

NORTHERN TERRITORY INDIGENOUS COMMUNITY SENTENCING MECHANISMS: AN ORDER FOR SUBSTANTIVE EQUALITY

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I Introduction: The Changing Landscape of Northern Territory Community Sentencing

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

There have been a significant number of studies on Indigenous sentencing courts in Australia, but very little on their embodiment in the Northern Territory. Aboriginal community sentencing mechanisms in the Northern Territory have some distinct features, including their demonstrated capacity to tailor *and* supervise community-based sentences that conform to both the sentencing legislation and community expectations for punishment. This reflects the strong role that Indigenous laws play in Northern Territory communities and their potential to deliver 'more effective, meaningful and culturally appropriate sentencing options'.¹ In the Northern Territory, unlike in other Australian jurisdictions, there are avenues for community members to provide pre-sentencing advice on the sentence and collectively write references for the defendant. In addition, panel members on Community

Courts in small and remote Northern Territory Aboriginal communities can have a more intimate understanding of the offender's circumstances, compared to Indigenous courts in some urban and larger communities.

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

Both Community Courts and Law and Justice Groups were initiatives of Aboriginal community members. They respond to the specific circumstances of the Aboriginal community in which they operate. These have tended to be communities on Warlpiri (Central Australia), Yolŋu (East Arnhem), Tiwi (Bathurst and Melville Islands) and Larrakia (Darwin and surrounds) country. We argue that Community Courts and Law and Justice Groups have increased community control over offenders and have influenced offending behaviours and

relationships between offenders and the community. This argument is based on our observations, and experiences with providing training for and facilitating community sentencing mechanisms in remote Warlpiri, Tiwi and Yolŋu communities over the past six years, and a preliminary analysis of court listings data in Lajamanu.³ Notwithstanding actions by the government which seek to weaken the powers of Community Courts, the reinvigoration of Law and Justice Groups has revealed the resilience of Indigenous communities and their will to engage in the sentencing process in a meaningful way.

In 2011, the operation of Community Courts was undermined by legislative interpretation and administrative changes. Initially the then Northern Territory Chief Magistrate, Hillary Hannam, declared Community Courts invalid in the Northern Territory Court of Summary Jurisdiction (local criminal courts), although encouraged their continuation in the Youth Court. We argue that this ruling was based on a flawed interpretation of legislative procedures for the admission of cultural and customary law evidence and, to a lesser extent, the statutory prohibition on considering these factors to determine the seriousness of an offence.⁴ Subsequently, the Northern Territory Attorney-General, John Elferink, disbanded the Community Court program. The former legislation underpinning the invalidation of the Community Courts contravened the *Racial Discrimination Act 1975* (Cth) ('RDA'), as recognised by the Northern Territory Attorney-General (see, Part IV).⁵ The decision to suspend Community Courts also denies substantive equality by not allowing Indigenous offenders to have their community circumstances conveyed to the court with the same meaning as a non-Indigenous person, and instead subjecting them to norms associated with non-Indigenous offenders.

Substantive equality and non-discrimination is not the entire premise for the operation of Northern Territory Aboriginal involvement in sentencing. From our observations in Northern Territory Aboriginal communities, especially the justice work conducted in the Yolŋu, Tiwi and Warlpiri communities, we have seen that Indigenous sentencing mechanisms seek to fulfil much broader aims. Moreover, we believe it is problematic to rely on substantive equality as an end in itself. This would assume that mainstream sentencing courts deliver non-Indigenous people with an ideal form of justice, and would overlook many of their barriers to providing a fair hearing and just outcomes. Instead, we maintain that defendants from the Northern Territory's Indigenous communities require their community's

involvement in sentencing through Community Courts and Law and Justice Groups, to provide an avenue for the supply of background information, references and support to Indigenous defendants.

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

II Features of Australian Indigenous Sentencing Courts

There has been very limited analysis of the alternative sentencing mechanisms in the Northern Territory. While this paper hopes to add to the knowledge of these mechanisms, and to demonstrate their uniqueness, it is worthwhile to make some references to the broader phenomenon of Indigenous sentencing courts in Australia. There are a number of similarities among the experiences of Indigenous sentencing courts across Australia, including in the Northern Territory. The similarities stem from the interest of local communities in participating in Anglo-Australian justice mechanisms that affect their members. Community sentencing courts in the Northern Territory, as elsewhere in Australia, provide a direct channel for Indigenous communities to the justice system through providing 'input' into sentencing decisions or providing sentencing 'advice' through consultation.⁶

Over the past fifteen years, Indigenous sentencing courts have emerged throughout Australia as an alternative for sentencing less serious Indigenous offenders.⁷ They exist in small pockets and are not a wide-scale replacement for lower courts. These courts, which operate outside the mainstream judicial system, harness Indigenous justice and dispute resolution concepts by providing Indigenous Elders with a central role in the sentencing process.⁸ Indigenous sentencing courts are capable of improving Anglo-Australian law and justice by bringing additional information about a defendant's background and strengthening Indigenous communities by engaging them in the justice process and giving them more control over their community members. The provision of

community information may also mean that the courts do not rely on stereotypes in sentencing Aboriginal offenders.⁹ Marchetti and Daly's research shows how Indigenous courts provide 'innovative justice' by incorporating Indigenous knowledge and modes of social control into the sentencing process.¹⁰ Indigenous courts 'bend and change the dominant perspective of "white law"'.¹¹

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

1. The offender must be Indigenous;
2. The offender must have entered a plea or have been found guilty;
3. The offender must agree to have the matter heard in the Indigenous Community Court;
4. The charge must generally be one that is heard in a Magistrates' or Local Court (although there are some exceptions);
5. The offence must have occurred in the geographical area covered by the court.¹²

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

Indigenous participation in sentencing courts is conducted within the regulations and constraints of the Anglo-Australian legal system. Further to the limitations listed above, it is also accepted that Indigenous sentencing court members have limited control over the court process (which remains in the hands of magistrates); that only a small number of minor offenders come within its jurisdiction; that sentencing advice

must come within the range of punishments prescribed by legislation; and that Community Courts often operate in mainstream court complexes rather than in Indigenous spaces.¹³ Harry Blagg describes Community Courts as a liminal space between Aboriginal justice and white justice.¹⁴ Chris Cunneen perceives them as an appropriation of Aboriginal justice by the state.¹⁵ These critiques recognise that Community Courts do not operate in an Indigenous law framework, but provide a channel for Indigenous input into the Anglo-Australian criminal justice system.

In the Northern Territory, members of Aboriginal communities who have been involved in the establishment and operation of Community Courts are cognisant of their limited capacity to express Indigenous law and broadly respond to community justice concerns. Accordingly, Northern Territory Community Courts are only one aspect of law and justice work carried out by communities. In Central Australia, Indigenous-controlled Law and Justice Groups and Committees undertake a range of justice focused activities to provide the communities with a holistic response to criminal justice issues. These Groups describe their functions in the following respects: providing an interface with the justice system; involvement in pre-court conferencing and victim-offender conferencing; making recommendations to courts as requested; assisting with the development and management of community diversion programs; and reporting to local councils on law and justice trends and issues.¹⁶ On a more informal level, they act as a focal point for community law and justice concerns; facilitate dispute resolution; and maintain sound relations between the community and the police, the courts and correctional services.¹⁷ Since the abolition of Community Courts, Law and Justice-styled Groups have been established in two non-Warlpiri communities (Wurrumiyanga and Maningrida) and the Lajamanu Kurdiji Group continues to operate. These groups have taken on a greater function in providing pre-sentencing advice to courts, particularly in Wurrumiyanga, Maningrida and Lajamanu, their role should be regarded as one of complementing Community Courts rather than substituting them, as they do not have a role inside the courts and in front of the defendant.

III Community Courts and Law and Justice Groups in the Northern Territory

Since 2003 and until their disbandment in 2012, Northern Territory Community Courts played an important role in

furthering justice in the sentencing process.¹⁸ When they operated across remote and urban communities, Respected Persons would provide advice to the magistrate with respect to factors relevant to sections 5 and 6 of the *Sentencing Act 1995* (NT) (‘*Sentencing Act*’), such as the background of the defendant and their views about what would be effective and appropriate sentences. Additionally, Elders or Respected Persons on the panel would communicate with the offender about the impact of the crime and condemn the actions of the offender, often in an impassioned manner. Young people could also seek to be dealt with in the Community Court, which was supported by section 4(o) of the *Youth Justice Act 2005* (NT). Additionally, in a number of communities, especially in Central Australia, Law and Justice Groups would meet before sentencing to consider referrals, compile references and advise on sentencing dispositions for selected offenders. Both Community Courts and Law and Justice Groups could inform the Magistrates’ Court on subjective factors relevant to the defendant and a broader range of sentencing outcomes that would more effectively deter offending.

A Northern Territory Community Courts

During the 1980s, the Northern Territory experimented with community forums and local Indigenous court advisers to assist the court.¹⁹ However, Community Courts first commenced in Nhulunbuy (North East Arnhem Land) in 2003/2004 after the respected Yolju educator, linguist and community worker Raymattja Marika approached the Court requesting Yolju participation in the court process.²⁰ Around the same time, the then Chief Magistrate, Hugh Bradley entered discussions with Yilli Rreung Council in Darwin that resulted in a trial ‘circle sentencing’ project in Darwin, Nhulunbuy and the Tiwi Islands that was titled ‘Community Courts’. The court developed a set of guidelines for the Darwin community.²¹ Although designed for the Darwin Community Court, these guidelines were followed generally in communities in the Top End and Central Australia with different levels of formality according to community circumstances.

In the Northern Territory, Community Courts sat as the Court of Summary Jurisdiction, which precluded Community Courts from addressing serious matters, namely indictable-stream serious violent and sexual offences. Guideline 14 of the *Community Court, Darwin Guidelines* (‘*Guidelines*’) excluded sexual assault matters and noted the exercise

of caution for offences of violence, domestic violence and where the victim is a child.²² The stated objectives of the Community Courts in the *Guidelines* were to provide more ‘effective, meaningful and culturally relevant sentencing options; increase community safety; decrease rates of offending; and reduce repeat offending and breaches of court orders’.²³ The *Guidelines* also laid out goals for the community. These included increased engagement of community members with the administration of justice; improved understanding and knowledge of the sentencing process; increased accountability of the community, families and offenders; enhancement of the rights and status of victims in the sentencing process; enhancement of offenders’ prospects of rehabilitation; and promotion of reparation to the community and victim.

The process was not unduly formal in order to encourage and enhance a better understanding of the impact of offending by the offenders, their families and the community. The Community Court also communicated primarily in the local language, especially when addressing the offender.²⁴ We observed that this was important in engaging the defendant, as well as adding to the strength of the Community Court members. One outcome we observed in this process was that the defendant better understood sentencing orders and the community could work with the defendant to ensure compliance with conditions of orders. The *Guidelines* aimed to achieve community involvement in the sentencing process and to broaden the sentencing process so that a Community Court could examine the underlying issues of offending behaviour and consider the needs of the victim.²⁵ Aims also included giving the victim a place in the sentencing process²⁶ and providing support to the victim. Additionally, the aims included enhancing reparation from the offender to the community, (via community work).²⁷

From 2004 to 2012, 217 Community Courts were convened across 18 communities. The majority of these took place in Darwin, Nhulunbuy, Alyangula and Nguiu/Wurrumiyanga. In the Central Australian communities of Yuendumu and Lajamanu, the Community Court was based on a hybrid model that provided advice to the Court of Summary Jurisdiction during a sitting and met before sittings, so as to provide written advice to the magistrate on all sentences in advance of the court sitting. Of those offenders who were sentenced in these courts, 88 per cent were male and 12 per cent were female; 17 per cent were held in the Youth

Court while the majority (83 per cent) were heard in the Magistrates' Court or Court of Summary Jurisdiction.²⁸ As the process was voluntary for the defendant, generally more serious matters were referred to Community Courts for fear of excessive sentencing (or 'sentence creep') for lower level offences or for first time offenders. Additionally, if the matter was not sufficiently serious, 'there wasn't much motivation for community involvement and the process could seem tokenistic.'²⁹

In August 2007, the Northern Territory Department of Justice established the Community Court Program as part of its 'Aboriginal Justice Program'. It became part of the *Closing the Gap* response by the Northern Territory Government to the *Little Children are Sacred* report by the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse. Although funds were allocated and it was intended that the program was to operate, under a number of coordinators, in 10 communities across the Territory, insufficient funds were provided to the Court, and only one Community Court coordinator was employed to service the Top End.³⁰ By 2012, the Community Court Program was disbanded by the Northern Territory Government after the Chief Magistrate had declared the operation of Community Courts invalid.

B Law and Justice Groups

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

Law and Justice Groups are also important conduits for crime prevention and improving relations with the formal arms of the criminal justice system (police, courts, corrections agencies and relevant government officials). Originally, Law and Justice Groups were recognised in the 1995 Aboriginal Law and Justice Strategy, which was

the Northern Territory Government's response to the recommendations of the Royal Commission into Deaths in Custody ('RCIADIC').³¹ The Aboriginal Law and Justice Strategy provided a community justice framework to maximise community participation in the administration of justice, including through facilitating Law and Justice Groups and supporting Aboriginal women in dispute resolution practices, night patrols and safe houses. Between 1998 and 2005, the Aboriginal Law and Justice Strategy operated in a number of Warlpiri communities in Central Australia, initially in Ali Curung, then in Yuendumu, Willowra and Lajamanu.³² Law and Justice Groups in these communities came together in 2001 to form the Kurduju Committee. Government funding of these Groups ceased in 2004, although pre-court conferencing, an important aspect of Kurdiji work, continued to be supported by Community Corrections until 2008. Tangentyere Council offered outreach through their remote area support programme to Kurduju committee members in 2007, and in 2008 the then Department of Families, Housing, Community Services and Indigenous Affairs ('FaHCSIA') funded Justice Mediation Group in Yuendumu (recommending the pre-court conferencing and initiating a different type of community court from the top end model). In Ali Curung, Tangentyere Council also recommended pre-court conferencing and prepared reports for the court in late 2008.³³

The Lajamanu Kurdiji Group was reinvigorated in mid-2009 when, at the request of the community, the North Australian Aboriginal Justice Agency ('NAAJA') and later with the assistance of the Central Land Council, recommenced the pre-court conference and reference writing group.

There are currently four Law and Justice-styled Groups involved in pre-sentencing in the Northern Territory: Lajamanu's 'Kurdiji' Law and Justice Group (established in 1998 and reconstituted in 2009)³⁴ and the Yuendumu Mediation and Justice Group (established in 2006) in Warlpiri communities in Central Australia, Wurrumiyanga's Ponki Mediators in the Tiwi Islands (established in 2009) and Maningrida's Bunawarra Dispute Resolution Elders in the Top End (established in 2012). The process of writing the reports in Lajamanu, Wurrumiyanga and Maningrida involves the NAAJA community legal educator reading out the court list and, where a matter has been referred to the group by NAAJA or the Northern Territory Legal Aid Commission's criminal lawyers, the charges, the summary of agreed facts and prior offending. The group then decides

the cases for which they are prepared to write a letter of support and writes references outlining the group's knowledge of the offender's background (including their behaviour in the community), views about the offending, the offender's character, and ideas for the offender's rehabilitation and punishment.³⁵ The letters are provided to the defendant's lawyer before being submitted to the magistrate during sentencing submissions. The group members make themselves available for cross-examination if requested. In addition to this function, the group is involved in dispute resolution to resolve conflicts before they escalate.

The Yuendumu Mediation and Justice Group was previously partnered with FaHCSIA and the Attorney-General's Department in order to 'improve access to justice; strengthen community safety and security, and provide support and mentoring to community members'.³⁶ In the past it has been involved in advising magistrates during court sittings,³⁷ providing pre-court advice, providing phone link-ups with prisoners and organising anti-drink-driving education courses.³⁸ Both the Ponki Mediators and the Bunawarra Elders were previously heavily involved in Community Courts, and following the Courts' suspension they requested assistance from NAAJA in developing Kurdiji-styled groups to discuss cases on court lists, prepare references for court and make decisions in relation to community safety.

Law and Justice Groups in these communities have devoted substantial resources on a voluntary basis to their formation and work. The groups were intended to enable community participation in the justice process and provide a space for interaction between Indigenous and non-Indigenous laws and law makers.³⁹ They have a broad ambit that includes engagement and participation in the courts, promoting community safety, fostering Indigenous law and authority structures and acquiring recognition of Indigenous law from the Anglo-Australian judicial and, to some extent, legislative systems. The 2007 report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse expressed support for Law and Justice Groups and Community Courts that 'create the space for dialogue' between Indigenous communities and the Anglo-Australian justice system.⁴⁰ While the Law and Justice Groups provide an important mechanism for local input into justice in Aboriginal communities, including in the sentencing process, the suspension of Community Courts

has constrained Indigenous justice capacities and the realisation of substantive equality in sentencing. It removes an important forum for Respected Persons to converse with the defendant about his or her offending. The basis for suspending Community Courts is discussed in Part IV.

IV Suspending Community Courts: Disputing its Legislative Premise

In late 2011, the then Northern Territory Chief Magistrate Hillary Hannam suspended the operation of Community Courts in the Northern Territory Courts of Summary Jurisdiction on the basis that the procedures of Community Courts were inconsistent with section 104A of the *Sentencing Act* (prior to its amendment) and section 91 of the *Northern Territory National Emergency Response Act 2007* (Cth) ('*NTNER Act*') (since incorporated into the *Crimes Act 1914* (Cth) at section 16AA).⁴¹ Despite the suspension of Community Courts for adults, Community Courts continued to operate for a further year in the Youth Court. Sentencing for juveniles is covered by the *Youth Justice Act 2005* (NT) rather than the *Sentencing Act* and there is thus no statutory bar to convene Community Courts for juveniles. Section 4 of the *Youth Justice Act* specifically provides that 'if practicable, an Aboriginal youth should be dealt with in a way that involves the youth's community'.⁴² However, in December 2012 the newly elected Northern Territory Government abolished the Community Court program in the Youth Court, despite requests to provide additional funds for Community Courts.

Underpinning the disbandment of Community Courts is a shift away from a form of putative pluralism in the Northern Territory. The former Chief Magistrate and the Northern Territory Government have reinforced a homogenous justice framework in sentencing Indigenous offenders that inadequately accommodates for difference. Postcolonial theory informs us that the authority of settler-states is constantly offset by the worldview and competing social systems of the colonised.⁴³ Community Courts are a manifestation of Indigenous resistance to the whiteness of the criminal justice system, and represents the production of a hybrid judicial space between the colonised and the coloniser.⁴⁴ However, state apparatus continue to create and sustain practices that uphold white colonial power over colonised people.⁴⁵ These can occur through subtle ways in which the authority of the criminal justice system shapes postcolonial relations, or through more explicit

displays of power, such as through the invalidation of Community Courts. We argue that this assertion is not merely oppressive, but lacks legal legitimacy.

A Relevance of the Northern Territory Emergency Response

Former Chief Magistrate Hannam cited the prohibition of cultural and customary law considerations arising from the Northern Territory Emergency Response ('NTER') as one of the reasons for the invalidation of Community Courts. Section 91 of the *NTNER Act* and its successor, section 16AA of the *Crimes Act 1914* (Cth), limits the use of 'customary law or cultural practice' in sentencing mitigation or aggravation. Spiers Williams states that these legislative amendments alongside the broader Commonwealth response to the debates about violence against Aboriginal women and children have 'officially sanctioned intolerance to Aboriginal customary law and cultural practice' and undermined the 'the ethos of pluralism' that animated contemporary Northern Territory Government policies.⁴⁶

Although the NTER and the consequent legislative changes were not the sole reason behind the Northern Territory Chief Magistrate and the Government's decision to cease the operation of Community Courts, they provide a relevant context for understanding the dilution of Indigenous considerations in Northern Territory sentencing. The legislation undercut an extensive body of common law that accepted issues of Indigenous background, culture and punishment as relevant to sentencing. The High Court of Australia has described consideration of the 'material facts' that exist by reason of an offender's membership of an Aboriginal community as 'essential to the even administration of criminal justice'.⁴⁷ The 'material facts' that have been found to be relevant in sentencing Indigenous offenders can be grouped into the following categories, which exist in the Northern Territory (as listed in the cases below) and Australia-wide:⁴⁸

- The severe social and economic disadvantage, accompanied by endemic alcohol abuse, that exists in some Indigenous communities;⁴⁹
- The existence of Indigenous laws and cultural practices that explain the offender's motivation for committing the offence;⁵⁰
- The dispensation of punishment by community members pursuant to Indigenous laws;⁵¹

- The positive contribution the offender has made to his/her Indigenous community.⁵²

The Northern Territory Supreme Court has sought to strictly interpret section 91 of the *NTNER Act* in order to retain some discretion to consider Indigenous cultural issues⁵³ and, by implication, some scope for Community Courts to provide input into sentencing. In *R v Wunungmurra*,⁵⁴ the Court held that the prohibition on the use of evidence of customary law or cultural practices applied only in 'lessening or aggravating the seriousness of the criminal behaviour' and not in relation to other sentencing purposes.⁵⁵ The Supreme Court identified aspects of sentencing where culture or customary law may be taken into account *other than* in relation to determining the objective seriousness of the offence, including whether the offender had the predisposition to commit the crime, is of good character, likely to reoffend or be rehabilitated.⁵⁶ Consideration of these factors allows for individualised justice and substantive equality.⁵⁷

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

[S]ome of the deliberations in Community Courts concerning rehabilitation, remorse, deterrence and other sentencing considerations can involve cultural issues and practices. Most are unlikely to conflict with the *NTNERA* (Cth) as those issues concern primarily post-offence conduct and do not relate to the criminal conduct itself... [C]ases that arise in Community Courts in the Northern Territory possess elements common in cases in all Australian Courts – alcohol and substance abuse, spousal violence or more generally family violence, poverty and mental illness.⁵⁸

Community Courts can provide magistrates with a more textured understanding of the matters relevant to the offender and offence. Notwithstanding the limitations on adducing cultural and customary law information, there remain significant issues that can be conveyed irrespective of the limitations posed by section 91. Furthermore, 'culture' is not a discrete Aboriginal concept but a Western

construct that does not have practical resonance with Aboriginal communities, and nonetheless denies the role of cultural factors in non-Indigenous sentencing.⁵⁹ Aboriginal Elders in the Northern Territory have also commented that 'customary law' is not a separate system, as section 91 implies, but a guide for all aspects of Aboriginal life.⁶⁰

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

The former Chief Magistrate Hannam declared that the then section 104A of the *Sentencing Act* (prior to its amendment, which commenced on 1 July 2014) precluded the operation of Community Courts in the Northern Territory.⁶¹ This section, notwithstanding the Federal restrictions, regulates the reception of evidence of Aboriginal customary law and practices. The previous section 104A allowed a sentencing court to receive information about an aspect of Indigenous customary law, or the views of members of an Indigenous community, where certain procedural notice and form requirements had been fulfilled (namely disclosure of the evidence to the other party with reasonable notice and that the evidence be given on oath, by affidavit or statutory declaration). In inserting this section, the Northern Territory Government sought to improve the reliability of evidence of customary law by giving the other party adequate notice to seek its own evidence to present to the court.⁶² It was specifically responding to the decision in *Munungurr v The Queen*,⁶³ in which the Northern Territory Supreme Court requested greater disclosure in cases where evidence of Indigenous customary law and practices are being submitted. In introducing the Sentencing Amendment (Aboriginal Customary Law) Bill, the Attorney-General on 13 October 2004 said in his second reading speech:

The purpose of this Bill is to ensure that courts are provided with fully tested evidence about relevant customary law issues when they are sentencing an offender. ... This Bill provides a formal mechanism for raising issues relating to customary law, or the views of members of an Aboriginal community, when a court is sentencing an offender. It has long been an accepted practice for courts in the Northern Territory to accept and take into account evidence of relevant customary law when passing sentence on an Indigenous person. Aspects of customary law and attitudes of members of a particular Indigenous community towards an offence or an offender are often material facts that a court must take into account in the sentencing process.⁶⁴

The primary intention of the Northern Territory Parliament appears to be the regulation of how evidence of customary law is introduced to the court in order to promote transparency and allow testing of the reliability of its contents. Given the contents of the second Reading Speech, it seems sensible to read section 104A(2) as permitting the reception of evidence of culture and tradition and the views of Aboriginal Community members under a regime that gives the prosecution sufficient notice when these issues arise. It is interesting to note that at the time the Bill was drafted, the Nhulunbuy (North East Arnhem Land) Community Court had already commenced (in 2003/2004), and there had been a strong practice of community forums and Elder advisory groups in the 1980s.⁶⁵ There was no mention of Community Courts in either the Explanatory Memorandum or the Second Reading speech that introduced section 104A.

Furthermore, the wording of the provision prior to its amendment stated that the section only applies to the receipt of information in relation to 'Aboriginal customary law' or 'views expressed by members of an Aboriginal community'.⁶⁶ This contravenes section 10 of the *RDA* by making the evidential procedure only applicable to Aboriginal people by, according to the advice of the Northern Territory Solicitor-General, restricting the rights of Aboriginal people 'compared to any other race when providing information to a court during the sentencing process'.⁶⁷ In April 2014, the Northern Territory Government passed the *Justice and other Legislation Amendment Act 2014* (NT) to amend section 104A to give magistrates discretion to follow notice and form procedures for the admission of cultural evidence and has removed the requirement that relevant evidence be received from a party to the proceeding, per section 104A(2) of the *Sentencing Act*. The amendment also removed the section 104A(1)(b) provision that extends the notice and form requirements to the views of Aboriginal community members about the offender or the offence, which arguably include submissions of Community Court panel members. Furthermore, under the amended provision, section 104A no longer applies specifically to Aboriginal defendants. The Attorney-General stated that the amendment 'is designed to alleviate any inconsistency' with the *RDA* by ensuring sentencing courts 'may receive information regarding customary law or cultural practice' without restriction.⁶⁸ He further noted that the amendment removed restrictions for 'elders participating in a community court'.⁶⁹

Irrespective of the recent amendments to section 104A, our interpretation of the previous section 104A was that it did not necessitate the abolition of Community Courts.⁷⁰ While the former section 104A(2) required that the court may only receive cultural information from a party to the proceedings, avenues existed to adduce this information.⁷¹ Assuming this is cultural information relevant to matters other than the seriousness of the offence and thus not caught under section 106AA of the *Stronger Futures Act*, we contend that where the parties consented to cultural information being adduced by the Community Court, the section 104A(2) requirement is overcome. In this way, either the defence or prosecution could have led the evidence and not the Community Court member. Further, notice and form requirements under s104A could have been fulfilled where the defence or the Community Court convenor gave the prosecution affidavits stating panel members' views on possible cultural matters (such as the dispensation of Indigenous law punishment). Alternatively, section 104A may have been satisfied if Community Court members gave cultural evidence on oath, and the prosecution was provided with an outline of the evidence prior to proceedings. This would have given the prosecution an opportunity to test any evidence of customary law or practice that may arise in evidence.

The use of the former section 104A to undermine Community Courts' operation reflects a lack of appreciation of these courts' important role in providing Indigenous communities with a forum to contribute to the sentencing process and in providing magistrates and judges with a fuller picture of the subjective matters affecting the defendant and a wider range of community-based sentencing options.⁷² Given that section 104A was intended to increase the veracity of cultural and customary law evidence,⁷³ and not prohibit the operation of Community Courts, the abolition of these courts is an unnecessary setback for substantive equality. Now that section 104A has been amended there are no statutory hurdles to the convening of Community Courts. However, since the passing of the amendment in April 2014, there has been no move from either the judiciary nor the Northern Territory Government to reinstate Community Courts and restore one of the few avenues for Indigenous community members to participate constructively in the criminal justice system.

V The Role of Community Courts and Law and Justice Groups in Furthering Substantive Equality in Sentencing: Observations from the Field

This section considers the roles of Northern Territory Community Courts and Law and Justice Groups in sentencing, based on our observations and work with these groups in Lajamanu, Wurrumiyanga, Maningrida, Yuendumu and Nhulunbuy since 2005. We regard their effectiveness in two respects. First, they improve sentencing outcomes and promote 'individualised justice'.⁷⁴ By informing the court of the subjective circumstances of the local Indigenous offender, including their background, role in the community, risk factors and responsiveness to different types of sentencing orders, Indigenous sentencing mechanisms not only further sentencing objectives but also give rise to substantive equality. Community Courts and Law and Justice Groups also provide more appropriate options for sentencing dispositions for Indigenous offenders, as well as their communities. The involvement of the community enables the court to interrogate the nature of community-based sentencing dispositions, such as who will participate in a ceremony, who in the community will sign off, and whether it involves any harm. Second, Indigenous input into sentencing processes and decisions strengthens Indigenous community structures and furthers social cohesiveness. Both these functions are discussed below.

A Achieving the Purposes of Sentencing through Indigenous Participation

Engaging Indigenous community members in sentencing local offenders can facilitate the realisation of sentencing objectives. In relation to Community Courts, a stated goal is to 'provide more effective, meaningful and culturally relevant sentencing options'.⁷⁵ The purposes of sentencing in the Northern Territory are to punish, rehabilitate and deter the offender, deter the wider community, denounce the offending, and protect the community (*Sentencing Act*, section 5(1)). The matters that a judge or magistrate must take into account include the maximum penalty for the offence, the nature of the offence and the harm caused by the offence, the identity and age of the victim, the offender's criminal record, character, age, intellectual capacity, prospects of rehabilitation, remorse and a wide range of aggravating and mitigating factors.⁷⁶ In determining the character of the offender, relevant considerations are the offender's

criminal history, 'the general reputation of the offender' and 'any significant contributions made by the offender to the community'.⁷⁷ It is not only the sentence itself that can meet the aims of sentencing, but also the sentencing process and post-sentence circumstances.

We have observed that Indigenous people in Northern Territory communities, particularly remote communities, have been well positioned to help inform the court's understanding of factors relevant to sections 5, 6 and 6A of the *Sentencing Act*. Namely, they have conveyed to the magistrate matters in relation to the reputation of the offender, previous offending and its impact on the Indigenous community, the defendant's contributions to the Indigenous community and prospects and best methods of rehabilitation. This has enabled magistrates to frame sentences that are condign to the particular offender and the offence. It also furthers a recommendation of the RCIADIC, which recognises the disadvantage that Indigenous defendants face before mainstream courts and calls on courts in remote communities to 'consult with Aboriginal communities and organisations as to the general range of sentences which the community considers appropriate for offences committed'.⁷⁸

Members of Community Courts and Law and Justice Groups have also been involved in facilitating sentences that flow from the Community Court process. For example, Elders have worked to ensure the offender's good behaviour, curfews are met, fines are paid or that there is compliance with a community work order. In addition, we have observed how sentences designed and overseen by Indigenous sentencing mechanisms, such as work on the country or participation in ceremonies, can promote reconciliation between the offender and the community, and the offender and the victim. In Nhulunbuy, the Community Court tailored sentences to include public admissions of guilt in relation to offences of family violence before 300 people, with the victim also in attendance, and living on outstations and being counselled by senior clansmen and women. Former Chief Magistrate Blokland noted that whilst 'many of these orders could be made without going through the Community Court process', when there is 'family or community support for an order of the court, there is more confidence that the orders might be complied with'.⁷⁹

The capacity for Indigenous sentencing mechanisms to adopt community sentences is particularly relevant in light of the

2012 Northern Territory Supreme Court case of *R v Yakayaka and Djambuy*.⁸⁰ The Supreme Court sentenced a Yolŋu couple, convicted of cannabis offences, which involved a suspended sentence that was supervised by the Aboriginal community (as opposed to Northern Territory Corrections).⁸¹ Northern Territory Chief Justice Riley stated, 'I am told he will be under strict supervision (under Yolŋu law) within the community by community members for a significant period and that would seem to me to be an adequate response to any need for supervision in his circumstances'.⁸² The Chief Justice emphasised that this did not breach the sentencing prohibition on cultural or customary law considerations because it was not relevant to the seriousness of the offence, but rather to the consequence of the offending behaviour. The couple were immediately banished to an isolated 'Yolŋu prison' under the supervision of Elders for eight months. The courts' openness to such sentences speaks to the need for Indigenous communities to be involved in advising the court on these sentences.

Further, section 5(d) of the *Sentencing Act* states that an objective of sentencing is 'to make it clear that the community, acting through the court, does not approve of the sort of conduct in which the offender was involved'. Community Courts have been effective in delivering this message because they can convey the wrongfulness of the offence under both Anglo-Australian law (such as aggravated assault as a serious offence) and Indigenous law (such as the need to honour one's partner and skin group through respectful behaviours). The Elders' disapproval is poignant because of their strong role in the remote communities that we have observed. The Elders, in the absence of the victim, can also convey the impact on the victim while recognising the circumstances of the offender.⁸³

While not all crimes have equivalent Indigenous laws,⁸⁴ such as driving without a licence, Indigenous people have expressed that adherence to Anglo-Australian law is an important part of developing respect for both the local Indigenous law and the introduced law.⁸⁵ The Community Courts could also recognise ancillary detriment for the community that arose from these offences. We witnessed community courts where defendants were being sentenced for driving offences and the Elders spoke of the harmful effect this has, including because it extended the period in which the offender could not drive and therefore could not be of assistance to community members. In other cases involving sentencing for stealing and damaging a car, the

Community Court panel emphasised how it had contributed to the breakdown of relationships within the Indigenous group. These examples derive from our observations of real cases that enabled the Indigenous community to convey the wrongfulness to both laws. In these cases, the Community Court panel members censured the offender in their language, with the effect of shaming the offenders who would hang their head. In delivering their sentences, the magistrates often stated that the Community Court had helped deliver the message of the offender's wrongfulness more effectively than they could have done. They recognised that Community Courts further key sentencing objectives of denunciation, general and specific deterrence and community protection.⁸⁶

B Empowering Communities in the Justice Process

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

- Increase community participation in the administration of the law and sentencing process in defined cases;
- Increase community knowledge and confidence in the sentencing process in defined cases;
- Provide support to victims and enhance the rights and place of victims in the sentencing process; and
- Enhance the offender's prospects of rehabilitation and reparation to the community.⁸⁷

From our discussions with local Community Court members and Law and Justice Group members, it was apparent that Elders felt more in control of the punitive process and more aware of the issues facing their community. This knowledge was used not only to promote better sentencing outcomes but also to influence the offender's path and shape broader community justice initiatives. Peter Norden's research demonstrates the link between strong, cohesive communities and lawful behaviour through members having a sense of connectedness to their community.⁸⁸ Patrick Dodson notes that strengthening Indigenous cultural institutions and authority structures can facilitate Indigenous healing and thereby reduce substance abuse and crime.⁸⁹ Vesting Aboriginal communities with greater responsibility in

sentencing processes and sentencing outcomes maintains the relevance of Indigenous laws and authority structures.⁹⁰ The Australian Law Reform Commission in its report on *Aboriginal Customary Laws* articulated that a 'considerably greater degree of local control' over crime problems was needed to reduce offending in communities.⁹¹ This includes through community-initiated involvement in sentencing.⁹²

Our preliminary analysis of Lajamanu court lists reveals positive outcomes flowing from the Lajamanu Kurdiji Law and Justice Group. There was a steady reduction in overall offending rates from 1996 to the present. When the Kurdiji Group took a leading role on a range of justice matters including sentencing, there was over 50 per cent of a decrease in overall criminal cases, including a 90 per cent decline in dishonesty offences and 55 per cent fall in assault cases since 1996.⁹³ By contrast, Northern Territory imprisonment rates have increased by 72 per cent over the past decade,⁹⁴ a rate higher than any other Australian jurisdiction and more than double the national average of 31 per cent.⁹⁵ These results are not conclusive because they are not matched with a comparable control group or account for a wide range of variables affecting the reporting and prosecution of crime apart from the role of Kurdiji Group. Nonetheless, the consistent decrease in crime in Lajamanu offers an enticement for further research on the effectiveness of Law and Justice Groups in crime reduction. Indeed, these statistics match our observations that Lajamanu has become a safer community with the operation of Kurdiji because members of the community feel accountable to the Kurdiji and the Warlpiri authority structures that support its practices.⁹⁶

We note that concerns were expressed about the function of Law and Justice Groups, particularly during the period Community Corrections convened these groups. It is understood that during this period, reports contained only a recommendation of the preferred disposition and did not provide any background on the offender. It may have been thought that in failing to provide a justification of recommendations that the group was vulnerable to nepotism. The lack of detail of sentencing considerations was subsequently remedied when the Tangentyere Council outreach officer assisted in convening the Kurdiji in 2008 and provided extensive training on sentencing considerations. NAAJA likewise followed suit in asking Kurdiji members to address the relevant sentencing considerations in its letters.

VI Evaluations of the Effectiveness of Indigenous Sentencing Courts

While our observations indicate the important role of Community Courts and Law and Justice Groups in the Northern Territory, this needs to be matched with reference to the large number of evaluations of Australian Indigenous sentencing courts. The evaluations of these courts across Australia have sought to identify the extent to which they have reduced recidivism, improved court attendance, reduced incarceration rates and provided a culturally appropriate and empowering process for Indigenous communities, offenders and victims. Evaluations of Indigenous sentencing courts have been conducted separately in relation to New South Wales Circle Sentencing,⁹⁷ Victoria's Koori Courts,⁹⁸ Murri Courts in Brisbane,⁹⁹ Western Australia's Aboriginal Sentencing Court of Kalgoorlie,¹⁰⁰ Northern Territory Community Courts¹⁰¹ and Nunga Courts in South Australia.¹⁰² The findings reflect the unique operation and context of each sentencing court.¹⁰³

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

A Northern Territory

In relation to the Northern Territory, there have been three evaluations of Community Courts. In August 2006, a survey of users of the Community Courts program in Darwin and the Tiwi Islands found that 60 per cent of respondents believed that the Community Court model increased

community participation in sentencing and enhanced the procedures of the Court of Summary Jurisdiction.¹⁰⁴ The role of Elders was also seen to provide valuable assistance within the court process, and to provide a sense of community responsibility and accountability for the joint decisions made by the Court.¹⁰⁵

The preliminary findings of an evaluation by the Department of Justice in relation to Nhulunbuy Community Court in 2007 indicate that re-offending rates at Community Courts were lower than those of regular courts: a 40 per cent recidivism rate compared to a court average of 60 per cent.¹⁰⁶ These findings are limited due to an insufficient control group of like-offenders. Moreover, there were high levels of satisfaction in the process and outcomes of the Court, particularly the increased use of outstations for probation where the availability of alcohol was greatly reduced.¹⁰⁷

The final review of Community Courts from 2005-2012 prepared for the Northern Territory Department of Justice found that the overall recidivism rate of participants was 51 per cent. This was only slightly lower than the average for Indigenous offenders, being 53 per cent. The report also found that the breach of order rates of Community Courts participants were also much higher (30 per cent) than for Indigenous defendants in mainstream Magistrates Courts (11 per cent).¹⁰⁸

There were several limitations that the report itself highlighted. Firstly, the dataset was arguably too low to demonstrate statistical significance. Secondly, the report acknowledged that recidivism rates of participants need to be measured against comparable controls. The report specifically warns that 'directly comparing a second time offender and a sixth time offender within a re-offending rate analysis is problematic when deriving important policy or program assumptions'.¹⁰⁹ It would therefore have been preferable to compare Community Court participants' recidivism rates with offenders facing similar charges and with similar priors. Additionally it is appropriate to obtain a control group at the same location where similar policing, support networks and social pressures exist. The report failed to identify whether the recidivism of Community Court participants was for serious or more trivial offending. The high rates of policing and enforcement of traffic regulations in remote Aboriginal communities leave the recidivism rates open to misinterpretation. A more meaningful analysis of the recidivism figures would be to exclude minor traffic

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

B Evaluations in Other Australian Jurisdictions

(i) Quantitative Findings

As with evaluations in the Northern Territory, a number of quantitative studies in other Australian jurisdictions indicate that Indigenous sentencing courts have had a positive impact on specific deterrence by reducing recidivism. These findings have been made in relation to New South Wales Circle Sentencing,¹¹⁰ Victoria's Koori Courts¹¹¹ and Murri Courts in Brisbane.¹¹² Fitzgerald's research and Marchetti's research respectively reveal however that there are a number of limitations to these studies, particularly their lack of an appropriately comparable control group, their inadequate follow up periods and their unreliable court data.¹¹³

In order to provide a more rigorous evaluation of Circle Sentencing in New South Wales, Fitzgerald conducted a statistical analysis to assess whether Circle Sentencing had reduced the frequency of offending for participants, reduced the time period before re-offending or had reduced the seriousness of their offending. Fitzgerald concluded that Circle Sentencing had no effect on these indicators.¹¹⁴ Parallel findings emerged in a similarly designed statistical study by Morgan and Louis in relation to the former Queensland Murri Courts.¹¹⁵ However, Fitzgerald's research and Morgan and Louis' studies, did not have an appropriately comparable control group because they did not account for local factors such as local offending rates and rehabilitative and other social supports, notwithstanding that they accounted for Indigenous background, nature of the charge, criminal history, age and other relevant indicia. In Fitzgerald's analysis, participants who were sentenced by a Circle in the local court areas of Brewarrina, Nowra and Dubbo were compared with offenders from areas 'outside

of Sydney'.¹¹⁶ For Morgan and Louis, participants in Murri Courts were compared with Indigenous offenders who did not participate in a Murri Court under evaluation or other locations that have a Murri Court.¹¹⁷ By not controlling the study on the basis of the specific community, a range of variables exists, including local risk factors and support services. A properly controlled study for Indigenous offenders would involve comparing outcomes between those sentenced by an Indigenous court and those sentenced by a mainstream court within the *same* Indigenous community.

In respect of quantitative findings on court attendance, Morgan and Louis found that those appearing in a Murri Court were less likely to abscond than those appearing in a mainstream court.¹¹⁸ Regarding incarceration rates, they found that defendants in the Youth Murri Court compared to the Children's Court were just as likely to receive a custodial sentence, while adult offenders in Murri Courts were more likely to be sentenced to prison than in a Magistrate's Court. However, when adults who were already serving a period of prison were excluded, there was no difference in adult imprisonment rates.¹¹⁹ Of the remaining offenders who did not receive a custodial penalty, adult Murri Court participants were more likely to receive a custodial sentence with an immediate parole release date, a suspended sentence and in the case of those offenders that received a non-custodial penalty, Murri Court participants were more likely to receive some form of community supervision and work order.¹²⁰ Morgan and Louis were unable to obtain data on the participants who received rehabilitative orders. While these results show some benefit for the diversion for Indigenous offenders, a limitation of this study is that it is not geographically contingent, as highlighted above. This is particularly relevant here given that decisions about sentencing orders need to be considered in the context of services available to the particular community.

(ii) Qualitative Findings

Qualitative studies tend to be based on observations of Indigenous sentencing courts and interviews with court users to gauge their perceptions of the process and outcomes. Interviews have identified that users regarded the courts to have a positive impact, including on reducing recidivism. Analysis by the Cultural and Indigenous Research Centre Australia found a common perception that Circle Sentencing deters against reoffending and has a 'dramatic influence on offenders beyond reoffending', such as in relation to

substance abuse, employment and family relations.¹²¹ Daly and Proietti-Scifoni, in their study of the Nowra Circle in New South Wales, caution against simplistic analysis of recidivism in quantitative studies, given the multiple factors informing desistance or persistence of offending. The authors considered five factors relevant to reoffending: substance abuse, age, family relations, a changed identity, and hope for the future.¹²² They found that reoffending following participation in the Nowra Circle depended on a complex set of issues, including attitudes to prison, willingness to stop using illegal substances and to drink more responsibly and their age (with older offenders more likely to desist).¹²³ Daly and Proietti-Scifoni argue that desistance is a process, rather than a 'single event' or a response to a single fix.¹²⁴ Overall, Nowra defendants were positive about the Circle's informality, open information sharing, change in white-Indigenous power relations, meaningful and constructive censuring processes and its outcomes.¹²⁵

In relation to victims, it has been found that a greater degree of victims' participation in the Indigenous sentencing court process assisted in their healing.¹²⁶ Marchetti's study of Indigenous sentencing courts in New South Wales and Queensland, based on observations and semi-structured interviews, found that gendered power imbalances in family violence cases were reduced, although not eradicated.¹²⁷ The reduction was due to the capacity of victims to talk about issues and tell their story but also the presence of Elders and the capacity of these courts to shame the offender in a culturally appropriate way.¹²⁸ The role of Elders or Respected Persons and the culturally appropriate nature of the process generated accountability between offenders, victims and the wider community.¹²⁹

From interview data, it has been found that defendants before Indigenous sentencing courts regard the sentence with greater gravity because they perceived it as fair and appropriate.¹³⁰ Magistrates also felt better positioned to impose a sentence that reflected the needs of the offender and community following community discussion and disclosure of issues.¹³¹ Interviews conducted by Morgan and Louis found that Murri Courts were more likely than mainstream courts to reintegrate the offender into their community by (re)establishing relationships between the offender and respected members of the community.¹³² More broadly, studies have found that Indigenous sentencing courts have empowered Indigenous communities.¹³³ Communities felt a sense of ownership over the process and cultural

understanding was promoted between court workers and Indigenous communities.¹³⁴

Defendants have identified a number of drawbacks arising from participation in Indigenous sentencing mechanisms. For example, in interviews conducted with defendants sentenced in the Nowra Circle, one defendant felt that the Elders were unfairly 'ganging up' on him, although generally defendants regarded Elders as tough but encouraging and supportive.¹³⁵ Another defendant remarked that the presence of the prosecution took over and hindered an open discussion.¹³⁶ Others commented on the lack of information available about the process and the lack of post-Circle follow-up and support.¹³⁷ Finally, the Circle did not 'work' for defendants when, in the occasional case, they did not know the Elders and consider them to be Aunties and Uncles.¹³⁸ In relation to New South Wales Circle Sentencing and Queensland's former Murri Courts, Marchetti¹³⁹ and Morgan and Louis¹⁴⁰ identify that the effectiveness of Community Courts is compromised in the absence of culturally appropriate rehabilitation programs and services in the local community and custodial settings.

C Looking Backwards and Moving Forward in Northern Territory Indigenous Sentencing Courts

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

First, the success of the Community Courts is crucially dependent on local ownership of the process and local endorsement of its cultural appropriateness. For remote communities, this includes that Indigenous sentencing courts are closely connected with the community justice framework.¹⁴¹ By being embedded in the community

justice structure, Community Courts avoid legitimising the sentencing orders of mainstream courts¹⁴² and can effectively convey community justice concerns. Blagg notes that Indigenous-based justice mechanisms are successful where they are locally driven and integrated with Indigenous law and governance instruments.¹⁴³ In Central Australia, the Community Courts were closely linked to the Law and Justice Groups, which, as we observed, strengthened the role of the Court and enabled defendants and victims to have appropriate support following their appearance in the Indigenous sentencing court. This meant that their court appearance did not represent an isolated event but had ongoing relevance to their behaviour and healing. Additionally, Community Court members could look beyond the individual criminal act and examine ways of preventing similar behaviour in the community. This extends the current criminal justice system's focus on criminal behaviour to a focus on crime prevention.

Second, the qualitative studies also reveal the importance of court members having a connection with the offender and his or her family.¹⁴⁴ In Northern Territory Aboriginal communities, their relatively small size and cohesiveness made them fertile ground for engaging defendants. The intimate knowledge that the panel have of the defendant assisted the court in painting a fuller picture of the defendant's circumstances as well as increased the impact of the Community Court's shaming of the defendant. While Law and Justice Groups provide an avenue for sentencing input, they are unable to fill the void of Community Courts. This is because their advice is communicated to the magistrate and they cannot censure the defendant. By contrast, Community Court members can speak freely, and in language, to offenders for whom they are familiar. The offender can therefore appreciate how the punishment flows from the reprobation of their community.

The selection of appropriate people, according to the particular offender and offence, to sit on Community Courts is a third consideration.¹⁴⁵ In the Northern Territory this requires that the people selected for panels have appropriate relationships to the defendants and are not in jeopardy of breaching avoidance relationships. In relation to the Nhulunbuy Community Court, former Chief Magistrate Blokland observed that 'it would be unheard of for a Yolŋu person to be present, sit or speak in a setting where their own law or gurutu (kinship) did not permit'.¹⁴⁶ When Community Courts operated, the selection of their panels

was made in consultation with corrections officers, local Elders and with the consent of the parties. Commentator Bob Gosford described Yuendumu Community Court as bringing together 'respected community members and the defendant's family and kinship group'.¹⁴⁷ Appropriateness also depends on the role of the panel members in the community. The authority of Community Courts is enforced when members are engaged in broader community justice strategies and perform roles as Indigenous law custodians. We observed in Yuendumu that very senior law people were engaged in the process, such as Peggy Nampijimpa Brown and Harry Jakamarra Nelson. These women and men were involved in a range of justice initiatives, such as in relation to reducing petrol sniffing¹⁴⁸ and dispute resolution, and had leading roles on Yuendumu Council. In relation to the Nhulunbuy Community Court, two of the Respected Persons involved in its establishment and who sat on its panel were made Justices of the Peace. For these people, Ms Raymattja Marika and Mr Barnambi Wunungmurra, they were given 'a sense of acknowledgment under both systems of law'.¹⁴⁹

Fourth, the participation of Indigenous sentencing court members requires support and commitment to the process by the magistrate or judge.¹⁵⁰ The judicial officer is the final arbiter on who constitutes the Community Court and whether the court operates for a particular hearing or altogether. We observed that magistrates had greater confidence in the process where the panel members were respected and law-abiding. Marchetti and Ransley claim that cultural awareness training of judicial officers, as well as other court participants (prosecutors, defence lawyers and court staff), is necessary for their effective engagement with the process.¹⁵¹ The training needs to be complemented with guidance on 'how to use this awareness to transform practices involving Indigenous people'.¹⁵²

A fifth lesson is that Indigenous sentencing courts are effective where they can advise on a broad range of sentencing orders that are relevant to the community.¹⁵³ The New South Wales Aboriginal Justice Advisory Council identified the value of Circle Sentencing in adopting more appropriate, holistic and workable solutions and sentencing orders, and its capacity for collective responsibility in implementing sentencing outcomes.¹⁵⁴ In the Northern Territory, Indigenous people have the potential to be involved in a range of sentencing outcomes that conform with the legislation, including supervising community-styled orders such as exile¹⁵⁵ and participation in a ceremony or a work camp. Aside from

Indigenous law-related orders, Indigenous courts should have the capacity to order participation in local programs and activities that can form part of sentencing conditions. This requires that community-based sanctions in the form of rehabilitative programs, such as drink driving programs, are adequately resourced. In remote Northern Territory communities, there are currently very few rehabilitative services (such as drug, alcohol or mental services) or community corrections officers to supervise defendants.¹⁵⁶

VII Conclusion

Sentencing is a process premised on individualised justice. Without the full set of information on the offender, the impact of the offence and the effect of sentencing options, it is impossible to give meaning to this concept. In order to ascertain information for Aboriginal defendants in Northern Territory Aboriginal communities and afford them substantive equality there is a need for community participation in sentencing. This can be realised through reinstating Community Courts following the amendments to section 104A of the *Sentencing Act 1995* (NT), as well as by drawing on the lessons from Australian Indigenous courts. Our observations of Community Courts testify to the importance of community ownership over the process, links between the Community Courts and other community-based justice mechanisms, the selection of appropriate Respected Persons, responsive magistrates and the availability of a range of well-resourced community-based sentencing options.

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

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

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- 1 Joe Yick and Peter Warner, 'Recidivism in the Northern Territory: Adult Prisoners Released in 2001-02' (Paper presented at Australian Institute of Criminology Conference, Canberra, 6-7 June 2005) 8.
 - 2 See, eg, Central Desert Regional Council, *Yuendumu Court Support* (5 January 2012) <<http://centraldesert.nt.gov.au/news/yuendumu-court-support>>.
 - 3 Crawford has worked with and observed Community Courts since 2009, originally as NAAJA's senior criminal lawyer in Katherine. Since 2011 he has had the role of member then Coordinator of Legal Education, Training and Projects with NAAJA where he has been involved in supporting communities in the reformation

- of Law and Justice Groups across Lajamanu, Wurrumiyanga and Maningrida. He has also conducted training for Community Court panellists at Maningrida and Wurrumiyanga. Anthony has attended meetings of Law and Justice Groups and observed Community Courts in Lajamanu and Yuendumu as part of her fieldwork in relation to the criminalisation of Indigenous drivers since 2008.
- 4 The then Chief Magistrate Hillary Hannam declared Community Courts invalid because they do not meet notice and form requirements for the admission of Indigenous evidence under s 104A of the *Sentencing Act 1995* (NT) and s 91 of the *Northern Territory National Emergency Response Act 2007* (Cth). See, Hillary Hannam, 'Current issues in Delivering Indigenous Justice: Challenges for the Courts' (Paper presented at Australian Institute of Judicial Administration Conference, University of South Australia, Adelaide, 18 July 2013) <<http://www.aija.org.au/Ind%20Courts%20Conf%2013/Papers/Hannam.pdf>>.
- 5 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 11 February 2014 (John Elferink, Attorney-General and Minister for Justice). Available at <<http://notes.nt.gov.au/lant/hansard/hansard12.nsf/4d7545924cd0b81f692569a50000643b/545fe67a5fd5536069257cdd0020d6a1?OpenDocument&Highlight=2,104a>>.
- 6 Kathy Daly and Elena Marchetti, 'Innovative Justice Processes: Restorative Justice, Indigenous Justice, and Therapeutic Justice' in Marinella Marmo, Willem De Lint and Darren Palmer (eds), *Crime and Justice: A Guide to Criminology* (Lawbook, 4th ed, 2012) 462.
- 7 Since the early 1990s separate Indigenous sentencing courts have formally emerged in New South Wales (circle sentencing currently operates in Nowra, Dubbo, Armidale, Bourke, Brewarrina, Blacktown, Coonamble, Kempsey, Lismore, Mount Druitt, Moree, Nambucca Heads, Ulladulla and Walgett), Queensland (Murri Courts – since abolished – but are still operating informally as Indigenous Sentencing Lists in some courts supported by the Community Justice Groups), Victoria (Koori Courts - seven Magistrates' Courts, two Children's Courts and one County Court), Western Australia (the Kalgoorlie-Boulder Community Court and the Geraldton Barndimalgu Courts) and South Australia (Nunga Courts operate at Port Adelaide, Port August, Mt Gambia and Murray Bridge and in the Supreme Court). In some jurisdictions, this is supported by legislation, such as the *Magistrates' Court Act 1989* (Vic) s 4D, the *Criminal Procedure Act 1986* (NSW) s 348, and the *Criminal Law (Sentencing) Act 1988* (SA) s 9c. In other jurisdictions there is no stable legislative basis, or legislation which may be interpreted to conflict with the operation of community sentencing courts (such as has been argued in relation to the Northern Territory).
- 8 Daly and Marchetti, above n 6, 461.
- 9 Northern Territory Law Reform Committee, *Report of the Committee of Inquiry into Aboriginal Customary Law in the Northern Territory: Towards Mutual Benefit* (Parliament of the Northern Territory, Darwin, 2003) 31.
- 10 Daly and Marchetti, above n 6, 465.
- 11 Elena Marchetti and Kathy Daly, 'Indigenous Sentencing Courts: Towards a Theoretical Jurisprudential Model' (2007) 29(3) *Sydney Law Review* 415, 429.
- 12 Ibid 421.
- 13 See, Ibid 420-421. Elena Marchetti has also found that Indigenous sentencing courts set among Indigenous art, space and symbols positively affect the manner in which justice is administered and received for Indigenous participants. See, Elena Marchetti, 'Australian Indigenous Sentencing Courts: Restoring Culture in the Sentencing Court Process' in Jane Bolitho, Jasmine Bruce and Gail Mason (eds), *Restorative Justice: Adults and Emerging Practice* (Sydney Institute of Criminology Monograph Series, 2012) 100-120.
- 14 Harry Blagg, 'Colonial Critique and Critical Criminology: Issues in Aboriginal Law and Aboriginal Violence' in Thalia Anthony and Chris Cunneen (eds), *The Critical Criminology Companion* (Hawkins Press, 2008) 140.
- 15 Chris Cunneen, 'Understanding Restorative Justice through the Lens of Critical Criminology' in Thalia Anthony and Chis Cunneen (eds), *The Critical Criminology Companion* (Hawkins Press, 2008) 293.
- 16 Ali-Curung, Lajamanu and Yuendumu Law and Justice Committees, *The Kurduju Committee Report*, Volume No 1 (2001); Lajamanu Law and Justice Group, *Kurdjiji: 'Shield - to Protect and Discipline' – Lajamanu Visitor Guide* (March 2014) <<http://www.clc.org.au/files/pdf/KurdjijiNEbook-6.pdf>> 6.
- 17 Ibid.
- 18 The participants to the Community Court would include the magistrate, Elders or Respected Persons, the defendant and their support person(s), the victim or representative and their support person(s), community court officer, community corrections officer, prosecutor, defence lawyer, interpreter(s) and if available, relevant health worker. The Respected Persons or Elders who sat on the panel were generally drawn on the recommendation of the Community Corrections Officer or Community Court officer in consultation with relevant community members.
- 19 Hugh Bradley, *Community Court Darwin Guidelines, and the General Sentencing Provisions in the Sentencing Act 2005 (NT)* (27 May 2005) Community Court of Darwin <http://www.nt.gov.au/justice/ntmc/docs/community_court_guidelines_27.05.pdf> 1; Mary Spiers Williams, 'The impossibility of community justice whilst there is Intervention' (Paper presented at the 5th Annual Australian and New Zealand Critical Criminology Conference, 29 July 2011).

- 20 Jenny Blokland, 'The Northern Territory Experience' (Paper presented at Australian Institute of Judicial Administration Indigenous Courts Conference at Mildura, 7 September 2007) <<http://www.aija.org.au/Ind%20Courts%20Conf%202007/Papers/Blokland.pdf>> 7.
- 21 Bradley, above n 19, 1.
- 22 Ibid 3.
- 23 Ibid 2.
- 24 From our observations, the Court engaged its own interpreter when one was requested and available, so that the discussion between the Community Court participants could be interpreted in English and the local language.
- 25 Bradley, above n 19, 6.
- 26 Unlike in mainstream formal court sentencing processes, where victims are generally not invited to participate actively in the court with the exception of providing victim impact statements; in Community Courts, the victim can participate to give the offender a full perspective of the effects of their actions on the victim. Most of the process is on shaming the offending, with the discussion on the penalty generally left to the end.
- 27 Bradley, above n 19, 2.
- 28 Daniel Suggit, *Joining Forces: A Partnership Approach to Effective Justice: Community-Driven Social Controls Working Side by Side with the Magistracy of the Northern Territory – A Review of Community Courts Northern Territory Government Pilot and Program 2005-2012* (Report to the Northern Territory Government, 2012).
- 29 Comment from Ben Grimes, former lawyer North Australian Aboriginal Justice Agency, 2014.
- 30 Hannam, above n 4, 3.
- 31 Chief Justice Brian Martin, 'Customary Law – Northern Territory' (Paper presented to the Colloquium of the Judicial Conference of Australia, 5 October 2007) <http://www.supremecourt.nt.gov.au/media/docs/commonwealth_intervention.pdf> 19.
- 32 In 1997 the former Lajamanu Community Government Council and the Lajamanu Tribal Council wrote to the Chief Minister of the Northern Territory, the Minister for Police and the Minister for Aboriginal Development to establish a forum to bring their 'two laws' together in a practical and meaningful way. The Lajamanu Law and Justice Committee was established in 1998 and the Lajamanu Community Law and Justice Plan was signed by the Territory and Commonwealth Governments and community organisations in 1999. This group set a precedent for other Aboriginal communities in the Northern Territory. See, Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle 'Little Children Are Sacred'*, Final Report (2007) 175 -179. In particular, note recommendations 4, 7 and 8.
- 33 Spiers Williams, above n 19, 6.
- 34 See, Lajamanu Law and Justice Group, above n 16, 6.
- 35 Central Land Council, *Kurdiji Building Opening Day* (20 May 2013) <<http://www.clc.org.au/publications/content/kurdiji-building-opening-day>>.
- 36 Blokland, above n 20, 16.
- 37 Bob Gosford, 'Court Day in Yuendumu – Part 2: The Northern Myth' *Crikey* (online), 23 October 2008 <<http://blogs.crikey.com.au/northern/2008/10/23/the-community-court-caravan-rolls-into-yuendumu>>.
- 38 Blokland, above n 20, 17.
- 39 Blagg, above n 14, 140.
- 40 Northern Territory Board of Inquiry, above n 32, 175 -179, 181, in particular recommendations 4, 7, 8.
- 41 Hannam, above n 4, 4-5.
- 42 *Youth Justice Act* 2005 (NT) ss 4(f), 4(g), 4(o).
- 43 Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press, 1st edn, 2007) 8.
- 44 Homi K. Bhabha, *The Location of Culture* (Routledge, 2nd edn, 1994).
- 45 Edward Said, *Culture and Imperialism* (Vintage, 2nd edn, 1994) 23.
- 46 Mary Spiers Williams, 'Why Are There No Adult Community Courts Operating in the Northern Territory of Australia?' (2013) 8(4) *Indigenous Law Bulletin* 7, 8.
- 47 *Neal v The Queen* (1982) 149 CLR 305, 326 affirmed in *Bugmy v The Queen* [2013] HCA 37, 39.
- 48 See, Thalia Anthony, *Sentencing Indigenous Offenders* (Indigenous Justice Clearinghouse Research Brief No 7, March 2010) <<http://www.indigenousjustice.gov.au/briefs/brief007.pdf>> 2.
- 49 *R v Benny Lee* [1974] NTSC 221; *R v Herbert & Others* (1983) 23 NTR 22; *Robertson v Flood* (1992) 111 FLR 177.
- 50 *R v Iginiwuni* [1975] NTCCA 6; *R v Davey* (1980) 2 A Crim R 254; *R v Lane, Hunt & Smith* [1980] NTSC (Unreported, 29 May).
- 51 *Jabaltjari v Hammersley* (1977) 15 ALR 94; *R v Mamarika* (1982) 5 A Crim R 354; *Jadurin v The Queen* (1982) 7 A Crim R 182; *R v Minor* (1992) 105 FLR 180; *Munungurr v The Queen* (1994) 4 NTLR 63; *The Queen v Walker* [1994] 46 NTSC 1; *R v Miyatatawuy* (1996) 87 A Crim R 574; *R v Poulson* (2001) 122 A Crim R 388.
- 52 John Nicholson, 'Sentencing Aboriginal Offenders – A Judge's Perspective' (Paper presented to the Uluru Criminal Law Conference, Uluru, 31 August–1 September 2012).
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- 54 *R v Wunungmurra* (2009) 231 FLR 180.
- 55 Ibid 185 [23].

- 56 Ibid.
- 57 See, Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 1st edn, 2013) 6, 9, 72, 200.
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- 59 Ibid 6; Human Rights and Equal Opportunities Commission, Submission No 5 to Senate Legal and Constitutional Affairs Committee, *The Inquiry into the Crime Amendment (Bail and Sentencing) Bill 2006*, 27 September 2006, 5.
- 60 James Gurrwangu Gaykamangu, 'Ngarra Law: Aboriginal Customary Law from Arnhem Land' (2012) 2 *Northern Territory Law Journal* 236; George Pascoe Gaymarani, 'An Introduction to the Ngarra Law of Arnhem Land' (2011) 1 *Northern Territory Law Journal* 283.
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- 67 Elferink, above n 5.
- 68 Ibid.
- 69 Ibid.
- 70 See, Spiers Williams, above n 46, in which Spiers Williams reaches the same conclusion.
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- 72 See, *ibid*; Spiers Williams, above n 46.
- 73 Toyne, above n 62.
- 74 This has been identified by the High Court of Australia as a 'lynchpin' of sentencing law (*Wong v The Queen* (2001) 207 CLR 584, 611) and is reflected in the *Sentencing Act 1995* (NT).
- 75 Bradley, above n 19, 2.
- 76 *Sentencing Act 1995* (NT) ss 5(2), 6A.
- 77 *Sentencing Act 1995* (NT) s 6.
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- 80 *R v Yakayaka and Djambuy* (Unreported, Supreme Court of Northern Territory, Riley CJ, 17 December 2012).
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