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Indigenous sentencing courts: Towards a theoretical and jurisprudential model

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Abstract

Beginning in 1999, a number of Indigenous sentencing courts were established in Australia that use Indigenous community representatives to talk to a defendant about their offending and to assist a judicial officer in sentencing. The courts are often portrayed as having emerged to reduce the over-representation of Indigenous people in the criminal justice system and to address key recommendations made by the Royal Commission into Aboriginal Deaths in Custody, in particular, those centred on reducing Indigenous incarceration, and on increasing participation of Indigenous people in the justice system as court staff or advisors. They are also said to reflect partnership practices that were recommended in Justice Agreements throughout Australia between state governments and Indigenous organisations. In this article, we argue that these courts have broader aims and objectives in that they seek to achieve a cultural and political transformation of the law, which is not as evident in other new justice practices such as restorative justice or therapeutic jurisprudence.

There is a great deal of variation in the way the courts have been established and in the practices used. Despite the variations we show that the courts have common goals: to make court processes more culturally appropriate and to increase the involvement of Indigenous people (including the offender, support persons and the local community) in the court process. Although advocates of new justice practices

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merge and blend Indigenous sentencing courts with restorative justice and therapeutic jurisprudence, we argue that while they have some elements in common, Indigenous courts have distinct aims and objectives. By analysing practices, protocols and other empirical materials, we show why Indigenous sentencing courts deserve a unique theoretical and jurisprudential model and why they are better viewed as being in a category of their own.

1. Introduction

The first urban Indigenous sentencing court was convened in Port Adelaide (a suburb of Adelaide, Australia) on 1 June 1999. Seven years later, all but one state (Tasmania) has established some type of Indigenous justice practice. There are now two kinds of Indigenous justice practices in Australia: courts in urban centres, which set aside one to three days a month to sentence Indigenous offenders; and practices in remote Indigenous communities when judicial officers travel on circuit (eg, in Western Australia, courts in Wiluna, Yandeyarra, Geraldton, and in the Ngaanyatjarra Lands; and in Queensland, the Justice Groups' oral or written submissions to magistrates and judges at sentencing in the circuits to Cape York, the Gulf area, Thursday Island, Palm Island and other circuits to remote areas). Hybrid forms are now emerging, with the introduction of Circle Courts in more remote areas of New South Wales while magistrates are on circuit.

This article focuses on the first type of Indigenous justice practices, Indigenous sentencing courts in urban centres (see Table 1), because they rely on agreed practices and protocols. The urban courts in Queensland, Victoria, New South Wales,[1] South Australia, the Northern Territory and the Australian Capital Territory were established according to certain principles and processes, which were developed at their inception or some time after their formation. The Indigenous justice practices in remote Indigenous communities, such as those in Western Australia and in North Queensland, are less formalised and consistent and are more likely to work in isolation of other practices in a particular jurisdiction. The dividing line between the 'urban' courts and those

[1] The Indigenous sentencing courts in more remote towns in New South Wales are held when a magistrate travels on circuit. However, they were established according to the practice directions and processes used for the New South Wales urban courts; thus, they are included in this study.

in more remote areas is somewhat unclear and there is fluidity over time. Therefore, the points we make about the theoretical and jurisprudential uniqueness of Indigenous sentencing courts can, in some circumstances, be applied to sentencing practices in more remote areas.

Table 1: Courts Established in Australia, 1999-2006

Jurisdiction	Court and establishment date	Legislation or other directive that governs establishment and procedure
Australian Capital Territory	• Ngambra Circle Court – May 2004	Interim Practice Direction: Ngambra Circle Sentencing Court and the general sentencing provisions in the *Crimes (Sentencing) Act 2005* (ACT)
New South Wales	• Nowra Circle Court – Feb 2002 • Dubbo Circle Court – Aug 2003 • Brewarrina Circle Court (on circuit) – Feb 2005 • Bourke Circle Court – Mar 2006 • Kempsey Circle Court – Apr 2006 • Armidale Circle Court – Apr 2006 • Lismore Circle Court – Mar 2006 • Mt Druitt Circle Court – due to start Nov 2006 • Walgett Circle Court (on circuit) – June 2006	*Criminal Procedure Regulation 2005* (NSW) and *Criminal Procedure Act 1986* (NSW)
Northern Territory	• Darwin Community Court (also used in Nhulunbuy and Nguiu on the Tiwi Islands when the Magistrate is on circuit) – Apr 2005	Community Court Darwin: Guidelines and the general sentencing provisions in the *Sentencing Act 2005* (NT)
Queensland	• Brisbane Murri Court – Aug 2002 • Brisbane Youth Murri Court – Mar 2004 • Rockhampton Murri Court (Aboriginal people, Torres Strait Islanders and South Sea Islanders) – Jun 2003 • Rockhampton Youth Murri Court (Aboriginal people, Torres Strait Islanders and South Sea Islanders) – Oct 2004 • Townsville Murri Court – Mar 2006 • Townsville Youth Murri Court – Feb 2006 • Caboolture Youth Murri Court – Feb 2006 • Mt Isa Murri Court – restarted Dec 2005 • Mt Isa Youth Murri Court – Jun 2006	*Penalties and Sentences Act 1992* (Qld) and *Juvenile Justice Act 1992* (Qld)

South Australia	• Port Adelaide Nunga Court – Jun 1999 • Murray Bridge Nunga Court (on circuit) – Jan 2001 • Port Augusta Special Aboriginal Court – Jul 2001 • Port Augusta Youth Aboriginal Court – May 2003 • Ceduna Aboriginal Court (on circuit) – Jul 2003	*Criminal Law (Sentencing) Act 1988* (SA) – also applies to the sentencing of 'youth'
Victoria	• Shepparton Koori Court – Oct 2002 • Broadmeadows Koori Court – Mar 2003 • Warrnambool Koori Court (on circuit including Hamilton and Portland) – Jan 2004 • Mildura Koori Court – July 2005 • Children's Koori Court - Oct 2005	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)

We have been observing these courts and talking to the key actors involved with them (judicial officers, Indigenous representatives, prosecutors, and defence attorneys) since 2001. A major contribution we make to the study of these courts is the ability to offer a comparative view of Indigenous court practices, rather than a single-jurisdiction focus. We find that within any jurisdiction, practices vary by magistrate. We also find that like restorative justice and therapeutic jurisprudence, actual practices may not correspond to aspirations, especially in the high volume jurisdictions.[2]

Indigenous sentencing courts arose first in Magistrates' or Local Courts, but are now part of the Youth (or Children's) Courts in some jurisdictions. The courts have emerged mainly from the efforts of individual magistrates and Indigenous community members, but they are now becoming formally recognised as a legitimate forum for sentencing Indigenous offenders, with

[2] A high volume jurisdiction is South Australia. Queensland and Victoria are moderately high volume jurisdictions. Low volume jurisdictions are the Australian Capital Territory, Northern Territory and New South Wales.

the enactment of legislation to validate their operation. Despite their legitimisation, however, the number of offenders sentenced in these courts in most jurisdictions is still quite low.[3]

Although advocates of new justice practices merge and blend Indigenous sentencing courts with restorative justice and therapeutic jurisprudence,[4] we argue that while they have some elements in common, Indigenous courts have distinct aims and objectives. By analysing practices, protocols and other empirical materials, we show why Indigenous sentencing courts deserve a unique theoretical and jurisprudential model. We argue this position not only for descriptive or empirical reasons, but also on political grounds.

Some points of definition need to be made. First, we are not using the term 'jurisprudence' in an analytic sense as something which simply explains the nature of law and legal systems;[5] but rather as referring to a study of legal practices and how *justice* is achieved in these new forums. Jurisprudence is a term which 'at its simplest' is used to describe 'the corpus of answers to the question "what is law?"'.[6] However, it has also been used in a broader sense to 'gain an understanding of the sorts of things involved when asking [what is law?]', including an

[3] The Indigenous sentencing courts in a high volume jurisdiction can hear up to 350 cases a year (eg Port Adelaide Nunga Court: see John Tomaino, *Information Bulletin: Aboriginal (Nunga) Courts* (undated) at 7), whereas the low volume jurisdictions hear as few as 13 cases a year because they restrict cases to those in which incarceration is likely and defendants are deemed ready to change (eg Nowra Circle Court: see Ivan Potas, Jane Smart, Georgia Brignell, Brendan Thomas & Rowena Lawrie, *Circle Sentencing in New South Wales: A Review and Evaluation* (2003) at 9). However, even the high volume courts have a low number of offenders appearing before them when compared to the number of offenders that appear before a mainstream Magistrates' Courts.

[4] See for example, Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 7; Michael S King, 'Applying Therapeutic Jurisprudence in Regional Areas - the Western Australian Experience' (2003) 10 *E Law: Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v10n2/king102.html> accessed 5 December 2006; Arie Freiberg, 'Problem-Oriented Courts: An Update' (2005) 14 *Journal of Judicial Administration* 178.

[5] Antony Flew & Stephen Priest, *A Dictionary of Philosophy* (2002) at 224.

[6] Wayne Morrison, *Jurisprudence: From the Greeks to Post-Modernism* (1997) at 1.

understanding of the 'nature and context of the "legal enterprise"'.[7] It can therefore involve many perspectives and perceptions of 'law' itself. In this article, jurisprudence is used in a broader sense to describe the philosophical basis of the Indigenous sentencing courts, which can be inferred by analysing the courts' aspirations and practices, and how these then are used in making decisions when sentencing Indigenous offenders. Our comparison of Indigenous sentencing courts with restorative justice and therapeutic jurisprudence shows that all three are driven by practice and pragmatism rather than a pure legal or prescriptive 'theory'. Although they have some elements in common, there are key points of difference.

Second, these courts are not practicing or adopting Indigenous customary laws. Rather, they are using Australian criminal laws and procedures when sentencing Indigenous people, but allowing Indigenous Elders or Respected Persons to participate in the process. This is different from a court's recognition or application of Indigenous customary laws at sentencing, as for example, when Indigenous punishment practices such as spearing, shaming and banishment are taken into account.[8] The Indigenous sentencing courts discussed in this article do not use traditional forms of punishment although 'they do give due recognition and respect to cultural considerations' such as respect for Elders.[9] Some courts will also take into account an apology that has been given according to customary traditions or banishment. Generally, however, the sentences imposed remain within the realm of the mainstream criminal and sentencing laws.

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[7] Wayne Morrison, *Jurisprudence: From the Greeks to Post-Modernism* (1997) at 2.

[8] For a detailed discussion of the use of customary law and its place in the Australian legal system see Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (1986); Mark Finnane, '"Payback", Customary Law and Criminal Law in Colonised Australia' (2001) 29 *International Journal of the Sociology of Law* 293; Heather McRae, Garth Nettheim, Laura Beacroft & Luke McNamara, *Indigenous Legal Issues: Commentary and Materials* (3rd ed, 2003); Northern Territory Law Reform Commission, *Report of the Committee of Inquiry into Aboriginal Customary Law* (2003); Law Reform Commission of Western Australia, *Aboriginal Customary Laws Project 94: Discussion Paper* (2005).

[9] Mark Harris, *"A Sentencing Conversation": Evaluation of the Koori Courts Pilot Program October 2002-October 2004* (2006) at 15.

Third, the courts discussed in this article are not Indigenous controlled 'community courts'. Although such courts currently exist in other countries such as the United States and Papua New Guinea, they do not presently exist in Australia.[10]

The common features of the courts are that: (1) an offender must be Indigenous (or in some courts, Indigenous or South Sea Islander; although in the Northern Territory there is no such restriction) and must have entered a guilty plea or was found guilty in a summary hearing;[11] (2) the offender agrees to having the matter heard in the Indigenous sentencing court; (3) the charge is one that is normally heard in a Magistrates' Court; (4) the offence must have occurred in the geographical area covered by the court (although there has been a recommendation made to relax this requirement in Victoria);[12] and (5) a magistrate retains the ultimate power in sentencing the offender.[13]

During the sentencing process, a magistrate typically sits at eye-level with an offender, usually at a bar table or in a circle rather than on an elevated bench. All the courts involve Elders or Respected Persons, but the role and degree of their participation varies greatly.[14] The offender is

[10] Law Reform Commission of Western Australia, *Aboriginal Customary Laws Project 94: Discussion Paper* (2005) at 142.
[11] In Victoria, the Koori Court will also have jurisdiction to deal with an offence where the defendant 'intends to consent to the adjournment of the proceeding to enable him or her to participate in a diversion program': *Magistrates' Court Act* 1989 (Vic) s 4F(c)(iii).
[12] See recommendation 17 in Mark Harris, *"A Sentencing Conversation": Evaluation of the Koori Courts Pilot Program October 2002-October 2004* (2006) at 12.
[13] Elena Marchetti & Kathleen Daly, 'Indigenous Courts and Justice Practices in Australia' (2004) *Trends & Issues in Crime and Criminal Justice no 277* <http://www.aic.gov.au/publications/tandi2/tandi277.html> accessed 5 December 2006.
[14] For example, in some jurisdictions the Elder or Respected Person simply appears at the court hearing to advise the magistrate and to talk to the offender about their behaviour. In other jurisdictions the Elder or Respected Person will participate in writing a pre-sentence report, will interview the offender and/or will continue to monitor the offender's behaviour and support the offender to change their behaviour after sentencing.

encouraged to appear before the court with a support person, usually a family member, friend, or partner. This person will sit beside the offender during the hearing and will be invited to speak to the court. There is a greater degree of interaction between an offender and a magistrate, which contrasts with mainstream Magistrates' Court hearings, where the interaction is normally between a magistrate and an offender's legal representative. There is also a greater involvement of Indigenous court workers who monitor an offender's progress after the sentence hearing.[15]

Victoria, New South Wales, and the two territories place limitations on the types of offences that can be heard in their courts. Victoria does not allow sexual offences or family violence offences;[16] New South Wales does not allow offences of malicious wounding, grievous bodily harm, rape, other sexual assault offences and stalking, offences involving the use of a firearm, certain drug offences and offences relating to child prostitution or pornography;[17] the Australian Capital Territory does not allow sexual offences and offenders who are addicted to drugs (other than cannabis);[18] and the Northern Territory does not allow sexual offences and it is also cautious about considering violent offences, domestic violence offences and offences where the victim is a child.[19] Family violence and sexual assault offences are viewed by some communities as being too complex for the Indigenous sentencing courts and as offences that might have an adverse

[15] Elena Marchetti & Kathleen Daly, 'Indigenous Courts and Justice Practices in Australia' (2004) *Trends & Issues in Crime and Criminal Justice no 277* <http://www.aic.gov.au/publications/tandi2/tandi277.html> accessed 5 December 2006. Not all courts have appointed an Indigenous court worker to specifically work in the Indigenous sentencing court. For example, Queensland uses an Indigenous community corrections officer as the nominated 'Indigenous court worker' but this person is employed by Queensland Corrective Services rather than the Magistrates' Court. There has been a recommendation made in Queensland that an Indigenous person be appointed to work in each Indigenous sentencing court.

[16] *Magistrates' Court Act* 1989 (Vic) s 4F(1)(b)(i) and (ii).

[17] *Criminal Procedure Act* 1986 (NSW) s 348.

[18] Australian Capital Territory Department of Justice and Community Safety, 'Final Interim Practice Direction: Ngambra Circle Sentencing Court' (2004) at clause 14 and 15 <http://www.courts.act.gov.au/magistrates/index.html2006> accessed 12 June 2006.

[19] Northern Territory Department of Justice, *Community Court Darwin: Guidelines* (2005) <http://www.nt.gov.au/justice/ntmc/docs/community_court_guidelines_27.05.pdf> accessed 11 June 2006.

effect on the collaborative nature of the courts.[20] Informal discussions with key people involved with the courts have also revealed a concern that the penalties imposed in family violence and sexual assault cases may appear to outsiders as being too 'lenient'. For this reason it is believed that such offences are better left for sentencing by the mainstream court system. Indeed, with the Federal Government's focus in 2006 on the physical and sexual abuse of Indigenous women and children, debates surrounding the question of how to best address family violence have intensified.[21]

Three reasons are generally given for establishing these courts:[22] (1) they can reduce the over-representation of Indigenous people in custody; (2) they offer an opportunity for governments to address key recommendations made by the Royal Commission into Aboriginal Deaths in Custody, in particular, those centred on reducing Indigenous incarceration, increasing the participation of Indigenous people in the justice system as court staff or advisors, and identifying mechanisms for Indigenous communities to resolve disputes and deal with offenders in culturally appropriate ways; and (3) to complement Justice Agreements that have been forged in Australian states and territories.[23]

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[20] Mark Harris, *"A Sentencing Conversation": Evaluation of the Koori Courts Pilot Program October 2002-October 2004* (2006) at 122-123.

[21] Larissa Behrendt, 'Politics Clouds Issues of Culture & "Customary Law"' (2006) 26 *Proctor* 14.

[22] These are reasons given in promotional material or in articles or reports (including media reports, as a way to introduce a story), which are written about the courts, as opposed to the aims and objectives set out in legislation or other primary material related to the courts.

[23] Daniel Briggs & Kate Auty, 'Koori Court Victoria – Magistrates Court (Koori Court) Act 2002' (Paper Presented at the Australian and New Zealand Society of Criminology Annual Conference, Sydney, October 2003); Ivan Potas, Jane Smart, Georgia Brignell, Brendan Thomas & Rowena Lawrie, *Circle Sentencing in New South Wales: A Review and Evaluation* (2003); Queensland Department of Justice and Attorney-General, *Factsheet: Murri Court* (2003) <http://www.justice.qld.gov.au/courts/factsht/C11MurriCourt.htm> accessed 31 May 2006.

These often-cited reasons are a governmental and bureaucratic gloss on more profound changes in court-community relationships and practices, which arise with greater trust between 'white justice' and members of Indigenous communities. Specifically, we find that the courts (1) encourage a more open and honest level of communication between an offender and magistrate; (2) place greater reliance on Indigenous knowledge in the sentencing process that includes informal modes of social control both inside and outside the courtroom; and (3) may fashion more appropriate penalties that are better suited to an offender's situation.[24] They may also have collateral, longer-term effects such as strengthening Indigenous communities by re-establishing the authority of Elders. Ultimately, rates of offending and incarceration may be reduced, but these are long-term aims, and surely they cannot be accomplished by the presence of these courts alone.

In Part 2, which follows, we sketch affinities between Indigenous sentencing courts, restorative justice, and therapeutic jurisprudence; and we trace the ways in which proponents merge and blend these practices. Then, in Part 3, we turn to a detailed discussion of the aims and objectives of Indigenous sentencing courts as these are stated in legislation, Hansard, practice directions, court guidelines and in other materials produced by court authorities and by judicial officers involved with the courts. Part 4 compares the similarities and differences in Indigenous sentencing courts, restorative justice, and therapeutic jurisprudence. From it, we elucidate a distinctive theoretical and jurisprudential framework for Indigenous sentencing courts.

2. New Justice Practices: Affinities and Merging of Terms

[24] Elena Marchetti & Kathleen Daly, 'Indigenous Courts and Justice Practices in Australia' (2004) *Trends & Issues in Crime and Criminal Justice no 277* <http://www.aic.gov.au/publications/tandi2/tandi277.html> accessed 5 December 2006.

During the 1990s, a variety of new courts and justice practices emerged in Australia. They include restorative justice conferences, Indigenous sentencing courts, and many types of specialist or problem-oriented (also termed problem-solving) courts. The justice practices are typically associated with principles of restorative justice or therapeutic jurisprudence or both.

The ground was softened for these new courts and justice practices, with social movements in the 1960s and 1970s that called for more humane and effective responses to offenders and victims in the criminal process, and with the emergence of concepts of informal justice and popular justice, which vested more authority in lay actors and community organisations. Indigenous sentencing courts, restorative justice, and problem-oriented or specialist courts (often guided by therapeutic jurisprudence, but not always) share affinities in that they emphasise the need for more effective forms of communication in relating to and helping offenders desist from crime and reintegrate into a community. When they emerged, all identified failures with mainstream criminal justice, and all sought methods of 'doing justice' in different ways.

Although each justice practice emerged independently, connections are drawn among them. For example, therapeutic jurisprudence proponent David Wexler merges therapeutic jurisprudence with restorative and Indigenous justice when he says that 'therapeutic jurisprudence … [is similar] to concepts such as restorative justice … concepts that originated in tribal justice systems

of Australia, New Zealand, and North America'.[25] Leading restorative justice and Indigenous justice advocates have done the same.

A typical account of restorative justice, such as that given by John Braithwaite is to say that it is 'ground[ed] in traditions of justice from the ancient Arab, Greek, and Roman civilisations that accepted a restorative approach' and that '... philosophies of New Zealand Maori, North American Indian, [and] Christian ... restorative justice have been the sources of deepest influences on the contemporary social movement'.[26] In 1996, Indigenous justice advocates Robert Yazzie and James Zion described Navajo peacemaking processes and outcomes as restorative justice ('Navajo restorative justice is actually restorative justice'),[27] but by 2001, after the term therapeutic jurisprudence was in wide use, Zion 2001-02 said that the 'Navajo Nation judicial system anticipated the therapeutic jurisprudence movement about 20 years ago by integrating traditional Navajo justice concepts into a western-styled judicial system'.[28] These shifts in terminology that relate Navajo justice first to restorative justice and then to therapeutic jurisprudence, show how Indigenous theories are incorporated within (or speakers adapt to) emerging 'new ideas' in justice. But, as we shall show below, there are key differences.

What, then, are restorative justice and therapeutic jurisprudence? How do these justice ideas relate to specialist or problem-solving courts or to Indigenous sentencing courts? We briefly

[25] David Wexler, 'Therapeutic Jurisprudence: It's Not Just for Problem-Solving Courts and Calendars Anymore' in Carol R Flango, Neal Kauder, Kenneth G Pankey Jr & Charles Campbell (eds), *Future Trends in State Courts 2004* (2004) 87 at footnote 15.
[26] John Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' in Michael Tonry (ed), *Crime and Justice: A Review of Research* (1999) 1 at 1.
[27] Robert Yazzie & James Zion, 'Navajo Restorative Justice: The Law of Equality and Justice' in Burt Galaway & Joe Hudson (eds), *Restorative Justice: International Perspectives* (1996) 157 at 172. Note, however, that Navajo peacemaking processes are not like Indigenous sentencing courts. The Navajo justice system is an autonomous system based on traditional beliefs and knowledge, which uses some principles from restorative justice and therapeutic jurisprudence.
[28] James Zion, 'Navajo Therapeutic Jurisprudence' (2001-02) 18 *Touro Law Review* 563 at 569.

consider these questions to clarify sources of confusion and the need to draw jurisprudential distinctions.

Restorative justice resists easy definition because it encompasses a variety of practices at different stages of the criminal process, including *diversion* from court prosecution, actions taken *in parallel* with court decisions, and meeting between victims and offenders *at any stage* of the criminal process (for example, arrest, pre-sentencing, and prison release).[29] It can be used by all agencies of criminal justice (police, courts, and corrections). It is also used in non-criminal decision-making contexts such as child protection and school discipline. It is sometimes associated with the resolution of broad political conflict (such as South Africa's Truth and Reconciliation Commission), although transitional justice may be the more appropriate term. Definitions vary widely. A popular one, proposed by Tony Marshall is a 'process whereby all the parties with a stake in a particular offence come together to resolve collective how to deal with the aftermath of the offence and its implications for the future'.[30] Other advocates suggest this definition is too narrow because it includes only face-to-face meetings, it emphasises process over the desired outcome of 'repairing the harm', and it ignores the potential need for coercive sanctions.[31]

[29] For discussion of the problems of definition, see Gerry Johnstone, 'Introduction: Restorative Approaches to Criminal Justice' in Gerry Johnstone (ed), *A Restorative Justice Reader: Texts, Sources, Context* (2003) 1; for discussion of the history and application of, and research on, restorative justice in Australia and New Zealand, see Kathleen Daly, 'Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects' in Allison Morris & Gabrielle Maxwell (eds), *Restorative Justice for Juveniles: Conferencing Mediation and Circles* (2001) 59; Kathleen Daly, 'Restorative Justice: The Real Story' (2002) 4 *Punishment & Society* 55; Kathleen Daly & Hayes Hennessey, 'Restorative Justice and Conferencing in Australia' (2001) *Trends & Issues in Crime and Criminal Justice no 186* <http://www.aic.gov.au/publications/tandi/tandi186.htm> accessed 5 December 2006; Kathleen Daly & Hayes Hennessey, 'Restorative Justice and Conferencing' in Adam Graycar & Peter Grabosky (eds), *Handbook of Australian Criminology* (2002) 294.

[30] Tony F Marshall, *Restorative Justice: An Overview* (1996) at 37.

[31] Lode Walgrave, 'How Pure Can a Maximalist Approach to Restorative Justice Remain? Or Can a Purist Model of Restorative Justice Become Maximalist?' (2000) 3 *Contemporary Justice Review* 415 at 418.

The practices associated with restorative justice include conferences, circles,[32] and sentencing circles (although we would argue that circle courts in Australia are types of Indigenous sentencing courts). Common elements of restorative justice are an informal process; a dialogic encounter among lay (not legal) actors, including offenders, victims, and their supporters; an emphasis on victims describing how the crime affected them and offenders taking responsibility for their acts; and consensual decision-making in deciding a penalty, which is normally centred on 'repairing the harm' caused by the crime. A key point to be made is that practices that are now associated with restorative justice, such as conferences, came first; the term and principles of restorative justice came later.[33] Restorative justice, both in principle and practice, is more informal than problem-oriented or specialist courts, many (although not all) of which are guided by the idea of therapeutic jurisprudence. And, in principle, restorative justice gives far more attention to the experiences of crime victims and to their role in penalty setting and justice.

Therapeutic jurisprudence 'focuses attention on the … law's impact on emotional life and psychological well-being' and 'proposes … [to] use the tools of the behavioural sciences to study the therapeutic and antitherapeutic impact of the law'.[34] The term was first introduced in the United States in the late 1980s for mental health cases,[35] but has since expanded to include family, criminal, and civil cases. A leading proponent, Judge David Wexler, argues that

[32] Circles, as used in the United States of America, are used for white and African-American people, at least in Minnesota.

[33] See Kathleen Daly & Russ Immarigeon, 'The Past, Present and Future of Restorative Justice: Some Critical Reflections' (1998) 1 *The Contemporary Justice Review* 21; Tony F Marshall, 'Restorative Justice: An Overview' in Gerry Johnstone (ed), *A Restorative Justice Reader: Text, Sources, Context* (2003) 28. In Australia and New Zealand, the idea of restorative justice began to be used widely in about 1995, some years after the passage of legislation in both countries (New Zealand in 1989 and South Australia in 1993) to establish conferences. See Kathleen Daly, 'Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects' in Allison Morris & Gabrielle Maxwell (eds), *Restorative Justice for Juveniles: Conferencing Mediation and Circles* (2001) 59.

[34] Bruce J Winick & David Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003) at 7.

[35] David Wexler, *Therapeutic Jurisprudence, the Law as a Therapeutic Agent* (1990).

therapeutic jurisprudence and problem-oriented courts were 'born at the same time and have always been closely connected, but they are close cousins rather than identical twins'.[36]

Problem-oriented courts were established in 1989 in the United States, with the founding of the first drug court. Like the relationship of conferences to restorative justice, drug courts came first and were then linked to the term and principles of therapeutic jurisprudence.[37] Similar developments occurred in Australia. The first Australian drug court was established in 1999 without using the term therapeutic jurisprudence.[38] The term has grown broader with time. For example, Bruce Winick and David Wexler now propose that therapeutic jurisprudence principles can be brought into *all* judicial contexts to 'help people solve crucial life problems'.[39] With a broader application, which is focused on a *way of judging*, judicial officers

- can interact with individuals in ways that induce hope and that will motivate them to [use] available treatment programmes;
- can use techniques [to] encourage offenders to confront and solve their problems, to comply with rehabilitation programmes, and to develop law-abiding coping skills;
- will need to develop enhanced interpersonal skills, understand the psychology of procedural justice, and learn to be effective risk managers.[40]

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[36] David Wexler, 'Therapeutic Jurisprudence: It's Not Just for Problem-Solving Courts and Calendars Anymore' in Carol R Flango, Neal Kauder, Kenneth G Pankey Jr & Charles Campbell (eds), *Future Trends in State Courts 2004* (2004) 87 at 87.

[37] Arie Freiberg, 'Problem-Oriented Courts: An Update' (2005) 14 *Journal of Judicial Administration* 178; Peggy Fulton Hora, William G Schma & John T A Rosenthal, 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America' (1999) 74 *Notre Dame Law Review* 439.

[38] Arie Frieberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pramatic Incrementalism?' (2002) 20 *Law in Context* 6 at 10-11.

[39] Bruce J Winick & David Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003) at 8.

[40] Bruce J Winick & David Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003) at 8.

In addition to a *way of judging*, therapeutic jurisprudence continues to be associated with a *set of practices* that normally feature in problem-oriented courts, which include:

- integration of treatment services with judicial case processing;
- ongoing judicial intervention and close monitoring; and
- multi-disciplinary involvement and collaboration with community-based and government organisations.[41]

According to Greg Berman and John Feinblatt, problem-solving (or problem-oriented) courts have these elements:

> [They] use their authority to forge new responses to chronic social, human, and legal problems … that have proven resistant to conventional solutions. They seek to broaden the focus of legal proceedings, from simply adjudicating past facts and legal issues to changing the future behaviour of litigants and ensuring the future well-being of communities. And they attempt to fix broken systems, making courts (and their partners) more accountable and responsive to their primary customers – the citizens who use courts every day, either as victims, jurors, witnesses, litigants, or defendants.[42]

These courts are focused on responding to the problems which may have contributed to an offender's criminal behaviour,[43] and as we see from Berman and Feinblatt, they may have

[41] Arie Frieberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pramatic Incrementalism?' (2002) 20 *Law in Context* 6 at 11.
[42] Greg Berman & John Feinblatt, 'Problem-Solving Courts: A Brief Primer' (2001) 23 *Law & Policy* 125 at 126.
[43] Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 7.

broader aspirations such as "fix[ing] broken systems" and being "responsive to ... the citizens who use courts every day ..." By comparison, specialist courts are defined as having 'limited or exclusive jurisdiction in a field of law presided over by a judicial officer with experience and expertise in that field'.[44] According to Freiberg, an example of a specialist court includes the courts in New South Wales which deal with child sexual assault. Specialist courts, he argues, may not necessarily adopt a problem-solving approach; rather, such courts are specialised in a particular area of the law. Some specialist courts may be problem-oriented courts, but only if they adopt the problem-focused features of these latter courts. Drug, family violence and mental health courts are some of the courts that Freiberg refers to as examples of problem-oriented courts.[45]

From our review so far, the reader can broadly distinguish restorative justice and therapeutic jurisprudence. However, beginning in 2002, the area became somewhat more complex and confusing as judicial officers in the United States and Australia began to associate therapeutic jurisprudence with restorative justice, and then Indigenous sentencing courts. For example, Marilyn McMahon and David Wexler suggest in the introduction to a special issue of *Law in Context* that 'therapeutic jurisprudence approach resonates sympathetically with the alternative dispute resolution/restorative justice movement'.[46] A year later, Magistrate Michael King not only linked therapeutic jurisprudence with restorative justice, but also with the rationale for Indigenous justice practices in Western Australia (the Wiluna Aboriginal Court and the

[44] Arie Freiberg, 'Innovations in the Court System' (Paper Presented at the Crime in Australia: International Connections, Australian Institute of Criminology Conference, Melbourne, 2004) at 2.
[45] Arie Freiberg, 'Innovations in the Court System' (Paper Presented at the Crime in Australia: International Connections, Australian Institute of Criminology Conference, Melbourne, 2004) at 2.
[46] Marilyn McMahon & David Wexler, 'Therapeutic Jurisprudence: Developments and Applications in Australia and New Zealand' (2002) 20 *Law in Context* 1 at 1.

Yandeyarra Circle Court).[47] He and other magistrates say they are using a therapeutic jurisprudence principle of 'community consultation and collaboration' in establishing these courts. Thus, a therapeutic *way of judging* appears not to be limited to problem-oriented courts or specialist courts, but can be used in any court setting or a penalty-setting context, including restorative justice meetings and Indigenous justice practices. In 2005, Magistrates King and Kate Auty described the Koori Courts in Victoria and Aboriginal court processes in Western Australia as being 'therapeutic' because the courts encourage 'respect for the process', Indigenous Elders and Indigenous culture; they involve key players in the court process who are all intent on ensuring that justice is done, that offenders 'take responsibility for their actions' and that some sort of healing and rehabilitation occurs; and they promote 'job satisfaction and … positive cultural change'.[48]

Compared to the literature on restorative justice and therapeutic jurisprudence (with their associated conference or court practices), far less is said about the theoretical or jurisprudential underpinnings of Indigenous sentencing courts. Some scholars note that the shaming and healing elements of Indigenous courts are similar to the desired elements of restorative justice conferences.[49] Others, such as Freiberg claim that '[t]he [Indigenous] courts are not problem-solving courts … rather [they] can be conceived of as a specialist court with some problem-solving and therapeutic overtones' because '[their] key features are participation, co-ordination of

[47] Michael S King, 'Applying Therapeutic Jurisprudence in Regional Areas - the Western Australian Experience' (2003) 10 *E Law: Murdoch University Electronic Journal of Law* at [44-45] <http://www.murdoch.edu.au/elaw/issues/v10n2/king102.html> accessed 5 December 2006.
[48] Michael S King, 'Therapeutic Jurisprudence: An Emerging Trend in Courts of Summary Jurisdiction' (2005) 30 *Alternative Law Journal* 69 at 71.
[49] See for example, Doug Dick, 'Circle Sentencing of Aboriginal Offenders: Victims Have a Say' (2004) 7 *The Judicial Review* 57; Michael S King, 'Therapeutic Jurisprudence: An Emerging Trend in Courts of Summary Jurisdiction' (2005) 30 *Alternative Law Journal* 69.

service delivery and community involvement'.[50] At a general level, we can see similarities among restorative justice, therapeutic jurisprudence and Indigenous sentencing courts. All emphasise *improved communication* between legal authorities, offenders, victims, and community members, using plain language and reducing some legal formalities. All emphasise *procedural justice*, that is, treating people with respect, listening to what people say, and being fair to everyone. All suggest the value of *using persuasion and support* to encourage offenders to be law-abiding, and all assume that *incarceration should be used as a penalty of last resort* (except some procedures in drug courts). However, our view, which is shared by others who research Indigenous justice, is that Indigenous sentencing courts have a distinctive theoretical and jurisprudential basis, which cannot be simply derived from or subsumed by restorative justice or therapeutic jurisprudence.

For example, Mark Harris draws analogies with American community courts and with therapeutic jurisprudence, but he concludes that Koori Courts are 'more than just an example of restorative justice or therapeutic jurisprudence'; they are in fact 'unique unto themselves'.[51] A similar view was reached by the Western Australian Law Reform Commission in its discussion paper on Aboriginal Customary Laws, where the point was made that Indigenous courts should not be viewed as problem-oriented or problem-solving courts:

[50] Arie Freiberg, 'Innovations in the Court System' (Paper Presented at the Crime in Australia: International Connections, Australian Institute of Criminology Conference, Melbourne, 2004) at 8.
[51] Mark Harris, *"A Sentencing Conversation": Evaluation of the Koori Courts Pilot Program October 2002-October 2004* (2006) at 134. American community courts are courts that are located in a particular neighbourhood and deal with 'quality of life' crimes. They differ from problem-solving courts in that their focus is not on addressing the problems of an offender group but rather to resolve community problems: Victoria Malkin, 'Community Courts and the Process of Accountability Consensus and Conflict at the Red Hook Community Justice Centre' (2003) 40 *American Criminal Law Review* 1573.

> While it is clear that Aboriginal courts are specialist courts, there are differing views as to whether Aboriginal courts should be classified as problem-solving courts and whether they operate within the framework of therapeutic jurisprudence. The commission has strong reservations about the categorisation of Aboriginal courts as problem-oriented or problem-solving courts. If there is a problem to be solved, it is the failure of the criminal justice system to accommodate the needs of Aboriginal people and to ensure that they are fairly treated within that system.[52]

In analysing Canadian circle sentencing, Ross Green observes that 'a prominent goal of circle sentencing is to promote both community involvement in conducting the circle and consensus among participants during the circle'.[53] He emphasises the role of Indigenous community engagement and participation in justice practices. Likewise, Luke McNamara says that Canadian circle courts represent a shift away from 'culturally inappropriate and unfair non-Aboriginal sentencing processes' towards process that embrace a 'genuine respect for, and meaningful co-operation with, Aboriginal law and justice values and processes'.[54] In both cases, the authors cite a different relationship of 'white law and justice' to the Indigenous domain.

In sum, restorative justice and therapeutic jurisprudence lack a political dimension that is more often present in Indigenous sentencing courts, specifically, the potential of these courts to empower Indigenous communities, to bend and change the dominant perspective of 'white law' through Indigenous knowledge and modes of social control, and to come to terms with a colonial past.

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[52] Law Reform Commission of Western Australia, *Aboriginal Customary Laws Project 94: Discussion Paper* (2005) at 146.
[53] Ross Gordon Green, *Justice in Aboriginal Communities* (1998) at 72. See also at p 53 where Green describes the role of restorative justice in certain Canadian sentencing court initiatives.
[54] Luke McNamara, 'The Locus of Decision-Making Authority in Circle Sentencing: The Significance of Criteria and Guidelines' (2000) 18 *Windsor Yearbook of Access to Justice* 60 at 61.

3. Aims, Objectives, Practices and Protocols of Indigenous Sentencing Courts

Most Indigenous sentencing courts in Australia are based on a model used by the South Australian Nunga Court, the first Indigenous sentencing court established in an Australian urban centre. The jurisdictions using a different model are New South Wales and the Australian Capital Territory, which use the Circle Court model, and the Northern Territory Community Courts, which use a combination of the Nunga and Circle Court models. The Circle Courts are loosely based on the Canadian Circle Court model.[55] The main differences between the Nunga and Circle Court models are as follows: the Circle Court hearings are often held in a venue that is culturally significant to the local Indigenous community instead of the mainstream Magistrates' or Local Court; the participants in a Circle Court sit in a circle rather than sitting around a Bar table or in the normal courtroom seats; victims have a greater degree of participation in Circle Courts; and the Elders in a Circle Court have a greater degree of participation in the framing of the penalty imposed on an offender.

The Victorian Koori Courts were the first (and thus far, the only) Indigenous sentencing courts to be established under a separate legislative framework.[56] More recently New South Wales and South Australia have amended their criminal court procedure and sentencing Acts to formally recognise their Indigenous sentencing court processes.[57] Prior to these amendments the courts

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[55] Ivan Potas, Jane Smart, Georgia Brignell, Brendan Thomas & Rowena Lawrie, *Circle Sentencing in New South Wales: A Review and Evaluation* (2003) at 3.
[56] *Magistrates' Court Act* 2002 (Vic) ss 4A to 4G, 16(1A)(e) and (f), 17A, sch 8 s 28 and *Children and Young Persons Act* 1989 (Vic) ss 8, 16A to 16D, 27A, 280BA, sch 3 s 27.
[57] *Criminal Procedure Regulation* 2005 (NSW) sch 4; *Criminal Procedure Act* 1986 (NSW) ch 7, pt 4; *Criminal Law (Sentencing) Act* 1988 (SA) s 9C. According to s 3A the South Australian *Criminal Law (Sentencing) Act* applies to the sentencing of a 'youth'.

were operating under general sentencing provisions and certain practice directions. The Queensland Murri Courts, the Northern Territory Community Courts and the Australian Capital Territory Ngambra Circle Sentencing Court operate under general sentencing provisions, 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.[58] Procedurally, the Northern Territory Community Courts follow a set of 'Guidelines' and the Ngambra Circle Sentencing Court follows an 'Interim Practice Direction'.

The presence of specific legislation governing a court's establishment can affect its scope and process. For example, one of the reasons given by a Queensland Magistrate as to why the Elders of the Murri Court do not have more involvement in the determination of the sentence (in the way the Elders do in New South Wales) is because there is no specific legislative framework allowing the Court to operate too differently to the mainstream Magistrates' Court. Similarly, one of the reasons given by a policy adviser in the Northern Territory as to why the Community Courts are open to all offenders, whether Indigenous or not, is because the Courts were not established under a specific Act.

On the other hand, another Queensland Magistrate expressed concern about the development of legislation to govern the Murri Courts because he believed that the process would become 'state-led' and government controlled. Likewise, a South Australian magistrate, who at the time had been working in the Nunga Court for about a year, expressed concern that the experimental qualities of the court would be compromised by drafting legislation too early. He recalled that

[58] *Penalties and Sentences Act* 1992 (Qld) ss 9(2)(o), 9(7) and 9(8); *Juvenile Justice Act* 1992 (Qld) s 150(1)(g); *Sentencing Act* 2005 (NT) s 104A; *Crimes (Sentencing) Act* 2005 (ACT) – s 33 simply states that the cultural background of an offender may be taken into account when sentencing.

early in 2001, draft legislation had been prepared to provide a legislative basis for all the 'specialist courts':

> It was the most complicated thing. It was done by a parliamentary drafts[person] who never bothered to discover what the different courts were doing, what their different needs were. … One of the good things about special interest courts is that [they arise] through personal initiative, in a somewhat ad hoc manner, but with a kind of frontier mentality, which is quite exciting. It's very experimental. … To get very strict legislative framework at an early stage is going to be counterproductive, as much as politicians and the Attorney-General would like it.[59]

Table 2 summaries the aims and objectives of the courts in each jurisdiction based on information contained in legislation, Hansard, practice directions, court guidelines and in other materials produced by court authorities and by judicial officers involved with the courts.

Table 2: Legislation, Protocol or Guidelines and State Aims of the Court

Jurisdiction	Legislation/Protocol/ Guideline	Aims
Australian Capital Territory	Interim Practice Direction: Ngambra Circle Sentencing Court, clause 3	• 'involve Aboriginal and Torres Strait Islander communities in the sentencing process • increase the confidence of Aboriginal and Torres Strait Islander communities • reduce barriers between Courts and Aboriginal and Torres Strait Islander communities • provide culturally relevant and effective sentencing options for Aboriginal and Torres Strait Islander offenders • provide the offender concerned with support services that will assist the offender to overcome his or her offending behaviour • provide support to victims of crime and enhance the rights and place of victims in the sentencing process • reduce repeat offending in Aboriginal and Torres Strait Islander communities'
New South Wales	*Criminal Procedure Regulations 2005* (NSW), sch	• 'include members of Aboriginal communities in the sentencing process • increase the confidence of Aboriginal communities in the sentencing

[59] Kathleen Daly, Interview with South Australian Magistrate (Face-to-face interview, November 2001).

	4, s7	process • reduce barriers between Aboriginal communities and the courts • provide more appropriate sentencing options for Aboriginal offenders • provide effective support to victims of offences by Aboriginal offenders • provide for the greater participation of Aboriginal offenders and their victims in the sentencing process • increase the awareness of Aboriginal offenders of the consequences of their offences on their victims and the Aboriginal communities to which they belong • reduce recidivism in Aboriginal communities'
Northern Territory	Community Court Darwin: Guidelines, clauses 11 and 12	• 'achieve more culturally appropriate sentencing outcomes • increase community safety while decreasing offending rates • increase community participation and knowledge in the sentencing process • make the community, families and the offender more accountable • provide support for, and increased participation of victims • rehabilitate the offender and give them the opportunity to make amends to the community'
Queensland	'Factsheet: What is the Murri Court', Department of Justice and Attorney-General, Queensland. Paper written by Magistrate Annette Hennessy, 2006. (Legislation is currently being proposed.)	Factsheet: • 'take into account cultural issues by providing a forum where Aboriginal and Torres Strait Islanders have an input into the sentencing process' Hennessy paper: [60] • honour the importance of Indigenous community input in the sentencing process • provide the judicial officer with awareness of the social context of the offences and offender's life in order to impose more successful and culturally appropriate bail and sentencing orders • divert offenders from imprisonment by imposing other appropriate penalties • check the rate of Indigenous defendants failing to appear in court or failing to comply with community-based orders • 'ethos of the interaction is to strongly condemn the offending behaviour … whilst encouraging the offender … to rehabilitate themselves and make redress to the community'[61]
South Australia	'Information Bulletin: Aboriginal (Nunga) Courts', Office of Crime Statistics and Research, South Australia.	Information Bulletin: • 'provide a more culturally appropriate setting than mainstream courts • reduce the number of Aboriginal deaths in custody • improve court participation rates of Aboriginal people • break the cycle of Aboriginal offending • make justice pro-active by seeking opportunities to address underlying crim-related problems with a view to making a difference • recognise the importance of combining punishment with help so that courts are used as a gateway to treatment • involve victims and the community as far as possible in the ownership of the court process'

[60] The following information was taken from Annette Hennessey, 'The Queensland Murri Court' (Paper Presented at the Queensland Law Society Legal Educators & Young Lawyers Conference, Brisbane, 9 June, 2006).
[61] Annette Hennessey, 'The Queensland Murri Court' (Paper Presented at the Queensland Law Society Legal Educators & Young Lawyers Conference, Brisbane, 9 June, 2006) at 4.

	Kathleen Daly, Interview with Magistrate Chris Vass, the magistrate who first established an Indigenous sentencing court in Australia (Face-to-face interview, September 2001)	Vass Interview: • 'not just about keeping people out of prison. … [M]ain role is to gain the confidence of the Aboriginal people, to have Aboriginal people trust the legal system, make them feel like they have a say, make them feel more comfortable with what is happening, encourage them to be at court, encourage them to feel some ownership of the court process'
Victoria	*Magistrates' Court (Koori Court) Act 2002* (Vic) and *Children's Court (Koori Court) Act 2004* (Vic), s 1. Victoria, *Parliamentary Debates*, Legislative Assembly, 24 April 2002, 1128-32 (Mr Hulls).	• 'greater participation of the Aboriginal community in the sentencing process by the Aboriginal elder or respected person and others' • 'assist in achieving more culturally appropriate sentence for young Aboriginal people' A more detailed set of aims for the court and for community building are enumerated in the Attorney-General's Second Reading of the Bill: *Operational aims*: • 'further the ethos of reconciliation by incorporating Aboriginal people in the process and by advancing partnerships developed in the broad consultation process, which has led to this initiative being adopted • divert Koori offenders away from imprisonment to reduce their overrepresentation in the prison system • reduce the failure to appear rate at court • decrease the rates at which court orders are breached • deter crime in the community generally' *Community building aims*: • 'increase Aboriginal ownership of the administration of the law • increase positive participation in court orders and the consequent rehabilitative goals for Koori offenders and communities • increase accountability of the Koori community families for Koori offenders • promote and increase Aboriginal community awareness about community codes of conduct/standards of behaviour and to promote significant and culturally appropriate outcomes • promote and increase community awareness about the Koori court generally'

When analysing these aims, we see that the most common are to make the process more culturally appropriate and more participatory for members of the Indigenous community and the offender: all six jurisdictions include these two items.[62] Indeed, in his evaluation of the Koori Courts in Victoria, Harris states:

[62] See Australian Capital Territory Department of Justice and Community Safety, 'Final Interim Practice Direction: Ngambra Circle Sentencing Court' (2004) 2006 at clause 3.; *Criminal Procedure Regulations* 2005 (NSW) sch 4, s 7,

> Notwithstanding the success of the Koori Court in keeping people out of gaol and reducing the levels of re-offending, it seems clear that ultimately the major achievement of the Koori Court will be the manner in which it has served to increase Indigenous community participation in the justice system and recognised the status of Elders and Respected Persons.[63]

Similarly, a review conducted of the first 12 months of operation of the Nowra Circle Sentencing Court noted that reducing recidivism should not be the only goal of circle sentencing, but rather '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'.[64]

The importance of culturally appropriate and participatory processes is partly signalled in the court venue and atmosphere: all courts have Indigenous insignia, and the court space is shifted or remodelled to make the hearings more conducive for discussion and for input of Indigenous knowledge. In the Australian Capital Territory and in New South Wales, the hearings are not held in a mainstream courtroom but rather in a facility that holds cultural meaning for the local Indigenous community. In other jurisdictions, paintings or other Indigenous artwork and symbolism are displayed in the mainstream courtroom. The aim is to ensure that the offender has

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particularly paragraphs (a), (b), (c) and (d); Northern Territory Department of Justice, *Community Court Darwin: Guidelines* (2005) <http://www.nt.gov.au/justice/ntmc/docs/community_court_guidelines_27.05.pdf> accessed 11 June 2006; Queensland Department of Justice and Attorney-General, *Factsheet: Murri Court* (2003) <http://www.justice.qld.gov.au/courts/factsht/C11MurriCourt.htm> accessed 31 May 2006; Annette Hennessey, 'The Queensland Murri Court' (Paper Presented at the Queensland Law Society Legal Educators & Young Lawyers Conference, Brisbane, 9 June, 2006) at 7.; John Tomaino, *Information Bulletin: Aboriginal (Nunga) Courts* (undated) at 4; s 1 of both the *Magistrates' Court (Koori Court) Act* 2002 (Vic) and the *Children's Court (Koori Court) Act* 2004 (Vic).

[63] Mark Harris, *"A Sentencing Conversation": Evaluation of the Koori Courts Pilot Program October 2002-October 2004* (2006) at 15.

[64] Ivan Potas, Jane Smart, Georgia Brignell, Brendan Thomas & Rowena Lawrie, *Circle Sentencing in New South Wales: A Review and Evaluation* (2003) at 52.

a greater understanding of and respect for their own culture and for the process. The Indigenous community, through its Elders or Respected Persons, has the opportunity to influence outcomes. Court hearings take up much more of the court's time due to the increased participation of the offender and the community; a fact which has resulted in the courts being designated dedicated times to conduct the hearings.[65] Although the hearings are meant to be more informal in order to encourage understanding and increase communication of all participants, the atmosphere is serious and respectful.[66]

One of the most important features of the courts is the involvement of the Elders or Respected Persons and the impact they can have on an offender's attitude and behaviour. This is closely related to the objectives of making the process more culturally appropriate and more participatory on the part of the Indigenous community. Ideally, a positive impact occurs when an Elder or Respected Person has an existing relationship with the offender and when the offender comes to understand that he/she has 'committed an offence not only against the white law but also against the values of the … [Indigenous] community'.[67] The moral dialogue with Elders or Respected Persons can be highly personalised, calling upon the offender's obligations to family and kin, and which seeks to bring the offender back into the fold. The cultural shaming that is engendered by the participation of the Elders or Respected Persons can be more confronting (and also more constructive and positive) for a defendant in an Indigenous than a mainstream sentencing

[65] Annette Hennessey, 'The Queensland Murri Court' (Paper Presented at the Queensland Law Society Legal Educators & Young Lawyers Conference, Brisbane, 9 June, 2006) at 3.
[66] Doug Dick, 'Circle Sentencing of Aboriginal Offenders: Victims Have a Say' (2004) 7 *The Judicial Review* 57; Annette Hennessey, 'The Queensland Murri Court' (Paper Presented at the Queensland Law Society Legal Educators & Young Lawyers Conference, Brisbane, 9 June, 2006).
[67] Mark Harris, *"A Sentencing Conversation": Evaluation of the Koori Courts Pilot Program October 2002-October 2004* (2006) at 73.

process.[68] In this way the application of 'white law' is inflected by Indigenous knowledge and cultural respect.

The shaming aspect of the hearing often works best when the offender comes from the same community as the Elders or Respect Persons and an offender respects their authority.[69] This kind of synergy and connection can be more difficult to achieve in larger urban cities, but in the case of courts in smaller towns, care is taken to ensure that the Elders or Respected Persons that participate in a hearing know the offender and their family. Another role for Elders and Respected Persons is meeting with the offender as part of the sentence (e.g. formalised weekly meetings).

Another set of objectives, which all jurisdictions allude to, is to reduce offending rates and rehabilitate the offender.[70] It is too early to tell whether the courts have had an impact on the recidivism rates of offenders. We have already noted problems of assuming that courts can quickly deliver on reducing rates of offending or incarceration. Anecdotal evidence suggests that for some courts, appearance rates are higher and re-offending has decreased.[71] Finally, all of the

[68] Elena Marchetti & Kathleen Daly, 'Indigenous Courts and Justice Practices in Australia' (2004) *Trends & Issues in Crime and Criminal Justice no 277* <http://www.aic.gov.au/publications/tandi2/tandi277.html> accessed 5 December 2006.
[69] See Doug Dick, 'Circle Sentencing of Aboriginal Offenders: Victims Have a Say' (2004) 7 *The Judicial Review* 57 at 60. where Magistrate Doug Dick, one of the Magistrates involved with the Nowra Circle Sentencing Court states that '[c]ommunity representatives who have no knowledge of the offender would be of little use to Circle Court'.
[70] See Australian Capital Territory Department of Justice and Community Safety, 'Final Interim Practice Direction: Ngambra Circle Sentencing Court' (2004) 2006 at clause 3; *Criminal Procedure Regulations* 2005 (NSW) sch 4, s 7, particularly paragraphs (g) and (h); Northern Territory Department of Justice, *Community Court Darwin: Guidelines* (2005) <http://www.nt.gov.au/justice/ntmc/docs/community_court_guidelines_27.05.pdf> accessed 11 June 2006; Annette Hennessey, 'The Queensland Murri Court' 'The Queensland Murri Court' (Paper Presented at the Queensland Law Society Legal Educators & Young Lawyers Conference, Brisbane, 9 June, 2006) at 1; John Tomaino, *Information Bulletin: Aboriginal (Nunga) Courts* (undated) at 4; Victoria, *Parliamentary Debates*, Legislative Assembly, 24 April 2002, (Rob Hulls) at 1128-9.
[71] Chris Cunneen, *The Impact of Crime Prevention on Aboriginal Communities* (2001) at 68; Elena Marchetti & Kathleen Daly, 'Indigenous Courts and Justice Practices in Australia' (2004) *Trends & Issues in Crime and Criminal*

courts, except those in Queensland and Victoria, state that an objective is to support victims or to involve victims in the sentencing process.[72] Our observations suggest that with the exception of some New South Wales Circle Courts, victims do not typically attend the hearings.

From our observations and interviews to date, the main outcomes achieved by the courts have been to increase communication and understanding between offenders, magistrates and the Indigenous community. The increased understanding has lead to the imposition of penalties that are more suited to the offender. However, it is important to stress that without appropriate services or programs that would benefit an offender in a particular community, there is little scope for courts to impose penalties that can be more effective.[73] The courts have contributed to what one Aboriginal Project Officer in New South Wales calls 'two way learning': that of the magistrate (and other court officials) and that of members of the Indigenous community. Depending on the jurisdiction, we see indications of Indigenous empowerment, inside and outside the courtroom.

4. Comparing Restorative Justice, Therapeutic Jurisprudence and Indigenous Sentencing Courts

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Justice no 277 <http://www.aic.gov.au/publications/tandi2/tandi277.html> accessed 5 December 2006; Mark Harris, *"A Sentencing Conversation": Evaluation of the Koori Courts Pilot Program October 2002-October 2004* (2006) at 85-87; Annette Hennessey, 'The Queensland Murri Court' 'The Queensland Murri Court' (Paper Presented at the Queensland Law Society Legal Educators & Young Lawyers Conference, Brisbane, 9 June, 2006) at 8; John Tomaino, *Information Bulletin: Aboriginal (Nunga) Courts* (undated) at 7.

[72] See Australian Capital Territory Department of Justice and Community Safety, 'Final Interim Practice Direction: Ngambra Circle Sentencing Court' (2004) 2006 at clause 3; *Criminal Procedure Regulations* 2005 (NSW) sch 4, s 7, particularly paragraphs (e) and (f); Northern Territory Department of Justice, *Community Court Darwin: Guidelines* (2005) <http://www.nt.gov.au/justice/ntmc/docs/community_court_guidelines_27.05.pdf> accessed 11 June 2006; John Tomaino, *Information Bulletin: Aboriginal (Nunga) Courts* (undated) at 4.

[73] Ivan Potas, Jane Smart, Georgia Brignell, Brendan Thomas & Rowena Lawrie, *Circle Sentencing in New South Wales: A Review and Evaluation* (2003) at 52.

Table 3 lists the ways that restorative justice, therapeutic jurisprudence and Indigenous sentencing courts are similar and different, using practices in Australia as our point of reference. Justice practices and courts may vary in other countries.

Table 3: Differences and Similarities in Restorative Justice, Therapeutic Jurisprudence and Indigenous Sentencing Courts in Australia

Points of Difference/ Similarity	Restorative Justice	Therapeutic Jurisprudence	Indigenous Sentencing Courts
1. Site of hearing/practice	Not court-centred (eg meetings take place in community centres)	Court-centred	Both court-centred and not court-centred, but the site is redecorated using culturally appropriate insignia
2. Stage of criminal justice process	All stages: diversion from court prosecution; in parallel with court decisions; meetings between offender and victim at any stage (eg arrest, pre-sentence, pre-prison release)	All stages for the role of judicial offer; post guilty plea and pre-sentence or sentence hearing for problem-oriented courts	Sentence hearing
3. Admission of 'guilt'	Required	Normally required, with some exceptions (eg mental health courts)	Required
4. Knowledge base	Lay actors such as victims and their supporters and other community members (such as fire safety people, school principals)	Community-based and government treatment and service organisations	Elders or Respected Persons and supporters
5. Interaction in the justice process	Between offender, victims, supporters, police officer and coordinator	Between offender, judicial officer, and community-based and government organisations	Between magistrate, Elders or Respected Persons, offender and supporters
6. Relationship building	Between offender, victim and community	Legal actors (especially judicial officers) and treatment and service organisations act as teams to build relationship with offender	'White justice' and Indigenous people and offender
7. Focus of the hearing/practice	Addressing needs of both offender and victim	Addressing needs of offender and correcting law and legal processes to be more humane and holistic	Addressing needs of offender (and to a lesser degree victim) and Indigenous community
8. People seeking change	Policy-makers, administrators and practitioners (police and co-	Judicial officers	Indigenous groups, magistrates and sometimes policy makers

	ordinators) and therefore more legislatively based.		
9. Aspirations	Hold offender accountable, address questions victims have about the offence, and repair the harm caused. (A sincere apology may occur but is not expected.)	Induce hope in an offender in ways that will motivate him/her to use available treatment programs; encourage more sympathetic legal processes	Rebuild Indigenous communities; make court processes more culturally appropriate; engender greater trust between Indigenous communities and court staff; more open exchange of information in court

One major similarity across the three is that each relies on people who are not normally involved with criminal court hearings to participate in the hearings and to inform the court about the offender and their situation (Items 4 and 5 in Table 3). Although the types of people who participate in each process may vary, there is a common understanding that the key people who are normally involved in court hearings, such as defence lawyers, prosecutors and judges, are not necessarily the only people who should be involved in determining what happens to offenders. Courts using restorative justice practices rely heavily on lay actors such as victims, supporters of either the offender or the victim, and other community members; courts using therapeutic jurisprudence rely mainly on specialist professionals and organisations, which can provide information about treatment and rehabilitation services; and Indigenous sentencing courts rely heavily on Elders, Respected Persons or other members of the local Indigenous community. These groups of people do not traditionally participate in criminal court proceedings, although some victims may provide a victim impact statements in regular sentencing hearings.[74] The inclusion of different groups of people in sentencing changes its focus from one that is more punitive to one which is more rehabilitative or reconciliatory.

[74] Jonathon Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32 *Journal of Law and Society* 294 at 295-296; Mark Israel, 'Victims and Criminal Justice' in Andrew Goldsmith, Mark Israel & Kathleen Daly (eds), *Crime and Justice: A Guide to Criminology* (2006) 395 at 395-396.

Another similarity is that none is engaged in a determination of facts about an offender's guilt (Item 3 in Table 3). Although mental health courts, which are often associated with therapeutic jurisprudence, are sometimes involved with determining whether or not a person is fit to stand trial, they are still not, in such matters, addressing the question of a person's guilt. The central task for all three processes, then, is how to best deal with an offender's behaviour after the offender has entered a guilty plea or has been found guilty. Thus, as yet, none of the practices is concerned with fact-finding, but rather with how best to respond to the offending behaviour, and in the case of restorative justice, and to a lesser degree, Indigenous sentencing courts, how to assist victims. The stage at which this occurs in the criminal justice process can vary (Item 2 in Table 3).

Each justice practice or court is concerned not only with responding to an offender's behaviour, but also with addressing the concerns of other people (Item 7 in Table 3). Restorative justice includes a victim's needs in its enquiry;[75] processes that adopt therapeutic jurisprudence attempt to correct the 'antitherapeutic impact of the law';[76] and Indigenous sentencing courts seek to make the court process more culturally appropriate and inclusive of the Indigenous community. Although each practice attempts to make the criminal justice process more meaningful to particular groups of people and to address procedural weaknesses, each varies in focus. The different foci are a consequence of their distinct aspirations and are crucial in influencing the relationships which are fostered by each practice.

[75] Kathleen Daly, Hennessey Hayes & Elena Marchetti, 'New Visions of Justice' in Andrew Goldsmith, Mark Israel & Kathleen Daly (eds), *Crime and Justice: A Guide to Criminology* (2006) 439 at 441.
[76] Bruce J Winick & David B Wexler, 'Introduction: Therapeutic Jurisprudence as a Theoretical Foundation for These New Judicial Approaches' in Bruce J Winick & David B Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003) 7 at 7.

Although we see points of similarity across the three practices, it is in the areas of difference that we can identify the unique theoretical and jurisprudential basis of Indigenous sentencing courts. These are especially evident in items 6, 8, and 9 in Table 3.

For item 6, relationship building, each practice strives to build a relationship with an offender and a quite different entity. Restorative justice practices aim to build a relationship between an offender, victims and the community; and therapeutic jurisprudence aims to bring together legal actors and organisations offering rehabilitation services to best assist with changing the offender's behaviour. In contrast, Indigenous sentencing courts aim to change the relationship between 'white' (non-Indigenous) justice and Indigenous people, including the offender.

For item 8, people seeking change, Indigenous courts have been established largely (although not entirely) by the activism of Indigenous people and organisations, that is, by forces external to the courts and government bureaucracies. For example, in New South Wales, the Aboriginal Justice Advisory Council 'explored the concept of circle sentencing and put a proposal in 2002 to the Standing Committee of Criminal Justice System Chief Executive Officers to examine the development of a circle sentencing model for NSW'.[77] In Victoria the Koori Courts were established as an initiative of the Victorian Aboriginal Justice Agreement, which was an agreement between Victorian state government departments and key Koori organisations.[78] In South Australia, Magistrate Chris Vass had many meetings with members of the Aboriginal community in Port Adelaide for a couple of years in preparing for a new court model. In an

[77] Ivan Potas, Jane Smart, Georgia Brignell, Brendan Thomas & Rowena Lawrie, *Circle Sentencing in New South Wales: A Review and Evaluation* (2003) at 3.
[78] Mark Harris, *"A Sentencing Conversation": Evaluation of the Koori Courts Pilot Program October 2002-October 2004* (2006) at 16.

interview, he said, 'I didn't talk about it to the Chief Magistrate or the Attorney-General's office, or with any government agency. I thought that once I do that, they'll form a committee, and nothing would happen. It was a matter of talking with Aboriginal people, listening to them.'[79] This contrasts with restorative justice and therapeutic jurisprudence, which in Australia, emerged mainly as a result of the efforts of government and judicial officers.[80] The fact that Indigenous people and organisations played a significant role in establishing Indigenous sentencing courts had the effect of influencing the aims and practices of the courts, despite the fact that the justice process remained within the scope of the mainstream non-Indigenous legal system.

For item 9, aspirations, the differences are most marked. Although each justice practice seeks to correct problems with mainstream criminal justice, each is motivated by a different politics and constituency. Indigenous sentencing courts, unlike the two others, have political aspirations to rebuild and empower Indigenous communities by engendering greater trust and co-operation between Indigenous communities, court staff and Indigenous offenders, and by changing the way justice is achieved in the 'white' court system to better reflect Indigenous knowledge and values. Although restorative justice principles can and have been put into the service of broader political projects (such as truth commissions),[81] they are more typically cast as reflecting the aspirations of three main stakeholders - victims, offenders and 'communities'[82] in the aftermath of crime.

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[79] Kathleen Daly, Interview with Magistrate Chris Vass, the magistrate who first established an Indigenous sentencing court in Australia (Face-to-face interview, September 2001). See Kathleen Daly, Hennessey Hayes & Elena Marchetti, 'New Visions of Justice' in Andrew Goldsmith, Mark Israel & Kathleen Daly (eds), *Crime and Justice: A Guide to Criminology* (2006) 439 at 451.

[80] Kathleen Daly, 'Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects' in Allison Morris & Gabrielle Maxwell (eds), *Restorative Justice for Juveniles: Conferencing Mediation and Circles* (2001) 59.

[81] Kathleen Daly, 'Restorative Justice: The Real Story' (2002) 4 *Punishment & Society* 55 at 57; Declan Roche, 'Dimensions of Restorative Justice' (2006) 62 *Journal of Social Issues* 217.

[82] Paul McCold, 'Towards a Holistic Vision of Restorative Juvenile Justice: A Reply to the Maximalist Model' (2000) 3 *Contemporary Justice Review* 357 at 401.

Therapeutic jurisprudence encourages change in individual offending, in the role of judicial officers, and in a more humane application of law, but the political dimensions of such change are not explicated.

5. Conclusion

Indigenous sentencing courts reflect some aspects of therapeutic jurisprudence and restorative justice practices, but they have other distinct goals and objectives. The most important, which is reflected in legislation or other material across all jurisdictions, is increasing the involvement of Indigenous people in court processes and making the sentencing hearing more culturally appropriate. This new justice practice is concerned with establishing trust between Indigenous communities and 'white justice', which for centuries has been grounded in distrust and conflict. Establishing trust occurs through meaningful communication and participation of Indigenous people with 'white justice' (which includes not just the judicial officer, but also the police prosecutor and defence lawyer). Indigenous sentencing courts are ultimately concerned with transforming racialised relationships and communities. Thus, they are operating according to a transformative, culturally appropriate and politically charged participatory jurisprudence.

A dominant government view is that the rationale for Indigenous sentencing courts is to decrease re-offending and an over-representation of Indigenous people in custody. Although such change is, of course, desirable, it will take some time. It would be naive to suppose there would be major changes in incarceration rates in a short period of time, particularly when the courts themselves handle a limited share of Indigenous defendants.

There is, we fear, a single-minded government focus in evaluating the 'effect' of these courts on reducing re-offending and rates of incarceration. Such 'effects' will not be dramatic in the near term and this may suggest to policy makers that the courts do not 'work'. A longer term perspective is required, one that recognises the need for more than a new kind of court practice. If Australian people and policymakers want to reduce the share of Indigenous people in the criminal justice system, additional forms of intervention and structural change are required. These include increased economic development and capacity building, and better educational and health outcomes, all of which need to be forged in a context of Indigenous self-determination. Any effort to address the over-representation of Indigenous people in the criminal justice system must also confront a legacy of government policies and practices over the past two centuries, which systemically disadvantaged and oppressed Indigenous people. Put in this light, we see that compared to the aspirations for restorative justice and therapeutic jurisprudence, Indigenous sentencing courts are more explicitly concerned with a political agenda for social change in race relations.