

Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model

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Abstract

Since 1999, a number of Indigenous sentencing courts have been 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 the 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 made 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 Indigenous sentencing courts have been established in each Australian State and Territory and in the practices they use. 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 associate 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.

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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 two types of Indigenous justice practices in Australia: more formalised practices, typically, although not always, in urban and country town areas, in which one to three days a month are set aside to sentence Indigenous offenders; and less formalised practices where judicial officers travel on circuit to regional and remote areas (for example, 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). These two types of practices can be distinguished by the way in which 'the court' is constituted in a formal sense. The more formalised practices can be termed Indigenous sentencing courts. In the less formalised practices, a judicial officer may solicit (or receive) sentencing-related information from Indigenous people, but the court practices are more variable and ad hoc. Hybrid forms have emerged, with the introduction of circle courts and Aboriginal Courts, in which magistrates travel on circuit to regional and remote areas in New South Wales and South Australia, respectively.

This article focuses solely on Indigenous sentencing courts (see below, Table 1), not on all Indigenous justice practices. Indigenous sentencing courts in Queensland, Victoria, New South Wales,¹ South Australia, the Northern Territory, the Australian Capital Territory and some of the courts in Western Australia were established according to certain principles and processes, which were developed at their inception or sometime after their formation. The less formalised practices in some areas of Western Australia and North Queensland are more varied and are contingent on the inclinations and capacities of individual judicial officers, as well as the strength of the Indigenous community group. For example, in Queensland, amendments to the *Sentencing and Penalties Act 1992* (Qld) were the basis for the formation of Indigenous sentencing courts (the Murri Courts) as well as the less formalised and more varied practices of Community Justice Groups' submissions at sentencing. Because of the varied orientations and capacities of both judicial officers and Indigenous community groups in the less formalised practices, we focus our attention in this article on Indigenous sentencing courts. However, the points we make about the theoretical and jurisprudential uniqueness of Indigenous sentencing courts are, in some circumstances, also applicable to the less formalised practices.

1 The Indigenous sentencing courts in Brewarrina and Walgett, 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, we define them as Indigenous sentencing courts.

Table 1: Indigenous Sentencing Courts Established in Australia, 1 June 2006 – January 2007²

Jurisdiction	Court and establishment date	Legislation or other directive that governs establishment and procedure
Australian Capital Territory	<ul style="list-style-type: none"> • Ngambra Circle Court – May 2004 	Interim Practice Direction: Ngambra Circle Sentencing Court, and the general sentencing provisions in the <i>Crimes (Sentencing) Act 2005</i> (ACT)
New South Wales	<ul style="list-style-type: none"> • 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 – Jan 2007 • Walgett Circle Court (on circuit) – June 2006 	Criminal Procedure Regulation 2005 (NSW) and <i>Criminal Procedure Act 1986</i> (NSW)
Northern Territory	<ul style="list-style-type: none"> • Darwin Community Court (also used in Nhulunbuy and Ngiu on the Tiwi Islands when the magistrate is on circuit) – Apr 2005 	Community Court Darwin: Guidelines, and the general sentencing provisions in the <i>Sentencing Act 2005</i> (NT)
Queensland	<ul style="list-style-type: none"> • 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 	<i>Penalties and Sentences Act 1992</i> (Qld) and <i>Juvenile Justice Act 1992</i> (Qld)

² The information presented in this table is current to January 2007. We understand that other courts have been established since this time in Queensland, Victoria and New South Wales.

South Australia	<ul style="list-style-type: none"> • 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 	<i>Criminal Law (Sentencing) Act 1988 (SA)</i> – also applies to the sentencing of ‘youth’
Victoria	<ul style="list-style-type: none"> • 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 • Moe – May 2006 	<i>The Magistrates’ Court (Koori Court) Act 2002 (Vic)</i> amended the <i>Magistrates’ Court Act 1989 (Vic)</i> and the <i>Children and Young Persons (Koori Court) Act 2004 (Vic)</i> amended the <i>Children and Young Persons Act 2004 (Vic)</i>
Western Australia	<ul style="list-style-type: none"> • Norseman Aboriginal Sentencing Court – Feb 2006 • Kalgoorlie Aboriginal Sentencing Court – Nov 2006 	<i>Magistrates Court Act 2004 (WA)</i> and <i>Sentencing Act 1995 (WA)</i>

We have been observing Indigenous justice practices (both Indigenous sentencing courts and the less formalised practices) and talking with the key actors involved, such as judicial officers, Indigenous representatives, prosecutors, and defence lawyers, 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 between presiding magistrates. We also find that, like restorative justice and therapeutic jurisprudence, actual practices may not correspond to aspirations, especially in the high volume jurisdictions. An example of a high-volume jurisdiction is the Port Adelaide Nunga Court in South Australia, where any eligible defendant who wishes to be sentenced by the court can do so. Based on data from the 2005-6 fiscal year, a total of 134 Indigenous defendants were sentenced in this court.³ Low-volume jurisdictions, such as the Nowra Circle Court in New South Wales, sentence 13 or fewer Indigenous defendants a year because they restrict their cases to those in which incarceration is highly likely and defendants are deemed ready to change.⁴ High and low volume jurisdictions reflect a spectrum of different policy approaches to Indigenous sentencing courts, which range from hearing as many eligible cases as possible, to limiting the number of cases to defendant-based ‘readiness’ or risk of incarceration criteria.⁵

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

Whilst advocates of new justice practices associate Indigenous sentencing courts with restorative justice and therapeutic jurisprudence,⁶ we argue that, although 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.

Prior to engaging in such discussion some points of definition need to be made. Firstly, we are not using the term 'jurisprudence' in an analytic sense as something which simply explains the nature of law and legal systems,⁷ 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?"'.⁸ 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 understanding of the 'nature and context of the "legal

3 Data provided by a Courts Administration Authority (CAA) official, personal communication, 9 March 2007 (statistics on file with the authors). We have learned from the CAA official that data reported for years 2003–4 and earlier for South Australian Indigenous sentencing courts are inaccurate. Thus, statistics presented in John Tomaino, *Information Bulletin: Aboriginal (Nunga) Courts* (2004) at 7 <http://www.ocsar.sa.gov.au/docs/information_bulletins/IB39.pdf> accessed 9 July 2007 are not correct, as are those reported in CAA's *Annual Reports* for years 2003–04 or earlier. It is important to emphasise that the defendants' cases are complex: a total of 414 files (involving 1,492 charges) were finalised for the 134 defendants sentenced in 2005–6 fiscal year in Port Adelaide.

4 Ivan Potas, Jane Smart, Georgia Brignell, Brendan Thomas & Rowena Lawrie, *Circle Sentencing in New South Wales: A Review and Evaluation* (2003) at 9. More recent data, which we obtained from the Nowra Circle Court Magistrate, show that over a period of three years and three months from 2002 to 2005, a total of 28 defendants were sentenced (statistics on file with the authors).

5 It can be difficult to classify jurisdictions as high, moderately high or low volume because data systems are not in place in most jurisdictions to adequately depict case loads or re-offending patterns. For example, in an evaluation of the Koori Courts in Victoria, it is reported that during the period 1 April 2003 to 7 October 2004 in the Broadmeadows Koori Court, 'the Court heard 90 matters and there were approximately 14 instances of re-offending, representing a re-offending rate of 15.5%', see Mark Harris, "A Sentencing Conversation": *Evaluation of the Koori Courts Pilot Program October 2002–October 2004* (2006) at 79. The statement refers to finalised matters or 'files' rather than the number of defendants. Re-offending should be keyed to the number of individual defendants (not the number of files) and, typically, there is a window of time of least six months to one year after a sentence is imposed to assess the prevalence of re-offending. This standard practice was not followed; this means that re-offending rates were likely underestimated, especially when re-offending was defined as a subsequent court conviction.

enterprise”’.⁹ It can therefore involve many perspectives and perceptions of the “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 are then 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.

Secondly, Indigenous sentencing courts are not practicing or adopting Indigenous customary laws. Rather, they are using Australian criminal laws and procedures when sentencing Indigenous people, while allowing Indigenous Elders or Respected Persons to participate in the process. This differs 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.¹⁰ 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.¹¹ 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.

Finally, 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.¹²

6 See, for example Arie Freiberg, ‘Problem-Oriented Courts: Innovative Solutions to Intractable Problems?’ (2001) 11 *Journal of Judicial Administration* 8; Michael S King, ‘Applying Therapeutic Jurisprudence in Regional Areas: the Western Australian Experience’ (2003) 10(2) *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* 196.

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

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

9 *Id* at 2.

10 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*, Report No 31 (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*, Report No 28 (2003); Western Australian Law Reform Commission, *Aboriginal Customary Laws: Discussion Paper*, Report No 94 (2005); Western Australian Law Reform Commission, *Aboriginal Customary Laws: Final Report*, Report No 94 (2006).

11 Harris, above n5 at 15.

12 Western Australian Law Reform Commission, *Aboriginal Customary Laws: Discussion Paper*, above n10 at 142.

The common features of the Indigenous sentencing courts are that: (1) the offender must be Indigenous (or in some courts, Indigenous or South Sea Islander; although in the Northern Territory there is no such restriction); (2) the offender must have entered a guilty plea or have been found guilty in a summary hearing;¹³ (3) the offender must agree to have the matter heard in the Indigenous sentencing court; (4) the charge must be one that is normally heard in a Magistrates' or Local Court; (5) 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;¹⁴ and (6) a magistrate retains the ultimate power in sentencing the offender.¹⁵

During the sentencing process, a magistrate typically sits at eye-level with the 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.¹⁶ The offender is encouraged to appear before the court with a support person, usually a family member, friend, or partner. This person sits beside the offender during the hearing and is invited to speak to the court. There is a greater degree of interaction between the offender and magistrate, which contrasts with mainstream Magistrates' or Local 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 the offender's progress after the sentence hearing.¹⁷

Victoria, New South Wales, Western Australia, and the two territories place limitations on the types of offences that can be heard in their Indigenous sentencing courts. Victoria does not allow sexual offences or family violence offences;¹⁸ Western Australia does not allow offences involving sexual assault;¹⁹ New South Wales does not allow offences of malicious wounding, grievous bodily harm, rape and other sexual assault offences, stalking, offences involving the use of a firearm, certain drug offences, or offences relating to child prostitution or pornography;²⁰ the Australian Capital Territory does not allow sexual offences or offenders who are addicted to illicit drugs (other than cannabis);²¹ the Northern Territory does not allow sexual offences and it is also cautious about cases

13 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(1)(c)(iii).

14 See recommendation 17 in Harris, above n5 at 12.

15 Elena Marchetti & Kathleen Daly, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends & Issues in Crime and Criminal Justice* at 2.

16 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.

17 Marchetti & Daly, above n15 at 2.

18 *Magistrates' Court Act* 1989 (Vic) ss 4F(1)(b)(i), (ii).

19 Email from Magistrate Kate Auty, Magistrates' Court, Western Australia, to Kathleen Daly, 9 June 2007.

20 *Criminal Procedure Act* 1986 (NSW) s 348.

involving violent offences, domestic violence offences or offences where the victim is a child.²² 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 effect on the collaborative nature of the courts.²³ 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 the past two years on the physical and sexual abuse of Indigenous women and children, debates surrounding the question of how to best address family violence have intensified.²⁴

Three reasons are generally given for establishing Indigenous sentencing courts:²⁵ (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.²⁶

These often-cited reasons are a governmental and bureaucratic gloss on more profound changes in court-community relationships and practices, which are brought about by increased 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 the 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 the

21 Australian Capital Territory Department of Justice and Community Safety, *Final Interim Practice Direction: Ngambra Circle Sentencing Court* (2004) at cls 14, 15 <<http://www.courts.act.gov.au/magistrates>> accessed 9 July 2007.

22 Northern Territory Department of Justice, *Community Court Darwin: Guidelines* (2005) at cl 14 <http://www.nt.gov.au/justice/ntmc/docs/community_court_guidelines_27.05.pdf> accessed 11 June 2006.

23 Harris, above n5 at 122–123.

24 Larissa Behrendt, 'Politics Clouds Issues of Culture & "Customary Law"' (2006) 26(6) *Proctor* 14 at 14.

25 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.

26 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, 1 October 2003); Potas, Smart, Brignell, Thomas & Lawrie, above n4; Queensland Government Department of Justice and Attorney-General, *Factsheet: Murri Court* (2003) <<http://www.justice.qld.gov.au/courts/pdfs/C11MurriCourt.pdf>> accessed 31 May 2006.

offender's situation.²⁷ 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 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. We also trace the ways in which proponents merge 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.²⁸ Part 4 compares the similarities and differences between Indigenous sentencing courts, restorative justice, and therapeutic jurisprudence. From this comparison we elucidate a distinct theoretical and jurisprudential framework for Indigenous sentencing courts.

2. *New Justice Practices: Affinities and Merging of Terms*

During the 1990s, a variety of new courts and justice practices emerged in Australia. They included restorative justice conferences, Indigenous sentencing courts, as well as many types of specialist and problem-oriented (also termed problem-solving) courts. These 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, as well as specialist and problem-oriented (often, but not always, guided by therapeutic jurisprudence) 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 can be 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'.²⁹ Leading restorative justice and Indigenous justice advocates have done the same.

27 Marchetti & Daly, above n15 at 5.

28 Space limitations preclude a detailed discussion of actual practices and interactions in the sentencing courts.

A typical account of restorative justice, such as that given by John Braithwaite, considers that it is ‘ground[ed] in traditions of justice from the ancient Arab, Greek, and Roman civilisations that accepted a restorative approach’ and that the ‘... philosophies of New Zealand Maori, North American Indian, [and] Christian ... restorative justice have actually been the sources of deepest influences on the contemporary social movement’.³⁰ In 1996, Indigenous justice advocates Robert Yazzie and James Zion described Navajo peacemaking processes and outcomes as restorative justice,³¹ but in 2001, once the term therapeutic jurisprudence was in wide use, Zion stated that the ‘Navajo Nation judicial system anticipated the therapeutic jurisprudence movement about twenty years ago by integrating traditional Navajo justice concepts into a western-styled judicial system’.³² 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 how speakers adapt them to, emerging ‘new ideas’ in justice. However, 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-oriented courts, or to Indigenous sentencing courts? We briefly 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).³³ It can be used by all agencies of criminal justice (police, courts, and corrections). It is also used in non-criminal decision-making

29 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) at 88, footnote 15 <http://www.nsconline.org/WC/Publications/KIS_CtFutu_Trends04.pdf> accessed 9 July 2007.

30 John Braithwaite, ‘Restorative Justice: Assessing Optimistic and Pessimistic Accounts’ in Michael Tonry (ed), *Crime and Justice: A Review of Research* (1999) at 1; 5.

31 Robert Yazzie & James Zion, ‘Navajo Restorative Justice: The Law of Equality and Justice’ in Burt Galaway & Joe Hudson (eds), *Restorative Justice: International Perspectives* (1996) 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.

32 James Zion, ‘Navajo Therapeutic Jurisprudence’ (2001-2002) 18 *Touro Law Review* 563 at 569.

33 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). 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); Kathleen Daly, ‘Restorative Justice: The Real Story’ (2002) 4 *Punishment & Society* 55; Kathleen Daly & Hennessey Hayes, ‘Restorative Justice and Conferencing in Australia’ (2001) 186 *Trends & Issues in Crime and Criminal Justice*; Kathleen Daly & Hennessey Hayes, ‘Restorative Justice and Conferencing’ in Adam Graycar & Peter Grabosky (eds), *The Cambridge Handbook of Australian Criminology* (2002).

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 in such a case. Definitions vary widely. A popular one, proposed by Tony Marshall is: a 'process whereby parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its implications for the future'.³⁴ Other advocates suggest that 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.³⁵

The practices associated with restorative justice include conferences, circles,³⁶ 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 has 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 'restorative justice' and its principles came later.³⁷ Restorative justice practices, both in principle and practice, are more informal than problem-oriented or specialist courts, many (although not all) of which are guided by the idea of therapeutic jurisprudence. In principle, restorative justice gives far more attention to the experiences of victims of crime 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'.³⁸ The term was first introduced in the United States in the late 1980s for mental health cases,³⁹ but has since expanded to include family, criminal, and civil cases. A leading proponent, David Wexler, argues that therapeutic jurisprudence

34 Tony F Marshall, 'Restorative Justice: An Overview' in Gerry Johnstone (ed), *A Restorative Justice Reader: Texts, Sources, Context* (2003) at 28.

35 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.

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

37 See Kathleen Daly & Russ Immarigeon, 'The Past, Present and Future of Restorative Justice: Some Critical Reflections' (1998) 1 *Contemporary Justice Review* 21; Marshall, above n34 at 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', above, n33.

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

39 David Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (1990).

and problem-oriented courts were ‘born at the same time, and have always been closely connected, but they are actually close cousins rather than identical twins’.⁴⁰

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 linked at a later time to the term ‘therapeutic jurisprudence’ and its principles.⁴¹ Similar developments occurred in Australia. The first Australian drug court was established in 1999 without using the term therapeutic jurisprudence.⁴² 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’.⁴³ 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; and
- will need to develop enhanced interpersonal skills, understand the psychology of procedural justice, and learn to be effective risk managers.⁴⁴

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:

- the integration of treatment services and judicial case processing;
- ongoing judicial intervention and close monitoring; and
- multi-disciplinary involvement and collaboration with community-based and government organisations.⁴⁵

According to Greg Berman and John Feinblatt, problem-oriented courts have the following 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

40 Wexler, above n29 at 87.

41 Freiberg, ‘Problem-Oriented Courts: An Update’, above n6; Peggy Fulton Hora, William G Schma & John TA Rosenthal, ‘Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America’ (1998-1999) 74 *Notre Dame Law Review* 439.

42 Arie Freiberg, ‘Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?’ (2002) 20(2) *Law in Context* 6 at 10–11.

43 Winick & Wexler, above n38 at 8.

44 Ibid.

45 Freiberg, ‘Therapeutic Jurisprudence in Australia’, above n42 at 11.

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.⁴⁶

These courts are focused on responding to the problems which may have contributed to an offender's criminal behaviour,⁴⁷ and as we see from Berman and Feinblatt, they may have 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'.⁴⁸ 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.⁴⁹

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 the 'therapeutic jurisprudence approach resonates sympathetically with the alternative dispute resolution/restorative justice movement'.⁵⁰ 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 Yandeyarra Circle Court).⁵¹ 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 or 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;

46 Greg Berman & John Feinblatt, 'Problem-Solving Courts: A Brief Primer' (2001) 23 *Law & Policy* 125 at 126.

47 Freiberg, 'Problem-Oriented Courts', above n6. at 9.

48 Arie Freiberg, 'Innovations in the Court System' (Paper presented at the Australian Institute of Criminology International Conference on Crime in Australia: International Connections, Melbourne, 30 November 2004) at 2.

49 Ibid.

50 Marilyn McMahon & David Wexler, 'Therapeutic Jurisprudence: Developments and Applications in Australia and New Zealand' (2002) 20(2) *Law in Context* 1 at 1.

51 King, above n6 at [44]–[45].

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'.⁵²

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 sentencing courts are similar to the desired elements of restorative justice conferences.⁵³ 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 service delivery and community involvement'.⁵⁴ 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 have to 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 distinct 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 concludes that Koori Courts are 'more than just an example of restorative justice or therapeutic jurisprudence'; they are in fact 'unique unto themselves'.⁵⁵ 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:

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

52 Michael S King & Kate Auty, 'Therapeutic Jurisprudence: An Emerging Trend in Courts of Summary Jurisdiction' (2005) 30 *Alternative Law Journal* 69 at 71.

53 See for example, Doug Dick, 'Circle Sentencing of Aboriginal Offenders: Victims Have a Say' (2004) 7 *Judicial Review* 57.

54 Freiberg, above n48 at 8.

55 Harris, above n5 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-oriented courts in that their focus is not on addressing the problems of an offender group but rather to resolve community problems, see 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.

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.⁵⁶

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'.⁵⁷ 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 processes that embrace a 'genuine respect for, and meaningful co-operation with, Aboriginal law and justice values and processes'.⁵⁸ In both cases, the authors cite a different relationship between 'white law and justice' and the Indigenous domain.

Jonathan Rudin also argues that unless Indigenous people 'are given some options and opportunities to develop processes that respond to the needs of that community', such practices should not be termed Indigenous justice.⁵⁹ This is a crucial point and one way to distinguish Indigenous justice practices, such as Indigenous sentencing courts, from restorative justice practices. Although non-Indigenous restorative justice advocates say that restorative justice is drawn from Indigenous peoples' justice practices, this glosses over the histories and particularities of Indigenous social organisation before and after colonial conquest. Indigenous culture is dynamic and changing, but at times, it is wrongly depicted in romantic and static terms, as if culture were frozen in time.

In summary, restorative justice and therapeutic jurisprudence lack a political dimension that is more often present in Indigenous sentencing courts. Specifically, Indigenous sentencing courts have the potential 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. With the political aspiration to change Indigenous-white justice relations, Indigenous sentencing courts, and Indigenous justice practices generally,

56 Western Australian Law Reform Commission, *Aboriginal Customary Laws: Discussion Paper*, above n10 at 146. This view was reinforced in Western Australian Law Reform Commission, *Aboriginal Customary Laws Project: Final Report*, above n10 at 125, at the same time that the Commission 'acknowledges that therapeutic jurisprudence initiatives or restorative justice may be effective for Aboriginal offenders'.

57 Ross Gordon Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (1998) at 72. See also at 53 where Green describes the role of restorative justice in certain Canadian sentencing court initiatives.

58 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.

59 Jonathan Rudin, 'Aboriginal Justice and Restorative Justice' in Elizabeth Elliott & Robert M Gordon (eds), *New Directions in Restorative Justice: Issues, Practice, Evaluation* (2005) at 99.

are concerned with group-based change in social relations (a form of political transformation), not merely change in an individual.

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. These circle courts are loosely based on the Canadian circle court model.⁶⁰ 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 at 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.⁶¹ 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.⁶² Prior to these amendments the courts were operating under general sentencing provisions and certain practice directions. The Queensland Murri Courts, the Northern Territory Community Courts, the Western Australian Aboriginal Sentencing 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.⁶³ Procedurally, the Northern Territory Community Courts follow a set of 'Guidelines' and the Ngambra Circle Sentencing Court follows an 'Interim Practice Direction'.

60 Potas, Smart, Brignell, Thomas & Lawrie, above n4 at 3.

61 *Magistrates' Court Act* 1989 (Vic) ss 4A to 4G, 16(1A)(e), (f), 17A, sched 8 s 28; *Children and Young Persons Act* 1989 (Vic) ss 8, 16A-16D, 27A, 280BA, sch 3 s 27.

62 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 *Criminal Law (Sentencing) Act* 1988 (SA) applies to the sentencing of a 'youth'.

63 *Penalties and Sentences Act* 1992 (Qld) ss 9(2)(o), 9(7), 9(8); *Juvenile Justice Act* 1992 (Qld) s 150(1)(g); *Sentencing Act* 2005 (NT) s 104A; *Magistrates Court Act* 2004 (WA) s 24 – This provision does not specifically refer to the need to include cultural considerations. Instead it refers to the establishment of a division of the Magistrates' Court for specific class or classes of cases; *Crimes (Sentencing) Act* 2005 (ACT) s 33 simply states that the cultural background of an offender may be taken into account when sentencing.

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 same way 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.⁶⁴

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.⁶⁵ 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 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 a very strict legislative framework at an early stage is going to be counterproductive, as much as politicians and the Attorney-General would like it.⁶⁶

Table 2 summarises 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.

64 Telephone interview, a Northern Territory Policy Officer, 24 June 2005, interview by Elena Marchetti.

65 Informal interview, a Queensland Youth Murri Court Magistrate, 20 April 2006, interview by Kathleen Daly.

66 Face-to-face interview, a South Australian Magistrate, 27 November 2001, interview by Kathleen Daly.

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

Jurisdiction	Legislative/Protocol/ Guideline	Aims
Australian Capital Territory	Interim Practice Direction: Ngambra Circle Sentencing Court, cl 3	<ul style="list-style-type: none">• 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 Regulation 2005 (NSW), sch 4, s 7	<ul style="list-style-type: none">• Include members of Aboriginal communities in the sentencing process• Increase the confidence of Aboriginal communities in the sentencing 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, cls 11, 12	<ul style="list-style-type: none"> • 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 increase participation of victims • Rehabilitate the offender and give them the opportunity to make amends to the community
Queensland	<p>Queensland Department of Justice and Attorney-General, <i>Murri Court</i> (2006) <http://www.justice.qld.gov.au/courts/factsht/C11MurriCourt.htm#1> accessed 2 August 2007</p> <p>Paper written by Magistrate Annette Hennessy, 2006</p> <p>(Legislation is currently being proposed)</p>	<p>Factsheet:</p> <ul style="list-style-type: none"> • Take into account cultural issues by providing a forum where Aboriginal and Torres Strait Islanders have an input into the sentencing process <p>Hennessy paper:^a</p> <ul style="list-style-type: none"> • 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 • '[E]thos of the interaction is to strongly condemn the offending behaviour ... whilst encouraging the offender ... to rehabilitate themselves and make redress to the community'^b

a) The following information was taken from Annette Hennessy, 'The Queensland Murri Court' (Paper presented at the Queensland Law Society Legal Educators & Young Lawyers Conference, Brisbane, 9 June 2006).

b) Id at 4.

<p>South Australia</p>	<p>John Tomaino, <i>Information Bulletin: Aboriginal (Nunga) Courts</i> (2004) at 7 <http://www.ocsar.sa.gov.au/docs/information_bulletins/IB39.pdf> accessed 9 July 2007</p> <p>Kathleen Daly, Interview with Magistrate Chris Vass, the magistrate who first established an Indigenous sentencing court in Australia (Face-to-face interview, 22 November 2001)</p>	<p>Information Bulletin:</p> <ul style="list-style-type: none"> • 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 crime-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 <p>Vass Interview:</p> <ul style="list-style-type: none"> • ‘[N]ot 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’
<p>Victoria</p>	<p><i>Magistrates’ Court (Koori Court) Act</i> 2002 (Vic) s 1 and <i>Children’s Court (Koori Court) Act</i> 2004 (Vic) s 1</p> <p>Victoria, <i>Parliamentary Debates</i>, Legislative Assembly, 24 April 2002, 1128-1132 (Rob Hulls)</p>	<ul style="list-style-type: none"> • 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 <ul style="list-style-type: none"> • 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: <p><i>Operational aims:</i></p> <ul style="list-style-type: none"> • 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

		<ul style="list-style-type: none"> • 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 <p><i>Community building aims:</i></p> <ul style="list-style-type: none"> • 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 promote significant and culturally appropriate outcomes • Promote and increase community awareness about the Koori court generally
Western Australia	Email from Bradley Mitchell, Project Manager, Kalgoorlie Magistrates' Court, to Kathleen Daly, 11 June 2007	<ul style="list-style-type: none"> • Deliver culturally appropriate sentencing for local Aboriginal people • Improve access to and equity of court services for Aboriginal people • Increase the openness and inclusiveness of court services for Aboriginal people • Improve relationships between the Court and Aboriginal people • Reduce Aboriginal imprisonment numbers and recidivism rates in the Eastern Goldfields • Enhance safety for all members of the local community

When analysing these aims, a common thread emerges from all seven jurisdictions, which endeavour to make the process more culturally appropriate, more inclusive of the Indigenous community and more inclusive of the offender than other sentencing options.⁶⁷ Indeed, in his evaluation of the Koori Courts in Victoria, Harris states:

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.⁶⁸

Similarly, a review conducted of the first 12 months of operation of the Nowra Circle Sentencing Court in New South Wales 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'.⁶⁹

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 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.⁷⁰ 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.⁷¹

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 they have 'committed an offence not only against the white law but also against the values of the [Indigenous] community'.⁷² The moral dialogue with Elders or Respected Persons can be highly personalised, calling upon the offender's obligations to family and kin, and can seek to bring the offender back

67 See Australian Capital Territory Department of Justice and Community Safety, above n21 at cl 3; Criminal Procedure Regulation 2005 (NSW) sched 4, s 7, particularly paras (a), (b), (c) and (d); Northern Territory Department of Justice, above n22; Queensland Department of Justice and Attorney-General, above n26; Id at 7; Tomaino, above n3 at 4; *Magistrates' Court (Koori Court) Act* 2002 (Vic) s 1; *Children's Court (Koori Court) Act* 2004 (Vic) s 1; Email from Bradley Mitchell, Project Manager, Kalgoorlie Magistrates' Court, to Kathleen Daly, 11 June 2007.

68 Harris, above n5 at 15.

69 Potas, Smart, Brignell, Thomas & Lawrie, above n4 at 52.

70 Hennessy, above n66 at 3.

71 Dick, above n53 at 62; Id.

72 Harris, above n5 at 73. The Elders and an offender usually have closer connections in communities which are small and closely connected rather than in larger urban centres.

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 rather than a mainstream sentencing process.⁷³ In this way the application of 'white law' is inflected by Indigenous knowledge and cultural respect.

Positive forms of shaming can occur when the offender comes from the same community as the Elders or Respected Persons and the offender respects their authority.⁷⁴ 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 who 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, for example, in formalised weekly meetings.

Another set of objectives, which all jurisdictions allude to, is to reduce offending rates and rehabilitate the offender.⁷⁵ It is too early to tell whether the courts have had an impact on the rates of recidivism. 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.⁷⁶ Finally, all of the courts, except those in Queensland, Western Australia and Victoria, state that an objective is to support victims or to involve victims in the sentencing process.⁷⁷ 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. This increased understanding has led 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.⁷⁸ The courts have

73 Marchetti & Daly, above n15 at 5.

74 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', see Dick, above n53 at 60.

75 See Australian Capital Territory Department of Justice and Community Safety, above n21 at cl 3; Criminal Procedure Regulation 2005 (NSW) sched 4, s 7, particularly paragraphs (g) and (h); Northern Territory Department of Justice, above n22; Hennessy, above n66 at 1; Tomaino, above n3 at 4; Victoria, *Parliamentary Debates*, Legislative Assembly, 24 April 2002 (Rob Hulls) at 1128–1129; Email from Bradley Mitchell, Project Manager, Kalgoorlie Magistrates' Court, to Kathleen Daly, 11 June 2007.

76 Chris Cunneen, *The Impact of Crime Prevention on Aboriginal Communities* (2001) at 68; Marchetti & Daly, above n15; Harris, above n5 at 85–87; Hennessy, above n66 at 8; Tomaino, above n3 at 7. To date, we note that evidence on re-offending is either anecdotal or relies on statistical analyses that are incomplete or questionable.

77 See Australian Capital Territory Department of Justice and Community Safety, above n21 at cl 3; Criminal Procedure Regulation 2005 (NSW) sched 4, s 7, particularly paragraphs (e) and (f); Northern Territory Department of Justice, above n22; Tomaino, above n3 at 4.

contributed to what a New South Wales Aboriginal Project Officer calls ‘two way learning’: that of the magistrate (and other court officials) and that of members of the Indigenous community.⁷⁹ Depending on the jurisdiction, we see indications of Indigenous empowerment, both inside and outside the courtroom.

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

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 (e.g. 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 (e.g. arrest, pre-sentence, pre-prison release)	All stages in relation to 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 (e.g. mental health courts)	Required

⁷⁸ Potas, Smart, Brignell, Thomas & Lawrie, above n4 at 52.

⁷⁹ Informal face-to-face interview, a New South Wales Aboriginal Project Officer, 18 May 2005, interview by Kathleen Daly and Elena Marchetti.

4. Knowledge base	Lay actors, such as victims and their supporters and other community members (such as fire safety people, school principals, etc.)	Community-based and government-based 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-based 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	Between 'White justice', 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-ordinators), and therefore more legislatively based	Judicial officers	Indigenous groups, magistrates and sometimes policy makers
9. Legal and justice 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 offender in ways that will motivate them to use available treatment programs; encourage more sympathetic legal processes	Make court processes more culturally appropriate; engender greater trust between Indigenous communities and court staff; more open exchange of information in court

10. Political aspirations	Minimal; focus is on change in justice practices for a more reintegrative, and negotiated justice	Minimal; focus is on change in justice practices for a more humane and holistic response to individual offender; however, in a few justice centres there is a secondary attention to community change.	Significant; transform relations between 'white justice' and Indigenous communities; rebuild and empower Indigenous communities; change race relations
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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; 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 statement in regular sentencing hearings.⁸⁰ The inclusion of different groups of people in sentencing changes its focus from one that is more punitive to one which is more negotiated, rehabilitative or reconciliatory.

Another similarity is that none of the processes are engaged in a determination of 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).

⁸⁰ Jonathan 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.

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;⁸¹ processes that adopt therapeutic jurisprudence attempt to correct the 'antitherapeutic impact of the law';⁸² 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 the distinct aspirations of each process and are crucial in influencing the relationships which are fostered by each practice.

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, 9 and 10 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 sentencing 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'.⁸³ 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.⁸⁴ 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 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

81 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) at 441.

82 Bruce J Winick & David Wexler, 'Introduction: Therapeutic Jurisprudence as a Theoretical Foundation for These New Judicial Approaches' in Winick & Wexler (eds), above n38 at 7.

83 Potas, Smart, Brignell, Thomas & Lawrie, above n4 at 3.

84 Harris, above n5 at 16.

people, listening to them.’⁸⁵ This contrasts with restorative justice and therapeutic jurisprudence, which in Australia, emerged mainly as a result of the efforts of government and judicial officers.⁸⁶ 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.

The differences are most marked for the aspirations noted in Items 9 and 10. 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 other practices, 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.⁸⁷ Although restorative justice principles can and have been put into the service of broader political projects (such as truth commissions),⁸⁸ they are more typically cast as reflecting the aspirations of the three main stakeholders in the aftermath of crime: victims, offenders and ‘communities’.⁸⁹ Therapeutic jurisprudence encourages change in individual offending, in the role and stance of judicial officers, and in a more humane application of the law, but, with the exception of a handful of community centres, the political dimensions of such change have not been explicated by practitioners. They appear to be limited to individual relationships between defendants, judicial officers and specialist professionals.

5. Conclusion

Indigenous sentencing courts reflect some aspects of therapeutic jurisprudence and restorative justice practices, but they have 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

85 Face-to-face interviews, Magistrate Chris Vass, Port Adelaide Magistrates’ Court, 28 September 2001 and 22 November 2001, interview by Kathleen Daly. Magistrate Vass is the magistrate who established the first urban Indigenous sentencing court in Australia; see also Daly, Hayes & Marchetti, above n79 at 451.

86 Kathleen Daly, ‘Conferencing in Australia and New Zealand’, above n33.

87 It is important to note that Indigenous justice practices such as Indigenous sentencing courts, have been criticised as co-opting Indigenous symbols of authority (i.e. the Elders) to serve the laws of the coloniser. For a more detailed discussion of such criticisms, see Lois Erikson, ‘BLB 4142 Advanced Legal Research Dissertation’, paper submitted in completion of course requirements at Victoria University, February 2006 at 23–27. While we acknowledge that the courts and practices ultimately exist within the hegemonic ‘white’ legal system, they are an attempt to accommodate Indigenous knowledge and discourse.

88 Daly, ‘Restorative Justice: The Real Story’, above n33 at 57; Declan Roche, ‘Dimensions of Restorative Justice’ (2006) 62 *Journal of Social Issues* 217.

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

sentencing hearings more culturally appropriate. This new justice practice is concerned with establishing trust between Indigenous communities and 'white justice': a relationship which for centuries has been grounded in distrust and conflict. Establishing trust occurs through meaningful communication and participation of Indigenous people in '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 the over-representation of Indigenous people in custody. Although such change is, of course, desirable, it will take some time. It would be naïve to suppose that 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 short 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 the 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 of restorative justice and therapeutic jurisprudence, Indigenous sentencing courts are more explicitly concerned with a political agenda for social change in race relations.

