

# **Northern Territory Indigenous community sentencing mechanisms: an order for substantive equality\***

## **Introduction: the changing landscape of Northern Territory community sentencing**

Indigenous Community Courts and Law and Justice Groups in the Northern Territory have channelled Indigenous perspectives into the sentencing process. They fashion a two-way form of justice in which Indigenous and mainstream notions of justice can meet. Indigenous community input promotes substantive equality by informing the court of factors relevant to the experiences of Indigenous defendants, advising the court on community-based sentencing options, and enabling defendants to more fully understand the ramifications of their offending. In the formal courts, lawyers filter the community context of the Indigenous defendant and the defendant is disconnected from the community's response to his or her offending. This prevents Indigenous defendants from having their unique community circumstances understood and properly accounted for in sentencing.

There has been a significant number of studies on Indigenous sentencing courts in Australia, but very little on their embodiment in the Northern Territory. Aboriginal community sentencing mechanisms in the Northern Territory have some distinct features, including their demonstrated capacity to tailor *and* supervise community-based sentences that conform to both the sentencing legislation and community expectations for punishment. This reflects the strong role that Indigenous laws play in Northern Territory communities and, their potential

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to deliver 'more effective, meaningful and culturally appropriate sentencing options'.<sup>1</sup> In the Northern Territory, unlike in other Australian jurisdictions, there are avenues for community members to provide pre-sentencing advice on the sentence and collectively write references for the defendant. In addition, panel members on Community Courts in small and remote Northern Territory Aboriginal communities can have a more intimate understanding of the offender's circumstances, compared to Indigenous courts in some urban and larger communities.

This article contends that two long-standing community sentencing mechanisms in Northern Territory Aboriginal communities give rise to substantive equality through providing a more appropriate setting to deliberate on the sentences of Indigenous offenders. These mechanisms are the Northern Territory Indigenous Community Courts (hereafter, 'Community Courts'), which reside during formal court sittings, and Law and Justice Groups, which convene prior to Magistrates' Court sittings to prepare advice on sentencing options and written references.<sup>2</sup> They are able to shed light on the distinct subjective circumstances of Indigenous defendants and the seriousness of the offence for the community. Their advice to the court on the sentencing disposition can be more effective in deterring the offender and the Aboriginal community from committing similar offences, especially where Indigenous law and culture play a strong role in community governance. Through formal sentencing processes, the Anglo-Australian courts are not otherwise privy to community knowledge relevant to Indigenous defendants.

Both Community Courts and Law and Justice Groups were initiatives of Aboriginal community members. They respond to the specific circumstances of the Aboriginal community in which they operate; these have tended to be communities on Warlpiri (central

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<sup>1</sup> Joe Yick and Peter Warner, 'Recidivism in the Northern Territory: Adult Prisoners Released in 2001-02' (Paper presented at Australian Institute of Criminology Conference, Canberra, 6-7 June 2005) 8. Available at [http://www.aic.gov.au/media\\_library/conferences/2005-abs/yick.pdf](http://www.aic.gov.au/media_library/conferences/2005-abs/yick.pdf).

<sup>2</sup> See for example, Central Desert Regional Council, 'Yuendumu Court Support' (Alice Springs, 5 January 2012). Available at <http://centraldesert.nt.gov.au/news/yuendumu-court-support>.

Australian), Yolŋu (East Arnhem), Tiwi (Bathurst and Melville Islands) and Larrakia (Darwin and surrounds) country. Based on our observations and experiences with providing training for and facilitating community sentencing mechanisms in remote Warlpiri, Tiwi and Yolŋu communities over the past decade and a preliminary analysis of court listings data in Lajamanu,<sup>3</sup> we argue that Community Courts and Law and Justice Groups have increased community control over offenders and have influenced offending behaviours and relationships between offenders and the community. Notwithstanding attempts by government to strip the powers of Community Courts, the reinvigoration of Law and Justice Groups has revealed the resilience of Indigenous communities and their will to engage in the sentencing process in a meaningful way.

In 2011, the operation of Community Courts was undermined by legislative interpretation and administrative changes. Initially the then Northern Territory Chief Magistrate, Hillary Hannam, declared Community Courts invalid in the Northern Territory Court of Summary Jurisdiction (local criminal courts), although encouraged their continuation in the Youth Court. We argue that their invalidation was based on a flawed interpretation of legislative procedures for the admission of cultural and customary law evidence and, to a lesser extent, the statutory prohibition on considering these factors to determine the seriousness of an offence.<sup>4</sup> Subsequently, the Northern Territory Attorney General, John Elferink, disbanded the Community Court program. Further, it is our contention that the former legislation

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<sup>3</sup> Crawford has worked with and observed Community Courts since 2009 originally as the senior criminal lawyer for the Katherine office of the North Australian Aboriginal Justice Agency (NAAJA). Since 2011 he has had the role of member then Coordinator of Legal Education, Training and Projects with NAAJA where he has been involved in supporting communities in the reformation of Law and Justice Groups across Lajamanu, Wurrumiyanga and Maningrida. He has also conducted training for Community Court panelists at Maningrida and Wurrumiyanga. Anthony has attended meetings of Law and Justice Groups and observed Community Courts in Lajamanu and Yuendumu as part of her fieldwork in relation to the criminalisation of Indigenous drivers.

<sup>4</sup> Then Chief Magistrate Hillary Hannam declared Community Courts invalid because they do not meet notice and form requirements for the admission of Indigenous evidence under s 104A of the *Sentencing Act 1995* (NT) and s 91 of the *Northern Territory National Emergency Response Act 2007* (Cth). See Hillary Hannam, 'Current issues in Delivering Indigenous Justice: Challenges for the Courts' (Paper presented at Australian Institute of Judicial Administration Conference at University of South Australia, Adelaide, 18 July 2013). Available at <http://www.aija.org.au/Ind%20Courts%20Conf%2013/Papers/Hannam.pdf>.

underpinning the invalidation contravened the *Racial Discrimination Act 1975* (Cth) (hereafter the *Racial Discrimination Act*). The decision to suspend Community Courts also denies substantive equality by not allowing Indigenous offenders to have their community circumstances conveyed to the court with the same meaning as a non-Indigenous person, and instead subjecting them to norms associated with non-Indigenous offenders.

However, substantive equality and non-discrimination is not the entire premise for the operation of Northern Territory Aboriginal involvement in sentencing. From our observations in Northern Territory Aboriginal communities, especially the justice work conducted in Yolŋu, Tiwi and Warlpiri communities, we have seen that Indigenous sentencing mechanisms seek to fulfil much broader aims. Moreover, we believe it is problematic to rely on substantive equality as an end in itself. This would assume that mainstream sentencing courts deliver non-Indigenous people with an ideal form of justice and would overlook many of their barriers to providing a fair hearing and just outcomes. Instead, we maintain that defendants from Northern Territory's Indigenous communities require their community's involvement in sentencing if they are to be afforded at least the standard of individualised justice afforded to non-Indigenous defendants. This is partly because in mainstream Australian society higher levels of literacy mean that family and other support people are more able to provide written reference material in support of pleas of mitigation when compared with Indigenous people in the Northern Territory. Community Courts and Law and Justice Groups provide an avenue for the supply of background information, references and support.

The additional benefits produced for Aboriginal communities from these mechanisms, as we have observed, are that Aboriginal Elders feel that they have a stake in the justice process and the Indigenous law-making structures in the community are affirmed. In the final parts of this article we refer to some of these benefits and draw on our observations and the literature on Australian Indigenous sentencing courts to identify the components for effective Indigenous involvement in sentencing, especially by ensuring that Indigenous people have a sense of ownership over the process.

## Features of Australian Indigenous sentencing courts

There has been very limited analysis of the alternative sentencing mechanisms in the Northern Territory. While this paper hopes to add to the knowledge of these mechanisms, and to demonstrate their uniqueness, it is worthwhile to make some references to the broader phenomenon of Indigenous sentencing courts in Australia. There are a number of similarities among the experiences of Indigenous sentencing courts across Australia, including in the Northern Territory. The similarities stem from the interest of local communities in participating in Anglo-Australian justice mechanisms that affect their members. Community sentencing courts in the Northern Territory, as elsewhere in Australia, provide a direct channel for Indigenous communities to the justice system through providing 'input' into sentencing decisions or providing sentencing 'advice' through consultation.<sup>5</sup>

Over the past fifteen years, Indigenous sentencing courts have emerged throughout Australia as an alternative for sentencing less serious Indigenous offenders.<sup>6</sup> They exist in small pockets and are not a wide-scale replacement of the lower courts. These courts, which operate outside the mainstream judicial system, harness Indigenous justice and dispute resolution concepts by

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<sup>5</sup> Kathy Daly and Elena Marchetti, 'Innovative Justice Processes: Restorative Justice, Indigenous Justice, and Therapeutic Justice' in Marinella Marmo, Willem De Lint and Darren Palmer (eds) *Crime and Justice: A Guide to Criminology*, 4th edn (Lawbook, 2012) 462.

<sup>6</sup> Since the early 1990s separate Indigenous sentencing courts have formally emerged in New South Wales (circle sentencing currently operates in Nowra, Dubbo, Armidale, Bourke, Brewarrina, Blacktown, Coonamble, Kempsey, Lismore, Mount Druitt, Moree, Nambucca Heads, Ulladulla and Walgett), Queensland (Murri Courts – since abolished – but are still operating informally as Indigenous Sentencing Lists in some courts supported by the Community Justice Groups), Victoria (Koori Courts - seven Magistrates' Courts, two children's courts and one county court), Western Australia (the Kalgoorlie-Boulder Community Court and the Geraldton Barndimalgu Courts) and South Australia (Nunga Courts operate at Port Adelaide, Port August, Mt Gambia and Murray Bridge and in the Supreme Court). In some jurisdictions, this is supported by legislation, such as the *Magistrates' Court Act 1989* (Vic) s 4D, the *Criminal Procedure Act 1986* (NSW) s 348, and the *Criminal Law (Sentencing) Act 1988* (SA) s 9c. In other jurisdictions there is no stable legislative basis, or legislation may be interpreted to conflict with the operation of community sentencing courts (such as has been argued in relation to the Northern Territory).

providing Indigenous Elders with a central role in the sentencing process.<sup>7</sup> Indigenous sentencing courts are capable of improving Anglo-Australian law and justice by bringing additional information about a defendant's background and of strengthening Indigenous communities by engaging them in the justice process and giving them more control over their community members. The provision of community information may also mean that the courts do not rely on stereotypes in sentencing Aboriginal offenders.<sup>8</sup> Daly and Marchetti's research shows how Indigenous courts provide 'innovative justice' by incorporating Indigenous knowledge and modes of social control into the sentencing process.<sup>9</sup> Indigenous courts 'bend and change the dominant perspective of "white law"'.<sup>10</sup>

In a number of Australian states there are now formal mechanisms to accommodate Indigenous community involvement in sentencing. Marchetti and Daly list the following common eligibility requirements of Indigenous sentencing courts in various Australian jurisdictions:<sup>11</sup>

1. The offender must be Indigenous;
2. The offender must have entered a plea or have been found guilty;
3. The offender must agree to have the matter heard in the Indigenous community court;
4. The charge must generally be one that is heard in a Magistrates' or Local Court (although there are some exceptions);
5. The offence must have occurred in the geographical area covered by the court.

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<sup>7</sup> Daly and Marchetti, 'Innovative Justice Processes', above n 5, 461.

<sup>8</sup> Northern Territory Law Reform Committee, *Report of the Committee of Inquiry into Aboriginal Customary Law in the Northern Territory: Towards Mutual Benefit* (Parliament of the Northern Territory, Darwin, 2003), 31.

<sup>9</sup> Daly and Marchetti, 'Innovative Justice Processes', above n 5, 465.

<sup>10</sup> Elena Marchetti and Kathy Daly, 'Indigenous Sentencing Courts: Towards a Theoretical Jurisprudential Model' (2007) 29(3) *Sydney Law Review* 415, 429.

<sup>11</sup> *Ibid*, 421.

The processes governing Indigenous sentencing courts across Australia also bear similarities. In general, they operate in Anglo-Australian courts with a strong emphasis on community participation for improved and longer-term outcomes for the community, the victim and the offender. Typically, the courts are conducted by a magistrate who sits at eye-level with the offender, the victim and community representatives (Elders or Respected Persons). The offender is encouraged to bring along a support person (usually a friend, partner or family member). Physical barriers between the participants are kept to a minimum, often allowing participants to sit together at a table or in a circle. Magistrates and legal representatives are encouraged to speak in plain language to minimise verbal barriers. The role of the magistrate is to act as a facilitator between the participants.

Indigenous participation in sentencing courts is conducted within the regulations, places and constraints of the Anglo-Australian legal system. Further to the limitations listed above, it is also accepted that Indigenous sentencing court members have limited control over the court process (which remains in the hands of magistrates); that only a small number of minor offenders come within its jurisdiction; that sentencing advice must come within the range of punishments prescribed by legislation; and that community courts often operate in mainstream court complexes rather than in Indigenous spaces.<sup>12</sup> Harry Blagg describes community courts as a liminal space between Aboriginal justice and white justice.<sup>13</sup> Chris Cunneen perceives them as an appropriation of Aboriginal justice by the state.<sup>14</sup> These critiques recognise that Community Courts do not operate in an Indigenous law framework, but provide a channel for Indigenous input into the Anglo-Australian criminal justice system.

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<sup>12</sup> See Ibid, 420-421. Elena Marchetti has also found that Indigenous sentencing courts set among Indigenous art, space and symbols positively impact on the manner in which justice is administered and received for Indigenous participants. See Elena Marchetti, 'Australian indigenous sentencing courts: restoring culture in the sentencing court process' in Jane Bolitho, Jasmine Bruce and Gail Mason (eds) *Restorative Justice: Adults and Emerging Practice* (Sydney Institute of Criminology Monograph Series, 2012) 100-120.

<sup>13</sup> Harry Blagg, 'Colonial Critique and Critical Criminology: issues in Aboriginal law and Aboriginal violence' in Thalia Anthony and Chris Cunneen (eds) *The Critical Criminology Companion* (Hawkins Press, 2008) 140.

<sup>14</sup> Chris Cunneen, 'Understanding Restorative Justice through the Lens of Critical Criminology' in Thalia Anthony and Chis Cunneen (eds) *The Critical Criminology Companion* (Hawkins Press, 2008) 293.

In the Northern Territory, members of Aboriginal communities who have been involved in the establishment and operation of Community Courts are cognisant of their limited capacity to express Indigenous law and broadly respond to community justice concerns. Accordingly, Northern Territory Community Courts are only one aspect of law and justice work carried out by communities. In central Australia, Indigenous-controlled Law and Justice Groups / Committees undertake a range of justice activities in communities to provide a holistic response to criminal justice issues. These Groups describe their functions in the following respects: providing an interface with the justice system; involvement in pre-court conferencing and victim-offender conferencing; making recommendations to courts as requested; assisting with the development and management of community diversion programs, and reporting to local councils on law and justice trends and issues.<sup>15</sup> On a more informal level, they act as a focal point for community law and justice concerns; facilitate dispute resolution, and maintain sound relations between the community and the police, the courts and correctional services.<sup>16</sup> Since the abolition of Community Courts, Law and Justice Groups have taken on a greater function in providing pre-sentencing advice to courts, particularly in Wurrumiyanga, Maningrida and Lajamanu. However, their role should be regarded as one of complementing Community Courts rather than substituting them, as they do not have a role inside the courts and in front of the defendant. The specific functions of Community Courts and Law and Justice Groups are discussed in the following section.

## **Community Courts and Law and Justice Groups in the Northern Territory**

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<sup>15</sup> Ali-Curung, Lajamanu and Yuendumu Law and Justice Committees, *The Kurduju Committee Report* (Vol 1, December 2001); Lajamanu Law and Justice Group, *Kurdiji: 'Shield - to protect and discipline' – Lajamanu Visitor Guide* (Kurdiji Group, March 2014) 6. Available at <http://www.clc.org.au/files/pdf/KurdijiNEbook-6.pdf>.

<sup>16</sup> Ibid.



Since 2003 and until their disbandment in 2012, Northern Territory Community Courts played an important role in furthering justice in the sentencing process.<sup>17</sup> When they operated across remote and urban communities, Respected Persons would provide advice to the magistrate with respect to factors relevant to ss 5 and 6 of the *Sentencing Act 1995* (NT) (hereafter '*Sentencing Act*'), such as the background of the defendant, their views about what would be effective and appropriate sentences. Additionally, Elders or Respected Persons on the panel would communicate with the offender about the impact of the crime and condemn the actions of the offender, often in an impassioned manner. Young people could also seek to be dealt with in the Community Court, which was supported by the *Youth Justice Act 2005* (NT) s 4(o). Additionally, in a number of communities, especially in central Australia, Law and Justice Groups would meet before sentencing to consider referrals, compile references and advise on sentencing dispositions for selected offenders. Both Community Courts and Law and Justice Groups could inform the Magistrates' Court on subjective factors relevant to the defendant and a broader range of sentencing outcomes that would more effectively deter offending. Both these justice mechanisms are discussed in this section.

### ***Northern Territory Community Courts***

During the 1980s, the Northern Territory experimented with community forums and local Indigenous court advisers to assist the court.<sup>18</sup> However, Community Courts first commenced in Nhulunbuy (North East Arnhem Land) in 2003/2004 after the respected Yolŋu educator, linguist and community worker Raymattja Marika approached the Court requesting Yolŋu

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<sup>17</sup> The participants to the Community Court would include the Magistrate, Elders or Respected Persons, the defendant and their support person(s), the victim or representative and their support person(s), community court officer, community corrections officer, prosecutor, defence lawyer, interpreter(s) and if available, relevant health worker. The Respected Persons or Elders who sat on the panel were generally drawn on recommendation of the Community Corrections Officer or Community Court officer in consultation with relevant community members.

<sup>18</sup> H. M. Bradley, 'Community Court Darwin Guidelines, and the general sentencing provisions in the *Sentencing Act 2005* (NT)' (Northern Territory Department of Justice, 2005) 1. Available at [http://www.nt.gov.au/justice/ntmc/docs/community\\_court\\_guidelines\\_27.05.pdf](http://www.nt.gov.au/justice/ntmc/docs/community_court_guidelines_27.05.pdf).

participation in the court process.<sup>19</sup> At around the same time, the then Chief Magistrate Hugh Bradley entered discussions with Yilli Rreung Council in Darwin that resulted in a trial 'circle sentencing' project in Darwin, Nhulunbuy and the Tiwi Islands that was titled 'community courts'. The court developed a set of Guidelines for the Darwin community.<sup>20</sup> Although designed for the Darwin Community Court, these Guidelines were followed generally in communities in the Top End and Central Australia with different levels of formality according to community circumstances.

In the Northern Territory, Community Courts sat as the Court of Summary Jurisdiction, which precluded Community Courts from addressing serious matters, namely indictable-stream serious violent and sexual offences. The Community Court Guideline 14 excluded sexual assault matters and notes the exercise of caution for offences of violence, domestic violence and where the victim is a child.<sup>21</sup> The stated objectives of the Community Courts in the Guidelines were to provide more 'effective, meaningful and culturally relevant sentencing options, increase community safety, decrease rates of offending, and reduce repeat offending and breaches of court orders'.<sup>22</sup> The Guidelines also laid out goals for community which included increased engagement of community members with the administration of justice, improved understanding and knowledge of the sentencing process, increased accountability of community, families and offenders, enhanced the rights and place of victims in the sentencing process, enhanced offenders' prospects of rehabilitation and promoted reparation to the community and victim.

The process would be not unduly formal to encourage and enhance a better understanding of the impact of offending by the offenders, their families and the community. The Community

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<sup>19</sup> Jenny Blokland, 'The Northern Territory Experience' (Paper presented at Australian Institute of Judicial Administration Indigenous Courts Conference at Mildura, 7 September 2007) 7. Available at <http://www.ajja.org.au/Ind%20Courts%20Conf%2007/Papers/Blokland.pdf>.

<sup>20</sup> Bradley, above n 18.

<sup>21</sup> Ibid 3.

<sup>22</sup> Ibid 2.

Court would communicate primarily in the local language, especially when addressing the offender.<sup>23</sup> We observed that this was important in engaging the defendant, as well as the forcefulness of the Community Court members. One outcome we observed in this process was that the defendant better understood sentencing orders and the community could work with the defendant to ensure compliance with conditions of orders. The Guidelines aimed to both achieve community involvement in the sentencing process and to broaden the sentencing process so that a Community Court could examine the underlying issues of offending behaviour and consider the needs of the victim.<sup>24</sup> The victim can have a place in the sentencing process<sup>25</sup> and receive support or some relief, including through reparation from the offender directly to the victim or through community work.<sup>26</sup>

From 2004 to 2012, 217 Community Courts were convened across 18 communities. With the majority taking place in Darwin, Nhulunbuy, Alyangula and Nguiu/Wurrumiyanga. In the central Australian communities of Yuendumu and Lajamanu, the Community Court was based on a hybrid model that provided advice to the Court of Summary Jurisdiction during a sitting *and* met before sittings to provide written advice to the Magistrate on all sentences in advance of the court sitting. Of those offenders who were sentenced in these courts, 88 per cent were male and 12 per cent were female; 17 per cent were held in the Youth Court while the majority (83 per cent) were heard in the Magistrates' Court/Court of Summary Jurisdiction.<sup>27</sup> As the process was voluntary for the defendant, generally more serious matters were referred to Community Courts for fear of excessive sentencing (or 'sentence creep') for

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<sup>23</sup> From our observations, the Court engaged its own interpreter when one was requested and available, so that discussion between the Community Court participants could be interpreted in English and the local language.

<sup>24</sup> Bradley, above n 18, 6.

<sup>25</sup> Unlike in mainstream formal court sentencing processes, where victims are generally not invited to participate actively in court with the exception of providing victim impact statements, in Community Courts, the victim can participate to give the offender a full perspective of the effects of their actions on the victim. Most of the process is on shaming the offending, with the discussion on the penalty generally left to the end.

<sup>26</sup> Bradley, above n 18, 2.

<sup>27</sup> Daniel Suggit, *Joining Forces: A partnership approach to effective justice: community-driven social controls working side by side with the Magistracy of the Northern Territory – a review of Community Courts Northern Territory Government Pilot and Program 2005-2012*, A report to the NT Government, 10 August 2012.

lower level offences or for first time offenders. Additionally, if the matter was not sufficiently serious, 'there wasn't much motivation for community involvement and the process could seem tokenistic.'<sup>28</sup>

In August 2007, the Northern Territory Department of Justice established the Community Court Program as part of its 'Aboriginal Justice Program'. It became part of the "Closing the Gap" response by the Northern Territory Government to the *Little Children are Sacred* Report. Although funds were allocated and it was intended that the program was to operate, under a number of Coordinators, in 10 communities across the Territory, insufficient funds were provided to the Court, and only one Community Court Coordinator was employed to service the Top End.<sup>29</sup> By 2012, the Community Court Program was disbanded by the Northern Territory Government after the Chief Magistrate had declared the operation of community courts invalid.

### *Law and Justice Groups*

Notwithstanding the disbandment of Community Courts, Law and Justice Groups have remained an essential feature of the law and justice milieu in a number of Northern Territory communities. Indeed, their growing role in central Australia and the Top End is testament to the resilience of Indigenous justice mechanisms and their capacity outside of state sponsorship. Law and Justice Groups provide pre-sentencing advice to the magistrate based on an evaluation of the offence (in terms of its significance to the community) and the offender (including his/her risk to the community and capacity to rehabilitate and reintegrate into the community). In the past, these groups operated alongside Community Courts, dealing with the bulk of offenders who did not go before Community Courts.

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<sup>28</sup> Comment from Ben Grimes, former lawyer North Australian Aboriginal Justice Agency 2014.

<sup>29</sup> Hannam, above n 4, 3.

Law and Justice Groups are also important conduits for crime prevention and improving relations with the formal arms of the criminal justice system (police, courts and corrections as well as relevant government officials). Originally Law and Justice Groups were recognised in the 1995 Aboriginal Law and Justice Strategy, which was the Northern Territory Government's response to the recommendations of the Royal Commission into Deaths in Custody.<sup>30</sup> The Aboriginal Law and Justice Strategy provided a community justice framework to maximise community participation in the administration of justice, including through facilitating Law and Justice Groups and supporting Aboriginal women in dispute resolution practices, night patrols and safe houses. Between 1998 and 2005, the Aboriginal Law and Justice Strategy operated in a number of Warlpiri communities in Central Australia, including Lajamanu,<sup>31</sup> Ali Curung, Yuendumu and Willowra. Law and Justice Groups in these communities came together in 2001 to form the Kurdiji Committee. Government funding of these groups ceased in 2003, although pre-court conferencing, an important aspect of Kurdiji work, continued to be supported by Community Corrections until 2005.

Through the support of the North Australian Aboriginal Justice Agency (NAAJA) and the Central Land Council, there are currently four Law and Justice Groups involved in presentencing in the Northern Territory: Lajamanu's 'Kurdiji' Law and Justice Group (established in 1998 and reinvigorated in 2009)<sup>32</sup> and the Yuendumu Mediation and Justice Group (2006) in Warlpiri communities in Central Australia, Wurrumiyanga's Ponki Mediators in the Tiwi

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<sup>30</sup> Chief Justice Brian Martin, 'Customary Law – Northern Territory' (Paper presented to the Colloquium of the Judicial Conference of Australia, 5 October 2007) 19. Available at [http://www.supremecourt.nt.gov.au/media/docs/commonwealth\\_intervention.pdf](http://www.supremecourt.nt.gov.au/media/docs/commonwealth_intervention.pdf).

<sup>31</sup> In 1997 the former Lajamanu Community Government Council and the Lajamanu Tribal Council wrote to the Chief Minister of the Northern Territory, the Minister for Police and the Minister for Aboriginal Development to establish a forum to bring their "two laws" together in a practical and meaningful way. The Lajamanu Law and Justice Committee was established in 1998 and the Lajamanu Community Law and Justice Plan was signed by the Territory and Commonwealth Governments and community organisations in 1999. This group set a precedent for other Aboriginal communities in the Northern Territory. See Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle 'Little Children Are Sacred'* (Final Report to Northern Territory Government, 2007) 175 -179 recommendations 4,7 & 8.

<sup>32</sup> See Lajamanu Law and Justice Group, above n 15, 6.

Islands (2009) and Maningrida's Bunawarra Dispute Resolution Elders in the Top End (2012). In 2013, the Kurdiji Group opened a meeting area building and meets approximately every eight weeks (generally prior to local court sittings) to discuss community safety, crime prevention, community governance, inter-agency collaboration and provide pre-sentence reports to the court on particular defendants.<sup>33</sup> The process of writing the reports involves the NAAJA community legal educator reading out the court list and, where a matter has been referred to the group by NAAJA or Northern Territory Legal Aid Commission criminal lawyers, the charges, the summary of agreed facts and prior offending. The group then decides the cases for which they are prepared to write a letter of support and writes references outlining the group's knowledge of the offender's background (including their behaviour in the community), views about the offending, the offender's character, and ideas for the offender's rehabilitation and punishment. The letters are provided to the defendant's lawyer before being submitted to the magistrate during sentencing submissions. The Kurdiji members make themselves available for cross-examination if requested. In addition to this function, the group is involved in dispute resolution to resolve conflicts before they escalate.

The Yuendumu Mediation and Justice Group was previously partnered with the then Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and the Attorney-General's Department in order to 'improve access to justice; strengthen community safety and security, and provide support and mentoring to community members'.<sup>34</sup> In the past it has been involved in advising Magistrates during court sittings,<sup>35</sup> providing pre-court advice, providing phone link-ups with prisoners and organising drink driving courses.<sup>36</sup> Both the Ponki Mediators and the Bunawarra Elders were previously heavily involved in Community Courts and following their suspension requested assistance

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<sup>33</sup> Central Land Council, *Kurdiji building opening day* (20 May, 2013). Available at <http://www.clc.org.au/publications/content/kurdiji-building-opening-day>

<sup>34</sup> Blokland, above n 19, 16.

<sup>35</sup> Bob Gosford, 'Court day in Yuendumu – Part 2', *The Northern Myth* (Crikey, Sydney, 23 October 2008).

Available at <http://blogs.crikey.com.au/northern/2008/10/23/the-community-court-caravan-rolls-into-yuendumu/>

<sup>36</sup> Blokland, above n 19, 17.

from NAAJA in developing Kurdiji-styled groups to discuss cases on court lists, prepare references for court and make decisions in relation to community safety.

Law and Justice Groups in these communities have devoted substantial resources on a voluntary basis to their development. The groups were intended to enable community participation in the justice process and provide a space for interaction between Indigenous and non-Indigenous laws and law makers.<sup>37</sup> They have a broad ambit that includes engagement and participation in the courts, promoting community safety, fostering Indigenous law and authority structures and acquiring recognition of Indigenous law from the Anglo-Australian judicial and, to some extent, legislative systems. The 2007 report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse expressed support for Law and Justice Groups and Community Courts that ‘create the space for dialogue’ between Indigenous communities and the Anglo-Australian justice system.<sup>38</sup> While the Law and Justice Groups provide an important mechanism for local input into justice in Aboriginal communities, including in the sentencing process, the suspension of Community Courts have constrained Indigenous justice capacities and the realisation of substantial equality in sentencing. It removes an important forum for Respected Persons to converse with the defendant about his/her offending. The basis for suspending Community Courts is discussed in the following section.

## **Suspending Community Courts: Disputing its legislative premise**

In late 2011, the then Northern Territory Chief Magistrate Hillary Hannam suspended the operation of Community Courts in the Northern Territory Courts of Summary Jurisdiction on the basis that the procedures of Community Courts were inconsistent with s 104A of the *Sentencing Act* (prior to its amendment) and s 91 of the *Northern Territory National Emergency*

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<sup>37</sup> Blagg, above n 13, 140.

<sup>38</sup> Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, above n 29, 175 -179, 181, Recommendations 4, 7, 8.

*Response Act 2007* (Cth) ('*NTNER Act*') (since incorporated into the *Crimes Act 1914* (Cth) at s 16AA).<sup>39</sup> Despite the suspension of Community Courts for adults, Community Courts continued to operate for a further year in the Youth Court. Sentencing for juveniles is covered by the *Youth Justice Act 2005* (NT) rather than the *Sentencing Act* and there is thus no statutory bar to convene Community Courts for juveniles. Section 4 of the *Youth Justice Act* specifically provides that 'if practicable, an Aboriginal youth should be dealt with in a way that involves the youth's community'.<sup>40</sup> However, in December 2012 the newly elected Northern Territory Government abolished the Community Court program in the Youth Court despite its requests for additional funds for Community Courts.

Underpinning the disbandment of Community Courts is a shift away from a form of putative pluralism in the Northern Territory. The former Chief Magistrate and the Northern Territory Government have reinforced a homogenous justice framework in sentencing Indigenous offenders that inadequately accommodates difference. Postcolonial theory informs us that the authority of settler states are constantly offset by the worldview and competing social systems of the colonised.<sup>41</sup> Community Courts are a manifestation of Indigenous resistance to the whiteness of the criminal justice system, and represent the production of a hybrid judicial space between the colonised and the coloniser.<sup>42</sup> However, state apparatus continue to create and sustain practices that uphold white colonial power over colonised people.<sup>43</sup> These can occur through subtle ways in which the authority of the criminal justice system shapes postcolonial relations, or through more explicit displays of power, such as through the invalidation of Community Courts. We argue that this assertion is not merely oppressive, but lacks legal legitimacy.

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<sup>39</sup> Hannam, above n 4, 4-5.

<sup>40</sup> *Youth Justice Act 2005* (NT) s 4 'Principles', ss 4(f), 4(g), 4(o).

<sup>41</sup> Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (with new preface) (Princeton University Press, 2007) 8.

<sup>42</sup> Homi K. Bhabha, *The Location of Culture* (Routledge, 1994).

<sup>43</sup> Edward Said, *Culture and Imperialism*, (Vintage, 1994) 23.



## *Relevance of the Northern Territory Emergency Response*

Former Chief Magistrate Hannam cited the prohibition of cultural and customary law considerations arising from the Northern Territory Emergency Response ('NTER') as one of the reasons for the invalidation of Community Courts. The *NTNER Act* s 91 and its successor, the *Crimes Act 1914* (Cth) s 16AA (Cth) as a result of the *Stronger Futures Act 2012* (Cth), limits the use of 'customary law or cultural practice' in sentencing mitigation or aggravation. Spiers Williams states that these legislative amendments alongside the broader Commonwealth response to the debates about violence against Aboriginal women and children have 'officially sanctioned intolerance to Aboriginal customary law and cultural practice' and undermined the 'the ethos of pluralism' that animated contemporary Northern Territory Government policies.<sup>44</sup>

Although the NTER and the consequent legislative changes were not the sole reason behind the Northern Territory Chief Magistrate and the Government's decision to cease Community Courts, they provide a relevant context for understanding the dilution of Indigenous considerations in Northern Territory sentencing. The legislation undercut an extensive body of common law that accepted issues of Indigenous background, culture and punishment as relevant to sentencing. The High Court of Australia has described consideration of the 'material facts' that exist by reason of an offender's membership of an Aboriginal community as 'essential to the even administration of criminal justice'<sup>45</sup> The 'material facts' that have been found to be relevant in sentencing Indigenous offenders can be grouped into the following categories, which exist in the Northern Territory (as listed in the cases below) and Australia-wide:<sup>46</sup>

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<sup>44</sup> Mary Spiers Williams, 'Why are there no adult Community Courts operating in the Northern Territory of Australia?' (2013) 8(4) *Indigenous Law Bulletin* 7, 8.

<sup>45</sup> *Neal v The Queen* (1982) 149 CLR 305 at 326; affirmed in *Bugmy v The Queen* [2013] HCA 37, [39].

<sup>46</sup> See Thalia Anthony, *Sentencing Indigenous offenders* (Indigenous Justice Clearinghouse Research Brief No. 7, March 2010) 2. Available at: <http://www.indigenousjustice.gov.au/briefs/brief007.pdf>

- the severe social and economic disadvantage, accompanied by endemic alcohol abuse, that exists in some Indigenous communities;<sup>47</sup>
- the existence of Indigenous laws and cultural practices that explain the offender's motivation for committing the offence;<sup>48</sup>
- the dispensation of punishment by community members pursuant to Indigenous laws;<sup>49</sup>
- the positive contribution the offender has made to his/her Indigenous community.<sup>50</sup>

The Northern Territory Supreme Court has sought to strictly interpret s 91 of the *NTNER Act* in order to retain some discretion to consider Indigenous cultural issues<sup>51</sup> and, by implication, some scope for Community Courts to provide input into sentencing. In *R v Wunungmurra*,<sup>52</sup> the Court held that the prohibition on the use of evidence of customary law or cultural practices applied only in 'lessening or aggravating the seriousness of the criminal behaviour' and not in relation to other sentencing purposes.<sup>53</sup> The Supreme Court identified aspects of sentencing where culture or customary law may be taken into account *other than* in relation to determining the objective seriousness of the offence, including whether the offender had the predisposition to commit the crime, is of good character, likely to reoffend or be rehabilitated.<sup>54</sup> Consideration of these factors allows for individualised justice and substantive equality.<sup>55</sup>

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<sup>47</sup> *R v Benny Lee* [1974] NTSC 221; *R v Herbert & Others* (1983) 23 NTR 22; *Robertson v Flood* (1992) 111 FLR 177.

<sup>48</sup> *R v Iginiwuni* [1975] NTCCA 6; *R v Davey* (1980) 2 A Crim R 254; *R v Lane, Hunt & Smith* [1980] NTSC (Unreported, 29 May).

<sup>49</sup> *Jabaltjari v Hammersley* (1977) 15 ALR 94; *R v Mamarika* (1982) 5 A Crim R 354; *Jadurin v The Queen* (1982) 7 A Crim R 182; *R v Minor* (1992) 105 FLR 180; *Munungurr v The Queen* (1994) 4 NTLR 63; *The Queen v Walker* [1994] 46 NTSC 1; *R v Miyatatawuy* (1996) 87 A Crim R 574; *R v Poulson* (2001) 122 A Crim R 388.

<sup>50</sup> John Nicholson, 'Sentencing Aboriginal Offenders – A Judge's Perspective' (Paper presented to the Uluru Criminal Law Conference, 31 August–1 September 2012).

<sup>51</sup> The former *NTNER Act* s 91 did not specify *Aboriginal* culture but this was the intention and effect of the legislation.

<sup>52</sup> *R v Wunungmurra* (2009) 231 FLR 180.

<sup>53</sup> *Ibid* 185 [23]

<sup>54</sup> *Ibid*.

<sup>55</sup> See Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013) 6, 9, 72, 200.

Therefore, the Supreme Court has identified features of custom and culture that are relevant for consideration by the Community Courts, such as the prospects for rehabilitation, remorse (as evidenced by submitting to community punishment pursuant to Indigenous laws) and the offenders' character and role in the community. Former Chief Magistrate Jenny Blokland has also iterated the viability of Community Courts in light of s 91:

[S]ome of the deliberations in Community Courts concerning rehabilitation, remorse, deterrence and other sentencing considerations can involve cultural issues and practices. Most are unlikely to conflict with the NTNERA (Cth) as those issues concern primarily post-offence conduct and do not relate to the criminal conduct itself. ... [C]ases that arise in Community Courts in the Northern Territory possess elements common in cases in all Australian Courts – alcohol and substance abuse, spousal violence or more generally family violence, poverty and mental illness.<sup>56</sup>

Community Courts can provide magistrates with a more textured understanding of the matters relevant to the offender and offence. Notwithstanding the limitations on adducing cultural and customary law information, there remain significant issues that can be conveyed irrespective of the limitations posed by s 91. Furthermore, 'culture' is not a discrete Aboriginal concept but a Western construct that does not have practical resonance with Aboriginal communities, and nonetheless denies the role of cultural factors in non-Indigenous sentencing.<sup>57</sup> Northern Territory Aboriginal Elders have also commented that 'customary law' is not a separate system, as s 91 implies, but a guide for all aspects of Aboriginal life.<sup>58</sup>

### ***Does section 104A of the Sentencing Act prohibit Community Courts?***

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<sup>56</sup> Blokland, above n 19, 7.

<sup>57</sup> Ibid 6; Human Rights and Equal Opportunities Commission, 'Submission to the Inquiry into the Crime Amendment (Bail and Sentencing) Bill 2006' (Submission no. 5, 27 September 2006) 5.

<sup>58</sup> James Gurrwanngu Gaykamangu, 'Ngarra Law: Aboriginal Customary Law from Arnhem Land' (2012) 2 *Northern Territory Law Journal* 236; George Pascoe Gaymarani, 'An Introduction to the Ngarra Law of Arnhem Land' (2011) 1 *Northern Territory Law Journal* 283.

The former Chief Magistrate Hannam declared that the then s 104A of the *Sentencing Act* (prior to its amendment, which commenced on 1 July 2014) precluded the operation of Community Courts in the Northern Territory.<sup>59</sup> This section, notwithstanding the Federal restrictions, regulates the reception of evidence of Aboriginal customary law and practices. The previous s 104A allowed a sentencing court to receive information about an aspect of Indigenous customary law, or the views of members of an Indigenous community, where certain procedural notice and form requirements had been fulfilled (namely disclosure of the evidence to the other party with reasonable notice and that the evidence be given on oath, by affidavit or statutory declaration). In inserting this section, the Northern Territory Government sought to codify the submission of cultural evidence through ensuring the quality of evidence of customary law and giving the other party adequate notice to seek evidence to present to the court.<sup>60</sup> It was specifically responding to the decision in *Munungurr v The Queen*,<sup>61</sup> in which the Northern Territory Supreme Court requested greater disclosure in cases where evidence of Indigenous customary law and practices are being submitted. In introducing the Sentencing Amendment (Aboriginal Customary Law) Bill, the Attorney-General on 13 October 2004 said in his second reading speech:

The purpose of this Bill is to ensure that courts are provided with fully tested evidence about relevant customary law issues when they are sentencing an offender. ... This Bill provides a formal mechanism for raising issues relating to customary law, or the views of members of an Aboriginal community, when a court is sentencing an offender. It has long been an accepted practice for courts in the Northern Territory to accept and take into account evidence of relevant customary law when passing sentence on an Indigenous person. Aspects of customary

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<sup>59</sup> Hannam, above n 4, 6.

<sup>60</sup> Peter Toyne (Minister for Justice and Attorney General) *Sentencing Amendment (Aboriginal Customary Law) Bill 2004*, Northern Territory Secondary Reading Speeches (2004). Available at [http://www.austlii.edu.au/au/legis/nt/bill\\_srs/saclb2004448/srs.html](http://www.austlii.edu.au/au/legis/nt/bill_srs/saclb2004448/srs.html)

<sup>61</sup> (1994) 4 NTLR 63.

law and attitudes of members of a particular Indigenous community towards an offence or an offender are often material facts that a court must take into account in the sentencing process.<sup>62</sup>

The sole intention of the Northern Territory Parliament appears to be the regulation of how evidence of customary law is introduced to the court in order to promote transparency and allow testing of the reliability of its contents. Given the contents of the second Reading Speech, it seems sensible to read s 104A(2) as permitting the reception of evidence of culture and tradition and the views of Aboriginal Community members under a regime that gives the prosecution sufficient notice when these issues arise. It is interesting to note that at the time this bill was drafted, Nhulunbuy (North East Arnhem Land) Community Court had already commenced (in 2003/2004) and there had been a strong practice of community forums and Elder advisory groups in the 1980s.<sup>63</sup> There was no mention of Community Courts in either the Explanatory Memorandum or the Second Reading speech that introduced s 104A to suggest that these ought to be curtailed or prohibited.

Furthermore, the wording of the provision prior to its amendment stated that the section applies to the receipt of information in relation to 'Aboriginal customary law' or 'views expressed by members of an Aboriginal community'.<sup>64</sup> This contravenes s 10 of the *Racial Discrimination Act* by making the evidential procedure only applicable to Aboriginal people. . In April this year, the Northern Territory Government passed the *Justice and other Legislation Amendment Act 2014* (NT) to amend s 104A to give magistrates discretion to follow notice and form procedures for the admission of cultural evidence and has removed the requirement that relevant evidence be received from a party to the proceeding (s 104A(2)). The amendment also removed the s 104A(1)(b) provision that extends the notice and form requirements to the views of Aboriginal community members about the offender or the offence, which arguably include submissions of Community Court panel members. Furthermore, under the amended

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<sup>62</sup> Toyne, above n 60.

<sup>63</sup> Blokland, above n 19, 6.

<sup>64</sup> *Sentencing Act 1995* (NT) s 1(a)-(b).

provision, s 104A no longer applies specifically to Aboriginal defendants. The authors believe the recent amendments have made s 104A compliant with the *Racial Discrimination Act*.

Irrespective of the recent amendments to s 104A, our interpretation of the previous s 104A was that it need not have prohibited Community Courts. While the former s 104A(2) required that the court may only receive cultural information from a party to the proceedings, avenues existed to adduce this information.<sup>65</sup> Assuming this is cultural information relevant to matters other than the seriousness of the offence and thus not caught under s 106AA of the *Stronger Futures Act*, we contend that where the parties consented to cultural information being adduced by the Community Court, the s 104A(2) requirement is overcome. In this way, either the defence or prosecution could have led the evidence and not the Community Court member. Further, notice and form requirements under s104A could have been fulfilled where the defence or the Community Court convenor gave the prosecution affidavits stating panel members' views on possible cultural matters (such as the dispensation of Indigenous law punishment). Alternatively, s 104A may have been satisfied if Community Court members gave cultural evidence on oath, and the prosecution was provided with an outline of the evidence prior to proceedings. This would have given the prosecution an opportunity to test any evidence of customary law or practice that may arise in evidence.

The use of the former s 104A to undermine Community Courts' operation reflects a lack of appreciation of these courts' important role in providing Indigenous communities with a forum to contribute to the sentencing process and in providing magistrates and judges with a fuller picture of the subjective matters affecting the defendant and a wider range of community-based sentencing options.<sup>66</sup> Given that s 104A was intended to increase the veracity of cultural and customary law evidence,<sup>67</sup> and not prohibit the operation of Community Courts, the abolition of these courts is an unnecessary setback for substantive

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<sup>65</sup> See Blokland, above n 19, 5.

<sup>66</sup> See Ibid; Spiers Williams, above n 44.

<sup>67</sup> Toyne, above n 60.

equality. Now that s 104A has been amended there are no statutory hurdles to the convening of Community Courts. However, since the passing of the amendment in April 2014, there has been no move from either the judiciary nor the Northern Territory Government to reinstate Community Courts and restore one of the few avenues for Indigenous community members to participate constructively in the criminal justice system.

## **The role of Community Courts and Law and Justice Groups in furthering substantive equality in sentencing: observations from the field**

This section considers the roles of Northern Territory Community Courts and Law and Justice Groups in sentencing, based on our observations and work with these groups in Lajamanu, Wurrumiyanga, Maningrida, Yuendumu and Nhunlunbuy since 2005. We regard their effectiveness in two respects. First, they improve sentencing outcomes and promote ‘individualised justice’.<sup>68</sup> By informing the court of the subjective circumstances of the local Indigenous offender, including background, role in the community, risk factors and responsiveness to different types of sentencing orders, Indigenous sentencing mechanisms not only further sentencing objectives but also give rise to substantive equality. Community Courts and Law and Justice Groups also provide more appropriate options for sentencing dispositions for Indigenous offenders, as well as their communities. The involvement of the community enables the court to interrogate the nature of community-based sentencing dispositions, such as who will participate in a ceremony, who in the community will sign off, and whether it involves any harm. Second, Indigenous input into sentencing processes and decisions strengthens Indigenous community structures and furthers social cohesiveness. Both these functions are discussed below.

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<sup>68</sup> This has been identified by the High Court of Australia as a ‘lynchpin’ of sentencing law (*Wong v The Queen* (2001) 207 CLR 584, 611) and is reflected in the *Sentencing Act 1995* (NT).

## *Achieving the purposes of sentencing through Indigenous participation*

Engaging Indigenous community members in sentencing local offenders can facilitate the realisation of sentencing objectives. In relation to Community Courts, a stated goal is to 'provide more effective, meaningful and culturally relevant sentencing options'.<sup>69</sup> The purposes of sentencing in the Northern Territory are to punish, rehabilitate and deter the offender, deter the wider community, denounce the offending, and protect the community (*Sentencing Act* s 5(1)). The matters that a judge or magistrate must take into account include the maximum penalty for the offence, the nature of and harm caused by the offence, the identity and age of the victim, the offender's criminal record, character, age, intellectual capacity, prospects of rehabilitation, remorse and a wide range of aggravating and mitigating factors (ss 5(2), 6A). In determining the character of the offender, relevant considerations are the offender's criminal history, 'the general reputation of the offender' and 'any significant contributions made by the offender to the community' (s 6). It is not only the sentence itself that can meet the aims of sentencing, but also the sentencing process and post-sentence circumstances.

We have observed that Indigenous people in Northern Territory communities, particularly remote communities, have been well positioned to help inform the court's understanding of factors relevant to ss 5, 6 and 6A of the *Sentencing Act*. Namely, they have conveyed to the Magistrate matters in relation to the reputation of the offender, previous offending and its impact on the Indigenous community, the defendant's contributions to the Indigenous community and prospects and best methods of rehabilitation. This has enabled Magistrates to frame sentences that are condign to the particular offender and the offence. It also furthers a recommendation of the Royal Commission into Aboriginal Deaths in Custody, which recognises the disadvantage that Indigenous defendants face before mainstream courts and calls on courts in remote communities to 'consult with Aboriginal communities and

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<sup>69</sup> Bradley, above n.18, 2.



organisations as to the general range of sentences which the community considers appropriate for offences committed'.<sup>70</sup>

Members of Community Courts and Law and Justice Groups have also been involved in facilitating sentences that flow from the Community Court process. For example, Elders have worked to ensure the offender's good behaviour, curfews are met, fines are paid or that there is compliance with a community work order. In addition, we have observed how sentences designed and overseen by Indigenous sentencing mechanisms, such as work on country or participation in ceremony, can promote reconciliation between the offender and the community and the offender and the victim. In Nhulunbuy, the Community Court tailored sentences to include public admissions of guilt in relation to offences of family violence before 300 people, with the victim also in attendance, and living on outstations and being counselled by senior clansmen and women. Former Chief Magistrate Blokland noted that whilst 'many of these orders could be made without going through the Community Court process', when there is 'family or community support for an order of the court, there is more confidence that the orders might be complied with'.<sup>71</sup>

The capacity for Indigenous sentencing mechanisms to adapt community sentences is particularly relevant in light of the 2012 Northern Territory Supreme Court case of *R v Yakayaka and Djambuy*.<sup>72</sup> The Supreme Court sentenced a Yolŋu couple, convicted of cannabis offences, which involved a suspended sentence that was supervised by the Aboriginal community (as opposed to Northern Territory Corrections).<sup>73</sup> Northern Territory Chief Justice Riley stated, 'I am told he will be under strict supervision (under Yolŋu law) within the

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<sup>70</sup> Royal Commission into Aboriginal Deaths in Custody, *National Report* (Australian Government Printing Service, 1991) Recommendation 104.

<sup>71</sup> Blokland, above n 19, 15.

<sup>72</sup> *R v Yakayaka and Djambuy* (Supreme Court of Northern Territory, 21207397 and 21207400, Riley CJ, 17 December 2012).

<sup>73</sup> Bob Gosford, 'Djambuy's case and the recognition of Aboriginal customary law', *The Northern Myth* (Crikey, Sydney, 6 February 2014). Available at <http://blogs.crikey.com.au/northern/2014/02/06/djambuys-case-and-the-recognition-of-aboriginal-customary-law/>. Transcript of Proceedings, *R v Yakayaka and Djambuy* (Supreme Court of Northern Territory, 21207397 and 21207400, Riley CJ, 17 December 2012) 6.

community by community members for a significant period and that would seem to me to be an adequate response to any need for supervision in his circumstances'.<sup>74</sup> The Chief Justice emphasised that this did not breach the sentencing prohibition on cultural or customary law considerations because it was not relevant to the seriousness of the offence, but rather to the consequence of the offending behaviour. The couple were immediately banished to an isolated "Yolŋu prison" under the supervision of Elders for eight months. The courts' openness to such sentences speaks to the need for Indigenous communities to be involved in advising the court on these sentences.

Further, s 5(d) of the *Sentencing Act* states that an objective of sentencing is 'to make it clear that the community, acting through the court, does not approve of the sort of conduct in which the offender was involved'. Community Courts have been effective in delivering this message because they can convey the wrongfulness of the offence under both Anglo-Australian law (eg aggravated assault as a serious offence) and Indigenous law (eg the need to honour one's partner and skin group through respectful behaviours). The Elders' disapproval is poignant because of their strong role in the remote communities that we have observed. The Elders, in the absence of the victim, can also convey the impact on the victim while recognising the circumstances of the offender.<sup>75</sup>

While not all crimes have equivalent Indigenous laws,<sup>76</sup> such as driving without a licence, Indigenous people have expressed that adherence to Anglo-Australian law is an important part of developing respect for both the local Indigenous law and the introduced law.<sup>77</sup> The

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<sup>74</sup> Ibid.

<sup>75</sup> See also 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.

<sup>76</sup> See Gaykamangu, above n 56; Gaymarani, above n 56, 299-300.

<sup>77</sup> Thalia Anthony and Harry Blagg, *Addressing the "Crime Problem" of the Northern Territory Intervention: Alternate Paths to Regulating Minor Driving Offences in Remote Indigenous Communities* (Report to the Criminology Research Council, CRC 38/09-10, 2012) 50. Available at [http://www.criminologyresearchcouncil.gov.au/reports/CRG\\_38-0910\\_FinalReport.pdf](http://www.criminologyresearchcouncil.gov.au/reports/CRG_38-0910_FinalReport.pdf)

Community Courts could also recognise ancillary detriment for the community that arose from these offences. We witnessed community courts where defendants were being sentenced for driving offences and the Elders spoke of the harmful effect this has, including because it extended the period in which the offender could not drive and therefore could not be of assistance to community members. In other cases involves sentencing for stealing and damaging a car, the Community Court panel emphasised how it had contributed to the breakdown of relationships within the Indigenous group. These examples derive from our observations of real cases that enabled the Indigenous community to convey the wrongfulness to both laws. In these cases, the Community Court panel members censured the offender, in language, with the effect of shaming the offenders who would hang their head. In delivering their sentences, the Magistrates often stated that the Community Court had helped deliver the message of the offender's wrongfulness more effectively than they could have done. They recognised that Community Courts further key sentencing objectives of denunciation, general and specific deterrence and community protection.<sup>78</sup>

### *Empowering communities in the justice process*

The involvement of senior members of the local community in the sentencing process harnesses the cultural strength and authority of Indigenous community structures.<sup>79</sup> This in turn empowers and enforces these structures. The stated 'community-oriented' goals of the Community Courts are to:

- Increase community participation in the administration of the law and sentencing process in defined cases;
- Increase community knowledge and confidence in the sentencing process in defined cases;

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<sup>78</sup> See also Blokland, above n 19, 7.

<sup>79</sup> This was a stated objective of Community Courts, which still exists on the Magistrates' Court website. Available at [http://www.nt.gov.au/justice/ntmc/specialist\\_courts.shtml](http://www.nt.gov.au/justice/ntmc/specialist_courts.shtml).

- Provide support to victims and enhance the rights and place of victims in the sentencing process; and
- Enhance the offender's prospects of rehabilitation and reparation to the community.<sup>80</sup>

From our observations and discussions with local Community Court members and Law and Justice Group members, it was apparent that Elders felt more in control of the punitive process and more aware of the issues facing their community. This knowledge was used not only to promote better sentencing outcomes but also to influence the offender's path and shape broader community justice initiatives. Peter Norden's research demonstrates the link between strong, cohesive communities and lawful behaviour through members having a sense of connectedness to their community.<sup>81</sup> Patrick Dodson notes that strengthening Indigenous cultural institutions and authority structures can facilitate Indigenous healing and thereby reduce substance abuse and crime.<sup>82</sup> Vesting Aboriginal communities with greater responsibility in sentencing processes and sentencing outcomes maintains the relevance of Indigenous laws and authority structures.<sup>83</sup> The Australian Law Reform Commission in its report on *Aboriginal Customary Laws* articulated that a 'considerably greater degree of *local control*' over crime problems was needed to reduce offending in communities.<sup>84</sup> This includes through community-initiated involvement in sentencing.<sup>85</sup>

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<sup>80</sup> Bradley, above n.18, 2.

<sup>81</sup> Peter Norden, 'Community Adversity and Resilience: The Distribution of Social Disadvantage in Victoria and New South Wales and the Mediating Role of Social Cohesion' (2004) 34 *Just Policy: A Journal of Australian Social Policy* 38.

<sup>82</sup> Patrick Dodson, 'Whatever Happened to Reconciliation?' in Jon Altman and Melinda Hinkson (eds) *Coercive Reconciliation: Stabilise, Normalise, Exit* (Arena Press, 2007) 24.

<sup>83</sup> Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (AGPS, 1986); Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Final Report (Project 94, 2006); Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform*, A Report to Government on Native Title Social Justice Measures (ATSIC, Canberra, 1995); Northern Territory Law Reform Committee, above n 8.

<sup>84</sup> Australian Law Reform Commission, Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (AGPS, 1986) [688].

<sup>85</sup> *Ibid* [1009]; Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Final Report (Project 94, 2006) 371.

Our preliminary analysis of Lajamanu court lists reveals positive outcomes flowing from the Lajamanu Kurdiji Law and Justice Group. There was a steady reduction in overall offending rates from 1996 to present, with the exception of 2007-2009 during which period the Kurdiji did not operate, when the Kurdiji Group took a leading role on a range of justice matters including sentencing, there was an over 50 per cent decrease in overall criminal cases including a 90 per cent decline in dishonesty offences and 55 per cent fall in assault cases since 1996.<sup>86</sup> By contrast, Northern Territory imprisonment rates have increased by 72 per cent over the past decade<sup>87</sup> – a rate higher than any other Australian jurisdiction and more than double the national average of 31 per cent.<sup>88</sup> These results are not conclusive because they are not matched with a comparable control group or account for a wide range of variables affecting the reporting and prosecution of crime apart from the role of Kurdiji Group. Nonetheless, the consistent decrease in crime in Lajamanu offers an enticement for further research on the effectiveness of Law and Justice Groups in crime reduction. Indeed, these statistics match our observations that Lajamanu has become a safer community with the operation of Kurdiji because members of the community feel accountable to the Kurdiji and the Indigenous authority structures that support its practices.

## **Evaluations of the effectiveness of Indigenous sentencing courts**

While our observations indicate the important role of Community Courts and Law and Justice Groups in the Northern Territory, this needs to be matched with reference to the large number of evaluations of Australian Indigenous sentencing courts. The evaluations of these courts across Australia have sought to identify the extent to which they have reduced recidivism,

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<sup>86</sup> This is based on court listings data provided by the Northern Territory Supreme Court and discussed in Will Crawford, 'Participatory action research: a tool for community legal education, crime prevention, activism and capacity building' (Paper presented at the National Association of Community Legal Centres conference, Adelaide, 31 August 2012).

<sup>87</sup> Mathew Lyneham and Andy Chan, *Deaths in Custody in Australia to 30 June 2011: Twenty Years of Monitoring by the National Deaths in Custody Program since the Royal Commission into Aboriginal Deaths in Custody* (Australian Institute of Criminology, 2013) iii-iv, 3.

<sup>88</sup> Australian Bureau of Statistics (ABS), *4517.0 – Prisoners in Australia*, Reissue (ABS, 2 April, 2013) 27; Australian Bureau of Statistics (ABS), *4517.0 – Prisoners in Australia*, (ABS, 2 April, 2012) 9.

improved court attendance, reduced incarceration rates and/or provided a culturally appropriate and empowering process for Indigenous communities, offenders and victims. Evaluations of Indigenous sentencing courts have been conducted separately in relation to New South Wales Circle Sentencing,<sup>89</sup> Victoria's Koori Courts,<sup>90</sup> Murri Courts in Brisbane,<sup>91</sup> Western Australia's Aboriginal Sentencing Court of Kalgoorlie<sup>92</sup> and Northern Territory Community Courts<sup>93</sup> and Nunga Courts in South Australia.<sup>94</sup> The findings reflect the unique operation and context of each sentencing court.<sup>95</sup>

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<sup>89</sup> Cultural and Indigenous Research Centre Australia, *Evaluation of Circle Sentencing Program: Report* (New South Wales Attorney-General's Department, 2008); Ivan Potas, Jane Smart, Georgia Brignell, Brendan Thomas and Rowena Lawrie, *Circle Sentencing in New South Wales: A Review and Evaluation* (Judicial Commission of New South Wales, 2003); Kathleen Daly and Gitana Proietti-Scifoni, *Defendants in the Circle: Nowra Circle Court, the Presence and Impact of Elders, and Re-offending* (School of Criminology and Criminal Justice, Griffith University, Brisbane, 2009). Available at [http://www.griffith.edu.au/\\_\\_data/assets/pdf\\_file/0007/189862/Defendants-in-the-Circle-updated-27-Jan.pdf](http://www.griffith.edu.au/__data/assets/pdf_file/0007/189862/Defendants-in-the-Circle-updated-27-Jan.pdf); Jacqueline Fitzgerald, 'Does Circle Sentencing Reduce Aboriginal Offending?' *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* (No 115, BOCSAR, May 2008) 1-12. Available at <http://www.bocsar.nsw.gov.au/agdbasev7wr/bocsar/documents/pdf/cjb115.pdf>.

<sup>90</sup> See Zoë Dawkins, Martyn Brookes, Katrina Middlin and Paul Crossley, *County Koori Court: Final Evaluation Report* (County Court of Victoria, Victorian Department of Justice and Clear Horizon Consulting, 27 September 2011) 3. Available at [http://www.countycourt.vic.gov.au/files/CKC%20Evaluation%20Report\\_FINAL\\_27Sep11.pdf](http://www.countycourt.vic.gov.au/files/CKC%20Evaluation%20Report_FINAL_27Sep11.pdf); Mark Harris, "'A Sentencing Conversation': Evaluation of the Koori Courts Pilot Program October 2002-October 2004 (Victorian Department of Justice, 2006).

<sup>91</sup> Anthony Morgan and Erin Louis, *Evaluation of the Queensland Murri Court: Final Report*, Technical and Background Paper no. 39 (Australian Institute of Criminology, October 2010). Available at <http://aic.gov.au/publications/current%20series/tbp/21-40/tbp039.html>; Natalie Parker and Mark Pathe, *Report on the Review of the Murri Court* (Queensland Department of Justice and Attorney General, 2006).

<sup>92</sup> Heather Aquilina, Jennifer Sweeting, Helen Liedel, Vickie Hovane, Victoria Williams, Craig Somerville, *Evaluation of the Aboriginal Sentencing Court of Kalgoorlie: Final Report* (Shelby Consulting, 16 October 2009). Available at [http://www.courts.dotag.wa.gov.au/\\_files/Kalgoorlie\\_Sentencing\\_Court\\_Report.pdf](http://www.courts.dotag.wa.gov.au/_files/Kalgoorlie_Sentencing_Court_Report.pdf)

<sup>93</sup> See Blokland, above n 19, 10-11, 15-16.

<sup>94</sup> The Cultural and Indigenous Research Centre Australia has just completed its evaluation of the Indigenous sentencing courts in South Australia, Queensland and the Northern Territory, which is yet to be released. It is part of a project funded by the Commonwealth Attorney-General's Department and entitled 'Aboriginal Sentencing Courts and Conferences'.

<sup>95</sup> Elena Marchetti, 'Indigenous Sentencing Courts' (Indigenous Justice Clearinghouse Research Brief 5, December 2009) 3. Available at <http://www.indigenousjustice.gov.au/briefs/brief005.pdf>.

In more recent evaluations, there has been a strong emphasis on the effect of Indigenous sentencing courts on reducing recidivism. We contend that this approach isolates the role of Indigenous sentencing courts to specific deterrence alone. It overlooks the range of functions that Indigenous courts carry out, including promoting individualised justice, providing a culturally appropriate process, strengthening Indigenous communities and reducing overall crime in the Indigenous community through general deterrence, as discussed above. Quantitative research also overlooks the complex patterns of offending behaviours and broad changes that the offender undergoes which can be discerned from qualitative studies. Nonetheless, both qualitative and quantitative studies provide useful reference points for the development of Indigenous sentencing mechanisms in the Northern Territory. In the latter part of this section, we consider how lessons from these studies across Australia (including previously in the Northern Territory) can be adapted to the Northern Territory community circumstances to achieve successful outcomes.

### *Northern Territory*

In relation to the Northern Territory, there have been three evaluations of Community Courts. In August 2006, a survey of users of the Community Courts program in Darwin and the Tiwi Islands found that 60 per cent of respondents believed that the Community Court model increased community participation in sentencing and enhanced the procedures of the Court of Summary Jurisdiction.<sup>96</sup> The role of Elders was also seen to provide valuable assistance within the court process, and to provide a sense of community responsibility and accountability for the joint decisions made by the Court.<sup>97</sup>

The preliminary findings of an evaluation by the Department of Justice in relation to Nhulunbuy Community Court in 2007 indicate that re-offending rates at Community Courts

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<sup>96</sup> See Blokland, above n 19, 11.

<sup>97</sup> Ibid 10-11.

were lower than those of regular courts: a 40 per cent recidivism rate compared to a court average of 60 per cent.<sup>98</sup> These findings are limited due to an insufficient control group of like-offenders. Moreover, there were high levels of satisfaction in the process and outcomes of the Court, particularly the increased use of outstations for probation where the availability of alcohol was greatly reduced.<sup>99</sup>

The final review of Community Courts from 2005-2012 prepared for the NT Department of Justice found that the overall recidivism rates of participants was 51 per cent. This was only slightly lower than the average for Indigenous offenders (53%). The report also found that the breach of order rates of Community Courts participants were also much higher (30 per cent) than for Indigenous defendants in mainstream Magistrates Courts (11 per cent).<sup>100</sup>

There were several limitations that the report itself highlighted. Firstly, the dataset was arguably too low to demonstrate statistical significance. Secondly, the report acknowledged that recidivism rates of participants need to be compared with comparable controls. The report specifically warns that 'directly comparing a second time offender and a sixth time offender within a reoffending rate analysis is problematic when deriving important policy or program assumptions'.<sup>101</sup> It would therefore have been preferable to compare Community Court participants' recidivism rates with offenders facing similar charges and with similar priors. Additionally it is appropriate to obtain a control group at the same location where similar policing, support networks and social pressures exist. The report failed to identify whether the recidivism of Community Court participants was for serious or more trivial offending. The high rates of policing and enforcement of traffic regulations in remote Aboriginal communities leave the recidivism rates open to misinterpretation. A more meaningful analysis of the recidivism figures would be to exclude minor traffic offences from this analysis or to only compare the recidivism rates with offenders from that community.

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<sup>98</sup> Ibid 15.

<sup>99</sup> Ibid.

<sup>100</sup> Suggit, above, n 27, 26.

<sup>101</sup> Ibid 25.



Likewise the breach rates were not analysed for their seriousness nor compared to like communities and offenders. As mentioned above, Community Court participants were often selected because their histories were more serious and it was felt that intervention was particularly required. The failure to use comparable controls therefore brings into question the utility of this data. The report did not conduct any interviews or surveys with defendants, victims or community panel members and therefore was unable to properly evaluate the goals relating to those groups (discussed above).

### *Evaluations in Other Australian Jurisdictions*

#### **(i) Quantitative findings**

As with evaluations in the Northern Territory, a number of quantitative studies in other Australian jurisdictions indicate that Indigenous sentencing courts have had a positive impact on specific deterrence by reducing recidivism. These findings have been made in relation New South Wales Circle Sentencing,<sup>102</sup> Victoria's Koori Courts<sup>103</sup> and Murri Courts in Brisbane.<sup>104</sup> However, Fitzgerald's and Marchetti's research reveals that there are a number of limitations to these studies, particularly their lack of an appropriately comparable control group; their inadequate follow up periods and their unreliable court data.<sup>105</sup>

In order to provide a more rigorous evaluation of Circle Sentencing in New South Wales, Fitzgerald conducted a statistical analysis to assess whether the Circle had reduced the frequency of offending for participants, reduced the time period before reoffending or had reduced the seriousness of their offending. Fitzgerald concluded that Circle Sentencing had no

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<sup>102</sup> Cultural and Indigenous Research Centre Australia, above n 90; Potas et al, above n 90.

<sup>103</sup> See Dawkins et al, above n 91; Harris, above n 91.

<sup>104</sup> Parker and Pathe, above n 87.

<sup>105</sup> Marchetti, 'Indigenous Sentencing Courts', above n 96, 3-4; Fitzgerald, above n 90, 1-12; Morgan and Louis, above n 92, 12.

effect on these indicators.<sup>106</sup> Parallel findings emerged in a similarly designed statistical study by Morgan and Louis in relation to the former Queensland Murri Courts.<sup>107</sup> However, Fitzgerald's and Morgan and Louis' studies did not have an appropriately comparable control group because they did not account for local factors such as local offending rates and rehabilitative and other social supports, notwithstanding that they accounted for Indigenous background, nature of the charge, criminal history, age and other relevant indicia. In Fitzgerald's analysis, participants who were sentenced by a Circle in the local court areas of Brewarrina, Nowra and Dubbo were compared with offenders from areas 'outside of Sydney'.<sup>108</sup> For Morgan and Louis, participants in Murri courts were compared with Indigenous offenders who did not participate in a Murri court in the evaluation courts or other locations that have a Murri court.<sup>109</sup> By not controlling the study on the basis of the specific community, a range of variables exists, including local risk factors and support services. A properly controlled study for Indigenous offenders would involve comparing outcomes between those sentenced by an Indigenous court and those sentenced by a mainstream court within the *same* Indigenous community.

In respect of quantitative findings on court attendance, Morgan and Louis found that those appearing in a Murri Court were less likely to abscond than those appearing in a mainstream court.<sup>110</sup> Regarding incarceration rates, they found that defendants in the Youth Murri Court compared to the Children's Court were just as likely to receive a custodial sentence, while adult offenders in Murri Courts were more likely to be sentenced to prison than in a Magistrate's Court. However, when adults who already serving a period of prison were excluded, there was no difference in adult imprisonment rates.<sup>111</sup> Of the remaining offenders who did not receive a custodial penalty, adult Murri Court participants were more likely to

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<sup>106</sup> Fitzgerald above n 90, 7.

<sup>107</sup> Morgan and Louis, above n 92, 113.

<sup>108</sup> Fitzgerald above n 90, 3.

<sup>109</sup> Morgan and Louis, above n 92, 18.

<sup>110</sup> Ibid 85.

<sup>111</sup> Ibid xv.

receive a custodial sentence with an immediate parole release date, a suspended sentence and in the case of those offenders that received a non-custodial penalty, Murri Court participants were more likely to receive some form of community supervision and work order.<sup>112</sup> Morgan and Louis were unable to obtain data on the participants who received rehabilitative orders. While these results show some benefit for the diversion for Indigenous offenders, a limitation of this study is that it is not geographically contingent (see above). This is particularly relevant here given that decisions about sentencing orders need to be considered in the context of services available to the particular community.

### **(ii) Qualitative findings**

Qualitative studies tend to be based on observations of Indigenous sentencing courts and interviews with court users to gauge their perceptions of the process and outcomes. Interviews have identified that users regarded the courts to be having a positive impact, including on reducing recidivism. Analysis by the Cultural and Indigenous Research Centre Australia found a common perception that Circle Sentencing deters against reoffending and has a 'dramatic influence on offenders beyond reoffending', such as in relation to substance abuse, employment and family relations.<sup>113</sup> Daly and Proietti-Scifoni, in their study of the Nowra (New South Wales) Circle, caution against simplistic analysis of recidivism in quantitative studies, given the multiple factors informing desistance or persistence of offending. The authors considered five factors relevant to reoffending: substance abuse, age, family relations, a changed identity, and hope for the future.<sup>114</sup> They found that reoffending following participation in the Nowra Circle depended on a complex set of issues, including attitudes to prison, willingness to stop using illegal substances and to drink more responsibly and their age (with older offenders more likely to desist).<sup>115</sup> Daly and Proietti-Scifoni argue

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<sup>112</sup> Ibid 144.

<sup>113</sup> Cultural and Indigenous Research Centre Australia, above n 90, 61.

<sup>114</sup> Kathleen Daly and Gitana Proietti-Scifoni, 'The Elders Know ... The White Man Don't Know': Offenders' Views of the Nowra Circle Court' (2011) 7(24) *Indigenous Law Bulletin* 17, 19.

<sup>115</sup> Ibid 20.

that desistance is a process rather than a 'single event' or a response to a single fix.<sup>116</sup> Overall, Nowra defendants were positive about the Circle's informality, open information sharing, change in white-Indigenous power relations, meaningful and constructive censuring processes and its outcomes.<sup>117</sup>

In relation to victims, it has been found that a greater degree of victims' participation in the Indigenous sentencing court process assisted in their healing.<sup>118</sup> Marchetti's study of Indigenous sentencing courts in New South Wales and Queensland, based on observations and semi-structured interviews, found that gendered power imbalances in family violence cases were reduced, although not eradicated.<sup>119</sup> The reduction was due to the capacity of victims to talk about issues and tell their story; the presence of Elders and the capacity of these courts to shame the offender in a culturally appropriate way.<sup>120</sup> The role of Elders or Respected Persons and the culturally appropriate nature of the process generated accountability between offenders, victims and the wider community.<sup>121</sup>

From interview data, it has been found that defendants before Indigenous sentencing courts regard the sentence with greater gravity because they perceived it as fair and appropriate.<sup>122</sup> Magistrates also felt better positioned to impose a sentence that reflected the needs of the offender and community following community discussion and disclosure of issues.<sup>123</sup> Interviews conducted by Morgan and Louis found that Murri Courts were more likely than mainstream courts to reintegrate the offender into their community by (re)establishing

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<sup>116</sup> Ibid 17.

<sup>117</sup> Ibid 20.

<sup>118</sup> See Potas et al, above n 90, 1, 18, 20.

<sup>119</sup> Marchetti, 'Indigenous Sentencing Courts and Partner Violence,' above n 76, 278.

<sup>120</sup> Ibid.

<sup>121</sup> Morgan and Louis, above n 92, 138; also see Cultural and Indigenous Research Centre Australia, above n 90; Parker and Pathe above n 92; Potas et al, above n 90.

<sup>122</sup> Cultural and Indigenous Research Centre Australia 2008, above n 90; Potas et al, above n 90.

<sup>123</sup> Marchetti, 'Indigenous Sentencing Courts and Partner Violence', above n 76, 278.

relationships between the offender and respected members of the community.<sup>124</sup> More broadly, studies have found that Indigenous sentencing courts have empowered Indigenous communities.<sup>125</sup> Communities felt a sense of ownership over the process and cultural understanding was promoted between court workers and Indigenous communities.<sup>126</sup>

Defendants have identified a number of drawbacks arising from participation in Indigenous sentencing mechanisms. For example, in interviews conducted with defendants sentenced in the Nowra Circle, one defendant felt that the Elders were unfairly 'ganging up' on him, although generally defendants regarded Elders as tough but encouraging and supportive.<sup>127</sup> Another defendant remarked that the presence of the prosecution took over and hindered an open discussion.<sup>128</sup> Others commented on the lack of information available about the process and the lack of post-Circle follow-up and support.<sup>129</sup> Finally, the Circle did not 'work' for defendants when, in the occasional case, they did not know the Elders and consider them to be Aunties and Uncles.<sup>130</sup> In relation to New South Wales Circle Sentencing and Queensland's former Murri Courts, Marchetti<sup>131</sup> and Morgan and Louis<sup>132</sup> identify that the effectiveness of community courts is compromised in the absence of culturally appropriate rehabilitation programs and services in the local community and custodial settings.

### *Looking backwards and moving forward in Northern Territory Indigenous sentencing courts*

A number of useful observations and lessons emerge from research on Indigenous sentencing courts in various Australian jurisdictions. These correlate with our observations of

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<sup>124</sup> Morgan and Louis, above n 87, 124.

<sup>125</sup> See Marchetti, 'Indigenous Sentencing Courts', above n 96, 4.

<sup>126</sup> Morgan and Louis, above n 92, 124.

<sup>127</sup> Daly and Proietti-Scifoni, above n 115, 18, 20.

<sup>128</sup> Ibid 19.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Marchetti, 'Indigenous Sentencing Courts and Partner Violence', above n 76, 278.

<sup>132</sup> Morgan and Louis, above n 92, 46, 127.

Community Courts in Warlpiri, Tiwi and Yolŋu communities. Given the Government's recent amendments to s 104A of the *Sentencing Act*, which could have the effect of reinstating Community Courts, these are important considerations to help frame community involvement in sentencing. However, while the discussion in this section offers some useful guideposts for the development of policies and processes around Community Courts, Indigenous court participation needs to come from within the specific Indigenous community and be adapted to its needs and the conditions of the Northern Territory.

First, the success of the Community Courts is crucially dependent on local ownership of the process and local endorsement of its cultural appropriateness. For remote communities, this includes that Indigenous sentencing courts are closely connected with the community justice framework.<sup>133</sup> By being embedded in the community justice structure, community courts avoid legitimising the sentencing orders of mainstream courts<sup>134</sup> and can effectively convey community justice concerns. Blagg notes that Indigenous-based justice mechanisms are successful where they are locally driven and integrated with Indigenous law and governance instruments.<sup>135</sup> In central Australia, the Community Courts were closely linked to the Law and Justice Groups, which, as we observed, strengthened the role of the Court and enabled defendants and victims to have appropriate support following their appearance in the Indigenous sentencing court. This meant that their court appearance did not represent an isolated event but had ongoing relevance to their behaviour and healing. Additionally, Community Court members could look beyond the individual criminal act and examine ways of preventing similar behaviour in the community. This extends the current criminal justice system's focus on criminal behaviour to a focus on crime prevention.

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<sup>133</sup> See Janet Hunt and Diane Smith, *Indigenous Community Governance Project: Year Two Research Findings*, Working Paper 36 (Centre for Aboriginal Economic Policy Research, 2007) 24; Gaykamangu, above n 56, 236.

<sup>134</sup> This concern is raised in: Cunneen, above n 14, 292.

<sup>135</sup> Blagg, above n 13, 140.

Second, the qualitative studies also reveal the importance of court members having a connection with the offender and his/her family.<sup>136</sup> In Northern Territory Aboriginal communities, their relatively small size and cohesiveness made them fertile ground for engaging defendants. The intimate knowledge that the panel have of the defendant assist the court in painting a fuller picture of the defendant's circumstances as well as increase the impact of the Community Court's shaming of the defendant. While Law and Justice Groups provide an avenue for sentencing input, they are unable to fill the void of Community Courts. This is because their advice is communicated to the magistrate and they cannot censure the defendant. By contrast, Community Court members can speak freely, and in language, to offenders for whom they are familiar. The offender can therefore appreciate how the punishment flows from the reprobation of their community.

The selection of appropriate people, according to the particular offender and offence, to sit on Community Courts is a third consideration.<sup>137</sup> In the Northern Territory this requires that the people selected for panels have appropriate relationships to the defendants and are not in jeopardy of breaching avoidance relationships. In relation to the Nhulunbuy Community Court, former Chief Magistrate Blokland observed that 'it would be unheard of for a Yolŋu person to be present, sit or speak in a setting where their own law or gurutu (kinship) did not permit'.<sup>138</sup> When Community Courts operated, the selection of their panels was made in consultation with corrections officers, local Elders and with the consent of the parties. Commentator Bob Gosford described Yuendumu Community Court as bringing together 'respected community members and the defendant's family and kinship group'.<sup>139</sup> Appropriateness also depends on the role of the panel members in the community. The authority of Community Courts is enforced when members are engaged in broader community justice strategies and perform roles as Indigenous law custodians. We observed in

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<sup>136</sup> Daly and Proietti-Scifoni, above n 115, 19.

<sup>137</sup> Potas et al, above n 90, 7; Blokland, above n 19, 13.

<sup>138</sup> Blokland, above n 19, 13.

<sup>139</sup> Gosford, 'Court Day in Yuendumu', above n 35.

Yuendumu that very senior Law people were engaged in the process, such as Peggy Nampijimpa Brown and Harry Jakamarra Nelson. These women and men were involved in a range of justice initiatives, such as in relation to reducing petrol sniffing<sup>140</sup> and dispute resolution, and had leading roles on Yuendumu Council. In relation to the Nhulunbuy Community Court, two of the Respected Persons involved its establishment and who sat on its panel were made Justices of the Peace. For these people, Ms Raymattja Marika and Mr Barnambi Wunungmurra, they were given 'a sense of acknowledgment under both systems of law'.<sup>141</sup>

Fourth, the participation of Indigenous sentencing court members requires support and commitment to the process by the magistrate or judge.<sup>142</sup> The judicial officer is the final arbiter on who constitutes the Community Court and whether the court operates for a particular hearing or altogether. We observed that magistrates had greater confidence in the process where the panel members were respected and law abiding. Sometimes the latter could be a difficult prerequisite to meet. Marchetti and Ransley claim that cultural awareness training of judicial officers, as well as other court participants (prosecutors, defence lawyers and court staff), is necessary for their effective engagement with the process.<sup>143</sup> The training needs to be complemented with guidance on 'how to use this awareness to transform practices involving Indigenous people'.<sup>144</sup>

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<sup>140</sup> Nicole Lee, 'Yuendumu trio awarded Order of Australia' (ABC Alice Springs, 17 August 2007). Available at <http://www.abc.net.au/local/stories/2007/08/17/2007838.htm>

<sup>141</sup> Blokland, above n 19, 13.

<sup>142</sup> Commenting on Indigenous sentencing courts in Australia, Marchetti and Ransley state that judges and magistrates are expected to deploy 'a range of different strategies and skills to improve communication with Indigenous offenders, make them more involved in the process, and more open to conversations around their offending and sentencing': Elena Marchetti and Janet Ransley, 'Applying The Critical Lens To Judicial Officers And Legal Practitioners Involved In Sentencing Indigenous Offenders: Will Anyone Or Anything Do?' (2014) 37(1) *University of New South Wales Law Journal* 1, 15.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*



A fifth lesson is that Indigenous sentencing courts are effective where they can advise on a broad range of sentencing orders that are relevant to the community.<sup>145</sup> The New South Wales Aboriginal Justice Advisory Council identified the value of Circle Sentencing in adopting more appropriate, holistic and workable solutions and sentencing orders, and its capacity for collective responsibility in implementing sentencing outcomes.<sup>146</sup> In the Northern Territory, Indigenous people have the potential to be involved in a range of sentencing outcomes that conform with the legislation, including supervising community-styled orders such as exile<sup>147</sup> and participation in a ceremony or a work camp, strengthens this potential of Community Courts. Aside from Indigenous law-related orders, Indigenous courts should have the capacity to order participation in local programs and activities that can form part of sentencing conditions. This requires that community-based sanctions in the form of rehabilitative programs, such as drink driving programs, are adequately resourced. In remote Northern Territory communities, there are currently very few rehabilitative services (such as drug, alcohol or mental services) or community corrections officers to supervise defendants.<sup>148</sup>

## Conclusion

Sentencing is a process premised on individualised justice. Without the full set of information on the offender, the impact of the offence and the effect of sentencing options, it is impossible to give meaning to this concept. In order to ascertain information for Aboriginal defendants in Northern Territory Aboriginal communities and afford them substantive equality there is a need for community participation in sentencing. This can be realised through the enactment of proposed amendments to the *Sentencing Act 1995* (NT) s 104A as well as by drawing on the

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<sup>145</sup> The Royal Commission into Aboriginal Deaths in Custody noted the efficacy of having Aboriginal communities involved in determining, planning and implementing local community service orders. Royal Commission into Aboriginal Deaths in Custody, above n 71, Recommendations 109–115.

<sup>146</sup> New South Wales Aboriginal Justice Advisory Council, *Circle Sentencing: Involving Aboriginal Communities in the Sentencing Process* (1999).

<sup>147</sup> See Gosford, 'Djambuy's case and the recognition of Aboriginal customary law', above n 74; *R v Yakayaka and Djambuy* (Supreme Court of Northern Territory, 21207397 and 21207400, Riley CJ, 17 December 2012)..

<sup>148</sup> See Anthony and Blagg, above n 78, 54.

lessons from Australian Indigenous courts. Our observations of Community Courts testify to the importance of community ownership of the process, links between the Community Courts and other community-based justice mechanisms, the selection of appropriate Respected Persons, a responsive Magistrate and the availability of a range of well-resourced community-based sentencing options.

By contrast, the former prohibition of Community Courts through a narrow interpretation of the *Sentencing Act* and the former *Northern Territory National Emergency Response Act* was both racially discriminatory and denied individualised justice to Northern Territory Aboriginal people. The amendments to s 104A of the *Sentencing Act* mean that Community Courts can now comply with the requirements of s 104A, leaving no statutory bar to the reinstatement of Community Courts. Furthermore, we have argued that the limited ban on cultural evidence under the *Northern Territory National Emergency Response Act* s 91 (now s 16AA of the *Crimes Act* (Cth)) need not preclude the operation of Community Courts because they deliberate on a range of matters and not exclusively on the narrow issue of whether culture or customary law mitigate or aggravate the objective seriousness of an offence which the legislation targets.

The failure to reinstate Community Courts privileges a notion of formal equality that normalises Anglo-Australian cultures and denies Northern Territory Aboriginal people a conduit for the expression of their community views. Community Courts bring into sharp relief the whiteness of formal equality and the strides that can be made in achieving substantive equality in the sentencing Indigenous defendants. The work of Community Courts, alongside Law and Justice Groups, draws on Indigenous strengths and reinforces the role of Indigenous justice structures in communities. This enables Northern Territory Aboriginal communities to work towards crime prevention and developing meaningful relationships with the justice system that redress the postcolonial inequalities.