

SPECIALIST COURTS FOR SENTENCING ABORIGINAL OFFENDERS IN AUSTRALIA

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SUMMARY

The specialist Aboriginal court is one of the most visible measures introduced to address the disadvantage and particular needs of Aboriginal people in the criminal justice system.

This study examines the different facets of the Aboriginal courts: their aims, how they work and what they achieve. These inquiries lead to a broader question - what is the significance of the Aboriginal court? Since the first Aboriginal court was established, that question has been variously answered, with some emphasising the court's distinctive features, such as the use of a more culturally appropriate court process or the empowerment of the Aboriginal community, whilst others stress their expected outcomes in terms of recidivism and compliance with court orders. Each of these features is important, influencing the court's processes and outcomes, its relationship to the Aboriginal community and the way Aboriginal people experience the criminal justice system through the Aboriginal court.

However, the main focus of this thesis is the significance of the Aboriginal court as a sentencing process. With informality and direct communication between the participants, the Aboriginal court receives a diverse range of information and cultural advice from Aboriginal Elders and other community members. This and the pivotal relationship of the Elders and judicial officer produce a distinctive form of decision-making. As a result, the Aboriginal court provides a simple and direct means to inform the court about the defendant's Aboriginality, offending and personal circumstances in a manner that a busy magistrates' court rarely has the time or resources to achieve.

This work is based primarily on a review of the literature, court publications and the growing number of studies which provide quantitative and qualitative data on the Aboriginal courts. Also, I draw on my previous experience as a lawyer in the South Australian Aboriginal courts (and now as a magistrate in mainstream and specialist courts) to add to these sources.

The capacity of the Aboriginal court to provide a better appreciation of Aboriginality in sentencing is almost wholly overlooked in the literature. Yet it should not be. It is the practical significance of Aboriginal court sentencing; it provides the means to overcome barriers of language, culture and social disadvantage so that Aboriginal people may be sentenced in a way that allows their 'story' to be heard and understood.

DECLARATION

'I certify that this thesis does not incorporate without acknowledgement any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where the reference is made in the text'.

Paul Bennett

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LIST OF SPECIAL NAMES AND ABBREVIATIONS

ACT	= Australian Capital Territory
AIIA	= Australasian Institute of Judicial Administration
ALRM	= Aboriginal Legal Rights Movement Inc.
AJAC	= Aboriginal Justice Advocacy Committee
AJO	= Aboriginal Justice Officer
ALS	= Aboriginal Legal Service
ALO	= Aboriginal Liaison Officer
ALS	= Aboriginal Legal Service
AMC	= Adelaide Magistrates Court
APOSS	= Aboriginal Prisoners and Offenders Support Services Inc.
APY	= Anangu Pitjantjatjara Yankunytjatjara (Lands)
ASC	= Aboriginal Sentencing Conference
ASG	= Aboriginal Sobriety Group Inc.
CAA	= Court Administration Authority (South Australia)
CMC	= Ceduna Magistrates Court
CSO	= Community Service Order
DPP	= Director of Public Prosecution (South Australia)
LSC	= Legal Services Commission
MBMC	= Murray Bridge Magistrates Court
NSW	= New South Wales
NSWLRC	= New South Wales Law Reform Commission
NT	= Northern Territory
NWY	= Nunkunwarrin Yunti of South Australia Inc.
PAUMC	= Port Augusta Magistrates Court

PLMC	= Port Lincoln Magistrates Court
PSR	= Presentence Report
OCSAR	= Office of Crime Statistics and Research (South Australia)
QLD	= Queensland
RCIADIC	= Royal Commission into Aboriginal Deaths in Custody
SA	= South Australia
SM	= Stipendiary Magistrate
VAJA	= Victorian Aboriginal Justice Agreement
VIC	= Victoria
VIS	= Victim Impact Statement
WA	= Western Australia
WALRC	= Western Australian Law Reform Commission

GLOSSARY

Aboriginal: I use the term *Aboriginal* as it is commonly used in Australia and overseas as a general description for Aboriginal peoples. It is also the most common description used by participants in the South Australian Aboriginal courts. *Indigenous* may be more appropriate elsewhere, such as Queensland, where there are much larger Torres Strait and Pacific Islander populations. For convenience I use the term *Aboriginal* for both Aboriginal and Torres Strait Islander peoples, unless it is appropriate to mention them separately.

Aboriginal court: There are numerous terms used throughout Australia for specialist Indigenous courts. Even in South Australia there is no uniformity in nomenclature, though *Aboriginal court* is the most common term used to describe the specialist Indigenous courts (in South Australia) by staff and other participants. I will use *Aboriginal court* as a generic term since it is accurate, concise and culturally neutral.

Aboriginal Justice Advocacy Committee: Committees established in most Australian states as a result of the Royal Commission into Aboriginal Deaths in Custody with the responsibility to monitor government compliance with RCIADIC recommendations. The Aboriginal Justice Advocacy Committee no longer exists as a separate entity in South Australia.

Aboriginal Justice Officer: Aboriginal Justice Officers (AJO) advise and assist Aboriginal people on warrants, payment arrangements for unpaid fines and court procedures. Though based in the Magistrates court (in South Australia), they organise section 9C sentencing conferences in all jurisdictions. More generally, they act as a link between the Aboriginal community and the court system. Interstate Aboriginal courts have similar positions, though variously described as Court or Project Officers.

Aboriginal Legal Service: The generic description for the various Aboriginal legal aid bodies specifically for Indigenous people in Australia. Some are state-wide, others are community or regional-based.

Aboriginal Liaison Officer: The Aboriginal Liaison Officer (ALO) is employed by the Department of Correctional Services (in South Australia) and based in prison or remand facilities to provide assistance to Aboriginal prisoners and their families. They act as an intermediary between the Aboriginal prisoners and the prison authorities with the additional responsibility to monitor prison compliance with the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

Aboriginal Sentencing Conference: A sentencing conference (commonly referred to as a '9C Conference') which may be conducted in an Aboriginal or mainstream criminal court in South Australia according to section 9C, *Criminal Law (Sentencing) Act 1988* (SA). The sentencing conference may only occur with the defendant's consent after a finding of guilt. The conference must include the prosecutor, an Aboriginal Justice Officer and will usually involve a defence counsel, Elders or Aboriginal community representatives and, less often, a victim. The exact process and degree of informality is variable and ultimately determined by the judicial officer. The sentencing conference may offer information, cultural advice and a general recommendation on sentence. However, the magistrate or judge remains responsible for the decision on penalty.

Anangu Pitjantjatjara Yankunytjatjara lands: The Aboriginal lands in the north-west of South Australia, Western Australia and the Northern Territory, commonly referred to as the 'APY lands'. The term will be used to refer to the APY lands in South Australia, unless otherwise indicated.

Circle-sentencing Court/Circle Court: The terms used for the conference-style Aboriginal courts in NSW and the ACT. The circle-sentencing court originated in Canada in the early 1990's. The circle-sentencing court process is similar to the conferencing courts in South Australia, though the circle usually meets in an Aboriginal community building rather than a courtroom. The circle often makes specific recommendations on penalty, which are usually adopted by the court. However, the magistrate remains responsible for the decision on penalty.

Colonisation: The term I use for the arrival and establishment of European society in Australia in 1788 and after. This is a vexed issue, with other terms such as *invasion* or *settlement* also sometimes used. Each term is not only a different description but also implies a particular view of post-colonial history.

Community Court: The title for the Aboriginal courts in Western Australia and the Northern Territory. It is a title rather than a particular form of Aboriginal court. In Western Australia the Community Court uses a Nunga court process, whilst the Darwin Community Court is a hybrid of the Nunga and circle court models. The Community courts are generally limited to Indigenous defendants, with some exceptions such as the Darwin Community Court, which is open to all offenders. *Community court* is used to describe these Indigenous courts, though the term also describes non-Indigenous, therapeutic courts in other jurisdictions (Victoria).

Community Justice Committee: The generic term I use for the committees established in many regional and remote Aboriginal communities interstate

(Northern Territory and the eastern states). In some instances the committees participate in the Aboriginal court or have a self-policing role in their community.

Community Service Order: An order imposed by a criminal court that may require a person to perform up to 320 hours of community service (the statutory maximum in South Australia) as a penalty or in discharge of existing fines. Community service is supervised by the Department of Correctional Services.

Complaint: The form of summons used in South Australia for summary charges, laid and usually finalised in the Magistrates Court.

Conferencing Court: The generic term I use for the Aboriginal court model in South Australia based on the section 9C sentencing conference (see *Aboriginal Sentencing Conference*).

Disputed Fact Hearing: A hearing conducted where the defendant admits the charge(s), but disputes the factual basis for sentencing. Evidence may be called or statements tendered, as determined by the sentencing judge/magistrate. These hearings rarely occur in the Magistrates Court (in South Australia), where such disputes are usually resolved by negotiation.

District/County Court: The intermediate court (between the Magistrates' and Supreme courts), presided over by a judge who hears more serious, indictable charges in most state jurisdictions (except the ACT, Tasmania and Northern Territory). This level of court is termed the *District* court in South Australia and the *County* court in some other jurisdictions.

Diversion Court: The term used for convenience to describe the Magistrates Court Diversion Program in South Australia, established in 2001 to provide an alternative (to mainstream criminal courts) for adults with a mental or intellectual impairment who are charged with summary or minor indictable offences. Since 2010 it has gradually merged with a substance abuse program to become the *Treatment Intervention Program Court*.

Elders/Respected Persons: Both terms are used in the Aboriginal courts and literature to describe the community representatives who advise and assist the judicial officer. The latter denotes that the representative may not be an Elder in the traditional sense. I use *Elders*, for convenience, as it is the description used in the South Australian legislation – see section 9C 3(a) *Criminal Law (Sentencing) Act 1988* (SA).

Ex Parte: A description for a proceeding or order made in the absence of one party, in the criminal context this will usually be the defendant. A typical example is an Intervention Order, which is initially made on the application of

the Police or, less often, a complainant acting on their own behalf, before the defendant is notified of the proceedings.

First Instance Warrant: The term in the Magistrates court in South Australia for a warrant issued for a defendant who fails to attend court. The warrant may be certified so that they can be bailed after arrest by the police. If not, the defendant must be brought before the court.

Information: The form of summons used in South Australia for minor or major indictable charges.

Intervention Order: An order, made by the Magistrates court or a police officer (in South Australia) to prevent or restrain a person from actions such as approaching or contacting another person (often granted in regard to domestic or family violence matters). Formerly called *Restraining Orders* in South Australia and described by a variety of other terms interstate.

Koori Court: The title of the Aboriginal court in Victoria, based on the term of self-description used by the Aboriginal community in Victoria. The court process is similar to the Nunga court in South Australia.

Magistrates Court: For convenience, I use this as the generic term for the summary, criminal courts where the Magistrate determines all matters of fact, law and penalty. They are the lowest tier of court, called Local Courts in NSW, and Magistrates Courts elsewhere (sometimes also referred to as *summary* or *lower* courts).

Major Indictable: More serious offences which, though initially laid in the Magistrates Court, must be determined in the District or Supreme Courts before a judge and (usually) jury.

Minor Indictable: Less serious indictable offences which are usually dealt with in the Magistrates court, though the defendant may elect for trial by jury in the District Court (in South Australia).

Murri Court: The title of the Queensland Aboriginal court, based on the term of self-description used by the Queensland Aboriginal community. The court process is similar to the Nunga court in South Australia.

Nunga Court: This term is used in two contexts. First, *Nunga Court*, the title of the Aboriginal court model in South Australia that does not employ the section 9C conference process. This model originated with the first Aboriginal court at Port Adelaide Magistrates Court in 1999. The Nunga court process has similarities to that of the mainstream criminal courts, with the main difference being that the magistrate is advised during the sentencing hearing by one or

more Elders on matters of the defendant's background, culture and, at times, penalty. Second, the term *Nunga court model*, or similar, will be used as a generic description for this type of sentencing process, which is currently employed in Aboriginal courts in Victoria, Western Australia, South Australia and (until recently) Queensland.

Presentence Report: The term for a report prepared, at the court's request, by the Department of Correctional Services (in South Australia) to provide information about the defendant's offending and personal circumstances to the sentencing court. The report can only be ordered by the court after a plea or finding of guilt.

Stipendiary Magistrate: The term for a Magistrate in South Australia - see section 3, *Magistrates Act 1983* (SA). Some other Australian jurisdictions use slightly different formal titles for magistrates. Whenever possible, I use the honorific *Magistrate* as the generic term.

Summary: The term *summary court* is sometimes used as an alternative description for the Magistrates court. *Summary offences* are those that are usually determined in the Magistrates court and for which there is no right to elect for trial by jury.

Supreme Court: The highest level of court in all state and territory jurisdictions, hearing the most serious criminal matters (murder, attempt murder etc.) and exercising appellate jurisdiction.

Suspended Sentence: The term in South Australia for a sentence of imprisonment that is not required to be served, subject to the person entering into a good behaviour bond. The whole sentence may be suspended, or part of the sentence may be served, with a portion suspended - see section 38, *Criminal Law (Sentencing) Act 1988* (SA).

Treatment Intervention Program Court: The specialist court in South Australia which currently operates in five magistrates' courts, combining mental health and substance abuse programs, usually of six months duration. The programs are only available to defendants who are pleading guilty to charges that can be finalised in the magistrates' court. The Treatment Intervention Program court has gradually replaced the *Diversion Court* since 2010.

Victim Impact Statement: A statement pursuant to section 7 *Criminal Law (Sentencing) Act 1988* (SA), provided by prosecution after a finding of guilt to inform the court of the affects of the offending on the victim. It may be read by the victim (or another nominated person such as a family member or the

prosecutor), or tendered in written form. They are usually provided in the higher courts, but less often in the magistrates' courts.

CHAPTER 1. INTRODUCTION

1.1 Aboriginal Courts in Australia

Since the first contemporary Aboriginal court commenced in 1999, more than fifty similar courts for the sentencing of Aboriginal offenders have been established throughout mainland Australia.¹ Whilst recent developments in Queensland cast some doubt on their continued growth,² the specialist Aboriginal court remains one of the most visible measures introduced to address the particular needs of Aboriginal people since the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) brought to light the extent of Aboriginal disadvantage in the criminal justice system.³

The Aboriginal court combines elements of the mainstream criminal court with informality, direct communication between the participants, a 'conversational' sentencing process and, most importantly, the involvement of Aboriginal community members.⁴ Whilst they are diverse and localised, Australian Aboriginal courts have several common features. With one exception, they are located in the magistrates' court.⁵ They are sentencing courts, limited to those who plead guilty. Consequently, no Aboriginal courts hear trials or other disputed matters.

The Aboriginal courts operate within the general criminal law, with Aboriginal cultural values and participation of Aboriginal community members influencing its structure, practices and sentencing approach. They do not apply customary law and are neither community-controlled nor diversionary courts. The forms of Aboriginal court vary, though features such as the central role of Aboriginal community members, informal communication between participants and a deliberative and non-adversarial approach to sentencing are universal. Their aims are wide-ranging, with some common themes: to provide a culturally relevant court, encourage greater involvement of the Aboriginal community in

¹ Aboriginal courts have been established in all Australian jurisdictions, except Tasmania. For a list of current Aboriginal courts, see Appendix 1, 145.

² The Queensland government announced in September 2012 that funding would be discontinued for the fourteen Murri Courts.

³ The Final Report of RCIADIC was released in 1991.

⁴ The often lengthy sentencing discussions in the Aboriginal court were aptly described by Dr Kate Auty, the first Koori Court magistrate in Victoria, as a 'sentencing conversation' - see Mark Harris, 'A Sentencing Conversation', Evaluation of the Koori Courts Pilot Program' (2006) 41 <www.justice.vic.gov.au/wps/wcm/connect/DOJ...A...K+-+Publications>

⁵ The one exception is the Koori County Court in Victoria.

the court process, obtain better sentencing information, improve appearance rates and reduce Aboriginal reoffending.

This study examines the different facets of the Aboriginal courts: their aims, how they work and what they achieve. These inquiries lead to a broader question - what is the significance of the Aboriginal court? Since the first Aboriginal court was established, that question has been variously answered, with some emphasising the court's distinctive features, such as the use of a more culturally appropriate court process or the empowerment of the Aboriginal community, whilst others stress their expected outcomes in terms of recidivism and compliance with court orders. Each of these features is important, influencing the court's processes and outcomes, its relationship to the Aboriginal community and the way Aboriginal people experience the criminal justice system through the Aboriginal court.

However, the main focus of this thesis is the significance of the Aboriginal court as a sentencing process. With informality and direct communication between the participants, the Aboriginal court receives a diverse range of information and cultural advice from Aboriginal Elders and other community members. By giving a voice to members of the Aboriginal community, the Aboriginal court provides a simple and direct way to inform the judicial officer of the issues often most important in sentencing - the defendant's Aboriginality, the extent of family support, prospects for rehabilitation and conditions within the local Aboriginal community. This is the crucial feature of the sentencing process, enabling the Aboriginal court to draw on the knowledge and values of the Aboriginal community in a way the mainstream magistrates' court rarely has the time or means to achieve. From this, the court can develop a better appreciation of Aboriginality as a factor in sentencing.

This aspect of Aboriginal court sentencing is almost wholly overlooked in the literature. Yet it should not be. It is the practical significance of Aboriginal court sentencing. That is not to suggest that Aboriginal court sentencing, alone, can (or does) produce an equality of outcomes for Aboriginal people in the criminal justice system, or immediately reduce recidivism or Aboriginal overrepresentation in custody. But the Aboriginal court does provide Aboriginal people with the chance to be heard and properly understood in the sentencing process.

Themes and Topics

With these themes in mind, this work first reviews the development of the Aboriginal courts in Australia (with the main focus on South Australia). The study then analyses the different Aboriginal court models, their theoretical and

legislative framework, aims, practices, the role of the participants and the sentencing process. The distinctive features of the Aboriginal court are examined: court procedure and design, the involvement of the Aboriginal community and the decision-making process.

Central to the analysis of the decision-making process is the pivotal relationship of the judicial officer and the Elders. The various factors that shape this relationship are considered: the personalities of the main participants, the court model, aims and practices, institutional and legal constraints and, critically, the willingness of the judicial officer to allow the Elders to participate fully in a sentencing dialogue. The relationship is highly variable, from fairly conventional arrangements where the Elders take an advisory role to a collaborative model where the Elders, as part of a conference or circle, influence the decision on penalty more directly. The nature of the 'collaborative' relationship between the judicial officer and Elders raises a crucial issue. Is it (or can it be) a 'power-sharing' arrangement? If so, is that consistent with the current Australian legal framework?

Also discussed are the studies and critiques which examine the Aboriginal courts from a range of practical and theoretical perspectives. In recent years Aboriginal court processes, outcomes and participant attitudes have been subject to increasing quantitative and qualitative evaluation. The studies suggest that the Aboriginal courts have generally met their aims to provide a more culturally relevant court, involve the Aboriginal community in the sentencing process and increase attendance rates, but have not been successful in engaging victims in the sentencing process or reducing recidivism rates.⁶

The results of the studies concerning recidivism raise a critical and much debated issue - can Aboriginal courts, as a single measure, reduce the rate of Aboriginal reoffending and overrepresentation in custody? The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) concluded the underlying causes of Aboriginal recidivism were complex and must be addressed by a broad sweep of social, economic and educational measures, beyond the narrow reach of criminal justice remedies. This thesis contends the RCIADIC analysis is crucial to an understanding of the limitations of Aboriginal courts and their capacity to influence recidivism rates.⁷

Many of the studies propose that Aboriginal courts adopt a different approach, adding pre- and post-sentence programs to address the primary causes of offending behaviour (alcohol and substance abuse, anger management,

⁶ See Chapter 4 *Aboriginal Court Studies and Evaluations*, 78.

⁷ The Royal Commission into Aboriginal Deaths in Custody (1991) Final Report, Summary.

domestic violence), arguing this is necessary if progress is to be made in reducing reoffending by Aboriginal court defendants. Such a change would face a number of practical difficulties (including the need for increased funding) and raise an important issue for the Aboriginal court - can greater involvement of therapeutic professionals at the pre-sentence stage be reconciled with genuine Aboriginal community influence in sentencing?

The Aboriginal courts have also attracted a broad range of criticisms which pose some significant theoretical issues. Is there a rationale for a separate court for Aboriginal people? What relationship should Aboriginal courts have to the criminal justice system? And are they to be defined as a distinctive court, or one derivative of other specialist courts?

The critiques encompass a variety of viewpoints: from those that question the legitimacy or need for a separate court for Aboriginal people to critiques that advocate more autonomous forms of Aboriginal court. There are also more pragmatic critiques which focus on the day-to-day workings of the Aboriginal court. These criticisms include the vexed issue of family violence in the Aboriginal community. Some of the viewpoints are critical of the way the Aboriginal courts approach family violence offenders and victims, whilst others question whether Aboriginal courts should deal with family violence matters at all.

This work is based primarily on a review of the literature, court publications and the growing number of studies which provide quantitative and qualitative data on the Aboriginal courts. I also draw on my previous experience as a lawyer in the South Australian Aboriginal courts (and now as a magistrate in mainstream and specialist courts) to add to these sources.⁸

As I have used my knowledge of the Aboriginal courts in South Australia to contribute to the thesis, I should explain my background in those courts and the criminal law generally.

My Background

My interest in the Aboriginal courts began through involvement as a lawyer. I was a lawyer with the Legal Services Commission (LSC) when I appeared on behalf a client in the first Nunga Court at Port Adelaide Magistrates Court on 1 June 1999.⁹ My involvement increased when I joined the Aboriginal Legal Rights

⁸ I have presided in the specialist Family Violence courts at Adelaide, Elizabeth and Christies Beach and the Treatment Intervention Program court at Christies Beach (magistrates' courts).

⁹ Initially called the 'Special Interest Court', but soon changed to 'Nunga Court', as the Port Adelaide Aboriginal Court is still called.

Movement (ALRM) in 2001, after which I appeared regularly in the Nunga Court at Port Adelaide and, on occasion, in the Aboriginal courts at Murray Bridge, Port Augusta and Ceduna (until my appointment as a magistrate). I also appeared on behalf of Aboriginal clients in mainstream criminal courts at all levels, including a number of circuit courts in which the defendants were predominantly Aboriginal.

Many things were striking about the Aboriginal courts: the informality, the direct talk which required the active participation of the defendant, and, most of all, the Elders. But the thing that struck me as distinctive (from a lawyer's point of view) was the way the open, conversational sentencing process brought to light information, either about the offending or the defendant's personal circumstances, that seemed to genuinely influence the outcome. The other noticeable feature was that formal submissions (by defence counsel) about the relevance of the defendant's Aboriginality were often briefer, or on occasion rendered unnecessary, as the magistrate would listen to the defendant, their family or the Elders and receive the information direct from the Aboriginal participants.

This contrasted sharply with my experience in other criminal courts (particularly in the higher courts),¹⁰ where sentencing submissions concerning the consequences of Aboriginality were formalised and almost wholly reliant on the defence counsel's knowledge and judgment as to what should be said or presented in terms of reports or other information. In the Aboriginal court there was no 'filtering' of information,¹¹ with the magistrate hearing about the relationship of the defendant's Aboriginality to their offending and everyday life from those who spoke from experience and, sometimes, personal knowledge.

It is from these experiences that my interest in the Aboriginal court sentencing process first arose.

1.2 Significance of the Research

The use of specialist Aboriginal courts in Australia during the last decade or more has been an important attempt by the court system to better meet the needs of Aboriginal offenders by involving members of the Aboriginal community in sentencing. During this time a sizeable body of research, commentary and evaluations has developed. Much of the literature is descriptive, whilst the

¹⁰ In South Australia there are two tiers of higher court, the District and Supreme Courts.

¹¹ A certain filtering or interpretation of information (in all matters) is part of the lawyer's craft – an issue further discussed in Chapter 3 *How the Aboriginal Courts Work*, 36.

studies and evaluations provide some qualitative and quantitative information on Aboriginal court processes and outcomes.

This work focuses on an aspect of the Aboriginal court that has received little attention in the literature – the Aboriginal court’s singular capacity to provide personal, social and cultural information relevant to Aboriginality as a factor in sentencing. Most current studies describe the capacity of the Aboriginal court to produce a culturally appropriate process and better sentencing information, but offer limited analysis of how these features can influence decision-making and shape the court’s distinctive sentencing approach.

There is extensive literature in the criminal law on Aboriginality as a general sentencing consideration, but it derives almost wholly from the practices and decisions of mainstream criminal courts. There is a paucity of case law involving Aboriginal courts’ treatment of the issue, or more generally of their sentencing practices and principles (a product, perhaps, of the non-adversarial attitude of the parties). For instance, in South Australia there have been only two appeal cases from the Aboriginal courts since 1999 (and the position is similar interstate).¹² The limited number of appellate decisions means that the sentencing approach and practices of the Aboriginal courts have been, overwhelmingly, determined incrementally by magistrates’ courts.¹³ One consequence of this is a complex and often localised picture of Aboriginal court practices – a challenge for any observer seeking to analyse Aboriginal courts at a broader, national level.

Why Examine South Australian Aboriginal Courts?

I have focussed on South Australian Aboriginal courts for two reasons: first, because I know them both from study and experience, and second, because of the differing models of Aboriginal court in use in South Australia.

Though some features of the Aboriginal courts are local and specific to each jurisdiction, in an important sense South Australia may be seen as a microcosm of the Australian experiment with specialist Aboriginal courts. South Australia alone has both Nunga and conferencing court models operating within the same jurisdiction.¹⁴ This allows for comparison between the two models within the

¹² In South Australia there have been two appeals from penalties in the Aboriginal courts – and none since 2002 (for a discussion of these two cases and the Victorian appeal case of *Morgan*, see Chapter 5 *Aboriginal Courts: Theory and Critiques*, 114-17).

¹³ For a discussion on the capacity of magistrates’ courts to instigate incremental change, see Sharyn Roach Anleu and Kathy Mack, ‘Magistrates, Magistrates Courts and Social Change’ (2007) 29(2) *Law & Policy* 183.

¹⁴ A brief summary of the Nunga and conferencing court models of Aboriginal court is given in the Glossary, with a more detailed description in Chapter 3 *How the Aboriginal Courts Work*.

same legal framework and, in one instance, the same locality.¹⁵ For this reason, South Australia is an especially useful starting point for a study of Aboriginal courts in Australia.

The literature and research on Aboriginal courts in South Australia is very limited, with two quantitative studies of the Nunga courts and a qualitative study of the Port Lincoln conferencing court.¹⁶ The Nunga court study by Tomaino preceded the introduction in South Australia of specialist sentencing legislation for Aboriginal offenders. The enactment of section 9C *Criminal Law (Sentencing) Act, 1988* (SA) in 2005 has seen a number of subsequent changes in the location, structure and practices of Aboriginal courts in South Australia which are yet to be comprehensively examined. Nor has any study reviewed (or compared) the Nunga and conferencing courts since both have operated in South Australia.

Thesis Aims and Objectives

My thesis aims to add to the existing body of research on specialist Aboriginal courts in two ways.

First, the Aboriginal courts in South Australia are described, with comparisons to similar courts interstate. Their legislative and theoretical framework, aims, practices and the participants' roles are examined.

Second, and more importantly, this work aims to provide some insight into the Aboriginal court decision-making process (with particular focus on the relationship of the Elders and the judicial officer) and how the participation of Aboriginal community members can improve the court's understanding of the relevance of Aboriginality in sentencing.

1.3 Methodology

My research draws on information from various published sources: a review of the literature, an analysis of existing quantitative and qualitative data, legislation and regulations, case law, Hansard, court documents (administrative) and

¹⁵ The Aboriginal Court at Port Augusta uses both conferencing and Nunga-style courts, which is the only example in Australia of both models operating at the same court.

¹⁶ The Nunga court studies are Bevan Fletcher & Bev O'Brien, 'Nunga Court Summary of findings from a quantitative analysis of the Court' (2008) Office of Crime Statistics and Research, Department of Justice, South Australia: Adelaide; John Tomaino, 'Aboriginal (Nunga) Courts' (2005) *Information Bulletin* 39, Government of South Australia, Office of Crime Statistics and Research: Adelaide; and for a conferencing court evaluation, see Jayne Marshall, 'Port Lincoln Aboriginal Court Pilot: Review Report' (2008) Office of Crime Statistics and Research, Department of Justice, South Australia: Adelaide.

reports such as RCIADIC. Multiple sources of data are used for two reasons. First, though literature is the main source of information, there are some significant gaps in the writings and commentary on the Aboriginal courts which require the use of other data. Also, a variety of sources ensures the information, analysis and conclusions in the thesis are as broadly based as the published data allows.

Literature Review

The literature is discussed as part of each topic, rather than in a separate literature review. I have chosen this approach as the literature and other published works are my primary source and provide much of the contents of the thesis.

The main sources for the literature on Australian Aboriginal courts are academic writings and commentary by observers and those who have participated in the courts (judicial officers and other court staff). The latter source is generally descriptive and observational, though often insightful of the workings and differences of the Aboriginal courts in their urban, provincial and remote (circuit) locations. A number of these articles are drawn from judicial conferences concerning Indigenous courts and sentencing measures.¹⁷

Whilst there have been only a few studies specifically on the development of Aboriginal courts in South Australia,¹⁸ there is a larger body of literature on specialist Aboriginal courts in other Australian jurisdictions which is relevant for comparative and analytical purposes to the study of Aboriginal courts in South Australia. There are few studies which adopt a national perspective,¹⁹ as most are limited to a particular jurisdiction (reflecting the state-based structure of criminal justice in Australia).

Some of the academic sources have a wider focus than the Aboriginal courts. Blagg examines the Aboriginal courts as part the relationship of Aboriginal people to the criminal justice system, whilst King et al look at Aboriginal courts in the context of the non-adversarial justice movement.²⁰

¹⁷ Indigenous Courts Conference, Australian Institute of Judicial Administration, September 2007: Mildura; 'The Changing Face of Justice', Association of Australian Magistrates Biennial Conference, June 2008: Sydney; and National Indigenous Courts Conference, Australian Institute of Judicial Administration, August 2009: Rockhampton.

¹⁸ Fletcher & O'Brien (2008) above n 16; Tomaino (2005) above n 16; and Marshall (2008) above n 16.

¹⁹ One exception is Elena Marchetti & Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 17 *Sydney Law Review* 6.

²⁰ Harry Blagg, 'Silenced in Court: Aboriginal People and the Courts' in *Crime, Aboriginality and the Decolonisation of Justice* (2008) 126; and Michael King et al, 'Indigenous Sentencing Courts' in *Non-Adversarial Justice* (2009) 178.

There is also a limited discussion of the literature concerning overseas Indigenous courts. Indigenous courts in Canada and, to a lesser extent, New Zealand, have had an important influence on the use of circle sentencing and conferencing processes in the Aboriginal courts in a number of Australian jurisdictions (NSW, ACT and SA). I do not attempt a detailed review of the literature on overseas Indigenous courts, but some discussion of international studies provides a broader context for the analysis.

Other Sources

Three other main sources are used. First, there are the academic and government evaluations of the Aboriginal courts. By jurisdiction, there are a growing number of quantitative reviews: Morgan and Louis (Queensland), Tomaino, Fletcher and O'Brien (South Australia), Borowski, Byles and Karp (Victoria), Fitzgerald (NSW) and Acquilina et al (Western Australia).²¹ Other evaluations, such as Parker and Pathe (Queensland), CIRCA, Daly and Proietti-Scifoni (NSW) and Harris (Victoria), have used a combination of methodologies, including participant interviews.²²

Secondly, there are official sources such as parliamentary debates, legislation, court publications and court eligibility guidelines which provide specific information concerning the aims, practices and rules of Aboriginal courts in South Australia and interstate. These sources are useful, though inevitably they

²¹ Anthony Morgan & Erin Louis, 'Evaluation of the Queensland Murri Court: Final Report', Australian Institute of Criminology (2010) <http://www.aic.gov.au> – also includes a qualitative study; Tomaino (2005) above n 16; Fletcher & O'Brien (2008) above n 16; Allan Borowski, 'Evaluating the Children's Koori Court of Victoria: Some Key Findings' (Paper presented at the Australian Institute of Criminology Seminar, Melbourne, March 2010) <http://www.aija.org.au/NAJ%202010/Papers/Borowski%20A%20ppt.pdf>; Dennis Byles & Tal Karp, 'Sentencing in the Koori Court of the Magistrates Court – A Statistical Report' (2010) Sentencing Advisory Council Victoria <www.sentencingcouncil.vic.gov.au/.../sentencingcouncil.../sentencing...>; Jacqueline Fitzgerald, 'Does circle sentencing reduce Aboriginal offending?' (2008) Crime and Justice Bulletin No. 115, New South Wales Bureau of Crime Statistics and Research: Sydney; and Heather Acquilina et al, 'Evaluation of the Aboriginal Sentencing Court of Kalgoorlie – Final Report' (2009) Report to the Department of the Attorney-General, Western Australia <www.courts.dotag.wa.gov.au/_.../Kalgoorlie_Sentencing_Courts_Repo...>

²² Natalie Parker and Mark Pathe, 'Summary of the Review of the Murri Court' (2006) Department of Justice and Attorney-General, Queensland, <<http://www.justice.qld.gov.au/files/Services/MurriCourtReport.pdf>>; Cultural & Indigenous Research Centre Australia, 'Evaluation of Circle Sentencing Program' (2008) NSW Attorney-General's Department, <[http://www.crimeprevention.nsw.gov.au/lawlink/cdp/llcdpiv.nsf/vwFiles/EvaluationOfCircleSentencingREPORT:pdf/\\$file/EvaluationOfCircleSentencingREPORT:Pdf](http://www.crimeprevention.nsw.gov.au/lawlink/cdp/llcdpiv.nsf/vwFiles/EvaluationOfCircleSentencingREPORT:pdf/$file/EvaluationOfCircleSentencingREPORT:Pdf)>; Kathleen Daly and Gitana Proietti-Scifoni, 'Defendants in the Circle: Nowra Circle Court, the Presence and Impact of Elders, and Re-Offending' (2009) School of Criminology and Criminal Justice, Griffith University; and Mark Harris (2006) above n 4.

tend (as observed by Marchetti and Daly) to reflect an 'official' view as to the aims and rationale of the Aboriginal court.²³

Finally, I have also drawn on my own experience of the Aboriginal courts in South Australia concerning their history, aims and practices.

Limitations of the Research

My past role as a legal practitioner and current one as a magistrate in the South Australian criminal justice system raises some issues for the research. I have used knowledge from my involvement in the Aboriginal courts (and the criminal courts generally) in South Australia in those areas of research where there is a paucity of literature and published sources. The contribution from my own knowledge is greatest in those sections of the thesis on the history and workings of the Aboriginal courts (Chapters 2 and 3).

Though first-hand knowledge is helpful, it must be approached with caution. The observations may be accurate, but only of a particular instance or court rather than the more general conclusions that can be reached from broader-based research. There can also be a certain lack of objectivity, or at least a personal perspective on events and their meaning that comes from being a participant rather than a detached observer. I have tried to be clear at each point in the thesis where I draw on my own experiences, whether as the sole source of information or in addition to published material.

There is another, larger limitation to my research. With the exception of my contribution, the thesis is wholly based on existing literature and other published sources. The literature is overwhelmingly the product of academics, lawyers, magistrates and other professionals, mostly from within the criminal justice system. Very few are by Aboriginal writers and almost none by Aboriginal participants.²⁴ As well, there are only a few qualitative works which include any data from interviews, surveys or informal discussions with Aboriginal court users to inform on the views of participants.²⁵

²³ Marchetti & Daly (2007) above n 19, 6.

²⁴ An exception is Colleen Welch, an Aboriginal Justice Officer who has been involved in the Nunga court at Port Adelaide (SA) and in section 9C conferences in other courts, see Colleen Welch, 'South Australian Courts Administration Authority: Aboriginal Court Day and Aboriginal Justice Officers' (2002) 5 (14) *Indigenous Law Bulletin*, 5.

²⁵ Perhaps the largest qualitative study of defendant's attitudes so far (a survey of 30 Koori Court defendants, to which 20 replied) was conducted by Mark Harris (2006) above n 4, 90-91. See also the more recent evaluations of circle sentencing court defendants in NSW - CIRCA (2008) above n 22, 37-38 and Daly & Proietti-Scifoni (2009) above n 22, 103.

As a result, there is only limited first-hand information on the views and experiences of the defendants, victims and families who use the court. To that extent, the existing literature may be seen as having a ‘top-down’ view. I have sought some balance by the use of the few works by Aboriginal writers. But it remains a shortcoming in this work that must be acknowledged, in the absence of a larger body of commentary and critique by Aboriginal writers.

Terminology

I have chosen to use certain terms for convenience or brevity, whilst acknowledging there are appropriate alternatives. I use the term *Aboriginal* as it is commonly used in literature as a generic term for Aboriginal peoples. Importantly, it is the most common term used in the specialist Aboriginal courts (at least in South Australia) by the Aboriginal staff and participants. Similarly, I use the term *Aboriginal court* as a generic description for specialist Indigenous courts as it is accurate, concise and culturally neutral. I acknowledge in some Aboriginal courts (particularly north Queensland) Torres Strait and Pacific Islander peoples also appear.

The term *Aboriginal culture* is used (unless indicated to the contrary) in the sense that it is distinct from non-Indigenous culture. Beyond that, it may often be more accurate to speak of Aboriginal cultures, as they differ according to locality, nation and language group. Similarly, the singular *Aboriginal community* is used as a general description for Aboriginal people within the locality of a particular court; though it is recognised within that group there may be many differences in culture and language.

I use the term *Magistrates’ Court* to describe the lowest tier of court in Australia, as most jurisdictions use this description, with the exception of New South Wales, where they are referred to as Local Courts. The description *specialist* is used as a general term for the Aboriginal court and others (in South Australia - the Drug, Diversion and Family Violence courts) which employ innovative court practices, though the term also includes courts with conventional procedures which exercise sole jurisdiction over particular offenders or area of law (such as the Industrial or Youth courts).²⁶ Finally, the term *jurisdiction* refers to a state or Territory jurisdiction as the Aboriginal courts are state-based and, overwhelmingly, deal with state criminal matters.

²⁶ The term ‘specialist’ is used by King et al (2009) above n 20, whilst Payne describes the Aboriginal, Drug, Diversion and Family Violence courts as ‘speciality’ courts – Jason Payne, ‘Speciality Courts: Current Issues and Future Prospects’ (2006) 317 *Trends & Issues*.

1.4 Thesis Summary

The thesis is comprised of six chapters:

Chapter 1 outlines the subject matter and objective of the thesis. I explain my interest and involvement in the Aboriginal courts, the significance of the topic and the research methodology. The limitations of literature-based research and the use of my own experiences are also discussed.

Chapter 2 provides a short intellectual and factual background to Aboriginal courts in Australia, which are examined in more detail in subsequent chapters. The chapter is divided into two parts. The first is a study of the ideas and influences that created or shaped the Aboriginal courts in Australia. Second, there is a brief description of the development of the Aboriginal courts in each jurisdiction, including a summary of the type of Aboriginal court used, legislation and institutional framework.

Chapter 3 considers how the Aboriginal courts work, examining their structure, aims and practices. Some of the features looked at are the varying offence, locality and jurisdictional rules. A comparison is made between the two models of Aboriginal court and mainstream criminal courts. Aboriginal court aims are discussed and a number of common objectives are identified, as are some differences between the models and jurisdictions. Practices such as informality, direct communication between the parties, a conversational approach to sentencing submissions and the use of therapeutic and restorative justice techniques are examined. Each of the participant's roles are described and compared to those in mainstream courts. Particular emphasis is given to those participants (such as the Elders and Aboriginal Justice Officers) who are unique to the Aboriginal court.

The second part of the chapter includes a critical analysis of the decision-making process. The relationship of the judicial officer and the Elders is explored as the central feature of the sentencing process. The other feature examined is the capacity of the Elders and other Aboriginal participants to provide social, cultural and personal information to inform the court on the offender, offending and the relevance of Aboriginality in determining an appropriate penalty.

Chapter 4 considers the quantitative and qualitative evaluations of the Aboriginal courts and their findings on the extent to which the Aboriginal courts meet their aims. The implications of the findings and the capacity of Aboriginal courts to achieve their objectives are discussed.

Chapter 5 reviews critiques on the Aboriginal courts. Most of the works relate to the Australian courts, though there is some international focus. The critiques are

examined in two broad categories: pragmatic critiques, which support the current forms of Aboriginal court, but criticise the way they currently operate (including critiques of the Aboriginal court approach to family violence matters) and those which reject the contemporary Aboriginal court, either maintaining there should be no separate Aboriginal court for Aboriginal people or proposing different forms of Aboriginal court.

A number of theoretical issues are also considered. What are the Aboriginal courts? Why have specialist courts for Aboriginal people? What is their role within the criminal justice system? As part of this inquiry, various jurisprudential works on Aboriginal and problem-solving courts are discussed.

Finally, Chapter 6 presents the thesis conclusions concerning the key elements of the Aboriginal courts, their distinctive features and the essential significance of the Aboriginal court sentencing process.

CHAPTER 2. CONTEMPORARY ABORIGINAL COURTS: A SHORT HISTORY

2.1 Introduction

This chapter will outline the growth of Aboriginal courts in Australia since 1999, with the main focus on South Australia. It describes the origins and progress of specialist Aboriginal courts in Australia, providing background to the discussion and analysis that will follow.

To properly understand how the Aboriginal courts have developed, it is helpful first to look at the ideas and influences that were their precursor: the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) report, the growing recognition of Aboriginality and Aboriginal community views in sentencing law, institutional innovations in the summary courts and the recognition that many Aboriginal people were alienated by the usual court process.

2.2 The Importance of RCIADIC

It is unlikely that specialist Aboriginal courts and sentencing measures in Australia would have emerged (at least in its current form) without the RCIADIC inquiry a decade earlier. But its influence was not explicit. The RCIADIC report did not propose a specialist Aboriginal court or similar sentencing measures. Of the 339 final recommendations, only one suggested a role for Aboriginal community participation in the sentencing process. Even that recommendation was limited to 'remote or discrete communities'.²⁷

However, the influence of the RCIADIC report emanated as much from the information it collated about the grossly disadvantaged position of Aboriginal people at all stages of the criminal justice system, as its recommendations. RCIADIC acted as a catalyst for change in the courts and other parts of the criminal justice system – some of the changes arose from its recommendations, others (like the Aboriginal courts) from the awareness of Aboriginal disadvantage it generated.

²⁷ The Royal Commission into Aboriginal Deaths in Custody, National Report (1991) - Recommendation 104 states '(t)hat in the case of discrete or remote communities sentencing authorities consult with Aboriginal communities and organisations as to the general range of sentences which the community considers appropriate for offences committed within the communities by members of those communities...'

The Royal Commission into Aboriginal Deaths in Custody was instituted in 1987 to investigate the deaths Australia-wide of 99 Aboriginal people in police and prison custody. The Commission, during its initial deliberations, came to the unexpected conclusion that the number of Aboriginal deaths did not reflect a higher rate of deaths in custody (compared to non-Aboriginal prisoners), but the gross over-representation of Aboriginal people in custody. The Commission found that Aboriginal people were about 15 times more likely than non-Aboriginal people to be in custody.²⁸ As a result, the Commission decided to investigate not only *how*, but also *why* they died.

Whilst the Commission continued to examine the conditions of Aboriginal prisoners in gaols and police cells (many of the final recommendations related to prisoner safety), its investigation was broadened to encompass the place of Aboriginal people in the criminal justice system and the circumstances in which they lived. There had been many previous investigations and Royal Commissions into aspects of the legal and welfare regimes governing Aboriginal people (mostly state-based inquiries).²⁹ The RCIADIC inquiry, which continued until its final report was released in 1991, was the first comprehensive, national investigation into the place of Aboriginal people in society and the criminal justice system.

Whilst a detailed study of RCIADIC is beyond the scope of this thesis, it is useful to summarise the information, analysis and recommendations of the Royal Commission which, it is argued, provided the justification and basic intellectual framework for the specialist Aboriginal courts which followed later in the decade.

RCIADIC: Analysis and Recommendations

The Royal Commission considered the fundamental causes of Aboriginal over-representation in custody arose from their historical relationship with the police, courts, and more generally, the state. The Commission observed a recurring pattern in the lives of those who died in custody; early and repeated contact with the criminal justice system and ‘a unique history of being ordered, controlled and monitored by the state’ involving criminal justice and welfare authorities (the latter continuing until the ‘Stolen Generation’ policies were abandoned in the early 1970’s).³⁰

²⁸ As at 30 June 1989 - *ibid*, 225.

²⁹ Before the 1967 referendum Aboriginal affairs were a state, not a Commonwealth responsibility.

³⁰ RCIADIC (1991) Final Report, Summary, 1.

The RCIADIC report described a 'legacy of domination and control'³¹ which resulted in a systemic disempowerment of Aboriginal people in every aspect of their lives; first and most importantly, dispossession from their land. One of the most destructive consequences of these earlier state policies, highlighted in the RCIADIC report, was the fracturing of families and the loss of culture, traditionally handed down through family and kin. This issue was itself the subject of a later inquiry in 1997 with the Bringing Them Home Report³² which investigated the historic and contemporary effects of state policies on Aboriginal family life.³³

As well as family and cultural dislocation, the Royal Commission identified the underlying causes of Aboriginal disadvantage in a wide range of social and criminal justice policy areas: poverty, unemployment, limited schooling, poor and overcrowded housing, remote communities with few services, alcohol and substance abuse and a troubled relationship with police. This analysis, with its emphasis on the social circumstances of the offender and the offending, led the Commission to make many recommendations concerning the social, economic and cultural needs of Aboriginal people (as well as recommendations specific to the criminal justice system).³⁴

The Royal Commission report acknowledged that the consequences of colonisation on Aboriginal society were complex and its impact varied from community to community. Some differences were intrinsic to the local Aboriginal community, whilst others arose from the degree of intrusion by European colonisation (greater in heavily settled, coastal areas). As the RCIADIC report commented, '(t)he Aboriginal experience of history has been very different in different parts of Australia. Approaches to remedying inequality need to take account of these differences. One lesson of history is that Aboriginal society is very local'.³⁵

This understanding of the complexity of Aboriginal society was central to the approach embraced in the Commission's recommendations; successful solutions need not be uniform, but should be formulated and implemented with the

³¹ Ibid.

³² Human Rights and Equal Opportunity Commission, 'Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Children from their Families' (1997).

³³ The 'Stolen Generation' policies occurred principally at state and Territory level involving the systematic removal of Aboriginal children from their families.

³⁴ The 339 recommendations have been categorised as follows: underlying issues – 126; criminal justice issues – 106; prisoner safety – 107 ; see Chris Cunneen, 'Racism, Discrimination and the Over- Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2006) 17(3) *Current Issues in Criminal Justice*, 335.

³⁵ RCIADIC (1991) above n 30, 2.

participation of local Aboriginal communities and organisations. This is apposite to the subsequent development of specialist Aboriginal courts and sentencing measures with its emphasis on diversity in structure and practice.

The Commission's recommendations had two primary objectives: to redress disadvantage through a combination of reform of criminal justice practices and programs for the social and economic progress of Aboriginal people; and to enhance 'the growth of empowerment and self-determination of Aboriginal society'.³⁶ In the Commission's view, neither objective could be achieved without the other.

RCIADIC and the Aboriginal Courts

The impact of RCIADIC on the development of the Aboriginal courts has been profound, though diffuse. Three general themes from the RCIADIC inquiry have proved most influential in the formation, aims and sentencing approach of the Aboriginal courts. They are:

- Aboriginal people are over-represented at every level of the criminal justice system; at arrest, court and in custody.
- Self-determination must be the basis for policy and action to address Aboriginal disadvantage within the criminal justice system.
- The causes of Aboriginal disadvantage are complex and effective action to reduce over-representation must extend beyond the criminal justice system into all areas of public policy.

These themes have each been critical to the development of the Aboriginal courts, though in differing ways. The first was crucial to why the Aboriginal courts were created, the second to the form they have taken and the third, to how they have approached the sentencing of Aboriginal offenders.

Aboriginal Over-Representation

The realisation that Aboriginal people were grossly over-represented in the criminal justice system came to widespread public notice as a result of the RCIADIC inquiry. The shocking extent of Aboriginal over-representation in the criminal justice system could no longer be ignored. As a result, Commonwealth and state governments accepted the vast majority of the Commission's recommendations. But the implementation of the recommendations by

³⁶ RCIADIC (1991) above n 30 [1.7.5] & [1.7.6].

government and criminal justice agencies has been patchy, varying according to the degree of commitment by state and Commonwealth governments.³⁷

In South Australia the position of Aboriginal people in the criminal system changed little after the final RCIADIC report. A 1998 study in South Australia showed Aboriginal people in the Magistrates court to be nearly four times more likely to receive a term of imprisonment than non-Aboriginal defendants.³⁸ In 1999 (when the first Aboriginal court was established) the National Prisoner Census found South Australia had the highest level of Aboriginal over-representation in custody in Australia.³⁹

Concerns about Aboriginal over-representation in custody encouraged a greater willingness amongst some in legal circles to find new methods to better engage Aboriginal people with the criminal justice system and reduce their numbers in custody. Tomaino, in his 2005 study, suggests a clear link between the RCIADIC findings on Aboriginal over-representation in the criminal justice system and the emergence of the Aboriginal courts in South Australia.⁴⁰ This view was shared by Marchetti and Daly in their Australia-wide review of Aboriginal courts in 2007.⁴¹

Interstate, the impact of the RCIADIC report on the formation of Aboriginal courts was more direct. In response to RCIADIC, the state governments in Victoria, NSW and Queensland committed to Aboriginal Justice Agreements which led to various criminal justice initiatives including the establishment of Aboriginal courts in all three states during 2002. Each of the state Justice Agreements had similar broad objectives: better access to the criminal justice system for Aboriginal people, Aboriginal participation in justice initiatives and the reduction of offending and incarceration rates.

³⁷ This has been the subject of much judicial and literary comment. For recent examples, see *R v Scobie* (2003) 85 SASR 77, in which Gray J was critical of the failure of government to implement RCIADIC recommendations, particularly those concerning remote areas; and Elliott Johnston, 'The Royal Commission in Aboriginal Deaths in Custody' in Elliott Johnston, Martin Hinton and Daryle Rigney (eds), *Indigenous Australians and the Law* (2008) 9.

³⁸ The study found 21% of Aboriginal defendants received imprisonment compared to 5.6% of non-Aboriginal defendants - Carol Castle and Adrian Barnett, 'Aboriginal People in the Criminal Justice System' (2000) *Information Bulletin* 13, Government of South Australia, Office of Crime Statistics and Research: Adelaide, 4.

³⁹ See the 1999 National Prisoner Census (ABS 2000), cited by Russell Hogg, 'Penalty and Modes of Regulating Indigenous Peoples in Australia' (2001) 3(3) *Punishment and Society*, 356; which found the level of over-representation in South Australia to be 12x, whilst the national average in 1999 was 10x.

⁴⁰ Tomaino (2005) above n 16, 4.

⁴¹ Marchetti & Daly (2007) above n 19, 2.

Self-Determination

The concept of self-determination was fundamental to the RCIADIC recommendations and proposed solutions to Aboriginal disadvantage. The meaning of self-determination, as a legal and political concept has given rise to much debate.⁴² Whilst there is a diversity of views on the issue, there is a general consensus that the concept must involve a genuine degree of autonomy for Aboriginal people in their everyday lives.

The RCIADIC report did not attempt to provide a precise definition of 'self-determination', but described it in practical terms as the right of Aboriginal people to make many of the decisions affecting their lives and to have the means to carry out those decisions. The Commission made the prescient observation that Aboriginal people needed not only power over decision-making, but also the 'resources and capacity' to control the future of their communities.⁴³ Where 'self-determination' is discussed in the thesis, I have used the meaning adopted by the RCIADIC inquiry.

The participation of Aboriginal community members in the sentencing process can be seen as a practical, if partial, application of the principle of self-determination.⁴⁴

A Different Approach to Sentencing

The RCIADIC inquiry did not consider Aboriginal over-representation in custody as a purely 'criminal justice' problem, understanding that the remedy required government action across a wide range of policy areas. The Royal Commission placed a strong emphasis on the issues underlying Aboriginal imprisonment rates:

Changes to the operation of the criminal justice system alone will not have a significant impact on the number of persons entering custody or the number of those dying in custody; the social and economic circumstances that both predispose Aboriginal people to offend and which explains why the criminal justice system focuses on them are much more significant factors in over-representation.⁴⁵

⁴² For two examples of discussions on self-determination, see Megan Davis, 'Self-Determination and the Demise of the Aboriginal and Torres Strait Islander Commission' in Johnston, Hinton and Rigney (eds) (2008) above n 37, 217; and Heather McRae et al, *Indigenous Legal Issues* (2009) 157-65.

⁴³ RCIADIC (1991) above n 30, 15.

⁴⁴ For a discussion of Aboriginal community participation in other aspects of the criminal justice system (rehabilitative programs, community policing etc.) – see Blagg (2008) above n 20, 126.

⁴⁵ RCIADIC (1991) above n 30, 1.

The Aboriginal courts have developed a similar view that the proper understanding of the defendant's Aboriginality requires an emphasis on the social, economic and cultural context of the offending and the offender's community. For the court and legally-trained participants, RCIADIC reinforced the importance of Aboriginality as a sentencing consideration, whilst the approach of the lay participants (Aboriginal and non-Aboriginal) in the court coalesced naturally with the RCIADIC analysis. For many of the Aboriginal participants the underlying causes of Aboriginal offending are not matters of abstract knowledge, but are intuitively understood from personal as well as professional experience.

2.3 Developments in the Criminal Courts and Case Law

This section will consider some of the developments in the criminal law that also helped to shape the Aboriginal court. A number of the features of the contemporary Aboriginal court can be found, in one form or another, in the pre-existing criminal law and mainstream courts. These features influenced the development of the Aboriginal court in different ways; its formation, structure and sentencing approach.

A Sense of Alienation

Perhaps the most powerful impetus for the development of new sentencing measures for Aboriginal offenders was a prevailing belief amongst many in the legal and Aboriginal communities that the legal system failed most Aboriginal people, who, in response, often seemed disengaged from the court process.

It was this view that first influenced Magistrate Vass to consider a less formal type of court in which the Aboriginal community could have input in the sentencing process. Magistrate Vass, reflecting (in a 2001 interview) on the reasons for the creation of the Nunga court at Port Adelaide, said of the relationship of Aboriginal people with the mainstream criminal courts, 'there was enormous dissatisfaction with the court system as it was. There was a lack of trust, a lot of frustration about not being able to have their say in court'.⁴⁶

This perception was not limited to one magistrate or jurisdiction. Gerard Bryant, a Victorian Koori Court magistrate, made an observation at a conference in 2008 which resonated with those who have worked in the criminal justice system with Aboriginal defendants, '[m]any times in sentencing Indigenous offenders, they

⁴⁶ J. Powell, interview with Magistrate Vass, *The Nunga Court: A Descriptive Study of Aboriginal Sentencing Day* (2001) cited by Tomaino (2005) above n 16, 2.

have appeared bored, indifferent, or simply disengaged from the process in the traditional justice system.⁴⁷ The WALRC (in a comprehensive review of Aboriginal people and customary law in the West Australian criminal justice system) took a similar view, commenting:

[M]any Aboriginal people are alienated from the criminal justice system. The reasons for this alienation include language and communication barriers; distrust resulting from past treatment and discrimination by agencies; and the lack of Aboriginal people working in the criminal justice system.⁴⁸

The sense of disengagement, not just by a few Aboriginal defendants, but at a more general, systemic level, was a major part in the realisation that a different approach was needed.⁴⁹ As the Aboriginal court was created, it drew on examples of innovation elsewhere in the criminal courts; the increasing use of specialist, problem-solving courts and the sporadic experimentation with Aboriginal community participation in sentencing.

The Growth of Specialist and Problem-Solving Courts

The trend towards the use of specialised courts in Australia to address particular types of offending or offenders gathered momentum in the late 1990s; in South Australia the Family Violence court started at Elizabeth in 1997, whilst the first Drug court was established in New South Wales in 1999. Within a few years Drug, Diversion (Mental Impairment) and Family Violence courts were to be found in most Australian jurisdictions.⁵⁰ These courts were innovative in the approach and processes they used, drawing on the concepts of therapeutic jurisprudence and restorative justice.

It is no coincidence these innovations took place in the magistrates' court.⁵¹ It is at this level that the overwhelming majority of people experience the criminal courts; with a large volume of cases processed daily, shortcomings such as lack of time or resources can be seen with stark clarity.⁵²

⁴⁷ Gerard Bryant, 'Special Solutions for Special Needs in Indigenous Communities' (Paper presented to the 16th Association of Australian Magistrates Biennial Conference, Sydney, June 2008) 3.

⁴⁸ Western Australian Law Reform Commission (WALRC) *Aboriginal Customary Law*, Discussion Paper, Project No. 94 (2005) 94, 99 & 104.

⁴⁹ See also the comments of Gray J in *R v Wanganeen* (2010) SASC 237, 11.

⁵⁰ For a review of problem-solving courts in Australia since the 1990s, see Michael King et al (2009) above n 20.

⁵¹ For a discussion of the capacity of the Magistrates court for innovation, see Anleu & Mack (2007) above n 13.

⁵² In 2007/08 in Australia 97% of all criminal matters were finalised in the Magistrates courts - Australian Bureau of Statistics, *Year Book Australia* (2010) 3.

By the time the first Aboriginal court was established in 1999, the summary courts in South Australia (and Australia-wide) were displaying an increasing preparedness to experiment with institutional change. Whilst this thesis will argue the Aboriginal courts are a distinct type of court,⁵³ they can also be seen as part of a broader response by the summary criminal courts, trying new approaches for those types of offenders or issues that mainstream courts had traditionally struggled to deal with through conventional sentencing practices.

Increasing Recognition of 'Community Views' in Sentencing Aboriginal Offenders

Whilst formalising Aboriginal participation in the sentencing process was an Aboriginal court innovation, the practice of Aboriginal community involvement in sentencing did not begin with the specialist Aboriginal court, nor is it confined to the Aboriginal court.⁵⁴ Aboriginal community participation in sentencing had occurred on a piecemeal basis, in some circuit and regional courts in the Northern Territory, Western Australia, Queensland and South Australia since the late 1970s.

The process in these courts was informal, variable and often short-lived. By the early 1980s circuit court magistrates attending the Anangu Pitjantjatjara Yankunyatjara (APY) lands in South Australia were regularly consulting with community Elders as part of the sentencing process.⁵⁵ Like similar experiments interstate, this was a pragmatic innovation in response to the difficulties of administering the criminal law, with origins in English law and culture, in traditional Aboriginal communities. Without institutional support or a structured, consultative process, the courts often waned over time, too dependent on the efforts of individual communities and magistrates.

The rationale for these new approaches to sentencing was to ensure that penalties better conformed to local community standards and promoted community confidence in the court.⁵⁶ These developments (perhaps because they usually occurred in remote circuit courts) took place without specialist legislation and with little discussion within legal circles or the wider community.

⁵³ This issue is further discussed in Chapter 5.2 *What Type of Court?* 107.

⁵⁴ For instance, in South Australia Aboriginal Sentencing Conferences are conducted in mainstream as well as Aboriginal courts.

⁵⁵ See Richard Bradshaw, 'Community Representation in Criminal Proceedings', 11/12 *Legal Service Bulletin* (1986) 111. Bradshaw suggests the practice in the APY circuit court (SA) commenced as early as November 1982.

⁵⁶ *Ibid.*

By the mid-1990s the appellate courts began to formally recognise a role for Aboriginal community needs and wishes in determining penalties, though with limitations and still in the context of sentencing in mainstream criminal courts.⁵⁷ At the same time, Queensland (1992) and the Northern Territory (1995) became the first jurisdictions to introduce legislative provisions to acknowledge Aboriginal community views in sentencing and to provide a process by which they could be heard in court.

Aboriginality as a Factor in Sentencing

During this time the Australian criminal law began to acknowledge the importance of Aboriginality as a factor in sentencing some Aboriginal offenders. This recognition first occurred at the national level with the High Court decision in *Neal v R* ('*Neal*').⁵⁸ Successive cases during the three decades since *Neal* have seen an evolution in the concept of Aboriginality and its consequences in the criminal law, as well as an incremental broadening of its application to Aboriginal offenders, whether living in remote, traditional or urban communities.

For the purpose of this thesis it is unnecessary (and too large a topic) to review in detail the case law on Aboriginality and its application in sentencing law.⁵⁹ But a short summary is useful to understand the meaning of Aboriginality in the criminal law, its use in sentencing and the role (as this thesis argues) it has played in the development of the Aboriginal courts. The concept of Aboriginality (in Australian law) was discussed by Merkel J in *Shaw v Wolf*,⁶⁰ in which the following commonly used definition, containing three elements, was adopted:

- A person of Aboriginal or Torres Strait Islander descent.
- A person who identifies as an Indigenous person.
- A person who has community acceptance as a member of one of those communities.⁶¹

⁵⁷ See *Munungurr v The Queen* (1994) 4 NTLR 63; for a general discussion of the case law concerning community participation in sentencing before the Aboriginal courts, see Neil Lofgren, 'Aboriginal Community Participation in Sentencing', 21 *Criminal Law Journal* (1997) 127.

⁵⁸ (1982) 149 CLR 305.

⁵⁹ A detailed discussion of case law on Aboriginality as a factor in sentencing can be found in Richard Edney & Mirko Bagaric, 'Aboriginality' in *Australian Sentencing: Principles and Practice* (2007) 241; see also Thalia Anthony, 'Sentencing Indigenous Offenders', Brief 7, *Indigenous Justice Clearinghouse* (2010) Department of Justice and Attorney-General (NSW) and Janet Manuell, *The Fernando Principle* (2009) Discussion Paper for the NSW Sentencing Council <www.sentencingcouncil.lawlink.nsw.gov.au/.../sentencing_indigeno...>

⁶⁰ (1998) 83 FLR 113.

⁶¹ This definition is widely used by government for administrative purposes and by many Aboriginal community organisations (to assess eligibility). It is also the definition adopted in South Australia in the *Criminal Law (Sentencing) Act 1988* – see s. 9C(4) in Appendix 2.2, 150.

In sentencing law it is not Aboriginality itself, but the consequences and disadvantage that may result from the membership of an Indigenous community that are relevant. The classic statement of this principle is found in *Neal*, where Brennan J stated:

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.⁶²

The principle in *Neal* has undergone a gradual evolution in its interpretation and application to sentencing Aboriginal offenders. Many of the earlier authorities, summarised in the New South Wales decision, *R v Fernando*,⁶³ emphasised the immediate social and economic causes of Aboriginal disadvantage and offending. One consequence was that most of the authorities involved offenders from remote or regional communities where the social and economic disadvantage of the Aboriginal community was in obvious contrast to mainstream society.⁶⁴

Over the last decade there has been a movement towards a broader interpretation of Aboriginality and the circumstances in which it is applicable in sentencing. In South Australia the decision of the Full Court (Supreme Court) in *R v Smith*⁶⁵ declared Aboriginality may be relevant to sentence regardless of whether the offender lives in a remote, regional or urban Aboriginal community, or in a traditional or mainstream lifestyle. A number of judicial authorities have also begun to view Aboriginality in a more historical context, acknowledging that the cultural and social consequences of dispossession and past state policies leading to the break-up of many Aboriginal families may be relevant to Aboriginal offending and sentencing.

The latter approach is found in the (minority) judgment of Eames JA, in *Fuller-Cust*, who examined the relevance of the generational effect of family break-up resulting from Stolen Generation policies on an offender living a non-traditional, urban lifestyle. Eames JA emphasised the need to consider Aboriginal offending in a broader social and historical context, stating, '[t]o not consider these

⁶² (1982) 149 CLR 305, 326-27 (Brennan J).

⁶³ (1992) 76 A Crim R 58 - see the summary of eight sentencing propositions at 62-3 (Wood J).

⁶⁴ *R v Fernando*, *ibid*; *Rogers & Murray* (1989) 44 A Crim R 301; and *Juli* (1990) A Crim R 31.

⁶⁵ (2003) SASC 263 - see the comments of DeBelle J at [61-62].

matters, and thus to ignore the appellant's Aboriginality, would be to sentence the appellant as "someone other than himself".⁶⁶

The expansive view of Aboriginality is not universal, with a more limited view adopted in a number of authorities, including the majority judgment in *Fuller-Cust*.⁶⁷ Whilst differences in interpretation continue, the criminal law now recognises the relevance of the social, economic and cultural consequences of Aboriginality as a factor relevant in sentencing an Aboriginal offender. Even so, Aboriginality does not automatically reduce an offender's sentence (though it may often do so); in one circumstance it will mitigate an offence and in another it may be an aggravating factor.⁶⁸

An apt summary of Aboriginality and its use in sentencing is found in Gray, Burgess and Hinton:

[T]he court must consider not only the impact of colonisation, Aboriginal culture and the influence of customary law at the general level, but at the specific level as well...this will involve the court in considering how an individual's Aboriginality has impacted on such things as that individual's ability to participate in the community, his or her ability to access services provided in the community and his or her ability to take advantage of opportunities in the community.⁶⁹

Whilst the growing recognition of Aboriginality by the criminal law has occurred almost wholly in mainstream courts, it has played a crucial, if indirect role in the emergence of the specialist Aboriginal court. It demonstrated that the criminal law could accommodate diversity and acknowledge the special needs of many Aboriginal offenders within general sentencing principles. As such, it offered an approach that was consistent with the notion of a separate Aboriginal court operating within a uniform court structure. More than that, the notion of Aboriginality, with its attendant elements of culture, kinship, social and economic conditions, provides a natural framework for sentencing in the Aboriginal court.

⁶⁶ (2002) 6 VR 496, 520.

⁶⁷ For examples of a more restrictive view of Aboriginality, see the judgment of Batt JA in *Fuller-Cust* (2002) 6 VR 496; and also *Ceissman* (2001) 119 A Crim R 535 and *Pitt* (2001) NSWCCA 156.

⁶⁸ *R v Fernando* (1992) 76 A Crim 58.

⁶⁹ Tom Gray, Sally Burgess and Martin Hinton, 'Indigenous Australians and sentencing' in Johnston, Hinton & Rigney (eds) (2008) above n 37, 118.

2.4 The Growth of Aboriginal Courts since 1999

Since the first contemporary Aboriginal court in Australia commenced in 1999,⁷⁰ more than fifty Aboriginal courts have been established throughout mainland Australia in a number of urban, provincial and remote communities with significant Aboriginal populations. This time has seen a general trend towards the use of specialist Aboriginal courts, though their development has differed in number and approach between many of the jurisdictions.

Aboriginal Courts in South Australia

The Aboriginal court began under the official title of 'Special Interest Court' at Port Adelaide Magistrates Court (in suburban Adelaide) on 1 June 1999.⁷¹ The court was the initiative of the supervising Magistrate at Port Adelaide, Chris Vass. He had previously worked in Papua New Guinea and later was the presiding magistrate on the APY court circuit (in the Aboriginal communities of the remote north-west of South Australia), where a form of community participation in sentencing had sporadically taken place since the 1980s.

Crucial to the establishment of the first Aboriginal court were discussions conducted by Magistrate Vass with Aboriginal community representatives and organisations such as the Aboriginal Legal Rights Movement (ALRM). This ensured the participation and support of the local Aboriginal community for the new court. Once established the court quickly became known by Aboriginal and other users as the 'Nunga court'.⁷² It was a purely local initiative, receiving no specific legislative or financial support from the state government or the Courts Administration Authority (CAA).⁷³ The Nunga court developed incrementally, with no express aims or procedural rules at the outset. The result was a court which retained some similarities to the mainstream model, whilst incorporating

⁷⁰ I use the term 'contemporary' because Aboriginal (or 'Native') courts previously operated in WA and Queensland from the 1930s to 80s, usually with a limited jurisdiction and restricted to local Aboriginal reserves or remote communities. For a summary of these courts, see Mark Harris, 'From Australian to Aboriginal Courts in Australia – Bridging the Gap?' (2004) 16(1) *Current Issues in Criminal Justice*, 27-8; and Australian Law Reform Commission (ALRC) *Recognition of Aboriginal Customary Law*, 31(2) Ch 29 (1986).

⁷¹ This section will draw primarily on my own experiences and the articles by Marchetti & Daly (2007) above n 19, 2; Tomaino (2005) above n 16, 5 (which includes a number of excerpts from interviews in 2001 with Magistrates Vass and Boxall); and Peggie Dwyer, 'Sentencing Aboriginal Offenders: The Future of Indigenous Sentencing Models', (Paper presented at the 19th International Conference of the International Society for the Reform of the Criminal Law, Edinburgh, June 2005).

⁷² *Nunga* is a common term of self-description used by most Aboriginal communities in the southern part of South Australia.

⁷³ The CAA is the administrative body responsible for all state courts in South Australia.

innovative ways for Aboriginal participants to have a voice rarely heard in the traditional criminal court.

The combination of local and judicial initiative has remained the method by which Aboriginal courts have developed in South Australia. The South Australian government played no direct role in these early developments, eschewing the approach subsequently taken in other states of establishing Aboriginal courts as part of a larger commitment (in a formal Aboriginal Justice Agreement) to redress disadvantage and promote Aboriginal participation in the criminal justice system.⁷⁴

Port Adelaide

The Port Adelaide Nunga court commenced with one Elder, a community worker from the Aboriginal Prisoner and Offender Support Services (APOSS),⁷⁵ to assist the magistrate. Later the court operated with three Elders, and more recently with two. Their backgrounds have been varied, though they often have some experience in the criminal justice system.⁷⁶ Representatives from the Department of Correctional Services and Aboriginal community organisations such as APOSS or the Aboriginal Drug and Alcohol Council (ADAC) also attend the court on occasions to give advice on appropriate rehabilitative and health programs.

Within a short time the Aboriginal court at Port Adelaide attracted a large number of Aboriginal defendants electing to be sentenced by the 'Nunga court' in preference to the mainstream court.⁷⁷ Two factors contributed to the growth and acceptance of the Nunga court. The area encompassed by Port Adelaide Magistrates Court contains the largest Aboriginal community in metropolitan Adelaide. Also, a number of Aboriginal Justice Officer's (AJO's) were (and still are) based at the Port Adelaide courthouse. The AJO's are often the first point of contact with the courts for many Aboriginal people. As a consequence, they play an important educational role concerning the availability of the Aboriginal

⁷⁴ This approach, adopted in NSW, Victoria, Queensland and, more recently in Western Australia, will be discussed later in this section.

⁷⁵ APOSS assists Aboriginal offenders with rehabilitative programs.

⁷⁶ For instance, one Elder has worked with the Department of Correctional Services at a remand facility and another was a foster-parent to many 'at-risk' Aboriginal youths.

⁷⁷ The earliest figures for 'cases heard' are from 2003/04, with 349 cases heard at the Port Adelaide Aboriginal Court (32 sitting days) from a total of 504 at Port Adelaide, Port Augusta and Murray Bridge Aboriginal Courts. There are no Aboriginal court statistics available for 1999-2002 – Tomaino (2005) above n 16, see Table 1, 7.

court.⁷⁸ Whilst the AJO's involvement in the Nunga court proceedings is limited, their role behind the scenes is crucial.⁷⁹

Murray Bridge

In January 2001 a second Aboriginal court was established at Murray Bridge Magistrates Court with Chris Vass again the inaugural magistrate. The court was closely modelled on the Nunga court at Port Adelaide, though with some differences. The court is held in the general courtroom with one or two Elders to assist the magistrate. The court includes Aboriginal communities in Murray Bridge and its surrounding areas, in particular the community at Raukkan.⁸⁰ The presence of an Aboriginal (live-in) drug and alcohol rehabilitation facility near Murray Bridge has meant a significant proportion of the defendants in the Aboriginal court have alcohol or substance abuse problems and come from communities other than the Ngarrindjeri traditional to the area.

Port Augusta

In July 2001 an Aboriginal court started at the Port Augusta Magistrates Court. Usually referred to as the 'Aboriginal Sentencing Court', it was, in its early years, similar in approach to the Aboriginal courts at Port Adelaide and Murray Bridge. More recently, it has adopted a conferencing model in accordance with section 9C, *Criminal Law (Sentencing) Act, 1988* (SA), whilst retaining a Nunga court as well.⁸¹ A distinguishing feature at Port Augusta is the diversity of the Aboriginal groups appearing in the court (Aboriginal and mainstream); they come from regional towns, Aboriginal homelands⁸² and remote communities, with lifestyles varying from urban to traditional.⁸³

Ceduna

In July 2003 an Aboriginal court modelled on the Nunga court at Port Adelaide was established at Ceduna Magistrates Court. Unlike the other Aboriginal courts,

⁷⁸ The AJO's have many roles, but their responsibility for fines payment by Aboriginal people brings them into contact with a large proportion of those who have been through the courts or received expiation notices.

⁷⁹ A more detailed description of the AJO's role in the Nunga and conferencing-style Aboriginal courts will be given in Chapter 3.5, *How the Aboriginal Courts Work*, 55.

⁸⁰ Until 1982 the community was called Point McLeay.

⁸¹ Section 9C came into effect in December 2005.

⁸² 'Homelands' are a designated area set aside for a particular Aboriginal family group; some are on the outskirts of regional towns (such as Ceduna and Port Lincoln), others in more remote areas like the APY lands.

⁸³ Including about 19 different tribal or language groups, according to former Magistrate Field, the inaugural Aboriginal court magistrate at Port Augusta – see Fred Field, "A Response to 'Special Solutions for Special Needs in Indigenous Communities'" (Paper presented to the Association of Australian Magistrates Conference, Sydney, June 2008).

Ceduna was (and remains) a circuit court with no resident magistrate. The court was intended to serve the disparate Aboriginal communities at Ceduna, Koonibba, Yalata and Oak Valley (whose members often move between these and other more distant communities). But the Aboriginal court was unsuccessful, attracting few in number, with most having their matters dealt with in the mainstream circuit court. Importantly, there were difficulties with obtaining Elders willing to assist the court and (as a circuit court) there were frequent changes of magistrate. Within a few years the court was virtually moribund. In recent years some discussions have occurred within the magistracy and the Court Administration Authority to reinstitute a specialist court for the Aboriginal communities of the West coast of South Australia, though with no progress at present.⁸⁴

Port Lincoln

In November 2007 a pilot Aboriginal court began as part of the monthly Port Lincoln circuit court. The court is modelled on the section 9C process, with the sentencing conference taking place before the court hearing. The AJO plays a more prominent role in the conferencing court, arranging and taking part in the sentencing conference. There is a greater emphasis on restorative justice than in the Nunga court with victims encouraged to attend the conference. As the sentencing conference is time-consuming, it is a low-volume court, with the remaining Aboriginal defendants appearing in the mainstream court. Port Lincoln has a number of magistrates presiding in the Aboriginal court (whichever magistrate is on circuit), rather than the same magistrate as is the practice at the Port Adelaide, Murray Bridge and Port Augusta courts.

The initial wave of innovation in South Australia (with the establishment of the first three Aboriginal courts in Australia) has passed, though it maintains a unique mix of Nunga and conferencing-type courts in one jurisdiction. The conferencing courts at Port Augusta and Port Lincoln are lower volume than the Port Adelaide and Murray Bridge Nunga courts, but all place an emphasis on the prompt disposition of matters. Practices common in some other specialist courts,⁸⁵ such as deferred sentencing, bail programs and judicial case management are used on occasion, but are not a central part of the court's sentencing approach.

⁸⁴ Discussions took place between magistrates, the CAA and AJO's in 2008/09 to recommence the Ceduna Aboriginal court, but (at the time of writing) nothing has eventuated.

⁸⁵ In South Australia - the Drug, Diversion and Family Violence courts.

Aboriginal Courts in other Australian jurisdictions

Since 2002 Aboriginal courts have been established in every other jurisdiction in Australia, with Tasmania the only exception.

New South Wales

New South Wales showed an early interest in the development of circle-sentencing courts in Canada. In 1995 the Judicial Commission of NSW hosted a circle-sentencing seminar for judicial officers given by a visiting Canadian judge. In 2000 the NSW Law Reform Commission of New South Wales (NSWLRC) released a comprehensive report, 'Sentencing: Aboriginal Offenders',⁸⁶ which endorsed a trial circle-sentencing court to commence in 2002. The NSWLRC, however, counselled against wholesale adoption of overseas measures without careful adaptation to the wishes and needs of the local Aboriginal community and the different legal framework in Australia.⁸⁷ The result reflected that approach, with a 2003 evaluation of the NSW circle-sentencing courts commenting:

While the NSW model most resembles the Canadian model of 1992, it is unique in that it has drawn on a number of sources, including a discussion paper for conferences for adult offenders, NSW young offender's legislation,⁸⁸ guidelines for conducting Aboriginal Community Justice Groups and an AJAC discussion paper on circle sentencing.⁸⁹

The first specialist Aboriginal court in New South Wales commenced at Nowra in February 2002. Other Aboriginal courts have since started in various New South Wales regional centres where there are substantial Aboriginal communities. All are circle sentencing courts, established by regulation under the *Criminal Procedure Act 1986* (NSW), with a high degree of uniformity in procedure and operation.

The circle courts conduct a sentencing conference in which the magistrate, Elders, defendant and (sometimes) the victim participate. The hearing takes place in a community building, not a courtroom. Though the magistrate remains responsible for the imposition of the sentence, the penalty recommendation of the sentencing conference is highly influential. As the sentencing process is time-

⁸⁶ Law Reform Commission of New South Wales, 'Sentencing: Aboriginal Offenders', Report 96 (2000).

⁸⁷ *Ibid* [4.35 & 4.36].

⁸⁸ NSW adopted conferencing for youths in 1997.

⁸⁹ Ivan Potas et al, 'Circle Sentencing in NSW: a Review and Evaluation' (2003) Judicial Commission of New South Wales, 3.

consuming, the courts are low-volume and limited to those who are assessed as likely to rehabilitate and facing a real prospect of imprisonment.

Queensland

In August 2002 the first Queensland Aboriginal court, known as the 'Murri court', opened in Brisbane.⁹⁰ Subsequently, more than a dozen Aboriginal courts for adults and youths commenced in regional centres around Queensland, operating as summary, sentencing courts on the Nunga court model. The Murri courts have been open to Aboriginal and Torres Strait peoples and, in north Queensland, Pacific Islander offenders, creating a diverse cultural mix.⁹¹

The state government, committed to the Queensland Aboriginal and Torres Strait Islander Justice Agreement since 2000,⁹² has, until recently, given significant administrative and financial support to the Murri courts.⁹³ This ceased in September 2012, when the state government announced the Murri courts (and specialist courts for drug offenders, the homeless and intellectually disabled) will no longer be funded as part of a strategy to reduce government costs.⁹⁴ As a consequence, they will cease operation (at least in their current form) shortly.

Whilst no specific legislation or rules were enacted to establish specialist Aboriginal courts in Queensland, the *Penalties and Sentences Act 1992* (Qld) provided a general legislative foundation for the Murri court sentencing process and the participation of Indigenous community members. It requires the sentencing court (whether an Aboriginal or mainstream court) to consider cultural factors and representations made by a community justice group on behalf of an Indigenous offender.⁹⁵ Community justice groups have had a historical role in regional Aboriginal communities (particularly northern Queensland) which predates the Murri courts. They may provide a panel of Elders or make sentencing recommendations directly to the court, as well as give advice on local rehabilitative programs. These provisions will continue to be available to Indigenous offenders in mainstream criminal courts.

⁹⁰ *Murri* is the common term of self-description used by Aboriginal people in Queensland.

⁹¹ One example is the Rockhampton Murri Court (for adults and youths).

⁹² The agreement, signed on 19 December 2000, committed the government to eliminating Aboriginal disadvantage in the criminal justice system.

⁹³ For a summary of the early years of the Murri court, see Parker & Pathe (2006) above n 22.

⁹⁴ Tony Moore, *Diversions courts fall victim to funding cuts*, Brisbane Times, 13 September 2012 <www.brisbanetimes.com.au/queensland/diversionary-courts-fall-victim-to-fundin...>

⁹⁵ Section 9(2)(p) includes both Aboriginal and Torres Strait Islander offenders - see Appendix 2.4, 153.

Victoria

In October 2002 the first 'Koori Court' started at Shepparton in country Victoria.⁹⁶ Though this and the subsequent Koori courts have followed the Nunga court model, Victoria has arguably been the most innovative in many aspects of its approach. The Victorian Government has played a more direct role than interstate, establishing the Koori Court Division of the Magistrates Court by legislation, the *Magistrates Court (Koori Court) Act 2002* (Vic). The legislation was a response to the Victorian Aboriginal Justice Agreement (VAJA)⁹⁷ in which the state government gave a commitment to redress Aboriginal disadvantage in a number of areas of criminal justice and social policy. The Koori Court remains the only Australian Aboriginal court to be established by legislation.

The Koori Court legislation sets out a framework and objectives, but is not prescriptive as to how the court should function (except the legislative preclusion of sexual and some family violence offences from the court). It operates as a sentencing court with a minimum of formality similar to the Nunga-style courts in South Australia. The Koori courts have expanded to a significant number of urban and regional centres in Victoria,⁹⁸ with the first Koori youth court opening in 2005 and a pilot Koori County (District) Court in 2008 (the first in Australia at the superior court level).

Australian Capital Territory

The Ngambra Circle Sentencing Court started as a six month pilot in the Australian Capital Territory (ACT) in May 2004. The court is closely modelled on the circle sentencing courts in NSW, with a comprehensive set of rules governing eligibility and procedure.⁹⁹ The court convenes at a local Aboriginal community centre, unless the defendant is in custody, in which case the usual court is used. The Ngambra court has an extensive jurisdiction,¹⁰⁰ though sexual offences and offenders with a drug addiction (other than cannabis) are precluded. The Community Elders Panel and the sentencing recommendation have considerable influence, though the magistrate remains ultimately responsible for penalty.¹⁰¹

⁹⁶ *Koori* is the common term of self-description used by Aboriginal people in Victoria.

⁹⁷ Department of Justice, Victorian Aboriginal Justice Agreement, available at <<http://www.justice.vic.gov.au>>

⁹⁸ Ten as of 1 January 2013 – see Appendix 1, 145.

⁹⁹ Final Interim Practice Direction, ACT Magistrates Court Division, dated 20 April 2004 <<http://con.justice.act.gov.au/resources/uploads/Magistrates/p>>

¹⁰⁰ There is no second tier (District or County) court in the ACT.

¹⁰¹ For a detailed description of the court, see Shane Madden, 'The Circle Court in the ACT – An Overview and its Future' (Paper presented at the Australian Institute of Judicial Administration (AIJA) Indigenous Courts Conference, Mildura, September 2007).

Northern Territory

The Northern Territory established a 'Community Court' in Darwin in April 2005. It is not an explicitly Aboriginal court, though its practices and emphasis on cultural factors and community views on sentence have a close similarity to Aboriginal courts interstate. As it is not limited to Indigenous offenders, the participation of Respected Persons or community members in the court process is open to all in the local community. Nonetheless, the large majority of defendants in the Darwin Community court are Indigenous.¹⁰² Elsewhere in the Northern Territory all the Community court participants are Indigenous.¹⁰³

The Community court also operates three circuit courts including the Tiwi Islands and Nhulunbuy. The main features of these courts are involvement of the local community, integration of services and public accountability of the offender to the victim. The court uses a form of sentencing conference which takes place as part of the sentencing hearing. No specific legislation established the Community courts, though guidelines issued by the Chief Magistrate in 2005 govern eligibility and procedure. The sentencing approach of the Community court is supported by section 104A *Sentencing Act 1995* (NT), a general provision requiring all criminal courts to have regard to community opinion and customary law when considering penalty for an Aboriginal offender.

There are also a large number of remote circuits courts (called 'Bush Courts') in the Northern Territory where, at least informally, many Aboriginal court practices are used. Community views and cultural information are often put to the court by local 'Law and Justice' committees.¹⁰⁴ In the Bush courts (and the circuit Community courts) there is a great diversity in language and culture, with English usually a second language for the Aboriginal participants.

Western Australia

In Western Australia the early development of Aboriginal courts was wholly dependent on local initiative. No legislation or court guidelines were introduced to encourage or regulate sentencing courts or measures for Aboriginal offenders. The first courts to incorporate Aboriginal community participation began at Wiluna (2001) and Yandeyarra (2003). In 2004 the state government committed

¹⁰² This was anticipated in the *Darwin Community Court Guidelines* (see paragraph 6), issued by Chief Magistrate Bradley on 27 May 2005

<www.nt.gov.au/justice/ntmc.../community_court_guidelines_27.05.p...>

¹⁰³ For a description of the Community courts and Bush courts in the Northern Territory, see Jenny Blokland, 'The Northern Territory Experience', (Paper presented at the Australian Institute of Judicial Administration, Indigenous Courts Conference, Mildura, September 2007) 3.

¹⁰⁴ The committees have a variety of titles and some a broad range of functions including program delivery and community policing, such as night patrols.

to an Aboriginal Justice Agreement, followed by the release in 2006 of the Western Australian Law Reform Commission report, *Aboriginal Customary Law*, which recommended the widespread use of Aboriginal courts for adults and youths.¹⁰⁵

Since then three Aboriginal courts have been set up in regional centres, with two Community courts established at Norseman and Kalgoorlie (each using a Nunga court process). The other is the Barndimalgu Family Violence Court in Geraldton, the first specialist Aboriginal court in Australia created solely for family violence offenders. The court, established in August 2007, is available for Aboriginal domestic violence offenders facing a risk of imprisonment. Similar to other therapeutic, specialist courts, it employs practices such as intensive supervision and deferred sentencing, though the program offered is tailored to local cultural and social needs.¹⁰⁶

2.5 Conclusion

Since 1999 the Aboriginal courts have grown steadily into a significant part of the summary, criminal court system. Even so, Aboriginal courts are only available to a small minority of Aboriginal defendants charged with criminal offences. As well, the recent decision by the Queensland government to cease funding the Murri courts suggests the Aboriginal courts may not yet be considered an established part of the criminal justice system.

The Aboriginal courts are established by a number of methods: legislation, regulation, practice directions and administrative decision. There are two basic models, the Nunga and conferencing (or circle-sentencing) courts. In some jurisdictions (NSW, ACT and Victoria), the Aboriginal courts are fairly uniform in structure and practice; in South Australia, Western Australia and the Northern Territory, they are more disparate, often varying from one court to another.

These courts have been shaped by various influences: the growth of new specialist courts and an increasing recognition of the importance of Aboriginal community views and Aboriginality as factors in sentencing Aboriginal offenders. However, most important was RCIADIC, with themes of Aboriginal overrepresentation and disadvantage in the criminal justice system, self-determination and the need to understand the underlying causes of Aboriginal

¹⁰⁵ WALRC (2006) above n 48 – see Appendix A (to the report), Recommendation 24.

¹⁰⁶ Western Australian Law Reform Commission (WALRC) *Family and Domestic Violence Court Intervention Programs*, Project No. 96, Consultation Paper (2008) 18-30.

offending. Their continuing influence can be seen in the court's structure, practices and, most of all, its aims. These are examined in the next chapter.

CHAPTER 3. HOW THE ABORIGINAL COURTS WORK

3.1 Introduction

This chapter examines the ways in which the Aboriginal court structure, rules, aims and practices differ from other criminal courts and how the court makes decisions on sentence.

First, the procedure for sentencing after a guilty plea the magistrates' court is outlined, to provide background to the discussion of Aboriginal court rules and practices.

Second, the rules and guidelines that define Aboriginal court eligibility, locality and jurisdiction are summarised.

Third, the Aboriginal court's formal structure is examined. The institutional and procedural framework of the two basic models, the Nunga court and conferencing/circle court are described. There are many variations within the two models, between each jurisdiction and sometimes from one locality to another.

Fourth, the common aims and practices of the Aboriginal courts are discussed. These are informal, though important influences on how the court works.

Finally, the decision-making process in the Nunga and conferencing is examined, with particular emphasis on the relationship of the judicial officer and the Elders. Decision-making in the Aboriginal court is considered in two stages: the deliberative phase in which the process is conversational and generally inclusive of all the participants; and the sentencing phase, where there is a greater formality as the judicial officer imposes penalty. The role of the Elders and other Aboriginal participants in sentencing raises two issues that are discussed: whether Aboriginal involvement changes the nature of decision-making in the Aboriginal court and how the court accommodates the potential conflict between the influence of the Elders and the legal responsibility of the judicial officer for the sentencing decision.

3.2 The Magistrates Court (Criminal Division)

To put the Aboriginal court sentencing processes in context, it is useful to describe the typical guilty plea and sentencing procedure in the mainstream magistrates' court (it is unnecessary to consider the trial procedure as Aboriginal

courts do not hear trials or other disputed hearings).¹⁰⁷ This description is based on the Magistrates Court (criminal) in South Australia and is generally accurate, though it should be understood there are local variations between (and sometimes, within) each jurisdiction.¹⁰⁸

The magistrates' court, as the lowest tier of criminal court, hears summary and minor indictable offences (more serious, major indictable charges are referred to the District or Supreme Courts). The magistrate decides all issues of law and fact, whether at trial or during sentencing. The offences vary, with traffic and minor street or behavioural offences such as offensive language or resist police, making up the majority of matters in an average general list.¹⁰⁹ More serious offences such as theft, serious criminal trespass¹¹⁰ and various forms of assault are also dealt with in the magistrates' court.¹¹¹ The latter charges are mostly minor indictable and, upon the defendant's election, can be heard before a jury in a higher court (but rarely are).

Most criminal charges in the summary courts are prosecuted by the police. Some defendants are legally represented, particularly those charged with more serious offences. Proceedings are conducted with a degree of formality. The magistrate is seated on an elevated bench, with the prosecutor and defence counsel at the bar table (positioned in front of the bench). The defendant will, in most cases, be placed in the dock (a closed box usually to the side and front of the courtroom). The defendant and others involved in the case are brought into and out of court by the court orderlies, who are often the general public's first point of contact with the court.

If represented by counsel, the defendant, after entering a guilty plea, will play a mostly passive role. The magistrate will direct any queries to the prosecutor or defence lawyer, rarely speaking with the defendant (or their family, if present). The prosecutor will provide the court with details of the offending, the

¹⁰⁷ The latter includes disputed facts hearings, where there is a guilty plea and a dispute over the factual basis of the plea.

¹⁰⁸ A comprehensive description of the procedure in the magistrates court in South Australia can be found in the Legal Services Commission publication, *The Law Handbook Online* <<http://www.lawhandbook.sa.gov.au/>>

¹⁰⁹ In the calendar year 2007 these categories of matters made up 65.6% of all offences finalised by way of a finding of guilt in the magistrates court – see Crime and Justice in South Australia 2007, Adults Courts and Corrections, Office of Crime Statistics and Research (OCSAR), Department of Justice, Government of South Australia: Adelaide, Table 2.14 <<http://www.ocsar.sa.gov.au/>>

¹¹⁰ The offence which superseded the previous charge of Break Enter and Larceny (abolished in South Australia in 1999).

¹¹¹ These constitute 21.8% of all matters finalised by way of a finding of guilt in the Magistrates court – Office of Crime Statistics and Research, above n 109 (the 2007 figures are used as they are the most recent statistics currently available from OCSAR (SA)).

defendant's prior criminal record and, sometimes, information concerning of the impact of the offence(s) on the victim.¹¹²

Defence counsel will then make submissions on penalty. Sometimes pre-sentence or specialist reports are provided to the court by the defence, or at the court's initiative.¹¹³ If the defendant is unrepresented (as are significant number in the summary courts),¹¹⁴ the magistrate will speak directly with them, to obtain information about the offending and their personal circumstances. Then the magistrate will sentence the defendant, explaining the penalty and (usually) why it is imposed.

The process and the roles of the participants in mainstream summary courts are formalised, with most of the sentencing information received from the prosecutor and defence counsel, or from other professional sources. The parties and counsel stand whilst they address the court. The court proceedings are usually conducted in formal language and tend to be brief, with most matters in a typical general list completed within a few minutes.¹¹⁵ As a result, a magistrate in a mainstream court has little direct interaction with a defendant during sentencing (except where the defendant is unrepresented and then the contact will often be constrained by time).

3.3 The Aboriginal Court: Jurisdictional Rules and Guidelines

The jurisdictional framework of the Aboriginal courts is made up of four criteria: plea, locality, offences and eligibility. The criteria in each of the jurisdictions are similar, but are formulated by different means: legislation (Victoria), regulation (NSW) and elsewhere by practice direction or unwritten convention.¹¹⁶ South Australia adopts the latter approach, with three courts having individual practice

¹¹² In South Australia the Victim Impact Statement, pursuant to section 7, *Criminal Law (Sentencing) Act 1988*, may be tendered or read to the court (by the prosecutor or victim).

¹¹³ The Pre-Sentence Report (PSR) is prepared by the Department of Correctional Services. Psychological and psychiatric reports are the most common types of specialist report tendered in the summary court.

¹¹⁴ I am unaware of any studies which indicate the proportion of defendants who are unrepresented in the Magistrates courts in South Australia, but, on my observation, they are a substantial number of all defendants.

¹¹⁵ The average general list in a South Australian magistrates court has about 70 files per day, which may involve 30-50 defendants (some with multiple files) - for a detailed descriptions and analyses of summary court general lists, see Kathy Mack & Sharyn Roach Anleu, 'Getting Through the List': Judgecraft and Legitimacy in the Lower Courts' (2007) 16(3) *Social & Legal Studies* 341; and Kathy Mack & Sharyn Roach Anleu, 'Performing Impartiality: Judicial Demeanour and Legitimacy' (2010) 35(1) *Law & Social Inquiry* 137, 145-6.

¹¹⁶ For a summary of Aboriginal court jurisdictional rules and how they are formulated, see Marchetti & Daly (2007) above n 19, 5; and King et al (2009) above n 20, 178-83.

directions, whilst the Murray Bridge Nunga Court follows similar practices to the Nunga Court at Port Adelaide, but has no formal rules.¹¹⁷

Plea and Locality Guidelines

Plea and locality guidelines are common to all Aboriginal courts. The Aboriginal courts are sentencing courts and do not hear trials or adjudicate any contested matters. The practice in South Australia is that a defendant's matters will only be transferred into an Aboriginal court after a guilty plea is either entered or indicated by their counsel. If a charge already in the Aboriginal court is contested, it (and any related charges) will be returned to the mainstream court for determination. The requirement that only guilty plea matters can be dealt with in the Aboriginal court does raise the possibility of 'convenience pleas' by defendants in order to gain access to the court. This is more likely where the defendant has multiple charges or files (if one or two are disputed, and the remainder are guilty pleas, the pressure is often substantial to plead to all charges so they can be dealt with one penalty). The court's guilty plea guidelines and convenience pleas have been the subject of various criticisms (discussed in Chapter 5).¹¹⁸

There are two aspects to the locality guidelines. The first limits the matters dealt with in each Aboriginal court to those that occur within the court's geographical jurisdiction. One exception is the defendant who has some matters for plea in the Aboriginal court and some elsewhere. In those circumstances the defendant will usually be permitted to transfer charges from other courts to the Aboriginal court so they have the benefit of a uniform approach to penalty. This is the same practice adopted in other magistrates' courts in South Australia. The primary purpose of the locality guideline is to regulate the court's workload; a necessity whilst there are a limited number and spread of Aboriginal courts available to only a small proportion of Aboriginal defendants who wish to access them.¹¹⁹

Second, many Aboriginal courts either require or indicate a preference that the defendant live in or have close ties to the local Indigenous community. The rationale for this limitation (expressed in a number of the court practice directions)¹²⁰ is that a more appropriate penalty may be fashioned where the

¹¹⁷ There is no CAA policy for the use of practice directions by South Australian courts, so it is left to each Aboriginal court to decide whether to have practice directions (and if so, in what form).

¹¹⁸ See Chapter 5.3 *Pragmatic Critiques*, 108.

¹¹⁹ This rule has spawned a number of practices to avoid its rigour, including defendants surrendering to non-appearance warrants from other jurisdictions at an Aboriginal court in order to gain access to the court.

¹²⁰ For one example, see the *Darwin Community Court Guidelines* (Practice Direction 16) above n 102.

defendant is locally-based and more likely to be known by the Elders and better assisted by the services available through the Aboriginal court.¹²¹ In my experience this guideline is usually interpreted in a generous, inclusionary manner, to encourage acceptance of an applicant into the court wherever possible. Even so, the locality guidelines (and the guilty plea rules) have been the source of much criticism.¹²²

Offence and Jurisdictional Guidelines

With one exception, Aboriginal courts are summary and presided over by magistrates. The only Aboriginal court established in a higher jurisdiction is the Koori County Court in Victoria.¹²³ It commenced in 2009 in the Latrobe Valley and is subject to the same legislative guidelines as the summary Koori courts.

In South Australia the Aboriginal courts can deal with the same range of offences as a mainstream summary court. Interstate some offences are precluded from the Aboriginal court. The Aboriginal courts in Victoria, NSW, ACT and the Northern Territory exclude all forms of sexual offences. Sexual offences are not precluded from Aboriginal courts in South Australia, but are rarely dealt with in an Aboriginal court as most sexual offences are major indictable and must be determined in the District or Supreme Courts.¹²⁴ Some other categories of offences are also prohibited, such as serious drug offences in NSW and breach of Intervention Orders in Victoria. Otherwise, family violence offences are not generally excluded in any of the jurisdictions.¹²⁵

Eligibility Guidelines

The final criterion is Aboriginality, which is applied in most Australian jurisdictions as a prerequisite to participation in the Aboriginal court. The exact form of the guideline is variable, but generally requires that the defendant identify with an Aboriginal or Torres Strait Islander community and be accepted by that community.

The requirement of Aboriginality is not universal. At Rockhampton, Pacific Islanders, a long-established community on the central and northern coast of

¹²¹ The Aboriginal courts at Port Adelaide, Port Augusta and Port Lincoln each indicate in their guidelines a preference for defendants with ties to the local community.

¹²² The critiques of the guilty plea and locality guidelines are discussed in Chapter 5.3 *Pragmatic Critiques*, 108.

¹²³ It was established as a division of the Victorian County Court in the *County Court Amendment (Koori Court) Act 2008 (Vic)*.

¹²⁴ Though legislation has been recently enacted in South Australia which will greatly expand the criminal jurisdiction of the magistrates' court, it is unlikely to alter the number of sexual offences heard in the Aboriginal courts.

¹²⁵ For more detail, see Chapter 5.3, *Family Violence and the Aboriginal Courts*, 117.

Queensland, were eligible (with Aboriginal and Torres Strait Islanders) to appear in the Murri Court. Also, the Community court in Darwin is open to all offenders, though the large majority of its participants are Aboriginal (Darwin is the exception - all defendants in the other Community courts in the Northern Territory are Aboriginal).¹²⁶

The rules and guidelines provide a jurisdictional framework for the court, outlining the types of offences and defendants that may be dealt with by the court. More generally, they give the Aboriginal court a strong local focus, with ties to the local area and Aboriginal community an integral part of the court's makeup. In this respect the court guidelines reflect the localised nature of most Aboriginal communities.

3.4 Aboriginal Court Models, Aims and Practices

There are two basic models of Aboriginal court. These are the Nunga court, which in structure is more alike to the mainstream criminal court and the conferencing or circle court (two similar forms of the same model), which formalise the participation of the Elders and other participants in a sentencing conference/circle.

However, informal factors also shape the court's processes and help define how the participants relate to each other. The court's aims have a persuasive effect, most of all their influence on the judicial officer, Elders and the other main participants. Practices such as informality and direct communication between the parties provide the means by which the Aboriginal members can genuinely participate in the sentencing dialogue.

The Nunga Court Model

The Nunga court model is the original form of Aboriginal court and is most similar to the mainstream summary criminal court. This model is used in two of the four South Australian Aboriginal courts (Port Adelaide and Murray Bridge) as well as Victoria, Western Australia and (formerly) Queensland. They have been described at length in the literature by both observers and participants (including a number of magistrates). Some examples of the literature that provide a detailed picture of the Nunga court in operation in different

¹²⁶ Blockland (2009) above n 103.

jurisdictions are Tomaino (South Australia), Harris, Briggs and Auty (Victoria) and Hennessey (Queensland).¹²⁷

This description of the current structure in the Nunga court in South Australia draws on the work by Tomaino and other sources such as Welch,¹²⁸ as well as my own experiences in each of the Nunga courts.¹²⁹ It is a general description and provides an overview of the structure and processes of the Nunga court model, though the courts are localised and given to some variations in form and practice.

The centre of the Nunga court is the bar table. On one side sits the magistrate, the Elders (usually 2-3) and the magistrate's clerk; on the other is the police prosecutor, defence counsel, the defendant and, often, a member of the defendant's family. Defendants in custody are also seated at the bar table and are unrestrained by handcuffs. In the public seating (usually arrayed in a semi-circle), there may be other family members, a Community Corrections officer¹³⁰ and, sometimes, a representative from an Aboriginal community organisation, which typically offer rehabilitative services. The Aboriginal Justice Officer (AJO) does not usually take part in Nunga court proceedings, but plays an integral role out-of-court.¹³¹

Much of the mainstream criminal court process is recognisable in the Nunga court. Pleas of guilty are taken (by the clerk or magistrate) from the defendant. The police prosecutor then reads the allegations of the offending and provides details of any prior criminal record. Sometimes a Victim Impact Statement is read or tendered to the court. Victims are rarely in court, although sometimes a partner or family member will attend with a defendant charged with domestic violence offences (in which they are the victim).

Defence counsel will speak next (almost every defendant is legally represented – due to the availability of assistance through the Aboriginal Legal Rights

¹²⁷ Tomaino (2005) above n 16; Mark Harris (2006) above n 4; Daniel Briggs & Kate Auty, 'Koori Court Victoria-Magistrates Court (Koori Court) Act 2002' (Paper presented at the International Society for the Reform of the Criminal Law, Brisbane, July 2006); and Annette Hennessey, 'Indigenous Sentencing Practices in Australia' (Paper presented at the International Society for the Reform of the Criminal Law, Brisbane, July 2006).

¹²⁸ Welch (2002) above n 24.

¹²⁹ From 1999-2007 I appeared in the Aboriginal courts at Port Adelaide, Murray Bridge, Port Augusta and, when previously in operation, Ceduna.

¹³⁰ From the Department of Correctional Services (responsible in South Australia for community supervision and the prison system).

¹³¹ For a more detailed description of the AJO's role – see Chapter 3.5 *The Roles of the Participants*, 55.

Movement and the Legal Services Commission).¹³² Defence submissions are often short, summarising the causes of the defendant's offending, rehabilitative needs and the penalty sought. Comment may also be made about any pre-sentence or specialist reports tendered to the court. The parties remain seated when they address the magistrate.

At this point the proceedings differ from the mainstream court. The Elders, invited by the magistrate to talk with the defendant, will now assume a more prominent role. The defendant may be known to them through family, community or other ties. The talk is often wide-ranging, the essence of which will be the defendant's problems and how they relate to the offending. The Elders may offer a mixture of advice, empathy and admonition. The magistrate will then speak with the defendant and any family or support persons present, often further exploring the issues raised by the Elders.

The Elders and the magistrate will then discuss the appropriate sentence. The discussion takes place in open court. The Elders' advice is usually clear, but general as to the sentencing approach they recommend. The magistrate may then ask the prosecutor and defence counsel for final submissions on penalty. The magistrate will then sentence the defendant, often incorporating the Elders' views (and usually explaining the final decision on penalty is the magistrate's sole responsibility).

After sentencing the AJO'S will speak with the defendant and family to explain the penalty, any ongoing obligations such as bond supervision or community service and the consequences of non-compliance. If a Community Corrections officer from the Department of Correctional Services (DCS) is also present, they will join in the discussion and give initial directions.¹³³

This model, currently operating at Port Adelaide, Murray Bridge and (on occasion) Port Augusta Aboriginal courts, enables a high-volume of cases to be finalised without delay. With an emphasis historically on the speedy disposition of matters, practices such as rehabilitative bail programs, judicial monitoring and deferred sentencing are used on occasion, but not as a matter of course.¹³⁴

There has been some change to this approach since 2011 with the introduction of a six month Drug and Alcohol Treatment program for Aboriginal offenders

¹³² If the defendant has legal aid, they may be represented by a private lawyer or a solicitor from the Legal Services Commission.

¹³³ The Community Corrections officer at court will not necessarily be the defendant's ongoing supervising officer.

¹³⁴ For a summary of the use of similar programs and practices in problem-solving courts, see King et al (2009) above n 20, 138-177.

with substance abuse problems at the Port Adelaide Nunga court. Program assessment and review is administered by the Drug court staff in liaison with the Department of Correctional Services and an AJO.¹³⁵ Applicants must plead guilty and otherwise be eligible for the Nunga court.¹³⁶ Entry into the program is voluntary, with the defendant having the choice of being sentenced in the Nunga court without participation in the program. If the defendant chooses to enter the program, they are placed on a supervised bail agreement requiring program attendance. When the program is completed, sentencing then takes place in the Nunga court.¹³⁷ As this is a recent innovation, it may be unclear for some time what outcomes the program will have either therapeutically or in terms of recidivism rates for participants.¹³⁸

The Legal Basis of the Nunga Court

The Nunga court in South Australia has no specific legislative authority. The legal basis for the Nunga court process is found in the general sentencing provisions under section 6 *Criminal Law (Sentencing) Act 1988* (SA). Section 6 states a court:

- (b) may inform itself on matters relevant to the determination as it sees fit;
- (c) must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.

These provisions were the legislative basis for the four Aboriginal courts established in South Australia from 1999 to 2005.¹³⁹ Section 6 applies to all criminal courts in South Australia and does not specifically authorise the Nunga court procedure. However, the section is broad enough to allow the receipt of sentencing information from the Elders, defendant's family, Aboriginal community organisations, as well as from the usual sources. This was confirmed by the Supreme Court in *Police v Carter*, a prosecution appeal against penalty, in which Nyland J commented that the Nunga court's 'creative approach...was to be encouraged and supported'.¹⁴⁰ This remains the position in South Australia

¹³⁵ The Drug Court (SA) operates at Adelaide Magistrates Court, where it sits weekly.

¹³⁶ CAA email dated 8 February 2011.

¹³⁷ Deferred sentencing (for up to 12 months) is expressly authorised under s 19B, *Criminal Law (Sentencing) Act 1988* (SA).

¹³⁸ A recent OCSAR study evaluated the recidivism rates of defendants on the Treatment Intervention Program (TIP) at a number of magistrates' courts in South Australia, but there were too few defendants (3) on the program at the Port Adelaide Nunga Court to draw any conclusions.

¹³⁹ Port Adelaide (1999), Murray Bridge (2001), Port Augusta (2001) and Ceduna (2003).

¹⁴⁰ *Police v Carter* (2002) SASC 48 at [53] - Nyland J upheld the appeal against penalty, but endorsed the Nunga court sentencing process.

(there have been no further appeals from any form of Aboriginal court in South Australia since 2002).

Conferencing and Circle Sentencing Courts

The conferencing and circle sentencing courts are fundamentally similar, and, for the purpose of this thesis, are considered as variations on a single model. The conferencing court operates only in South Australia, whilst the circle court has been adopted in NSW, ACT and the Northern Territory. Though mostly similar in practice, their origins are different.

The circle sentencing courts in New South Wales (the first jurisdiction to adopt the circle court in 2002) drew heavily on the example of the circle court initiated in Canada in the early 1990's.¹⁴¹ The earliest recorded circle-sentencing court took place in Canada in 1992 as a result of an initiative by the sentencing judge and the local Indigenous community in *R v Moses*.¹⁴² The essence of circle-sentencing was a meeting between the judge and community members (usually in the offender's community) to discuss and agree upon a penalty with the dual aims of rehabilitation and reparation (to the victim and community). This approach was largely adopted in New South Wales, though modified to suit local needs.

The conferencing court owes more to the experience of the diversionary family conference in the Youth Court in South Australia,¹⁴³ a measure influenced in turn by the development of conferencing in the New Zealand juvenile justice system in the late 1980's.¹⁴⁴ The Aboriginal Sentencing Conference (which forms the basis of the conferencing court) is a hybrid, drawing on elements of the family conference, but like the circle court, is a presentence, rather than a diversionary measure. Whilst the Aboriginal Sentencing Conference is most frequently used in an Aboriginal court setting, it has a broader ambit, being available as a sentencing measure for Aboriginal people in either a specialist Aboriginal court or a mainstream court in any jurisdiction. Its current use in mainstream courts is

¹⁴¹ A short summary of the growth of the circle courts can be found in McCrae et al (2009) above n 42, 575-7; or there is a more detailed analysis in Luke McNamara, 'Indigenous Community Participation in the Sentencing of Criminal Offenders: Circle Sentencing' (2000) 5(4) *Indigenous Law Bulletin* 5.

¹⁴² (1992) 71 CCC (3d) 347 (Yukon Territorial Court).

¹⁴³ Introduced in the *Young Offenders Act 1993* (SA).

¹⁴⁴ For a discussion of the influence of New Zealand juvenile conferencing in Australia, see Blagg (2008) above n 20, 126-7.

sparing, subject to the judicial officer's discretion and the exigencies of time and resources.¹⁴⁵

Given the similarity of the two courts, I will outline the conferencing model used in South Australia, but mention those features where the circle sentencing court differs. The model examined is that used in the two Aboriginal courts at Port Augusta and Port Lincoln (this is not necessarily the same form used for Aboriginal Sentencing Conferences in mainstream courts).¹⁴⁶

The Conferencing Court Model

The conferencing court process is more complex and time-consuming than the Nunga court. As a consequence the conferencing court (and, similarly, the circle court) is a low volume court that deals with far fewer cases than the Nunga court. It is conspicuously different from the Nunga court (and even more so from the mainstream court).

A defendant may be referred to a sentencing conference at their request, the court's initiative or by one of the other parties. The assessment process is more rigorous than in the Nunga court. The AJO assesses the eligibility of the defendant and makes a recommendation to the magistrate, who makes the final decision. The eligibility guidelines are designed to select those most likely to benefit from the process.

The AJO (at Port Lincoln Aboriginal court a Conference Co-ordinator also assists) organises the conference: contacting most of the parties, obtaining details of the charges and allegations from prosecution and providing copies of any reports that may be used during sentencing. The AJO will also explain the conference process to the defendant, their family and any other (non-professional) parties that may attend. The victim is contacted by prosecution as part of their statutory responsibility to provide a Victim Impact Statement.

The conference takes place in a courtroom, but is conducted in an informal manner. The participants are usually seated around the bar table in the courtroom. The discussion at the conference is often lengthy and discursive. Victims are encouraged to attend, though often they do not (more often if there

¹⁴⁵ From April 2006 to September 2010 there had been 27 Aboriginal Sentencing Conferences, taking place at every level of criminal court in South Australia – CAA email, 27 September 2011.

¹⁴⁶ At present, the only judicial summary of the section 9C process used in mainstream criminal courts is found in *R v Wanganeen* (2010) SASC 237 (Gray J).

are charges involving the defendant's family).¹⁴⁷ The conference may occur before or during the sentencing hearing.

At Port Lincoln the conference takes place before the hearing and without the participation of the magistrate. The conference group, through the AJO and Conference Co-ordinator, provides a report to the magistrate, prosecution and defence for use in the sentencing hearing. The sentencing hearing takes place a few days later, with prosecution and defence making submissions on penalty. The conference procedure at Port Augusta court is mostly similar, but with the important difference that the magistrate participates in the conference. Sentencing submissions in the Port Augusta court will usually take place after the conference concludes. At this point the court resumes a greater formality. Submissions (in both conferencing courts) will often incorporate comments about or recommendations from the conference, as well as addressing any legal issues. The magistrate will then sentence the defendant, explaining the penalty in plain language.

These differences are based on practicalities, not principle or legislation (section 9C says little about procedure). Port Augusta is a permanent court with more capacity for the magistrate to participate in a lengthy conference. Port Lincoln is a circuit court, with the magistrate required to deal with a large amount of work in one week each month. As the conference lasts about 1.5-2 hours,¹⁴⁸ it is not feasible for the magistrate to attend. There is some disadvantage in this, as the magistrate does not hear the whole discussion, or experience how the information is expressed by the participants. This is of particular importance as the magistrate must assess the ability and commitment of the defendant to rehabilitate and make lifestyle changes.¹⁴⁹ It also has a significant impact on the capacity of the conference to directly influence decision-making (which I will discuss later in the chapter).¹⁵⁰

The Role of the Conference

The formal role of the conference is to provide information and advice on sentence. That is made clear by the legislation as section 9C states the sentencing court 'may...take into consideration views expressed at the

¹⁴⁷ Port Lincoln Aboriginal court has had some success in encouraging victims to attend – see *Port Lincoln Aboriginal Conferences; Guidelines and Case Flow Management (12/3/08)* Court Administration Authority, Government of South Australia, 8.

¹⁴⁸ *Ibid*, 4.

¹⁴⁹ I am not aware of any specific research on this last point, but the literature (by Magistrates Auty and Hennessy) and my own experience in the Nunga courts and three section 9C conferences (in mainstream courts) suggests it is important.

¹⁵⁰ See Chapter 3.6 *The Decision-Making Process*, 66.

conference'.¹⁵¹ The weight given to the conference's 'views' (and the decision on penalty), remains a matter entirely for judicial discretion.¹⁵² This is explained during the conference with all parties advised that the decision on sentence rests with the magistrate. The guidelines for the conferencing courts at Port Lincoln and Port Augusta also emphasise this point.¹⁵³

This is done, in part, to explain the legal status of the conference to the participants and, also, out of concern that the Elders and other Aboriginal members of the conference are not seen to be responsible for the sentence. This is of particular importance where a sentence of imprisonment or some other type of punitive penalty is imposed, which, if attributed to the Elders, may undermine their position in the community. Section 9C does not preclude the sentencing conference from making explicit recommendations on penalty, but it is uncommon in practice for the conference to do so.

The sentencing conference also has a more general, informative function; to assist the court in understanding Aboriginal society and culture, as well as to better inform the defendant of court procedures and the consequences of criminal behaviour.¹⁵⁴ It was anticipated when the legislation was introduced that the conference process would promote more informed sentencing decisions and better compliance with court orders.¹⁵⁵ As to the latter, no research has yet been undertaken to examine whether improved rates of compliance with court orders have been achieved by the conferencing court process.

The Legal Basis of the Conferencing Court

Section 9C *Criminal Law (Sentencing) Act 1988* (SA) came into effect in 2005, providing a discrete legislative basis for specialised sentencing practices for Aboriginal offenders.¹⁵⁶ It established a sentencing process, not a separate court. The legislation did not formalise the existing Nunga court procedure, but introduced a new conference-based sentencing process termed an 'Aboriginal Sentencing Conference'.¹⁵⁷ The legislation is cast wide, making the Aboriginal

¹⁵¹ Section 9C (1)(b) – for a reproduction of s 9C, see Appendix 2.2, 150.

¹⁵² *R v Wanganeen* (2010) SASC 237, 4 (Gray J).

¹⁵³ The guidelines at Port Augusta Aboriginal court also apply when it convenes as a Nunga court.

¹⁵⁴ *R v Wanganeen* (2010) SASC 237, 3 (Gray J).

¹⁵⁵ No research has yet been conducted on compliance with conferencing court orders – see Chapter 4 *Aboriginal Court Studies and Evaluations*, 78.

¹⁵⁶ It was enacted as part of the *Statutes Amendment (Intervention Programs and Sentencing Procedures) Act 2005* (SA) which included a number of other, unrelated changes to bail and pre-sentencing procedures.

¹⁵⁷ This was new for adults in South Australia, though a diversionary form of conferencing had been used for juveniles since the introduction of the *Young Offenders Act* (SA) in 1993.

Sentencing Conference available, at least potentially, to all Aboriginal defendants, regardless of age, location, culture or jurisdiction.

Whilst section 9C is essentially procedural and contains no express objectives, the parliamentary debates at the introduction of the legislation reveal the underlying rationale for the use of special sentencing measures. In the debate the Attorney-General, Michael Atkinson, explained the context and purpose of section 9C:

The Magistrates Court has for some time used culturally appropriate techniques when sentencing Aboriginal offenders. These techniques are designed to promote understanding of the consequences of criminal behaviour in the accused and an understanding of cultural and societal influences in the court and thereby make the punishment more effective... (s)entence conferencing helps to reduce the alienation of Aboriginal offenders that so often impedes their rehabilitation and compliance with court orders.¹⁵⁸

Two assumptions appear to underpin the legislation. First, involvement by Aboriginal people in the mainstream criminal justice system is often an alienating experience. Second, that the criminal law, or at least the sentencing process, is not culturally neutral and special measures may, in some circumstances, be necessary to redress the disadvantage faced by many Aboriginal defendants. The rationale of the legislation mirrors that of the Aboriginal court; that the needs of Aboriginal people can be met within the general framework of the criminal law through a culturally appropriate sentencing process. The expectation was that the defendant's compliance with court orders and rehabilitation would be enhanced by a court process that was less alienating.

The statutory framework for the Aboriginal Sentencing Conference is set out in section 9C. The prerequisites for a sentencing conference are:

- The defendant must be Aboriginal – s 9C (1) and (4)
- The defendant must consent to the conference – s 9C (1)
- The conference must include the defendant, defence counsel (if any), the prosecutor, victim and victim's representative (if the victim chooses to attend) – s 9C (2)

Other parties such as the Elders, the defendant's family, those assisting the defendant through counselling or in some other capacity and 'a person qualified to provide cultural advice' (in practice, usually the Elders) may also participate in

¹⁵⁸ South Australia, Parliamentary Debates, House of Assembly, 22 September 2005, 3559 and 17 October 2005, 3605 (Michael Atkinson, Attorney-General).

the sentencing conference. They may attend the conference if the court considers they can 'contribute usefully'.¹⁵⁹ It is a curious aspect of the legislation that the involvement of the Elders in a sentencing conference is not mandatory. In practice, the participation of the Elders is a prerequisite as a sentencing conference would be a hollow and ineffective exercise without the Elders and other Aboriginal community members.

The Circle Court Model

The circle sentencing court process, used in New South Wales and the ACT, is generally similar to the conferencing court. However, there are two principal differences between the circle and conferencing courts. First, the circle courts are usually conducted in a community building, rather than a courthouse (except where the defendant is in custody and a secure courtroom is required).

The second is more significant. One of the express functions of the circle is to make a recommendation as to the appropriate penalty. The circle's discussions involve the magistrate, who retains the ultimate decision on sentence and may reject the circle's recommendation. However, as an agreed recommendation is a critical part of the circle's role, wherever possible, the circle will reach a proposed sentence by consensus (or at least, majority).¹⁶⁰

The sentence must also be accepted by the defendant. This is a critical difference from the Nunga and conferencing courts, neither of which requires the defendant's consent to the imposition of a penalty that may be proposed in discussion. If there is no consensus on penalty, or the recommendation is not accepted by the defendant, the magistrate will sentence the defendant in a mainstream court.¹⁶¹ This is a powerful incentive (at least for the defendant) for a consensus to be achieved.

Common Aims

It is important to examine the objectives of the Aboriginal courts to understand what they aim to do, before looking more closely at their decision-making processes.

Identifying Aboriginal court aims serves a number of purposes:

¹⁵⁹ Section 9C (3).

¹⁶⁰ See *Criminal Procedure Regulation 2010* (NSW) r 44(4) – Appendix 3, 162; and Practice Direction 54, Ngambra Circle Sentencing Court, above n 99.

¹⁶¹ For descriptions of the circle court process, see Potas et al (2003) above n 89; Doug Dick, 'Circle Sentencing in New South Wales: Sentencing Aboriginal Offenders' (Paper presented at the AIJA Indigenous Courts Conference, Mildura, September 2007); and Madden (2007) above n 101.

- An explanation or justification for the creation and use of a specialist court, separate from the mainstream equivalent.
- To articulate what the court seeks to achieve.
- To provide a set of measures by which the court may be evaluated.

Of these, perhaps the most important to the court's day-to-day operations is the capacity to provide a consensus amongst the participants as to what the court aims to do and the means it should use.

However, discerning the common aims of Aboriginal courts in Australia is not straightforward. There is no uniform approach to enunciating court aims, with some jurisdictions codifying their objectives in regulations or practice directions,¹⁶² whilst others are drawn from publications and other sources.¹⁶³ As well, there are some differences in Aboriginal court aims (and the emphasis given to particular aims) in each jurisdiction.¹⁶⁴ The most common Aboriginal court aims have been summarised as follows:¹⁶⁵

- involve Indigenous people in the sentencing process
- increase the confidence of Indigenous people in the sentencing process
- reduce barriers between Indigenous people and the courts
- provide culturally appropriate sentencing options
- rehabilitate offenders
- provide offenders with rehabilitative support services
- provide support to victims and involve them in the sentencing process
- make the offender, families and the community more accountable
- reduce recidivism
- increase the rate of court appearances
- increase the compliance rate with community-based orders
- provide the judicial officer with an awareness of the social context of the offending and offender
- decrease the number of deaths in custody
- decrease the rate of Indigenous imprisonment, though with appropriate sentences

¹⁶² The aims of the NSW circle courts are outlined in *Criminal Procedure Regulation 2010* (r 35 - Appendix 3, 157), whilst the Northern Territory and ACT list their objectives in court practice directions.

¹⁶³ These jurisdictions are South Australia, Western Australia, (formerly) Queensland and Victoria - the latter has specific legislation, but it outlines no aims or objectives.

¹⁶⁴ Marchetti & Daly (2007) above n 19, 11 – Table 2 provides a comprehensive summary of the aims for each jurisdiction, also detailing the relevant sources.

¹⁶⁵ King et al (2009) above n 20, 180.

Marchetti categorised Aboriginal court aims as either *criminal justice* or *community-building*.¹⁶⁶ Criminal justice aims are described as those which seek to provide better sentencing information, improve attendance and compliance rates or reduce recidivism. In one sense, these are not essentially different from the aims of other specialist and mainstream courts which must also balance the interests of the offender, victim and community in sentencing; though the emphasis given to these aims and the means used in the Aboriginal courts to achieve them are.

Community-building aims express a broader, social objective - to change the relationship of the local Aboriginal community to the criminal justice system through their greater participation in the sentencing process.¹⁶⁷ Marchetti and Daly described this feature as lending the Aboriginal court a unique 'political dimension' because 'they are concerned with group-based change to social relations...not merely change in an individual.'¹⁶⁸ This aspect of the Aboriginal court is discussed further in Chapter 5.¹⁶⁹

My review of the literature, published aims and other sources indicates Aboriginal courts in Australia share three fundamental aims:

- The provision of a culturally relevant sentencing process and approach.
- Participation of the Aboriginal community in the sentencing process.
- The provision of better sentencing information.

These aims express a common commitment to increased Aboriginal influence in a better sentencing process. Importantly, the aims of the Aboriginal courts reach beyond the court process. They touch on the relationship of Aboriginal people to the criminal justice system, aiming to encourage greater confidence by the Aboriginal community in the courts.

But within this framework of fundamental common aims, there are differences. Whilst most jurisdictions have an explicit aim to reduce the rate of Aboriginal recidivism and some seek to improve court appearance rates, neither aim is universal. The other important difference is the emphasis in the circle-sentencing and conferencing jurisdictions of NSW, ACT, Northern Territory and South Australia on the participation of the victim in the sentencing process. In

¹⁶⁶ Elena Marchetti, 'Indigenous Sentencing Courts' (2009) *Indigenous Justice Clearinghouse*, Brief 5, December 2009, 3.

¹⁶⁷ Marchetti & Daly (2007) above n 19, 9-10.

¹⁶⁸ Chapter 5 *Aboriginal Courts: A Distinct Type of Court?* 107.

¹⁶⁹ Chapter 5 *Aboriginal Courts: Theory and Critiques*, 99.

those jurisdictions which use the Nunga court model, the role of the victim is given less priority, suggesting a greater focus on the defendant. But as will be seen later,¹⁷⁰ the different emphasis on victim participation is less in practice than the courts' aims may suggest.

Common Practices

A review of the literature indicates the most common practices are:

- a more culturally appropriate environment
- informality
- direct communication between participants
- a conversational and non-adversarial approach to sentencing

A critical feature of a culturally appropriate environment is the design and layout of the courtroom. The presentation of the courtroom and proceedings are recognised as important in symbolic, as well as practical ways. The purpose is to ensure that the court environment and process are infused with Aboriginal values, rather than those of mainstream courts. As King et al observed of the interrelationship of court design to non-adversarial justice practices, 'court buildings embody social values and have psychological implications for what happens in them'.¹⁷¹

The design of the court is usually configured to make it less like a formal, mainstream court. The public seating is brought closer in a semi-circle. The parties, including the magistrate and Elders, sit at the same level, usually around the bar table.¹⁷² The defendant's family are encouraged to be present in court and one (at least) usually sits with the defendant at the bar table. A range of other measures are used in the Aboriginal courts in South Australia to make the environment more culturally appropriate to Aboriginal people. There may be Aboriginal artwork or motifs on display. The court orderlies are Aboriginal and an AJO is present to assist the defendant with enquiries (such as court dates, payment arrangements on fines) and liaise with family and other community members. Proceedings are commenced with the magistrate acknowledging the local Aboriginal community and their relationship to the land.

The practices of informality, direct communication and a collaborative approach relate to the way the proceedings are conducted and how the participants relate to each other. They are not unique to the Aboriginal court. Elements of each can

¹⁷⁰ Chapter 4 *Aboriginal Court Studies and Evaluations*, 78.

¹⁷¹ King et al (2009) above n 20, 215.

¹⁷² The layout and design of Aboriginal courts in South Australia varies as most are converted mainstream courtrooms, not purpose-built.

be seen, on occasion, in mainstream summary courts and, more often, in problem-solving, specialist courts.¹⁷³ Nonetheless, these practices are essential to the genuine participation of the Elders, other community members and the defendant in the Aboriginal court sentencing process.¹⁷⁴

A 'Sentencing Conversation'

The result is well documented by those who have observed or participated in the Aboriginal courts.¹⁷⁵ The proceedings often involve a wide-ranging discussion, with a large amount of information provided about the defendant, the offending and its causes. This process was aptly described by Magistrate Auty (the first presiding magistrate at the Shepparton Koori court) as 'a sentencing conversation'.¹⁷⁶

The importance of the conversational approach to sentencing is not just the type of information produced, but how it is expressed. The defendant will talk about their offending, problems and lifestyle, without the intercession of their lawyer. As well as the defendant speaking directly to the court, their family will often offer further information, which is usually helpful and sometimes remarkably blunt.

Aboriginal Court Practices and Linguistic Disadvantage

There is a second, important aspect to this. In using their own words, the defendant and family use their own language. Even in those areas where the Aboriginal communities speak English as a first language,¹⁷⁷ many will talk in an idiom recognised as Aboriginal English, which includes unique words and grammatical constructions as well as words with different meanings from regular English.¹⁷⁸ The differences can be so significant that misunderstandings may take place, particularly if the court and counsel only infrequently deal with Aboriginal defendants.

This aspect of linguistic disadvantage was recognised as a significant problem for many Aboriginal participants in the criminal courts by the Queensland Criminal

¹⁷³ For a discussion of these practices in specialist courts, see King et al (2009) above n 20.

¹⁷⁴ The *Victorian Magistrates Court (Koori Court) Act, 2002* enshrines the requirement that proceedings be conducted informally and in plain English – see s 4D (4) & (5).

¹⁷⁵ Briggs & Auty (2006) above n 127; Harris (2006) above n 4; Hennessey (2006) above n 127.

¹⁷⁶ A quote from Magistrate Auty - see Harris (2006) above n 4, 41.

¹⁷⁷ Of the four South Australian Aboriginal courts, only Port Augusta has a significant number of defendants for whom English is a second language.

¹⁷⁸ Aboriginal English is a recognised dialect; see Dianna Eades, *Aboriginal English and the Law* (1992).

Justice Commission in a 1996 report.¹⁷⁹ Yet this disadvantage has been given less attention and, at times, overlooked, in comparison to the more obvious difficulties the criminal justice system (in South Australia) confronts in providing adequate interpreting services for defendants who speak an Aboriginal language.¹⁸⁰

Aboriginal courts are singularly equipped, through the presence of the Elders, AJO's and the acquired knowledge of the judicial officer (when experienced in the Aboriginal court), to allow the defendant and family to tell their story and be properly understood. In this way the Aboriginal court is told, first hand, about the defendant's offending, lifestyle and needs.

This is the key element of the Aboriginal court sentencing process. The ability of Aboriginal people to be heard in their own words is crucial to genuine participation in the sentencing process. As a result, the court is not confined to receiving information from defence counsel and other traditional sources which may be 'filtered' to conform to legally acceptable norms.¹⁸¹ Instead, the defendant and the other Aboriginal participants can genuinely engage in the sentencing hearing, often speaking from personal experience to provide information and advice on the defendant, the offending or conditions within the local Aboriginal community. The outcome is an open, conversational process that can influence, or at times, become part of decision-making on sentence.

3.5 The Roles of the Participants

In this section the roles of the non-judicial participants, in both the Nunga and conferencing courts, are looked at in more detail. The role of the magistrate will be examined in the next section, as part of the analysis of the decision-making process. The differences in the roles of the non-judicial participants in the Aboriginal and mainstream criminal courts raise a number of issues which are novel and have been the subject of little academic or professional discussion. As a result, they remain currently unresolved by formal or judicial guidelines.

¹⁷⁹ Queensland Criminal Justice Commission, 'Aboriginal Witnesses in Queensland's Criminal Courts' (1996) <www.cmc.qld.gov.au/.../aboriginal-witnesses-in-queenslands-criminal...> See also the later observations by the West Australian Law Reform Commission in 'Aboriginal Customary Law: Discussion Paper' (2005) above n 48, 99.

¹⁸⁰ This long-running problem was the subject of critical comment by Sulan J in *Frank v Police* (2007) SASC 288.

¹⁸¹ There is no criticism in this; one of the lawyer's tasks is to assess what to say in the most legally persuasive manner.

The Elders

The Elders have a pivotal role in the Aboriginal court. This is the universal view in the literature and various qualitative studies of the Aboriginal court¹⁸². The CIRCA evaluation of the NSW circle courts commented, '(o)ther reviews and evaluations of Aboriginal courts have also concluded that the general perception is that they provide a more culturally appropriate justice approach, and that the involvement of the Elders is highly valued and considered critical to the success of the program.'¹⁸³ That assessment is equally true of the position in South Australia.¹⁸⁴

The Elder's role in the Aboriginal court is multi-faceted; they may provide background information, act as a 'cultural adviser' to the magistrate or advise on or influence the decision on sentence. Their role in regard to the defendant, whom they may know personally (or indirectly through family), can be complex; offering empathy, advice and sometimes, criticism or admonition (the process of 'shaming' is recognised within Aboriginal communities and the courts). The Elders' role is a demanding one, requiring a deft balancing of different responsibilities to the court and the Aboriginal community. These responsibilities may sometimes be difficult to reconcile, particularly in contentious matters where the Aboriginal community (or sections of it), the court and the other professional participants can have differing views as to an appropriate outcome.

How the Elders perform their role is currently influenced by personality and established practice, rather than formal rules, legislation or case law. Their role has evolved from practices developed since the first Nunga court. Their role in South Australia is similar in the Nunga and conferencing courts, though in the latter, the Elders may be joined by other community members in the conference group. The legislation does little to define the position of the Elders. Section 9C allows for the participation in a sentencing conference by an Aboriginal Elder, though their involvement is not a prerequisite for a conference.¹⁸⁵ A similar provision permits a person 'qualified to provide cultural advice' to participate in a conference.¹⁸⁶

Section 9C provides little guidance on the criteria for an Elder and none as to their functions or how they are to be selected.¹⁸⁷ In South Australia the selection

¹⁸² CIRCA (2008) above n 22, Harris (2006) above n 4; Morgan & Louis (2010) above n 21.

¹⁸³ CIRCA (2008) above n 22, 20.

¹⁸⁴ See Tomaino (2005) above n 16; and Marshall (2008) above n 16, 11.

¹⁸⁵ Section 9C (3)(a).

¹⁸⁶ Section 9C (3)(b).

¹⁸⁷ The only requirement being that the person must be 'accepted within the defendant's Aboriginal community as an Elder' – s. 9C(3)(a).

of Elders in both the Nunga and conferencing courts is usually made on the recommendation of the AJO's, with the magistrate(s) of the Aboriginal court to give formal approval. Interstate the legal position is generally similar, with the role and function of the Elders established by practice, rather than legislation. One jurisdiction, Victoria, recognises the court's right to receive information from an Elder, though there are no prescriptive rules concerning the selection, duties or role of the Elders in the sentencing process.¹⁸⁸

There are benefits in this approach. The lack of formal guidelines enables each jurisdiction, or individual courts, to make arrangements for the selection and involvement of Elders which suit local conditions. Also, the absence of legislation or guidelines avoids the vexed problem of attempting a legislative definition of concepts such as 'Elders' and 'community', which may have subtly different meanings in non-Aboriginal and Aboriginal society, or in each Aboriginal community. But it does leave a number of issues concerning the participation of the Elders in the Aboriginal court unresolved.

First, who do they represent? Second, what 'conflict of interest' guidelines apply to the Elders?

The Elders and the Aboriginal Community

The legislation requires that an Elder 'be regarded as such by the defendant...and the defendant's community',¹⁸⁹ but does not purport to make the Elder a 'representative' of the Aboriginal community. To do so could be problematical. Aboriginal communities are often no more homogenous than those in non-Aboriginal society. Divisions of gender, clan and locality (and opinion) can be significant even within small and remote communities. As a consequence, it may be difficult for any one person to represent 'a community view', particularly in contentious criminal matters where unanimity of opinion may not exist.¹⁹⁰

The Elder assists the court as a respected member of the local community, drawing on their experience of Aboriginal society and culture. Whilst it may be too much to say they are 'representative' of the community, they form the crucial link between the court and the local Aboriginal community. In that capacity they may give general advice on cultural matters or social conditions within the local Aboriginal community as well as information specific to the

¹⁸⁸ For the position in Victoria, see s 4G(2) *Magistrates Court (Koori Court) Act 2002*.

¹⁸⁹ Section 9C (3)(a).

¹⁹⁰ For a discussion of this issue by a former judicial officer experienced in the Aboriginal courts and circuits in remote Aboriginal communities - see Field (2008) above n 83.

defendant. The Elders' ties to the local Aboriginal community bring another, more general benefit to the Aboriginal court. Their relationship to and standing with local Aboriginal people enhances acceptance of the court amongst the Aboriginal community.

Conflict of Interest

The other issue is what 'conflict of interest' rules currently apply, or should apply to the Elders? The conflict of interest rules relating to judicial officers are highly developed, with both formal judicial guidelines and a well-established case law.¹⁹¹ These rules are intended to ensure the judicial officer remains impartial and disengaged, in a personal sense, from the parties who appear in their court. But the role of the Elders, and to a significant extent, their authority in the court, arises from their knowledge of and ties to the local Aboriginal community.¹⁹² This can sometimes include personal or kinship relations with the defendant, their family or the victim.¹⁹³ Consequently, the Elders' role in the Aboriginal court requires a different concept of 'conflict of interest' which acknowledges there can be impartiality without a judicial-like requirement of complete disengagement from the defendant, victim, their families or the local Aboriginal community.

There are no conflict of interest guidelines formulated for Elders participating in the South Australian Aboriginal courts. However, there is a Code of Conduct for Elders in the Victorian Koori courts.¹⁹⁴ They cover a number of issues such as confidentiality of information, a bar on giving legal advice and, most relevantly, a requirement that they disqualify themselves from a matter where their impartiality 'might reasonably be questioned'. The principle is unarguable, though its application could be problematic.

Given the small and inter-related nature of many Aboriginal communities, it would be unrealistic to require the Elders to only be involved with a defendant unknown to them. Such an approach would detract from the very qualities of community and cultural knowledge that the Elders bring to the Aboriginal court. This issue has received limited attention in the literature. It was discussed in the evaluation of the Kalgoorlie Community Court in which it was concluded that ties

¹⁹¹ For professional conduct guidelines for Australian judicial officers, see the *Guide to Judicial Conduct*, The Australasian Institute of Judicial Administration Inc. (2nd ed, 2007).

¹⁹² This is not unknown in Anglo-Australian criminal law; the early (medieval) jury often had local, even personal knowledge of the defendant or the alleged offence.

¹⁹³ In the review of the Koori court by Harris a questionnaire of defendants indicated that in 20 cases, the Elders were known to them on 11 occasions – see Harris (2006) above n 4, 90.

¹⁹⁴ See *Operational Manual for Victorian Koori Court – Conduct for Aboriginal Elders or Respected Persons and Conflict of Interest*, 20.

to the local community and families need not preclude an Elder from participating in a sentencing matter (in fact it was thought those ties may ensure the offender takes more notice of what is said).¹⁹⁵ Nor, in my experience, has conflict of interest given rise to an objection or a request for disqualification of an Elder in a South Australian Aboriginal court.

There may be a number of reasons for this. The first is that the process is very transparent. Any personal or family contacts with the defendant are made clear by the Elders and are often the explicit basis for their opinion about the defendant. Second, there may be some reluctance (personal and cultural) to openly challenge an Elder. As well, the inter-related nature of Aboriginal society is understood and accepted by Aboriginal defendants and unlikely, in most cases, to be seen as unusual or improper.

Nonetheless, it seems certain the defendant has the right to object to an Elder's involvement in their case. This 'right' arises from the principles of procedural fairness. In one jurisdiction, New South Wales, the court practice directions enshrine the right to object to an Elder, but do not define 'conflict of interest'.¹⁹⁶ How an objection might be dealt with is unclear. The study of the Kalgoorlie Community Court did not propose a formal procedure, but observed conflicts of interest could be avoided by careful selection of more than one Elder, so that a conflicted Elder may withdraw without the defendant being precluded from being sentenced by an Aboriginal court.¹⁹⁷ It is likely that conflicts of interest will be (or have been) resolved by compromise and informal means, rather than judicial ruling. However, some uncertainty will remain until guidelines are formulated, or an objection to an Elder is made, requiring determination by a court.

A suitable approach, upon objection by a defendant or their lawyer, would be to adopt the procedure used when a judicial officer is asked to disqualify themselves from hearing a trial or sentencing matter. First, the party raising the issue must explain the reasons for the objection. The Elder would then indicate their attitude, either by voluntarily withdrawing from the case or giving their reasons for declining to do so.¹⁹⁸ If the Elder refuses to withdraw, the party making the

¹⁹⁵ Acquilina et al (2009) above n 21, 104; see also the comments in Harris (2006) above n 4, 45 and Dr. Michael S King, 'Judging, judicial values and judicial conduct on problem-solving courts, Indigenous sentencing courts and mainstream courts' (2010) 19 *Journal of Judicial Administration* 133, 156.

¹⁹⁶ *Criminal Procedure Regulations 2010* (NSW) r 41 – see Appendix 3, 161.

¹⁹⁷ Acquilina et al (2009) above n 21, 104.

¹⁹⁸ Judicial officers, upon objection or of their own motion, will sometimes disqualify themselves from hearing a matter, though it does not necessarily indicate actual bias, but rather a 'reasonable apprehension' they may not be impartial.

objection may then make further submissions, after which the judicial officer would decide the matter (without taking advice from the other Elders).

The Significance of the Elders

The Elders' role is significant for three reasons. First, the Elders are a crucial source of personal, community and cultural information or advice. Second, they are the critical link between the court and the local Aboriginal community. Finally, the Elders occupy a unique position in the decision-making process. Whilst in some other specialist courts (Drug, Family Violence and Diversion courts) case workers provide information concerning eligibility or continuing participation in the court's rehabilitative program, in no other criminal court do laypersons directly advise on or influence the sentencing decision (the Elders' role in decision-making will be discussed further in the next section).¹⁹⁹

The Aboriginal Justice Officer

The AJO's have very different roles in the Nunga and conferencing courts in South Australia.²⁰⁰ They are often seen in the Nunga court, but usually play no role in the proceedings. Their role in the Nunga court is nonetheless crucial, with out-of-court duties which involve liaising with the defendants and their families, advising of court dates, sorting out non-appearance warrants and making payment arrangements for fines. The AJO's also explain the consequences of the penalties imposed by the Nunga court (particularly ongoing obligations such as community service, supervised bonds or a suspended sentence). More generally, as the first point-of-contact for many Aboriginal people with the court system, they provide information about the Nunga court and its eligibility guidelines.²⁰¹

Section 9C gives the AJO a pivotal role in the conferencing court. Section 9C (1) provides that the sentencing conference is to take place 'with the assistance of an Aboriginal Justice Officer'.²⁰² In *R v Wanganeen*, Gray J suggests the AJO or the judicial officer may 'informally' chair the sentencing conference.²⁰³ The AJO's organisational duties involve assessment of the defendant's eligibility, notifying

¹⁹⁹ Laypersons in a jury or a (Youth court) family conference may be partially analogous, but they do not influence a court imposed sentence.

²⁰⁰ For a description of the duties of an interstate equivalent, the Koori Court Officer (Victoria), see Harris (2006) above n 4, 38-40.

²⁰¹ The first AJO's were appointed in December 1999 and are based in a former courtroom at Port Adelaide Magistrates court. For a description of their early role, see the article by the AJO Colleen Welch – Welch (2002) above n 24, 5.

²⁰² See also s 9C(5) which outlines the AJO's responsibilities in an Aboriginal Sentencing Conference.

²⁰³ *R v Wanganeen* (2010) SASC 237, 13 - though in my experience participating in three District Court sentencing conferences as defence counsel, the judge rather than the AJO chaired the conference.

the parties of hearing dates, distributing information (police allegations, prior records and reports) to the participants and occasionally arranging transport. These duties can be onerous and are additional to the AJO's other functions. This has, at times, acted as a curb on the use of sentencing conferences, though more so in mainstream courts.²⁰⁴ If sentencing conferences are more frequently used in Aboriginal and mainstream courts, the issue of adequate AJO numbers may become more critical.

The AJO plays an active role during the sentencing conference. Section 9C (5)(a) states that the AJO may assist the court 'by providing advice on Aboriginal society and culture'. In practice, it is the Elders who give cultural advice, whilst the AJO will often discuss matters relating to their role as the conference organiser or their knowledge of the defendant (from personal knowledge or discussions before the conference). However, as each have standing under Section 9C to give cultural advice, it is possible the court could receive conflicting views from the AJO's and Elders, which could prove difficult to resolve.

To the writer's knowledge, this has not yet occurred (and is unlikely to do so, as the provision of cultural advice is usually left to the Elders by the AJO's, who may not be as senior or from the same community as the defendant). If a conflict should arise over a cultural matter, it would need to be determined by the judicial officer (if crucial to penalty) in a similar manner to a dispute between other expert witnesses. This may be done by evidence being given or further submissions by the parties, after which the judicial officer would give a decision and reasons. The impact of such a process on the standing and working relationship of the AJO and Elders would be extremely detrimental. For that reason, it is highly likely the issue would resolve by discussion, as the Elders, AJO's and court would be eager to avoid any open conflict.

Prosecution

Of all the participants, the role of the police prosecutor is most similar to that in the mainstream court. Perhaps because of this, the role of prosecution has received less attention in commentary than that of other participants. However, the general observation made in the literature is that prosecution have shown a commitment to the Aboriginal court and the need for a less adversarial approach.²⁰⁵ This was the view in the evaluation of the Port Lincoln Aboriginal

²⁰⁴ A conference was held at Adelaide Magistrates Court in September 2008 involving AJO's, court staff and some judiciary, to formulate agreed guidelines as to the AJO's responsibilities in an Aboriginal Sentencing Conference (in mainstream and Aboriginal courts) and limit the AJO's burgeoning duties.

²⁰⁵ Marchetti & Daly (2007) above n 19.

Court, conducted after the conferencing court had been in operation for nearly a year. The report commented, '[i]n general, the police respondents were generally supportive of the conference process.'²⁰⁶ Interstate studies have found a similar approach by prosecution in other jurisdictions.²⁰⁷

The main difference for an Aboriginal court prosecutor is not what they do, but how they perform their duties. In both the Nunga and conferencing courts, prosecution give particulars of the offending, prior record and, sometimes, a Victim Impact Statement. This is no different from what they do in the mainstream court. The noticeable difference is the approach to submissions about penalty. In both forms of Aboriginal court prosecutors tend to make less specific submissions on penalty, preferring more general comments; for instance, they may make submissions about the seriousness or the prevalence of the offending rather than urging imprisonment or some other punitive penalty. This subtle difference is important, as it allows the subsequent sentencing discussion involving the Elders and other participants to take place without the parties having fixed or overtly conflicting positions on penalty.

The more collaborative approach by prosecution is not unique to the Aboriginal court. It is found in some other specialist courts, such as the Drug Court and the Diversion Court, where a strong therapeutic and cooperative ethos prevails.²⁰⁸ Indeed, aspects of this approach can be seen in a typical general list (in a mainstream criminal court) where many submissions on bail applications and guilty pleas are agreed between defence and prosecution. In the Aboriginal court and all other courts, the legal position is the same - an agreed position or submission is not binding on the judicial officer, but it is persuasive.

Defence Counsel

Defence counsel plays a different and, in one sense, lesser role in the Aboriginal court. The fundamental difference for a defence lawyer in the Aboriginal court is that they are no longer the sole or even major source of information and explanation for the defendant. Whilst this is similar to some other specialist courts such as the Drug or Diversion courts, the Aboriginal court is distinctive in the degree to which there is direct communication with the defendant and their family.

As the magistrate and Elders speak directly with the defendant, many defence lawyers concentrate their submissions on legal issues and the proposed

²⁰⁶ Marshall (2008) above n 16, 13.

²⁰⁷ Harris (2006) above n 4, 51-3.

²⁰⁸ For a discussion of these issues in the problem-solving courts, see King et al (2009) above n 20, 138-69.

sentence. Submissions on the defendant's offending and personal circumstances tend to be shorter (than in a mainstream court), anticipating the discussion that will follow. This is the general approach, at least amongst lawyers who regularly appear in the Aboriginal courts in South Australia.²⁰⁹ The literature suggests there are similar practices amongst defence lawyers in Aboriginal courts interstate.²¹⁰ Harris, in his review of the Victorian Koori Court, quotes a Victorian Aboriginal Legal Service lawyer describing his approach to submissions:

'I try to keep things to a minimum as to what my submissions are and then have the relevant people speak ... it has much more meaning coming from those people and the court can sort of see whether they're really genuine or not.'²¹¹

This approach is consistent with the ethos of the Aboriginal court that participants should communicate directly with each other. It is also prudent as it avoids the difficulty of counsel making a submission about a matter, only to have it contradicted later by the defendant. Whilst that is a mild embarrassment experienced by every defence counsel at some time, it can be damaging for the defendant (whether it arises from misunderstanding or a change of instructions).

Whilst the traditional advocacy role of the defence counsel is less prominent in the Aboriginal court, there are additional out-of-court duties that are important to the defendant's successful participation. In both models of Aboriginal court, the lawyer must prepare their client for the different role and expectations of the defendant. This is no small thing. Many Aboriginal defendants, used to being passive in court and often reticent in formal situations, initially find the change to speaking for themselves a difficult transition. The different skills and extra duties required of a defence lawyer in the Aboriginal and other therapeutic-type courts are well understood in the literature.²¹²

One concern raised about the different role of defence counsel in the Aboriginal court is that, with an emphasis on cooperation between the parties, they may not adequately protect the defendant's interests. An example, given by Tomaino, was the suggestion that the Aboriginal court approach to sentencing may be contrary to the 'traditional roles for lawyers in court, especially defence lawyers, (which are) about minimising the State's intrusion into the lives of defendants'.²¹³ Having observed Koori Court proceedings, Harris considered this

²⁰⁹ Tomaino (2005) above n 16, 14.

²¹⁰ Dick (2007) above n 161; Madden (2007) above n 101; and Harris (2006) above n 4.

²¹¹ Harris (2006) above n 4, 49.

²¹² See Harris (2006) above n 4, 49, concerning the practice in the Aboriginal courts; or for a more general discussion, King et al (2009) above n 20, 230-9.

²¹³ Tomaino (2005) above n 16, 14.

criticism unfounded, as participation in rehabilitative programs and deferral of sentence were usually an alternative to imprisoning the defendant.²¹⁴

This issue is not confined to the Aboriginal court. It has arisen more generally with the emergence of problem-solving courts (such as the Drug Court) and has prompted the suggestion that these types of court 'require lawyers to rethink their approach to the court process and their role in it.'²¹⁵ Even so, the 'proper role' of defence counsel in problem-solving courts is difficult to define,²¹⁶ with tension between the traditional duty to (ethically) represent their client's interest and the institutional pressures from the court and other participants to be a 'team player'.²¹⁷ Nonetheless, the defence lawyer's paramount duty must be to represent their client, though this can be consistent with the imposition of supervisory orders (rather than less intrusive orders) where that is necessary to encourage rehabilitation and reduce the likelihood of reoffending.

If there is a potential conflict between the defence lawyer's traditional approach (to minimise the penalty or the restrictions on the defendant) and the frequent use of supervisory penalties by specialist courts, it rarely arises in practice. Most defendants in the Aboriginal courts face serious charges with a real risk of imprisonment; so the offer of a community-based alternative involving supervision and treatment is usually readily accepted and preferable to prison. Where a defendant faces minor charges, courts (Aboriginal and others) are generally reluctant to refer them to treatment programs where places are often prioritised to more serious offenders whose offending may more readily justify a lengthy period of supervision and treatment.

The Defendant and Family

The defendant is expected to speak frankly with the magistrate and Elders about their offending and personal circumstances, without the intercession of their lawyer. Many do this willingly, some are more reticent. This occurs in both models of Aboriginal court and is very different to the role of a represented defendant in a mainstream criminal court. The willingness of defendants to engage in this way is, in part, due to an implicit understanding that this is a necessary part of participation in the Aboriginal court. On occasion, the defendant may even tell of other (uncharged) offending or anti-social behaviour,

²¹⁴ Harris (2006) above n 4, 51.

²¹⁵ King et al (2009) above n 20, 232.

²¹⁶ Karen Freeman-Wilson, Ronald Sullivan and Susan Weinstein, 'Critical Issues for Defense Attorneys in Drug Court' (2003) 4 *Monograph Series*, 4 (National Drug Court Institute USA).

²¹⁷ *Ibid.*

which, nonetheless, can be helpful to the court in assessing the defendant's rehabilitative needs.²¹⁸

There are protections against the potential danger that the defendant could be sentenced more harshly due to disclosures unrelated their charges. First, there is a formal protection in the established sentencing principle that a person may only be penalised for charged offences.²¹⁹ Second, the therapeutic approach of the Aboriginal court provides an informal guarantee to the defendant that, in foregoing their traditional right to be spoken for only by counsel, the court will aim to fashion a penalty that better addresses the defendant's needs and the problems underlying the offending.

Even so, there is no legal guarantee that a defendant could not be charged with a new offence on the basis of 'admissions' made in the course of a sentencing discussion.²²⁰ But it is unlikely, as there is a tacit understanding by the court's regular participants that active involvement by the defendant is to be encouraged as a necessary element in the Aboriginal court process.

Whilst not formally prohibited, a defendant is discouraged from remaining silent in the Aboriginal court. This is not a matter of law, but practice. It would be difficult for a conferencing court to function without an actively engaged defendant (and hardly less so for a Nunga court). In the South Australian Aboriginal courts, a defendant who refuses to speak is encouraged to do so; and almost all do, to some extent.²²¹ Where a defendant is reticent, their family will often provide valuable information.

The importance of the defendant's family is often underestimated in commentary on the Aboriginal courts. The role of the defendant's family is, like that of the Elders, a distinctive feature of the Aboriginal court. The significance of the defendant's family is recognised in the Aboriginal court by their physical presence at the bar table, with one or two family members seated with the defendant,²²² and their inclusion in the sentencing discussion. The defendant's family, particularly older or more senior relations will frequently provide useful

²¹⁸ For a discussion of this issue, see King (2010) above n 195, 155-6.

²¹⁹ There are two statutory exceptions to this rule - where 'considerations' are taken into account or a 'course of conduct' is alleged in relation to sexual offences - but neither are important in the Aboriginal court context.

²²⁰ There is a further uncertainty about this issue - if prosecution charged a defendant with a new offence on the basis of in-court admissions (before a warning against self-incrimination was given), there may be an argument as to the admissibility of the evidence.

²²¹ Harris (2006) above n 4, 46-8, suggests a significant number of defendants in the Koori Court chose not to speak, but on my observation very few fail to do so in the South Australian Aboriginal courts.

²²² This occurs even if the defendant is in custody.

information about the defendant and extended family which can help the court to assess the degree of family support available and the defendant's prospects for rehabilitation.

This aspect of family involvement in the Aboriginal court sentencing process and its potential impact on penalty was recognised in the recent study of Queensland Murri courts.²²³ The study observed:

The presence of family members provides the Magistrate and Elders with an insight into the offender's living circumstances and home life they might not otherwise had and can provide valuable information regarding the suitability of a non-custodial sentence (or conversely, other people who might be affected if the accused receives a custodial penalty).²²⁴

As well as being a practical benefit to the sentencing process, the recognition of family in the Aboriginal court is a crucial aspect in providing a culturally relevant court and, in a symbolic sense, is reflective of the importance of kinship in Aboriginal society.

3.6 The Decision-Making Process

The magistrate has ultimate legal responsibility for the decision on sentence in the Aboriginal court; but before imposing sentence, the magistrate takes a less prominent (and less traditional) role. Unlike the mainstream criminal court, where the judicial officer is the focal point at all stages of the sentencing proceedings, the decision-making phase in the Aboriginal court is more diffuse. Decision-making in the Aboriginal court extends beyond the imposition of penalty by the judicial officer, including the preceding 'sentencing conversation' between the magistrate, Elders and other participants.²²⁵ Central to this process is the relationship between the magistrate and the Elders.

This section discusses the nature of decision-making in the Aboriginal court; asking whether it is fundamentally similar to the mainstream magistrates' court, or changed by the role of the Aboriginal community and the different processes of the Aboriginal court? Five features of the sentencing process are examined: the phases of the sentencing process, the role of the judicial officer, the relationship of the Elders and magistrate, the extent to which decision-making is

²²³ Morgan & Louis (2010) above n 21, 129.

²²⁴ Ibid.

²²⁵ Harris (2006) above n 4, 41.

shared or devolved by the judicial officer and whether the decision-making process influences the court's approach to sentencing.

The Sentencing Process: Discussion and Decision

The sentencing process in the Aboriginal court can be seen as having two stages; the *deliberative* and *sentencing* phases. They are defined by the differing roles of the magistrate and Elders in each phase. There is not always a clear demarcation between the two phases, as the sentencing process in the Aboriginal court tends to be conversational rather than formal.²²⁶

The deliberative phase is marked by an open discussion amongst the participants in which the Elders take a leading role. The Elders may often, by dint of their knowledge and position within the Aboriginal community, lead the discussion with the defendant and their family. From this talk, information is gained and the Elders will advise, encourage or sometimes admonish the defendant. The information provided by the Elders may have a number of facets; advice concerning cultural matters and living conditions within the local Aboriginal community or background knowledge of the defendant that may place the offending in proper context or help to identify the offender's rehabilitative needs. The sentencing phase occurs as the court returns to a more traditional formality and focus, with the judicial officer imposing the penalty on the defendant.

The Magistrate and Elders in the Sentencing Process

The Elders play a crucial role in the sentencing process and, arguably, can be said to be the most 'important element' in the deliberative phase.²²⁷ Certainly, the general view of commentators, studies and judicial participants of the Aboriginal court is typified by the comment of Judge Marshall Irwin (former Queensland Chief Magistrate) who, emphasising the significance of the Elders in the Murri Court, said '[t]hey help get at the source of criminal behaviour and breakdown the disengagement that Indigenous people have had with the courts'.²²⁸

What then is the role of the magistrate? In the deliberative phase the magistrate will, most often, encourage others to talk, raise issues that should be discussed and explain any legal constraints on the sentencing discretion.²²⁹ Where usually

²²⁶ A sentence of imprisonment will usually be accompanied by formal sentencing remarks, though a less punitive penalty may not.

²²⁷ Daly & Proietti-Scifoni (2009) above n 22, 107.

²²⁸ Marshall Irwin, 'Summarising Courts Alternatives' (Paper presented at the Queensland Law Society, Brisbane, September 2008) 3.

²²⁹ For instance, a defendant may have breached parole, requiring that a mandatory sentence of imprisonment be served in addition to that imposed by the court.

the magistrate dominates proceedings, in the deliberative phase the Elders may assume a pivotal role. At this stage, the magistrate who does least will often do best, allowing others to give their views. The extent of the Elders' role will depend (as Harris describes it) on the 'space' allowed for their contribution by the magistrate.²³⁰ The degree to which this occurs is determined by the individual magistrate, with formal rules playing no role.

In certain respects the demands on Aboriginal court magistrates are similar to those faced by judicial officers in other specialist and problem-solving courts, where a non-adversarial approach and direct communication between the judicial officer and the defendant is often also employed.²³¹ However, the need to accommodate the role of the Elders in the sentencing dialogue presents a distinctive challenge for Aboriginal court magistrates, requiring a very different approach to the conventional judicial role.

In the sentencing phase the magistrate's role is more akin to that in a mainstream criminal court. At this point the proceedings will usually assume a more formal tone, with the magistrate telling the defendant what the penalty is and why that penalty has been imposed. Sometimes the magistrate, either at the start of the hearing, or before sentencing, will explain to the defendant and others that the decision on sentence is made solely by the judicial officer. This is done most often where there is a sentence of imprisonment or some other form of punitive penalty. The explanation reflects both legal reality and the sensitivity of the Elders' position in the court and their community.

The Magistrate/Elders Relationship

The relationship of the magistrate and the Elders is the foundation of the Aboriginal court. Their different relationship during the deliberative phase is based on an informal consensus between the parties which derives little from legislation, case law or rules, but reveals itself in practice.²³² The consensus is shaped by a mix of factors: personality, commitment to the court's aims, as well as other, more pragmatic concerns.

The personalities of the magistrate and Elders play the critical role in determining their relationship, the most important aspect of which is the

²³⁰ Harris (2006) above n 4, 74.

²³¹ For a discussion of the challenges for the judiciary in the new types of specialist court, see Jelena Popovic, 'Judicial Officers – Complementing Conventional Law and Changing the Culture of the Judiciary' in Marilyn McMahon & David Wexler, *Therapeutic Jurisprudence* (2003) 121-35.

²³² McNamara refers to this as an 'informal convention' between the parties - 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*, 48.

willingness of the judicial officer to encourage genuine input by the Elders and other Aboriginal participants during sentencing. This is the touchstone of the relationship and determines the extent to which the Elders (and where involved, other Aboriginal community members) can participate fully in the deliberative phase of sentencing.

Whilst the importance of personality should not be over-emphasised, it does mean the Aboriginal court tends to be more influenced by changes in key personnel than other forms of court where the structure and practices are more clearly founded on formal rules and institutional arrangements. However, there are benefits as well - the personal nature of the magistrate /Elders relationship lends a dynamic element to the decision-making process and enables the court to be more responsive to local needs.

The personal relationship between the magistrate and Elders is underpinned by their commitment (and that of the other participants) to the court's fundamental aims to encourage the involvement of the Aboriginal community in a culturally relevant sentencing process. The aims of the court are an indirect, but powerful influence on the parties. Of course, they are not binding, but have persuasive effect, as the court's aims encapsulate the rationale for Aboriginal participation and values in the court process.²³³

The influence of the model of Aboriginal court on the magistrate/Elders relationship is more complex. Its importance is the extent to which the court's structure creates a genuine sentencing dialogue between the magistrate, Elders and other Aboriginal participants.

Both models of Aboriginal court provide a formal framework for an open sentencing discussion, though by different means. The conferencing and circle courts provide a more explicit right of participation by a wider range of parties than the Nunga court. For this reason, the conferencing and circle courts tend to allow for greater Aboriginal involvement and influence in the sentencing discussion. Of the conferencing and circle courts, the latter may influence the penalty more directly through the practice of making a specific recommendation on penalty.

An exception is the conferencing court at Port Lincoln (SA), where the magistrate takes no part in the sentencing conference, which provides a report for the magistrate to later consider when deciding penalty. The separation of the judicial officer from the conference's deliberations places the Elders and other

²³³ The importance of the commitment of the parties to the court's aims was emphasised in the study of the Queensland Murri courts by Morgan & Louis (2010) above n 21, 130.

conference members in a more conventional relationship with the magistrate, without the capacity for a sentencing dialogue typical of other Aboriginal courts. Consequently, decision-making is more removed from the deliberative phase than in most other Aboriginal courts and the role of the conference members limited to providing advice and pre-sentence information.

There are also pragmatic elements to the relationship between the judicial officer and Elders. As in other types of court, the magistrate derives authority from the court's legal and institutional framework. However, the Elders bring a different, though complementary form of authority to the Aboriginal court, drawn from their position and status in the Aboriginal community, rather than from institutions, rules or legislation.

This aspect of the Elder's role was described by the West Australian Law Reform Commission (WALRC) as possibly 'a more effective authority structure than a non-Aboriginal judicial officer in terms of impacting on the offender's behaviour and encouraging compliance with orders of the court'.²³⁴ The juxtaposition of the magistrate and Elders in the Aboriginal court brings together judicial authority with the community standing of the Elders, encouraging both compliance and engagement by Aboriginal defendants in the court process.²³⁵

The relationship of the magistrate and Elders is by necessity an informal arrangement. It can be seen as a compromise – an attempt to reconcile in practice the principle, enshrined in the court's legal framework, of sole judicial authority with the objective of Aboriginal community involvement in the sentencing process. Aboriginal participation has the potential to influence the sentencing process in a manner and to an extent which may not, in principle, be easily reconciled with judicial decision-making and responsibility for penalty. McNamara, discussing this issue in his analysis of the Canadian circle courts, referred to the 'inherent paradox' of trying to accommodate community aspirations for greater control over criminal justice processes within the existing legal system.²³⁶

This is not an issue of everyday concern in the Aboriginal court – when problems or uncertainties arise in the relations between the magistrate and Elders or other participants, they tend to be resolved by compromise (there is little guidance from legislation or case law on the issue). But the dichotomy between

²³⁴ WALRC (2006) above n 48, 156 - the WALRC report recommended the establishment of Aboriginal courts such as existed elsewhere in Australia.

²³⁵ For a discussion of the differing views concerning the legitimacy of judicial authority, see Mack & Anleu (2010) above n 115, 139-42.

²³⁶ McNamara (2000) above n 232, 47.

Aboriginal court practices and its legal framework inevitably limits the extent to which the Elders, conference or circle members may influence the sentencing process. The implications of this are discussed next.

The Nature of Decision-making in the Aboriginal Court

This section examines whether the different practices used in Aboriginal court sentencing changes the nature of decision-making on penalty. This is discussed in three parts. Is the innovative process used by the Aboriginal court no more than a new method of providing pre-sentence information to the magistrate? Or a fundamentally different way of deciding what the penalty should be? Finally, is the process consistent with the court's legal framework?

In a formal sense, the Aboriginal court does not alter the legal position that the judicial officer, alone, decides sentence. In South Australia the participation of the Elders or other community members (in either a Nunga or conferencing court) is at the judicial officer's discretion, as is the extent to which the judicial officer has regard to their advice or information.²³⁷ Though the legal framework differs in each jurisdiction, the primacy of the judicial officer in sentencing is uniform and unequivocal. In those jurisdictions where special Aboriginal court legislation, rules or practice directions apply,²³⁸ they restate the legal position and are explicit that the Elders, conference and circle members are advisory to the judicial officer.²³⁹

Whilst the legal status of the judicial officer in the Aboriginal court is clear, in practice the position is more complex. Though there are some differences between the models of Aboriginal court and the sentencing process is inclined to local variation, some generalisations can be made.

The Elders (and, on occasion, other Aboriginal participants) play a significant role in the sentencing process through their dialogue with the judicial officer and the defendant. The open, sentencing dialogue is clearly different from the way decisions are made in a mainstream criminal court. Generally, the Aboriginal court process will do more than just provide pre-sentence information; often it will produce a consensus as to the defendant's needs which may suggest a general approach in sentencing (or in the NSW and ACT circle courts a specific recommendation on penalty is usually made). This process does not decide or dictate penalty, but it can influence the judicial officer's decision.

²³⁷ The position is the same in the Nunga and conferencing courts – see sections 6 and 9C, *Criminal Law (Sentencing) Act 1988* (SA) – see Appendices 2.1 & 2.2, 149-51.

²³⁸ NSW, Victoria, South Australia, ACT and the Northern Territory.

²³⁹ For instance, in South Australia s 9C states 'before sentencing an Aboriginal defendant, the court *may* (my emphasis) convene a sentencing conference'.

The capacity of Aboriginal people to influence decision-making during the sentencing dialogue distinguishes the Aboriginal court process from mainstream and other specialist courts. In the latter courts, professional participants often provide therapeutic, medical or correctional services reports, though in an essentially passive, advisory role (usually in written reports).²⁴⁰ In contrast, the sentencing process in the Aboriginal court can be described as 'collaborative'. Aboriginal court sentencing will be collaborative, regardless of the court's model or structure, where it features the magistrate and Elders (or conference/circle members) working together during the deliberative phase to reach an appropriate approach to sentencing.

Even so, there are some differences between the Nunga, conferencing and circle courts. The conferencing and circle courts, by formalising the involvement of Aboriginal community members and encouraging a wider range of participants, can be more conducive to the collaborative approach. Ultimately, though, the court's structure is less significant than the working relationship of the judicial officer and the Elders.

Is a Collaborative Approach 'Power-Sharing'?

In a formal sense there can be no element of 'power-sharing' in the Aboriginal court as only the magistrate has the legal authority to decide and impose a sentence. However, McNamara suggests in his analysis of the Canadian circle courts that the 'notion of "power-sharing" is apt to convey how the practice operates, reflecting as it does the collaborative nature of the exercise as between the judge, other court officers and the community'.²⁴¹

McNamara argues that two features of (Canadian) circle court practice indicate there is a potential for defacto power-sharing. First, the judicial officer is not the sole focus of the sentencing hearing. In contrast, the discussion is open, informal and amongst the non-judicial participants, the Elders bring an alternative form of authority. Further, where a recommendation is made on penalty, it is the product of the circle, not just the judicial officer. Second, the frequency with which the circle court adopts the recommendation on penalty suggests its persuasive effect is more than merely advisory.

However, McNamara observed that the extent to which there was power-sharing in substance, rather than in appearance, varied in each circle court,

²⁴⁰ In the Drug, Family Violence and Diversion courts the therapeutic professionals are sometimes present in court, but provide their reports in writing and rarely engage in sentencing discussions (unless invited to do so by the judicial officer).

²⁴¹ McNamara (2000) above n 232, 48.

determined by a number of factors, most importantly the relationship between the judicial officer and the Indigenous community:

If the practice of circle sentencing has its foundation in the community, and provided there is a genuine willingness on the part of the judge (and other key players, including the Crown and defence counsel) to share power and control with respect to the sentencing of Aboriginal offenders, then circle sentencing can constitute an important shift in the locus of decision-making authority.²⁴²

So, is the sentencing process in Australian Aboriginal courts a power-sharing arrangement?

Whether considered from a legal or practical perspective, the Aboriginal court sentencing process falls short of power-sharing. The extent to which Aboriginal community members may participate in the sentencing process and influence penalty is, ultimately, dictated solely by the judicial officer. Even in the circle courts in NSW and the ACT, where a specific recommendation on penalty is usually made, this can only occur with the magistrate's consent (as a member of the circle). The studies on the circle courts suggest that the recommendations of the circle members are persuasive, but will only be adopted if the magistrate agrees with the proposed sentence.²⁴³

It might be said that in the Aboriginal court the sentencing process is shared, but power is not. The Elders and other Aboriginal community members have influence, though without the capacity to compel or impose a decision on the judicial officer. A collaborative approach does not suggest the magistrate, Elders and other participants are equals in the process, but that they each genuinely participate in the sentencing dialogue.

If it were otherwise, the arrangement would be inconsistent with basic legal principles which require the judicial officer, as the decision-maker on penalty, to be accountable (to an appellate court) and the decision-making process to be transparent.²⁴⁴ If the Elders, conference or circle members were in practice to decide the sentence, rather than to influence the decision, it would be difficult to reconcile with the primacy of the judicial officer within Aboriginal court's current legal framework.

²⁴² Ibid, 57.

²⁴³ Potas et al (2003) above n 89; and CIRCA (2008) above n 22.

²⁴⁴ In South Australia the judicial officer must give sentencing remarks to explain the penalty (though a failure to do so does not render the penalty invalid) – s. 9 *Criminal Law (Sentencing) Act 1988* (SA).

Aboriginal Court Sentencing: A Different Process and a Different Approach

This chapter has so far examined the way in which sentencing occurs in the Aboriginal court, emphasising the importance of the role of the Aboriginal community in creating a very different sentencing process from that in mainstream magistrates' courts. However, it is argued the difference is more than just procedural; the involvement of the Aboriginal community also produces a distinctive sentencing approach, characterised by a strong emphasis on the social and cultural aspects of Aboriginality. This is not to suggest the Aboriginal court changes the substantive sentencing law, but rather its application. Whilst the principles governing the relevance of Aboriginality are well-established and uniform in sentencing law, their application can differ greatly in frequency and emphasis.

The reasons for this are practical. A proper understanding of the social, economic and cultural context of Aboriginal offending can require the court to assess the relevance of conditions in an Aboriginal community culturally distinct and, perhaps, geographically distant from the mainstream society the court occupies. Gray, Burgess and Hinton (in their review of sentencing practices of Aboriginal offenders) commented on the importance of the court receiving comprehensive information when sentencing a defendant from a different culture and lifestyle:

Sentencing requires many value judgments to be made. Value judgments that reflect the judicial officer's perception of the individual, their attitude, their value and their potential to contribute to society viewed from the perspective of the sentencer's own values.²⁴⁵

Knowledge of matters relevant to Aboriginality will not always be readily available to the judicial officer, or to counsel or other professional participants. Sometimes defence counsel will provide the information, either through submissions, or less often, professional reports. But these traditional ways of informing the court are at times inadequate. This is particularly so in the busy magistrates court where counsel may often be less experienced and, most critically, a high volume of cases places constraints on time and resources.²⁴⁶

²⁴⁵ Tom Gray, Sally Burgess and Martin Hinton, 'Indigenous Australians and Sentencing' in Johnston, Hinton & Rigney (eds) (2008) above n 37, 118-19.

²⁴⁶ For example, anthropological reports are sometimes used in higher court criminal matters to provide social and cultural information on Aboriginal defendants, but they can be prohibitively expensive in the magistrates' court (given the high volume of cases and the lower range of penalty).

Even where the information is communicated in a comprehensive manner, it will almost inevitably be ‘filtered’, as the lawyer chooses, by judgment and experience, what to put to the court. The lawyer may do so by omitting from submissions material considered to be irrelevant or adverse to the defendant (in terms of the desired sentence). These decisions play a crucial role in what is presented and may directly influence the court’s decision on sentence, as defence counsel is usually the principal source of information on a defendant in a mainstream court.²⁴⁷

In contrast, the Aboriginal court process ensures that sentencing information and cultural advice is provided by Aboriginal Elders, AJO’s and others such as the defendant’s family, as well as by counsel or professional reports. When information or advice about the social and cultural conditions in an Aboriginal community, family group or relating to the defendant is received from Aboriginal people speaking from personal knowledge or experience, it is less likely to be overlooked or given insufficient weight in the sentencing process. As a Murri court magistrate, speaking to the 2010 review of the Queensland Murri courts, observed:

Without the guidance of the Elders we as Magistrates may as well be back in a robe in mainstream court, it would be no different. You can have every intention of employing as many therapeutic mechanisms at your disposal, but, unless you understand the context of the offending behaviour it is unlikely that the sentence you give will have significant meaning in a Murri offender’s life.²⁴⁸

The importance of a proper understanding of Aboriginality in sentencing is that criminal conduct is viewed not only as a consequence of the offender’s individual characteristics, but also in the context of the prevailing social conditions and cultural mores in defendant’s community. This can (and does) occur in mainstream criminal courts, but the institutional guarantee of Aboriginal participation in the Aboriginal court process ensures a greater emphasis and appreciation of Aboriginality in sentencing. On this point Gray, Burgess and Hinton commented:

(T)he Nunga court provides an example of where the judiciary has adapted its practices on sentencing so as to ensure that it listens to the Aboriginal people and

²⁴⁷ The comparison is made with a represented defendant in a mainstream court as almost all defendants in the Aboriginal court are represented.

²⁴⁸ Morgan & Louis (2010) above n 21, 124.

is fully informed as to the relevance of Aboriginality to the imposition of sentence.²⁴⁹

3.7 Conclusion

The magistrate has final responsibility for the decision on penalty, though the influence of the Elders and community members is persuasive. The extent of their influence varies according to a number of factors, most important of which is the willingness of the judicial officer to encourage the Elders and other Aboriginal participants to engage in a sentencing dialogue. The influence of the Elders and other Aboriginal community members is greatest during the deliberative phase, when the sentencing process is open and conversational, with the judicial officer more a 'first among equals'.

Generally, the Elders and other Aboriginal participants influence sentencing indirectly, providing information and advice rather than making explicit sentencing recommendations. Of the different forms of Aboriginal court, only the circle court regularly makes specific recommendations on penalty. Aboriginal influence tends to be greater (and the sources of information more diverse) in the conferencing and circle courts where the court's structure encourages a wider involvement of Aboriginal community members. As a consequence, the sentencing process in the conferencing and circle courts is more time-consuming, with fewer cases dealt with compared to the higher volume, Nunga court model.

The structure and practices of the Aboriginal court provide the means for the Aboriginal community to engage in the court process and influence sentencing through a more collaborative approach by the judicial officer and Aboriginal community members to decision-making. The crucial element in this process is the relationship between the judicial officer and Elders. Though their relationship is collaborative, it is not a power-sharing arrangement. The Elders exercise influence, but the parties are not equal, as the judicial officer retains ultimate legal authority in sentencing.

The collaboration of the judicial officer and Aboriginal community members also provides better sentencing information. The Elders and other members of the local Aboriginal community (sometimes with personal links to the defendant or

²⁴⁹ Tom Gray, Sally Burgess and Martin Hinton in 'Indigenous Australians and Sentencing' in Johnston, Hinton & Rigney (eds) (2008) above n 37, 119 – the authors are well-placed to make such an assessment, being a Supreme Court judge, barrister and the Solicitor-General (South Australia).

family) are well-placed to provide information on the social and cultural context of the offending and offender. The content and source of the information are fundamental to the way Aboriginal values and knowledge influences both the court's approach to sentencing and the manner in which it takes place.

CHAPTER 4. ABORIGINAL COURT STUDIES AND EVALUATIONS

4.1 Introduction

Having examined how the Aboriginal courts work, this chapter examines the crucial issue – do they achieve their aims?

During their early years there were few evaluations of the Aboriginal courts and those conducted were generally lacking in comprehensive, quantitative data or overly reliant on anecdotal information. More recently, there have been an increasing number of studies of Aboriginal courts in most jurisdictions which now provide a reasonable amount of qualitative and quantitative data concerning the court's processes and outcomes. The studies have examined a wide range of issues, with the focus mostly on whether Aboriginal courts meet their objectives.

The objectives discussed in this section are those which are common to Australian Aboriginal courts and most frequently evaluated – improved attendance rates, reduced recidivism, increased Aboriginal participation in the criminal courts, a culturally relevant court and better sentencing information.²⁵⁰ These objectives demonstrate the court's concerns with both practical outcomes (appearance and recidivism rates) and broader aims to ensure a better court process (Aboriginal participation, cultural relevance and improved sentencing information). Some of the studies have considered other issues, most significantly, the types of penalties imposed by the Aboriginal courts and how they compare to equivalent mainstream courts.²⁵¹ The evaluations on penalty are discussed together with the criticisms of Aboriginal court sentencing in the next chapter.²⁵²

This chapter examines the general conclusions that may be drawn from the studies. The inquiry as to whether Aboriginal courts realise their principal objectives also leads to a larger issue - do they have the capacity, within their current framework, to achieve their desired objectives? This question requires analysis not only of what Aboriginal courts can achieve, but also their limitations.

²⁵⁰ See Chapter 3.4 *Aboriginal Court Models, Aims and Practices*, 41.

²⁵¹ Morgan & Louis (2010) above n 21; Tomaino (2005) above n 16; and Fletcher & O'Brien (2008) above n 16.

²⁵² See Chapter 5.3 *Pragmatic Critiques*, 113-17.

4.2 An Overview of the Studies and Evaluations

Before considering the evaluations of the Aboriginal courts in detail, it is useful first to summarise them by type and jurisdiction, and discuss the limitations of the data. All the studies are from government or academic sources. Whilst some study a single court, others evaluate multiple courts within a jurisdiction. The studies examine both the Nunga-type and circle courts, though none make comparisons between the models (nor are any cross-jurisdictional).²⁵³

By jurisdiction, the quantitative studies include:²⁵⁴

- Tomaino (2005), Fletcher and O'Brien (2008) and Bond and Jeffries (2012) - South Australia
- Harris (2006), Borowski (2010), Byles and Karp (2010) - Victoria
- Fitzgerald (2008) - NSW
- Acquilina et al (2009) – Western Australia
- Morgan and Louis (2010) - Queensland

These studies analyse the effect of Aboriginal courts on attendance, reoffending and imprisonment rates. They discuss the factors that influence these outcomes, making recommendations (mostly in regard to reducing recidivism).

The range of qualitative studies is more extensive, including (by jurisdiction):²⁵⁵

- Potas et al (2003), CIRCA (2008), Daly and Proietti-Scifoni (2009) - NSW
- Tomaino (2005), Marshall (2008) - South Australia
- Harris (2006), Borowski (2010) - Victoria
- Parker and Pathe (2006), Morgan and Louis (2010) - Queensland
- Ngambra Circle Court evaluation (2010) - ACT

These studies consider a wide range of issues reflecting the main Aboriginal court objectives – whether the court process is culturally relevant to Aboriginal people or provides better sentencing information, the empowerment of the

²⁵³ The conferencing courts in South Australia have not been subject to quantitative analysis, as the South Australian studies have only examined the Nunga courts.

²⁵⁴ Tomaino (2005) above n 16; Fletcher & O'Brien (2008) above n 16; Christine Bond and Samantha Jeffries, 'Indigenous Sentencing Outcomes: A Comparative Analysis of the Nunga and Magistrates Courts in South Australia' (2012) 14 Flinders Law Journal 359; Harris (2006) above n 4; Borowski (2010) above n 21; Byles & Karp (2010) above n 21; Fitzgerald (2008) above n 21; Morgan & Louis (2010) above n 21; and Acquilina et al (2009) above n 21.

²⁵⁵ Potas et al (2003) above n 89, CIRCA (2008) above n 22, Daly & Proietti-Scifoni (2009) above n 225; Tomaino (2005) above n 16, Marshall (2008) above n 16; Harris (2006) above n 4, Borowski (2010) above n 21; Parker & Pathe (2006) above n 22, Morgan & Louis (2010) above n 21; and Department of Justice & Community Safety (ACT) 'Strengthening the Ngambra Circle Sentencing Court' (2010) <http://www.justice.act.gov.au/cache/attachments/5600>.

Aboriginal community and the attitudes and expectations of the participants and the Aboriginal community to the court. However, most emphasis is given to the fundamental Aboriginal court aim to increase genuine participation of the Aboriginal community in the court process and decision-making.

Limitations of the Research Data

Although studies into the Aboriginal courts have burgeoned in recent years, the research has limitations and should be viewed with caution. A number of the quantitative studies have highlighted difficulties in collating comprehensive data due to court records being inaccurate or inadequate to identify Aboriginal court matters.²⁵⁶ It has also been observed that information collected for qualitative studies may be predisposed to a more positive view of the Aboriginal courts as participation in the research is voluntary.²⁵⁷ To that might be added the observation that most of the stakeholders and participants in the Aboriginal court are likely to be committed to the court and have a positive view of its operation.

Further, there have been no national studies and only one evaluation has been conducted in the more remote Aboriginal courts in Western Australia and the Northern Territory.²⁵⁸ These are critical shortcomings in the data. Without national data, comparisons between jurisdictions or models of Aboriginal court are essentially speculative. The absence of research from the Northern Territory is particularly significant as it has the highest proportion of Aboriginal courts operating in remote areas with traditional or semi-traditional communities. As a result, there is no information currently available to indicate whether Aboriginal courts in urban or provincial areas have different outcomes or are perceived differently by their participants from those in remote locations.

Some of these issues may be addressed in a national evaluation of Aboriginal courts and related criminal justice measures (commissioned by the Commonwealth Attorney-General's Department) presently being undertaken by the Cultural and Indigenous Research Centre (CIRCA). At the time of writing the results (or the completion date) of this research have not been released.²⁵⁹

²⁵⁶ Harris (2006) above n 4, 21-3; Parker & Pathe (2006) above n 22; Morgan & Louis (2010) above n 21, 23.

²⁵⁷ CIRCA (2008) above n 22, 16.

²⁵⁸ The exception being the study of the Kalgoorlie Community Court – see Acquilina et al (2009) above n 21.

²⁵⁹ The South Australian component of the evaluation, conducted jointly with the Courts Administration Authority (SA) was estimated in early 2011 to take two years.

That said, a review of the current studies shows sufficient depth and diversity in the available data to allow for some conclusions to be drawn concerning Aboriginal courts Australia-wide. The first studies examined are the evaluations of attendance and recidivism rates in the Aboriginal courts. With one exception, these are quantitative studies.²⁶⁰

Attendance Rates

The first evaluation of appearance rates analysed figures for the Aboriginal courts in South Australia (at Port Adelaide, Port Augusta and Murray Bridge) in 2003-04.²⁶¹ The appearance rate in those three courts for non-custodial defendants was 62.3%, though there was no comparison with (or analysis of) the general appearance rate for Aboriginal defendants in mainstream magistrates' courts.²⁶²

This was done in a subsequent evaluation of attendance rates in the same three South Australian Aboriginal courts from 2002-06.²⁶³ The quantitative study recorded attendance rates in the Aboriginal courts at 62%, above that for Aboriginal defendants in other magistrates' courts (52%) and close to the overall attendance rate for non-Aboriginal defendants (64%).²⁶⁴ The study found attendances were higher regardless of location of the Aboriginal court, offence type, age or sex of the offender, commenting the 'Nunga Court appears to have a positive influence on appearance rates'.²⁶⁵

The review of the Queensland Murri courts by the Australian Institute of Criminology provides the most comprehensive quantitative evaluation of Aboriginal courts in one jurisdiction.²⁶⁶ The study involved three areas of inquiry: appearance rates, recidivism and rates of imprisonment.²⁶⁷ The evaluation of five urban and regional Murri courts (adult and juvenile) over a two year period found Murri court non-attendance rates were significantly lower (12%) than those for Murri defendants in mainstream courts (40%).²⁶⁸

²⁶⁰ The study by Daly & Proietti-Scifoni used qualitative methods to assess recidivism at the Nowra Circle Court.

²⁶¹ Tomaino (2005) above n 16.

²⁶² *Ibid*, 8.

²⁶³ The study analysed attendance rates, recidivism and penalties on a database of 1266 matters (court files) involving 470 defendants at Murray Bridge, Port Adelaide and Port Augusta courts – Fletcher & O'Brien (2008) above n 16.

²⁶⁴ *Ibid*.

²⁶⁵ *Ibid*, 15.

²⁶⁶ Morgan & Louis (2010) above n 21.

²⁶⁷ There is a discussion on the data on rates of imprisonment in the Murri courts in the next chapter – p116-17.

²⁶⁸ Morgan & Louis (2010) above 21, 85.

The issue of a warrant was used as the measure of non-attendance, which may not fully reflect the number of non-appearances (as not all non-appearances will result in the issue of a warrant). It should be noted non-attendance does not necessarily indicate disinterest in the proceedings (as for minor charges it is possible in absence to adjourn a hearing or plead guilty in writing).²⁶⁹ However, the proportion of non-appearances due to other factors such as guilty pleas in absence are unlikely to vary greatly between different types of magistrates' court, so the study's findings that the issue of warrants in the Murri courts are less than a third of that in mainstream magistrates' courts (for Aboriginal defendants) suggests a substantially higher rate of appearance in the Murri courts.

The fourth study to consider appearance rates was conducted in the Victorian Children's Koori court, which showed a low 11% non-appearance rate by Aboriginal juveniles.²⁷⁰ Though the appearance rate appears impressively high, no comparison was made with mainstream Children's courts, so it is unclear what difference the Koori court made to the rate of appearance.

Are Objectives on Attendance Rates being met?

The studies of the South Australian Nunga courts and Queensland Murri courts indicate substantially higher attendance rates for Aboriginal defendants in the Aboriginal courts in comparison to appearance rates of Aboriginal defendants in equivalent mainstream magistrates' courts.²⁷¹ The appearance rates in both those studies were higher regardless of the type of defendant (age or sex) or locality of court.

Why Aboriginal court appearance rates should be higher than those for Aboriginal defendants in mainstream magistrates' courts is less certain. The studies have been cautious in identifying the causes of higher appearance rates in the Aboriginal courts. The Murri court study considered there were a number of possible reasons for the difference - the attraction to Aboriginal defendants of a culturally relevant court, a more flexible attitude by the court to the issuing of warrants, support by court officers and family for the defendant to participate in the court and fewer appearances in the Murri court before sentencing.²⁷² The two studies of South Australian Nunga courts described the analysis of attendance rates as 'complex', both suggesting one relevant factor could be the

²⁶⁹ In South Australia a defendant may plead guilty in writing to a charge on Complaint – s 57A *Summary Procedure Act 1921* (SA).

²⁷⁰ Borowski (2010) above n 21.

²⁷¹ Tomaino (2005) above n 16; Fletcher & O'Brien (2008) above n 16; and Morgan & Louis (2010) above n 21.

²⁷² Morgan & Louis (2010) above n 21, 143.

lesser number of hearings in the Nunga court because of its role as a sentencing court (ie fewer court attendances and less time than a trial court).²⁷³

The answer may be that each of those factors plays a role in producing better appearance rates. As well, the greater sense of Aboriginal community acceptance and confidence in the court may also contribute (with more practical measures) to better Aboriginal court attendance rates.²⁷⁴ A comparison with appearance rates of Aboriginal defendants in other specialist courts (such as the Drug or Mental Health Diversion courts) where there is also a significantly higher level of support to the defendant between court appearances than in the mainstream criminal court, might help to identify the extent to which factors particular to the Aboriginal court influence their appearance rates.

No studies have yet analysed appearance rates in conferencing or circle courts. However, it is probable these courts also enjoy higher appearance rates as the model of Aboriginal court would seem unlikely to be a major factor influencing appearance rates (though the number of court appearances and time from first appearance to finalisation in each model may be relevant).

The Benefits of Better Attendance Rates

The importance of better attendance rates in the Aboriginal courts should not be underestimated. Better attendance rates bring a number of benefits. First, with fewer non-attendances, the court's proceedings are likely to be finalised more quickly. Second, fewer arrest warrants in the Aboriginal courts should reduce time spent in custody by Aboriginal defendants, whether through shorter periods in police custody or court-ordered remands in custody (though no studies have yet analysed the relationship between differing court practices on the issue of first instance warrants and rates of police and remand custody).²⁷⁵ A speedier disposition of matters and less time in custody would not only benefit Aboriginal defendants, but also save the court, police and Department of Correctional Services time and resources.²⁷⁶

²⁷³ Tomaino (2005) above n 16; and Fletcher & O'Brien (2008) above n 16, 8 - the latter study found there was an average of two appearances in the Nunga court, compared to eight in mainstream magistrates' courts.

²⁷⁴ There is a discussion on the importance of Aboriginal community confidence in the Aboriginal courts later at pages 92-4.

²⁷⁵ All warrants for non-appearance result in the arrested person spending some time in custody, though some warrants will allow police bail and others, certified 'bail excluded', require the defendant to be brought before a court (involving a longer time in custody).

²⁷⁶ As of 30 June 2010, 6367 prisoners were on remand or unsentenced in Australia (21% of 29 700 sentenced and unsentenced prisoners). Indigenous prisoners make up 26% of the total - Australian Bureau of Statistics, 'Prisoners in Custody' (2012)
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0-2012-Main%...>>

A decrease in the time in custody spent by Aboriginal people may have another, indirect benefit. As said, fewer non-appearance warrants should cause some reduction in Aboriginal incarceration rates in both police and correctional services custody (though the effect is difficult to quantify).²⁷⁷ If so, it may lead to a lowering in the number of Aboriginal deaths in custody, as the critical RCIADIC finding was that the rate of deaths in custody was a consequence of the high rate of Aboriginal incarceration. Whilst non-appearance warrants are only one component contributing to incarceration rates in police or remand custody of Aboriginal people (and a smaller element again in the overall rate of Aboriginal people in custody), it is an aspect of court practice where the potential for improvement in reducing time spent by defendants in custody is clear.

An emphasis on further improvement in Aboriginal appearance rates could be achieved in four ways: greater access to Aboriginal courts through an increase in their number, a more systematic use 'warrants to lie' for first non-appearances,²⁷⁸ a co-ordinated approach to encourage attendance by AJO's, the Department of Correctional Services (if supervising the defendant) and defence lawyers,²⁷⁹ and the use of these methods in tandem with the arrangement of an 'Aboriginal' list in mainstream criminal courts.²⁸⁰

Reducing Recidivism Rates

The reduction of recidivism has been the most debated of the Aboriginal court objectives. Given the gross over-representation of Aboriginal people in the criminal justice system, it is perhaps unsurprising that considerable emphasis (particularly by government) has been placed on the aim to reduce Aboriginal reoffending. Though much discussed, the effect of Aboriginal court sentencing on recidivism has been unclear until fairly recently, when a number of quantitative evaluations of Aboriginal court recidivism rates have cast more light on the issue.

²⁷⁷ The police are responsible for people in custody on non-appearance warrants before they attend court and the Department of Correctional Services for those remanded in custody by the court.

²⁷⁸ A 'warrant to lie' is a first instance warrant issued by the magistrates' court, but not released to the police for enforcement, subject to the person's attendance at court on the next occasion – in effect, a 'suspended' warrant.

²⁷⁹ Particularly if the defendant is represented by an Aboriginal Legal Service as they employ Field Officers who often make direct contact with the defendant (or their family) about court dates and other appointments.

²⁸⁰ An Aboriginal List could involve listing a number of Aboriginal defendants at the same time, with, if possible, Aboriginal court staff.

The first quantitative study to analyse recidivism rates occurred as part of a general evaluation of the Victorian Koori court (adult) from 2002-04.²⁸¹ The study, released in 2006, found the recidivism rates for the Koori courts at Shepparton and Broadmeadows were about 12.5% and 15.5% respectively, whilst the measure used for the general rate of recidivism in Victoria was 29.4%.²⁸² The study opined the Koori court results may imply a greater reduction in recidivism than the figures disclosed, as the Koori court dealt with more serious offenders with 'a higher propensity to offend' than did the mainstream magistrates' court.²⁸³

The OCSAR study of South Australian Aboriginal courts from 2002-06 found there was a reduction in reoffending rates after appearing in the Aboriginal courts, but no comparison was made with Aboriginal offenders in mainstream or other courts in South Australia as to the likelihood, seriousness or frequency of reoffending.²⁸⁴ Consequently, it was acknowledged no conclusion could be drawn from the data on the effect of Aboriginal courts on recidivism rates in comparison to mainstream or other specialist courts in South Australia.²⁸⁵

A quantitative evaluation of the Victorian Children's Koori court from 2005-08 analysed recidivism rates (as well as compliance with court orders and attendance rates).²⁸⁶ The study tracked 72 defendants during the first 30 months from the court's establishment. It found that breaches of court orders were 'very low' at 13%,²⁸⁷ whilst recidivism rates were described as 'high'. However, the reoffending was described as often 'less serious' than the earlier offences and 'lower than that found by other studies'.²⁸⁸ Again, this study made no comparisons to Aboriginal or non-Aboriginal youths in other courts and so provided no basis on which to determine whether these results differ from those for Aboriginal youths in other Children's courts.

In 2008 the NSW Bureau of Crime Statistics and Research released a comprehensive quantitative evaluation of the circle courts in New South Wales.²⁸⁹ The study considered reoffending rates by defendants over a 15 month

²⁸¹ The evaluation was primarily a qualitative study, but with some quantitative data concerning recidivism – Harris (2006) above n 4.

²⁸² Ibid, 85.

²⁸³ Ibid, 87.

²⁸⁴ Fletcher & O'Brien (2008) above n 16, 18 – the results are described as 'indicative' only.

²⁸⁵ Ibid.

²⁸⁶ Borowski (2010) above n 21.

²⁸⁷ Ibid, 28-9.

²⁸⁸ Ibid, 46 – the 'other studies' referred to were unnamed.

²⁸⁹ Fitzgerald (2008) above n 21 - the survey included the eight circle sentencing courts operating from 2002-07, with all but one (Mt. Druitt) being in regional NSW. It should be noted the total number of defendants in the circle courts during that time was only about 230.

period after sentencing by the circle courts from 2002-07. It concluded that the circle courts have met most their objectives concerning the involvement of the Aboriginal community in a culturally appropriate sentencing process. However, it found there was no clear evidence that involvement of Aboriginal people in the circle court process, alone, reduced either the rate or seriousness of recidivism in comparison with mainstream criminal courts.²⁹⁰ Fitzgerald observed that '(c)onsideration should perhaps be given to combining circle sentencing with other programs...that have been shown to alter the risk factors for further offending'.²⁹¹

The quantitative review of the Queensland Murri courts came to a similar conclusion.²⁹² The study found the Murri court had no significant effect on the likelihood, seriousness or frequency of reoffending (apart from a small difference in frequency of reoffending by youths).²⁹³ The report's view was that the Murri courts may only have an impact on reoffending rates if rehabilitative services designed to address the underlying causes of Aboriginal offending were made a 'fundamental component' of the court's bail and post-sentence programs.²⁹⁴ The implications of that recommendation will be discussed later in the chapter.

The only study from a Western Australian Aboriginal court suggests slightly worse results for recidivism rates in the Kalgoorlie Community Court. Adult and juvenile defendants were surveyed from November 2006 to March 2009 in both the Community (Aboriginal) and mainstream magistrates' courts at Kalgoorlie. The findings found that defendants in the Community court were more likely to reoffend than Aboriginal defendants dealt with in the mainstream magistrates' court.²⁹⁵

However, the study noted this disparity may be explained, at least in part, by the fact that a larger number of Community court defendants were juveniles, fewer were first offenders and there were a larger proportion of serious offences dealt with by the Community court (all factors that tend towards a higher rate of reoffending). These factors may explain the disparity – they also highlight the difficulties in sentencing comparisons between Aboriginal and mainstream courts, even in the same locality. The results proved to be contrary to the expectations of the stakeholders spoken to during the study, which had the

²⁹⁰ Ibid, 6-7.

²⁹¹ Ibid, 7.

²⁹² Morgan & Louis (2010) above n 21.

²⁹³ Ibid, 145 - the study considered no reliable conclusion could be drawn about the difference in frequency.

²⁹⁴ Ibid, 146.

²⁹⁵ Acquilina et al (2009) above n 21, 52-7.

‘impression’ there had been a reduction of reoffending amongst defendants dealt with in the Community court.²⁹⁶

Two qualitative studies have also considered the issue of recidivism, although from different perspectives.²⁹⁷ Neither study conducted primary research on recidivism rates, accepting the findings of the earlier Fitzgerald evaluation.

The CIRCA study surveyed the circle court’s participants, seeking their attitudes on a range of issues, including the court’s effectiveness in reducing recidivism. It found the common view was that the circle courts were having a beneficial effect on reoffending rates.²⁹⁸ One explanation for the apparent conflict between the quantitative data and the perception of the participants may be explained by Fitzgerald’s finding that the circle courts do have an effect on reoffending, but to no greater degree than the mainstream courts – a distinction that may not have been clear to the participants, whose views were most likely shaped by their experience in the circle courts, without the perspective of comparison with other courts.²⁹⁹

The problem of how to measure recidivism was considered in the recent evaluation of the Nowra Circle court,³⁰⁰ which suggested a more accurate measure of reoffending required a mix of quantitative and qualitative methods. This recommendation was based on their observation that ‘desistance from offending’ is often an uneven process which may not be adequately explained by statistical methods alone. The study advocated a combination of statistical data and qualitative methods to provide a more comprehensive and subtle understanding of recidivism. Whilst the time and resources required for such an approach may be well-suited to a review of a single court, it could prove more difficult or impractical where the evaluation encompasses a large number of courts or defendants.³⁰¹

Do Aboriginal Courts Reduce Recidivism?

Four quantitative studies have considered the effect of Aboriginal courts on recidivism in comparison to equivalent mainstream courts.³⁰² Their findings on

²⁹⁶ Ibid, 52-3.

²⁹⁷ Daly & Proietti-Scifoni (2009) above n 22; and CIRCA (2008) above n 22.

²⁹⁸ CIRCA (2008) above n 22, 7 & 49.

²⁹⁹ Or the natural tendency those surveyed to remember a successful defendant – *ibid*.

³⁰⁰ Daly & Proietti-Scifoni (2009) above n 22.

³⁰¹ The Daly & Proietti-Scifoni study was limited, but conducted in depth - involving 13 circles at the Nowra circle court.

³⁰² Harris (2006) above n 4, Fitzgerald (2008) above n 21, Morgan & Louis (2010) above n 21 and Acquilina et al (2009) above n 21. Two other studies (Fletcher & O’Brien and Borowski) also

recidivism are conflicting and have proved more contentious than any other Aboriginal court issue.

The first study (Harris) to analyse the effect of Aboriginal court sentencing on recidivism rates found there was a marked reduction in recidivism rates of defendants dealt with by the Victorian Koori court. However, the study's methodology and results have been the subject of considerable criticism. It calculated the general recidivism rate in Victoria on an average for offenders either under community supervision or after release from prison, rather than all offenders or all Aboriginal defendants in non-Koori courts.³⁰³

Fitzgerald criticised this methodology, observing that the two categories used were likely to represent more serious offenders and, therefore, the rate of reoffending derived from the two (or their average) was likely to be higher than that for all offenders (as the latter would also include less serious or infrequent offenders).³⁰⁴ Another factor, though less significant, is that Koori courts exclude offences of sexual assault and breach of an intervention order (dealt with in the mainstream magistrates' court), which are more serious types of offences that may involve a higher likelihood of imprisonment.

The studies of the NSW circle courts and the Queensland Murri courts measured time, frequency and seriousness of reoffending in comparison with offenders in equivalent mainstream magistrates' courts.³⁰⁵ Both found there was no greater impact on reoffending by the Aboriginal courts when compared to similar mainstream courts. The study of the Kalgoorlie Community Court found reoffending rates were worse for those who appeared in the Aboriginal court, when compared to the mainstream court.³⁰⁶ Although this study considered the conclusion may, to some extent, reflect the fact that the Community court was dealing with more serious offences and defendants with more significant criminal records, it supports the findings of the NSW and Queensland studies which suggest the Aboriginal court sentencing process does not, as a single measure, reduce recidivism.³⁰⁷

measured recidivism in their respective Aboriginal courts, but did not use any comparison group from a mainstream court.

³⁰³ Harris (2006) above n 4, 85.

³⁰⁴ See the critique in Fitzgerald (2008), which described the Koori court findings as 'ill-founded' because the general recidivism figures only include more serious offenders; above n 21, 2.

³⁰⁵ Fitzgerald (2008) above n 21 (NSW); Morgan & Louis (2010) above n 21 (Qld).

³⁰⁶ Acquilina et al (2009) above n 21.

³⁰⁷ The study also suggested 'a lack of programs and suitable personnel' contributed reoffending rates - Acquilina et al (2009) above n 21, 89.

Although this research is not comprehensive,³⁰⁸ it is sufficient to allow some conclusions to be drawn. Given the criticisms of the methodology used in the Koori court study and the contrary results of the other three studies, the findings on the impact of the Koori court on recidivism must be considered suspect. Rather, the available data supports the conclusion that Aboriginal court sentencing, in its current form, seems to have no greater impact on recidivism than a mainstream magistrates' court.

There should be no surprise in this. As a number of the studies commented, the Aboriginal courts generally do not have integrated pre- or post-sentence programs to address issues frequently related to Aboriginal offending (drug and alcohol abuse, anger management, domestic violence etc). Also, the Aboriginal court is one specialist court of limited ambit, numbers and jurisdiction, so that currently only a small proportion of Aboriginal defendants are dealt with in Aboriginal courts. Rather, it is mainstream criminal courts that sentence the vast majority of Aboriginal offenders. This was the view of the Murri court study, which commented that '(t)he Murri Court represents just one part of the criminal justice system; while it can be a catalyst for change, it is not a cure all for Indigenous offending.'³⁰⁹

It is useful when considering the capacity of the Aboriginal court to reduce recidivism or incarceration rates to return the findings of RCIADIC. The view of RCIADIC was unequivocal, emphasising in its analysis and recommendations the need for a wide range of social, economic and other policy responses to address Aboriginal disadvantage and offending rates, with criminal justice measures just one aspect of a successful approach. Any assessment of the influence of Aboriginal courts on recidivism rates must be made in this context; that Aboriginal courts cannot provide a single remedy to high reoffending rates, but may be one of an array of measures to address the underlying causes of Aboriginal recidivism.

Responses to Studies on Recidivism

There have been two principal responses to the findings that Aboriginal courts seem no more effective than mainstream magistrates' courts in reducing recidivism.

First, Fitzgerald observed that reducing recidivism is only one of a number of Aboriginal court objectives, most of which have been, to some extent,

³⁰⁸ None of the studies of recidivism are cross-jurisdictional or involve courts in remote areas.

³⁰⁹ Morgan & Louis (2010) above n 21, 133.

achieved.³¹⁰ Whilst true, this may not be persuasive to governments faced with competing claims for funding from other specialist and mainstream courts (and other sectors of the criminal justice portfolio such as police). It also tends to overlook the emphasis most governments place on the aim to reduce recidivism and the consequent expectation (at least amongst those governments formally committed to this objective in Aboriginal Justice Agreements) that Aboriginal courts would play a significant role in achieving that aim.³¹¹

Marchetti and Daly, reviewing Aboriginal courts Australia-wide, observed that the 'dominant view' in government circles was that reducing recidivism was the main rationale for the use of specialist Aboriginal courts.³¹² The accuracy of this observation is borne out by the recent decision of the Queensland state government to no longer fund the Murri courts (and two other specialist courts).³¹³ The reason given by the state government was that they had not been successful in reducing recidivism or imprisonment rates for Indigenous offenders.³¹⁴ It is likely the other state governments will continue to have a similar attitude to the importance of Aboriginal courts reducing recidivism, though the emphasis on reducing recidivism as the main measure of 'success' may lessen if governments are persuaded that the Aboriginal courts bring about other practical outcomes (such as improving attendance rates).

The second response has been to propose that rehabilitative programs designed to address the causes of Aboriginal offending be integrated into the Aboriginal court process as part of both a pre and post-sentencing regime. In that way the Aboriginal court would take on some of the features of other specialist and problem-solving courts (ie the Drug, Family Violence and Diversion courts) that use the program-based approach to sentencing.³¹⁵ This approach raises a number of issues that require discussion.

Proposals for a Program-Based Approach

The need for a broader approach combining the Aboriginal court process with rehabilitative programs to address the key causes of offending (drug and alcohol abuse, anger management, poor impulse control etc.) has been recommended in

³¹⁰ Fitzgerald (2008) above n 21, 7.

³¹¹ NSW, Victoria, Queensland and Western Australia.

³¹² Marchetti & Daly (2007) above n 19, 23.

³¹³ Tony Moore, 'Diversionary courts fall victim to funding cuts', *Brisbane Times*, 13 September 2012.

³¹⁴ Ibid - see the statement of Jarrod Bleijie, Queensland Attorney-General and Justice Minister.

³¹⁵ The Diversion court is both a sentencing and diversionary court.

recent years by a growing number of studies.³¹⁶ The Murri court study saw this as necessary if there was to be genuine progress in reducing reoffending rates, commenting:

Realistically, for the Murri Court to have any impact on reoffending (while not moving away from the philosophy of involving Indigenous community representatives in the sentencing process), strategies are required to enhance the capacity of rehabilitative programs to address those factors recognised as being associated with the disproportionate rate of offending among Indigenous offenders.³¹⁷

This observation raises three important issues.

First, a move towards Aboriginal courts incorporating pre- and post-sentence rehabilitative programs would require additional funding. Such a commitment by government may not be easily secured if the programs are seen to duplicate those in mainstream or other specialist courts, unless a case is clearly made for the provision of those services within the context of an Aboriginal sentencing court. In South Australia this has already occurred at the Port Adelaide Nunga court with the integration of an existing drug rehabilitation program which can be completed before sentencing (as part of specific bail conditions requiring participation).³¹⁸ The decision to take this approach was an attempt to increase Aboriginal participation in the drug rehabilitation program (as there had been a consistent pattern of very low participation rates by Aboriginal offenders in the Drug Court).³¹⁹

Second, the use of rehabilitative programs before sentencing would change an essential feature of the Aboriginal court. Since its beginning the Aboriginal court has used pre-sentence programs and deferred sentencing sparingly. It has operated as a sentencing court with an emphasis on finalising matters without delay. The incorporation of pre-sentence programs would increase the number of court hearings (and time) before sentencing, which might adversely affect

³¹⁶ Harris (2006) above n 4; Fitzgerald (2008) above n 21; CIRCA (2008) above n 22; Morgan & Louis (2010) above n 21; and Acquilina et al (2009) above n 21.

³¹⁷ Morgan & Louis (2010) above n 21.

³¹⁸ The legislative authority for this approach is derived from the *Bail Act 1984* (SA) and s.19B *Criminal Law (Sentencing) Act 1988* (SA), the latter providing for deferral of sentencing pending completion of an 'intervention' program.

³¹⁹ When established in 2000, the Drug Court in South Australia anticipated that 25% of its participants would be Aboriginal, but the numbers were rarely more than a handful (the writer was a member of the Drug Court Steering Committee and responsible for arranging representation for all Aboriginal defendants in the Drug Court from 2001-07).

appearance rates (unless counteracted by a significant level of support to the defendant from program staff between court hearings).³²⁰

Third, if rehabilitative programs play a more prominent role in the pre-sentence phase of the Aboriginal court, program recommendations as to treatment or assistance are also likely to influence the court's decision on penalty. This would need to be carefully balanced with the role of the Elders and other Aboriginal community members so that they retain a degree of influence commensurate with a genuine Aboriginal court sentencing process.

A number of measures could achieve this balance. First, the program should be culturally relevant for Aboriginal offenders with a significant number of Aboriginal staff. Second, the program should be designed in consultation with the local Aboriginal community or provided (if possible) by an Aboriginal community organisation. These measures embody the recommendations of RCIADIC (in particular, the principle and practice of self-determination), and so, should avoid the risk of the rehabilitative program being implemented in a manner incompatible with court's aims of Aboriginal community involvement and a culturally appropriate court process.³²¹

Finally, where the program is to be completed before sentencing, the program report should not be prescriptive; guiding, but not restricting the sentencing deliberations of the magistrate and Elders.³²²

Aboriginal Participation and a Culturally Relevant Court

Greater Aboriginal involvement in the criminal court and providing a more culturally appropriate sentencing process are closely related aims that can be conveniently considered together. The studies have made largely similar findings that both models of Aboriginal court have fostered genuine Aboriginal participation in the sentencing process, whilst providing a more culturally appropriate court than the mainstream courts.³²³

These issues have been the subject of a number of qualitative evaluations of Nunga-type courts in Victoria and Queensland.³²⁴ The Queensland study has

³²⁰ This is the practice in the Drug court and Diversion courts in South Australia, where program staff will usually remind the defendant of appointments and court hearings.

³²¹ See RCIADIC recommendations 113 & 114.

³²² Each of the program-based courts in South Australia (Family Violence, Diversion and the Drug courts) provide regular 'review' reports on the defendant's progress and a final report to summarise participation and recommended treatment – these are informative, but not prescriptive.

³²³ Marshall (2008) above n 16 (SA); Potas et al (2003) above n 89; and CIRCA (2008) above n 22 (NSW).

³²⁴ Harris (2006) above n 4; Borowski (2010) above n 21; and Morgan & Louis (2010) above n 21.

been the most detailed, finding the Murri court processes were viewed by the participants as culturally appropriate, whilst satisfaction levels by users were 'high'.³²⁵ The study recognised the need for a broad spectrum of community participation in the sentencing process; including not only Elders and Indigenous court staff, but also the defendant, their family, support persons and Community Justice Groups as important participants. The involvement of the Elders and the other Murri community members was found to foster greater trust by the participants in the court's processes.³²⁶ The Victorian Koori court studies made some additional observations, finding the position of the Elders within their community³²⁷ and a general awareness of distinctly Koori mores and codes of conduct³²⁸ were enhanced as a result of Koori involvement in sentencing process.

The CIRCA study indicates the position is similar in the NSW circle courts. It surveyed the major participants at each of the nine circle courts, finding participation by the local Aboriginal communities was greater in circle courts than in the mainstream magistrates' court.³²⁹ This was achieved mostly through the participation of the Elders, Project Officers and defendants. It was noted there was some involvement by victims in the sentencing circle, but the study was equivocal about the extent to which this occurred.³³⁰ The participants surveyed also considered the court's processes were, in comparison to equivalent mainstream courts, culturally appropriate.³³¹

Confidence in the circle sentencing process was 'high' with the Elders, Project Officers (the equivalent of an AJO in South Australia) and defendants indicating that barriers between the Aboriginal community and the courts were reduced 'to some extent'.³³² The degree of acceptance of the circle courts by the Aboriginal and non-Aboriginal communities was said to depend mostly on the 'skills and commitment of the Project Officer, and the support and attitude of the Magistrate'.³³³

³²⁵ Morgan & Louis (2010) above n 21, 132.

³²⁶ Ibid, 121-9.

³²⁷ Harris (2006) above n 4.

³²⁸ Borowski (2010) above n 21.

³²⁹ CIRCA (2008) above n 22, 34 & 46.

³³⁰ It noted insufficient data was collected to assess the level of victim involvement – ibid, 46.

³³¹ Ibid, 8.

³³² Ibid, 8.

³³³ Ibid, 8 & 49.

The Benefits of Aboriginal Participation in a Culturally Relevant Court

The studies found that Aboriginal participation brought benefits to both the Aboriginal community and the court, as each is strengthened by their involvement with the other.

The Aboriginal community gains through involvement in the sentencing process in a number of ways. Participation in sentencing has the potential to empower individuals, such as Elders and AJO's, and the broader Aboriginal community. As participants, the Elders and AJO's develop skills and experience, whilst through them, the local Aboriginal community exercises some influence over a significant aspect of Aboriginal life. The role of the Elders in the Aboriginal court may enhance their standing within the local Aboriginal community. The participatory process can also strengthen the sense of community responsibility for the offender, acting as a focus for extended family or community organisations to offer support.³³⁴ The CIRCA study considered these as positive, though perhaps 'unintended' effects of active community participation in sentencing Aboriginal offenders.³³⁵

The court also benefits, both in how it performs its work and its acceptance within the Aboriginal community. The participation of Elders and AJO's promotes a 'two-way education process' with other court staff, counsel and magistrates,³³⁶ providing an important conduit for cross-cultural understanding and learning.³³⁷ Perhaps most important, the influence of Aboriginal people and values in the sentencing process is critical in promoting community acceptance of the court.³³⁸ From this, the court derives a more diffuse form of authority through Aboriginal community involvement and acceptance, as well as from the traditional sources of its legal and institutional framework.

However, the studies suggest the Aboriginal courts have been much less successful in encouraging the participation of victims (whether Aboriginal community members or not). The level of participation of victims appears generally low, though somewhat higher in the circle and conferencing courts where there is a greater formal emphasis on their involvement.³³⁹ The Murri court study concluded there was minimal participation by victims in the

³³⁴ CIRCA (2008) above n 22, 63; and Morgan & Louis (2010) above n 21, 122.

³³⁵ CIRCA (2008) above n 22.

³³⁶ Harris (2006) above n 4, 35-7.

³³⁷ The Harris study also made recommendations for formal cross-cultural training for all Koori court staff.

³³⁸ Morgan & Louis (2010) above n 21, 132; CIRCA (2008) above n 22, 49; Potas et al (2003) above n 89, 51; and Acquilina et al (2009) above n 21, 48.

³³⁹ CIRCA (2008) above n 22; Marshall (2008) above n 16; Borowski (2010) above n 21; and Morgan & Louis (2010) above n 21.

sentencing process, observing few victims attended court, and often those who did were partners or family members (ie victims of family violence offences).³⁴⁰

Two measures were proposed to rectify this: an increase in victim support services for those who wished to attend court and greater use of Victim Impact Statements so that those who did not want to appear in court could still inform the court of their views and how they were affected by the offending.³⁴¹ The writer's experience is similar to that of the Murri court study; victims rarely attend the Nunga courts in South Australia unless a partner or member of the family.³⁴² Nor are Victim Impact Statements (VIS) used significantly more in South Australian Aboriginal courts than in mainstream magistrates' courts.³⁴³

Better Sentencing Information

The first study of the Nunga courts in South Australia (2005) examined how Aboriginal courts obtained sentencing information.³⁴⁴ It described how pre-sentence, psychiatric and psychological reports were employed extensively in the Nunga courts to identify the defendant's needs, responsiveness to intervention and the availability of rehabilitative or treatment programs. In addition to these traditional sources of information, other more innovative methods were also used, such as hearing directly from the defendant, their family or Aboriginal community groups as to the level of support and non-government services available for the defendant's rehabilitation.³⁴⁵ The study described the Nunga court as offender-focussed, with the emphasis on identifying and accessing rehabilitative services appropriate to the defendant.

The first evaluation of the (adult) Koori court emphasised the narrative nature of the sentencing process, observing that it provided a mechanism for the court to receive a depth of personal and cultural information rarely available in the mainstream criminal courts.³⁴⁶ A subsequent evaluation of the Koori Children's Court found that the additional sentencing information was often elicited from the defendant or their family by the Elders.³⁴⁷ This is of particular importance in the Children's court where adolescent defendants are often very reticent. If

³⁴⁰ Morgan & Louis (2010) above n 21, 130-1.

³⁴¹ Ibid.

³⁴² Tomaino (2005) above n 16, 5-6.

³⁴³ In South Australian magistrates' courts Victim Impact Statements are usually submitted in written form, having been forwarded by the investigating police to the Police Prosecutor (in the writer's experience they are used no differently in Aboriginal and mainstream courts) .

³⁴⁴ Tomaino (2005) above n 16.

³⁴⁵ Such as the Aboriginal Sobriety Group (ASG) or the Aboriginal Prisoner and Offender Support Service (APOSS).

³⁴⁶ Harris (2006) above n 4, 46-8.

³⁴⁷ Borowski (2010) above n 21, 41.

unrepresented, this can leave the Children's court with minimal sentencing information. The Murri Court study made similar findings, recognising the practical benefits of an active involvement of Aboriginal Elders, defendants and their families, providing the sentencing court with information and advice on the social and cultural context of the offending, the defendant and the local community.³⁴⁸

The key element in this process is time - for the defendant and family to tell their stories and for the court to have the capacity to listen and invite, rather than compel, engagement by the defendant in the dialogue.³⁴⁹ The result is a process that produces information about the offending and the defendant that has greater depth from a diversity of sources.

4.3 Conclusion

The quantitative and qualitative studies provide valuable information as to what the Aboriginal courts do and the extent to which they meet their objectives. The studies reviewed in this chapter examine a range of issues which reflect an emphasis on both practical outcomes (attendance and recidivism rates) and general aims to achieve a better court process (Aboriginal participation, cultural relevance and better sentencing information).

Whilst a number of conclusions can be drawn from the studies, the data must be viewed with some caution. This is, in part, because the current research is incomplete in significant areas, and also because a number of the Aboriginal court's aims are general and difficult to measure by objective means. Nonetheless, the results of the studies are important for what they say about the Aboriginal court's capacity to achieve its objectives and, also, its limitations.

A number of studies indicate Aboriginal courts markedly improve attendance rates.³⁵⁰ The criminal justice system derives considerable benefits from better attendance rates. There are fewer non-appearances and warrants, resulting in shorter waiting times and court lists. Most importantly, Aboriginal defendants are likely to be in custody on fewer occasions (and then, perhaps, for shorter times).³⁵¹

³⁴⁸ Morgan & Louis (2010) above n 21, 124.

³⁴⁹ Harris (2006) above n 4, 48.

³⁵⁰ Tomaino (2005) above n 16; Fletcher & O'Brien (2009) above n 16; and Morgan & Louis (2010) above n 21.

³⁵¹ Shorter lists should mean shorter remand times for those in custody.

It is arguable that better attendance rates also reflect a deeper change in the relationship of Aboriginal people to the (Aboriginal) criminal court. Whilst practical measures to secure attendance and avoid the issuance of warrants are important, the sense that the Aboriginal community has an interest in the Aboriginal court through the involvement of Elders, AJO's and other members may also be a contributing, positive influence.

However, the studies suggest Aboriginal courts do not have the same effect on recidivism.³⁵² For some time the effect of Aboriginal courts on recidivism rates was unclear, with research incomplete and analysis often based partly on anecdotal evidence. Whilst the research is still not comprehensive, a number of the studies indicate the Aboriginal court sentencing process, alone, has had no greater impact in reducing reoffending rates than the mainstream magistrates' courts. These studies recommend incorporation of rehabilitative programs as part of the pre and post-sentencing approach of the Aboriginal court to assist in reducing reoffending rates.³⁵³

Although Aboriginal court sentencing has not been shown to reduce reoffending, the qualitative research from the Murri court study suggests the involvement of Aboriginal Elders in the sentencing process has the capacity to influence decision-making. Two main factors are identified as influencing decision-making - the amount and diversity of sentencing information and the longer time allowed during the 'sentencing conversation'.³⁵⁴ This process allows a greater depth of insight into the underlying causes of the offending and the defendant's prospects for rehabilitation.³⁵⁵ On this point the Murri court study observed:

Magistrates indicated that the input of Elders, in addition to submissions made to the court based on assessments of the offender, have a significant bearing on their decision-making with regard to sentencing. In many instances, issues may be identified which may not have otherwise not been known to the court, relating to the offender's circumstances or the circumstances of the offence, which are considered during sentencing.³⁵⁶

This is the significance of Aboriginal court sentencing – the information and advice from the Elders and other Aboriginal community members enables an understanding of the circumstances of the offender and offending in the

³⁵² Fitzgerald (2008) above n 21; Acquilina et al (2009) above n 21; and Morgan & Louis (2010) above n 21.

³⁵³ Fitzgerald (2008) above n 21; CIRCA (2008) above n 22; Acquilina et al (2009) above n 21; and Morgan & Louis (2010) above n 21.

³⁵⁴ The extra time available in the Murri court was given particular emphasis by the magistrates interviewed - Morgan & Louis (2010) above n 21, 124-33.

³⁵⁵ Harris (2006) above n 4; Morgan & Louis (2010) above n 21.

³⁵⁶ Morgan & Louis (2010) above n 21, 124.

sentencing process which a mainstream magistrates' court will rarely have the time or means to achieve. This allows the court to develop a better appreciation of the relevance of Aboriginality as a factor in sentencing. The result can be a penalty more appropriate for the offender and community.

But does a more 'appropriate' penalty matter, if Aboriginal court sentencing does not reduce reoffending? It does, for two reasons.

First, every sentencing court, regardless of type, will aim to fix a penalty according to the specific circumstances of the offender and their offending. For an Aboriginal offender this will usually involve consideration of cultural and other factors concerning their Aboriginality. Of course, cultural considerations will not always be relevant to an Aboriginal offender or their offending, but the studies suggest the Aboriginal court process is better equipped through the use of a sentencing dialogue involving the Elders and other Aboriginal people to identify how and when those factors may influence the penalty.

Second, an important feature of the conversational sentencing style is its capacity to explore the defendants' willingness to change their offending behaviour and the level of family and community support available. This aspect of the sentencing process is a crucial element in the rehabilitation of the offender. The court can then fashion a penalty that incorporates the most suitable program(s), fully aware of the extent of the informal support for the defendant from family and the Aboriginal community. This may become an increasingly relevant feature of the sentencing process in the future if the Aboriginal court develops a more program-based approach to sentencing.

The studies examined in this chapter are concerned with what the contemporary Aboriginal courts do, and whether they meet their objectives. In the next chapter the theory and critiques of the Aboriginal court are discussed. The issues considered are theoretical, but no less important – what are the Aboriginal court's rationale, definition and relationship to the criminal justice system?

CHAPTER 5. ABORIGINAL COURTS: THEORY AND CRITIQUES

5.1 Introduction

From their beginning the Aboriginal courts have attracted much comment and criticism from a variety of sources: the media, legal and academic commentary. This part of the thesis will examine those critiques.

The critiques can be divided into two broad categories: those which generally accept the contemporary forms of Aboriginal court and specialist sentencing measures, but are critical of their mode of operation; and critiques which reject the existing models of Aboriginal court. The latter category includes opposing standpoints - critiques which question whether there should be a separate court or sentencing measures for Aboriginal people and those which seek much greater autonomy for an Aboriginal legal system, either in the form of separate, autonomous courts or by full recognition of customary law.

Each form of critique reveals different views on the nature of the existing Aboriginal courts, their place in the criminal justice system and proposals for different models of Aboriginal court. They also raise some important conceptual issues.

First, is there a theoretical rationale for the Aboriginal court and its role in the criminal justice system? Central to the discussion is the notion of 'substantive equality' as a conceptual and practical justification for special measures for Aboriginal people within the criminal justice system.

Second, how are the Aboriginal courts to be defined? It is an important issue, both to distinguish Aboriginal courts from other specialist courts and mainstream courts, as well as to identify where special sentencing practices for Aboriginal people are sufficiently regular and institutionalised to constitute a 'court' rather than an occasional sentencing measure.

Third, how can they be categorised: problem-solving, therapeutic, restorative justice or a distinctive type of court? A number of different views will be examined: the influence of therapeutic jurisprudence, restorative justice problem-solving methods on Aboriginal court practices³⁵⁷ and the Aboriginal

³⁵⁷ Kate Auty, 'We Teach all Hearts to Break – But Can We Mend Them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts' (2006) 1 *Murdoch University Electronic Journal of Law*, 101; and King et al (2009) above n 20.

court as a unique or distinctive court.³⁵⁸ Each reflects a different analysis of the essential features and significance of the Aboriginal court.

Finally, can the Aboriginal court, operating within the mainstream legal system and criminal law, genuinely give voice to Aboriginal people and address their needs?

5.2 The Aboriginal Courts: Theoretical Issues

Though their origins are pragmatic, the Aboriginal courts have prompted a growing theoretical debate. Currently, there are a limited number of jurisprudential works which have sought a theoretical understanding of the contemporary Aboriginal court, considering what type of court they are and how they may be defined. These are not esoteric questions. Whether the Aboriginal court is a derivative or distinctive type of court can have practical implications for how the court should develop in terms of its structure and place in the criminal justice system, or what aspects of the court are considered essential. It is those issues I will first examine.

Is there an 'Aboriginal Court' Theory?

To an observer, the Aboriginal courts (or at least the features that distinguish them from other courts) are easy to identify. Yet they are difficult to define. Aboriginal courts are diverse in structure and practice, often varying according to locality and personalities. Their emergence has been driven more by need and circumstance than theory, incorporating other specialist court practices which themselves have been influenced by concepts of therapeutic jurisprudence and restorative justice. As a result, they have been more often described than defined, whilst the definitions have tended to emphasise what they are not.³⁵⁹ Consequently, there is no comprehensive body of thought that can be considered 'Aboriginal court theory'.

This section does not propose a complete theoretical model, but examines two fundamental questions. How can the Aboriginal court be distinguished from other courts and from occasional sentencing practices for Aboriginal people? And how can it be defined?

³⁵⁸ Marchetti & Daly (2007) above n 19; and Harris (2006) above n 4.

³⁵⁹ For instance, it is often emphasised that they are not community or customary law courts.

Aboriginal Courts and Informal Sentencing Practices Distinguished

A useful starting point is the work by Marchetti and Daly in which they propose a theoretical model for 'Indigenous justice practices'. They define Indigenous justice practices (quoting Jonathon Rudin) as those that ensure Indigenous people 'are given some options and opportunities to develop processes that respond to the needs of that community.'³⁶⁰ They suggest there are two categories of Indigenous justice practices: those that are sufficiently formalised and regular to constitute an *Indigenous sentencing court*, whilst other practices which are more variable or sporadic are termed *Indigenous sentencing practices*.³⁶¹

Marchetti and Daly observed that the Indigenous sentencing courts are more commonly found in urban and regional townships, where the special sentencing practices involving Aboriginal community members are more institutionalised and are less affected by changes in personnel. This is contrasted with less formalised practices, more often in remote or circuit courts, where the court will receive sentencing information from local Elders or community groups on an ad hoc basis. These arrangements, it is observed, tend to be more dependent on the efforts of individual judicial officers and members of the local Aboriginal community.³⁶²

A Definition for the Aboriginal Court

The distinction between Aboriginal court sentencing and more informal practices is a useful one, though the line between the two categories is often blurred in practice. But the principal issue is still left unanswered – what defines the Aboriginal court?

Many features make the Aboriginal court sentencing process distinctive. Some of the practices that exemplify the Aboriginal court (such as informality and a non-adversarial ethos) are important, but not unique; they are also found, to some extent, in mainstream and other specialist courts. It is the participation of Aboriginal community members in sentencing that distinguishes the Aboriginal court from other courts. In other courts non-professional or laypersons may advise, but none join the judicial officer in a sentencing dialogue.

³⁶⁰ Marchetti & Daly (2007) above n 19, 9, quoting Jonathon Rudin, 'Aboriginal Justice and Restorative Justice' in Elizabeth Elliott & Robert M Gordon (eds) in *New Directions in Restorative Justice: Issues, Practice, Evaluation* (2005) 99.

³⁶¹ Marchetti & Daly (2007) above n 19.

³⁶² *Ibid*, 2.

But the involvement of the Aboriginal community must be meaningful. The mere presence of Elders in a court does not necessarily constitute a genuine Aboriginal court as an 'active participation by elders is essential if the court is to be an Aboriginal court – as opposed to simply being a court with Aboriginal Elders present but playing a minor role'.³⁶³ As argued in the last chapter, the importance of genuine Aboriginal community involvement is twofold; it is essential to the cultural relevance of the court process, whilst Aboriginal knowledge and advice can lead to better sentencing decisions.

The Aboriginal court can be described (and distinguished from other courts and sentencing measures) as one that features a genuine involvement by Aboriginal community members in decision-making as an accepted and regular part of the sentencing process. This definition identifies the essential features of the Aboriginal court whilst allowing for its diversity in form and practice. It is not a prescriptive definition, and nor should it be. The diverse and localised nature of the Aboriginal courts (mirroring Aboriginal society) favours a loose framework. But it is a definition which can provide a general theoretical basis for the Aboriginal courts, separate and distinct from other mainstream and specialist courts.

What Type of Court?

There has been considerable debate as to how the Aboriginal court should be categorised: problem-solving, therapeutic, restorative justice or a distinct type of court? Each of the different views can be seen as attempts to discern what is most important about the Aboriginal court. Whilst this may not be an issue of significance in the day-to-day workings of the court, how the court is viewed can, in the longer-term, influence the development of the Aboriginal court and its relationship to mainstream and other specialist courts.

I will review the various viewpoints in three categories: problem-solving/therapeutic, restorative justice or a 'distinct' type of court.

The Aboriginal Court: A Problem-Solving or Therapeutic Court?

The theories of problem-solving courts and therapeutic jurisprudence are closely associated, with the therapeutic approach underpinning the practices of the

³⁶³ Blagg et al, 'Systemic Racism as a Factor in the Over-Representation of Aboriginal People in the Victorian Criminal Justice System' (Draft Paper prepared for the Equal Opportunity Commission and the Aboriginal Justice Forum, Melbourne, 2004) 122.

problem-solving court.³⁶⁴ For that reason, and because they are often complementary in practice, it is convenient to group problem-solving courts and therapeutic jurisprudence together, though it must be acknowledged they are discrete bodies of thought and not always synonymous in the Aboriginal court or elsewhere.

Specialist courts designed to address specific offending-related issues such as drug addiction, mental health or family violence have emerged in Australia during the last two decades. Commonly referred to as ‘problem-solving’ courts, in both conceptual and practical terms they are said to ‘represent a move away from a focus on individuals and their criminal conduct to offenders’ problems and their solutions’.³⁶⁵ The broader focus of the problem-solving courts has been described as one that uses ‘their authority to forge new responses to chronic social, human and legal problems’.³⁶⁶

Even so, the emphasis remains on the individual offender, with the court seeking ‘to primarily address the defendant’s immediate problems, and only secondarily, the wider socio-political structures’.³⁶⁷ To achieve those aims, the problem-solving courts employ a number of practices such as judicial monitoring, a collaborative approach with government and other services and non-traditional roles for the judicial officer, counsel and other participants.³⁶⁸

Fundamental to the problem-solving court is the identification of a particular ‘problem’; sometimes a type of offending, though more often a ‘cause’ of the offending such as poor mental health or substance use. Of course, there is rarely a single cause of offending behaviour, with (for instance) drug addiction often associated with other pathologies such as poor physical and mental health, family-breakup, homelessness etc. Most problem-solving court programs recognise this, attempting to treat the offender’s problems holistically, whilst maintaining an emphasis on the primary cause.

The Aboriginal court, though displaying a ‘problem-solving’ approach to offending (viewing the individual’s offending in a broader, social context), is not a problem-solving court. First, there is only infrequent use of judicial monitoring

³⁶⁴ Arie Freiberg, ‘Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?’ in McMahon & Wexler (eds) (2003) above n 231; and Marchetti & Daly, above n 19.

³⁶⁵ King et al (2009) above n 20, 138.

³⁶⁶ Greg Berman & John Feinblatt, ‘Problem-Solving Courts: A Brief Primer’ (2001) 23 *Law and Policy*, 126.

³⁶⁷ King et al (2009) above n 20, 141.

³⁶⁸ For a more detailed definition of ‘problem-solving’, see King et al (2009) above n 20, 140; and Arie Freiberg, ‘Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?’ in McMahon & Wexler (eds) (2003) above n 231, 10-11.

and few Aboriginal courts have specialised programs. More importantly, they do not address a particular problem. In an obvious sense this is true, as the causes of Aboriginal offending are too diverse to be attributed to a single problem (and, of course, Aboriginality itself is not a 'problem'). The primary causes of Aboriginal offending are complex and vary according to the locality and circumstances of each community and offender. In the South Australian context these differences can be dramatic, with the Nunga court in metropolitan Port Adelaide dealing with typically urban problems such as offending related to poly-drug abuse whilst the Port Augusta court sentences some offenders from the APY lands with forms of substance abuse such as petrol-sniffing specific to remote areas such as Central Australia.³⁶⁹

However, there is a sense in which the Aboriginal courts can be said to address a different type of problem; the systemic disconnect between many Aboriginal people and the criminal courts. This was the conclusion of the WALRC which, observing there were different views as to how the Aboriginal courts could be classified, opined:

The Commission has strong reservations about the categorisation of Aboriginal courts as problem-orientated 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.³⁷⁰

Therapeutic jurisprudence is a broad concept, encompassing not only court practices but all other aspects of ordinary people's contact with the law. Freiberg suggests it is more an 'approach' than theory. At the most fundamental level a therapeutic approach by the law is one that enhances wellbeing, rather than causing harm.³⁷¹ Marchetti and Daly describe the therapeutic approach as associated with practices such as integration of services, judicial case management and 'a new way of judging' in which the judicial officer motivates the offender 'to confront and solve their problems'.³⁷²

A number of commentators, including judicial officers with experience in Aboriginal and other specialist courts, describe Aboriginal courts as 'therapeutic' because they encourage the defendant to take responsibility, promote

³⁶⁹ As defendants from the APY lands in custody are kept at Port Augusta prison (to avoid lengthy transports), they are usually brought before the Port Augusta Aboriginal court, if pleading guilty, even though the charges may arise outside the jurisdiction.

³⁷⁰ WALRC (2006) above n 48, 146.

³⁷¹ Arie Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' in McMahon & Wexler (eds) (2003) above n 231, 8-9.

³⁷² Marchetti & Daly, above n 19, 6-7.

rehabilitation and foster respect for the court process.³⁷³ This view places as much emphasis on the court's approach to sentencing, as the practices it employs. It sees the Aboriginal court as part of a larger therapeutic movement, together with other specialist courts such as the drug, family violence and mental health courts.

Certainly, therapeutic influences can be seen in the Aboriginal courts. The Aboriginal court approach to sentencing, placing a strong focus on the needs and problems of the offender, can be considered as therapeutic. But other features that are commonly associated with the therapeutic approach are either absent or used only sporadically in the Aboriginal court. As said, very few Aboriginal courts have specialised or integrated treatment programs, whilst judicial case management and deferred sentencing are infrequently used.³⁷⁴ This is particularly the case in the high-volume Nunga-type courts, where constraints of time and large caseloads place a greater priority on finalising matters promptly.

Freiberg did not consider Aboriginal courts were 'problem-solving courts...rather (they) can be conceived of as a specialist court with some problem-solving and therapeutic overtones'.³⁷⁵ This work takes a similar view. In the main, problem-solving and therapeutic practices are used in the Aboriginal court as an adjunct to the key part of the sentencing process – the sentencing 'conversation' between the judicial officer, Elders and other Aboriginal participants.

A Restorative Justice Court?

Restorative justice includes a wide variety of practices which makes precise definition difficult.³⁷⁶ Restorative justice has been described as seeking 'the restoration of victims, offenders and communities primarily through mediated encounters between victims and offenders'.³⁷⁷ A number of Aboriginal court practices such as informal process, a consensual approach to decision-making and, particularly, the use of sentencing circles and conferences, are considered common elements of restorative justice.³⁷⁸ Whilst these are contemporary

³⁷³ King et al (2009) above n 20, 178-9; and Auty (2006) above n 357, 101.

³⁷⁴ The Nunga Court at Port Adelaide (SA) and the Barndimalgu Court at Geraldton (WA) are two exceptions, with their own integrated programs – see Chapter 2.4, 27 & 34.

³⁷⁵ Arie Freiberg, 'Innovations in the Court System' (Paper presented at the Australian Institute of Criminology International Conference on Crime in Australia: Melbourne, November 2004) 8.

³⁷⁶ Marchetti & Daly (2007) above n 19, 7.

³⁷⁷ King et al (2009) above n 20, 39.

³⁷⁸ Marchetti & Daly (2007) above n 19, 7.

examples of restorative justice practices, some commentators have suggested its origin lies in the traditions of ancient and Indigenous cultures.³⁷⁹

It is clear the notion of restorative justice, if broadly understood as giving 'more attention to the victims of crime and to their role in penalty setting and justice',³⁸⁰ has influenced the structure of the conferencing and circle courts. Both formally enshrine the victim's right to attend the sentencing conference or circle and to be heard concerning the offender, offending and penalty. There is less emphasis on the victim in the Nunga-type courts, with no specific practices to encourage their participation.³⁸¹ Nonetheless, the Aboriginal courts' open, conversational sentencing process contains the potential for a restorative justice approach. But at present, the reality falls well short of the potential; victims only sometimes attend the conferencing and circle courts and very rarely in the Nunga-style courts.³⁸²

However, the practice of shaming the defendant by the Elders, which is used on occasion in all models of Aboriginal court, can be seen as a form of restorative justice practice. Often described as 'reintegrative shaming',³⁸³ the Elders will sometimes dress down the defendant during the sentencing discussion in a manner which condemns their offending behaviour and emphasises their responsibilities to family, the Aboriginal community and wider society. Even though this usually occurs without the victim being present, it can still be restorative in that the shaming is intended to reinforce the defendant's sense belonging to the local Aboriginal community, with the support and obligations that entails. The purpose of the shaming process in the Aboriginal court is to encourage rehabilitation, not to stigmatise the defendant. This process draws its force from the authority of the Elders and their capacity to identify with the defendant as members of the same community.

The notion of restorative justice influences some Aboriginal court practices and the structure of the conferencing and circle courts. But the defendant, not restorative justice (or the victim) is their primary purpose.

³⁷⁹ For a brief summary of the literature on the origins of the concept of restorative justice, see Marchetti & Daly (2007) above n 19, 6.

³⁸⁰ Marchetti & Daly (2007) above n 19, 7.

³⁸¹ Of the Nunga court jurisdictions, only South Australia formally recognises the importance of victims in its aims.

³⁸² See Chapter 3.4 *Aboriginal Court Models Aims & Practices*, 41.

³⁸³ King et al (2009) above n 20, 52-6.

Aboriginal Courts: A Distinct Type of Court?

This thesis takes the view that Aboriginal courts are a different type of court which are distinct from mainstream and other specialist courts. There are different views as to what makes the Aboriginal court a distinct form of court, though all emanate from the role of the Aboriginal community. Marchetti and Daly argue that the Aboriginal courts have a 'unique' theoretical and jurisprudential basis and exhibit a 'political dimension' as one of their principal aims is to change the relationship between the Aboriginal community and the courts.³⁸⁴ The key to this transformation is the involvement of the Elders and other Aboriginal community members in the court's process and decision-making. They argue the emphasis given to social change within the Aboriginal community sets the Aboriginal court apart from other specialist or mainstream courts, which seek primarily to bring about individual change in the offender (though they may have regard to broader societal factors).³⁸⁵

The importance of this feature of the Aboriginal courts will vary considerably in practice. The capacity of Aboriginal participation in the court to change the relationship between the criminal court and the local Aboriginal community will depend significantly on the degree of influence of the Aboriginal members within the Aboriginal court and their community. Their influence may be more pronounced where the Aboriginal court's locality includes smaller, discrete Aboriginal communities (such as in regional or remote areas), rather than metropolitan Aboriginal courts which usually encompass more disparate Aboriginal communities.

Harris similarly described Koori courts as 'unique unto themselves', distinguished by the role of the Elders in the sentencing process and the importance accorded to the Koori community.³⁸⁶ This observation is crucial. The role and identity of the Elders and other Aboriginal community members is without equivalent in any other criminal court. Whilst lay persons participate in the juvenile Family Conferences (in South Australia), this is an out-of-court diversionary process. As well, various types of therapeutic professionals assist in the Drug, Diversion and Family Violence courts, but they do not participate as community members and are not involved in sentencing discussions. Only in the Aboriginal court are lay members of the community given a meaningful role in the sentencing process.

This feature is pivotal to the way the Aboriginal court operates, and what it aims to do. It distinguishes the Aboriginal court from mainstream and other specialist

³⁸⁴ Marchetti & Daly (2007) above n 19, 9-10.

³⁸⁵ King et al (2009) above n 20, 141.

³⁸⁶ Harris (2006) above n 4, 134.

courts. Whilst the Aboriginal court draws widely on other influences such as therapeutic jurisprudence and restorative justice, it is a distinct type of court.

5.3 Pragmatic Critiques

This section considers the critiques that analyse the Aboriginal court in its current forms and position within the criminal justice system. These are pragmatic critiques which broadly accept the contemporary models of Aboriginal court, but are critical of aspects of how they work in practice. They span a wide range of views, including the vexed issue of how Aboriginal courts should deal with family violence matters, or whether they are equipped, in any circumstances, to do so. Many of the critiques can be seen as expressions of a general frustration that the specialist Aboriginal courts are not available to all, or even a majority of Aboriginal people. Perhaps for that reason, the source of much of this criticism comes from Aboriginal people; often defendants or other participants such as AJO's or Elders critical of the limited access to the Aboriginal court

Criticisms of the Guilty Plea Rule

A common criticism is that the Aboriginal courts are only accessible by guilty plea for those offences that fall within the court's jurisdiction.³⁸⁷ Blagg described the 'necessity to plead guilty as a major source of dissatisfaction' with the Victorian Koori court. He also found that a powerful motivation amongst Aboriginal defendants for seeking entry to the Koori court was their desire to be 'judged' by the Elders.³⁸⁸ Though most of the literature concerning this critique involves the Victorian Koori court, it is reasonable to assume that the criticism may equally apply to the other jurisdictions (as each has similar guilty plea guidelines). Certainly, similar complaints about the guilty plea rule were often made to the writer (as a lawyer) by defendants who disputed some of their charges, but wanted to be sentenced by an Aboriginal court.

The Convenience Plea

A related criticism is that the guilty plea rule encourages distortions in the court process. The literature suggests that Aboriginal people sometimes enter a 'plea

³⁸⁷ Harris (2006) above n 4, 129-31; Bridget McAsey, 'A Critical Evaluation of the Koori Court Division of the Victorian Magistrates' Court' (2005) 10(2) *Deakin Law Review*, 684; Blagg et al (2004) above n 364, 124-5; and Blagg (2008), above n 20, 134-5.

³⁸⁸ Blagg (2008) above n 20, 134.

of convenience' in order to access the Aboriginal court.³⁸⁹ McAsey considered the open process of the Koori court, which encourages the defendant to speak directly and candidly with the magistrate and Elders, may reduce the likelihood of false guilty pleas.³⁹⁰ However, the commentary suggests convenience pleas do happen, though in the absence of thorough qualitative research, it is unclear how prevalent the practice may be, or whether it is more common in Aboriginal courts than in other types of court.

This is not an issue limited to the Aboriginal courts, with similar concerns raised in the submissions to the Victorian Sentencing Advisory Council during their review of proposals for sentence indications and discounts in all criminal courts.³⁹¹ The Sentencing Advisory Council conducted its own qualitative research into defendant's decisions to plead guilty, but the data did not inquire whether the guilty plea represented a genuine admission of guilt or a plea of convenience.³⁹²

In the writer's experience, convenience pleas do occur in the Aboriginal court, as well as in mainstream and other specialist courts. The defendant who 'just wants to get it over and done with' by guilty plea is a common occurrence, at least in the lower courts. Sometimes a 'convenience plea' may mask the defendant's guilt, which they prefer not to admit. In mainstream courts the motive for convenience pleas tend to be time and cost,³⁹³ whilst in specialist courts (such as the Drug, Diversion and Aboriginal courts) the pressures to plead guilty to gain rehabilitative assistance or a hoped-for sentence are likely to be more significant.³⁹⁴ The fact that a guilty plea is entered for pragmatic reasons will not necessarily render it improper (or invalid). A convenience plea may be accepted, if made by a properly informed defendant.³⁹⁵

³⁸⁹ By 'plea of convenience' I refer to a plea of guilty entered by a defendant who does not admit the allegations and would have otherwise contested the matter.

³⁹⁰ McAsey (2005) above n 387, 684.

³⁹¹ Victorian Sentencing Advisory Council, 'Sentence Indication and Specified Sentence Discounts' (2007) Final Report, 25-6

<www.sentencingcouncil.vic.gov.au/.../sentencingcouncil.../sentence_indicat...>

³⁹² Ibid, 24 – the study surveyed the reasons for guilty plea of 30 sentenced prisoners.

³⁹³ The explanations commonly given to the writer by many defendants (as a solicitor and later as a magistrate) are that they cannot afford to take more time off work to come to court again or to pay a private lawyer (if they are ineligible for legal aid).

³⁹⁴ The eligibility guidelines in the Drug, Diversion (Mental Health) and Aboriginal courts also play a role. These courts will not accept disputed files. If a defendant has multiple files, one of which is a not guilty plea, the temptation is to plead guilty so all files can be dealt with as part of one sentence.

³⁹⁵ A 'consciousness of guilt' is a relevant, though not always decisive factor in determining whether a guilty plea has been properly entered – see *R v Stevens* (2011) SASC 69 and *Meissner v R* (1995) HCA 41; 184 CLR 132; 130 ALR 547.

There is, if anything, greater incentive to plead guilty in the Aboriginal courts because of the strong desire of Aboriginal defendants to access the court's distinctive approach to sentencing (and most importantly, the involvement of the Elders). A number of the comments made by Aboriginal defendants during a review of the Koori court suggest this is a significant factor in the decision to plead. One typical comment was:

The Koori court is a good idea, but can't plead not guilty, some plead guilty to charges because they can see justice when elders are sitting round the table.³⁹⁶

Whilst convenience pleas happen in all courts, from the writer's experience Aboriginal court sentencing with family, Elders and Aboriginal court staff present is a powerful incentive, where the alternative may be a lengthy delay and an uncertain outcome.

The implications of convenience pleas in the Aboriginal courts (and other courts) are difficult to quantify. Certainly, a court which is perceived to overly encourage convenience pleas may lose the confidence of those who use it. But there is nothing in the literature or studies to suggest the Aboriginal courts 'encourage' convenience pleas – though it seems likely they attract convenience pleas by defendants wanting to access what they perceive to be a better process and (hoped-for) better penalty. Aboriginal defendants may acquire longer criminal records (through convenience pleas), with the harmful consequences that can entail. But there little evidence, anecdotal or objective, to suggest this occurs more often in the Aboriginal courts than mainstream or other specialist courts.

Should the Aboriginal Court hear trials?

The problem of convenience pleas is easier to identify than to solve. There are mixed views as to whether Aboriginal courts should hear trials. Blagg et al reported a strong desire amongst Aboriginal defendants to have the Koori court expanded to include not guilty matters;³⁹⁷ whilst McAsey noted other participants in the court were opposed to such a move.³⁹⁸ As yet there has been very little discussion in the literature whether the processes of the Aboriginal court and the criminal trial can be reconciled. Nor has there been any movement in South Australia or the other jurisdictions to have Aboriginal courts hear trials.

It is difficult to envisage how an Aboriginal court could hear a trial in a manner different from the mainstream criminal court. Many of the informal processes that make the Aboriginal court more attractive to Aboriginal people may be less

³⁹⁶ Blagg (2008) above n 20, 135.

³⁹⁷ Blagg et al (2004) above n 363, 125.

³⁹⁸ McAsey (2005), above n 387.

easy to apply to the trial process, where strict, formal rules are considered intrinsic to a proper determination of guilt or innocence. Another obvious problem would be the absence of a role for the Elders in a trial court, where prior knowledge of the defendant, victim or witnesses would, under the prevailing rules of judicial impartiality and bias, preclude any involvement by them in decision-making. These features, which are essential to Aboriginal court sentencing, are inimical to the trial process as it operates under Australian criminal law.

However, the Aboriginal court's aim to provide a more culturally appropriate process can be consistent with and even enhance the formal requirements of a fair trial. There are two ways in which this could be done – both relating to how evidence from Aboriginal witnesses is taken and understood by the court.

First, for many Aboriginal witnesses (whether the defendant or witnesses for prosecution or defence) it may be more natural to 'tell their story' in narrative form during examination-in-chief, rather than in response to the usual question-and-answer method. This was recognised in the Queensland Criminal Justice Commission report, 'Aboriginal Witnesses in Queensland's Criminal Courts' and made the subject of one of its recommendations.³⁹⁹

Second, there should be explicit recognition by a trial court (where there are Aboriginal witnesses) that Aboriginal English, as a form of English spoken by many Aboriginal people in urban, regional and remote areas, will have some differences in language and meaning from standard English – and those differences must be taken into account when assessing the evidence.⁴⁰⁰ Both these suggestions predate the Aboriginal court, but they are consistent with its example of adapting traditional court processes to Aboriginal culture.

Criticisms of Venue and Locality Rules

Geographical limitations on eligibility for the Aboriginal court ('venue rules') are another cause of criticism and frustration for many Aboriginal defendants who wish to access the court.⁴⁰¹ Though specific guidelines differ from one court or

³⁹⁹ Queensland Criminal Justice Commission, 'Aboriginal Witnesses in Queensland's Criminal Courts' (1996) <www.cmc.qld.gov.au/.../aboriginal-witnesses-in-queenslands-criminal...> See Recommendation 4.1, which states '(t)he CJC recommends that the *Evidence Act 1977* (Qld) be amended to include a provision that a witness may give evidence-in-chief in narrative form and the court may direct that evidence be given in this form'.

⁴⁰⁰ See the discussion on Aboriginal English by Diana Eades, *Aboriginal English and the Law* (1992) and the draft 'Direction to the Jury on Aboriginal English' in Appendix 4 to 'Aboriginal Witnesses in Queensland's Criminal Courts', *ibid*.

⁴⁰¹ The 'venue' rule usually requires that an offence be determined in the jurisdiction where it is alleged to have occurred, although matters for guilty plea are often transferred to other courts

locality to another, all impose limitations (that the offences must occur within the court's area) to prevent the court from being inundated with defendants from other localities. In that respect the venue rules of Aboriginal courts reflect those of mainstream magistrates' courts, which are also limited to matters that arise within their jurisdictional boundaries. Some Aboriginal courts also impose a further limitation that the defendant must be from (or known to) the local Aboriginal community. The purpose of the locality rules are twofold: to limit the volume of cases and maintain a strong local focus so the Elders are more likely to 'know' the defendants and or family.⁴⁰²

Harris recorded a number of criticisms of these restrictions in an evaluation of the Koori court; for instance, the case of women prisoners in Victorian custodial institution precluded from the local Koori court as their facility fell outside the Koori court's catchment area. Another, more general complaint was that court boundaries did not reflect those of the Koori communities.⁴⁰³ This is a criticism more relevant to metropolitan and provincial Aboriginal courts which usually cover a smaller geographical area and, often, a more dispersed Aboriginal community.

Too Few Courts, Too Many Restrictions

The criticism of the venue rules leads to a more general critique – that there are too few Aboriginal courts for those Aboriginal defendants who wish to access them. A survey of Aboriginal defendants in the above evaluation of the Koori court found the respondents to the questionnaire were unanimous in agreeing that 'the Koori Court should be made available to other Aboriginal communities in Victoria'.⁴⁰⁴

Venue rules are more problematic where the courts are limited in number and geographical spread. This was recognised in the recommendations made by the evaluation, which proposed an expansion of the Koori court throughout Victoria.⁴⁰⁵ To some extent that has occurred in Victoria, and also in NSW, but less so elsewhere (in South Australia there has been no increase in the number of Aboriginal courts since 2003). The criticism is likely to continue as long as there are an inadequate number of Aboriginal courts, leaving many Aboriginal defendants unable to access the courts merely because of the location of their offending.

for various reasons, such as convenience or to consolidate multiple files for sentence – see Chapter 3.3. *The Aboriginal Court: Jurisdictional Rules & Guidelines*, 38.

⁴⁰² They may 'know' them personally or indirectly through family or mutual acquaintance.

⁴⁰³ Harris (2006) above n 4, 129-30.

⁴⁰⁴ *Ibid*, 90.

⁴⁰⁵ *Ibid*; see Recommendations 14, 16 & 17; 128-31.

Access to the limited number and spread of Aboriginal courts is compounded by other factors, in particular the greater time taken to finalise matters due to the court's conversational process, which means only a small minority of Aboriginal defendants are able to access the court. It is significant that the source of much of this criticism comes from Aboriginal people – often defendants or other participants, such as AJO's and Elders, frustrated at restricted access to the Aboriginal court.

Criticisms of Aboriginal Court Sentencing

There have been two principal criticisms made of Aboriginal court sentencing; first, that the court's sentences may be too intrusive or punitive through the over use of supervisory orders, and second, that the penalties are too lenient. At first glance, the criticisms appear contradictory. These critiques and their sources are analysed in this section. Part of the discussion will involve an examination of appellate cases and the limited number of evaluations which analysed Aboriginal court sentencing.

Are Aboriginal Court Orders too intrusive?

A concern expressed by some participants in the Koori court during its early years was that penalties may become too intrusive, even punitive.⁴⁰⁶ There has been no quantitative research to examine how the number and type of supervisory orders in the Aboriginal courts compare with those in the mainstream courts. However, given the needs of many defendants and the approach to sentencing in the Aboriginal courts, it is likely the Aboriginal courts make a significant number of supervised orders (the same observation could be also be made of the Drug, Diversion and Family Violence courts).

Supervised orders (in South Australia imposed as part of a bond) will not, as a matter of law, be considered punitive or excessive unless the order is disproportionate to the offending and the defendant's personal circumstances.⁴⁰⁷ As almost every defendant is represented in the Aboriginal court, the presence of defence counsel should provide some protection against such an outcome (or at least act as a reminder to the court that the order should not be too intrusive or paternalistic). Perhaps these safeguards have been sufficient, as more recent commentary has not seen those concerns repeated. Nor has there been an appeal in South Australia by a defendant against an Aboriginal court sentence (on this or other grounds).

⁴⁰⁶ Blagg et al (2004), above n 363, 124.

⁴⁰⁷ Supervision can be imposed as part of a simple bond (s 39) or on a suspended sentence bond - s 38 *Criminal Law (Sentencing) Act 1988 (SA)*.

Are Aboriginal Courts a 'Soft Option'?

A long-standing critique made of the Aboriginal courts is that they are a 'soft option' for Aboriginal offenders.⁴⁰⁸ The criticism suggests that Aboriginal courts impose lesser penalties for offenders on the basis of Aboriginality alone; in other words, a lower sentence than a non-Aboriginal person (or an Aboriginal person in a mainstream court) of similar circumstances would receive. The criticism has, until recently, been based on scant evidence. However, two studies of sentencing in Queensland and South Australian Aboriginal courts now throws some light on the issue, where previously anecdotal evidence, personal opinion and criticism of specific cases prevailed.⁴⁰⁹

The criticism of Aboriginal court sentencing, voiced in the media and by some members of the legal profession, has mostly involved the Victorian Koori court. It is unclear why this is, whether due to issues peculiar to Koori court sentencing practices, or perhaps the pivotal role taken by the Victorian government in establishing and expanding the Koori court (making the court's perceived failings more overtly 'political'). One example of this critique can be seen in an extended article published in *The Weekend Australian* in October 2010 in which criticism of the Koori court touched on a number of issues, principally about sentencing (though also the court's approach to family violence matters).⁴¹⁰ In the article, Peter Faris QC, a member of the Victorian Bar, was critical of a recent Victorian Court of Criminal Appeal decision in which 'shaming' by Koori court Elders was accepted as a mitigating factor.⁴¹¹ He said of the Koori court:

It's only got a purpose if it's going to give him some benefit. And the purpose, one would have thought, is a lesser sentence. It makes white people feel better because it shows we are doing something for the Aborigines. And it makes Aborigines feel better because they get off lighter; you get a day's embarrassment in exchange for not going to gaol.⁴¹²

The article raised some serious issues concerning family violence and the Koori court's effect on recidivism. On the purportedly 'lenient' sentencing approach of the court, no objective research was cited. Ironically, the case of *Morgan* referred to in the article in support of the argument was one in which the defendant had been gaoled by the County Koori court, a decision then

⁴⁰⁸ Carry Crawford, *Koori Courts too soft*, the *Sunday Herald Sun*, 8 August 2004; *Court a Joke*, *Warrnambool Standard*, 14 July 2004; Jewel Topsfield & Marc Moncrief, *Tough Justice or soft touch in the Koori Court?*, the *Age*, 4 September 2004.

⁴⁰⁹ Morgan & Louis (2010) above n 21; and Bond & Jeffries (2012) n 254, 359.

⁴¹⁰ Richard Guillatt, *Aboriginal courts fail to deter violent offenders*, *The Weekend Australian*, 23-24 October 2010.

⁴¹¹ *R v Morgan* (2010) VSCA 15 (19 February 2010).

⁴¹² Guillatt (2010) above n 410, 25.

overturned (and the sentence of imprisonment suspended) by the Court of Criminal Appeal.

As said, for much of the time since the establishment of the first Aboriginal court, the critics, and those who sought to refute the criticism, have been equally hampered by the lack of objective or quantitative research on sentencing in the Aboriginal courts. McAsey, in her analysis of the Victorian Koori court, answered the criticism of Koori court sentencing standards by emphasising the rigour with which Aboriginal defendants are required to explain their offending and the 'dressing down' they often receive from the Elders (who, it was suggested in the article, sometimes propose a penalty more severe than that imposed by the magistrate).⁴¹³

More recently, Gerald Bryant, a Victorian magistrate with experience in the Koori Court at Shepparton, replied to (an earlier) criticism by Peter Faris QC suggesting the Koori courts were a 'soft option' and a 'waste of money'.⁴¹⁴ Bryant's response, in a paper to the Association of Magistrates Conference in 2008, was in a similar vein; that the intensive engagement required of the defendant can prove so difficult that some prefer to be sentenced in a mainstream court.⁴¹⁵ However, neither argument directly answered the critique, which was of sentencing outcomes, not process.

Interestingly, the research indicates the reasons given by Aboriginal defendants for preferring the Aboriginal courts are more complex than that suggested by Peter Faris' critique. A survey of Koori court defendants found they gave a number of reasons for their desire to be sentenced by the Koori court process: the hope for a lighter sentence, but also the opportunity to 'have their say' in court, the involvement of Koori Elders and the belief that only the Koori court offered a genuine prospect of support from their community.⁴¹⁶ Similarly, a survey of Murri court defendants showed that most did not necessarily expect a lighter sentence in the Murri court, choosing the court for other reasons as well, such as legal advice, the presence of Aboriginal community members or a perception they would be treated more fairly.⁴¹⁷

⁴¹³ McAsey (2005) above n 387, 681-2.

⁴¹⁴ Peter Faris, *Kooris' court a waste of money*, The Australian, 9 May 2008.

<<http://www.theaustralian.com.au/business/legal-affairs/kooris-court-a-waste-of-mone...>>

⁴¹⁵ Bryant (2008) above n 47.

⁴¹⁶ From a questionnaire of 30 defendants who had been sentenced by the Koori court - Harris (2006) above n 4, 90-1.

⁴¹⁷ *Ibid*, 135 (Table 75) – only 10% indicated they chose the court expecting to receive a lighter sentence.

Research on Aboriginal Court Sentencing

There is now research available from Queensland and South Australia which provides the first comparative data on Aboriginal and mainstream court sentencing standards.⁴¹⁸ The results are mixed, showing no clear statistical picture of Aboriginal court sentencing relative to equivalent mainstream courts.

The Queensland study examined five Murri courts throughout metropolitan and regional Queensland from January 2007 to December 2008,⁴¹⁹ including more than 1900 referrals and 1400 defendants in both the youth and adult Murri courts.⁴²⁰ The preliminary data showed a much higher rate of custodial orders imposed in the Murri courts compared to equivalent mainstream courts.⁴²¹ However, once other variables were factored in (seriousness of charges, multiple charges and prior record etc), the study concluded that adults sentenced in the Murri courts 'were not significantly more likely than offenders sentenced in a mainstream Magistrates Court to receive a custodial sentence.'⁴²²

The South Australian study compared sentencing (reviewing all types of penalties) in Aboriginal and mainstream magistrates' courts from 2007 to 2009.⁴²³ It found the 'Nunga court'⁴²⁴ was more likely to impose imprisonment on an Aboriginal offender than a mainstream court, but, in relative terms, was 'significantly less likely' to do so (once allowance was made for seriousness of offence, prior record and other variables).⁴²⁵

The South Australian study observed these results may reflect the impact of Aboriginal court processes, with the magistrates 'acutely cognisant of the devastating impact of incarceration on Indigenous people'.⁴²⁶ Certainly, the information and awareness produced by the sentencing process can influence decision-making. But it does not explain the different conclusions of the two studies – as the dire consequences of high levels of imprisonment on Aboriginal families and communities are likely to be well understood in both South Australian and Queensland Aboriginal courts.

⁴¹⁸ Morgan & Louis (2010) above n 21; and Bond & Jeffries (2012) above n 254.

⁴¹⁹ Brisbane, Caboolture, Mount Isa, Rockhampton and Townsville courts.

⁴²⁰ Some defendants were referred to the Murri court more than once during the period.

⁴²¹ Only custodial sentences were considered - Morgan & Louis (2010) above n 21, 91 (Table 45).

⁴²² Ibid, 98.

⁴²³ The survey period included 14 728 cases in the Magistrates' courts (96.3%) and 564 cases in the Aboriginal courts (3.7%) - Bond & Jeffries (2012) above n 254, 379.

⁴²⁴ The article refers to the 'Nunga courts', though this may be a matter of description as during 2007-09 both Nunga and conferencing courts were operating in South Australia.

⁴²⁵ Bond & Jeffries (2012) above n 254, 381.

⁴²⁶ Ibid, 382.

Whilst sentencing comparisons between Aboriginal and mainstream courts (or Aboriginal courts in different jurisdictions) will inevitably be made, they are problematic. Many factors may influence sentencing outcomes in Aboriginal and mainstream courts: general and specialist sentencing legislation, offence guidelines, the court's location, or a high proportion of remanded prisoners.⁴²⁷ The lower rate of imprisonment recorded in the South Australian study may reflect different sentencing practices in South Australian Aboriginal courts; but even if so, it is unlikely to be the sole cause.

So, are the Aboriginal courts a 'soft option'? Certainly, the Queensland study does not support a contention that sentencing levels in the Murri courts are inadequate, or even different (in general terms) from mainstream magistrates' courts in Queensland. However, as the data from the South Australian Aboriginal courts is less clear, it is useful to look at the response of prosecution to the court's penalties.

There have been only two prosecution appeals against penalties from Aboriginal courts in South Australia.⁴²⁸ Both appeals, *Koolmatrrie* and *Carter*, arose from the same court within a short time of each other.⁴²⁹ Whilst each prosecution appeal was successful, in *Koolmatrrie* no mention was made of the Nunga court approach to sentencing, and in *Carter*, the Supreme Court endorsed the 'more creative approach' to sentencing taken by the Aboriginal court (though it affirmed this had to be subject to general sentencing principles). There have been no further prosecution appeals from South Australian Aboriginal courts since 2002. This suggests prosecution have not viewed the general sentencing approach in the Aboriginal courts in South Australia since 1999 as 'too soft'.⁴³⁰

From the two studies examined it is difficult to draw a clear conclusion on the impact of Aboriginal courts on sentencing outcomes. That will require further research, ideally in both Nunga court and circle sentencing jurisdictions.

Family Violence and the Aboriginal Courts

In recent years there has been an increasing public and academic debate about violence in Aboriginal communities.⁴³¹ The debate has focussed particularly on violence against women and children and the response of criminal justice

⁴²⁷ A lengthy time on remand before sentence can result in non-custodial penalty, or no penalty, where otherwise a sentence of imprisonment would have been appropriate.

⁴²⁸ Tomaino (2005), above n 16, 2.

⁴²⁹ *Police v Koolmatrrie* (2002) SASC 47; and *Police v Carter* (2002) SASC 48.

⁴³⁰ In South Australia the Police prosecute the large majority of matters sentenced in the Magistrates' courts.

⁴³¹ For two differing views, see Joan Kimm, *A Fatal Conjunction* (2004); and Blagg (2008), above n 20, Chapter 8, 'Family Violence', 136.

system. There is a substantial body of literature on the nature, extent and causes of violence against women and children in Aboriginal society. I refer to this form of violence by the general term, 'family violence', which in the context of Aboriginal society can include either immediate or extended members.⁴³² There is considerable debate about the real level of family violence, with the extent of unreported crime difficult to estimate due to the longstanding distrust of police by many in the Aboriginal community. Even so, it is viewed as a major and unresolved issue by both Aboriginal and non-Aboriginal communities.

The causes of family violence within Aboriginal communities are complex, with substantial disagreement within the literature as to the extent to which Aboriginal culture and society contributes to the levels of Aboriginal family violence. McCrae et al suggest the causes of family violence can be broadly placed into three categories – *underlying*, *situational* and *precipitating* factors.⁴³³ This view argues that family violence within Aboriginal communities can only be understood in the context of their dispossession and its consequences for traditional family and community structures (an underlying cause). The consequences of dispossession and the loss of culture and community structures can be seen in situational factors such as family breakup, poverty, alcohol and substance abuse. Precipitating factors are the immediate causes of violence that typically arise out of the day-to-day stresses of Aboriginal community life (ill-health, the early death of family members and consequent funerals etc).

Many of the longer-term causes are beyond the capacity of the criminal courts (mainstream or Aboriginal) to meaningfully address. But much of the criticism of the treatment of Aboriginal family violence by the criminal courts has been on a more practical level, with the main emphasis on alleged inadequate sentencing. Whilst this critique has concerned mainstream criminal courts (and more often the higher courts, rather than the magistrates' courts), the issues are equally relevant to the Aboriginal courts.

Kimm, a trenchant critic of sentencing practices concerning Aboriginal offenders charged with violence offences against women and children, argued that the emphasis in recent decades on culture and Aboriginality, as a defence or in mitigation of penalty, has led to insufficient concern for the protection of Aboriginal victims. In practice, this has resulted in priority too often being given to male offenders over women and children as victims.⁴³⁴

⁴³² For a discussion of the concepts of 'family violence' and 'domestic violence', see McCrae et al (2009) above n 42, 507-08; and Blagg (2008) above n 20, 136-52.

⁴³³ McCrae et al (2009) above n 42, 508-11.

⁴³⁴ Kimm (2004) above n 431, 135.

Similar concerns have been raised by a number of academic critics in the previously mentioned Weekend Australian article regarding the Koori and NSW circle court's treatment of family violence offences.⁴³⁵ The criticism was twofold: the courts are so focussed on the defendant's cultural needs and rehabilitation that penalties are too lenient and, consequently, they fail to deter or reduce reoffending rates. No examples were given in the Weekend Australian article, either of case studies or sentencing data, to substantiate the assertion of inadequate penalties by Aboriginal courts in family violence matters.⁴³⁶

Nonetheless, the critique raises an important issue. The participatory nature of the sentencing process can be problematic in family violence matters in the Aboriginal court. The Aboriginal courts rely on Elders and community members to provide sentencing advice to the magistrate. Difficulties can arise, particularly in smaller communities, where the Elders, defendant and victim may be related.

In the 2008 Association of Australian Magistrates conference, Fred Field, a South Australian magistrate with extensive experience of circuit and regional courts involving large Aboriginal communities (including the Port Augusta Aboriginal Sentencing court), warned of the dangers of judicial officers assuming that Aboriginal communities are monolithic in their interests or views on sentencing matters.⁴³⁷ Whilst Field's warning was a general one, it is particularly relevant to family violence offences where the breakdown in a relationship can embroil the extended families of the victim and defendant in a continuing dispute. This can cause widespread disharmony in the community and jeopardise the standing of the Elders or members of the sentencing circle as impartial participants.

None of this means the advice of Elders and senior community members in family violence matters should be discounted, but it is reason for caution concerning the risk of conflicting loyalties that may not be obvious to a judicial officer from outside the community and culture. As well, the Elders themselves may, because of family loyalty or the nature of the charges, be unwilling to be as directly involved in the sentencing decision as they would otherwise.

Another concern, particularly in the conferencing and circle courts, is that the participation of family violence victims in a sentencing conference may put them in a position of a 'power imbalance' where they are subject to influence, often subtle, from the defendant or family. The victim may also be fearful of reprisal or exclusion from the family group. This was recognised in the recent evaluation of

⁴³⁵ Guilliat, (2010) above n 410, 25.

⁴³⁶ The penalty complained of (in the article) in *Morgan* was imposed by the Court of Criminal Appeal, overturning a custodial sentence by the Koori County court.

⁴³⁷ Field (2008), above n 83, page 3 (not numbered).

the Ngambra Circle court, which observed in a discussion of the sensitivities of dealing with victims in family violence matters:

Therefore victims are highly attuned to direct or indirect comment that suggests that they are somehow at fault or contribute to the defendant's violence against them...(and) to the defendant's capacity for threat or intimidation or indeed that person's capacity to appear remorseful.⁴³⁸

These issues were also considered by Marchetti in a study which reviewed the relevant literature, conceptual issues and the disposition of family violence matters in three Murri courts (Queensland) and two circle courts (NSW).⁴³⁹ The study's conclusions disclosed some ambivalence in the literature about the capacity of all forms of Aboriginal court to address a power imbalance between the defendant and victim during the sentencing process (if the latter attends the court). It found support for family violence offences being heard by Aboriginal courts, concluding that the process of 'shaming' of the defendant by Elders and the opportunity for the victim to tell their experience to the defendant and court provides some redress of the power imbalance.⁴⁴⁰ This view was expressed as a preliminary one, with Marchetti observing there is presently little research on the impact of culturally-specific measures (like Aboriginal courts) on rates of family violence.

It should be said these issues are not confined just to the Aboriginal court, or to sentencing matters only. Often, where there is a power imbalance between the victim and offender, it is most likely to be exploited before a plea is entered. Many family violence charges in mainstream and Family Violence courts are withdrawn or dismissed (before a plea is entered) because the victim or witnesses are unwilling to give evidence against a member of their family.⁴⁴¹ In most cases, prosecution will not proceed with the charge where victims wish to withdraw their complaint (if there is no other independent evidence of the alleged offence), though usually after the victim undergoes counselling, or otherwise seeks an exemption from the court from giving evidence.⁴⁴²

⁴³⁸ 'Strengthening the Ngambra Circle Sentencing Court' (2010) above n 255, 52.

⁴³⁹ Elena Marchetti, 'Indigenous Sentencing Courts and Partner Violence: Perspectives of Court Practitioners and Elders on Gender Power Imbalances During the Sentencing Hearing' (2010) 43(2) *Australian & New Zealand Journal of Criminology*, 263 – the courts studied were Brisbane, Rockhampton, Mount Isa, Dubbo and Nowra.

⁴⁴⁰ *Ibid*, 278.

⁴⁴¹ Sometimes the charges will be withdrawn by prosecution, other times dismissed by the court after a trial.

⁴⁴² This is the usual procedure in South Australia, when either the charge is withdrawn by prosecution or dismissed by the court after an exemption is given to the victim under section 21(3) *Evidence Act 1929 (SA)*.

Aboriginal Court approaches to Family Violence Offences

There are no easy or uniform answers to those criticisms. Some are of the view that Aboriginal courts should deal with family violence matters, though in a manner sensitive to the needs of the victim with a priority on changing the behaviour of the perpetrator.⁴⁴³ Others consider the interests of Aboriginal offenders and victims in family violence matters cannot be reconciled in the Aboriginal court process.⁴⁴⁴

Both approaches have shortcomings. The Ngambra Circle court evaluation recommended a cautious, but inclusive approach to family violence offences, subject to the victim's consent and the involvement of specially trained prosecutors and support services. These are prudent recommendations, but are more suited to a low volume court dealing with a single sentencing conference, rather than a high volume Nunga-style court dealing with a wide variety of offences. As victims rarely attend the Nunga-style court (though they sometimes come to court as family support for the defendant), it tends to be more offender-focussed than the conferencing and circle courts. This does not mean the Nunga court will necessarily overlook the victim's interests, as prosecution should nonetheless provide information on the impact of the offence on the victim. But with the victim absent and the Nunga court's natural focus on the defendant's rehabilitation, it is crucial that the court and Elders emphasise the victim's needs during the sentencing discussion so that the penalty will adequately balance the interests of the defendant and victim.

On the other hand, to exclude all family violence offences from the Aboriginal court would by no means ensure they will be better dealt with in another court. For example, in South Australia they are more likely to be heard in a mainstream court, as there are only four specialist Family Violence courts, and none operate in regional or remote areas.⁴⁴⁵ Also, for Aboriginal offenders who are dealt with in specialist family violence courts, the programs available will not necessarily be suitable. In South Australia the Family Violence court programs are not culturally-specific and may not accommodate issues such as the extended family,

⁴⁴³ Annette Hennessy and Carol Willie, 'Sentencing Indigenous Offenders in Domestic and Family Violence Matters – A Queensland Experience' (Paper to the Australian and New Zealand Society of Criminology, Hobart, February 2006).

⁴⁴⁴ 'Strengthening the Ngambra Circle Sentencing Court' (2010) above n 255, 53 [136].

⁴⁴⁵ The four Family Violence courts are based in metropolitan Adelaide at Adelaide, Elizabeth, Port Adelaide and Christies Beach, which are limited to offences within their jurisdictions.

different relationships between family members and a defendant who may not speak English as a first language or be literate in written English.⁴⁴⁶

Is a Uniform Approach Possible?

Currently, there is no uniform 'Aboriginal court' approach to family violence matters. In Victoria, legislation bars some family violence (and sexual) offences from the Koori court on the basis they are too 'complex'.⁴⁴⁷ Oddly, the legislation precludes breach of intervention order offences from the Koori court, but not family violence assaults (which are often objectively more serious than breach of intervention order offences). With the exception of Victoria, the Aboriginal court jurisdictions accept family violence matters, though a few courts such as Port Lincoln Aboriginal court (South Australia) and the Community court in the Northern Territory may preclude such offences at their discretion.⁴⁴⁸

A contrasting approach is seen in Western Australia where the only Aboriginal Family Violence court has been established (Barndimalgu court, Geraldton). The Barndimalgu court does not allow the participation of victims (though a victim support service is active), as there is a concern this could deter the defendants from being completely open with the court.⁴⁴⁹ Mandatory exclusion of victims is a questionable measure, both in terms of the victim's interests and the defendant's need to accept responsibility for their actions. Regardless, this is not an approach that could be adopted by Aboriginal courts in South Australia, as a victim has a statutory right to be heard in court either personally, through prosecution, a personal representative or in the form of a written Victim Impact Statement.⁴⁵⁰

A consistent approach to family violence matters by Aboriginal courts may not be easily achieved, with the response influenced by many factors: the type of court, seriousness of the offending, the gender balance and training of Elders, locality of the community, the strength of culture and the availability of Indigenous counselling services for victims and offenders. The last point is critical. In South Australia the majority of specialised programs service the Family

⁴⁴⁶ Many of the rehabilitative programs in Drug, Diversion and Family Violence courts require the defendants to use materials before and during each session which presume a certain level of literacy.

⁴⁴⁷ See s 4F (1)(a)(i) & (ii), *Magistrates Courts Act 1991* (Vic) - the complexity may be a cultural one, as these charges are not necessarily more legally complex than other types of minor indictable offences. For a discussion on this point, see Harris (2006) above n 4,122-5.

⁴⁴⁸ See the Darwin Community Court Guidelines, issued by Chief Magistrate Bradley on 27 May 2005, above n 102 (Practice Direction 14); and *Port Lincoln Aboriginal Conferences; Guidelines and Case Flow Management*, above n 147, 2.

⁴⁴⁹ WALRC (2008) above n 106, 18-30.

⁴⁵⁰ Section 7 *Criminal Law (Sentencing) Act 1988* (SA).

Violence courts, whilst little is specifically targeted for Aboriginal offenders (particularly outside the metropolitan area).⁴⁵¹ The development of culturally-appropriate programs for Aboriginal people in both metropolitan and regional communities is a crucial prerequisite if Aboriginal courts (in South Australia and elsewhere) are to develop effective approaches to family violence offences that properly balance the interests of the defendant and victim.

5.4 Radical Critiques

This section discusses the critiques that take a more radical position, rejecting the current forms of Aboriginal court. These critiques have widely differing views as to why the contemporary Aboriginal courts are unacceptable and what should replace them. First, there are the critics that argue any form of separate court for Aboriginal people is contrary to the fundamental rule of equality before the law. Second, the critiques that consider the Aboriginal courts in their current form are incapable of redressing Aboriginal disadvantage in the criminal justice system, and so propose different legal approaches such as recognition of Aboriginal customary law or an independent and comprehensive system of Aboriginal courts.

Each of the critiques offers a different analysis of the rationale, practices and position of the contemporary Aboriginal courts within the criminal justice system.

Criticisms of a Separate Aboriginal Court: The ‘Two Laws’ Critique

A fundamental criticism of separate courts for sentencing Aboriginal offenders has been that Aboriginal courts create (in effect) two legal systems for Aboriginal and non-Aboriginal people. This critique has arisen more often in the media, or from some members of the legal profession, than in academic commentary. The essential complaint is that a separate Aboriginal court provides special and unwarranted treatment for Aboriginal people that are not available to non-Aboriginal people within the criminal justice system.

The critique raises a basic theoretical objection to a separate Aboriginal court, though with practical implications. It argues there is no legal rationale for a separate Aboriginal court and that such a court is inconsistent with the fundamental principle of equality before the law. At a more practical level, the

⁴⁵¹ There is one program, recently started, for Aboriginal male family violence offenders; but it is limited in the number of places available and only for those in some Adelaide (metropolitan) areas.

criticism suggests that Aboriginal courts (or any separate measures for sentencing) provide an advantage for Aboriginal people, usually in the form of unjustifiably lenient penalties, which are not available for non-Aboriginal offenders.

One example of this criticism were the comments, David Galbally QC, a prominent member of the Victorian bar, who criticised the Koori court in the media in 2003 as contrary to ‘the principle of one justice system for all citizens’⁴⁵² (though he did later modify his comments).⁴⁵³ Earlier, similar comments were made in the Queensland Parliament and by some members of the legal profession during debates in 2000 (preceding the establishment of the Murri court in 2002) which asserted that the proposed Aboriginal court would be ‘special treatment’ for Aboriginal people.⁴⁵⁴

The Western Australian Law Reform Commission (WALRC), in its 2006 report, *Aboriginal Customary Law*,⁴⁵⁵ cited critical media comment concerning an earlier Discussion Paper which advocated the establishment of Aboriginal courts and partial recognition of customary law. One editorial in February 2006 was highly critical, referring to the proposals as likely ‘to result in two systems of law’.⁴⁵⁶ This critique has tended to occur when Aboriginal courts are either yet to be established or in their early stages of development (and frequently in tandem with concerns about the court’s approach to sentencing).

More than the criticism of sentencing standards, it is a critique that goes to the heart of the legal justification for separate sentencing measures for Aboriginal people. An analysis of this critique and the countervailing arguments necessarily involves a discussion of the issue of equality before the law and the notion of ‘substantive equality’.

Arguments for Differential Treatment for Aboriginal People

The arguments in support of differential treatment for Aboriginal people (such as Aboriginal courts and similar measures) were summarised by the WALRC. Though the WALRC report was considering the broader issue of recognition of Aboriginal customary law, it discusses the rationale for a separate Aboriginal court.⁴⁵⁷ The arguments addressed two fundamental, though slightly different

⁴⁵² David Galbally, *Koori Court tips scales*, Herald Sun, 13 March 2003.

⁴⁵³ McAsey (2005) above n 387, 683.

⁴⁵⁴ Harris (2004) above n 70, 36.

⁴⁵⁵ WALRC (2006) above n 48.

⁴⁵⁶ The *West Australian* editorial, 8 February 2006; cited in WALRC (2006) above n 48, 7 & 13.

⁴⁵⁷ Recommendation 24 proposed the establishment of Aboriginal courts in Western Australia.

questions. Is it legitimate to have a separate court for Aboriginal people? If so, is it necessary?

The WALRC cited the 'unique status' of Aboriginal people as the original inhabitants of Australia as 'perhaps the most persuasive' argument supporting differential treatment.⁴⁵⁸ The status and culture of Aboriginal people were recognised as decisive factors in the High Court decision on native title in *Mabo v Queensland (No. 2)*.⁴⁵⁹ The WALRC considered these features set Aboriginal people apart, in law and fact, from other migrant and ethnic groups (though it recognised each should have their cultural differences considered in a multicultural society) and justified protection of their unique status.⁴⁶⁰ This view mirrored an earlier recommendation of the Australian Law Reform Commission (ALRC) in a review of the status of Aboriginal customary law in the Australian legal system.⁴⁶¹

The argument takes on greater force when juxtaposed with the disadvantage experienced by Aboriginal people in the criminal justice system and society, making them 'more unequal than any other social or cultural group in Australia'.⁴⁶² In 2006, at the release of the WALRC report, Indigenous people were nearly 14 times more likely to be imprisoned than non-Indigenous people.⁴⁶³ Worse still, the wretched position of Indigenous people in the Australian prison system is part of a long-term and deteriorating situation, with their numbers increasing from 14% of the total prison population in 1992 to 26.1% in 2010-11⁴⁶⁴ (though comprising only 2.5% of the total Australian population in 2011).⁴⁶⁵

The Concept of Substantive Equality: A Rationale for the Aboriginal Court?

The social condition of Aboriginal people and their status as 'the most disproportionately imprisoned culture in Australia' may explain why most Australian jurisdictions have introduced innovative, remedial measures such as

⁴⁵⁸ WALRC (2006) above n 48, 10.

⁴⁵⁹ (1992) 175 CLR 1.

⁴⁶⁰ WALRC (2006) above n 48, 11.

⁴⁶¹ ALRC (1986) above n 70 [163-5].

⁴⁶² WALRC (2006) above n 48, 10.

⁴⁶³ Australian Institute of Criminology, 'Crime and criminal justice statistics: Indigenous Prisoners' (2010) <<http://www.aic.gov.au/stats/cjc/corrections/indigenous.html>>

⁴⁶⁴ Productivity Commission, 'Report on Government Services 2012' (Justice Sector) 166 <www.pc.gov.au/_data/.../government-services-2012-volume1.pdf>

⁴⁶⁵ According to the 2011 census - Australian Bureau of Statistics, 'Census of Population and Housing 2011'

<www.abs.gov.au<ABS Home>Statistics>

the Aboriginal court.⁴⁶⁶ But is a separate Aboriginal court consistent with the principle of equality before the law?

The answer lies in the notion of 'substantive equality'; that is treating people, whether an individual or group, differently according to their specific circumstances to reduce disadvantage.⁴⁶⁷ This approach understands that to treat everyone in the same manner, regardless of their situation, may only perpetuate inequality.

The principle of substantive equality is established in both international and domestic law. The WALRC examined the basis of the principle in international law, referring to decisions of the International Court of Justice, the Universal Declaration of Human Rights⁴⁶⁸ and the International Covenant on Civil and Political Rights.⁴⁶⁹ Whilst international treaty obligations are not binding in state criminal courts (unless adopted by the legislature), they have persuasive force.⁴⁷⁰

Domestically, the principle is enshrined at a national level in section 8 of the *Racial Discrimination Act 1975* (Cth) which allows for special or remedial measures to redress substantive inequality for an individual or group. A day-to-day application of the principle (in South Australia) can be found in section 13, *Criminal Law (Sentencing) Act 1988* (SA), which requires a sentencing court to consider the defendant's means and any hardship before making a pecuniary order (fine, compensation or costs).

The notion of substantive equality is the fundamental rationale for the use of remedial measures such as Aboriginal courts and their use of Aboriginality as an essential consideration in sentencing. Both remedies are consistent with and operate within the uniform criminal law. In *Police v Carter* Nyland J said of the procedural innovations of the Nunga court, '[d]espite the court's unique procedures, it remains subject to the usual sentencing principles.'⁴⁷¹ In a similar vein, Gray, Burgess and Hinton, discussing Aboriginality as a factor in sentencing, commented:

It is important to point out it is not a matter of an Aboriginal person receiving special treatment. Rather it is a matter of ensuring the application of the law,

⁴⁶⁶ WALRC (2006), above n 48, 10.

⁴⁶⁷ The concepts of 'formal equality' and 'substantive equality' are discussed in the WALRC report, above n 105, 8.

⁴⁶⁸ Article 7, WALRC (2006), above n 48, 8.

⁴⁶⁹ Article 26, *ibid*.

⁴⁷⁰ This is the position in South Australia; see the comments of Perry J in *Police v Abdulla* (1998) 74 SASR 337.

⁴⁷¹ *Police v Carter* (2003) 86 SASC 48, 6 [16].

which assumes all people to be equal, is in fact, being applied to equals equally and not to unequals equally.⁴⁷²

The unique status and culture of Aboriginal people, their disadvantaged position in the criminal justice system and alienation from the traditional court process justify the use of the Aboriginal court and its distinctive sentencing approach as necessary and legitimate expressions of the concept of substantive equality. The use of these measures does not conflict with the rule of equality before the law, but rather seeks to fulfil its promise.

Self-Determination Critiques

Finally, there are the critiques that argue the contemporary Aboriginal courts fail to address Aboriginal disadvantage in the criminal justice system or genuinely fulfil the promise of self-determination. Generally, these criticisms emphasise the importance of Aboriginal customary law and Indigenous structures in the achievement of those aims.

Harris described the Aboriginal courts in Australia as a 'hybridised system' that could only represent Indigenous systems of law to the extent allowed by the mainstream law and, as such, was not 'a true representation of Indigenous beliefs'.⁴⁷³ The most trenchant criticism was that they may be seen as 'a continuance of the colonial practice of co-opting members of the Indigenous community to police of their own community', drawing an analogy with the past use of Native police and courts.⁴⁷⁴ However, Harris did not argue that Aboriginal courts should operate as customary law courts, observing that to associate the Aboriginal court too closely with the use of customary law was to create the danger that Aboriginal communities would be left with a stark choice, to produce a code of laws where none exists or to adhere solely to mainstream criminal law.

The last point is an important one. Aboriginality and Aboriginal culture are central to the sentencing process in the Aboriginal courts and are considerations relevant to most Aboriginal people, regardless of locality or lifestyle. But customary law, as it is generally understood in literature and the criminal courts,⁴⁷⁵ is rarely relevant in the Aboriginal courts in South Australia, Victoria, NSW and the ACT (and less so in urban and provincial Aboriginal courts in

⁴⁷² Tom Gray, Sally Burgess & Martin Hinton, 'Indigenous Australians and sentencing' in Johnson, Hinton & Rigney (eds) (2008) above n 37, 118.

⁴⁷³ It was made clear in the aftermath of *Mabo (No 2)* that the criminal law could not coexist with a second, autonomous body of law – see *Walker* (1994) 69 ALJR 117.

⁴⁷⁴ Harris (2004) above n 70, 36.

⁴⁷⁵ For a discussion of Aboriginal customary law and its relationship to the mainstream legal system – see Bruce Lander, 'Aboriginal customary law and common law' in Johnson, Hinton & Rigney (eds) (2008) above n 37, 85; and ALRC (1986) above n 70, 31(2) Ch 29.

Western Australia and the Northern Territory). To limit the Aboriginal court to only applying customary law would confine its usefulness to predominantly remote areas and overlook the capacity of other (including the present) models to influence the sentencing process and law with Aboriginal values and culture. It might also prompt legislative proposals to 'codify' Aboriginal customary laws, or in the alternative, encourage moves to curtail the use of customary law as a defence or factor in mitigation of penalty (such as the provisions introduced by the Commonwealth government for federal criminal matters in 2006).⁴⁷⁶

McAsey considered the Victorian Koori court to be more inclusive of Aboriginal people in the legal system by changing the court's processes to be more amenable to Aboriginal attitudes and culture. The Koori court approach was described as 'adaptive incorporation', as it increased Aboriginal participation. This was distinguished from merely increasing the number of Aboriginal people working in the criminal justice system without making genuine changes to practice or structure (termed 'straight incorporation'). However, in either case, it was argued the Koori court did not necessarily alter the essential power imbalance between Aboriginal people and the legal system, and so fell short of promoting real self-determination.⁴⁷⁷

The key to a genuine transformation of this relationship was suggested to be a further devolution of power to the Aboriginal community, with the injunction that 'if they (the non-Aboriginal community) wish to negotiate with an Aboriginal community, they need to do so within the frameworks that Aboriginal people find acceptable'.⁴⁷⁸ The analysis leaves unclear the extent to which a further devolution of power would be limited by the present framework of a uniform criminal law, court system and the judicial officer with legal responsibility for sentencing decisions.

A different proposal for greater devolution of decision-making to Aboriginal people was made in 2001 by Michael Mansell (of the Tasmanian Aboriginal Legal Service). He proposed an institutional solution; a separate system of Aboriginal Community Tribunals which would have a similar criminal and family jurisdiction to state and Federal Magistrates courts.⁴⁷⁹ The Tribunals would be answerable to the local Aboriginal community and generally free of interference from the mainstream criminal courts (whether there would be oversight by an appellate

⁴⁷⁶ *The Crimes Amendment (Bail and Sentencing) Bill 2006* (Cth).

⁴⁷⁷ McAsey (2005) above n 387, 665-70.

⁴⁷⁸ *Ibid*, 669 (quoting Larissa Behrendt).

⁴⁷⁹ Michael Mansell, 'Introducing Fairness: Aboriginal Community Sentencing Tribunals' (Paper presented to the Best Practice Interventions in Corrections for Indigenous People Conference, convened by the Australian Institute of Criminology, Sydney, October 2001).

court was not discussed). The explicit purpose of the Tribunal would be to reduce the number of Aboriginal people in custody.

There is much to be said for a comprehensive system of Aboriginal courts rather than an ad hoc arrangement to which only a small number of Aboriginal defendants have access. But several criticisms of such a proposal can be foreseen. A system institutionally separate from the mainstream criminal courts may be properly said to create 'two laws' for Aboriginal and non-Aboriginal people, unless they operate within the general law and are accountable to appellate courts in the current manner.

Also, an Indigenous court system which mirrors the mainstream legal system will carry a weight of expectation, whilst being unlikely to bring about substantial change. Assuming a near complete responsibility for Aboriginal criminal justice (with a primary objective of reducing Aboriginal people in custody) is a danger in the absence of the social, economic and educational measures necessary to address the underlying causes of Aboriginal recidivism and overrepresentation. The proposal may offer the formal appearance of self-determination, but lack the means to achieve it.

The Canadian Example: Critiques of Circle Sentencing

The debate concerning the nature of Indigenous courts and their place in the criminal justice system has not been limited to Australia. The Canadian experience and literature is particularly relevant given the influence of Canadian circle courts on the development of Aboriginal courts in some Australian jurisdictions.⁴⁸⁰ A discussion of some of the literature is worthwhile as many of the issues raised are apposite to the Australian Aboriginal courts and the other, related measures introduced to reduce Aboriginal disadvantage in the criminal justice system.

Attempts to increase Indigenous involvement in the criminal justice system in Canada commenced in the 1970's through a combination of more Indigenous police, judiciary, correctional staff and programs such as 'healing lodges' (still places of detention, but with an emphasis on rehabilitation and Indigenous culture).⁴⁸¹ These measures were followed in the 1990's with the introduction of circle-sentencing courts and the legislative change to the Canadian Criminal Code in 1996 requiring that a sentencing court must have 'particular attention to

⁴⁸⁰ The ACT and NSW.

⁴⁸¹ For a summary of Indigenous criminal justice measures in Canada since the 1970's – see Luke McNamara, 'Aboriginal justice reform in Canada: Alternatives to state control' in Kayleen M Hazlehurst (ed), *Perceptions of Justice: Issues in Indigenous and Community Empowerment* (1995).

the circumstances of Aboriginal offenders'.⁴⁸² The notion of restorative justice, seen as consistent with Indigenous values, influenced many of the innovations, particularly circle courts and the use of healing lodges.

These measures have not been without their critics, with some arguing that the changes have not gone far enough, whilst others suggest that undue emphasis on legal reform overlooks the social and economic programs needed to address the underlying causes of Indigenous disadvantage.

The first critique argues that the reforms to the criminal justice system in Canada have not altered its basic structure or underlying principles, calling for more fundamental change based on greater autonomy and a discrete Indigenous legal system for regions where the communities are predominantly Indigenous. The proposals for legal and territorial autonomy gained support from a number of sources, including a series of public inquiries into Indigenous justice issues⁴⁸³ and constitutional debates during the early 1990's concerning Indigenous self-government.⁴⁸⁴

Part of the plan for self-government was to incorporate a separate jurisdiction for regions with large Indigenous populations. This approach suffered a setback when proposals for separate Indigenous legal jurisdictions were rejected at a national referendum on constitutional amendments to facilitate self-government in 1992.⁴⁸⁵ The proposal for a territorial jurisdiction for some Indigenous communities was criticised by both opponents and advocates of separate Indigenous justice measures; on the one hand, that it would create different criminal laws and courts within Canada, and on the other, that it offered little to Indigenous people living elsewhere amongst majority non-Indigenous communities.

The second critique of the Canadian approach emphasised the importance of economic and social justice measures to address the underlying causes of Indigenous disadvantage in the criminal justice system.⁴⁸⁶ Their critique is twofold. First, increased Indigenous staffing and programs in the criminal justice system have occurred without making the fundamental changes to its essentially

⁴⁸² Section 718.2(e) *Criminal Code of Canada* - which took effect from 3 September 1996.

⁴⁸³ For instance, the report by the Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (1991) Ottawa.

⁴⁸⁴ Luke McNamara in 'Aboriginal justice reform in Canada: Alternatives to state control' in Hazlehurst (ed) (1995) above n 481, 9-12.

⁴⁸⁵ A proposal to amend section 35 of the *Constitution Act 1982* to recognise the right of Indigenous peoples to self-government was rejected in a national referendum on 26 October 1992.

⁴⁸⁶ Jane Dickson-Gilmore & Carol La Prairie, *Will the Circle be Unbroken? Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (2005).

Eurocentric nature that are necessary to reduce recidivism rates.⁴⁸⁷ The result, it is said, may have simply made the system more effective in a punitive sense.⁴⁸⁸ Second, the emphasis on legal and institutional reform with a focus on Indigenous culture may have diverted attention from the ‘unpalatable truth’ that measures to address the causes of Indigenous over-representation are inevitably long-term and costly.

The Canadian Critiques: Relevance to Australian Aboriginal Courts

There has been a similar debate in Australia as to the relative importance of socio-economic and legal (systemic) factors as causes of Aboriginal overrepresentation in the criminal justice system. Some scholars consider systemic factors to be a significant element in the high rates of Aboriginal arrest and imprisonment,⁴⁸⁹ whilst others emphasise the importance of social and economic factors.⁴⁹⁰ Though there is disagreement over the efficacy of criminal justice measures to reduce Aboriginal over-representation, there is a measure of consensus that action to improve the social condition of Aboriginal people is integral to the solution.

An emphasis on making legal processes and institutions more culturally appropriate, if pursued without other policy measures to address Indigenous disadvantage, is unlikely to reduce Indigenous recidivism and imprisonment rates. But the two approaches are not mutually exclusive. Those who advocate the need to change systemic and cultural factors within the criminal justice system that exacerbate Aboriginal disadvantage do not suggest such measures are sufficient. As Marchetti and Daly commented on this issue, ‘[u]ltimately, rates of offending and incarceration may be reduced, but these are long-term aims and surely cannot be accomplished by the presence of these [Aboriginal] courts alone’.⁴⁹¹

In the Australian context, RCIADIC addressed this issue by recommending a careful balance of the needs for social, economic and educational measures with changes within the criminal justice system to reduce Aboriginal disadvantage. The recommendations of RCIADIC were emphatic on both issues; that changes to the criminal justice system to empower Aboriginal people and make its

⁴⁸⁷ Ibid, 229.

⁴⁸⁸ The process of increasing Indigenous staff within the criminal justice system was termed ‘Indigenization’ by Paul Haverman in ‘The Indigenization of Social Control in Canada’ in Robert Silverman & Marianne O’Neilson (eds), *Aboriginal Peoples and Canadian Criminal Justice* (1992).

⁴⁸⁹ Cunneen (2006) above n 34, 329; and Blagg (2008) above n 20.

⁴⁹⁰ For example of the latter view, see Don Weatherburn, Jacqueline Fitzgerald & Jiu hao Hua, ‘Reducing Aboriginal Over-Representation in Prison’ (2003) 62(3) *Australian Journal of Public Administration* 65.

⁴⁹¹ Marchetti & Daly (2007) above n 19, 6.

processes more culturally relevant were crucial, whilst recognising this had to occur in tandem with measures to address the underlying causes of Aboriginal disadvantage. The challenge for such an approach, highlighted by the Canadian experience, is that criminal justice measures are attractive as offering seemingly 'immediate' solutions when Indigenous communities appear in crisis, whilst other policy responses are usually longer-term and expensive.

5.5 Conclusion

A number of general conclusions can be drawn from the critiques of the contemporary Australian Aboriginal courts. These provide a rationale and definition for the Aboriginal court.

The concept of substantive equality, firmly established and accepted in Australian law, provides a rationale for a separate court for sentencing Aboriginal offenders. This principle has been long applied in various areas of the law, most relevantly in the approach to Aboriginality in sentencing. It is not Aboriginal ethnicity, but the unique nature of Aboriginal culture and the consequences of Aboriginality – the grossly disadvantaged position of Aboriginal people in society and their over-representation in the criminal justice system – that justify the use of remedial measures such as the Aboriginal court. The purpose is not 'special treatment', but equality before the law.

The defining feature of the Aboriginal court is a genuine participation by Aboriginal community members as a regular part of the sentencing process. Where participation is genuine, members of the Aboriginal community can influence the court process and sentencing. Their involvement also has the capacity to change the relationship of the local Aboriginal community to the criminal court. These features are unique to the Aboriginal court and distinguish it from mainstream and other specialist or problem-solving courts.

The Aboriginal court, in each of its current models, is a 'hybridised' form, operating within the constraints of a non-Aboriginal legal system.⁴⁹² It is neither a customary law nor a community-controlled court. Within the limitations of a uniform criminal law and court system, the contemporary Aboriginal court allows the local Aboriginal community some influence within a collaborative sentencing process in which Aboriginal knowledge and values can inform the court's decision.

⁴⁹² Harris (2006) above n 4, 35.

Critics and users of the current forms of Aboriginal court have highlighted a number of shortcomings. Access to the Aboriginal courts is restricted by their limited numbers, as well as plea, locality and jurisdictional guidelines, so that currently only a small proportion of all Aboriginal defendants have the option to be sentenced in an Aboriginal court.⁴⁹³ Nor is there a settled Aboriginal court approach to family violence matters or a consensus as to how they should balance the court's focus on the rehabilitation of the defendant with the interests of the victim. These issues remain presently unresolved.

The harshest criticism has come not from those who highlight the day-to-day shortcomings of the Aboriginal court, but the critics who point to its inability to reduce Aboriginal disadvantage, most clearly seen in high recidivism and incarceration rates. Some propose different forms of Aboriginal court, based on customary law or a system of courts for Aboriginal people, institutionally separate from the mainstream legal system. However, these proposals are unlikely to influence Aboriginal reoffending rates if introduced without other measures to address the social conditions that are the underlying causes of Aboriginal disadvantage and offending. Nor are they likely, at least in the foreseeable future, to be acceptable to government or the general public.

Other critics suggest a more pragmatic approach to address recidivism, proposing that Aboriginal courts adopt pre- and post-sentence rehabilitative programs similar to those used in the specialist drug and mental health courts. Whilst this approach is less ambitious, it may not be easily achieved. It will be difficult to persuade government, or court administrations, that funding should be directed to Aboriginal courts for drug or mental health programs if they merely duplicate programs in other specialist courts – unless culturally specific programs are demonstrated to be effective and necessary for the particular needs of Aboriginal defendants.

The majority of critics advocate a specialist court for Aboriginal people, though (amongst those critics) there are differing views over many issues: the most appropriate model, the degree to which it should be independent from the rest of the court system and the extent to which an Aboriginal court can reduce Aboriginal disadvantage within the criminal justice system. But there is agreement in one respect. All the critics accept that the use of criminal justice measures alone are insufficient to address Aboriginal recidivism or over-

⁴⁹³ No research has been specifically conducted on the relative proportion of Aboriginal defendants sentenced in Australian Aboriginal courts, but a comparison was made of the number of Aboriginal defendants sentenced in mainstream magistrates' courts (96.3%) and Aboriginal courts (3.7%) in South Australia from 2007-09 - Bond & Jeffries (2012) above n 254, 379.

representation in custody unless there is more comprehensive action to improve the social condition of Aboriginal people.

CHAPTER 6. CONCLUSIONS

The Aboriginal court has developed as a compromise between the uniform criminal law with the traditional legal authority of the judicial officer and the objective of Aboriginal influence in the sentencing process through the participation of the Elders and other Aboriginal community members. The sentencing dialogue is the defining feature of the Aboriginal court. The mix of participants, the collaborative method of decision-making and relationship between the judicial officer and Elders creates a process unique to the Aboriginal court.

The sentencing process is significant in a number of ways. First, it is the means by which the local Aboriginal community can participate in the court's decisions. Second, it forms the link between the court and Aboriginal community, fostering better relations. Most importantly, by drawing on Aboriginal knowledge and values from Elders and other Aboriginal community members, it can influence the court's approach to sentencing by providing better information on social and cultural conditions relevant to the defendant and the local Aboriginal community.

Although the Aboriginal courts vary from one jurisdiction (or locality) to another, a number of general conclusions can be drawn about the court's aims, how it works, what it achieves and the significance of the sentencing process.

Theoretical Issues

Whilst the Aboriginal court began as a pragmatic response to Aboriginal alienation and disadvantage in the criminal justice system, there is a theoretical basis that establishes a justification and definition for a separate Aboriginal court.

The unique culture and position of Aboriginal society as Australia's First People, together with their gross disadvantage at all levels of the criminal justice system, explains why the criminal justice system has experimented so widely with a special measure such as the Aboriginal court. However, it is the notion of substantive equality which provides the rationale for their use - that Aboriginal courts are not an extra or unwarranted benefit for Aboriginal people, but a necessary measure to encourage the genuine involvement of Aboriginal people in the sentencing process.

The use of Aboriginal sentencing courts is not contrary to the principle of equality before the law, but a step towards its fulfilment. The comments of a

Queensland magistrate at the opening of the Townsville Murri Court in 2006 are relevant to all Aboriginal courts:

[It] does not provide any benefit to an Indigenous defendant over a white defendant. It provides many of the benefits that non-Indigenous people have had over a period of time and recognises that the Indigenous defendant, in many respects, deserves more time and input from their own people.⁴⁹⁴

The Aboriginal court can be distinguished from other special sentencing measures for Aboriginal offenders as one where Aboriginal participation and influence in sentencing are an accepted and regular part of the court process.⁴⁹⁵ This is a deliberately broad definition, reflecting the loose and varied structure of Aboriginal courts. They can be further defined as a distinct type of court, differentiated from mainstream and other specialist courts by a number of unique features: the role of the Elders in the sentencing dialogue, the judicial officer's relationship with the Elders' (or conference/circle members) and the court's aim to bring about change at a community level by improving relations between the Aboriginal community and court.

To these can be added one other feature; the Aboriginal court can be said to address a different sort of 'problem' from other specialist courts. The Drug, Family Violence and Diversion (Mental Impairment) courts focus on a particular problem of the individual offender. The Aboriginal court also seeks to address the underlying problems leading to the defendant's offending. However, at a more general level it aims to remedy the systemic failings of cultural and linguistic disadvantage in the criminal courts so as to better 'accommodate the needs of Aboriginal people and to ensure that they are fairly treated within that system'.⁴⁹⁶

Aboriginal Court Structure: Formal and Informal Factors

The Aboriginal courts have been established by a variety of means: special legislation, regulations, practice directions and judicial initiative. The Aboriginal court sentencing process is ultimately defined by its legal and institutional framework, but within that structure informal factors determine how the court operates and the degree of Aboriginal community influence. In practice the sentencing process is shaped by a complex interplay of factors: the personalities of the judicial officer and Elders, the nature of the local Aboriginal community(s), the model of Aboriginal court and the commitment of participants to the court's

⁴⁹⁴ WALRC (2006) above n 48, 16.

⁴⁹⁵ See the discussion in Chapter 5.2 *Aboriginal Courts and Informal Sentencing Practices Distinguished*, 101-2.

⁴⁹⁶ WALRC (2006) above n 48, 146.

aims and practices. Of the latter, the aims of Aboriginal participation and a culturally relevant court are most crucial in shaping the court's practices.

For these reasons, the Aboriginal court is influenced to an unusual degree by personal and informal factors. Most important is the willingness of the judicial officer to allow the Elders and other Aboriginal community members to actively engage in the sentencing dialogue. This is the essential feature as the influence of the Aboriginal participants on the sentencing process is founded on persuasion, rather than legislation. The court also tends to be localised, reflecting, in part, the regional nature of Aboriginal communities. As a result, the court's form, practices and the composition of its Indigenous participants can vary substantially from one jurisdiction (or locality) to another.

The Sentencing Dialogue

There may be a number of participants in the sentencing dialogue - the judicial officer, Elders, prosecution and defence counsel, the defendant and family, AJO's, community representatives and, on occasion, the victim. As the conferencing and circle courts formalise Aboriginal participation, they tend to have a wider range of community members involved in the sentencing dialogue (than the Nunga court model).

The dialogue is open and conversational, in which the Elders will often take a leading or significant role. The discussion may touch on many issues: cultural matters, living conditions within the local community, the defendant's offending, background or rehabilitative needs. The information that emerges from the dialogue will often suggest, usually indirectly, the appropriate sentencing approach. In the circle courts Aboriginal influence may be more direct, with the sentencing dialogue generally resulting in the circle making a specific recommendation on penalty.

The Decision-Making Process

The relationship between the judicial officer and the Elders is the foundation of the sentencing dialogue. The relationship is based on an informal consensus, not explicit legal rules. The informal understanding between judicial officer and Elders (or conference/circle members) is the linchpin of the sentencing process in all Aboriginal courts, regardless of model or jurisdiction. That is not to say the parties are equal. It is the judicial officer who determines both the extent of the Elders' influence in the sentencing dialogue and, ultimately, the penalty.

The relationship between the judicial officer and Elders is described in this thesis as *collaborative*, not power-sharing. It is the sentencing process that is shared, not the power to sentence. This description represents the reality of the

sentencing dialogue between the Elders and the judicial officer (the ‘deliberative phase’), whilst recognising the latter’s legal primacy and responsibility for penalty (the ‘sentencing phase’).

The relationship highlights two features peculiar to the Aboriginal court. First, the judicial officer is not the dominant figure throughout sentencing, but plays a lesser role during the sentencing dialogue, allowing the Elders and other Aboriginal members to take a greater part. Second, the position of the Elders involves a delicate balance between the persuasive influence they exercise in sentencing as a result of their status in the Aboriginal community and the criminal law, which accords them no special status in decisions on penalty.

Aboriginal Court Models

This thesis does not suggest one model of Aboriginal court is preferable in all circumstances. It is not the formal structure, but the nature of the relationship between the judicial officer and Elders that is critical to the decision-making process.⁴⁹⁷ Nonetheless, the court’s structure is relevant as it provides the framework for the decision-making process.

The conferencing/circle courts generally have a wider range of participants, whilst the sentencing discussions take considerably longer than in the Nunga court. As a result, they are low volume courts, dealing with only a small number of Aboriginal defendants. However, the lengthy sentencing discussion is well suited to matters where the offences are more serious, or the defendant’s needs more complex. The Nunga court sentencing process is usually shorter, so that a larger number of cases are finalised. They can (and do) deal with serious matters, but are generally more appropriate for ‘general list’ matters which are less complex or serious.⁴⁹⁸

Though each jurisdiction (with the exception of South Australia) operates a single type of Aboriginal court, the different models can be seen as complementary. A combination of both models is ideal,⁴⁹⁹ providing a capacity to consider in depth difficult sentencing matters, whilst allowing access to a greater number of Aboriginal defendants. Ultimately, however, the availability of either type of Aboriginal court (or any at all) is likely to be determined by practicalities of time and resources.

⁴⁹⁷ The exception to this is the Port Lincoln conferencing court, where the magistrate does not take part in the sentencing conference – see p. 47.

⁴⁹⁸ The two are not always synonymous – sometimes a matter that will involve a significant penalty can be straightforward.

⁴⁹⁹ At present, only the Aboriginal court at Port Augusta (SA) operates both types of court at the same location.

What do Aboriginal Courts Achieve?

Aboriginal courts achieve most of their principal aims: Aboriginal participation, a culturally relevant court process, better sentencing information and increased attendance rates by Aboriginal defendants. Each of these aims has a common element - they either result in or derive from the Aboriginal community being better engaged with the court.

Of these objectives, the importance of improved attendance rates is often underestimated. Poor attendance rates by Aboriginal defendants are a common problem throughout the criminal courts which, by delaying proceedings, impacts adversely on all parties – not least of which is the number of Aboriginal defendants held in custody awaiting finalisation at trial or plea.

The reasons for better attendance rates in the Aboriginal courts are not clearly understood. Whilst it is thought Aboriginal court practices and its role as a sentencing court contributes to better appearance rates, there is no data on the issue. Nor is it known to what extent better appearance rates influence the number of court hearings or length of proceedings in the Aboriginal court (though it must shorten proceedings). Better appearance rates are also likely to reduce the number of occasions (and the length of time) Aboriginal court defendants spend in custody – a human and financial benefit to the Aboriginal community, court system and government. Research into the correlation between appearance rates, length of proceedings and custodial remand rates in the Aboriginal and mainstream magistrates' courts is necessary if the actual benefits of higher appearance rates are to be identified.

Aboriginal participation in the sentencing process has other, indirect benefits. For the Aboriginal community, there can be a degree of empowerment derived from the involvement and influence of the Elders, AJO's and (on occasion) other Aboriginal people in the sentencing process. As the criminal justice system affects the lives of so many in the Aboriginal community (particularly their experience of police and prison custody), the involvement of Aboriginal community members in the sentencing process can be seen as an important, if limited, application of self-determination in practice.

There is also a reciprocal benefit for the court from its greater acceptance within the Aboriginal community through the involvement of Aboriginal people in the court process. The Elders provide an important link between the court and Aboriginal community and a different form of authority drawn from their community status. The complementary roles of the judicial officer and Elders lend the court a more subtle authority that encourages compliance and engagement.

However, the Aboriginal court has not been successful in all its aims. First, victim participation in the Aboriginal courts (particularly the Nunga-type courts) has fallen well short of the aim to encourage their involvement. For many types of offences an increased use of Victim Impact Statements (in South Australia), whether written or oral, may be sufficient.⁵⁰⁰ But, in family violence matters a different approach may be necessary if the Aboriginal court is to properly balance concern for rehabilitation of the defendant with the interests of the victim. This remains a crucial issue for the large majority of Aboriginal courts, as at present, only a small number have developed specific family violence programs or strategies.⁵⁰¹

Recent studies suggest that participation by the victim in family violence matters can be beneficial if they are encouraged to speak openly of their experience and the community members involved in the sentencing process take a position clearly disapproving of family violence.⁵⁰² The studies also emphasise the need for adequately funded and culturally appropriate programs for family violence offenders.⁵⁰³ These measures are necessary if Aboriginal courts are to treat family violence matters in a manner that encourages victims to have confidence in the court process and defendants to change their behaviour. It is important that Aboriginal court practice and outcomes in family violence matters be subject to evaluation to assess the court's impact on the victim, defendant and rates of reoffending.

Second, Aboriginal courts do not appear to have reduced the recidivism rates of those it has sentenced. Though this is only one aim amongst a number of Aboriginal court objectives, it is the main focus of government interest in the Aboriginal courts. This is understandable (and perhaps inevitable) given the priority governments place on the need to reduce crime rates. But as a court with limited resources which sentences only a small minority of all Aboriginal defendants, it is an unrealistic measure of success.

A number of studies have concluded that the Aboriginal court process is unlikely to change long-term reoffending behaviour without adequate programs to

⁵⁰⁰ Or its equivalent in other jurisdictions.

⁵⁰¹ Two examples of courts with family violence programs or strategies are the Ngambra Circle Sentencing Court (ACT) and the Barndimalgu Family Violence Court (WA) - see Chapter 5.3 *Family Violence and the Aboriginal Courts*, 117.

⁵⁰² Marchetti (2010) above n 439, 277-8; and Ngambra Circle Sentencing Court (2010) above n 255, 52.

⁵⁰³ Ibid.

address offending behaviour.⁵⁰⁴ Typical of these studies is the comment of the Kalgoorlie Community Court evaluation:

[H]owever, operating without sufficient supports, the one-half to three-quarters of an hour that the client spends within the Community Court is insufficient to result in sustained behavioural change.⁵⁰⁵

The studies recommend that the Aboriginal courts be funded to include programs to address behaviours (alcohol and substance abuse, anger management etc) related to high rates of offending.⁵⁰⁶ This proposal is attractive, but problematic for a number of reasons.

First, if the Aboriginal court does evolve into a form more similar to other problem-solving courts, with rehabilitative programs integrated into the pre- and post-sentencing phases, it would require a significant increase in funding to the Aboriginal court (which, at least in South Australia, has been historically a low cost specialist court). With so many competing interests within the criminal justice portfolio, this is by no means certain to occur.

Second, the integration of pre-sentence programs into the Aboriginal court could undermine or reduce the role of the Elders and other Aboriginal participants if program staff and their recommendations become the primary influence in the decision-making process. But community participation and a program-based approach can be reconcilable if the local Aboriginal community is consulted concerning the design and implementation of the program, as well as during the sentencing process.

Finally, even if rehabilitative programs are widely introduced into the Aboriginal courts, the effect on general recidivism rates is unlikely to be significant whilst only a small minority of all Aboriginal defendants are sentenced by Aboriginal courts. As well, the capacity of the Aboriginal court to reduce reoffending by those it sentences is likely to be limited (particularly in dysfunctional or isolated Aboriginal communities without sufficient services and infrastructure) unless the court is part of a broader approach to address the societal causes of Aboriginal disadvantage.

⁵⁰⁴ Acquilina et al (2009) above n 21; Morgan & Louis (2010) above n 21; CIRCA (2008) above n 22; and Fitzgerald above n 21.

⁵⁰⁵ Acquilina et al (2009) above n 21, 89.

⁵⁰⁶ Acquilina et al (2009) above n 21; Morgan & Louis (2010) above n 21; CIRCA (2008) above n 22; and Fitzgerald (2008) above n 21.

The Significance of Aboriginal Court Sentencing

So, in its present form, the Aboriginal court does not appear to reduce reoffending rates. Even if suggested changes to a more program-based approach occur, the effect of those measures on recidivism remains uncertain. What, then, is the significance of Aboriginal court sentencing? In light of the recent abolition of the Murri courts in Queensland, it is a question of pressing importance.

This thesis has argued the critical feature of the Aboriginal court is the voice it gives to the Aboriginal community in the sentencing process. The practical significance of Aboriginal participation is its capacity to provide better information on the issues often most relevant in sentencing an Aboriginal offender – the defendant's Aboriginality, attitude to the offending, rehabilitative needs, level of family support and the conditions within the local Aboriginal community.

Of course, these factors may be considered when Aboriginal offenders are sentenced in mainstream criminal courts. In fact, it is from mainstream courts that most (appellate) case law on Aboriginality in sentencing is derived. But the imperative to 'get through the list' in the mainstream magistrates' court means it is not always feasible to fully explore the issue of Aboriginality. These disadvantages are difficult to overcome, even where counsel or the judicial officer are knowledgeable in the social and cultural issues relevant to the local Aboriginal community and the defendant. To these problems, the Aboriginal court brings a different answer - the involvement of the Elders and other Aboriginal community members' presenting a simple and direct means to provide the court with better sentencing information.

This may seem a modest outcome, but it is a significant one nonetheless. Whilst it may be said 'there's always a story behind offending',⁵⁰⁷ for many Aboriginal people language, culture, and the more general problems of limited time and the volume of cases, are barriers to their 'story' being heard.⁵⁰⁸ It is of fundamental importance that a sentencing court has adequate information concerning the offending, the offender and the extent of their family and community support to determine the appropriate penalty. For an Aboriginal offender that will often involve a consideration of the relevance of their Aboriginality. Not to do so may lead to an Aboriginal defendant being sentenced without a genuine

⁵⁰⁷ Judge Marshall Irwin (Chief Magistrate, Queensland) 'Summarising Courts Alternatives' (Paper presented to the Queensland Law Society, Brisbane, September 2008) 2.

⁵⁰⁸ Cultural and linguistic disadvantage was found to be a key cause of the alienation of many Aboriginal people from the criminal justice system in separate reports by the Queensland Criminal Justice Commission (1996) above n 399 and Western Australian Law Reform Commission (2005) above n 48.

understanding of their personal and social circumstances. This is less likely to occur in an Aboriginal court.

It must be said that these conclusions are drawn from research that is patchy. There is substantial data on the type of information produced by the Aboriginal court sentencing dialogue and the role of the Elders in that process. The studies agree the Aboriginal court process generally provides better (more thorough and diverse) sentencing information.⁵⁰⁹ But there is much less research on how the court uses that information or the influence of the Elders on decision-making. The recent Murri court study concluded the information produced by the sentencing process (particularly the input of the Elders) had a 'significant bearing' on decision-making, often raising issues which otherwise may not have been known to the court.⁵¹⁰ No other study has so far examined this aspect of Aboriginal court decision-making. Nonetheless, these findings by the Murri court study have some support from the literature on the influence of the 'sentencing conversation' on decision-making.⁵¹¹

There is also little research on how the Aboriginal courts treat the issue of Aboriginality and the role it plays in their decision-making. But, given the importance of the court's aim of cultural relevance and the prominence of the Elders and other Aboriginal community members in providing sentencing information, it is reasonable to conclude the Aboriginal court places a strong emphasis on Aboriginality as a factor in sentencing. This too, is my observation from involvement in many matters in the South Australian Aboriginal courts.⁵¹²

Surprisingly, this issue has received little attention in the studies and literature, perhaps because the importance of Aboriginality as a sentencing consideration in the Aboriginal court is often so evident that it passes without explicit recognition. It is an issue that deserves further research to examine how the involvement of Aboriginal community members in sentencing influences the consideration of Aboriginality and, more generally, decision-making.

⁵⁰⁹ Tomaino (2005) above n 16, 5-6; Harris (2006) above n 4, 46-8; Borowski (2010) above n 21, 41; and Morgan & Louis (2010) above n 21, 124.

⁵¹⁰ Morgan & Louis (2010) above n 21, 124; see also the comments of King, who drew a similar conclusion in 'Judging, judicial values and judicial conduct on problem-solving courts, Indigenous sentencing courts and mainstream courts' (2010) above n 195, 143.

⁵¹¹ Most significantly, the writings of Aboriginal court magistrates Auty and Hennessy – see especially, Auty (2006) above n 357, 128; and Annette Hennessy, 'Indigenous Sentencing in Queensland Magistrates' Court – Murri Court' (Paper presented to the Law Council of Australia Rule of Law Conference, Brisbane, August 2007).

⁵¹² As a defence counsel (1999-2007) – see Chapter 1.1 *My Background*, 4.

Conclusion

Now in their second decade, the benefits and limitations of contemporary Aboriginal courts have become clear. Aboriginal courts are not an easy solution to the complex problems of stubbornly high rates of Aboriginal recidivism and imprisonment. But they do provide a genuine degree of engagement for Aboriginal people in the court and Aboriginal defendants have better rates of appearance in the Aboriginal court.

However, this thesis has argued the most significant and practical benefit of the Aboriginal court is, through the role of Aboriginal people in the sentencing process, its capacity to properly appreciate the relevance of Aboriginality to the defendant's offending, lifestyle and future needs. The Aboriginal court offers what is often lost in the busy list of the average magistrates' court – the time and means to overcome barriers of language, culture and social disadvantage so that Aboriginal people have the opportunity to be heard and understood in the sentencing process.

APPENDIX 1. TABLE OF ABORIGINAL COURTS - 1 JANUARY 2013

JURISDICTION	MODEL	LOCALITY	DATE OF COMMENCEMENT	LEGISLATION, REGULATIONS & GUIDELINES
Australian Capital Territory	Circle Sentencing Court	Ngambra Circle Sentencing Court	May 2004	Practice Directions, 1 December 2007 and general sentencing provisions in the <i>Crimes (Sentencing) Act 2005 (ACT)</i>
New South Wales	Circle Sentencing Court	Nowra Circle Court Dubbo Circle Court Brewarinna Circle Court (on circuit) Bourke Circle Court Kempsey Circle Court Armidale Circle Court Lismore Circle Court Mt Druitt Circle Court Walgett Circle Court (on circuit) Moree Circle Court Ulladulla Circle Court Wellington Circle Court Coonamble Circle Court Blacktown Circle Court	February 2002 August 2003 February 2005 March 2006 April 2006 April 2006 March 2006 November 2006 June 2006 2010 2010 2010 2010 2010	<i>Criminal Procedure Regulation 2005 (NSW)</i> and the <i>Criminal Procedure Act 1986 (NSW)</i>
Northern Territory	The Darwin court (a hybrid of the Nunga and Circle	Darwin Community Court	April 2005	Darwin Community Court Guidelines and the <i>Sentencing</i>

	court models) Circuit courts which preceded the Darwin Community Court, but now generally follow Community Court procedure	Wadeye Daly River Maningrida Jabiru Galiwinku Numbulwar Nhulunbuy Alyangula Oenipelli Ngulu Milikapiti Pirlamgimpi		<i>Act 1995 (NT)</i> , in particular, Section 104A
Queensland	Nunga Court – to cease operation as funding cancelled in September 2012	Brisbane Murri Court Rockhampton Murri Court (for Aboriginal people, Torres Strait and Pacific Islanders) Mt Isa Murri Court Townsville Murri Court Caboolture Murri Court Cherbourg Murri Court Ipswich Murri Court Coen Murri Court Cleveland Murri Court Caloundra Murri Court Cairns Murri Court St George Murri Court Mackay Murri Court Inala/Richlands Murri Court	August 2002 June 2003 Restarted December 2005 March 2006 March 2006 November 2006 February 2007 March 2007 May 2007 June 2007 January 2008 June 2008 November 2008 March 2009	<i>Juvenile Justice Act 1992 (Qld)</i> and the <i>Penalties and Sentences Act 1992 (Qld)</i> , in particular Section 9(2)(p)
South Australia	Nunga Court	Port Adelaide Nunga Court	June 1999	Section 6; and

	Conference Court	Murray Bridge Nunga Court Ceduna Nunga Court Port Augusta Aboriginal Sentencing Court Port Lincoln Aboriginal Court	January 2001 July 2003 - c.2005 (now defunct) July 2001 (Nunga Court 2001-08, Conferencing Court since) November 2007	Section 9C, <i>Criminal Law (Sentencing) Act 1988</i> (SA)
Victoria	Nunga Court	Shepparton Koori Court Broadmeadows Koori Court Warrnambool Koori Court (circuit includes Hamilton and Portland Courts) Mildura Koori Court Moe/Latrobe Valley Bairnsdale Swan Hill Latrobe Valley County Court	October 2002 April 2003 January 2004 July 2005 May 2006 March 2007 July 2008 February 2009	<i>Magistrates Court (Koori Court) Act 2002</i> (Vic) and the <i>Children and Young Persons (Koori Court) Act 2004</i> (Vic) amending the <i>Children and Young Persons, Act 2004</i> (Vic) <i>County Court Amendment (Koori Court) Act 2008</i>
Western Australia	Nunga Court Circuit court using Nunga Court processes (open to non-Indigenous offenders)	Wiluna Aboriginal Community Court Yandeyarra Aboriginal Community Court Norseman Community Court Kalgoorlie-Boulder Community Court Barndimalgu (Geraldton)	2001 September 2003 February 2006 November 2006 August 2007	<i>Sentencing Act 1995</i> (WA) – general sentencing provision

		Family Violence Court		
Tasmania			No Aboriginal Courts in use	

Explanatory Note: I have included in this table, current to 1 January 2013, any criminal courts in Australia which use Aboriginal Court-type procedures on a regular basis. Also included are courts that were previously operating, but have now ceased (or will soon do so).

Acknowledgement : In compiling this table, I have borrowed heavily from the list, current to 12 May 2009, in Elena Marchetti (2009) *Indigenous Sentencing Courts*, Indigenous Justice Clearinghouse, Brief 5, December 2009, Department of Justice and Attorney-General: Sydney.

APPENDIX 2. LEGISLATION

2.1 CRIMINAL LAW (SENTENCING) ACT 1988 (SA) - SECTION 6

6—Determination of [sentence](#)

For the purpose of determining [sentence](#), a [court](#)—

- (a) is not bound by the rules of evidence; and
- (b) may inform itself on matters relevant to the determination as it thinks fit; and
- (c) must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.

2.2 CRIMINAL LAW (SENTENCING) ACT 1988 (SA) – SECTION 9C

9C—Sentencing of Aboriginal defendants

(1) Before sentencing an Aboriginal defendant, [the court](#) may, with the defendant's consent, and with the assistance of an [Aboriginal Justice Officer](#)—

(a) convene a sentencing conference; and

(b) take into consideration views expressed at the conference.

(2) A sentencing conference must comprise—

(a) the defendant and, if the defendant is a child, the defendant's parent or guardian; and

(b) the defendant's legal representative (if any); and

(c) the prosecutor; and

(d) if the victim chooses to be present at the conference—the victim, and, if the victim so desires, a person of the victim's choice to provide assistance and support; and

(e) if the victim is a child—the victim's parent or guardian.

(3) A sentencing conference may also include (if [the court](#) thinks the person may contribute usefully to the sentencing process) one or more of the following:

(a) a person regarded by the defendant, and accepted within the defendant's Aboriginal community, as an Aboriginal elder;

(b) a person accepted by the defendant's Aboriginal community as a person qualified to provide cultural advice relevant to sentencing of the defendant;

(c) a member of the defendant's [family](#);

(d) a person who has provided support or counselling to the defendant;

(e) any other person.

(4) A person will be taken to be an Aboriginal person for the purposes of this section if—

(a) the person is descended from an Aboriginal or Torres Strait Islander; and

(b) the person regards himself or herself as an Aboriginal or Torres Strait Islander or, if the person is a young child, at least one of the parents regards the child as an Aboriginal or Torres Strait Islander; and

(c) the person is accepted as an Aboriginal or Torres Strait Islander by an Aboriginal or Torres Strait Islander community.

(5) In this section—

"Aboriginal Justice Officer" means a person employed by the South Australian [Courts](#) Administration Authority whose duties include—

(a) assisting [the court](#) in sentencing of Aboriginal persons by providing advice on Aboriginal society and culture; and

(b) assisting [the court](#) to convene sentencing conferences under this section; and

(c) assisting Aboriginal persons to understand [court](#) procedures and sentencing options and to comply with [court](#) orders;

"close personal relationship" means the relationship between 2 adult persons (whether or not related by [family](#) and irrespective of their gender) who live together as a couple on a genuine domestic basis, but does not include—

(a) the relationship between a legally married couple; or

(b) a relationship where 1 of the persons provides the other with domestic support or personal care (or both) for fee or reward, or on behalf of some other person or an organisation of whatever kind;

Note—

Two persons may live together as a couple on a genuine domestic basis whether or not a sexual relationship exists, or has ever existed, between them.

"domestic partner"—a person is the [domestic partner](#) of another if he or she lives with the other in a [close personal relationship](#);

"family" includes—

(a) the defendant's [spouse](#) or [domestic partner](#); and

(b) any person to whom the defendant is related by blood; and

(c) any person who is, or has been, a member of the defendant's household; and

(d) any person held to be related to the defendant according to Aboriginal or Torres Strait Islander kinship rules and observances;

"spouse"—a person is the [spouse](#) of another if they are legally married.

2.3 SENTENCING ACT 1995 (NT) - SECTION 104A

Information on Aboriginal customary law and community views

(1) This section applies in relation to the receipt of information about any of the following matters by a court before it passes a sentence on an [offender](#):

(a) an aspect of [Aboriginal customary law](#) (including any punishment or restitution under that law) that may be relevant to the [offender](#) or the [offence](#) concerned;

(b) views expressed by members of an [Aboriginal community](#) about the [offender](#) or the [offence](#) concerned.

(2) The court may only receive the information:

(a) from a party to the proceedings; and

(b) for the purposes of enabling the court to impose a proper sentence or to make a proper order for restitution or compensation (as mentioned in section 104(1) and (2)).

(3) In addition, and despite any other provisions, the court may only receive the information if it is presented to the court as follows:

(a) the party to the proceedings that wishes to present the information (*the first party*) gives notice about the presentation to each of the other parties to the proceedings;

(b) the notice outlines the substance of the information;

(c) the notice is given before the first party makes any submission about sentencing the [offender](#);

(d) each of the other parties has a reasonable opportunity to respond to the information;

(e) the information is presented to the court in the form of evidence on oath, an affidavit or a statutory declaration.

(4) In this section:

"Aboriginal community" includes a community of Torres Strait Islanders.

"Aboriginal customary law" includes a customary law of the Torres Strait Islanders.

2.4 PENALTIES AND SENTENCES ACT 1992 (QLD) - SECTION 9(2)p

Section 9(2)

In sentencing an offender, a court must have regard to -

(p) if the offender is an Aboriginal or Torres Strait Islander person - any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender, including, for example—

(i) the offender's relationship to the offender's community; or

(ii) any cultural considerations; or

(iii) any considerations relating to programs and services established for offenders in which the community justice group participates;

2.5 MAGISTRATES' COURT ACT 1989 (VIC) – SECTIONS 4D, 4F & 4G

4D Establishment of Koori Court Division

4D. Establishment of Koori Court Division

(1) The Court has a Koori Court Division.

(2) The Koori Court Division has such of the powers of the Court as are necessary to enable it to exercise its jurisdiction.

(3) Despite anything to the contrary in this Act, the Koori Court Division may only sit and act at a venue of the Court specified by the Chief Magistrate by notice published in the Government Gazette.

(4) The Koori Court Division must exercise its jurisdiction with as little formality and technicality, and with as much expedition, as the requirements of this Act and the [Sentencing Act 1991](#) and the proper consideration of the matters before the Court permit.

(5) The Koori Court Division must take steps to ensure that, so far as practicable, any proceeding before it is conducted in a way which it considers will make it comprehensible to-

(a) the accused; and

(b) a family member of the accused; and

(c) any member of the Aboriginal community who is present in court.

(6) Subject to this Act, the regulations and the rules, the Koori Court Division may regulate its own procedure.

4F Circumstances in which Koori Court Division may deal with certain offences

4F. Circumstances in which Koori Court Division may deal with certain offences

(1) The Koori Court Division only has jurisdiction to deal with a proceeding for an offence (other than an offence constituted by a contravention of a sentence imposed by it) if-

(a) the accused is Aboriginal; and

(b) the offence is within the jurisdiction of the Magistrates' Court,
other than-

(i) a sexual offence as defined in [section 6B\(1\)](#) of the [Sentencing Act 1991](#); or

(ii) a contravention of a family violence intervention order or a family
violence safety notice under the [Family Violence Protection Act 2008](#)
or an offence arising out of the same conduct as that from which the
contravention arose; or

(iii) a contravention of a personal safety intervention order under the
[Personal Safety Intervention Orders Act 2010](#) or an offence arising out
of the same conduct as that out of which the
contravention arose; and

(c) the accused-

(i) intends to plead guilty to the offence; or

(ii) pleads guilty to the offence; or

(iii) intends to consent to the adjournment, under [section 59](#) of the
[Criminal Procedure Act 2009](#), of the proceeding to enable him or her to
participate in a diversion program; and

(d) the accused consents to the proceeding being dealt with by the Koori
Court Division.

(2) Subject to and in accordance with the rules-

(a) a proceeding may be transferred to the Koori Court Division, whether
sitting at the same or a different venue; and

(b) the Koori Court Division may transfer a proceeding (including a
proceeding transferred to it under paragraph (a)) to the Court,
sitting other than as the Koori Court Division, at the same or a
different venue.

(3) Despite anything to the contrary in this Act, if a proceeding is
transferred from one venue of the Court to another, the transferee venue is
the proper venue of the Court for the purposes of this Act.

4G Sentencing procedure in Koori Court Division

4G. Sentencing procedure in Koori Court Division

(1) This section applies to the Koori Court Division when it is considering which sentence to impose on an accused.

(2) The Koori Court Division may consider any oral statement made to it by an Aboriginal elder or respected person.

(3) The Koori Court Division may inform itself in any way it thinks fit, including by considering a report prepared by, or a statement or submission prepared or made to it by, or evidence given to it by-

(a) a Koori Court officer employed as an Aboriginal justice worker; or

(b) a community corrections officer appointed under Part 4 of the [Corrections Act 1986](#); or

(c) a health service provider; or

(d) a victim of the offence; or

(e) a family member of the accused; or

(f) anyone else whom the Koori Court Division considers appropriate.

(4) Nothing in this section affects the requirement to observe the rules of natural justice.

(5) This section does not limit-

(a) any other power conferred on the Court by or under this or any other Act; or

(b) any other specific provision made by or under this or any other Act for the making of any report, statement or submission, or the giving of any evidence, to the Court for the purpose of assisting it in determining sentence.

(6) To avoid doubt, [Part 3.10](#) of the [Evidence Act 2008](#) does not apply to the Koori Court Division in considering the sentence to impose under this section, unless the Koori Court Division directs, in accordance with [section 4\(2\)](#) of the [Evidence Act 2008](#), that it applies.

APPENDIX 3. REGULATIONS

CRIMINAL PROCEDURE REGULATION 2010 (NSW) –

REGULATIONS 35 - 46

35. Objectives of the program

The objectives of the [program](#) are as follows:

- (a) to include members of Aboriginal communities in the sentencing process,
- (b) to increase the confidence of Aboriginal communities in the sentencing process,
- (c) to reduce barriers between Aboriginal communities and the courts,
- (d) to provide more appropriate sentencing options for Aboriginal [offenders](#),
- (e) to provide effective support to [victims](#) of offences by Aboriginal [offenders](#),
- (f) to provide for the greater participation of Aboriginal [offenders](#) and their [victims](#) in the sentencing process,
- (g) to increase the awareness of Aboriginal [offenders](#) of the consequences of their offences on their [victims](#) and the Aboriginal communities to which they belong,
- (h) to reduce recidivism in Aboriginal communities.

36. Eligibility to participate in program

A person is eligible to participate in the [program](#) only if:

- (a) the person is an [Aboriginal person](#), and
- (b) the person is an [offender](#), and
- (c) the person has been assessed as suitable for participation in the [program](#) by the [Aboriginal Community Justice Group](#) for the [declared place](#) at a meeting convened in accordance with Division 2, and
- (d) the person enters into an agreement to participate in the [program](#), and

(e) the court considers that the facts, as found by the court, or as pleaded to by the person, in connection with the offence, together with the person's antecedents and any other information available to the court, indicate that it is likely that the person will be required to serve, or be subject to, a [relevant sentence](#).

(2) In this [clause](#),
"relevant sentence" means:

(a) any [sentence of imprisonment](#), including a suspended sentence and a sentence the subject of a periodic detention order, intensive correction order or home detention order under the [Crimes \(Sentencing Procedure\) Act 1999](#), or

(b) a community service order under the [Crimes \(Sentencing Procedure\) Act 1999](#), or

(c) an order providing for an [offender](#) to enter into a good behaviour bond under the [Crimes \(Sentencing Procedure\) Act 1999](#).

37. Measures that constitute the circle sentencing program

The [program](#) is constituted by the following measures:

(a) A [participating court](#) refers an [offender](#) for participation in a circle sentencing intervention [program](#) by making a [program participation order](#) and the [offender](#) enters into an agreement to participate in the [program](#).

(b) The [Project Officer](#) for the [declared place](#), in consultation with the [presiding Magistrate](#), convenes a [circle sentencing group](#) for the [referred offender](#).

(c) The [circle sentencing group](#) meets:

(i) to determine an appropriate plan (if any) for the treatment or rehabilitation of the [referred offender](#), and

(ii) to recommend an appropriate sentence for the [offender](#).

(d) The [offender](#) complies with the requirements of an [intervention plan](#) (if any) determined by the [circle sentencing group](#).

38. Convening of circle sentencing group

A participating court that makes a [program participation order](#) in respect of a [referred offender](#) must notify the [Project Officer](#) for the [declared place](#) of the order.

(2) The [Project Officer](#) must convene a [circle sentencing group](#) for the [referred offender](#) as soon as practicable after being notified of the making of a [program participation order](#) in respect of the [offender](#).

(3) A [circle sentencing group](#) must be convened at a location approved by the [presiding Magistrate](#).

39. Constitution of circle sentencing group

(1) A [circle sentencing group](#) for a [referred offender](#) must include the following persons:

(a) the [presiding Magistrate](#),

(b) the [offender](#),

(c) the [offender](#)'s legal representatives (unless the [offender](#) directs otherwise),

(d) the prosecutor,

(e) the [Project Officer](#),

(f) at least 3 [Aboriginal persons](#) (but no more than the maximum number of persons specified in the [guidelines](#)) chosen by the [Project Officer](#), being persons who the [Project Officer](#) is satisfied belong to the Aboriginal community of which the [offender](#) claims to be part or with which the [offender](#) claims to have a close [association](#) or kinship.

(2) A [circle sentencing group](#) convened by a [Project Officer](#) may (but need not) include the following persons:

(a) any [victim](#) of the [offender](#)'s offence who consents to participate in the group,

(b) a support person for any such [victim](#) chosen by the [victim](#),

(c) a support person for the [offender](#) chosen by the [offender](#),

(d) any other person or persons chosen by the [Project Officer](#), but only with the consent of the [offender](#) and, if a [victim](#) is participating, the consent of the [victim](#).

(3) A member of a [circle sentencing group](#) may object to the participation in the group of a person chosen by the [Project Officer](#) for the purposes of subclause (1) (f) or (2) (d). The [presiding Magistrate](#) is to determine any such objection.

(4) The [presiding Magistrate](#) may invite any other person of a class specified by the [guidelines](#) to attend a [circle sentencing group](#).

(5) The [guidelines](#) may specify whether that person may or may not participate in the [circle sentencing group](#).

40. Functions of circle sentencing groups

The functions of a [circle sentencing group](#) are as follows:

(a) to determine an appropriate plan for the treatment or rehabilitation of a [referred offender](#),

(b) to recommend an appropriate sentence for the [offender](#),

(c) to provide support or other assistance to the [offender](#) in completing the [program](#) or an [intervention plan](#) arising out of the [program](#),

(d) such other functions as may be imposed or conferred on the group by this Division or the [guidelines](#).

(2) Without limiting subclause (1) (a), a [circle sentencing group](#) may require a [referred offender](#) to comply with a plan that includes requirements relating to any one or more of the following:

(a) the conduct and good behaviour of the [offender](#),

(b) attendance for counselling or other treatment,

(c) the supervision of the [offender](#) for the duration of the plan,

(d) residence, [association](#) with other persons or attendance at specified locations,

(e) involvement in activities, courses, training or employment for the purpose of promoting the re-integration of the [offender](#) into the community,

(f) such other matters as the group considers would promote the treatment or rehabilitation of the [offender](#).

41. Exclusions of persons from circle sentencing groups

(1) The [presiding Magistrate](#) may exclude a person (other than the [offender](#) or a [victim](#)) from participation in a [circle sentencing group](#) if the Magistrate is satisfied that:

- (a) the person has a conflict of interest that would prevent the person from impartially discharging his or her obligations as a member of the group, or
- (b) the behaviour of the person is disrupting the orderly conduct of a meeting of the group.

(2) The Magistrate may, with the agreement of the other members of the group, invite another person to replace a person who has been excluded from participating in the group under subclause (1). However, if the other members do not agree, the [Project Officer](#) is to convene a new [circle sentencing group](#) for the [offender](#) excluding any such person.

(3) A person who is not a member of the [circle sentencing group](#) may not attend a meeting of the group unless all of the following persons consent:

- (a) the [presiding Magistrate](#),
- (b) the [offender](#),
- (c) the [victim](#), if a [victim](#) is participating in the group.

42. Termination of circle sentencing group meeting

(1) The [presiding Magistrate](#) may terminate a meeting of a [circle sentencing group](#) if the Magistrate is satisfied that the behaviour of a member of the group is disrupting the orderly conduct of the meeting.

(2) If a meeting is terminated, the Magistrate may direct the [Project Officer](#) to convene a new [circle sentencing group](#) or the Magistrate may return the matter to the [participating court](#).

43. Victims to be heard

If a [victim](#) agrees to participate in a [circle sentencing group](#), the [victim](#) must be given an opportunity to express his or her views about the [offender](#) and the nature of the offence committed against the [victim](#).

44. Procedure generally

- (1) The procedure for the calling of meetings of a [circle sentencing group](#) and the conduct of business at those meetings is, subject to this Division and the [guidelines](#), to be as determined by the group.
- (2) The [presiding Magistrate](#) is to preside at a meeting of a [circle sentencing group](#).
- (3) The quorum for a meeting of a [circle sentencing group](#) is all of the members of the group (other than members excluded under [clause 41](#)).
- (4) A decision supported by a majority of the members in a meeting of the [circle sentencing group](#) is to be treated as a decision of the whole group.

45. Records of meetings

- (1) The [presiding Magistrate](#) must make a record (or cause a record to be made) of the following matters in connection with a [circle sentencing group](#):
 - (a) the name, address and date of birth of the [referred offender](#),
 - (b) the nature of the offence,
 - (c) the name of the [Project Officer](#),
 - (d) the names of the other members of the group and the capacity in which they participated,
 - (e) the dates on, and the locations at, which the [circle sentencing group](#) met,
 - (f) particulars of any [intervention plan](#) determined, or sentence recommended, by the group,
 - (g) the major points of discussion of the group,
 - (h) any other matter that the Magistrate considers relevant.
- (2) A copy of a record made under subclause (1) must be kept in the [participating court](#)'s file for the proceedings in respect of which a [referred offender](#) was referred.

46. Reconvening of the circle sentencing group

- (1) The [Project Officer](#) may, in consultation with the [presiding Magistrate](#), reconvene a [circle sentencing group](#) after it has determined an [intervention plan](#) or recommended an appropriate sentence (or both) for a [referred offender](#) for the purpose of reconsidering any matter it had previously determined or recommended.
- (2) The members of the reconvened group should, so far as is reasonably possible, be the same members who participated in the original [circle sentencing group](#).
- (3) A [circle sentencing group](#) cannot be reconvened if:
 - (a) the period of 12 months has elapsed since the matter to be reconsidered was originally determined or recommended by the group, or
 - (b) the court that referred the [referred offender](#) to the group has imposed a sentence on the [offender](#) for the offence (whether or not in the terms recommended by the group).

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