

IMPLEMENTING RESTORATIVE JUSTICE TO ADDRESS INDIGENOUS YOUTH RECIDIVISM AND OVER-INCARCERATION IN THE ACT: NAVIGATING LAW REFORM DYNAMICS

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I Introduction

There is a recurrent and intensifying problem of over-incarceration and recidivism among Indigenous youths in Australia. Although less than five per cent of young Australians are Indigenous, they account for almost half of the youths in detention.¹ The Australian Institute of Health and Welfare found that between 2009 and 2013 the level of Indigenous over-representation among detained youths increased from 26 to 31 times the non-Indigenous rate.² The latest Indigenous disadvantage report corroborates this trend, finding that the daily average detention rate for Aboriginal and Torres Strait Islander youth increased sharply between 2000-01 and 2007-08 and remained high in 2012-13 at 365 per 100 000 10-17 year olds, around 24 times the rate for non-Indigenous youth.³ Moreover, Indigenous youth re-offending rates remain consistently high. Between 2003-08, 53 per cent of young Indigenous people who had been arrested were repeat offenders.⁴

The Australian Capital Territory ('ACT') mirrors these nationwide trends and reflects an even direr situation in some instances. While Indigenous people make up only 1.5 per cent of ACT's population,⁵ 28 per cent of the ACT's detained youths between 2009 and 2013 were Indigenous.⁶ On the most recent statistics on Indigenous re-offending rates in the ACT at 2011-12, the ACT had the highest levels of Indigenous over-representation in youth justice supervision in Australia.⁷ While in some eyes, the ACT has one of Australia's most progressive legal frameworks, which includes restorative justice, human rights legislation, pre-court diversion programs and an Indigenous sentencing court, its Indigenous over-representation appears to be worsening.

Some saw promise in the ACT's emerging restorative justice framework⁸ as a potential means of addressing Indigenous youth recidivism and over-incarceration. This article argues that the failure of the legislative process to engage with underlying reform dynamics impeded this promise. The waxing and waning of support for the Territory's restorative justice reforms amongst stakeholders has resulted in a patchwork of practices that fail to meet hoped-for aims. This article argues that if restorative justice is to meet its promise, a new regulatory approach is required that better manages reform dynamics, by addressing competing stakeholder interests and expectations.

Part I of this article examines Indigenous over-representation in the youth justice system against the context of historical and ongoing colonialism in the implementation of criminal justice policy. It then outlines the potential of restorative justice to address this, showing there is evidence that its practices may reduce recidivism and incarceration among Indigenous youths.⁹ However, this can only occur if there is in place a law reform strategy that can harness its potential to better address what this article refers to as 'reform dynamics', in particular any colonial or racialised attitudes toward the implementation of reform which persist. Part II expands on the notion of 'reform dynamics', describing how the term seeks to capture the tensions among competing interests and expectations of immediate stakeholders (who can be usefully categorised into Indigenous youth offenders, their victims, the affected community and juvenile justice professionals). Part III uses systems theory as a conceptual framework to further unpick these tensions. A three-step methodology is used to analyse the extent to which the reforms have created normative change among stakeholders in favour of restorative justice; the extent to which ensuing legal changes give effect to this normative agenda; and finally, the extent to which

any desired behavioural changes have been produced. This methodology allows an assessment of reform effectiveness in managing the dynamics needed to address policy challenges. Part IV applies the methodology developed to evaluate the success of the ACT's present restorative justice framework. It focuses on three relevant aspects of this framework – the ACT's Indigenous Galambany Circle Sentencing Court, the engagement with the *Crimes (Restorative Justice) Act 2004* (ACT) legislation, and the potential use of the *Human Rights Act 2004* (ACT) to manufacture a culturally responsive and restorative civil remedy within mainstream courts. The analysis demonstrates that the reforms have not brought about a re-adjustment of stakeholder expectations to a degree sufficient to say the use of restorative justice can be mainstreamed so as to alleviate Indigenous youth recidivism and over-incarceration. As a possible solution, the authors draw on a policy initiative utilised in New Zealand – the Family Group Conferencing ('FGC') scheme – as a template of how to more effectively manage stakeholder tensions. Part V proposes a set of steps to develop a similar model in the Australian context. It is suggested that such an approach presents a way of harnessing restorative justice's promise of addressing Indigenous over-representation in the youth justice system.

II Indigenous Youth Recidivism and Over-Incarceration – Confronting a Dire Situation

A Contextualising the Issue

While scholars have proposed a wide range of theories to explain Indigenous over-representation in Australia's juvenile justice system, this reality must first be understood within its broader context of colonialism and the effects that colonialism has had on Indigenous contact with criminal law. Cunneen, in particular, has argued that penal policies have been closely tied to imperialist and colonialist strategies which legitimated, and eventually normalised, discriminatory penal practices toward Indigenous groups.¹⁰ Crucially in Cunneen's view this 'highly selective nature of penalty and the way it bears so disproportionately on marginalised groups'¹¹ remains in effect today. Weatherburn accepts the explanation of systemic bias in the operation of Australia's laws but also focuses attention on the effects of social disadvantage on Indigenous offending and resultant prison over-representation.¹² Noel Pearson takes a radically different view of Indigenous offending and incarceration caused by violent offending.¹³ He has argued trenchantly that substance abuse is the root cause

of such violence rather than being a symptom of Indigenous disadvantage. This violence is a significant contributor to the offending which sees Indigenous offenders jailed repeatedly. He also argues that until the 'symptom theory' is rejected and Indigenous people take responsibility for their own behaviour can the position change.¹⁴

B The Prospects of a Restorative Justice Strategy

Given the traditional debate in juvenile justice between a 'justice' approach and a 'welfare' approach to youth offending, restorative justice provides an alternative paradigm with its focus on effecting 'change in the young offender's behaviour and attitudes'.¹⁵ Restorative justice in its practical expression in the criminal justice system is commonly understood as 'a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.'¹⁶ The restorative approach is contrasted with a 'justice' approach, which conceives of crime as a violation of state sanctioned rules through law-breaking, rather than a violation of people and relationships.¹⁷ This approach centres on 'determining blame and administering punishment'.¹⁸ The 'welfare' approach focuses on rehabilitation and addressing the offender's vulnerabilities associated with the commission of the crime.¹⁹ As opposed to stigmatising offenders as 'deserving punishment' under the 'justice' paradigm, or potentially pathologising them by concentrating on their faults and weaknesses under the 'welfare' model, the restorative perspective seeks to empower young offenders to mend damaged relationships within their community, with a view to their reintegration into mainstream society.²⁰ This approach has gained some traction within the Australian juvenile justice system.

Like all approaches, there are practical difficulties in measuring the effectiveness of such programs. In the most recent comprehensive meta-analysis of the effect of its practices on youth re-offending, Weatherburn and Macadam note mixed results.²¹ They found that the effect of restorative justice on youth recidivism was in most instances not statistically significant.²² Nevertheless, they accepted that restorative justice had 'quite substantial' effects in reducing youth re-offending in studies where the practice changes were systemic.²³ For example, in the midwestern region of the United States, where all juveniles were referred to restorative justice processes rather than to court, youths were between 37-59 per cent less likely to re-offend.²⁴ The evidence is

more clearly positive for youth imprisonment with studies systematically demonstrating positive results. For example, following the original development of restorative justice in New Zealand, the number of youth custodial sentences imposed declined from 193 in 1989²⁵ to 105 in 1999.²⁶ In Nova Scotia, there was a more pronounced reduction from 147 custodial sentences imposed in 1998-99 down to 55 in 2004-05.²⁷ Both sets of studies suggest restorative processes can have a positive effect on youth recidivism and incarceration rates.

The promise suggested by these studies has not been matched in the case of Indigenous offenders in the ACT's experience with restorative justice.²⁸ There are various factors at play that might explain this relative lack of success. Specifically, as regards Indigenous offenders, the notion of 'penal culture' – understood as the 'broad complex of law, policy and practice' which frames the implementation of reform – provides one explanation that might usefully be developed.²⁹ Competing interests and expectations among stakeholders about how the law should work will have conditioned how restorative reforms are implemented, which may alter the intended effects of legal change.³⁰ Collectively, such tensions among stakeholders form what can be referred to as the 'reform dynamics' which need to be navigated.³¹ In the absence of a broader awareness about these competing discourses, restorative justice practices risk being diluted or misapplied amidst a penal culture that continues to be influenced by racialised ideas.³² Therefore, as a pre-condition to harnessing restorative justice's considerable promise, law-makers need to have adequately addressed these dynamics and the tensions between stakeholders about how the law should work in practice.

III Deconstructing the Dynamics of Law Reform Practice in the ACT

The primary stakeholders involved with Indigenous law reform with regards to young offenders in the ACT include the young offenders themselves, their affected community, their victims and 'juvenile justice professionals'. Targeting these key stakeholders permits a potentially instructive 'big picture' analysis of reform dynamics.

A Indigenous Youth Offenders

In the eyes of Indigenous youth offenders,³³ the mainstream legal system's lack of legitimacy is its resounding feature.

The view that 'many aborigines (sic) feel that they are political prisoners – goaled by the discriminatory laws of a racist society – a society that's very foundation is illegal' remains firmly alive.³⁴ The discriminatory nature of policing in Indigenous communities and the criminalisation of Indigenous youth in Australia is widely acknowledged,³⁵ and constitutes a major obstacle to the legitimisation of mainstream legal policies.³⁶ For such young people, criminal justice policies designed to address specific Indigenous needs are more often carried out in a way that fails to recognise the diversity of Indigenous populations and remains committed to a mainstream criminal justice approach.³⁷ The priorities of Indigenous youth offenders in criminal justice reform primarily relates to moving the legal system away from a penal culture of control and punishment towards a sensitivity toward Indigeneity and availing opportunities for greater ownership of the legal process.³⁸

B The Affected 'Community'

While any concept of 'community' is fraught, it can usefully be reduced to people who have been directly or indirectly harmed by a wrongful act and who have an interest in communicating their expectations for how law should resolve the harm.³⁹ At one extreme the community's view will align with the state sanctioning of crime through punishment so as to reinforce norms of social behaviour.⁴⁰ On another view, 'community', can reflect the recognition that purely punitive approaches are ineffective and lead to more problematic social outcomes.⁴¹ The 'community' may also have a stronger interest in reintegrating victims and offenders through measures that demonstrate social support, such as education and training programs rather than punishment.⁴² While community interests and expectations will remain diverse, they are broadly defined here as sanctioning crime as a normative breach and reintegrating victims and offenders so as to prevent reoffending.

C Victims

There is an increasing expectation for victims to be given greater recognition in the criminal justice process. This is partly the result of a growing recognition of the harm that criminal offending causes, not only material but psychological and relational.⁴³ Victims perceive crime as attacks on their sense of autonomy, order and relatedness in society, and as such demand responses that help them gain an understanding of the crime committed and an

opportunity to come to terms with their own emotional trauma.⁴⁴ For instance, ACT laws in the criminal justice system seek to empower victims during ongoing legal processes providing victims with some opportunity to be informed about progress in relation to the prosecution of the accused, and by also adopting procedures that are designed to protect victims from unregulated interactions with the offender in the courtroom.⁴⁵ The legislation also impels the court to 'consider' victim impact statements during sentencing.⁴⁶ Therefore, victims' interests and expectations reflect an evolving trend toward greater empowerment and compensation with a view to preventing further offending.

D Juvenile Justice Professionals

The breadth of 'juvenile justice professionals' involved in implementing laws which affect young people when they offend is potentially vast – from police to correctional officers at the margins. The literature largely attributes interests and expectations to these actors as axiomatic propositions, rather than seeing any consistency of interests or expectations. Here the focus is narrowed to justice professionals directly involved in the operations of the criminal justice response, primarily comprising police, magistrates and judges, correctional agencies (both for supervision and confinement), youth workers (including youth and community, juvenile justice and teachers), prosecutors and defence lawyers. Some shared interest in how they carry out their professional obligations has been identified,⁴⁷ but there are distinct differences in the perspectives of each set of actors. For police officers, previous 'tough on crime' policies that have associated Aboriginal juvenile offenders with criminality may continue to shape their law enforcement decisions in charging, cautioning or diverting offenders.⁴⁸ For magistrates, judges and correctional officers, their decision-making may be influenced by a tendency to resist change, which entails ceding existing powers and authority over offenders, especially discretion over sentencing practices.⁴⁹ More positively, in one study magistrates and judges were observed to demonstrate increasing sensitivity to Indigenous over-incarceration during bail and sentencing decisions.⁵⁰ Defence lawyers who are traditionally seen as resistant to informal justice processes may see restorative options as incompatible with their primary role of client advocacy.⁵¹ However, there is some suggestion that lawyers may be increasingly aware of more multi-dimensional functions, such as facilitating the resolution of interests and relationships rather than simply defensive advocacy.⁵² To categorise these diverse interests

into a particular 'position' is at best artificial but for the purposes of analysis they are grouped as the exercise of clear decision-making authority and the application of clear rules which do not impede their professional obligations.

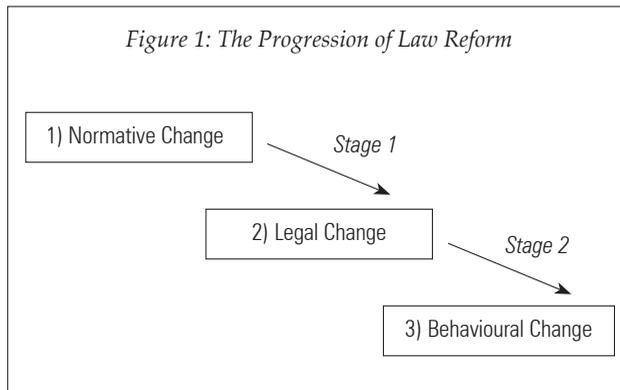
These key stakeholders in criminal justice reform each have different perspectives on the criminal justice system's purposes and on how law reform of the system should work. Each exerts a distinctive influence on the development of legal policy that aligns with their existing interests, either consciously or implicitly.⁵³ The interplay of their diverse, often contradictory, reactions to regulatory change will collectively alter how the reforms transpire and can distort or undermine strived-for change.⁵⁴ While restorative justice reforms may appear to be a promising approach to Indigenous youth recidivism and over-incarceration, ignoring these competing claims will impede any potential promise. The authors suggest this need not always be so. Systems theory provides a model of analysing a discrete law reform process that can foreground these 'reform dynamics' with a view to mitigating such impediments.

IV Systems Theory – A Conceptual Framework for Assessing Law Reform

Systems theory conceives law reform as a complex interplay of stakeholders and institutions. It argues that law reforms often fall short of their reform goals because policymakers fail to anticipate the implications of change in one or several parts of an interconnected system.⁵⁵ Legal reforms may seek to influence stakeholders' particular interests and expectations about how the law should work in order to create the intended changes.⁵⁶ Stakeholders affected by the changes however, may either consciously or implicitly seek to influence how the law reforms transpire in ways that were unintended and unhelpful.⁵⁷ Systems theory advocates that policymakers can anticipate these interconnections in the law reform process.⁵⁸ Systems theory has been applied to a wide range of legal policymaking processes. For example, New Zealand legislators sought to anticipate competing stakeholder interests in environmental management law reform by including resolution mechanisms that ensured that such interests could be resolved consistent with, rather than in opposition to, the reform's overarching objectives of promoting environmental sustainability.⁵⁹

As an example of the application of this approach a three-step methodology is formulated and used to evaluate the

effectiveness of the ACT's restorative justice reforms. The first step assesses the extent to which the reform sought to create normative change in favour of this policy goal. The second step evaluates the extent to which the ensuing legal changes gave effect to this normative agenda. The third step assesses the extent to which the desired behavioural change occurred in response to the legal changes. This methodology is represented as follows:



During the two-stage process of converting normative shifts to legal change and then translating the legal change to behavioural change, it is possible to trace the extent to which law reform has reshaped, or been reshaped by, competing stakeholder interests and expectations during the progression of law reform. The methodology allows one to assess the effectiveness of ACT law reform in managing reform dynamics, so as to address the identified policy need.

V Evaluating the ACT's Current Reform Framework in Restorative Justice

The potential positives of a restorative justice approach provided to address Indigenous youth recidivism and over-incarceration must be supported by a regulatory framework that is embraced and supported by stakeholders if it is to succeed. A systems theory methodology allows an evaluation of this success at two tipping points – the conversion of intended normative shifts into legislative change and the effecting of the desired behavioural change in this redesigned justice system. The evaluation focuses on three restorative justice related legal reforms in the ACT which have direct application to Indigenous communities – the Galambany Circle Sentencing Court; the *Crimes (Restorative Justice) Act 2004* (ACT) legislation; and the scope of the innovative *Human Rights Act 2004* (ACT) – to create restorative outcomes.

A The Galambany Circle Sentencing Court

(i) Normative Change

A reform that sought to explicitly deal with Indigenous over-representation in the criminal justice system is the ACT's Galambany Circle Sentencing Court. The concept behind the Galambany Court was driven by political motivations that aimed to develop Indigenous justice practices and mitigate, in some way, the 'inefficiencies and incompetencies' of the traditional Anglo-Saxon criminal justice system in its approach to Indigenous offenders.⁶⁰ Post-*Mabo*⁶¹ and the subsequent recognition of native title, Indigenous law is at best incorporated in a way that preserves Western legal system dominance.⁶² But the political will formed by the Royal Commission into Aboriginal Deaths in Custody's report on the gravity of Aboriginal over-representation in the criminal justice system catalysed the need for new justice practices to empower Aboriginal people.⁶³ Law reform which arose from this sought to establish Indigenous courts which bore many similarities with restorative practices, in their aspirations to resolve crime in a healing and constructive manner for offenders, enhance communication among participants and afford all participants with respect and a voice.⁶⁴ Given this, restorative justice was 'never one of the main aims of Indigenous sentencing courts' when these courts were initially conceived.⁶⁵ Restorative processes lack this political dimension. As Marchetti and Daly note, Indigenous courts have an explicit political aspiration for social change in race relations, 'to bend and change the dominant perspective of "white law"'.⁶⁶ Therefore, the motivations to establish the ACT's Galambany Court envisaged a transformative shift so as to make the court process more culturally responsive and specifically reduce Indigenous over-representation in the criminal justice system. Notably, any particular alignment with restorative justice was not part of the normative change envisaged by key stakeholders at that time.

(ii) Legal Change

The Galambany Court was established in 2004 for Indigenous adult offenders.⁶⁷ It represents an incorporation into the Western legal system in a manner that maintains the latter's dominance. For one, the Galambany Court operates as a division of the ACT Magistrates Court and preserves the latter's jurisdiction in sentencing Indigenous offenders.⁶⁸ Rather than adopting any Indigenous customary laws, the Galambany Court uses only Australian criminal

law to sentence offenders already deemed guilty through plea or finding in the mainstream courts.⁶⁹ There is no specific legislation that governs its establishment and the Court operates under general sentencing provisions in the *Crimes (Sentencing) Act 2005* (ACT) which provides that the offender's cultural background *may* be considered during sentencing under section 33.⁷⁰ Nevertheless, its procedure is governed by a Practice Direction which clearly seeks to capture in its aims and conduct a normative agenda of change – providing culturally relevant court processes targeted to reduce recidivism among Indigenous offenders.⁷¹ Since 2010, the Court's operation has been extended to Indigenous young people. The Practice Direction introduces restorative elements, specifically to provide 'effective and restorative processes' by involving victims, offenders and their supporters and affording them a voice.⁷² The Galambany Court has not represented the normative shift initially hoped for, but it has instead become focused on restorative aims as part of giving effect to a culturally responsive process consistent with reducing Indigenous (youth) over-representation in the criminal justice system.

(iii) Behavioural Change

The Galambany Court has achieved some success in giving legal effect to a modified normative agenda, but behavioural change among stakeholders has been more limited. Positive evaluations found that circle courts reconciled relationships for Indigenous communities and generated understanding and accountability among participants by increasing dialogue.⁷³ However, victims 'do not typically attend hearings'⁷⁴ which subverts any restorative goal of healing relationships by bringing those affected together. In the absence of more recent evaluations, consultations from stakeholders in a 2010 Options Paper, seeking to strengthen the initiative, demonstrated that the Court had failed to change the practices of the ACT's criminal justice agencies, in any substantial way, in relation to Indigenous offenders. This is said to be the case, despite a general expression of support for its continuance.⁷⁵ The Paper noted that the Office of the ACT's Director of Public Prosecutions remained reluctant to refer cases due to the perception that the Circle Court was 'too lenient'.⁷⁶ The Court Registry was not proactive in supporting its operations.⁷⁷ The views of Indigenous community representatives about culturally meaningful options were not always respected when they were expressed.⁷⁸ Moreover, in spite of the 2010 extension, few young people have in fact been referred to the program.

Of the Indigenous youths admitted to Bimberi Youth Justice Centre in 2011-12 and 2012-13 (98 and 53 respectively),⁷⁹ only 8 in 2011-12 and 9 in 2012-13 had been referred to the Circle Court.⁸⁰ While the Court is reported to have an estimated 75 per cent success rate in mitigating recidivism,⁸¹ members of the Aboriginal community contend that the program has failed to engage with young people.⁸² Attitudes do not appear to have progressed with stakeholders still approaching Indigenous offending in an ethnocentric manner, with a harsher mentality toward young Aboriginal offenders and a continuation of past practices. On any realistic assessment, the desired behavioural change has not occurred and the evidence suggests that the reform has not yet been able to reshape stakeholder interests and expectations in favour of addressing Indigenous youth recidivism and over-incarceration through a predominant circle court approach.

B The *Crimes (Restorative Justice) Act 2004* (ACT) ('CRJA')

The introduction of the *CRJA* was the culmination of the ACT's long-standing intention to extend restorative justice programs and introduce a model of restorative justice within its mainstream courts.⁸³ Previously, the use of restorative justice had been confined to a pre-court diversionary conferencing for juvenile offenders run by ACT Police.⁸⁴ The program, although small, became internationally recognised as effective and produced very positive indications about its potential for reducing crime.⁸⁵ The program was 'not underpinned by any formal procedures and [was seen as]... very much experimental'.⁸⁶ Given the success it generated, policymakers were keen to implement a statutory basis for conferencing that brought restorative justice practices for both juveniles and adults into the mainstream domain.⁸⁷ One aim of this introduction was to address recidivism, though not specifically Indigenous reoffending.

(i) Normative Change

During efforts that ultimately led to the *CRJA*'s implementation, policymakers envisaged a fundamental reshaping of the criminal justice system that was both in line with restorative justice principles and which could accommodate Indigenous needs and concerns. There were significant concerns within the ACT Indigenous community that existing police-run conferences exacerbated discrimination against Indigenous offenders.⁸⁸ Indigenous young people were often deemed 'ineligible' under existing

ACT Police guidelines.⁸⁹ This problem was exacerbated by the perception that police diversionary conferencing failed to engender the Indigenous communities' trust, resulting in lower participation rates.⁹⁰ In light of these concerns, policymakers sought to create a system-wide approach with the overarching principle that 'restorative justice [become] a recourse of first preference throughout the criminal justice process'.⁹¹ Policymakers also proffered an approach that explicitly protected the interests of all affected stakeholders including victims, offenders and the community.⁹² In addressing Indigenous interests, policymakers tried to balance the tension between the lack of separate 'Indigenous-specific diversionary programs' and the preferences of some Aboriginal people to use mainstream agencies, by recommending further pre-legislative consultation with local Indigenous communities.⁹³ These law reform efforts represented a normative attempt to shift and position restorative justice as the mainstream response. A focus on addressing Indigenous over-representation was less apparent and therefore less evident in the resultant legislative changes.

(ii) Legal Change

The legal change introduced by the *CRJA* fell well short of the normative shifts envisaged. The centrality of prosecution was preserved and so diminished the possibility of mainstreaming restorative justice through an automatic widening. Indeed, a key strength of the *CRJA* lay in its extensive coverage of offences and offenders.⁹⁴ But after 10 years, the Act's operation remains limited to juvenile offenders and less serious offences punishable at most by short periods of imprisonment.⁹⁵ It has not moved to a wider range of offences nor an extension to adult offenders.⁹⁶ The Act's foothold in the ACT criminal justice system remains limited by the legislature's intention for restorative justice to operate as a parallel, rather than a replacement system.⁹⁷ Secondly, the express prioritisation of victims' rights under the Act's objects and Explanatory Statement⁹⁸ has meant that giving equal importance to all affected parties is contradicted in practice. The *CRJA* also has failed to address Indigenous concerns about the lack of culturally appropriate restorative justice processes. There are no provisions that require the police, courts, or the scheme's operators (the Restorative Justice Unit) to address the distinctive needs of Indigenous youths during conferencing. In a pessimistic assessment, the legal change under the *CRJA* has failed to carry anywhere near the full extent of the normative agenda initially envisaged, particularly in respect to mainstreaming

restorative justice processes or in tailoring such processes to Indigenous needs.

(iii) Behavioural Change

On a positive note, restorative justice processes have demonstrated a capacity to heal relationships among conference participants equally and reintegrate both victims and offenders. This is the case despite the *CRJA*'s explicit prioritisation of victims' rights. According to the (only publically available) First Phase Review of the *CRJA*, victims' levels of fear and anger toward the offender had decreased substantially after conferencing. While 44 per cent and 12 per cent of victims had respectively felt anger and fear towards the offender before the restorative justice process, this decreased to 15 per cent and two per cent after the process.⁹⁹ About 78 per cent of victims reported that they would have no difficulty meeting the offender again and many expressed positive feelings towards the young person.¹⁰⁰ Similarly, the high 98 per cent compliance rate with restorative justice agreements by offenders demonstrates their apparent commitment to repair the harm caused to others.¹⁰¹ There are also some indications of reduced recidivism rates among young offenders after conferencing.¹⁰² With 90 per cent of participants expressing that they did not feel pressure to participate in restorative justice and 96 per cent reporting that they would recommend the process to others,¹⁰³ the *CRJA* demonstrates an ability to encourage greater acceptance of restorative justice's legitimacy among affected victims, offenders and the community. However, in contrast to these positive changes, the proportion of offenders being diverted remains very small. For example, while there were a total of 6210 court appearances during 2006,¹⁰⁴ only 104 conferences were conducted during the scheme's first year of operation between 2005-06 and this has remained the annual level.¹⁰⁵ With the prosecution maintaining centrality, the capacity to mainstream restorative justice has faltered. The *CRJA* is at best a tangential response to Indigenous youth recidivism and over-incarceration. Only 10 per cent of offenders referred to conferencing in the ACT were Indigenous.¹⁰⁶ Moreover, the First Phase Review contains no indication as to how Indigenous concerns have specifically been accommodated within restorative processes, nor specifies about satisfaction rates among Indigenous participants.

Ultimately, while this law reform has achieved some success, it has been much less effective in bringing about change.

The absence of efforts to cater to the needs of Indigenous youth more directly during conferencing runs the risk of continuing, if not exacerbating, their disengagement with the mainstream legal processes.

C Novel Uses of the *Human Rights Act 2004* (ACT) ('HRA') to Achieve Restorative Outcomes – A Case Study

David Helmhout's case involves a novel attempt to seek a restorative justice remedy against the state through the mainstream court system by means of the ACT's unique human rights legislation. The HRA has no specific restorative intention but this case study exemplifies the potential of the legislation to reshape stakeholder interests and expectations towards a more restorative Indigenous focus.

(i) Normative Change

Helmhout's action represents an attempt to use the HRA's innovative potential. Based on allegations that he was sprayed with capsicum foam while in custody at the ACT Watchhouse, Helmhout lodged a civil claim seeking a statutory remedy against the Commonwealth and two former Australian Federal Police officers for breaching his right against unlawful arrest and detention under section 18(7) of the HRA and his right not to be subject to torture under section 10(1) of the Act.¹⁰⁷ While *Morro v Australian Capital Territory*¹⁰⁸ recognises that the HRA confers a substantive independent right to 'compensation' rather than a mere declaratory right under section 18(7), there is no established legal foundation for the specific remedy Helmhout sought – namely participation in a restorative justice-type healing ceremony.¹⁰⁹ Accordingly, Helmhout argued for an expansive interpretation of 'relief' under section 40C so as to include a remedy he saw as assisting in restoring his dignity in Aboriginal terms.¹¹⁰ At the outset, Helmhout sought directions for the defendants to participate in and cover the costs of a traditional Aboriginal healing ceremony to be carried out in Perth, his traditional country.¹¹¹ According to Helmhout's barrister, Anthony Hopkins, the proposal has wider ramifications to facilitate greater engagement with Indigenous healing and restorative justice practices in Australian law.¹¹² These proceedings are a small indication that the ACT's legal system may be potentially ripe for normative change based upon imaginative use of the HRA.

(ii) Legal Change

The legal proceedings Helmhout commenced are reported to now be settled, though the proposed healing ceremony has yet to be held. The Commonwealth shifted their position and expressly agreed to participate in the ceremony. However, no formal court declaration of a human rights breach was made and as such there is no binding determination on which a legal precedent could be built.

(iii) Behavioural Change

There is some evidence that this action has begun to generate behavioural change among some stakeholders toward recognising Indigenous restorative needs within Australian law. Attempts by Helmhout's lawyers to pioneer this case demonstrates some evidence of a reformed mindset. The Commonwealth's preliminary agreement to participate in the healing ceremony suggests that behavioural shifts which normalise the idea of reconciling Indigenous restorative justice may seep into the minds of a conservative legal community – particularly if the healing ceremony proceeds.

Despite this patchwork of law reform, their collective effect has not on any assessment brought about a shift in stakeholder interests and expectations which would suggest that they will support the use of restorative justice processes as a means to alleviate Indigenous youth recidivism and over-incarceration. Mainstream notions of crime control which marginalise Indigenous perspectives remain in ascendency.¹¹³ Against the background of this relatively depressing lack of success in shifting entrenched attitudes and practices, an analysis of the reform dynamics offers some hope.

VI The Way Forward

While Part IV demonstrates that the ACT's restorative justice framework has had limited success in addressing Indigenous youth recidivism and over-incarceration, some useful lessons can be drawn from the law reform experiences themselves.¹¹⁴

A Lessons from the ACT's Current Restorative Justice Framework

Taking each of the three restorative justice reform initiatives in turn, there are suggestions as to how such performance could be better managed.

For the Galambany Court, the law reform process suggests that entrenched stakeholder interests and expectations significantly impeded the process of translating legal change into desired behavioural outcomes. In terms of positives, the law reform did introduce culturally responsive processes into the Australian legal system which were previously absent. Accordingly, this may lay a foundation that legitimates normative shifts. The difficulty is that there were no measures put in place to develop understanding of and support for the reform agenda among the general community and criminal justice agencies through education and organisational practice, alongside its actual law reform processes. Such practices may have addressed any racialised understandings and practices. Supporting law reform with mechanisms that seek to directly influence (and periodically monitor) stakeholder behaviour in support of intended reform objectives may have better facilitated the translation of legislative intentions into desired outcomes.

For the *CRJA*, the law reform process suggests that existing stakeholder interests and expectations impeded the process of translating its normative change, of mainstreaming restorative processes and accommodating Indigenous needs. Restorative conferencing was instituted as a peripheral scheme to prosecution without any indication of how Indigenous needs would be accounted for. The reforms created a greater legal inducement than previously existed to engage with restorative programs which had the capacity to change attitudes among participating stakeholders. In drawing from these lessons, the ACT needs leadership to avoid the reform being subsumed into the dominant narratives of the criminal justice system, which continue to over-emphasise the importance of appropriate redress to victims and crime sanctioning in relation to Indigenous offending.

As for *Helmhout's* case, its importance is its creativity. It suggests that progress may also be achieved through using existing ACT legislation in an imaginative way. While no legal change is likely to be achieved by *Helmhout's* case in the sense of establishing a precedent for accommodating Indigenous restorative practices, this attempt has the capacity to create greater receptiveness among stakeholders, including lawyers and judges, towards restorative approaches in relation to Indigenous groups.

In considering the patchwork of restorative justice measures as a whole, there is limited success in channeling restorative justice's potential to address Indigenous youth

recidivism and incarceration. A new approach with a more comprehensive and targeted statutory scheme may provide a better response.

B Guidelines for a New Regulatory Approach

The authors suggest that revisiting the New Zealand practice of FGC, which largely initiated the first wave of restorative justice in Australia, may provide some fresh ideas. New Zealand's *Children, Young Persons and Their Families Act 1989* (NZ) ('*CYPFA*') and its restorative FGC scheme presents a demonstrated example of effective law reform producing behavioural change.¹¹⁵ The decline in youth offending and incarceration in New Zealand by 30-40 per cent during the last decade¹¹⁶ would suggest that the reforms have contributed to this reduction and in the process successfully navigated stakeholder tensions to achieve intended outcomes. New Zealand's FGC scheme is particularly pertinent given the similarities of gross over-representation of Indigenous young people in their justice system.¹¹⁷

(i) Establishing a Comprehensive and Targeted Statutory Scheme

The *CYPFA* ushered in what was said to be 'a new paradigm' for New Zealand's youth justice system, by overhauling formal court proceedings in favour of culturally flexible FGCs as the basis for decision-making in the Youth Court.¹¹⁸ One of the Act's distinguishing features is its comprehensive approach of bringing all youth justice matters under its purview, where such matters would previously have gone to court.¹¹⁹ Reflecting a blended Maori/Western conferencing model that was seen as restorative in nature, participants in the FGC (comprising the young offender, the victim, their respective families and juvenile justice professionals) are tasked with conceiving a plan about how best to deal with the offending and designed as far as was possible to restore harmony among parties.¹²⁰ Importantly, the Act provides flexibility for FGCs to adopt culturally appropriate processes that would be most effective for the young person. Under section 21 of the Act, the FGC could be tailored according to the wishes of the young person's family group. The coordinator has the scope to select a culturally significant venue such as *Marae* and an appropriate facilitator depending on the young person's cultural background.¹²¹ Under section 29, FGCs are free to tailor plans according to the parties' particular needs.¹²² The coordinator may conduct the conference in a way that best suits the nature of the case.¹²³ As compared to

the patchwork of restorative practices that continues to have a marginal impact on the ACT's youth justice system, the FGCs provide the potential for mainstreaming a culturally flexible restorative justice approach tailored to suit the needs of individual youth offenders.

There is a risk in simply transporting what is seen as a successful reform in one system into another, expecting similar success. For one, an Australian equivalent would need to be modified with clear legislative intent to apply specifically to Indigenous youth offenders and to make conferencing the default response. The ACT offers a small jurisdiction where this might be done. Secondly, simply parachuting a particular model (no matter how well evaluated elsewhere) is inappropriate. For the program to have any legitimacy in the eyes of Indigenous young offenders and their communities, lawmakers must consult widely with local communities to determine how the law should be constructed to better meet the needs of different cultural groups in the ACT. So for instance, where the New Zealand Youth Court retains overall control over FGCs in endorsing conceived plans and resolving disagreements,¹²⁴ the ACT's Galambany Court would be better placed to fill this role as a specialised Indigenous court that has expertise in providing culturally relevant processes. Such communities have, in the past, expressed their general support for the Indigenous court to provide a specialist response to address young Indigenous offenders' needs¹²⁵ and have voiced their interest in 'Indigenous-specific diversionary programs'.¹²⁶ This history suggests there would be some Indigenous community support for conferencing as the default response for all Indigenous youth offending in the ACT, but this would need to be determined.

(ii) Strong Leadership

While New Zealand's youth justice reform had itself been a contested and divisive issue, strong leadership was 'immensely influential' in steering the CYPFA's formulation.¹²⁷ Recommendations, including the family conference structure that reflected Indigenous methods of mediation, consensus and reconciliation and that required a shift in power from the judge to the community in the court system, were systematically incorporated into legislation after agency, practitioner or community dissent had dissipated.¹²⁸ This transformative effect of strong leadership in recasting the New Zealand reforms was crucial. Rather than allowing the legislative process to be manipulated amidst conflicting

stakeholder interests and altering the course of the intended changes, as it did in the ACT, the influence of strong leadership ensured a legislative outcome that mainstreamed culturally appropriate conferencing.

Influential individuals would need to understand the opportunities and limitations of bureaucratic policymaking and safeguard the law reform process from regulatory or agency capture. Importantly, they would also need to be alert to, and seek to, actively counter any pitfalls in the law reform process which may induce the marginalisation of the reform initiative. Ultimately, it is imperative for such leaders to take charge to develop a focused reform strategy, by actively educating stakeholders in order to gain broad-based support for culturally flexible restorative justice reform, and to ensure the close monitoring of the progress of reform. This ensures that the legal and behavioural change is developing in accordance with their normative agenda.

(iii) Legislative Inducement

Compared to the ACT where referrals to conferencing or circle sentencing are discretionary,¹²⁹ the CYPFA explicitly mandates the use of restorative justice as the default position. The Act expressly prohibits the prosecution of young persons until an FGC has been convened.¹³⁰ The imposition of such a mandate can in itself directly influence behavioural change, in line with the reform's normative agenda.

(iv) Education and Organisational Practice

A key aspect to mainstreaming the FGC in New Zealand was education and training efforts that promoted stakeholder support for restorative conferencing.¹³¹ While the changes were initially 'counter-cultural' to existing organisational practice,¹³² training programs were central to promoting understanding among justice agencies about their roles and responsibilities. This sought to induce them to align their core operations accordingly, and reshape their organisational culture to some degree to support the FGC's implementation.¹³³

For the ACT, similar education programs which support the mainstreaming of culturally relevant restorative justice conferencing for Indigenous youth offenders would be essential, particularly programs targeted towards educating the general public and juvenile justice professionals. At present such information is largely confined to those who

find themselves participating in the process. For justice agencies, training efforts should be particularly focused on stakeholders such as prosecutors and defence lawyers. Although these stakeholders are seen as likely to be culturally resistant toward restorative approaches, they are considered to be essential gatekeepers and as result, such training is imperative. In this way, they may also serve as important actors to counter any discriminatory attitudes and practices which persist among other stakeholders towards the implementation of criminal justice policies that give primacy to FGCs.

(v) Monitoring and Evaluating Adherence

The *CYPFA* provides detailed guiding principles for monitoring mechanisms to ensure restorative justice in practice. Specifically, section 260 of the Act requires FGCs to make decisions, recommendations and plans that will help strengthen the communities involved, and reconcile relationships. The requirement to maintain written records of FGC agreements¹³⁴ facilitates regular monitoring and evaluation of outcomes, according to intended reform objectives.¹³⁵ Such features should be included in any ACT reform legislation to ensure that ongoing behavioural change among stakeholders during the law's implementation can be monitored.

These are just a few simple guidelines as to how a more comprehensive and targeted regulatory approach that manages stakeholder tensions more effectively may be implemented in order to support restorative reform's progression.

VII Conclusion

It has been more than 23 years since the Royal Commission into Aboriginal Deaths in Custody's report identified the gross over-representation of Indigenous youths in the criminal justice system as a symptom and cause of Indigenous deaths in custody. Yet many promising strategies to reduce recidivism and incarceration have proven ineffective.

This article has argued that any regulatory reform must effectively manage law reform dynamics by addressing competing stakeholder interests and expectations if it is to succeed. The ACT's restorative justice and other initiatives have largely failed to deliver on their considerable promise, because this was not done. As systems theory analysis of the

ACT reforms suggests, attempts to accommodate stakeholder tensions among Indigenous youth offenders, their victims, the affected community and the relevant juvenile justice professionals within the reform process have resulted in those reforms largely being reshaped to suit existing interests and expectations. Despite a patchwork of law reform initiatives seeking to reduce Indigenous re-offending through circle sentencing and mainstreaming restorative justice, the collective effect has not succeeded in helping in any way to address Indigenous over-representation. In drawing on lessons from the experiences in New Zealand's FGC reforms in managing these dynamics, this article has recommended that the first step must be a holistic change of focus in the system to default conferencing.

The ACT's criminal justice system is at an opportune juncture to meet the mounting challenges of Indigenous youth recidivism and over-incarceration, as it prepares to launch a new justice reform strategy over 2014–16 that again highlights restorative options.¹³⁶ It is ripe this time to get it right and to harness measures that the policy urgency of Indigenous recidivism and over-incarceration warrants.

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