daly 2007).

Most of the courts focus on offenders who are in danger of being sentenced to prison. They appear in an Indigenous sentencing court to see whether an alternative and more appropriate sentence to imprisonment can be imposed. Their main aims and objects are to make the court process more culturally inclusive and appropriate, and to reduce offending and recidivism.

Sentences imposed are by no means a 'soft option' but are often "onerous on the offender as they … involve treatment and close supervision" (Fingleton 2007: 18).

The circle court model (loosely based on the Canadian model) is used in New South Wales and the Australian Capital Territory. The Nunga court model is used by the remaining jurisdictions, except the Northern Territory, which uses a combination of the two models. There is much more involvement during the hearing and framing of the penalty by the Elders or Respected Persons in the circle court model than in the Nunga court model. Up to four Elders/Respected Persons sit in the circle court, compared with only one or two in the Nunga court. There is a preference for an equal number of male and female Elders or Respected Persons present or, for courts where there is only one Elder or Respected Person, for the sex of that person to match the sex of the offender. Circle sentencing hearings are often held in a venue that is culturally significant to the local Indigenous community instead of a mainstream court. In New South Wales the circle court is a closed court, which means that only the people participating in the court hearing can sit in the circle and observers need permission to attend.

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Philosophy underpinning the courts

Indigenous court practices are sometimes associated with restorative justice and therapeutic jurisprudence (Freiberg 2005, Harris 2006a, King 2003, McAsey 2005). However, although they share some qualities, Indigenous sentencing courts should be considered in a category of their own because their aims and objectives are more politically charged and focused on community participation than other forms of court initiatives (Marchetti & Daly 2007). Legislation, court guidelines and other explanatory materials associated with the courts in all jurisdictions state that their main aims and objectives are to make the court process more culturally inclusive and appropriate, and to reduce offending and recidivism (for a detailed discussion of the aims and objectives of the courts see Marchetti & Daly 2007, Table 2). In all states, apart from Queensland, Western Australia and Victoria, increased participation and support of victims is also stated as an aim of the courts. However, in most hearings, victims do not attend and when they do, they often receive little or no support (Holder 2004).

Main findings of evaluations

There have only been a limited number of Indigenous sentencing court evaluations. Three evaluations have focused on the New South Wales circle courts (CIRCA 2008, Fitzgerald 2008, Potas et al. 2003), one on the Victorian Koori courts (Harris 2006b), one on the Queensland Murri courts (Parker & Pathe 2006), and one on the South Australian Nunga courts (Tomaino

2004). Payne also prepared a report for the Australian Research Council, which was based on an 'exploratory review' of specialty courts in Australia (Payne 2005). Further evaluations of the Koori courts, the Murri courts and the New South Wales circle courts are due to be released in the near future. Since the evaluations have been jurisdiction specific, comparisons are difficult. This section summarises the findings of the evaluations, while also identifying their limitations.

What was evaluated and what did they find?

The courts have both criminal justice aims (reducing recidivism, improving court appearance rates and reducing the over-representation of Indigenous people in the criminal justice system) and community building aims (providing a culturally appropriate process, increasing community participation and contributing to reconciliation). Of the criminal justice aims, only the impact of the courts on re-offending has been assessed.

The only evaluation that made any claims about whether the court had an impact on court appearance rates was Tomaino (2004). Although it reported that attendance rates had improved, it could only rely on anecdotal evidence for making any comparisons with the attendance rates of mainstream court hearings.

Most of the evaluations noted that criminal justice and community building aims were very much related and were being met. In particular, the studies suggested that recidivism should not be the only criterion of assessment and that it is important to measure success also in terms of the broader community building aims (CIRCA; 2008 Harris 2006b; Payne 2005; Potas et al. 2003; Tomaino 2004). Even Fitzgerald (2008: 7), whose evaluation concluded that the New South Wales circle courts did not reduce recidivism, stated that "[it] should not be concluded that circle sentencing has no value simply because it does not appear to have any short-term impact on reoffending. Reducing recidivism is just one of several objectives of the process".

Recidivism

All the evaluations examined whether the courts reduced recidivism and Fitzgerald focused solely on this issue. Some studies found that the courts reduced recidivism (Harris 2006b, Potas et al. 2003) but Fitzgerald critiqued several of these evaluations on the basis that there were no comparable control groups and that there were inadequate follow up periods (Fitzgerald 2008).

The most recent and comprehensive statistical analysis of recidivism was conducted by Fitzgerald. The study assessed whether there had been a reduction in frequency of offending, whether it took longer to reoffend and whether circle sentencing reduced the seriousness of offending (Fitzgerald 2008). Fitzgerald concluded that "circle sentencing has no effect on the frequency, timing or seriousness of offending".

The Fitzgerald findings were discussed in the complementary qualitative analysis conducted by the Cultural & Indigenous Research Centre Australia (CIRCA) (2008). This study found that there was a common perception that circle sentencing is having an impact on reoffending (see also Parker & Pathe 2006). In particular, the study relied on anecdotal evidence to suggest that circle sentencing has a "dramatic influence on offenders beyond reoffending" (CIRCA 2008: 61). For example, circle sentencing had created positive changes in offenders' behaviour in relation to substance abuse, employment and family relations.

Providing a more culturally appropriate process

The evaluations found that the Indigenous sentencing courts provide a more culturally appropriate sentencing process that encompassed the wider circumstances of defendants' and victims' lives, and facilitated the increased participation of the offender and the broader Indigenous community in the sentencing process (CIRCA 2008; Harris 2006b; Parker & Pathe 2006; Potas et al. 2003; Tomaino 2004).

> "It means a whole lot more to be given directions about your future life path from a person who is an Elder of your community and has a better understanding of the shoes us blackfellas walk in" (in Harris 2006).

Increased dialogue and participation were found to have a positive impact on generating understanding and accountability between all participants. For example, the interaction between the offender and the magistrate was found to engender a perception that the particular circumstances of the offender had been taken into account when sentencing (CIRCA 2008; Harris 2006b; Parker & Pathe 2006; Potas et al. 2003). The increased participation of the offender in the sentencing process was found to be directly related to their perception that the sentences they received were fair and appropriate (CIRCA 2008; Harris 2006b; Potas et al. 2003). Similarly, allowing a victim to participate in the process was considered to be beneficial for promoting understanding and healing (Potas et al. 2003), although some studies were unable to draw any conclusions about the effect on victims due to insufficient data.

The skills and commitment of the magistrates involved were also identified as critical in ensuring the process was more culturally appropriate (CIRCA 2008; Potas et al. 2003; Tomaino 2004). In particular, magistrates considered that having more time to sentence an offender allowed them to understand the offender's background, which in turn resulted in them being able to impose more appropriate sentences (CIRCA 2008; Harris 2006b).

The role of Elders/ Respected Persons and increased community participation

Potas et al. (2003: 52) stated in their report that "[fundamentally] the strongest aspect of the circle sentencing process, as clearly enunciated by the offenders themselves, is the involvement of the Aboriginal community in the sentencing process. Facing one's own

community – respected people who have known the offender his or her entire life – is the most powerful aspect of this process."

This view was shared by the other evaluations. In particular, the role of Elders or Respected Persons was identified as an integral and invaluable aspect of the process that generated accountability between offenders, victims and the wider community (CIRCA 2008; Harris 2006b; Parker & Pathe 2006; Potas et al. 2003). One defendant, cited in Harris (2006) said "[it] means a whole lot more to be given directions about your future life path from a person who is an elder of your community and has a better understanding of the shoes us blackfellas walk in".

...the involvement of the broader Indigenous community in the sentencing process was identified as promoting a sense of pride amongst Indigenous participants and a sense of ownership in the criminal justice process.

Increased community participation was found to have a twofold effect: it increased the accountability of the offender to their community and provided offenders with community support (CIRCA 2008; Parker & Pathe 2006; Potas et al. 2003). Community participation in the sentencing process often resulted in "shaming" of the offender, which in turn made offenders more likely to feel responsible for how their actions had impacted on families and communities (CIRCA 2008). At the same time community participation in the sentencing process was identified as an opportunity for defendants to change existing patterns of behaviour and reconnect with their community (Harris 2006; Potas et al. 2003).

Reconciliation and reconfiguring existing social relations

The evaluations found that Indigenous sentencing courts promoted shared justice, reconciliation and empowerment for Indigenous communities (CIRCA 2008; Harris 2006b; Parker & Pathe 2006; Potas et al. 2003). For example, the involvement of the broader Indigenous community in the sentencing process was identified as promoting a sense of pride amongst Indigenous participants and a sense of ownership in the criminal justice process. The CIRCA evaluation (2008) concluded that the courts encouraged a two-way education process between court workers and communities that promoted cross-cultural understanding and learning, as did the magistrates interviewed in the Harris study (2006). Similarly, Potas et al. (2003) found that circle sentencing built self and community determination, and that the process was effective in reducing barriers between courts and Indigenous communities. Community participation was perceived as critical in bridging the gap between Indigenous communities and "white law" (Parker & Pathe 2006; Potas et al. 2003).

Limitations of the studies

It is important to bear in mind that all the studies identified limitations in the manner in which the data were either collected or analysed, mainly that:

- there were inappropriate or non-comparable control groups (Payne 2005; Fitzgerald 2008; Parker & Pathe 2006; Tomaino 2004)
- there were inadequate follow-up periods (Payne 2005; Fitzgerald 2008)
- court records and court data were unclear, inaccurate or incomplete (Tomaino 2004; Parker & Pathe 2006; Harris 2006b)
- there were only limited data available due to the courts being relatively new; therefore the evaluations often relied on anecdotal evidence (Fitzgerald 2008, Parker & Pathe 2006; Potas et al. 2003).
- analysis based on interviews may be skewed towards the positive due to the voluntary nature of this research method (CIRCA 2008).
- quantitative data may be inadequate for measuring some aims of the courts that are focused on broader community benefits (CIRCA 2008).

The difficulty of evaluating and assessing innovative court processes was noted explicitly in several of the evaluations. Tomaino (2004), for example, suggested that "[when] weighing up the merits of any reform effort, it is important to ask the question: 'Compared to what?' Aboriginal Courts must not be compared to an idealised vision of justice that does not exist but rather, to their alternatives (for instance, the current mainstream courts)" (see also Harris 2006b).

Conclusion

Indigenous sentencing courts are expanding and are now considered a permanent feature of the Australian criminal court system. Evaluations conducted of the courts have made several recommendations to improve the courts and their role in the community. The most common were:

- additional support for participating Elders or Respected Persons in the form of transport, debriefing sessions, court facilities and orientation programs (CIRCA 2008; Parker & Pathe 2006; Tomaino 2004)
- further cross-cultural training of magistrates and non-Indigenous court personnel (CIRCA 2008; Harris 2006b; Potas et al. 2003; Tomaino 2004)
- expanding the provision of the courts to make them more widely accessible, in particular for non-urban communities (Harris 2006b; Potas et al. 2003; Tomaino 2004)
- more rehabilitation programs which are culturally appropriate (particularly drug and alcohol treatment programs) and offer more post-sentence support for offenders (CIRCA 2008; Fitzgerald 2008; Harris 2006b; Parker & Pathe 2006)
- improved monitoring, follow-up and reporting back to the court about the progress of offenders (CIRCA 2008; Tomaino 2004)
- improved data collection by criminal justice agencies and courts, and further evaluations to assess the effectiveness of the courts (CIRCA 2008; Harris 2006b; Parker & Pathe 2006; Tomaino 2004).

Ultimately the courts would not exist without the support, dedication and commitment of community Elders and Respected Persons. This needs to be acknowledged and valued by continuing to involve community representatives in the development

and evolution of the courts, and by appropriately compensating them for their time and knowledge (whether through direct remuneration or in other forms acceptable to the Elder or Respected Person). The role of the magistrate is also an integral part of the process so magistrates' commitment to working with Elders and Respected Persons and access to cross-cultural training is, therefore, important.

Respectful relations between judicial officers and Indigenous communities have the potential to produce more appropriate sentences as well as the empowerment of Indigenous Elders and their communities.

To ensure appropriate, comprehensive and rigorous evaluations of the courts, better systems of data collection need to be implemented. As with most court innovations, attempts to assess cost-effectiveness will be ineffective without proper comparisons with mainstream courts and without allowing the Indigenous sentencing courts a sufficient amount of time to fulfil their aims.

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Appendix: Australian adult Indigenous sentencing courts as at 12 May 2009

Jurisdiction	Model	Court, date	Legislation, protocol or guidelines
Australian Capital Territory	Circle Court	• Ngambra Circle Sentencing Court, May 2004	Practice Direction: Ngambra Circle Sentencing Court (updated 1 December 2007) and the general sentencing provisions in the *Crimes (Sentencing) Act 2005* (ACT)
New South Wales	Circle Court	• Nowra Circle Court, February 2002 • Dubbo Circle Court, August 2003 • Brewarrina Circle Court (on circuit), February 2005 • Bourke Circle Court, March 2006 • Kempsey Circle Court, April 2006 • Armidale Circle Court, April 2006 • Lismore Circle Court, March 2006 • Mt Druitt Circle Court, November 2006 • Walgett Circle Court (on circuit), June 2006	*Criminal Procedure Regulation 2005* (NSW) and *Criminal Procedure Act 1986* (NSW)
Northern Territory	Combination of the Circle and Nunga Court models; all the courts are customised for Indigenous offenders but also open to non-Indigenous offenders	• Darwin Community Court, April 2005. After the establishment of this court the following circuit courts, which use the procedures of the Darwin Community Court were implemented: • Wadeye Community Court • Daily River Community Court • Maningrida Community Court • Jabiru Community Court • Galiwinku Community Court • Numbulwar Community Court • Nhulunbuy Community Court • Alyangula Community Court • Oenpelli Community Court • Nguiu Community Court • Milikapiti Community Court • Pirlangimpi Community Court	Darwin Community Court Guidelines

Queensland	Nunga Court	• Brisbane Murri Court, August 2002 • Rockhampton Murri Court (Aboriginal people, Torres Strait Islanders and South Sea Islanders), June 2003 • Mt Isa Murri Court, restarted December 2005 • Townsville Murri Court, March 2006 • Caboolture, March 2006 • Cherbourg Murri Court, November 2006 • Ipswich Murri Court, February 2007 • Coen Murri Court, March 2007 • Cleveland Murri Court, May 2007 • Caloundra Murri Court, June 2007 • Cairns Murri Court, January 2008 • St George Murri Court, June 2008 • Mackay Murri Court, November 2008 • Inala/Richlands Murri Court, March 2009	*Penalties and Sentences Act 1992* (Qld) and *Juvenile Justice Act 1992* (Qld)
South Australia	Nunga Court	• Port Adelaide Nunga Court, 1 June 1999 • Murray Bridge Nunga Court (on circuit), January 2001 • Port Augusta Aboriginal Sentencing Court, July 2001 (in abeyance then revived in 2008) • Ceduna Aboriginal Court (on circuit), July 2003 (currently in abeyance)	*Criminal Law (Sentencing) Act 1988* (SA) – also applies to the sentencing of 'youth'
Victoria	Nunga Court	• Shepparton Koori Court, October 2002 • Broadmeadows Koori Court, April 2003 • Warrnambool Koori Court (on circuit includes Hamilton and Portland), January 2004 • Mildura Koori Court, July 2005 • Moe/Latrobe Valley, May 2006 • Bairnsdale, March 2007 • Swan Hill, July 2008 • Latrobe Valley County Court, February 2009	The *Magistrates' Court (Koori Court) Act 2002* (Vic) amended the *Magistrates' Court Act 1989* (Vic) and the *Children and Young Persons (Koori Court) Act 2004* (Vic) amended the *Children and Young Persons Act 2004* (Vic)
Western Australia	Nunga/Koori Court	• Norseman Community Court (on circuit), February 2006. Customised for Indigenous offenders but also open to non-Indigenous offenders. • Kalgoorlie-Boulder Community Court, November 2006	*Sentencing Act 1995* (WA)

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