

## **APPLYING THE CRITICAL LENS TO JUDICIAL OFFICERS AND LEGAL PRACTITIONERS INVOLVED IN SENTENCING INDIGENOUS OFFENDERS: WILL ANYONE OR ANYTHING DO?**

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### **I LAWYERING AND JUDGING IN THE FACE OF INDIGENOUS OVER-REPRESENTATION IN THE CRIMINAL JUSTICE SYSTEM**

In recent years there have been many attempts aimed at transforming the relationship between Indigenous people and the criminal justice system in Australia. Some of these attempts have been directed at policing relationships, including such measures as community and night patrols.<sup>1</sup> Others have focused on prisons, including attempts at greater cultural accommodation, and even the building of Aboriginal prisons.<sup>2</sup> The focus of this article, however, is on the relationship between Indigenous people and court processes, especially in regards to sentencing. In particular, the article explores innovative sentencing courts, practices and principles introduced across the Australian jurisdictions specifically aimed at Indigenous offenders. These include circuit courts in regional and remote centres where judicial officers seek the advice of community members when making sentencing determinations; Indigenous sentencing courts in urban cities and regional towns where Elders or community representatives are involved in the sentencing court process; and now the cross-border justice scheme where judicial officers and legal practitioners from the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Lands in the Northern Territory, South Australia and Western Australia are engaged in ‘processing’ offenders from ‘cross-border’ jurisdictions. These processes are often touted as providing a more culturally

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1 Harry Blagg and Giulietta Valuri, ‘Self-policing and Community Safety: The Work of Aboriginal Community Patrols in Australia’ (2004) 15 *Current Issues in Criminal Justice* 203, 203.

2 Department of Corrective Services, Government of Western Australia, *West Kimberley Regional Prison* (28 May 2013) <<http://www.correctiveservices.wa.gov.au/prisons/prison-locations/west-kimberley.aspx>>.

appropriate and inclusive courtroom experience for offenders. However, there has been little discussion about what that means in practice for the non-Indigenous legal players. The article begins with a brief discussion of the context in which these processes have arisen, followed by an overview of these processes to establish what has been done. It then looks at the extent to which formal, publicly available guidance is available to judicial and legal officers to assist them in being more culturally sensitive. We then discuss these findings in the context of principles underpinning problem-solving courts and therapeutic jurisprudence, and within a postcolonial framework, to help determine the emotive or relational characteristics and practices that non-Indigenous legal participants might be required to adopt in Indigenous-focused sentencing practices. We do not examine the stated and unstated assumptions underpinning such processes, or the informal training and discussion judicial officers and lawyers may receive, which are important topics, but beyond the scope of this article.

### A Context of Indigenous Sentencing Practices

For Indigenous people, as with non-Indigenous people, the most common court experience is a guilty plea and sentencing procedure.<sup>3</sup> For most people, this occurs in a Magistrates' Court (around 92 per cent of finalised criminal matters throughout Australia in 2011–12).<sup>4</sup> The sentencing process is critical because it provides an opportunity either for intervention and diversion, or for a deepening engagement with the criminal justice system.

The need for intervention and diversion is important because, since the 1991 Royal Commission into Aboriginal Deaths in Custody ('RCIADIC'),<sup>5</sup> the over-representation of Indigenous people in Australian prisons has worsened. In 1991, Indigenous people comprised 14 per cent of adult prisoners,<sup>6</sup> while in 2012 the rate was 27 per cent.<sup>7</sup> Indigenous imprisonment rates have more than doubled, from 1234 per 100 000 in the early 1990s to 2303 per 100 000 in 2010, compared with 169 per 100 000 for non-Indigenous people.<sup>8</sup> Indigenous men are now over-represented by a factor of 13.4, while Indigenous women are 16.5 times more

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3 Sharyn Roach Anleu and Kathy Mack, 'Intersections Between In-Court Procedures and the Production of Guilty Pleas' (2009) 42 *Australian and New Zealand Journal of Criminology* 1.

4 Australian Bureau of Statistics, *Criminal Courts Australia 2011–2012* (14 February 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Products/DBBA969B3A2DBB39CA257B11000D5DB6?opendocument>>.

5 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

6 Sara Hudson, 'Panacea to Prison? Justice Reinvestment in Indigenous Communities' (2013) *Centre for Independent Studies Policy Monograph* 134, 5.

7 Australian Bureau of Statistics, *Prisoners in Australia, 2012* (2 April 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Products/5087123B0CCE48C1CA257B3C000DC7CE?opendocument>>.

8 Chris Cunneen, 'Punishment: Two Decades of Penal Expansionism and Its Effects on Indigenous Imprisonment' (2011) 15 *Australian Indigenous Law Review* 8, 10.

likely than non-Indigenous women to be imprisoned,<sup>9</sup> and Indigenous juveniles are 28 times more likely to be in custody than non-Indigenous young people.<sup>10</sup>

There are competing explanations as to why this over-representation exists, and why it is getting worse. It has been argued that systemic bias, racial discrimination and institutional racism impact on Indigenous people in their contact with the criminal justice system.<sup>11</sup> Thus, Indigenous people are more likely than non-Indigenous people to be arrested, charged rather than cautioned, remanded in custody rather than bailed, and ultimately receive a prison sentence.<sup>12</sup> These outcomes can reflect personal bias, such as in the policing of public order offences and arrest decision-making. They can also reflect institutionalised bias, for example in bail laws which tend to disadvantage Indigenous people, who are more likely to have prior criminal histories and less settled living arrangements compared to non-Indigenous offenders.

On the other hand, it has been argued that Indigenous people are over-represented in prison because they are over-represented in crime.<sup>13</sup> Instead of focusing on institutional and systemic issues, it is argued, over-representation will be reduced by focusing on underlying issues that lead Indigenous people to offend at higher rates, such as substance abuse, family violence and unemployment. This line of argument contends that policies aimed at diverting Indigenous offenders from the criminal justice system have limited value. However, Cunneen responds that while Indigenous offending levels are problematic, the relationship with over-representation is complex and mediated by many factors.<sup>14</sup> He suggests that in Australia, punishment is highly racialised, with bail and remand in particular operating in a way that encourages perceptions of Indigenous people as risky and dangerous.<sup>15</sup> In this environment while it is clearly essential for underlying social and economic issues to be addressed, those measures are only part of the solution to the problem of Indigenous over-representation. For thousands of Indigenous people currently caught up in the

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9 Lorana Bartels, 'Sentencing of Indigenous Women' (Brief No 14, Indigenous Justice Clearing House, November 2012) 1.

10 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) 8.

11 See, eg, Chris Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2006) 17 *Current Issues in Criminal Justice* 329; Harry Blagg et al, 'Systemic Racism as a Factor in the Overrepresentation of Aboriginal People in the Victorian Criminal Justice System' (Research Report, Australian Institute of Justice and Standing Council on Law and Justice, September 2005).

12 Rick Sarre, 'Police and the Public: Some Observations on Policing and Indigenous Australians' (2005) 17 *Current Issues in Criminal Justice* 305, 307–8.

13 See, eg, Don Weatherburn, Jackie Fitzgerald and Jiuzhao Hua, 'Reducing Aboriginal Over-Representation in Prison' (2003) 62 *Australian Journal of Public Administration* 65; Lucy Snowball and Don Weatherburn, 'Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?' (2007) 40 *Australian and New Zealand Journal of Criminology* 272.

14 Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People', above n 11, 334–40.

15 Cunneen, 'Punishment', above n 8, 10.

criminal justice system, reducing its negative aspects, and particularly the prospects of incarceration, is of critical importance.

In an attempt to help achieve these goals, a broad range of sentencing measures designed for Indigenous people has been introduced over recent years, including specialty courts, changes in sentencing practices to accommodate cultural custom and input, and sentencing principles directed at acknowledging the impact of colonisation. A growing literature describes these measures,<sup>16</sup> with considerable attention paid to the role of Indigenous Elders, culture and experience, and how these factors can be recognised and incorporated into Australian courts. However, comparatively little attention has been paid to how Australian courts, judicial officers and lawyers need to, or indeed are capable of, change to take into account the experiences of Indigenous people. If the colonising impact of the Australian legal system is to be reduced for Indigenous people, to reduce the systemic and institutionalised disadvantage they experience, then the critical lens needs to be turned onto the legal system. By this we mean that rather than focusing on how Indigenous knowledge and culture can be adapted into the hegemonic mainstream system, it is time to examine how the court system can be adapted and transformed to suit Indigenous people. How can court practices and principles be adapted to reduce their criminogenic effects on Indigenous people who come into contact with them? How far have recent Australian innovations come in implementing culturally appropriate sentencing and inclusive processes for Indigenous offenders? In particular, how can the non-Indigenous judicial officers and legal practitioners who dominate the sentencing court landscape adapt their day-to-day practices to make the sentencing process more culturally appropriate and inclusive for Indigenous people and communities?

To answer these questions we rely on the following sources of information: First, we describe and analyse the legislation, guidelines and case law governing the various Indigenous-focused court processes from around Australia to determine what, if anything, has been specified as a culturally appropriate and inclusive process for dealing with Indigenous people who come before these courts. Our rationale in doing so is that such material provides the formal framework within which judicial and legal actors are expected to operate. Secondly, drawing on the literature about therapeutic jurisprudence, we examine what has been said about the role of lawyers, lawyering and judging in therapeutic contexts. This literature is useful because it describes how legal practices can be adapted to better meet the needs of those coming into contact with them. Thirdly, we look at postcolonial theory and literature that has described what it means to be culturally appropriate and inclusive within decision-making or justice-oriented contexts in order to understand the limitations, but also the possibilities of developing a culturally appropriate and

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16 See, eg, Thalia Anthony, 'Sentencing Indigenous Offenders' (Brief No 7, Indigenous Justice Clearing House, March 2010) 1; Elena Marchetti and Kathy Daly, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends and Issues in Crime and Criminal Justice* 1.

inclusive sentencing process. Finally, we examine what judicial officers and other court workers have said about how they carry out their duties in Indigenous-focused sentencing practices (such as Indigenous sentencing courts) and how they (and the legal practitioners present in their courts) adapt their style of lawyering and judging in the process. Our goal is to draw on these sources of information to identify what is known about culturally appropriate and inclusive practices for Indigenous people facing sentencing processes, and then to assess the extent to which current frameworks governing these processes incorporate, or fail to incorporate, guidelines for implementing culturally appropriate and inclusive practices. We finish with some suggestions as to what are the main emotive and relational characteristics and courtroom processes that appear to be crucial for non-Indigenous judicial officers and legal practitioners to adopt when working within sentencing contexts that claim to be Indigenous-focused, and with some recommendations as to what further research is required in order to fully understand what it means to be culturally appropriate and inclusive within a court setting.

Our focus is on the attitudes and behaviour of the non-Indigenous judicial and legal players involved in Indigenous-focused sentencing processes. However, we acknowledge that the arguments made and conclusions reached may also be relevant for Indigenous judicial officers and legal practitioners since they are ultimately operating within a system that is non-Indigenous-centric, and they are therefore also constrained in the manner in which they carry out their duties by the normative practices associated with such a system. It is important to note that our study has been limited to publicly available data and information about courts and sentencing processes. No doubt there is much discussion of these issues in judicial conferences and other informal meetings. However, we are interested in the formal rules governing courts and sentencing because it is within these boundaries that judicial actions and outcomes must be assessed. There is undoubtedly further fruitful work to be done in investigating the informal environment, but that is beyond the scope of this article.

## **II INDIGENOUS-FOCUSED SENTENCING PRACTICES AND COURT REFERRED REHABILITATION PROGRAMS**

This part of the article describes the kinds of court practices, and diversion and rehabilitation programs that specifically target Indigenous offenders. As a result, the judicial officers, prosecutors and defence lawyers involved in these practices and programs are required to adapt their conventional or traditional courtroom practices to better meet the needs of Indigenous participants. We also examine the legislation, guidelines and case law governing the operation of these schemes, in order to detail the extent of guidance given on culturally appropriate and inclusive practices. This descriptive section brings together currently available information in a comprehensive way, so as to facilitate the analysis set out in the following section.

A range of courts, practices and programs target Indigenous people across the Australian jurisdictions. What follows is a brief overview of this range in each of the Australian jurisdictions, as summarised in Table 1 below. The second column of the table lists Indigenous-focused sentencing courts or schemes; the third column identifies court based diversion or support programs; and the final column refers to sentencing principles. We expand upon each in the following paragraphs. By ‘Indigenous-focused’ we mean courts or court programs established specifically to meet the needs of Indigenous offenders and communities. While there are other specialty courts and programs that exist and may affect some Indigenous people (for example, drug, mental health and family violence courts), we have not included them here because their main focus is not on Indigenous people and therefore the extent to which they should be culturally appropriate and inclusive is less clear. Similarly, the programs we have identified in the third column of Table 1 are those which have diversion of Indigenous people as a specific goal. The programs that have been included are aimed at diverting Indigenous offenders from the criminal justice system into more culturally appropriate options, and our focus is to examine the extent of guidance provided as to what that concept means. In the final column of Table 1 we list sentencing practices and principles applied to Indigenous offenders because of their Indigeneity, which set out special measures aimed at specific cultural circumstances. These sentencing practices relate to courts in the given jurisdiction generally, rather than to the Indigenous-focused courts and schemes identified in the second column of the table. We have not included Tasmania because that state has no specialist courts or diversion programs directed at Indigenous people. While we have attempted to identify the current landscape of practices affecting the sentencing of Indigenous offenders as comprehensively as possible, there may be some omissions as some practices are ad hoc, locally developed and applied, and often difficult to access.

Table 1: Indigenous-Focused Courts, Programs and Practices by Jurisdiction<sup>17</sup>

| Jurisdiction | Courts and Schemes                                                                                | Diversion/Court Support Program                                                   | Sentencing Principles <sup>18</sup>                                                                                                                               |
|--------------|---------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Queensland   | Murri adult and children’s sentencing courts (abolished 2012 but still operating in some sites as | Queensland Indigenous Alcohol Diversion Program (de-funded in 2012) <sup>20</sup> | Sentencing courts are required to have regard to submissions of community justice group of offender’s community, including cultural considerations. <sup>21</sup> |

<sup>17</sup> The courts and programs listed in this table were identified by reference to the courts and Justice Department websites for each jurisdiction.

<sup>18</sup> This column is largely based on Anthony, above n 16.

|                   |                                                                                                                        |                                                                                       |                                                                                                                                                                |
|-------------------|------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Queensland (cont) | Indigenous sentencing lists) <sup>19</sup><br><br>Remote Justices of the Peace ('JP') Magistrates' Courts              | Community Justice Group programs<br><br>Morrington Island Restorative Justice Project |                                                                                                                                                                |
| New South Wales   | Circle Sentencing Courts                                                                                               | Aboriginal Clients Service Specialists Program                                        | No specific reference in legislation; instead the common law is applied, including a narrowed application of the <i>R v Fernando</i> principles. <sup>22</sup> |
| Victoria          | Koori adult and children's courts                                                                                      | None identified                                                                       | No specific reference in legislation, but Indigenous disadvantage is a consideration. <sup>23</sup>                                                            |
| South Australia   | Nunga/Aboriginal Sentencing Courts<br><br>Port Lincoln Aboriginal Conference Pilot and s 9C Conferencing <sup>24</sup> | None identified                                                                       | No specific reference in legislation, but <i>Fernando</i> principles are applied.                                                                              |
| Western Australia | Yandeyarra Court<br><br>Kalgoorlie-Boulder Aboriginal Community Courts<br><br>Barndimalgu Court                        | Indigenous Diversion Program                                                          | No specific reference in legislation, but social and economic disadvantage of Aboriginality may mitigate in sentencing. <sup>25</sup>                          |

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20 Ibid.

21 *Penalties and Sentences Act 1992* (Qld) s 9(2).

19 The Queensland Government announced in July 2012 the closure of diversionary courts and programs including the Murri Courts, and the Indigenous Alcohol Diversion Program, based largely on budgetary savings: see Tony Moore, 'Diversionary Courts Fall Victim to Funding Cuts', *The Brisbane Times* (online), 13 September 2012 <<http://www.brisbanetimes.com.au/queensland/diversionary-courts-fall-victim-to-funding-cuts-20120912-25sj5.html>>.

22 (1992) 76 A Crim R 58 ('*Fernando*'). See below for a discussion of the *Fernando* principles.

23 See Anthony, above n 16, 3.

24 *Criminal Law Sentencing Act 1988* (SA).

25 Ibid 2.

|                              |                                                                                      |                                                                 |                                                                                                 |
|------------------------------|--------------------------------------------------------------------------------------|-----------------------------------------------------------------|-------------------------------------------------------------------------------------------------|
| Northern Territory           | Community Courts (abolished in 2012) <sup>26</sup>                                   | Volatile Substance Abuse Program (Indigenous Diversion Program) | Court may hear community views or Indigenous customary law in some circumstances. <sup>27</sup> |
| Australian Capital Territory | Galambany (previously known as Ngambri) Circle Sentencing Court                      | None identified                                                 | Court must consider whether cultural background is relevant. <sup>28</sup>                      |
| Commonwealth                 |                                                                                      | None identified                                                 | Limits use of customary law or cultural practice. <sup>29</sup>                                 |
| Multi-jurisdictional         | Cross Border Justice Scheme (Northern Territory, Western Australia, South Australia) | None identified                                                 | N/A                                                                                             |

### A Indigenous Sentencing Courts

Indigenous sentencing courts (such as Nunga, Murri, Koori, and Circle Courts) emerged in response to the over-representation of Indigenous people in the criminal justice system and the problematic nature of justice system responses to Indigenous offenders and victims.<sup>30</sup> These problems included the apparent lack of deterrence and rehabilitation, and the fact that much of the system was culturally inappropriate for Indigenous people. According to King, the general goals of Indigenous sentencing courts are to:

- involve Indigenous people in the sentencing process;
- increase the confidence of Indigenous people in the sentencing process;
- reduce the barriers between the courts and people;
- provide culturally appropriate and effective sentencing options;
- rehabilitate offenders and give them the opportunity to make amends to the community;

26 In December 2012 the then new Northern Territory Government abolished the Community Court, without implementing any replacement, mainly because of perceived conflicts between its operation and the requirements of Commonwealth legislation implementing the Northern Territory intervention: see Hilary Hannam, 'Current Issues in Delivering Indigenous Justice: Challenges for the Courts' (Paper presented at the Australian Institute of Judicial Administration Indigenous Justice Conference, 17 July 2013) <<http://www.aija.org.au/Ind%20Courts%20Conf%2013/Papers/Hannam.pdf>>.

27 *Sentencing Act 1995* (NT) s 104A.

28 *Crimes (Sentencing) Act 2005* (ACT) s 33(m).

29 *Crimes Act 1914* (Cth) s 16(2A).

30 Michael S King, 'Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts, Indigenous Sentencing Courts and Mainstream Courts' (2010) 19 *Journal of Judicial Administration* 133.

- provide offenders with support services to assist in overcoming their offending behaviour;
- provide support to victims and enhance the rights and place of victims in the sentencing process;
- make the community, families and the offender more accountable
- deter crime in the Indigenous community generally;
- reduce recidivism;
- provide judicial officers with an awareness of the social context of the offender and the offending;
- reduce the rate of imprisonment of Indigenous offenders, although still imposing appropriate sentences;
- decrease the number of deaths in custody;
- increase the rate of appearances in court; and
- increase the compliance rate with community-based orders.<sup>31</sup>

These goals are broad and complex, but can be characterised as fitting two main themes. First, the courts are intended to help reduce Indigenous recidivism, imprisonment and deaths in custody. Second, they are meant to help bridge the barriers between Indigenous people and culturally alien mainstream courts, to enable better understandings of the court system by Indigenous participants, better understandings of Indigenous cultural norms and values by non-Indigenous participants, and increased participation of offenders in the processes affecting them.

Any analysis of Indigenous sentencing courts needs to begin by recognising the significant jurisdictional differences that exist. The first courts emerged in South Australia in 1999, and this 'Nunga Court' model was followed in Victoria and Queensland in 2002.<sup>32</sup> Circle sentencing models emerged in New South Wales, with circuit practices occurring in more remote areas.<sup>33</sup> Each jurisdiction

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31 Ibid 139. There have been some criticisms levelled at the courts, despite their widespread community support. Some, such as comments by Cripps and Langton, suggest that the Victorian Koori Courts are more lenient towards offenders who assault partners than a mainstream Magistrates' Court: see, eg, Richard Guilliatt, 'Aboriginal Courts Fail to Deter Offenders', *The Australian* (online), 23 October 2010 <<http://www.theaustralian.com.au/national-affairs/aboriginal-courts-fail-to-deter-offenders/story-fn59niix-1225942469876>>; Kylie Cripps, 'Speaking Up to the Silences: Victorian Koori Courts and the Complexities of Indigenous Family Violence' (2011) 7(26) *Indigenous Law Bulletin* 31. These criticisms were made after the Victorian Court of Appeal (not the Koori Court) reduced the sentence of an offender who had been through a Koori County Court process: see *R v Morgan* (2010) 24 VR 230. Others have attacked the courts as breaching principles of equality before the law: Peter Faris QC in Richard Guilliatt, 'Justice in Black & White', *The Weekend Australian Magazine* (Sydney), 23 October 2010, 22. In the main, however, police, judicial officers, lawyers and Elders seem to support the initiative: see, eg, Darrin Farant, 'Police Back Court for Aborigines', *The Age* (Melbourne), 1 February 2001, 6; Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Hawkins Press, 2008) 134.

32 Marchetti and Daly, above n 16, 2–3.

33 Elena Marchetti, 'Indigenous Sentencing Courts' (Brief No 5, Indigenous Justice Clearing House, 2009) 1.

has established its own practices and procedures, with South Australia's Nunga Courts operating under the *Criminal Law (Sentencing) Act 1988* (SA), including section 9C, which now allows courts at any level to convene sentencing conferences. Apart from stipulating the jurisdiction and membership of the court or conference, the South Australian legislation is silent in relation to how the courts or conferences are expected to operate and what processes should apply. However, some judicial guidance exists including in *R v Besant*,<sup>34</sup> which discussed when it is appropriate for courts to convene such conferences. In *R v Wanganeen*,<sup>35</sup> Justice Gray described the purpose of such conferences as being to 'promote, in the defendant, understanding of the consequences of criminal behaviour, and in the court, understanding of Aboriginal cultural and societal influences, and thereby make the punishment more effective.'<sup>36</sup> His Honour went on to describe the process of a sentencing conference as including the following:

- Seating of participants in a 'roundtable' arrangement.
- Introduction of the sentencing conference, its purpose and informal nature, by the judge.
- Introduction of all individuals present and their role by the judge.
- Victim impact statement read to the court.
- Introduction by the Aboriginal justice officer of his [or her] position and role.
- Summary by the prosecution of the basis of the allegations forming the charge.
- Participants invited in turn to speak, facilitated by the Aboriginal justice officer.
- Only one person speaking at a time.
- Prompting and questioning by the judge and defence counsel when appropriate.
- Adjourned for formal sentencing submissions.<sup>37</sup>

Despite some guidance in relation to seating arrangements and other procedural issues, there is nothing specifically detailing how judicial officers or lawyers should behave or what characteristic they should possess when working within such a framework.

In Victoria, the Koori Courts are recognised in the *Magistrates' Court Act 1989* (Vic) as a division for sentencing Indigenous offenders, while the Children's Koori Courts fall under the *Children, Youth and Families Act 2005* (Vic). Section 4D of the *Magistrates' Court Act* provides that:

- (4) The Koori Court Division must exercise its jurisdiction with as little formality and technicality, and with as much expedition, as the requirements of this Act and the Sentencing Act 1991 and the proper consideration of the matters before the Court permit.

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34 [2013] SADC 104.

35 (2010) 108 SASR 463.

36 Ibid 466.

37 Ibid 475.

- (5) The Koori Court Division must take steps to ensure that, so far as practicable, any proceeding before it is conducted in a way which it considers will make it comprehensible to –
  - (a) the accused; and
  - (b) a family member of the accused; and
  - (c) any member of the Aboriginal community who is present in court.

The *Act* goes on to specify the jurisdiction of the Koori Court, and in section 4G to outline its sentencing procedure:

- (2) The Koori Court Division may consider any oral statement made to it by an Aboriginal elder or respected person.
- (3) The Koori Court Division may inform itself in any way it thinks fit, including by considering a report prepared by, or a statement or submission prepared or made to it by, or evidence given to it by –
  - (a) a Koori Court officer employed as an Aboriginal justice worker; or
  - (b) a community corrections officer appointed under Part 4 of the *Corrections Act 1986*; or
  - (c) a health service provider; or
  - (d) a victim of the offence; or
  - (e) a family member of the accused; or
  - (f) anyone else whom the Koori Court Division considers appropriate.

In essence then, the legislative framework requires the Koori Court to operate with informality, expedition and comprehensibility; and enables the Court to inform itself from a broad range of sources. The Court's website expresses its primary goal as creating 'sentencing orders that are more culturally appropriate to Aboriginal offenders, thereby reducing the rate of re-offending and increasing the positive participation of the Koori community in the sentencing process.'<sup>38</sup> A brochure for legal practitioners appearing on the Koori Court website sets out similar goals, refers to the legislation, and additionally includes a diagram setting out the distinctive seating arrangements of the Court.<sup>39</sup> While the goal of achieving sentencing orders that are 'more culturally appropriate' is repeated, apart from the seating guide and some information on eligibility and Aboriginality, no guidance is given as to culturally appropriate options or practices, nor is there any assistance given in the relevant statutory rules.

In New South Wales, circle sentencing commenced in February 2002 in the Nowra Local Court. Since then the program has been expanded to the Armidale, Bourke, Brewarrina, Dubbo, Kempsey, Lismore, Mount Druitt and Walgett Local Courts.<sup>40</sup> Its aims are similar to Victoria's Koori Courts in that circle sentencing seeks to empower Indigenous communities and develop more appropriate

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38 Magistrates' Court of Victoria, *Koori Court FAQ* (2012)

<<http://www.magistratescourt.vic.gov.au/faqs/frequently-asked-questions/koori-court-faq>>.

39 Courts & Tribunals Victoria, *Koori Court and Koori Programs* (2013)

<<http://www.courts.vic.gov.au/courts-tribunals/specialist-courts-and-initiatives/koori-court>>.

40 Cultural and Indigenous Research Centre Australia, *NSW Attorney General's Department: Evaluation of Circle Sentencing Program Report* (2008) <[http://www.agd.nsw.gov.au/lawlink/cpd/ll\\_cpd.nsf/vwFiles/Circle\\_Evaluation\\_Report\\_Final.doc/\\$file/Circle\\_Evaluation\\_Report\\_Final.doc](http://www.agd.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/vwFiles/Circle_Evaluation_Report_Final.doc/$file/Circle_Evaluation_Report_Final.doc)>.

solutions to address offending. The *Criminal Procedure Regulation 2010* (NSW) spells out the goals and jurisdiction of the program, and in regulation 39 the membership of the circle sentencing group, which includes the magistrate, defendant, prosecutor, defence lawyer, the project officer and at least three 'Aboriginal Persons' chosen by the project officer. Victims and support persons may, but are not required to be, involved. Regulation 44 deals with circle sentencing by stipulating that it is to be determined by the group, with the magistrate to preside, and that all members are required for a quorum. Apart from this, as with South Australia, there seems to be little practical guidance as to how the courts are expected to achieve cultural appropriateness and inclusiveness.

The Australian Capital Territory ('ACT') has only one Indigenous sentencing court operating in Canberra, the Galambany Circle Sentencing Court, which was formerly named the Ngambra Circle Sentencing Court. This court was established in 2004 without a specific legislative framework but procedurally it followed a 'Practice Direction'.<sup>41</sup> In similar fashion to the legislation and supporting documentation aligned with the courts in the jurisdictions previously discussed, the Practice Direction only gives scant attention to how the magistrate and other legal practitioners need to conduct themselves within the circle sentencing process. The Practice Direction sets out the aims of the court, the procedures for assessing whether offenders are suitable for referral to circle sentencing, the procedures after referral, including the extent to which a victim should participate in the process, and how the circle is to be conducted. It contains guidelines in relation to seating arrangements and notes that all participants are to be given the opportunity to be heard. It also encourages less formality and the attainment of an agreement in relation to the sentence that is to be imposed. The Court's website explains that the 'purpose of the Circle Sentencing Court is to provide a culturally relevant sentencing option in the ACT Magistrates Court jurisdiction for eligible Aboriginal and Torres Strait Islander people who have offended' but as with the other jurisdictions, it appears that little consideration has been given as to what that might mean in practice.<sup>42</sup> Having said that, the website identifies the following factors as procedures that differ from a mainstream sentencing court process:

- The Circle Court Magistrate sits alongside panel members and Elders who are invited by the Magistrate to contribute to the sentencing process;
- Panel members and Elders contribute to the process in a variety of ways and have a major role in explaining culturally relevant details to the Court; and
- Panel members and Elders also have a role to let the defendant know that they do not accept or tolerate criminal behaviour in the Aboriginal and

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41 Magistrates Court of the ACT, Galambany Court, Practice Direction No 1 of 2012 (2011) <[http://cdn.justice.act.gov.au/resources/uploads/Magistrates/Practice\\_Direction\\_1\\_of\\_2012\\_Galambany\\_Court.pdf](http://cdn.justice.act.gov.au/resources/uploads/Magistrates/Practice_Direction_1_of_2012_Galambany_Court.pdf)>.

42 ACT Magistrates Court, *Galambany Circle Sentencing Court* (2011) <<http://www.courts.act.gov.au/supreme/page/view/1363>>.

Torres Strait Islander community. They also have an opportunity to speak with the defendant to explore ways in which criminal behaviour can be avoided in the future.<sup>43</sup>

Queensland's Murri Courts were established in 2002 as that state's first sentencing court for Indigenous offenders and were based upon the Nunga Court model. The Murri Courts (and as noted in Table 1, the Queensland Indigenous Alcohol Diversion Program) were abolished for budgetary reasons in 2012 by the newly elected government, however; Indigenous Sentencing Lists are being informally convened in various Magistrates Courts around the state.<sup>44</sup> Prior to their abolition, the courts were well established with up to 17 operating throughout the state,<sup>45</sup> but there again seems to have been relatively little practical guidance given on what was a culturally appropriate and inclusive sentencing practice. The *Supreme Court of Queensland Equal Treatment Benchbook* provides background information on Aboriginal and Torres Strait Islander people in Queensland, and some brief statements about references to deceased persons in Indigenous culture, cultural identity, and Indigenous language and communication, but no other assistance on cultural appropriateness and inclusiveness.<sup>46</sup> While a small number of magistrates are Indigenous and may be presumed to have this knowledge, most judicial officers and lawyers are not Indigenous, and can equally be assumed to need some guidance in this area.

Also in Queensland, the Remote JP Magistrates Court program was established in 1993 as part of the response to the RCIADIC recommendations. Under the program, JP magistrates, most of whom are Indigenous, can constitute a Magistrates Court to hear simple and some less serious indictable offences that can be dealt with summarily, where the defendant pleads guilty.<sup>47</sup> While most of these offences are necessarily less serious and unlikely in themselves to lead to incarceration, non-compliance with court-ordered penalties is a significant problem for Indigenous offenders in Queensland, and can compound the original offence (for example, in Queensland in 2011–12, 18 per cent of finalised offences dealt with against Indigenous offenders were for 'offences against justice' – largely non-compliance matters).<sup>48</sup> The Crime and Misconduct Commission in its report *Restoring Order: Crime Prevention, Policing and Local*

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43 Ibid.

44 See Moore, above n 19.

45 Magistrates Court of Queensland, *Annual Report 2011–2012* (2012) <[http://www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0003/167934/mc-ar-2011-2012.pdf](http://www.courts.qld.gov.au/__data/assets/pdf_file/0003/167934/mc-ar-2011-2012.pdf)>.

46 Supreme Court of Queensland, *Equal Treatment Benchbook* (Supreme Court of Brisbane Library, 2005) <[http://www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0004/94054/s-etbb.pdf](http://www.courts.qld.gov.au/__data/assets/pdf_file/0004/94054/s-etbb.pdf)>.

47 Department of Justice and Attorney-General (Qld), *Queensland Government Response to the Evaluation of the Remote Justices of the Peace Magistrates Court Program* (2011) <[http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0019/131581/response-remote-jp-magistrates-court-program-december-2011.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0019/131581/response-remote-jp-magistrates-court-program-december-2011.pdf)>. See also Fiona Allison et al, 'Sentencing and Punishment in the Indigenous Justices of the Peace Courts' (2012) 16 *Australian Indigenous Law Review* 15.

48 Australian Bureau of Statistics, *Criminal Courts Australia 2011–2012*, above n 4.

*Justice in Queensland's Indigenous Communities*<sup>49</sup> found that these courts can facilitate greater use of diversionary mechanisms, be more flexible and localised, and overcome delays in the mainstream court system; and recommended their expansion. An independent evaluation of the program<sup>50</sup> made 16 recommendations for the enhancement of the JP Magistrates Courts, which were generally accepted by the Queensland Government.<sup>51</sup> Notwithstanding this, there appears to be little in the way of formal guidelines or practice directions as to how these courts are meant to operate so as to enhance Indigenous involvement in the criminal justice system, apart from the involvement of Indigenous JPs.

Community Courts operate in Western Australia and used to operate in the Northern Territory prior to their abolition in 2012, although the Northern Territory Community Courts were expressed to be open to non-Indigenous as well as Indigenous offenders. However, as Hannam notes, over time the courts had 'evolved into an [I]ndigenous specific program and was ultimately utilised only in remote circuit courts in the Top End.'<sup>52</sup> The Northern Territory Community Courts were abolished principally because their operation was perceived as in conflict with the *NT National Emergency Response Act 2007* (Cth), section 91 of which specifically prevents a court from considering cultural laws or practices as a defence or in sentencing.<sup>53</sup> While guidelines were available in relation to the Northern Territory courts, they contained no assistance on how the courts were expected to adapt to Indigenous offenders.<sup>54</sup> In Western Australia, magistrates visiting remote Aboriginal communities access court facilities at multi-function police facilities, where the officer in charge also serves as court deputy registrar. Again, the *Western Australian Supreme Court Benchbook* includes some discussion of Indigenous issues, without specifically addressing the issue of what constitutes culturally appropriate and inclusive practice.<sup>55</sup>

Despite the various models operating and some significant differences between them, many Indigenous-focused sentencing courts share some common features and practices. Most important is the use of greater informality – in procedure, language, communication, and often in the courtroom layout and furniture. Secondly, most courts take more time for individual matters, and attempt to employ a more collaborative and inclusive decision-making process.

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49 Crime and Misconduct Commission Queensland, *Restoring Order: Crime Prevention, Policing and Local Justice in Queensland's Indigenous Communities* (2009).

50 Chris Cunneen et al, *Evaluation of the Remote JP Magistrates Court Program: Final Report* (The Cairns Institute, 2010) <[http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0011/88904/evaluation-of-the-remote-jp-magistrates-court-program.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0011/88904/evaluation-of-the-remote-jp-magistrates-court-program.pdf)>.

51 Department of Justice and Attorney-General (Qld), above n 47.

52 Hannam, above n 26, 3.

53 Ibid 4.

54 Department of Justice (NT), *Community Court Darwin: Guidelines* (2005) <[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)>.

55 Western Australian Supreme Court, *Equality Before the Law Benchbook* (Department of the Attorney-General WA, 2009) <[http://www.supremecourt.wa.gov.au/\\_files/equality\\_before\\_the\\_law\\_benchbook.pdf](http://www.supremecourt.wa.gov.au/_files/equality_before_the_law_benchbook.pdf)>.

This may include roles for Elders, Community Justice Groups, offenders' families, and victims and their families.<sup>56</sup> In all of the Indigenous-focused sentencing courts, however, the role of the judicial officer remains central.<sup>57</sup> 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. In many of these courts judicial officers can receive training and advice about cultural awareness. However, this may not extend to other important players in the legal system such as prosecutors, defence lawyers and court staff who can have an important impact on what happens in sentencing proceedings. And while cultural awareness training may be provided, there seems relatively little guidance on how to use this awareness to transform practices involving Indigenous people.

## B Indigenous Diversion and Support Programs

Compared to Indigenous courts, less is known publicly about the range of diversion and support programs shown in column three of Table 1. Information about them is largely limited to official sources, reports, websites and evaluations. Some involve judicial officers, as in the case of the former Queensland Indigenous Alcohol Diversion Program, which was a voluntary program within the Magistrates Court. It offered a pre-sentence bail-based court diversion program. Participants could still plead not guilty, but successful completion could be taken into consideration by the magistrate in mitigation of the penalty.<sup>58</sup> Others, such as the New South Wales Aboriginal Client Service Specialists Program provide advice and support to Indigenous defendants on how courts operate and potential outcomes. Their goals include minimising breaches of court orders and hence diversion from further engagement with criminal justice processes.<sup>59</sup>

A long established support program is Queensland's Community Justice Groups, which were established in 1993 after the RCIADIC completed its inquiry, and which provide support to victims and offenders throughout all stages of the criminal justice process.<sup>60</sup> While the groups work with Indigenous people to assist them through the system, they also have a legislative role under the *Penalties and Sentences Act 1992* (Qld) to make sentencing submissions where offenders are Indigenous. While this may well introduce Indigenous perspectives into the sentencing process, the process itself remains mainstream, with no

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56 Annette Hennessy, 'Indigenous Sentencing Practices in Australia' (Paper presented at the International Society for Reform of the Criminal Law Conference: Justice for All – Victims, Defendants, Prisoners and Community, Brisbane, 2–6 July 2006).

57 King, 'Judging, Judicial Values and Judicial Conduct', above n 30, 142.

58 Queensland Police Service, *Annual Report 2009–2010* (2010) 77.

59 Australian Indigenous HealthInfoNet, *Aboriginal Client Service Specialist (ACSS) Program* (2012) <<http://www.healthinfonet.ecu.edu.au/key-resources/programs-projects?pid=926>>.

60 Department of Justice and Attorney-General (Qld), *Community Justice Groups* (2008) <[http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0006/18528/Community\\_justice\\_groups.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0006/18528/Community_justice_groups.pdf)>.

requirement for adaptation for cultural appropriateness. Simply having an Indigenous voice in court does not necessarily change the dynamic of the sentencing process, although it is recognised that further study is necessary to examine the impact of this role of the Community Justice Groups.

### C Indigenous Sentencing Principles

The fourth column of Table 1 shows some of the different sentencing frameworks imposed in the various Australian jurisdictions by legislation or common law. As Anthony points out, only three of the Australian jurisdictions (the ACT, Queensland, and the Northern Territory) make specific legislative provisions regarding judicial notice of offenders' Indigenous backgrounds.<sup>61</sup> In the ACT and Queensland, cultural background or considerations are said to be relevant,<sup>62</sup> while in the Northern Territory submissions may be made about Indigenous customary law or the views of an Indigenous community<sup>63</sup> – as discussed above however, this provision has been affected by aspects of the Commonwealth government's Northern Territory intervention which may override some parts of the Northern Territory scheme.<sup>64</sup>

In the other jurisdictions common law principles may extend sentencing considerations to include disadvantage experienced by Indigenous offenders. The most significant case is *R v Fernando*<sup>65</sup> where Justice Wood set out principles relevant to the sentencing of Indigenous offenders, including the need to consider rehabilitation and alternatives to prison. The most relevant of these principles for the purposes of this article were the following:

- (E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects. ...
- (G) That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.<sup>66</sup>

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61 Anthony, above n 16, 1.

62 See, eg, *Crimes (Sentencing) Act 2005* (ACT) s 33(m); *Penalties and Sentences Act 1992* (Qld) s 9(2)(p).

63 *Sentencing Act 1995* (NT) s 104A.

64 See *Crimes Act 1914* (Cth) s 16A(2A) and *Northern Territory National Emergency Response Act 2007* (Cth) s 91 which limit the use of customary law.

65 (1992) 76 A Crim R 58.

66 Ibid 62–3.

Thus the *Fernando* principles facilitate sentencing courts in taking into consideration the subjective circumstances of disadvantage experienced by many Indigenous offenders. Later New South Wales decisions have narrowed the extent to which the *Fernando* principles are applied, particularly requiring the disadvantage to be exceptional.<sup>67</sup> By contrast, in South Australia, it has been held that the *Fernando* principles should have broad application.<sup>68</sup> This issue was recently brought before the High Court, as an appeal against the decision of the New South Wales Court of Criminal Appeal in *R v Bugmy*,<sup>69</sup> where the New South Wales Court found that ‘with the passage of time, the extent to which social deprivation in a person's youth and background can be taken into account, must diminish.’<sup>70</sup> The majority of the High Court, in October 2013<sup>71</sup> decided that in the absence of a legislative provision in New South Wales that directs courts to pay particular attention to the circumstances of Aboriginal offenders, there is

no warrant in sentencing an Aboriginal offender in New South Wales to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender.<sup>72</sup>

While the majority found that the ‘effects of profound childhood deprivation do not diminish with the passage of time’<sup>73</sup> and allowed the appeal, remitting the case for fresh sentencing, the case clearly establishes that the *Fernando* principles are about social and economic disadvantage rather than Indigeneity.

The final row in Table 1 refers to the Cross Border Justice Scheme. This does not create any Indigenous-focused sentencing court; instead it permits the cross jurisdictional conferring of law and authority on courts, judicial officers and police officers in a geographic area where Indigenous people live and easily move across state and territory boundaries. It is a joint initiative of the South Australian, Northern Territory and Western Australian governments designed to improve justice outcomes in the cross border regions. The scheme addresses the issue of the mobility of Indigenous offenders across jurisdictional boundaries in central Australia, and the impact this has on community safety.<sup>74</sup> The objectives of the program are to: (1) strengthen and improve community safety in the region; (2) remove any legal constraints that prevented the police and judicial bodies providing just outcomes (ie, inflexible cross-border law); (3) deliver timely and effective justice responses to the region; and (4) develop mechanisms

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<sup>67</sup> Anthony, above n 16, 3.

<sup>68</sup> Ibid.

<sup>69</sup> [2012] NSWCCA 223.

<sup>70</sup> Ibid [50].

<sup>71</sup> *Bugmy v The Queen* (2013) 87 ALJR 1022. On the same day the High Court handed down its decision in *Munda v Western Australia* (2013) 87 ALJR 1035, which also considered the application of the *Fernando* principles.

<sup>72</sup> *Bugmy v The Queen* (2013) 87 ALJR 1022, 1031 [36].

<sup>73</sup> Ibid 1032 [44]. See also Anthony Hopkins, ‘The Relevance of Aboriginality in Sentencing: “Sentencing a Person for Who They Are”’ (2012) 16 *Australian Indigenous Law Review* 37.

<sup>74</sup> South Australia, *Parliamentary Debates*, House of Assembly, 4 February 2009, 1368–71 (M J Atkinson, Attorney-General).

for government departments and agencies to work more collaboratively.<sup>75</sup> It allows magistrates to deal with offenders under three sets of laws (ie, South Australian, Western Australian and Northern Territory laws).<sup>76</sup> Thus far, only non-contested (ie, sentencing) hearings have been dealt with under the scheme.

While not established as a diversionary measure, or specifically to reduce Indigenous over-representation, the Cross Border Justice Scheme does involve courts in applying measures directed at Indigenous offenders and victims. As such, judicial officers involved in it are also required to consider aspects of cultural appropriateness. However, like the sentencing measures discussed above, there seems little in the cross border legislation that provides guidance on the practical interpretation and application of culturally appropriate court practices.

Overall then, Australian jurisdictions have experimented with a range of different courts, diversion programs and sentencing practices aimed at improving their processes to become more culturally appropriate and inclusive, and thus reduce Indigenous over-representation. Despite this, there is remarkably little guidance given as to how this is actually to be achieved. What rules or guidelines there are tend to relate to practical matters such as who should be involved in hearings, and how rooms should be arranged, or to the need to be aware of Indigenous culture. We found no published source that related specifically to the Indigenous-focused courts and programs that could assist judicial officers in adapting their mode of delivering justice to incorporate more culturally appropriate and inclusive measures, or to better interact with participants. Judicial officers and lawyers have almost entirely been left on their own to devise culturally appropriate and inclusive justice practices. As noted earlier, undoubtedly this analysis misses informal discussions and in-house workshops that may well occur. However, until these processes become public or further empirical research is conducted they are impossible to evaluate and their impact cannot be assessed. The next section explores how therapeutic jurisprudence and postcolonial theory can assist in understanding the idea and potential practice of culturally appropriate and inclusive sentencing processes.

### III WHAT CAN INNOVATIVE JUSTICE PRACTICES AND POSTCOLONIAL THEORY TELL US ABOUT JUDGING AND LAWYERING IN A CULTURALLY APPROPRIATE CONTEXT?

The introduction of innovative justice practices for sentencing Indigenous offenders is a consequence of both the evolution of justice practices that have appeared in jurisdictions around the globe to address the inadequacies of the conventional court system and a response to the over-representation of Indigenous people in custody. Innovative justice practices, including problem-

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75 Ashley Gordon, South Australia Police, 'The Cross Border Justice Project – Enhancing Justice and Victim Services in the Central Desert Region' (unpublished) 2–3, discussed in Monica Biddington, Parliament of Australia, *Bills Digest*, No 120 of 2008–09, 28 April 2009, 3.

76 Chris Charles, 'The National Cross-Border Justice Scheme' (2009) 7(12) *Indigenous Law Bulletin* 23.

solving<sup>77</sup> and specialty courts and court diversion programs were established to provide a more suitable method for determining the specific needs of particular groups of offenders, although early moves to introduce specialty courts were also focused on providing efficiencies within the court system so that cases were dealt with in a more timely and organised manner.<sup>78</sup> There are a number of factors that differentiate an innovative justice practice from conventional court practices.<sup>79</sup> Traditionally judicial officers are expected to carry out their duties by impassively considering the evidence and legal arguments presented by the prosecutor and defence lawyer.<sup>80</sup> When it comes to judicial officers it is important that they are perceived as being impartial, whereas for prosecutors and defence lawyers, their duties to the court and the client are paramount. Judicial officers, as independent and neutral arbitrators, traditionally make determinations according to the law and evidence presented in court, without becoming involved in political activism or the 'remedy[ing of] social problems.'<sup>81</sup> However, as is explained in more detail below, changes are afoot.

These roles and characteristics are, to some extent, modified when it comes to problem-solving or specialty courts and diversionary court programs. The underlying philosophy for many problem-solving or specialty courts has been termed 'therapeutic jurisprudence', meaning

the study of the *effect of the law, legal processes and legal system professionals on the wellbeing of those involved*. ... It asserts that judicial officers and lawyers can not only help to promote the resolution of a party's or client's wellbeing-related issues by referring them to appropriate health professionals and support services *but also by the processes they use and the way in which they interact with them*.<sup>82</sup>

Judicial officers taking a therapeutic jurisprudence approach to sentencing are more likely to interact directly with offenders in ways that encourage change and induce hope within individuals that they are capable of changing, and in ways

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77 Note that King suggests we refer to these courts as 'problem-focused' rather than 'problem-solving' courts: King, 'Judging, Judicial Values and Judicial Conduct', above n 30.

78 See, eg, Natasha Bakht, 'Problem Solving Courts as Agents of Change' (2005) 50 *Criminal Law Quarterly* 224; Greg Berman and John Feinblatt, 'Problem-Solving Courts: A Brief Primer' (2001) 23 *Law & Policy* 125; Arie Freiberg, 'Post-adversarial and Post-inquisitorial Justice: Transcending Traditional Penological Paradigms' (2011) 8 *European Journal of Criminology* 82; King, 'Judging, Judicial Values and Judicial Conduct', above n 30.

79 Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8, 10–11.

80 Kathy Mack and Sharyn Roach Anleu, "'Getting through the List": Judgecraft and Legitimacy in Lower Courts' (2007) 16 *Social and Legal Studies* 341, 342.

81 John Doyle, 'The Judicial Role in a New Millennium' (2001) 10 *Journal of Judicial Administration* 133, 137.

82 Michael S King, 'Therapeutic Jurisprudence Initiatives in Australia and New Zealand and the Overseas Experience' (2011) 21 *Journal of Judicial Administration* 19, 19 (emphasis added). See also Bruce J Winick, 'Applying the Law Therapeutically in Domestic Violence Cases' (2000) 69 *University of Missouri Kansas City Law Review* 33; Kathy Douglas, 'Therapeutic Jurisprudence, Restorative Justice and the Law' (2007) 32 *Alternative Law Journal* 107; Michael S King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096, 1097–8.

that involve continuing judicial monitoring and the integration of a number of community services.<sup>83</sup> The different types of problem-solving or specialty courts in Australia that have been identified as using notions of therapeutic jurisprudence include Domestic Violence Courts, Drug Courts, Homeless Persons Courts and Mental Health Courts (or courts that consider the special circumstances of an offender with mental health problems when determining their sentence).<sup>84</sup>

Another equally important ideological shift in the way criminal justice is now administered in the courts resulted with the restorative justice movement. Restorative justice

promises to hold offenders accountable for crime in ways that are constructive, but not punitive or harsh; to include the voice and experience of crime victims; and to be dialogic and participatory, with an emphasis on communication between offenders, victims and their supporters, and with less attention to the formalities of the criminal legal process or the voices of legal actors alone.<sup>85</sup>

Judicial officers and lawyers are often less likely to be involved in a restorative justice process, usually because such a process occurs as a diversion from court. However, if legal actors are present during a process that exhibits restorative justice aims, their involvement tends to focus on improving respectful communication between participants, and on finding an agreed sentencing outcome that best restores the harm inflicted on all those involved and offers the offender an opportunity to change their behaviour.<sup>86</sup> Therefore, in some ways the participation of legal actors in such a process can be similar to their participation in practices adopting therapeutic jurisprudence. Indeed, as King points out, often therapeutic and restorative justice principles are equally present in any type of court or diversionary program taking a problem-solving approach.<sup>87</sup>

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83 See, eg, Arie Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' (2002) 20(2) *Law in Context* 6; Bruce J Winick and David B Wexler, 'Introduction: II Therapeutic Jurisprudence as a Theoretical Foundation for These New Judicial Approaches' in Bruce J Winick and David B Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 7.

84 An assessment of the effectiveness and summary of the critiques of such courts is outside the scope of this article, since we are focusing on the roles and characteristics of judicial officers and other legal players involved with innovative justice practices rather than on whether or not such practices are effective and warranted. However, for further reading, particularly in relation to Drug Courts, see, eg, John E Cummings, 'The Cost of Crazy: How Therapeutic Jurisprudence and Mental Health Courts Lower Incarceration Costs, Reduce Recidivism, and Improve Public Safety' (2010) 56 *Loyola Law Review* 279; Morris B Hoffman, 'Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous' (2002) 29 *Fordham Urban Law Journal* 2063; James L Nolan Jr, 'Redefining Criminal Courts: Problem-Solving and the Meaning of Justice' (2003) 40 *American Criminal Law Review* 1541; Joy Wundersitz, 'Criminal Justice Responses to Drug and Drug-Related Offending: Are They Working?' (Technical and Background Paper No 25, Australian Institute of Criminology, 2007).

85 Kathleen Daly and Elena Marchetti, 'Innovative Justice Processes: Restorative Justice, Indigenous Justice and Therapeutic Jurisprudence' in Marinella Marmo, Willem De Lint and Darren Palmer (eds), *Crime and Justice: A Guide to Criminology* (Lawbook, 2012) 455, 456–7.

86 King, 'Therapeutic Jurisprudence Initiatives', above n 82, 30–3.

87 Ibid 20; see also Nolan Jr, above n 84, 1546.

Innovative sentencing approaches are more concerned than traditional courts with producing more appropriate outcomes for ‘cases involving individuals with underlying social and emotional problems’, being flexible with time frames and the method by which decisions are made, fostering active listeners, and involving individuals and organisations in the determination of the penalty to be imposed.<sup>88</sup> Increased dialogue and establishing a rapport with an offender are common elements of courts and diversionary programs endeavouring to adopt a therapeutic jurisprudence or restorative justice approach to sentencing.<sup>89</sup> Some have described the role of the judge in problem-solving courts as being akin to a ‘lawyer, sociologist, psychologist and even [a] psychoanalyst.’<sup>90</sup> They need to display empathy for an offender’s situation and provide validation of their story by showing that the court has taken it into account in making a decision about the sentence to be imposed.<sup>91</sup> Duffy distinguishes empathy from sympathy, claiming only the former can ensure that the judicial officer remains impartial and independent. A court adopting a problem-solving approach needs to ensure that the coercive nature of a conventional court is transformed into one where the offender makes choices about their future.<sup>92</sup> This forces defence lawyers to let go of control over what their client says in court and what other people say to their client. As King notes:

Just as therapeutic principles such [sic] self-determination, voice, validation and respect inform how a judge or magistrate operates according to therapeutic jurisprudence, so they should also inform how a lawyer interacts with and represents a client. Just as a therapeutic court sees the legal problem in the context of the social and personal factors affecting the person and contributing to the legal problem and seeks a holistic resolution, so a therapeutic jurisprudence lawyer should see the client’s best interests not in terms of a narrow legal outcome, such as an acquittal, avoiding prison or obtaining judgment, but in terms of the overall wellbeing of the client.<sup>93</sup>

This therapeutic jurisprudential practice should not be confined to what happens in court, since a client’s interaction with their lawyer before, during and after their hearing is equally as important when it comes to their psychological and emotional wellbeing.<sup>94</sup>

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88 David Rottman, ‘Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialized Judges)?’ (2000) 37 *Court Review* 22, 22. Such concerns make evaluating specialty courts and programs like Indigenous sentencing courts difficult, since their aims and objectives are more concerned with being effective rather than efficient (as is the case with mainstream courts): Nigel Stobbs and Geraldine Mackenzie, ‘Evaluating the Performance of Indigenous Sentencing Courts’ (2009) 13 *Australian Indigenous Law Review* 90.

89 Michael S King, ‘Therapeutic Jurisprudence and Criminal Law Practice: A Judicial Perspective’ (2007) 31 *Criminal Law Journal* 12, 14.

90 James Duffy, ‘Problem-Solving Courts, Therapeutic Jurisprudence and the *Constitution*: If Two Is Company, Is Three a Crowd?’ (2011) 35 *Melbourne University Law Review* 394, 395.

91 *Ibid.*

92 Michael S King, ‘Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education’ (2006) 15 *Journal of Judicial Administration* 129.

93 *Ibid* 135–6.

94 *Ibid.*

Arguably, Indigenous-focused sentencing practices can exhibit elements of both restorative justice and therapeutic jurisprudence, in that they have a strong focus on assisting Indigenous offenders to reconnect with their community (whether it be Elders, community representatives or victims) and obtain the help necessary to stop their offending behaviour.<sup>95</sup> King lists the following features as common to judging in both Indigenous sentencing courts and courts adopting a problem-solving or ‘solution-focused’ approach:

1. Each seeks to promote greater respect for the law by using processes appropriate for the parties and the resolution of the dispute.
2. In each of these approaches to judging, there is an endeavour to promote greater participation in the fact-finding and decision-making process.
3. Each seeks to promote a more comprehensive resolution of the legal problem by addressing underlying issues.
4. Each takes a broader view of defendants, seeing them in terms of their personal, family, economic and social context.
5. Each requires the judicial officer to exercise interpersonal skills such as promoting the involvement of parties and other relevant people and agencies in the process of fact-finding and decision-making, actively listening to them, appreciating and respecting the emotional and other psychological dimensions of the process, expressing empathy where appropriate and acting as a role model for other justice personnel involved in the process.<sup>96</sup>

However, Indigenous-focused sentencing practices also contain political and culturally transformative dimensions, which include notions of Indigenous community empowerment through increased court participation and the involvement of Elders and community representatives, and incorporation of cultural knowledge.<sup>97</sup> It is also important to differentiate Indigenous justice practices from problem-solving or problem-oriented courts, since ‘[A]boriginality is not a “problem” in need of an innovative solution’ and it therefore should not be ‘focused on and dealt with as such’.<sup>98</sup> Instead, such practices, although clearly seeking to improve the lives of Indigenous offenders by offering increased support and access to appropriate services, and by rebuilding cultural ties with their family and community, are seeking to also reverse many of the negative consequences resulting from Australia’s history of colonisation.

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95 See, eg, Jenny Blokland, ‘The Northern Territory Experience’ (Paper presented at the Australia Institute of Judicial Administration Indigenous Courts Conference, Mildura, 4–7 September 2007), where she notes: ‘The Community Court possesses some principles referable to restorative justice but whether the goals of restorative justice are met, depends greatly on the level and extent of participation, the type of case and the level of engagement of all relevant parties’: at 7. For a robust discussion of the ‘methodological’ similarities between therapeutic jurisprudence and restorative justice generally, see John Braithwaite, ‘Restorative Justice and Therapeutic Jurisprudence’ (2002) 38 *Criminal Law Bulletin* 244.

96 King, ‘Judging, Judicial Values and Judicial Conduct’, above n 30, 144.

97 Elena Marchetti and Kathleen Daly, ‘Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model’ (2007) 29 *Sydney Law Review* 415, 416.

98 Peggy Dwyer, ‘Sentencing Aboriginal Offenders: The Future of Indigenous Justice Models’ (Paper presented at the 19th International Conference of the International Society for the Reform of Criminal Law, Edinburgh, 26–30 June 2005) 2 <<http://www.isrcl.org/Papers/2005/Dwyer.pdf>>.

Considering that the Indigenous-focused sentencing practices that have been established in Australia exist within the imposed Eurocentric legal framework, it becomes even more crucial to consider how non-Indigenous legal players involved in such processes can ensure that Indigenous communities are empowered as a result of their participation. However, this begs the question: can a legal process that embodies Eurocentric norms and values and exists in a postcolonial environment ever be culturally appropriate, relevant and sensitive? The answer to this may depend on how well such a process can ‘de-colonise’ and thereby transform the historically negative race relations, which still exist between law enforcers and Indigenous communities.<sup>99</sup>

Without acknowledging the continued existence of the dominant colonial enterprise, changes to laws and legal practices will do nothing more than create a legal discourse that converses with itself to explain and manage the needs and wants of the colonised ‘Other’.<sup>100</sup> For example, as Davis notes despite the High Court’s recognition of native title in *Mabo v Queensland*,<sup>101</sup> it did not “recognise” Indigenous law, beyond the recognition that it exists. It merely construct[ed] a new fiction – “native title” – within the framework of Western law.<sup>102</sup> In this sense, postcolonialism in law and legal practice exists as primarily privileging the colonial Eurocentric legal system.<sup>103</sup> Having said that, Indigenous-focused sentencing courts and programs provide an opportunity for a legal ‘hybridity’ whereby the hegemonic system can be redefined and reinvented to accommodate Indigenous knowledge and values and vice versa.<sup>104</sup>

Legal institutions that have been established to somewhat reverse the negative impacts of colonisation, such as the over-representation of Indigenous people in the criminal justice system, need to be mindful of not continuing to suppress and marginalise Indigenous voices in ways that ‘reconfigure the meaning of what is heard and not heard’.<sup>105</sup> One particular problem in this regard is the prevalence of cultural assumptions and stereotypes about what constitutes Indigenous culture, for example the notion that traditional, remote culture is somehow more authentic than urban Indigenous culture, and the subsequent

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99 Deborah Bird Rose, ‘Land Rights and Deep Colonising: The Erasure of Women’ (1996) 3(85) *Aboriginal Law Bulletin* 6.

100 Alpana Roy, ‘Postcolonial Theory and Law: A Critical Introduction’ (2008) 29 *Adelaide Law Review* 315, 326.

101 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

102 Margaret Davies, *Asking the Law Question* (Lawbook, 2<sup>nd</sup> ed, 2002) 275.

103 This line of reasoning resembles Said’s construction of imperialism in *Orientalism: Western Conceptions of the Orient* (Penguin, 1978).

104 This type of transformation or understanding of Indigenous-focused sentencing courts and programs draws upon Bhabha’s work: see Davies, above n 102, 280–1; Roy, above n 100, 339–42.

105 Elena Marchetti, ‘The Deep Colonizing Practices of the Australian Royal Commission into Aboriginal Deaths in Custody’ (2006) 33 *Journal of Law and Society* 451, 461.

refusal to acknowledge cultural needs or practices of some Indigenous people.<sup>106</sup> Similarly, the meaning, weight and value placed on Indigenous knowledge shared by community members participating in a sentencing hearing can obviously affect whether or not such knowledge is relegated as superior or inferior to the hegemonic legal discourse. The assignment of cultural meaning and value by a sentencing court attempting to affirm and recognise Indigenous difference, can, as Anthony argues, inadvertently hamper Indigenous self-empowerment and result in social injustice.<sup>107</sup>

Therefore, although Indigenous and non-Indigenous Australians reside in a postcolonial society, colonialism still exists ‘as the effects of colonisation are enduring for both the colonisers and the colonised.’<sup>108</sup> As non-Indigenous participants operating within an ethnocentric legal process, judicial officers and lawyers need to not only apply principles relating to the practice of therapeutic jurisprudence but also be aware of the reality, knowledge and position of the colonised culture for which the Indigenous-focused court process or program has been established. From a postcolonial perspective, Indigenous-focused judging and lawyering will always privilege Anglo-Australian law and practice. Nevertheless, it is important to consider the extent to which cultural transformation is possible. This is explored in the following section by considering the extent to which non-Indigenous courtroom players can support a paradigm shift in sentencing practices by reference to published articles written by judicial officers who have presided over Indigenous-focused sentencing courts.<sup>109</sup>

#### IV JUDGING AND LAWYERING FROM A CULTURALLY APPROPRIATE AND INCLUSIVE PERSPECTIVE

Although the need for culturally appropriate and inclusive practices is often raised when discussing necessary reforms to the criminal justice system in dealing with Indigenous offenders and victims, there appears to be very little written, particularly by Indigenous scholars and program directors, about what ‘cultural appropriateness and inclusiveness’ actually means for non-Indigenous people involved in the implementation of such reforms. However, this question has been considered in relation to responding to family and sexual violence and

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106 Blagg notes that ‘[w]e need to engage with Aboriginal people on the basis that we really do not know or understand aspects of their social reality and ... from the fact that Indigenous social life itself is multiply ordered (and disordered) rather than uniform and standardised: a representation of Indigenous society that only exist in the minds of non-Indigenous people.’: Blagg, above n 31, 50.

107 Thalia Anthony, ‘Is There Social Justice in Sentencing Indigenous Offenders?’ (2012) 35 *University of New South Wales Law Journal* 563.

108 Roy, above n 100, 318.

109 Unfortunately, we have been unable to uncover any similarly focused published articles written by legal practitioners, who, when publishing articles relating to their experiences of working in Indigenous-focused sentencing courts, typically critique the justice process or conduct a doctrinal analysis of a particular law.

juvenile justice practices, and in relation to the provision of psychotherapeutic practice for Aboriginal people with mental health problems.<sup>110</sup> For example, *Strong Aboriginal Families, Together*, a Northern Territory organisation that works to ensure government and non-government policies and programs meet the needs of Aboriginal children, youth and families, states:

So truly culturally competent service delivery involves firstly respect for people and their cultures. That means, among other things, respect for their rights to uphold and strengthen their cultural values, beliefs, traditions and customs; and of their rights to develop their own institutional structures. It involves cooperative communication and an acute awareness of power relationships. And it means looking for appropriate ways to develop Aboriginal people's capacity – individually and collectively – to grow to meet the challenges. I'm not talking about you having to walk on eggshells, but about walking with awareness and confidence with the Aboriginal people you meet.<sup>111</sup>

Clearly, adopting a culturally appropriate and inclusive process involves more than a rudimentary change in processes and procedures; it encompasses changes in postcolonial power dynamics that might exist between Indigenous and non-Indigenous actors, and adjustments in a non-Indigenous person's perspectives. Although admitting that defining cultural appropriateness is no easy task, Kelly and Barac (in a submission to the New South Wales Department of Attorney-General and Justice on youth justice conferencing) list the following elements as important when working with Indigenous juveniles:

- The agency or program must work directly with local Indigenous communities;
- The preferred model for culturally appropriate service delivery is that the agency works in a direct and equal partnership with local Indigenous communities;
- Elders and/or respected community members must have a central place in [the] practice;
- Non-Indigenous personnel must engage in an ongoing capacity with the local Aboriginal community. For example: attending cultural events, being a part of NAIDOC celebrations, involvement in sorry business such as National

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110 See, eg, Andrew Day et al, 'Indigenous Family Violence: An Attempt to Understand the Problems and Inform Appropriate and Effective Responses to Criminal Justice System Intervention' (2012) 19 *Psychiatry, Psychology and Law* 104; Loretta Kelly, 'Using Restorative Justice Principles to Address Family Violence in Aboriginal Communities' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 206; Loretta Kelly and Antony Barac, 'The Rhetoric and the Reality: Youth Justice Conferencing for Aboriginal and Torres Strait Islander Young Offenders in New South Wales. Submission to the Review by the NSW Department of Attorney General and Justice of the Young Offenders Act 1997 and the Children (Criminal Proceedings) Act 1987' (2011); Melva Kennedy, 'Melva's Story: An Aboriginal Approach to Preventing Child Sexual Assault' in Jan Breckenridge and Lesley Laing (eds), *Challenging Silence: Innovative Responses to Sexual and Domestic Violence* (Allen & Unwin, 1999) chapter 13; David A Vicary and Brian J Bishop, 'Western Psychotherapeutic Practice: Engaging Aboriginal People in Culturally Appropriate and Respectful Ways' (2005) 40 *Australian Psychologist* 8; Wirringa Baiya Aboriginal Women's Legal Centre, 'Aboriginal Women Speaking Out About Violence: Is Anyone Listening?' (2011) 7(23) *Indigenous Law Bulletin* 28.

111 Josie Crawshaw, 'What Does Culturally Appropriate Service Delivery Mean for the Aboriginal Child, Youth and Families Sector?' (Paper presented at the Annual Conference of the NT Council on Social Services, Alice Springs, 3 May 2012) 7.

Sorry Day and local events, as well as (but not limited to) Invasion Day/Survival Day events;

- If non-Indigenous practitioners are involved, they must have in-depth knowledge of the local Aboriginal community's culture, protocols and customs (including customary law). For example, they must have cultural knowledge as to who are the acknowledged local elders (the practitioner must be able to discern between self-appointed Aboriginal elders and acknowledged Aboriginal elders who are 'widely respected for their fairness, reasonableness, honesty and wisdom');
- If a practitioner's work covers the geographic area of different Indigenous language groups, then there must be ongoing consultation with elders of those local communities to ensure that the current protocols are being adopted for different language groups; and
- Needless to say, the practitioner must not make assumptions about how particular Indigenous juveniles, their family or even their elders, practice their culture. In an urban Aboriginal community the cultural protocols may not appear 'Indigenous enough' if the practitioner already has stereotypes about Aboriginality and cultural manifestations.<sup>112</sup>

In an earlier publication which considers the use of restorative justice in addressing family violence in Aboriginal and Torres Strait Islander communities, Kelly also notes that in order to be culturally appropriate, justice programs need to 'respect and enhance' Australia's First Nations people's right to self-determination and 'meet the desired outcomes of the community'.<sup>113</sup> Ultimately, Kelly concludes that the New South Wales youth justice conferencing program operating at the time her article was published was culturally inappropriate because the restorative justice practices, as opposed to values, failed to enhance self-determination for the communities involved in the program. Tauri, a Maori academic, goes further when discussing the bicultural criminal justice programs that have been established in New Zealand and Canada. He believes that '[m]erely tinkering with the existing criminal justice system' by recruiting First Nations people in criminal justice roles without relinquishing control of the application of innovative processes will never address the cultural divide and disadvantage that is evident and ever present in the justice system.<sup>114</sup>

There has been some consideration of what specific judicial values and conduct are required when Australian judicial officers sit in judgement of Indigenous offenders particularly within the lower court hierarchy and in the context of sentencing (as opposed to defended criminal trials).<sup>115</sup> However, such analyses have been conducted in relation to comparing the 'broader approach to judging that takes place in Indigenous sentencing courts and in problem-solving courts' with the approach taken in conventional or mainstream courts in order to

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112 Kelly and Barac, above n 110, 17–18.

113 Kelly, above n 110, 212.

114 Juan Tauri, 'Explaining Recent Innovations in New Zealand's Criminal Justice System: Empowering Maori or Biculturalising the State?' (1999) 32 *Australian and New Zealand Journal of Criminology* 153, 162.

115 See, eg, King, 'Judging, Judicial Values and Judicial Conduct', above n 30; Ann-Claire Larsen and Peter Milnes, 'A Cautionary Note on Therapeutic Jurisprudence for Aboriginal Offenders' (2011) 18 *eLaw Journal: Murdoch University Electronic Journal of Law* 1.

determine whether the application of therapeutic jurisprudence principles to the judicial role and function undermines the application of legal principles, and the protection of judicial independence and impartiality.<sup>116</sup> This article, on the other hand, undertakes a different approach by considering what specific characteristics and conduct are desirable of both judicial officers and other legal players when participating in innovative sentencing processes that are intended as being culturally appropriate and inclusive.

A number of judicial officers, sometimes in collaboration with the Indigenous sentencing court coordinator with whom they work, have produced conference papers and articles describing their practices and their modes of thinking when sentencing Indigenous offenders within the scope of a specialty court.<sup>117</sup> These accounts cover courts in every Australian jurisdiction aside from Tasmania, which has never established an Indigenous-focused sentencing court process. Such work cannot, of course, provide us with the perspective of the Indigenous communities within which the sentencing practices operate, but it does provide us with further insights as to how judging and lawyering needs to differ from its normative Eurocentric comparative.

Reflecting a recognition that the Anglo-Australian legal system continues to advance colonial power despite its rejection of the concept of *terra nullius*, judicial officers who have described their involvement in Indigenous sentencing courts recognise the need for 'power sharing' between legal personnel and Indigenous community members:

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116 King, 'Judging, Judicial Values and Judicial Conduct', above n 30, 143.

117 See, eg, Kate Auty, 'We Teach All Hearts to Break – But Can We Mend Them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts' (2006) 1 *eLaw Journal Murdoch University Electronic Journal of Law – Special Series* 101; Blokland, above n 95; Daniel Briggs and Kate Auty, 'Koori Court Victoria – Magistrates Court (Koori Court) Act 2002' (Paper presented at the 18<sup>th</sup> International Conference of the International Society for the Reform of Criminal Law, Montreal, 8–12 August 2004); Andrew Cannon, 'South Australia: Nunga Court II – Aboriginal Sentencing Conferences' (Paper presented at the Australian Institute of Judicial Administration Indigenous Courts Conference, Mildura, 4–7 September 2007); Doug Dick, 'Circle Sentencing of Aboriginal Offenders' (Paper presented at the Sentencing: Principles Perspective & Possibilities Conference, Canberra, 10–12 February 2006); Doug Dick, 'Circle Sentencing of Aboriginal Offenders: Victims Have a Say' (2004) 7 *The Judicial Review: Journal of the Judicial Commission of New South Wales* 57; Doug Dick and Gail Wallace, 'Sentencing of Aboriginal Offenders' (Paper presented at the Australian Institute of Judicial Administration Indigenous Courts Conference, Mildura, 4–7 September 2007); Annette Hennessy, 'The Rockhampton Murri Court' (2006) 27 *Queensland Lawyer* 14; Annette Hennessy and Carolyn Willie, 'Sentencing Indigenous Offenders in Domestic and Family Violence Matters: A Queensland Experience' (Paper presented at the Australian and New Zealand Society of Criminology Conference, Hobart, 7–9 February 2006); Michael S King, 'Therapeutic Jurisprudence in Regional WA: The Geraldton Alternative Sentencing Regime' (2002) 29 *Brief* 22; Michael S King and Kate Auty, 'Therapeutic Jurisprudence: An Emerging Trend in Courts of Summary Jurisdiction' (2005) 30 *Alternative Law Journal* 69; Shane Madden, 'The Circle Court in the Act – An Overview and Its Future' (Paper presented at the Australian Institute of Judicial Administration Indigenous Courts Conference, Mildura, 4–7 September 2007); Jelena Popovic, 'The Art of Judging' (2008) 12 *Southern Cross University Law Review* 169; Tina Previtera and John Lock, 'Fly in/Fly out Justice: An Imperfect Journey' (2007) 1 *The Verdict* 28. The judicial officers that have authored or co-authored these publications are all non-Indigenous, although many of the co-authors are Indigenous.

if the community does not have confidence that the power-sharing arrangements will be honoured, the prospects for the successful implementation of Circle Court are likely to be diminished. I cannot over emphasise the importance of the magistrate, prosecutor and solicitor allowing this to happen.<sup>118</sup>

This notion that judicial officers in particular need to allow Elders and other community representatives to ‘take some ownership of the problems and justice issues’<sup>119</sup> is considered a necessary aspect of such courts, despite the fact that judicial officers retain the ultimate power in handing down the sentence. Indeed, sharing the sentencing decision-making process is seen as one of the most crucial components of the circle sentencing process by Dick and Wallace, who even go as far as placing responsibility for the success of the process on the attitude of the judicial officer.<sup>120</sup> Devolution of ownership of the process to Indigenous communities needs to commence at the time the Indigenous-focused sentencing practice is established, with some of the publications mentioning the fact that community Elders and representatives, and Indigenous legal service organisations formed a crucial component of the committees that were organised to establish the Indigenous sentencing court in question.<sup>121</sup> This was seen as a way of ensuring that community ownership was ‘simply treated as a “fact”’.<sup>122</sup> The dialogue and development of relationships that ensued as a result of the consultative process in establishing new Indigenous-focused court processes was described as taking steps that ‘involve[d] “risk” for all the parties’ but the ‘benefits are for the community – both legal and extra-legal.’<sup>123</sup> In this way, a cultural legal hybridity that questions the legitimacy and appropriateness of the law’s operation for Indigenous Australians can be created.

Similar to the judicial officer, Dick advocates that both the solicitor and prosecutor also need to genuinely attempt to power-share with Indigenous participants and that there is ‘no place for a prosecutor who is all passion but devoid of perspective and capacity to apply cultural sensitivity’.<sup>124</sup> This obviously contradicts what is usually learned by legal practitioners engaging in the traditional Eurocentric sentencing process. In effect, prosecutors and solicitors should have ‘little to say’ during a New South Wales Circle Court process,<sup>125</sup> and during a South Australian Aboriginal Sentencing Conference, a defence lawyer should allow the offender to ‘speak for him or herself and the lawyer’s role will be as an observer and to give advice as required’; these forms

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118 Dick, ‘Victims Have a Say’, above n 117, 61.

119 Popovic, above n 117, 177.

120 Dick and Wallace, above n 117, 13.

121 Auty, above n 117, 109; Blokland, above n 95, 7; Briggs and Auty, above n 117, 7; Madden, above n 117, 2. Although this is not mentioned in all publications that were reviewed, other documentation surrounding the establishment of various Indigenous-centered sentencing practices acknowledge that there had been considerable community consultation.

122 Briggs and Auty, above n 117, 8.

123 Ibid 4.

124 Dick, ‘Victims Have a Say’, above n 117, 61–2.

125 Dick and Wallace, above n 117, 10.

of conduct and roles are usually reserved for the silenced and oppressed colonised 'Other'.<sup>126</sup>

Magistrates and judges presiding over Indigenous sentencing courts no longer operate as a remote figurehead and instead enter the court as a supportive and active court participant willing to act as a facilitator, negotiator and broker. In this way, they reflect the practices of judicial officers presiding over courts adopting a therapeutic jurisprudence approach. Such a readjustment of roles enables all those present to meaningfully engage in the sentencing process.<sup>127</sup> Auty talks about hierarchies needing to be 'ruptured' when describing the new role of a magistrate involved in such courts, stating:

Additionally it is necessary to inform regional magistrates that their 'independence' is not challenged by 'going out' into the community and that ethical collaborations are possible and can be conducted at arms length without compromise. Developing a 'fieldwork judicial officer' is a novelty but it has been done. This transition is important for the success of a project which endeavours to import into the courtroom a community and its cultural norms both of which are so important to the success of the project.<sup>128</sup>

Many of the publications make note of the fact that communication, involving dialogue between the legal players and non-legal Indigenous participants, is central to the success of the various Indigenous-focused sentencing court practices.<sup>129</sup> The dialogue needs to be open and continuous and based on mutual respect, which at the same time embraces silence if required.<sup>130</sup> The fluidity of the dialogue and the modification of whose voices are prioritised, recognises that 'no one person or group has all of the wisdom or knowledge',<sup>131</sup> something which is contrary to the manner in which the roles of participants are perceived in a traditional postcolonial courtroom setting. Moreover, plain English is encouraged as opposed to the normal legalese used in most courts.<sup>132</sup> In the Northern Territory Community Courts Indigenous interpreters were often utilised.<sup>133</sup>

Courtroom insignia and layout play an important role in denoting the power of the judicial officer and hegemonic legal system. Since colonisation Australia's courtrooms have reflected British and non-Indigenous Australian cultural and political emblems. The symbols and rituals which exist in Australian courtrooms are not, according to Tait, experienced homogenously.<sup>134</sup> In Indigenous sentencing courts, this is addressed by conducting the hearings with less

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126 Cannon, above n 117, 6.

127 Ibid 1; Dick, 'Victims Have a Say', above n 117, 60–1; Popovic, above n 117, 178.

128 Auty, above n 117, 125.

129 Blokland, above n 95, 9; Briggs and Auty, above n 117, 3; Cannon, above n 117, 1; Hennessy, 'Indigenous Sentencing Practices in Australia', above n 56, 4; King and Auty, above n 117, 71.

130 Auty, above n 117, 120.

131 Hennessy, 'The Rockhampton Murri Court', above n 117, 17.

132 Hennessy, 'Indigenous Sentencing Practices in Australia', above n 56, 4.

133 Blokland, above n 95, 11–12.

134 David Tait, 'Boundaries and Barriers: The Social Production of Space in Magistrates' Courts and Guardianship Tribunals' (1999) 1 *Journal of Social Change and Critical Inquiry* 32, 34.

formality and reconfiguring the courtroom layout and appearance.<sup>135</sup> In some instances, the bar table is dispensed with and the participants sit on chairs in a circle,<sup>136</sup> or around an oval desk, but always with the judicial officer and Elders or community representatives sitting at the same level.<sup>137</sup> In other courts, informality (or formality) is achieved by whether the judicial officer wears their robes or in the language utilised in the court or by dispensing with the need to bow or stand when in the presence of or when addressing the judicial officer.<sup>138</sup> In fact, the degree of formality and seating arrangements are two of the handful of elements reflected in the published rules or guidelines governing the Indigenous-focused practices and programs described in the first half of this article. Another practice, which not only acknowledges the importance and *formality* of culture within the sentencing process, but also acknowledges the authority of and respect for the Elders is that of commencing the hearing with an acknowledgement of the local traditional owners of the land and introducing the Elders who are present.<sup>139</sup> This is not a usual practice within a conventional court hearing and it requires a specific level of insight and understanding on the part of the judicial officer presiding over the hearing of the cultural meaning and significance of such an acknowledgement.

Attendance at Indigenous community events and becoming involved in community activities is something Kelly and Barac identify as important elements of being culturally appropriate within an Indigenous context,<sup>140</sup> but only Auty (as a non-Indigenous judicial officer) raises this as an aspect of cultural change that resulted from the initiation of Indigenous-focused court practices.<sup>141</sup> Dick describes the relational transformation between the non-Indigenous legal participants and the Aboriginal participants as ‘positive and revolutionary’, stating that he is ‘honoured and humbled at the immense respect [he has been] ... shown by the Aboriginal community’.<sup>142</sup> He concludes that the strengthening of the bond between the legal system and the Aboriginal community is ‘because Circle Court does not end in the Courtroom, it continues to surround those who enter’ once they have returned to their life outside the Circle, which in some ways reflects the sentiments expressed in Kelly and Barac’s submission.<sup>143</sup>

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135 See, eg, Auty, above n 117, 120; Briggs and Auty, above n 117, 9; Dick and Wallace, above n 117, 5; Madden, above n 117, 12.

136 Dick and Wallace, above n 117, 5.

137 Auty, above n 117, 120.

138 See, eg, Briggs and Auty, above n 117, 9; Dick, ‘Victims Have a Say’, above n 117, 59; Hennessy and Willie, above n 117, 4; Previtera and Lock, above n 117, 33.

139 See, eg, Briggs and Auty, above n 117, 12; King and Auty, above n 117, 70; Madden, above n 117, 12.

140 Kelly and Barac, above n 110, 17–18.

141 See Briggs and Auty, above n 117, 3. The co-author Briggs is an Indigenous Koori Court coordinator. Auty also talks about the social involvement of the police and the prosecutor at football training and games once the process for establishing the Koori Court in Shepparton had commenced: Auty, above n 117, 112.

142 Dick, ‘Victims Have a Say’, above n 117, 6.

143 Ibid.

## V CONCLUSION

The need to increase Indigenous participation in the criminal justice system was raised in the RCIADIC recommendations, which also emphasised that culturally sensitive practices needed to be incorporated into the mainstream criminal and legal justice systems.<sup>144</sup> It is assumed that community input and participation will make a court or justice process more suitable, meaningful and relevant for the offender, which will in turn ultimately assist in changing offending behaviour and result in the implementation of more just and equitable outcomes. So what can be learned from the above analysis in relation to how non-Indigenous legal players need to conduct themselves in Indigenous-focused sentencing practices in order to support the transformation of the process into one that is culturally appropriate and inclusive? One problem we discovered is that very little guidance has been given to non-Indigenous judicial officers and lawyers as to what constitutes culturally appropriate and inclusive practices. Any guidance given seems to simply relate to courtroom setting and acknowledgement of Indigenous culture, which leaves much to be determined by the non-Indigenous legal players who hold the majority of power in the Anglo-Australian legal context. Despite the fact that some cultural awareness training may be available by way of workshops or conferences,<sup>145</sup> not all judicial officers or legal practitioners involved with Indigenous-focused sentencing practices attend, often because of a lack of government funding support or because they cannot be relieved from their work roles.

Another important (and possibly controversial) point that needs immediate consideration is that not all judicial officers and legal practitioners will be suited to this type of work. Indeed, former South Australian Chief Magistrate Moss once noted in relation to the Nunga Court that '[t]he second and perhaps most critical difficulty is that the magistrate's role is a very difficult one and not all of my magisterial colleagues would be able, or even willing, to run courts in this way.'<sup>146</sup>

Unless the non-Indigenous legal players involved in Indigenous-focused sentencing practices are dedicated and open to transforming the process into one that honours the cultural norms and values of the community in which the process is located, any reform that is introduced in the Anglo-Australian criminal court system will be no different to the conventional Eurocentric court process.

The point of this article is not to criticise the inspiring and transformative work currently being undertaken by judicial officers and legal practitioners involved with Indigenous-focused sentencing practices, but rather to use notions

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144 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, above n 5, vol 5, 91.

145 See, eg, the recent AIJA Indigenous Justice Conference, 'Current Issues in Delivering Indigenous Justice – Challenges for the Courts', University of South Australia, 18–19 July 2013 <<http://www.ajia.org.au/Ind%20Courts%20Conf%2013/Program.pdf>>.

146 Alan Moss, 'Diversionary Programs within the Criminal Justice System and their effects on Victims' (Paper presented at the Victims of Crime: Working Together to Improve Services Conference, Adelaide, May 2000) 67.

of therapeutic jurisprudence and postcolonial frameworks to obtain a more nuanced understanding of what further work is required to achieve the cultural transformation envisaged by the Indigenous ‘Other’ involved with such processes. Furthermore, it provides insights into how a ‘hybrid “in-between” space’ can force ‘the former colonisers ... to re-define themselves in relation to their Other’.<sup>147</sup>

Some of what has been uncovered in the analysis presented above reflects the themes that Daly and Proietti-Scifoni identified as being commonly present in the operation of Indigenous sentencing court processes.<sup>148</sup> These themes consist of:

1. ‘trust, voice, and informality’: The Indigenous community needs to trust the court process, which will only happen if the community believes they have an opportunity to speak and be heard, and are confident that what they will say will be taken seriously;
2. ‘plain English’: The language used needs to be accessible to the lay people using the court process in order to encourage trust in that process;
3. ‘the room and where people sit’: The formality of the courtroom setting can be intimidating for most people, which is why the set up of the room and where the judicial officer sits needs reconfiguration;
4. ‘taking risks’: Judicial officers and other legal practitioners involved in the process need to take risks when making decisions in order to shift power relations between the Indigenous community and the white authority figures;
5. ‘removing barriers’: The barriers constructed by western (white) law, such as the use of criminal law excuses or defences, judicial reasoning based on black-letter law and courtroom settings with elevated benches, all need to be deconstructed and modified in a way that allows Indigenous reasoning and interaction to occur; and
6. ‘Elders’ authority and wisdom’: The incorporation of cultural knowledge and values needs to go beyond simply allowing Elders or community representatives to speak. The emotional and spiritual power contained in the words uttered by members of the offender’s community need to be understood, acknowledged and respected.

However, our analysis provides further insights since it attempts to marry the emotive and relational characteristics that many scholars have identified as being crucial for practitioners of therapeutic jurisprudence or restorative justice processes with a postcolonial analysis of what it means to practise cultural appropriateness as a non-Indigenous judicial officer and legal practitioner. Having said that, the analysis presented is limited in that it predominantly reflects the voices and experiences of the non-Indigenous court players who have

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<sup>147</sup> Roy, above n 100, 356.

<sup>148</sup> 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, 2009) 12–14.

published their accounts. Further research in this area is required to determine whether such accounts match those of the Elders and community representatives involved in Indigenous-focused sentencing processes. Without such research, it is impossible to fully understand what it means for a non-Indigenous legal player to be culturally appropriate and inclusive.