

Cultural Safety in the Criminal Justice System: Aboriginal Community Sentencing  
Courts<sup>1</sup>

When in contemplation and reflection on my own performance in Court as a Judge, the issues that cause me to pause, are not usually those of the law or legal conundrums about the intersection of section 27 and 32 of the Criminal Code. It is the human interactions with those in the court room. The directions, questions and court room management, where I think, “I could have done that better”.

There is one incident which I have frequently returned to in my reflection, where a defendant in custody, present in the dock, verbally abused his lawyer in an aggressive manner.

He insulted their physical appearance, their legal acumen, demeaned them as a person, and ended with the ultimate insult (for those of you in the legal aid world) “I want a real lawyer”.

I didn’t pull him up. I didn’t stop the Court and address him. I was probably thinking about not engaging, in case it made him worse, or indeed turned his abuse on me, about the heavy list and large number of matters that needed to be managed and mentioned. I was not thinking about the safety of the lawyer or indeed of others in the Court. The weight of those other matters seemed more pressing on me at the time. And in not doing so, I missed an opportunity to reinforce a strong message, that this lawyer had a right to be respected in their workplace, and by not sending that individual message I didn’t send a message to all those other lawyers, defendants, family members, media representatives in the room, that in this court room, there is an expectation of safety and that the Court will reinforce that.

Because a court room should be a safe place. What we are often dealing with inside the courtroom are things occurring outside the court where people were not safe. In

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<sup>1</sup> “Smart and Safe – cultural safety in the criminal justice system: Aboriginal Community Sentencing Courts” a paper delivered by Chief Judge Elizabeth Morris AM at the 19<sup>th</sup> Biennial Criminal Lawyers Association of the Northern Territory Conference, Bali, 24 June 2024

order to elicit the best evidence, to make the best determination, to focus the lens of our legal system and its presumptions, over emotions, actions, trauma there is a need to provide a safe environment inside that court room.

For many Aboriginal people, the court room has not been a place where they feel safe. This is despite the factors that might be put in place with the best of intentions; a security officer, the reassurance of a lawyer, the politeness of a Judge, the assurance that the law treats all who come before it equally and that 'justice is blind'.

I speak about court room safety to introduce a transformative concept within our criminal justice system: cultural safety. As we endeavour to uphold justice and fairness, it is imperative to understand and integrate cultural safety into our practices. I want to particularly focus on the Aboriginal community sentencing courts, which are designed and developed to exemplify cultural safety in action.

Cultural safety is more than just cultural awareness or sensitivity. It is a proactive approach that ensures respect, understanding, and empowerment across different cultural interactions. It acknowledges the historical and social contexts affecting individuals, especially those from marginalized communities, and strives to create environments where they feel safe to express their identities without fear of judgment or discrimination. In our context, this means creating a judicial system that respects and understands the cultural identities of Aboriginal peoples and works towards their empowerment.

### **Understanding Cultural Safety**

The concept of cultural safety originated in the healthcare sector in New Zealand in the late 1980s. It was developed by Dr. Irihapeti Ramsden, a Māori nurse and educator, in response to the persistent health disparities faced by Māori people and the inadequacies of the existing cultural competency frameworks to address these issues.

These disparities are rooted in colonial history, systemic racism, and social inequities. Traditional cultural competency frameworks, which primarily focused on learning about other cultures and becoming sensitive to cultural differences, were insufficient to address the systemic and structural issues contributing to these health disparities.

Dr. Irihapeti Ramsden introduced the concept of cultural safety as part of her work in nursing education. Her goal was to create a framework that not only acknowledged the importance of understanding cultural differences but also addressed power imbalances, systemic inequities, and the need for a more profound, self-reflective approach to cross-cultural interactions.

Ramsden brought together an appreciation of Florence Nightingale's achievements and legacy and the ongoing obligation to provide health services that are respectful and responsive to the humanity of the people needing those services. Of Nightingale, she said, "[i]t would seem appropriate to remember the woman who set up the British model of nursing which still underpins nursing in this country to some extent. We owe respect to Florence Nightingale".<sup>2</sup> Her paper offered a revision of Nightingale's historical 'noblesse oblige' nursing ideology, where privileged people provided care to 'others' irrespective of nationality, culture, creed, colour, age, sex, political, religious belief or social status. To facilitate a reduction in health inequities and improve health outcomes for Māori, Ramsden recommended that the unique world views of Māori as tangata whenua (people of the land) and the new settlers, tauwiwi (non-Māori), be established and recognised. She reiterated that "the reintegration of body, soul and the environment as envisaged in the Ottawa Charter are part of the Māori reality"

Within her speech antiquated notions of power and relationships in nursing were reframed and contemporised with a simple but powerful interchange of words.

Only one word needs to be altered in order to suitably change the old nursing philosophy to become appropriate for the end of the 20<sup>th</sup> century and onward to the 21<sup>st</sup>. That word is *irrespective*. By adjusting it to become *respect-ive*, the objective of nurses to give appropriate service delivery can be achieved. Nurses provide care, *respective* of the nationality of human beings, the culture of human beings, the age, the sex, the political and the religious beliefs of other members of the human race.

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<sup>2</sup> Ramsden, I (1990a). Moving on: A graduation address. *Nursing Praxis in New Zealand*, 5(3), 34-36

Essentially, Ramsden pivots on the word “irrespective” simply shifting it to “respective”.<sup>3</sup>

Cultural safety shifts the focus from simply learning about other cultures (cultural awareness) or developing positive attitudes towards different cultures (cultural sensitivity) to examining how power dynamics, systemic structures, and personal biases affect interactions and outcomes. It emphasizes the importance of:

- **Self-Reflection:** Encouraging individuals to reflect on their own cultural identity, biases, and assumptions.
- **Power Dynamics:** Acknowledging and addressing power imbalances in interactions, particularly between dominant and marginalized groups.
- **Systemic Change:** Recognizing and addressing systemic and institutional structures that perpetuate inequities.
- **Empowerment:** Creating environments where individuals from marginalized cultures feel safe to express their identities and have their cultural needs respected.

Cultural safety has become a key component of nursing curricula in New Zealand, where students are taught to critically reflect on their own cultural identities and understand the impact of their actions on patients from different cultural backgrounds. The goal was to create a healthcare environment where Māori patients, and other marginalized groups, felt respected, valued, and safe.

While cultural safety originated in the healthcare sector, its principles have since been adopted and adapted for use in various fields, including education, social services, and the criminal justice system. In each of these sectors, cultural safety seeks to create environments that are respectful, inclusive, and free from discrimination, ultimately leading to better outcomes for individuals from diverse cultural backgrounds.

### **Relevance to the Criminal Justice System**

In the criminal justice system, cultural safety involves ensuring that interactions with Aboriginal peoples and other marginalized groups are respectful, equitable, and free

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<sup>3</sup> Hunter, K., Roberts, J., Foster, M., & Jones, S. (2021). Dr Irihapeti Ramsden’s powerful petitions for cultural safety. *Nursing Praxis in Aotearoa New Zealand*, 37(1), 25-28

from bias. This includes recognizing the historical and social contexts that influence their lives and addressing the systemic issues that contribute to their over-representation in the justice system. Implementing cultural safety in this context aims to create a more just and fair system where all individuals feel safe and respected.

For non-Aboriginal individuals, cultural safety involves understanding the deep-rooted histories and ongoing challenges faced by Aboriginal communities. It moves beyond tokenistic gestures to create meaningful, respectful, and safe interactions.

Cultural safety requires continuous education and reflection. It challenges us to examine our own prejudices and the systemic structures that perpetuate inequality. In the context of the criminal justice system, cultural safety means ensuring that Aboriginal people are treated with respect and their unique cultural contexts are considered in every aspect of legal proceedings.

### **The Role of Aboriginal Community Sentencing Courts**

The building of Aboriginal community sentencing courts in the NT is, we hope, an example of culturally safe practices within the criminal justice system. These courts recognize the importance of Aboriginal cultural practices and incorporate them into the sentencing process. They aim to reduce the over-representation of Aboriginal people in the criminal justice system by providing a more culturally appropriate and supportive environment.

I use the term 'building the community court' purposively. On a circuit court in Borroloola a few years ago, we were accompanied by a media crew, who were doing a story about the delivery of justice in the remote community. Upon arrival at the space where Court is held, we set up the folding tables, we moved the chairs around, we made sure the coffee machine had power, the court staff and I tried to create a space that would work and that would fit all the participants, and that we had to build ourselves. The media crew remarked on it, and I reflected that we have to 'build Court' each time we go. When developing the latest Northern Territory concept of community sentencing, I wanted to reflect that we were building a court together with the community that would meet the needs of that community. Not having the standard required English court historical infrastructure that we had to fit ourselves around, was something we could use as a strength.

The fundamental principles of these courts are outlined in the legislation and the Practice Directions. They include:

- Representation and Participation: Ensuring that Aboriginal elders and community representatives are actively involved in the sentencing process. This not only provides cultural insights but also fosters a sense of ownership and empowerment within the community. In a practical sense this is achieved by:
  - Participation of Law and Justice Group members in the court sitting (their authority is recognised and supported by the court by them sitting with the Judge and actively contributing to proceedings).<sup>4</sup>
  - The provision of the Aboriginal Experience Report to the court by the Law and Justice Group members. This report is prepared by the members and is drawn from their local and cultural knowledge, based on meeting with the offender and victim (if they are taking part) and another relevant parties.<sup>5</sup> It is an opportunity to have a voice in court sentencing proceedings on behalf of their communities on sentencing matters that affect them as victims, offenders or the broader community.
  - Enabling the display and creation of art and/or artefacts as chosen by the Law and Justice Group members for court <sup>6</sup> (also offering a grant to develop art or artefacts for use specifically in the community court courtroom).
  - Providing for members to name the community court in their community should they wish to do so. <sup>7</sup>
  - Considering alternative locations for the sitting of Community Court on community at the suggestion of the Law and Justice Group.<sup>8</sup>
  - Contact before Court by the Community Court Registrar to ask about these types of practical matters.

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<sup>4</sup> S107A and s107C *Sentencing Act 1995* NT; s80A and of the *Youth Justice Act 2005* NT Local Court Practice Direction (LCPD) 5I (54) and Youth Justice Practice Direction (YJPD) 4CA (52),

<sup>5</sup> S107B & s107E(2) *Sentencing Act*; s80B & s80D (2) of the *Youth Justice Act*; LCPD 5I (56) (d –f) (o) and YJPD 54 (e –g) (o).

<sup>6</sup> LCPD 5I 5(b) and YJPD 4CA 5(b)

<sup>7</sup> LCPD 5I 5(a) and YJPD 4CA 5(a)

<sup>8</sup> LCPD 5I 5(d) and YJPD 4CA 5(d)

- Expanding how a victim of crime may participate in the sentencing proceedings. Victims are able to appear via video or telephone or through a representative at the sentencing hearing if they choose to take part.<sup>9</sup>
- Expanding the participants who can sit at the table in Community Court<sup>10</sup>
- At the Angurugu sentence on the 7<sup>th</sup> June – there were more Aboriginal people around the table than non-aboriginal.

The principals also include:

- Cultural Education and Awareness: Judges, lawyers, and other court personnel undergo training to understand Aboriginal cultures, histories, and contemporary issues better. This training helps them interact respectfully and make informed decisions. This training is an ongoing and evolving commitment.
- Engagement and Consultation: Regular engagement with Aboriginal communities is crucial. This involves consulting about the impacts of legal decisions and incorporating feedback into the process. Sometimes it is not appropriate that a Court itself be involved in this process, and this is one of the funded activities of the Law and Justice Group outside the court room. The groups have a number of roles and tasks outside participation in Court.
- Respect for Traditional Knowledge: Aboriginal traditional knowledge and practices are respected and considered in decision-making. This includes acknowledging the role of elders and the importance of community-based resolutions.

Incorporating cultural safety into the criminal justice system involves several further key considerations:

- Creating Safe Environments: Foster an environment where Aboriginal participants feel safe to express their views and cultural practices without fear of racism or exclusion.

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<sup>9</sup> LCPD 5I (9) (13) and YJPD 4CA (9) (13)

<sup>10</sup> LCPD 5I (9- 12) and YJPD 4CA (9 -12)

- The importance of the prioritisation of language and holding the court on country in terms of increasing safety for Aboriginal participants should not be underestimated.
  - Community Court practice is trying to flip the predominance of the English language used in the courtroom to prioritise the use of local Aboriginal language in court.<sup>11</sup> The interpreter is there for the Judge, not the Defendant.
  - At Groote Eylandt Judge O’Loughlin encouraged the Law and Justice group members and participants at the commencement of the court to speak in their language and then where this occurred the discussion would proceed for a period and then halt to allow the interpreter to interpret back to English for the non-language speaking participants and the court record.
- Monitoring and Evaluation: Regularly monitor and evaluate the effectiveness of cultural safety practices, and then adjust practices based on feedback from Aboriginal community members and outcomes of decisions.

All of these principles have been incorporated into the model of Community Court that we are rolling out in the Northern Territory. But crucially, the model also supports and utilises the role of the Judge in promoting cultural safety.

Judges play a crucial role in fostering culturally safe discussions and environments. strategies we are working to employ include:

- Setting the Tone: Begin Court with an acknowledgment of the traditional custodians of the land<sup>12</sup>. State the importance of respect and cultural sensitivity.
- Education and Awareness: Ensure that all members are educated on cultural competency. Incorporate cultural education into regular training programs.
- Inclusive Facilitation Techniques: Use inclusive language and avoid jargon. Employ techniques that give everyone a fair chance to speak.

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<sup>11</sup> LCPD 5I (8) and YJPD 4CA (8)

<sup>12</sup> LCPD 5I (51) YJPD 4CA (49)



- Creating a Safe Space: Establish ground rules promoting openness and respect. Intervene if discussions become culturally insensitive.
- Active Listening: Practice active listening and show genuine interest in Aboriginal perspectives. Encourage clarifying questions that show respect and a desire to understand.
- Reflective Practices: Reflect on the effectiveness of discussions and seek feedback from Aboriginal members. Be open to suggestions for improvement.
- Use of Cultural Advisors: Involve the Law and Justice group members to provide guidance on cultural matters and help mediate discussions.
- Acknowledging Cultural Differences: Recognize and discuss cultural differences that may affect perceptions and interactions. Ensure decisions are inclusive and equitable.

## Conclusion

Incorporating cultural safety into our criminal justice system is not just an ethical imperative but a necessary step towards achieving true justice and fairness and safety. Aboriginal community sentencing courts provide a powerful model for how cultural safety can be practiced in a way that respects and empowers Aboriginal peoples. By understanding and implementing the principles of cultural safety, we can create a judicial system that is inclusive, respectful, and just for all.

And this for many who practice in the NT is not a new concept. There have been many instances where space has been made for Aboriginal voices to be heard in matters outside the community court lists, earlier community court sessions, the dilly bag prosecution, innovative court room practices to encourage evidence.

Instances where a Court has paused with patient silence rather than impatient silence whilst a witness considers and formulates their response.

But the system we have mitigates against the time and space needed for these interactions – there is too much to do, too many cases to get through before the end of the day. But if we don't make that space, our system, our outcomes and ourselves will be the poorer. Our justice system deserves the best of us.

As judges, legal defence lawyers, and prosecutors, policy lawyers and academics, we have a significant responsibility to ensure that our practices and policies do not

perpetuate systemic inequalities but rather work towards healing and reconciliation. By committing to cultural safety, we can contribute to a more just and equitable society for everyone.

Just as Dr. Irihapeti Ramsden was respectful of and built on the foundations of Florence Nightingale so we can we build on the foundations of justice and equality and fairness of the law, but we to do so, we need to truly see who is in the Court room.