EVALUATING THE PERFORMANCE OF INDIGENOUS SENTENCING COURTS

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I Introduction: Many Perspectives, Many Agendas

Justifications for, explanations of, and evaluations of Indigenous sentencing courts are varied and come from many sources.[1] Not infrequently, commentary and critique of these courts tends to involve attempts at evaluation and assessment from a range of different perspectives, sometimes to the point of conflation.

In 2008, Melbourne barrister Peter Faris QC, in an article commenting upon the expansion in jurisdiction[2] of the Koori Court system from the Magistrates' Courts into the County Court, asserted that:

> Victoria has opted to spend money on a touchy, feely criminal court designed to give soft justice to Aboriginal … offenders. This is a stupid waste of money. … The new court is supposed to be based upon the success of the Koori Magistrates Court, which disposes of 150 Aborigines a year in six courts – an average of one a fortnight ... We now have a form of reverse discrimination, defined by racial characteristics and to be applied by the justice system.[3]

Faris argues that the very existence of Indigenous courts constitutes an unacceptable legal dualism and a breach of the rule of law. He asserts that the clear implication of the specialised courts is that Indigenous offenders will receive sentences that are more lenient in comparison to non-Indigenous offenders in similar cases. Although a comprehensive response to this sort of fundamental jurisprudential (albeit somewhat simplistic and two-dimensional) criticism is beyond the scope of this paper,[4] his assertions about the clearance rates of the Koori Court – and the implication of a negative cost–benefit status – are criticisms of a different complexion and ones which must, and can, be addressed. However, we ought not to conflate issues of jurisprudence with more pragmatic issues of economics and efficiency. In responding to criticism such as Faris's, the first step ought to be to begin (or perhaps expand) a discourse about how Indigenous sentencing courts ought to be assessed and evaluated. Arguments about efficiency and effectiveness need to be dealt with distinctly from arguments about jurisprudence and politics. Evaluations from a number of perspectives are warranted and probably in the best interests of this emerging jurisdiction, but we need to be clear about exactly what is being evaluated and why.

In a response to the Faris article, Victorian Attorney-General Rob Hulls adopted a different evaluative perspective, asserting that the Koori Court has in fact been very successful in reducing recidivism rates among Aboriginal offenders in Victoria. Hulls suggests that this is mainly due to the presence of elders and respected persons in the Court. He further asserts that sentences handed down by the Koori Court are not more lenient and that a cost–benefit analysis of the courts must take into account any reduction in costs due to lower recidivism rates. We must conceive of the value of the Koori Court, Hulls argues, in terms of its role in combating the over-representation of Aboriginal people within the criminal justice system.[5] In commenting on the procedures and protocols within the Koori Court, Hulls observes that:

> In the mainstream court system, offenders can hide behind their lawyers. In the Koori Court, defendants have to speak for themselves and answer questions on why they committed an offence. They are forced to take full accountability for their actions in a way that is far more confronting than the mainstream court process.[6]

Indigenous sentencing courts are often conceived of and evaluated as examples of the so-called problem-solving courts.[7] Arie Freiberg classes the Indigenous sentencing courts with the problem-solving courts in a series of articles,[8] and places them within the following context:

> Problem-solving courts are courts that seek to change the way in which courts do their work. A problem-solving court can be regarded as one which seeks to use the authority of the court to address the underlying problems of individual litigants and possibly, as well, the social problems of the community. Examples of these forms of specialised courts include drug courts, mental health courts, indigenous courts, alcohol courts, family violence courts and community courts.[9]

One obvious way of creating courts that are more responsive to the needs of the Indigenous community, and perhaps more likely to engage effectively with offenders, is to make them more culturally appropriate. In discussing the establishment of the Nunga Court in South Australia, one report noted that:

> The overwhelming view that emerged from those discussions was that Aboriginal people mistrusted the justice system, including the courts. They felt that they had limited input into the judicial process generally and sentencing deliberations specifically. They also saw the courts as culturally alienating, isolating and unwelcoming to community and family groups. It was clear that Aboriginal people found aspects of the Australian legal system difficult to understand …[10]

Not all observers conceive of these courts in this way. Indigenous court initiatives are often the result of formalised justice agreements between executive government and Indigenous representative bodies or committees in a particular jurisdiction.[11] One important goal of the Indigenous court scheme relates to the democratisation process, that is, to increase the participation of Indigenous Australians in the machinery, functioning and evolution of each branch of government – including the justice system. Given an almost complete absence of Indigenous parliamentarians in most jurisdictions and an apparent lack of effective policy to remedy that reality,[12] it seems a sensible and pragmatic strategy to try and increase (in meaningful ways) the participation of Indigenous people in other areas of government and in mechanisms of social regulation. In noting that this political aspiration partly informs the rationale for the establishment of Indigenous courts, Elena Marchetti and Katherine Daly assert that they are to some extent qualitatively different to those courts more closely aligned with the restorative justice and therapeutic jurisprudence movements:

> Specifically, Indigenous sentencing courts have the potential to empower Indigenous communities, to bend and change the dominant perspective of 'white law' through Indigenous knowledge and modes of social control, and to come to terms with a colonial past. With the political aspiration to change Indigenous–white justice relations, Indigenous sentencing courts, and Indigenous justice practices generally, are concerned with group-based change in social relations (a form of political transformation), not merely change in an individual.[13]

It should be noted that not everyone agrees that the way to inspire political change is by creating specialist jurisdictions within the existing court system for dealing with the sentencing of Indigenous offenders. Michael Mansell has suggested that what is really needed are Indigenous sentencing courts that are operating within Indigenous communities and convened by Indigenous people themselves, rather than by magistrates or judges from the mainstream courts.[14] He contends that:

> Within the cities and towns where Aborigines are fully subjected to white laws, alternative legal mechanisms should be established. Those mechanisms should be run by Aborigines and give the Aboriginal person charged with the crime the option of being dealt with by their own people, or the white courts.[15]

Based on our discussion so far, then, we can identify at least the following possible bases for evaluating Indigenous courts:

1. cost–benefit analyses;
2. caseload and clearance rates;[16]
3. ability to reduce individual and group recidivism;[17]
4. ability to reduce Indigenous over-representation in the criminal justice system;
5. success in creating a more culturally appropriate justice system;
6. capacity to solve the individual human problems that lead to offending;
7. effectiveness in reducing the impact of criminal conduct on Indigenous communities;
8. role in furthering the reconciliation process; and

9. capacity to effect political change by empowering Indigenous communities to address criminal offending.[18]

Before analysing how the Indigenous sentencing courts are currently evaluated and suggesting some directions for reform and further study, we now consider the more general question of how mainstream courts are evaluated in order to see if those methods are sufficient or necessary in the more specialised context.

II What is the Role and Function of a Mainstream Court?

In a community which aspires to be governed by the rule of law, courts exist primarily to reduce stresses and tensions in the community. Responses to and management of non-conforming behaviour that is considered deserving of punishment are generally the responsibility of state-sanctioned courts and tribunals. This avoids situations where citizens take matters into their own hands and dispense individual conceptions of justice.[19] Although countless volumes of study and analysis have been written about the proper role of the court in a liberal democracy (in an abstract sense), not much of this study and analysis is reflected in the substantive law itself.[20]

We are unlikely to find much about the roles and function of mainstream courts written in their enabling legislation. There are a number of reasons for this. Firstly, a court system is constitutionally required and to some extent the role of the mainstream system and hierarchy of courts is dictated by both the Federal and State constitutions and by the overarching principles of the rule of law. Secondly, virtually all mainstream courts were created at a time when legislation was much more sterile and formal than is currently the case. At that time, the statements of operational policy and philosophy, as well as aims and objectives, were much more likely to be found in the common law judgments of the higher courts. Explanatory notes and memoranda, as we note below, are relatively modern phenomena. That is not to say that objectives, aims and purposes provisions cannot be found in the mainstream court legislation. Nevertheless, where such provisions are to be found they are likely to be relatively simple, straightforward and non-aspirational compared to the stated aims and objectives of the specialist or problem-solving courts. The aims are also dominated by references to efficiency processes, which perhaps explains why the assessment of mainstream courts is almost exclusively a quantitative exercise, reported as clearance rates and caseload management statistics in the relevant annual reports.[21] For example, s 1 of the *Magistrates' Court Act 1989* (Vic) provides that the purposes of the Act (and hence presumably the court) are:

> a) to establish the Magistrates Court of Victoria; and
> b) to amend and consolidate for the purposes of the new Court the law relating to the jurisdiction and procedure of Magistrates' Courts; and
> c) to provide for the fair and efficient operation of the Magistrates' Court; and
> d) to abolish inefficient and unnecessary court process and procedures; and
> e) to allow for the Magistrates' Court to be managed in a way that will ensure –
>   i) fairness to all parties to court proceedings; and
>   ii) the prompt resolution of court proceedings; and
>   iii) that optimum use is made of the Court's resources.

III How are Mainstream Courts Evaluated?

Mainstream courts are almost exclusively evaluated (in a formal sense) in relation to a very narrow range of efficiency processes and outcomes. This is not to say that the mainstream courts are not subject to evaluations of their processes and broader social outcomes by government and academics, but that this narrow focus on functional efficiency (rather than on substantive considerations of whether the courts are 'achieving' anything of substance) clearly predominates. The mainstream courts are obviously in the public eye on a constant basis as their operation is a fundamental component of the criminal justice system (rather than an experiment or an innovation) and as long as criminal offences are committed they will be operating on a daily basis. Mainstream courts, unlike the specialist and problem-solving courts, are also less likely to be competing with other institutions and programs for resources devoted to addressing social problems, since they are much more closely concerned with pure adjudication.

There are occasional analyses of the statistics relating to the tariffs handed down in particular jurisdictions and of such issues as the ratio of Crown appeals against sentence to offender appeals (and their relative successes), but we suggest that these are not really evaluations of the

mainstream sentencing courts themselves. Moreover, these types of evaluations are too infrequent and jurisdiction-specific to be of much use in terms of comparison to their Indigenous counterparts.[22] That is not to say that there is no public interest in the general punitiveness of sentences – there certainly is. But given that media coverage of particular sentencing cases is sometimes conducted to the point of saturation, while the great majority of sentencing matters occur outside any widespread public view, evaluations based on the appropriateness of tariffs can be both quite divergent from public perceptions and difficult to separate from confounding factors of law and order politics.

A survey of the annual reports published by the mainstream courts in most States and Territories reveals that these yearly statutory evaluations typically contain comment and statistics in relation to such criteria as:[23]

- disposition of caseload;
- workload (usually tabulated as civil and criminal matters heard by the court);
- length of time matters take to reach judgment;
- number of judgments delivered;
- timing between hearing and delivery of reserved judgments;
- sitting times of individual judges;
- issuing of practice directions;
- numbers of case appraisals, mediations, case supervisions, judicial reviews and applications heard;
- developments in court and registry processes and administrative procedures;
- training undertaken by judges and court staff; and
- information technology, equipment and facility improvements and expenditure.

Some non-administrative elements of the operation of mainstream courts do seem to be evaluated regularly, especially with respect to access to justice issues. Many courts, for instance, regularly publish data about the number of self-represented litigants that come before them, and the effectiveness of programs and schemes to assist these litigants. There is some evidence to suggest that process evaluations, which measure the extent to which courts are perceived as being procedurally fair and accessible, are those which litigants and court users themselves are most interested in. These sorts of evaluations seem to occur, however, only on an ad hoc basis.[24]

A number of US State court systems have embarked on fairly comprehensive quality measurement and improvement programs based on perceptions of the adequacy of service delivery.[25] Yet in some US jurisdictions it seems that, in terms of any broader evaluations, it is the functions of the judiciary itself, rather than the courts, which are more likely to be assessed.

A consortium of judicial organisations from a range of both common law and civil law countries (including some from Europe, Asia, Australia, and the United States) has, in fact, drawn up a document called the 'International Framework for Court Excellence', which claims to represent a 'framework of values, concepts, and tools by which courts worldwide can voluntarily assess and improve the quality of justice and court administration they deliver'.[26] The seven areas of court excellence suggested by this body are: court management and leadership; court proceedings; public trust and confidence; user satisfaction; court resources (human, material and financial); and affordable and accessible court services.

Even this set of evaluative criteria seems to be far more concerned with principles of administrative and economic efficiency, procedural fairness and due process, and user satisfaction, than with any assessment of whether the court is achieving any broader social, political or cultural outcomes. In this sense it reads very differently to the set of objectives and associated methods of evaluation that are emerging in relation to the speciality and Indigenous courts, as we shall see in the following sections. One explanation for this could be that if we conceive of the specialist courts as a subset of the overall jurisdiction of the mainstream courts, which are specifically tasked with addressing issues such as recidivism, attendance rates, rehabilitation and lifestyle problem-solving, then we might expect these courts to have more specialised and carefully delineated outcomes-based objectives.[27]

IV The Roles, Functions and Objectives of an Indigenous Sentencing Court

An obvious way to begin looking at the issue of how the Indigenous courts are to be evaluated is to simply list the express aims of the particular court and suggest that methods for evaluating the extent to which each of these has been achieved need to be adopted. In contrast to the enabling legislation and ancillary publications related to the mainstream courts, we can uncover a wealth of information

from even a cursory reading and analysis of similar documents and instruments related to the specialist courts – and of the Indigenous courts in particular. Such an exercise reveals that the Indigenous courts have some fairly broad aims and goals that may appear aspirational and ambitious.

Marchetti and Daly summarise the relevant enabling statutes, protocols and guidelines of the various Indigenous courts, and tabulate the express aims and objectives of the courts.[28] The list of aims is quite extensive. In Victoria, for example, the Koori Court is described as having the aims of increasing participation of the Aboriginal community in the sentencing process and achieving more culturally appropriate sentences for young Aboriginal people.[29] Marchetti and Daly identify further aims for the Koori Court, in terms of both operational and community-building roles, from the Attorney-General's second-reading speech of the legislation. The operational aims are to:

- further the ethos of reconciliation by incorporating Aboriginal people in the process and by advancing partnerships developed in the broad consultation process which led to the Koori Court's adoption;
- divert Koori offenders away from imprisonment to reduce their overrepresentation in the prison system;
- reduce the failure-to-appear rate at court;
- decrease the rates at which court orders are breached; and
- deter crime in the community generally.

The community-building aims are to:

- increase Aboriginal ownership of the administration of the law;
- increase positive participation in court orders and the consequent rehabilitative goals for Koori offenders and communities;
- increase accountability of Koori community families for Koori offenders;
- promote and increase Aboriginal community awareness about community codes of conduct/standards of behaviour and promote significant and culturally appropriate outcomes; and
- promote and increase community awareness about the Koori Court generally.[30]

By setting the bar so high in terms of aims and objectives, are the legislators, policymakers and supporters of the Indigenous sentencing court philosophy and practices making the process of meaningful and rigorous evaluation too difficult, and thereby inviting criticism from detractors?[31]

The *Coroners Act 2003* (Qld) is an example of legislation enacted to provide for the jurisdiction and functioning of a court which was largely reconceptualised at about the same time as the Drug Court and Murri Court commenced operation in Queensland. The statutory aims of the Queensland Coroners Court seem far less aspirational and broad based than those of the specialty courts.[32] Section 3 of the Act provides that the objects of the Act (and by implication those of the Coroners Court itself) are to:

a) establish the position of the State Coroner; and
b) require the reporting of particular deaths; and
c) establish the procedures for investigations, including by holding inquests, by coroners into particular deaths; and
d) help to prevent deaths from similar causes happening in the future by allowing coroners at inquests to comment on matters connected with deaths, including matters related to –
 i) public health or safety; or
 ii) the administration of justice.

We certainly note that aiming for some broad social benefits from a specialist court is not unique to Indigenous courts. Consider, for example, s 3(1) of the *Drug Court Act 2000* (Qld), which provides that the objectives of establishing the Drug Court in Queensland include: reducing the level of drug dependency in the community, reducing the level of criminal activity associated with drug dependency, reducing the health risks associated with drug dependency of eligible persons, and promoting the rehabilitation of eligible persons and their re-integration into the community.

V Options for Evaluating Indigenous Courts

Given that Indigenous sentencing courts have been operating in one form or another in Australia since the late 1990s, it is not surprising that some evaluations, of varying degrees of rigour, have been conducted in that time. Payne conducted a broad survey of the various types of evaluations of Indigenous courts in Australia that had been carried out between 1999 and 2004.[33] His survey noted that three types of evaluation have typically been used to measure the success and operation of speciality courts in general.

The first is process evaluations, which focus on the extent to which the actual operation of the court reflects the way in which the court was intended to operate. For some problem-solving courts this might consist of an analysis of how effectively the various personnel operate as a team (as intended in the design of the drug courts, for example). For Indigenous courts, where therapeutic processes are perhaps less central than the formal requirement to pass sentence, this sort of evaluation might just involve a consideration of how many offenders have been dealt with, the level of elder participation, and clearance rates. Payne identified the typical methods of process evaluation as including: observational studies involving a description of how the program operates; key informant interviews and qualitative analysis for describing the operational components of program delivery; and quantitative analysis of key indicator data.[34]

Secondly, specialty courts are generally subject to outcomes evaluations, which assess the extent to which the court has achieved the goals and objectives it was intended to achieve, as distinct from the particular processes used to achieve them.[35] Given the wide range of aims and objectives that are typically set for Indigenous courts and the benefits which the literature hopes will accrue from their operation, attempting to measure and evaluate all these discrete outcomes would appear daunting. This sort of evaluation obviously lends itself to quantitative methods, and a number of quantitative studies, of various degrees of complexity and rigour, have been carried out.[36]

Thirdly, specialty courts will be typically assessed by cost evaluations, which quantify the operational costs of running the court.[37] The reports and evaluations of the mainstream courts typically place a strong emphasis on the efficient use of resources. As discussed below in relation to research commissioned by one State law reform commission, the potential financial savings that are purported to accrue to the criminal justice system as a whole due to the effectiveness of problem-solving courts and specialty courts in reducing recidivism rates is a common theme. Payne identifies three general categories of cost evaluation – (1) cost analysis;[38] (2) cost-effectiveness evaluation;[39] and (3) cost–benefit evaluation.[40] Although all these forms of cost evaluation require some level of estimation, they are nevertheless widely relied upon by policymakers and court managers in mainstream as well as specialist courts.

Process evaluations, followed by cost evaluations, are the most common methods of evaluating mainstream courts. Note that the processes provided for by the enabling legislation of mainstream courts (where such legislation exists) are typically, and deliberately, quite broad. This is usually also true of the enabling legislation and protocols associated with the Indigenous courts, but in their case the relevant processes are usually more prescriptively described and therefore may be easier to evaluate. In describing how the Koori Court must operate when convened to deal with juvenile offenders, for example, s 517(3) of the *Children, Youth and Families Act 2005* (Vic) provides that:

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

The Act does, however, make some prescriptions as to process that might lend the Court quite readily to qualitative analysis. Section 517(4) of the Act requires that the Court:

> 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 child; and
> b) a family member of the child; and
> c) any member of the Aboriginal community who is present in court.

The Indigenous courts operate in an environment where law and order politics, high levels of public punitiveness, and chronically low levels of public confidence in the courts in general, tend to treat innovation and intrinsically less retributive processes with scepticism. In order to justify and support the operation of Indigenous courts it will, therefore, be necessary to ensure that the evaluation of them is more rigorous, more broadly based and carried out more frequently than might be the case for mainstream courts.[41] It is probably the case that Indigenous courts are going to have to perform better than mainstream courts in relation to any criteria, even given their more ambitious objectives. This might appear to be a somewhat cynical view, but the reality is that the mainstream courts are well established and in most cases are 'the only game in town' when it comes to the trying and sentencing of criminal matters. If the specialist courts, including the Indigenous courts, were to disappear tomorrow, the mainstream system would absorb those

matters currently referred to the specialist courts.[42] It is trite but true that if a guilty plea is a threshold requirement for access to an Indigenous court then they would have no work if nobody pleaded guilty – but any convicted offenders would still have to be sentenced.

With that in mind, we suggest that the broad categories of evaluation identified by Payne need to be expanded and subjected to an ongoing and critical discourse, which seems to have been infrequently pursued in the literature to date. This may partly reflect the uncoordinated and sporadic nature of the evaluative projects to date. Payne perhaps foreshadows this by observing, in relation to specialist courts in Australia generally, that:

> Most Australian specialty court programs have undertaken some type of process, outcomes or cost-effectiveness evaluation, but not on a continuing basis. Considerably more value would be added from embedded evaluations to improve outcomes as part of a process of continuous improvement. There have not been any long-term evaluation studies of key court outcomes such as offending, drug-use, health and social functioning, so the sustainability of achievements has not yet been rigorously tested. … There is also a need for greater collaboration across the states and territories in the development of good practice principles in the delivery of therapeutic and targeted interventions.[43]

To that end, we now engage in some analysis and discussion of a more specific set of possible evaluative criteria and methods.

A Cost–Benefit Evaluations

The Law Reform Commission of Western Australia, in preparing its final report into Aboriginal customary law in that State,[44] commissioned two investigations to highlight the cost–benefit implications that might inform decisions about the establishment and expansion of Indigenous courts. One investigation looked at the general cost of Aboriginal over-representation in the Western Australian justice system, and the other looked at the cost–benefit of the establishment of Indigenous courts as recommended by the report itself. Acknowledging that Indigenous over-representation was a significant problem in the State,[45] the Commission wanted to quantify the likely cost–benefit in reducing the proportion of Indigenous people currently within the Western Australian criminal justice system to the same level as that of non-Indigenous people.[46] Although the method the Commission adopted involved some generalised and derived data (based on estimated proportions of costs of crime from undifferentiated national data), there is a reasonably detailed description of the steps taken in these calculations that could be of significant use to other jurisdictions engaging in a cost–benefit analysis of the potential effect of Indigenous courts on reducing Indigenous over-representation within their own criminal justice systems. The cost of over-representation of Aboriginal people in the criminal justice system in Western Australia in 2006 was estimated at about $940 million. A similar cost–benefit analysis of the Koori Court in Victoria was conducted by Acumen Alliance in 2005.[47] We note that these studies do not expressly include the so-called flow-on savings that can accrue as a result of a fully functional Indigenous court.[48]

On the utility of cost evaluations, Payne concedes this point:

> cost evaluations, particularly cost–benefit evaluations are a crude measure of financial success because they only account for nominal benefits which can be valued in financial units. Such evaluations cannot determine or measure the other benefits derived from a specialty court program. For example, what monetary value can be placed on a participant's capacity to re-kindle their relationship with an estranged family member? … In this sense, cost evaluations … often underestimate the true benefits delivered by a program to a participant and the community.[49]

But probably the most important weakness with cost evaluations at the moment is that there is no real longitudinal component – savings due to lower incarceration rates will likely take decades to achieve (especially in light of how long it seems to be taking for the Royal Commission on Aboriginal Deaths in Custody recommendations to have an effect on over-representation and Aboriginal deaths in custody).

Finally, in order to avoid the risk of over-emphasising micro-economic and financial considerations, we ought not to conflate evaluations of the leadership or coordinating role that the Indigenous courts might have in addressing issues such as over-representation and the social costs of offending, with evaluations of how those problems are being dealt with at a systemic level. Courts are still primarily adjudicative in nature, even where they operate in partnership with other

service providers, such as in the Victorian Community Justice Centre model. Andrew Phelan expresses similar concerns about evaluations of the specialist courts in general, when he quite perceptively observes that:

> This has tended to focus public attention on the short-term results achieved by these courts rather than on the broader policy issues about better societies, or on the sustainability and cost-effectiveness of public spending on judicial problem-solving, compared with other therapeutic or social programs. In part, this may explain why there have been few if any comprehensive evaluations of problem-solving courts (those that do exist have focused on processes, or impacts in terms of a narrow range of measures, such as recidivism) and no evaluations of how cost-effective these courts may have been in producing whatever social outcomes, articulated or otherwise, they may have been seeking to achieve.[50]

B Caseloads and Clearance Rates as Benchmarks

Given the relatively low number of matters dealt with by the Indigenous sentencing courts (in comparison with most mainstream courts), evaluations of efficiency in some sense are of less immediacy than is the case in the mainstream courts, which are virtually guaranteed of a continuously high workload. As noted above, efficiency reporting and benchmarking comprise a central pillar of the evaluation process for the mainstream courts. We should not, however, assume that all Indigenous sentencing courts will have relatively low caseloads, or that it is even possible to make meaningful comparisons to the mainstream courts.

Marchetti and Daly point out that the differences in policy approaches to the role of the Indigenous courts between jurisdictions can have a significant effect on the volume of matters dealt with. Their study observed, for instance, that the Port Adelaide Nunga Court in South Australia dealt with 134 Indigenous offenders in the 2005–06 year, while the Nowra Circle Court in New South Wales appeared to sentence 13 or fewer offenders per year. They attribute these differences to the policy of the former court to accept for sentencing any eligible Indigenous offender, while the latter court will deal only with matters where there is likely to be a custodial sentence and the offender is assessed as being receptive to change.[51]

A further factor that potentially weighs against basing too much evaluation on these efficiency criteria is the fact that there is a developing diversity of jurisdictions with respect to Indigenous sentencing courts. Some, such as the Murri Court in Queensland, are sub-jurisdictions of the local Magistrates Court, while in other States the courts form part of the juvenile justice or children's courts. It may be administratively difficult and misleading to try and separate the statistics about Indigenous caseloads or clearance rates in the latter form of court from the court's overall workload.

C Reducing Individual and Group Recidivism

Unacceptable rates of recidivism[52] are an acute and chronic feature of the criminal justice system and have been seen as an almost intractable problem for a very long time. The inability of the traditional sentencing process to have any meaningful and measurable effect on re-offending is of course one of the key realities that has led to the rise of the problem-solving courts, with their potential to address and treat the causes of offending.

This is, then, a critical criterion by which the Indigenous courts are likely to be evaluated and we ought not to underestimate the depth of the challenge this represents, both in terms of the complexity of the causes of offending and in terms of establishing an accurate and accepted method of measuring Indigenous recidivism rates.

As Payne and others observe, the most intractable problem involved in any quantitative evaluation of speciality courts is the difficulty in establishing control groups by which to compare the participants in a specialty court program.[53] For an Indigenous sentencing court, where we might want to measure the relationship between appearance in the court with the chances that a given offender might re-offend, we would ideally need to compare the histories of Indigenous offenders within both the Indigenous courts and mainstream sentencing courts. The best way to pursue this sort of evaluation is to randomly select participants from a pool to participate in the Indigenous court, and then to send those not selected to be sentenced in the mainstream sentencing court. This latter process is of course unrealistic in that it is hardly equitable or fair to randomly avail some potential participants of the posited benefits of the specialist court and to reject others for the sake of a more sound methodology. Furthermore, it must be presumed that a number of Indigenous offenders will at least partly base their decision to enter a plea of guilty on the understanding that this is necessary to access the Indigenous court.

Nevertheless, a number of evaluations of the extent to which particular Indigenous courts may have had an effect on re-offending have been conducted. These studies vary in their degree of sophistication and analytical rigour. In some jurisdictions, there does not seem to be the data available for proper quantitative analyses. For example, a review of the Murri Court in Queensland, commissioned by the Queensland Department of Justice and Attorney-General, was conducted in 2005–06.[54] Although tasked with investigating the extent to which the Court was meeting its objectives, including a reduction in re-offending rates, the investigators were forced to rely on largely anecdotal evidence. The investigators had initially set out to make a comparison between the re-offending rates of Murri Court participants and other Indigenous offenders sentenced in mainstream courts. However, it was noted that:

> Such a comparison would need to recognise that offenders appearing in the Murri Court are considered at risk of receiving a sentence of imprisonment (given their offending histories and/or current offences) so the comparison group should include similarly at-risk Indigenous offenders sentenced in the mainstream Magistrates Court. At the time the Review was undertaken, no such comparative data existed.[55]

Although some manual data had been collected by individual Murri Court magistrates, the courts had only been operating in some widely dispersed locations for four years and very few offenders had reappeared for sentence in those locations in that time, so any statistics on recidivism rates would be unreliable. A detailed Murri Court database was a key recommendation of this report, and we suggest that, given the strong emphasis that is likely to be placed on effects of recidivism rates as a criterion for success of the court, this must be done in all jurisdictions in which Indigenous courts operate.[56]

Harris has published a report on an evaluation of the Koori Court Pilot Program in which it was claimed that re-offending rates in the two Koori Court pilot sites was 12.5 per cent and 15.5 per cent as compared to a rate of 29.4 per cent for all Victorian defendants. Some significant methodological problems with that study were pointed out by both Fitzgerald[57] and Marchetti and Daly.[58] We agree with those commentators that this study cannot be considered as evidence that the Koori Court has had an effect on recidivism rates.

A much more detailed and rigorous analysis of the rate of recidivism among circle sentencing participants in NSW was conducted by the Bureau of Crime Statistics and Research in 2007–08 and reported on by Fitzgerald.[59] The data generated by this study suggests that, in relation to the available data in that State – participation in circle sentencing did not reduce the frequency of offending, it did not increase the time until the next 'proven' offence and it did not reduce the seriousness of further offending. This study did include comparison to a control group of Indigenous offenders (matched for age, gender and principal offence, etc) sentenced in mainstream courts. The analysis was conducted on 68 circle sentencing offenders and 68 offenders from the control group.[60]

Given the relatively short time the Indigenous courts have been operating (especially beyond the piloting stages) it is somewhat unreasonable, we suggest, to expect that significant effects on recidivism rates at a community level would be measurable at this time, especially given the extent to which more than 200 years of acute, systemic disadvantage and dispossession have contributed to current levels of over-representation. But such reductions will inevitably be expected. Continuing longitudinal studies will need to be commissioned to further improve the methods used to evaluate Indigenous courts and to achieve some level of consistency between jurisdictions.

Fitzgerald concedes that the circle sentencing study was looking, albeit of necessity, for any 'short-term' impact.[61] She does, however, make some useful suggestions about how the circle sentencing process might be enhanced to have more of an effect on recidivism levels. These could include combining the circle sentencing approach with some other programs such as drug and alcohol treatment, employment and education assistance, and cognitive behaviour therapy. This is, in effect, suggesting that the Indigenous courts become even more interventionist and problem-solving in their approach. If done in consultation with, and with approval from, Indigenous stakeholders, this seems like sensible advice provided that the funding to facilitate such a cooperation between service providers is forthcoming.

D Measuring Reductions in Indigenous Over-Representation

Given the multiple systemic and contextual causes of the over-representation of Indigenous Australians in the criminal justice system, the operation of the Indigenous sentencing

courts will only ever be a complimentary strategy in the fight to reduce this.[62] Surely, we have enough research by now to realise that it is counterproductive to expect or claim that any single strategy or set of strategies is going to make quick and significant inroads into the over-representation problem. Again, we caution against unrealistic expectations of the Indigenous sentencing courts in evaluating this objective, as we did for evaluations in relation to change in recidivism rates. Incremental change is, by its nature, much more difficult to detect and measure. Perhaps it is worth considering whether the formal statements of the aims and objectives of the Indigenous courts need to be rewritten to acknowledge this (especially in relation to over-representation and recidivism). On the one hand, an objective that reads 'reduce recidivism in Aboriginal communities' is something that is going to be difficult to measure (as we have seen) and also to achieve in the short term. On the other hand, an objective as broadly drafted as 'Divert Aboriginal offenders away from imprisonment to reduce their over-representation in the prison system' is in one sense very easy to achieve and measure, in that any offender given a non-custodial sentence can be said to have been successfully diverted, but this objective is certainly not equatable to reducing over-representation as a whole.[63]

Traditionally, courts and judicial officers have been relatively non-interventionist and an offender's time in the court itself is minimal, meaning that there has been an extremely narrow window of opportunity for the court to make any real difference in the life and choices of the offender.[64] This means, of course, that if an offender is receptive to change when fronting court, the opportunity for the court to seize this moment and take advantage of it to try and effect that change is minimal. Even if we accept that most or all of the Indigenous sentencing courts are not problem-solving courts in the strict sense, the reality is that the beginning of any effect that these courts can have on an individual is while the offender is in the court.[65] So we can certainly expect the Indigenous courts to contribute to the fight against over-representation, but, at the same time, questions remain about the extent to which this contribution can be evaluated quantitatively.

E Providing a More Culturally Appropriate Forum for Sentencing

This rather generic objective (somewhat pithily described by Marchetti and Daly as 'the black robe deferring to the black face')[66] may actually serve as the bedrock for achieving more specific outcomes and could well be a valuable area for evaluation. We can expect that an environment in which offenders, support people and elders engage more readily, and actually talk more than the lawyers, would facilitate objectives such as:

- improving court participation rates;
- increasing participation of the Aboriginal community in the sentencing process;
- achieving more culturally appropriate sentencing outcomes;
- making the community, families and the offender more accountable;
- increasing the confidence of Aboriginal and Torres Strait Islander communities; and
- reducing barriers between courts and Aboriginal and Torres Strait Islander communities.[67]

The fundamental benefits of a more culturally appropriate sentencing tribunal are well documented and often commented upon.[68] Being made to face an adversarial court in which one is being held to account for unlawful behaviour can be confronting and embarrassing for anyone, and probably even more so for Indigenous people who can find the experience frightening and devoid of meaning.[69] Having elders in the court can ameliorate this – elders are not just there for shaming. And as Weatherburn observes in relation to the operation of circle sentencing in New South Wales, 'giving Aboriginal elders direct involvement in the sentencing of Aboriginal offenders encourages offenders to critically reflect upon their behaviour'.[70] In a range of research involving problem-solving courts, the positive effects on relationships between judges and court participants where there is an atmosphere of mutual respect have been noted.[71]

Qualitative evaluations of the extent to which Indigenous sentencing courts provide a more culturally appropriate environment should not be difficult to devise and administer, and, indeed, quite a few surveys of participants regarding this issue have been conducted.[72] Commenting on the content of responses from those making submissions to the Murri Court Review, for example, the report observed that:

> Mostly respondents supported the Murri Court concept because it involved Indigenous people in the justice system and made the justice system more responsive to the needs of Indigenous offenders and thus more culturally appropriate than other Magistrates Courts.[73]

At least one evaluation suggests that even where individuals had a negative experience in an Indigenous court their overall perception of the court program itself was positive.[74]

F Evaluating Political Change and Furthering the Reconciliation Process[75]

If we broadly conceive of reconciliation as partly a process for reconciling institutions of the coloniser with the values and systemic disadvantage of the colonised then it could well be that the operation of Indigenous sentencing courts will both promote reconciliation and provide a means for assessing its spread from the political sphere of parliamentary apologies to the more tangible area of criminal justice. It is not clear that there is any direct and sharply definable relationship between the participation of Indigenous people in the calling to account of offenders from their own community and the reconciliation of Indigenous and non-Indigenous communities, but it is a relationship that is often suggested and assumed. We suggest that this relationship is deserving of further investigation and worth including in the evaluation discourse.[76]

Of course, not all Australians may value the reconciliation process to the same degree, and some may not value it at all. It is possible to conceive of the objections to the supposed *legal* or jurisprudential pluralism which are levelled at the Indigenous court model as more a reflection of a fear or distrust of *cultural* pluralism. There is no doubt that the very nature of these courts is based on cross-cultural understanding and a blending of both Indigenous and non-Indigenous normative beliefs and values.[77] Not everyone will be comfortable with that reality and this makes it all the more essential that any successes in approaching issues of over-representation and Indigenous offending from a culturally hybrid court be evaluated and reported.

VI Conclusion

If Indigenous sentencing courts are convened for the benefit of Indigenous Australians and Indigenous communities, then the extent to which this benefit accrues in practice and how this benefit is to be measured surely needs to be driven, to at least some degree, by Indigenous people and communities. Indigenous people must have a voice in what gets evaluated and why. It is not clear that this is reflected across the range of evaluations that have so far taken place. Similar cautions in relation to the purported relevance and benefit of restorative justice practices aimed at addressing family and domestic violence in Indigenous communities are noted by Stubbs.

We agree that it is important to avoid the assumption that Indigenous justice practices necessarily equate with therapeutic and restorative justice theories,[78] which to some extent also underpin the operation of the Indigenous sentencing courts. For example, one assessment of the extent to which current restorative justice methods employed in relation to domestic and family violence within Indigenous communities are appropriate or even preferred by Aboriginal people themselves, notes that:

> A common claim made in support of restorative justice is that it is derived from, or reflects, Indigenous modes of dispute resolution. Such claims are over-generalised, obscure important differences between Indigenous peoples and their practices over space and time and have been subjected to resounding criticism because such claims have sometimes been associated with a failure to consult Indigenous peoples about the development or imposition of restorative justice programs.[79]

We also need to understand and acknowledge that there is a significant amount of diversity in the way that the various Indigenous sentencing courts operate between jurisdictions, as well as within a given State or Territory. As Irwin has pointed out, '[n]o two Murri Courts operate in exactly the same way. This is because they have been developed with the advice of the elders and respected persons to reflect local conditions. It is essential that this continues.'[80] Getting an overall or representative picture, whatever methods of evaluation are adopted, is going to be difficult.

Payne cautions that:

> Specialty court evaluations, although helpful, are not comparable because of the differences that exist in each jurisdiction. They are also limited by short follow-up times. Continual evaluation is necessary to monitor the development of special courts. An ongoing, or regular, evaluation program would also facilitate an evaluation of special courts' effectiveness in delivering sustainable benefits for offenders and the criminal justice system. … Future research efforts should consider cross-jurisdictional analysis. This would enable a more appropriate evaluation of the specialty court philosophy in delivering therapeutic outcomes for offenders.[81]

Evaluation of individual objectives and aims of the Indigenous sentencing courts will, however, inevitably be synthesised and incorporated into some overall view of whether these courts are of benefit to the wider community. It is not the case that each object, aim or hoped-for outcome will be given equal weight or significance in any such evaluation. This is especially so given the wider political context in which the courts operate. The Law Reform Commission of Western Australia, for example, noted in its report on the operation of the problem-solving courts in its jurisdiction that:

> While it is appropriate for judicial officers, lawyers and others to adjust their practices in order to promote participants' wellbeing, the merits of court intervention programs *cannot be measured by reference to the wellbeing of the participants*. These new court processes cannot be justified unless they can achieve outcomes that are beneficial for the whole community.[82]

It is somewhat sobering to read assertions by such an influential body that a requirement for community-wide benefits trumps other benefits – especially benefits to individuals who may be receptive to an opportunity to change their lives, or benefits to communities that have suffered generations of systemic disadvantage. But it is obviously true that all the specialty courts, to the extent that they are expected to effect results of benefit to the entire community, will compete with other institutions, projects and programs for public funding aimed at addressing social needs and problems.

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1 In this paper we consider only those Australian courts whose jurisdiction involves the sentencing of Indigenous offenders. We therefore use the phrases 'Indigenous courts' and 'Indigenous sentencing courts' interchangeably.

2 The extension in jurisdiction essentially allows Indigenous offenders who plead guilty to indictable, non-sex-related offences to consent to being sentenced by the County Koori Court rather than in the mainstream County Court. The Koori Court division of the County Court is created pursuant to s 4A of the *County Court Act 1958* (Vic). The jurisdiction of the Court to hear relevant matters is dealt with in s 4E and expressly excludes most sex offences, violence intervention orders and family violence safety notices under the *Family Violence Protection Act 2008* (Vic).

3 Peter Faris, 'Kooris' Court a Waste of Money', *The Australian* (online), 9 May 2008 <http://www.theaustralian.com.au/business/legal-affairs/kooris-court-a-waste-of-money/story-e6frg986-1111116285918> at 25 January 2010.

4 The assertion made repeatedly in the Faris article that the principle of equality before the law somehow implies that all offenders, regardless of their circumstances or context, ought to be dealt with in the same court, seems odd at a time when the range and number of specialist courts convened for the express purpose of dealing with specific classes of offender (such as the highly successful drug courts) are rapidly expanding. Furthermore, there is ample and longstanding research to suggest that cultural, social and linguistic factors impact significantly on the experience of Indigenous Australians in the court system – see, eg, Nigel Stobbs, 'An Adversarial Quagmire: The Continued Inability of the Queensland Criminal Justice System to Cater for Indigenous Witnesses and Complainants' (2007) 6(30) *Indigenous Law Bulletin* 15. We ought not to adopt an overly simplistic notion of 'equality' when we are dealing with something as complex and layered as the criminal justice system.

5 Hulls asserts that Koori people, for example, are 12 times more likely than non-Indigenous people to be incarcerated and that Koori contact with police had risen by over 30 per cent in the previous five years. Over-representation is clearly still both a chronic and acute problem. According to the Australian Bureau of Statistics, Indigenous people comprised 25 per cent of the total Australian prison population as at 30 June 2009: Australian Bureau of Statistics, *4517.0 – Prisoners in Australia* (2009) 8 <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4517.0Main+Features12009?OpenDocument> at 25 January 2010. This is despite Indigenous people comprising only 2.5 per cent of the Australian population: Australian Bureau of Statistics, *4714.0 – National Aboriginal and Torres Strait Islander Social Survey, 2008* <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4714.0Main+Features12008?OpenDocument> at 25 January 2010.

6 Rob Hulls, 'Koori Courts Help Cut Repeat Offences', *The Australian* (online), 16 May 2009 <http://www.theaustralian.com.au/business/legal-affairs/koori-courts-help-cut-repeat-offences/story-e6frg986-1111116350347> at 25 January 2010.

7 Although there is some debate about whether these courts are qualitatively similar to the other candidates for the 'problem-solving' mantle (such as the drug courts), there is no doubt that they are different to the mainstream or regular jurisdiction of the court hierarchy in which they operate, due to the fact that

they deal only with Indigenous offenders. They are referred to uncontroversially, however, as 'specialty 'or 'specialist' courts in the literature and we use both those labels interchangeably throughout this paper. For the purposes of our current discussion about court evaluation, not much hangs on whether we conceive of them as akin to the problem-solving courts in any case.

8 Most notably in: Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8; Arie Freiberg, 'Problem-Oriented Courts: An Update' (2005) 14 *Journal of Judicial Administration* 196.

9 Arie Freiberg, 'Non-Adversarial Approaches to Criminal Justice' (2007) 16 *Journal of Judicial Administration* 205, 210.

10 John Tomaino, *Aboriginal (Nunga) Courts*, Office of Crime Statistics and Research, Government of South Australia, Information Bulletin No 39, 2 <http://www.ocsar.sa.gov.au/docs/information_bulletins/IB39.pdf> at 25 January 2010.

11 For a discussion and evaluation of this process in Queensland, for example, see Chris Cunneen, Neva Collings and Nina Ralph, *Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement*, Institute of Criminology (2005).

12 In Queensland, for example, a recent parliamentary inquiry noted that there was virtually no participation by Indigenous Queenslanders in the State Parliament. The inquiry shied away from recommendations that would have any real effect on remedying that (such as the proposal from a number of submissions that some dedicated seats in the House of Representatives be reserved for Indigenous members). See Legal, Constitutional and Administrative Review Committee, Parliament of Queensland, *Hands On Parliament –A Parliamentary Committee Inquiry Into Aboriginal and Torres Strait Islander Peoples' Participation In Queensland's Democratic Process* (2003) (recommendation 24).

13 Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review* 414, 429–30.

14 Throughout this paper we refer to sentencing courts other than Indigenous sentencing courts as 'mainstream'.

15 See Michael Mansell, 'Introducing Fairness: Aboriginal Community Sentencing Tribunals' (Paper presented at the *Best Practice Interventions in Corrections for Indigenous People* Conference, Sydney, 8–9 October 2001).

16 Marchetti and Daly, 'Indigenous Sentencing Courts', above n 13, 418.

17 The target group being in this sense the class of offender that comes before the Indigenous courts (in most cases those convicted by plea of summary offences).

18 Mansell, above n 15.

19 See, eg, *Bremer Vulcan v South India Shipping Corporation Ltd* [1981] AC 909, per Lord Diplock (at 917): 'Every civilised system of government requires that the state make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant.'

20 It should hardly be necessary to cite the enormous range of literature and jurisprudential analysis devoted to what a court ought to be doing, how it ought to be doing it and to what ends; but for a recent, highly analytical and thought-provoking consideration of some of the issues arising from these questions, such as what the aims of a criminal trial should be, what social functions it ought to perform and how the trial as a political institution is linked to other institutions in a liberal democracy, the authors recommend Antony Duff et al (eds), *The Trial on Trial: Volume 2: Judgment and Calling to Account* (2006).

21 See the next section of this paper for a brief discussion of this phenomenon.

22 See, eg, Georgia Brignell and Hugh Donnelly, *Crown Appeals Against Sentence*, Judicial Commission of New South Wales, Monograph 27 (2005) <http://www.judcom.nsw.gov.au/publications/research-monographs-1/monograph27> at 25 January 2010.

23 This list is typical and representative of the general nature of these reports but does not purport to be in any way exhaustive.

24 David Rottman, 'Adhere to Procedural Fairness in the Justice System' (2007) 6(4) *Criminology and Public Policy* 835; Tom Tyler, 'Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want for the Law and Legal Institutions?' (2001) 19(2) *Behavioural Sciences and Law* 215 (2001). Rottman and Tyler both point out that courts have two publics, namely, those who have directly experienced them as litigants, etc, and those who experience them through the media and popular culture. The research concerning participant satisfaction with particular courts is complex, and we do not deal with it as a method of evaluation in any depth in this paper, although some such surveys of participant experience with the Indigenous sentencing courts have been reported. Payne claims that 'these evaluations have noted improvements in both victim and offender satisfaction and anecdotal evidence to suggest that the court increases Indigenous identification with the criminal justice system': Jason Payne, 'Specialty Courts: Current Issues and Future Prosects' (2006) 137 *Trends and Issues in Criminal Justice* 1, 4.

25 See, eg, Christopher Patterson, *Toward Service Excellence: A*

Preliminary Assessment of Service Quality in Georgia Courts, Institute for Court Management (2009) <http://www.ncsconline.org/D_ICM/programs/cedp/papers/Research_Papers_2009/Patterson_ServiceExcellenceGA.pdf> at 26 January 2010. This project sets out to measure service quality which is defined as 'the difference between customer perceptions versus expectations of the service provided': at v.

26 National Centre for State Courts, *International Framework for Court Excellence* (2008) 3 <http://www.courtexcellence.com/pdf/IFCE-Framework-v12.pdf> at 26 January 2010.

27 In addition to the important process objectives which all Indigenous courts would normally be expected to set given their operating philosophy.

28 Marchetti and Daly, 'Indigenous Sentencing Courts', above n 13, 434.

29 Ibid.

30 Ibid 434. The authors of that paper list the sources of these aims as *Magistrates' Court (Koori Court) Act 2002* (Vic) s 1; *Children and Young Persons (Koori Court) Act 2004* (Vic) s 1; Victoria, *Parliamentary Debates*, Legislative Assembly, 24 April 2002, 1128–32 (Rob Hulls). We note that there is an absence of an express goal of reducing recidivism among Aboriginal offenders or Aboriginal communities in this list. In some jurisdictions that is, in fact, an express objective – see, eg, sch 4 of the *Criminal Procedure Regulation 2005* (NSW), which provides that one objective of circle sentencing in that jurisdiction is to 'reduce recidivism in Aboriginal communities'.

31 One wonders, of course, whether those jurisdictions which have not enacted dedicated legislation to convene Indigenous sentencing courts, but instead rely on a broad interpretation and application of existing legislation for their operation, have made a deliberate decision to avoid formalising broader and more aspirational aims and objectives as a way of avoiding criticism that these courts are not achieving what they set out to do. This might especially be the case during the infancy of the court and for the duration of pilot schemes. Commenting on how the Murri Court in Queensland is given its jurisdiction as a sub-division of the mainstream Magistrates Court, former Chief Magistrate (and now judge of the District Court of Queensland) Marshall Irwin recently observed: 'This has been achieved by the creative use by magistrates of a principle in our adult and juvenile sentencing legislation requiring the court to consider relevant submissions from local Indigenous Community Justice Groups, including elders and respected persons when sentencing or considering bail applications concerning Aboriginal and Torres Strait Islander persons': Judge Marshall Irwin, 'Queensland Murri Court' (Paper delivered to the *Law Asia* Conference, 31 October 2008, Kuala Lumpur) 6 <http://archive.sclqld.org.au/judgepub/2008/irwin20081031.pdf> at 26 January 2010.

32 We should note, however, that the requirement for new and proposed legislation to include both objects clauses and explanatory memoranda is a relatively new phenomenon in Queensland, the latter being provided for by s 23 of the *Legislative Standards Act 1992* (Qld). That Act also requires that the explanatory memorandum attached to Bills must include a brief statement of the policy objectives of the Bill and the reasons for them, a brief statement of the way the policy objectives will be achieved by the Bill and why this way of achieving the objectives is reasonable and appropriate – and a brief assessment of the administrative cost to government of implementing the Bill, including staffing and program costs.

33 Jason Payne, *Speciality Courts in Australia: Report to the Criminology Research Council*, Australian Institute of Criminology (2006) <http://www.criminologyresearchcouncil.gov.au/reports/2005-07-payne/2005-07-payne.pdf> at 26 January 2010. For a summary of this report, see Payne, 'Specialty Courts', above n 24.

34 Payne, *Speciality Courts in Australia*, above n 33, 107.

35 Ibid 108.

36 Payne concluded that evaluations of the Indigenous courts in Australia had been overwhelmingly process-oriented, but a number of studies subsequent to the publication of his report to the Criminology Research Council have focussed on outcomes. Most notable are those which attempt to evaluate changes in recidivism rates such as Jacqueline Fitzgerald, 'Does Circle Sentencing Reduce Aboriginal Offending?' (2008) 115 *Crime and Justice Bulletin* 1, which is discussed in more detail later in this paper.

37 Payne, *Speciality Courts in Australia*, above n 33, 108–9.

38 Ibid 108. This simply involves calculating the overall costs of operating a given court without reference to any benefits. This is usually undertaken to inform the budgetary needs for the continuation and expansion of the court in question, especially during the piloting stage. Perhaps unsurprisingly, there are frequent complaints from supporters that the specialist courts are underfunded. See, eg, Irwin, above n 31.

39 Payne, *Speciality Courts in Australia*, above n 33, 108. This process involves determining how much benefit might be gained from a given level of expenditure. This method is primarily used to determine how much it costs for the court to achieve its goals. Payne (at 109) describes it as enabling 'key stakeholders to determine the program's effectiveness in achieving its goals and the aggregate expenditure needed to achieve those goals'.

40 Ibid 108. This refers to a comparison of dollar expenditure and dollars saved. So obviously, only a benefit which can be quantified in terms of monetary units can be included in this sort

of comparison. Payne (at 108) illustrates with the example of comparing the costs of improving participation rates in a court or program with the costs saved by a consequent reduction in offending rates.

41 It could of course be argued that the process of shaming that is central to the culturally appropriate practices in some Indigenous courts is in fact retributive in nature, but it is also at least arguable that the shaming process is intended to be therapeutic and forward-looking.

42 Faris, above n 3, in fact argues that this would be a good thing (at least in relation to Indigenous courts). He asserts that cultural factors are adequately assessed by mainstream courts and that 'any Magistrate or Judge must take into account these sort of matters. It is not necessary to fund a racially-defined court'.

43 Payne, *Specialty Courts in Australia*, above n 24, 6.

44 Law Reform Commission of Western Australia, The Interaction of Western Australian Law with Aboriginal Law and Culture, Project No 94 (2006) Appendix C.

45 Ibid, Appendix C, 409 (note 2).

46 The Report had concluded that, in 2002, 34 of every 1000 Western Australians was Aboriginal, yet 410 of 1000 Western Australian prisoners were Aboriginal. So to make the required estimate, this would entail calculating a cost reduction related to a 3.43 per cent incarceration rate instead of 41.08 per cent: at ibid.

47 Acumen Alliance, *Cost Benefit Analysis: Koori Court Program: Final Report to Department of Justice Victoria* (2006).

48 In fact the Law Reform Commission of Western Australia, *The Interaction of Western Australian Law with Aboriginal Law and Culture*, above n 44, Appendix C, 413, concluded that: 'The benefit cost ratio for the introduction of an Indigenous court in Western Australia servicing 88 finalised defendants per year is estimated at 2.5 : 1. That is, for every dollar spent on the operation of an Aboriginal court, the State of Western Australia will save at least $2.50. The analysis excludes savings related to other reduced costs. These other ['flow-on'] savings include savings to households and victims, to the insurance and security industries, and savings to other related government services, such as employment networks, welfare and health services, and other community services'.

49 Payne, *Specialty Courts in Australia*, above n 33, 112.

50 Andrew Phelan, 'Solving Human Problems or Deciding Cases? Problem Solving Courts' (Paper delivered to the *Promising Practices in Justice Responses to Victims & Witnesses* National Conference, Canberra, October 2003) <http://www.victimsupport.act.gov.au/category.php?id=57> at 26 January 2010.

51 Marchetti and Daly, 'Indigenous Sentencing Courts', above n 13, 418.

52 The target group in this sense being the class of offender that comes before the Indigenous courts (in most cases those convicted by plea of summary offences).

53 Payne, *Specialty Courts in Australia*, above n 33, 109–10.

54 Natalie Parker and Mark Pathé, *Report on the Review of the Murri Court*, Queensland Department of Justice and Attorney-General (2006) <http://www.justice.qld.gov.au/files/Services/MurriCourtReport.pdf> at 26 January 2010. Readers may like to consult Chapter 3 of this publication in relation to findings about whether the Murri Court is meeting its objectives. In relation to recidivism and re-offending rates, the report notes that there is a scarcity of data available concerning individual offenders. Given that the Court had only been operating for four years in a few locations, any recidivism rates and order breach rates calculated in that context would be unreliable in any case.

55 Ibid 24.

56 Ibid 6 (recommendation 2). In the 2006–07 Queensland State budget, $60 000 was provided for the development of a Murri Court information system/database. Whether this amount is sufficient or whether the database will contain all the fields recommended in the review is uncertain as yet. There has been $100 000 provided for an independent review of the Court, but the results of this review were not available as of the date that this paper was completed.

57 Fitzgerald, above n 36, 2.

58 Marchetti and Daly, 'Indigenous Sentencing Courts', above n 13, 419. Marchetti and Daly point out that when evaluating re-offending rates, investigators need to ensure that '[r]e-offending [is] keyed to the number of individual defendants (not the number of files)': at 419 (note 5).

59 Fitzgerald, above n 36.

60 Fitzgerald (ibid 7) does not concede that a more extensive set of controls would have any significant impact on the results.

61 Ibid 7.

62 In addition to all the factors referred to in the Royal Commission into Aboriginal Deaths in Custody and later reports and investigations, recent focus has also turned to the role of homelessness, for example, in over-representation. A recent Commonwealth Government Green Paper noted that '[t]here is a complex inter-relationship between homelessness and offending behaviour, with each contributing to increases in the other, compounded through social disadvantage': Commonwealth Government, *Which Way Home: A New Approach to Homelessness* (2008) 28. The Law Reform Commission of Western Australia, *Court Intervention Programs: Consultation Paper*, Project No 96 (2008) noted (at 6) that homelessness is itself caused by personal factors (such as 'disability, mental illness, alcohol and drug abuse, family breakdown, poverty and violence') and social and economic factors (such as 'housing affordability, access to

work, education and training, and entrenched disadvantage'). There is no court that is going to be able to address this myriad of interconnected problems on its own and it would be senseless to evaluate a court on the assumption that it could.

63 Given that there is a lack of evidence that the Indigenous courts are so far having much effect on recidivism rates, a non-custodial sentence on one occasion for an individual does not *necessarily* mean that they are any less likely to be dealt with by the criminal courts in the future.

64 We are not implying, of course, that the dynamics of Indigenous offending are a simple matter of life choice. But the impetus for real change needs to be internal, in an environment where a changed lifestyle can be supported, supervised and encouraged.

65 Michael King describes the therapeutic role of courts in sentencing in this way: 'it may be better for a court to take a positive approach – using its standing to motivate litigants to address underlying issues and the resolution of the legal problem itself – rather than to resort to the negative approach of coercion. It recognises that the crisis of coming to court – like other life crises – will be when people reflect on their situation and may be open to making life changes, providing the court with the opportunity to strengthen and support that motivation to change by participation in a problem-solving program'. Michael King, 'Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education' (2006) 15 *Journal of Judicial Administration* 129, 131.

66 Elena Marchetti and Kathleen Daly, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends and Issues in Crime and Criminal Justice* 1, 5.

67 All of these being aims and objectives of a range of Indigenous courts as summarised in ibid.

68 Not all commentators are wholly sanguine about the potential of Indigenous courts (as currently constituted) to accurately reflect or embody the values and needs of the communities for whose benefit they are convened. Rudin, for example, points out that simply providing a forum for the carrying out of some restorative justice processes and practices in relation to Indigenous offenders, is not necessarily a manifestation of Indigenous justice. Jonathan Rudin, 'Aboriginal Justice and Restorative Justice' in Elizabeth Elliott and Robert M Gordon (eds), *New Directions in Restorative Justice: Issues, Practice, Evaluation* (2005) 89.

69 Marchetti and Daly, 'Indigenous Courts and Justice Practices in Australia', above n 66, 5, citing Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (3rd ed, 2003).

70 Don Weatherburn, quoted in Irwin, above n 31, 10–11. See Bureau of Crime Statistics and Research, 'Circle Sentencing Evaluation' (Press Release, 16 July 2008) <http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_mr_cjb115> at 26 January 2010.

71 Carrie Petrucci, 'Respect as a Component in the Judge–Defendant Interaction in a Specialized Domestic Violence Court that Utilizes Therapeutic Jurisprudence' (2002) 38 *Criminal Law Bulletin* 263.

72 See, eg, Daniel Briggs and Kate Auty, 'Koori Court Victoria – Magistrates Court (Koori Court) Act 2002' (Paper presented at the *Australian and New Zealand Society of Criminology* Conference, Sydney, October 2003).

73 Parker and Pathé, above n 54, 23.

74 Ivan Potas et al, *Circle Sentencing in New South Wales: A Review and Evaluation*, Judicial Commission of New South Wales, Monograph 22 (2003) <http://www.judcom.nsw.gov.au/publications/research-monographs-1/monograph22/mono22.html> at 26 January 2010.

75 Although we are linking the process of reconciliation with political change here for the sake of convenience, these processes can be distinguished to the extent that one aspect of reconciliation is often conceived of as *including* Indigenous people in non-Indigenous institutions and processes, whereas true political change might be conceived of in terms of *transferring* power, authority or emphasis to institutions or processes which are for the sole use or 'benefit' of Indigenous people.

76 In fact, there is some evidence that commentators and policymakers in other jurisdictions are looking to the Indigenous sentencing court experience in Australia as a model for how criminal justice system reform can promote reconciliation: Yalis de Jesus Arocho, *Indigenous Peoples and Tribal Justice: A Comparative and Multi-Regional Study from a Therapeutic Jurisprudence Perspective* (2007).

77 For a useful analysis of the value of this cultural pluralism in addressing the problems of responding to offending in Aboriginal communities, see Kate Auty, 'We Teach All Hearts to Break – But Can we Mend Them? Therapeutic Jurisprudence and Aboriginal Sentencing Courts' (2006) Special Series 1 *E Law* 101.

78 Julie Stubbs, *Restorative Justice, Domestic Violence and Family Violence*, Australian Domestic and Family Violence Clearinghouse, Issues Paper No 9 (2004) 12.

79 Ibid. Note also comments about the purported dangers of co-opting Indigenous symbols of authority (ie, the Elders) to serve the laws of the coloniser, and the response from Marchetti and Daly, 'Indigenous Sentencing Courts', above n 13, 442 (note 87).

80 Irwin, above n 31, 9.

81 Payne, *Specialty Courts in Australia*, above n 33, 129.

82 Law Reform Commission of Western Australia, *Court Intervention Programs: Consultation Paper*, above n 62, 8 (emphasis added). The Commission was of the view that the most fundamental function of the problem-solving are principally designed to protect the community.

COURT AND TRIBUNAL DECISIONS