
'THE ELDERS KNOW ... THE WHITE MAN DON'T KNOW':

OFFENDERS' VIEWS OF THE NOWRA CIRCLE COURT

by Kathleen Daly and Gitana Proietti-Scifoni

This article highlights the findings from the first in-depth qualitative study of Aboriginal offenders' experiences with Circle Court.¹ Indigenous sentencing courts began in Australia in 1999, and there are more than 50 courts today.² They were established to increase trust between Indigenous people and white justice, and to strengthen Indigenous communities. All courts use Australian criminal law, not customary law; sentence Indigenous people who have pleaded guilty; and involve Elders, although a judicial officer has the final say in sentencing.³ Jurisdictional variation is strongly evident⁴ in how and why each court emerged; the volume of cases and kinds of offences heard; and the number, role, and financial support of the Elders. This article focuses on Circle Courts in New South Wales.

Research in New South Wales comes to differing conclusions about whether Circles reduce re-offending. Fitzgerald's quantitative study, which analysed Circles from 2002 to 2006, shows no differences in time to re-offend for people sentenced in Circle or regular courts.⁵ The Cultural and Indigenous Research Centre's ('CIRCA') qualitative study, which draws on interviews of Elders and court staff, suggests that Circles do reduce re-offending.⁶ We argue that quantitative research on re-offending needs to take a longer term and more holistic perspective. Desistance from crime takes time: it is a process, not an event.⁷ The concept of *pathways towards desistance* is a good way to understand Indigenous pathways into and out of crime.

METHODS

We analysed all the Nowra Circle Court cases for non-family violence offences from February 2002 to May 2005, a total of thirteen cases.⁸ The offences were property-related (theft, damage, break and enter), interpersonal violence, public order, driving-related, and carrying or using weapons.

Magistrate Doug Dick and Project Officer Gail Wallace supported the research; and Uncle Lou Davis, a Nowra Elder, was a paid research assistant. In April 2008, Uncle Lou and the senior author interviewed nine of the thirteen

offenders from the cases in the study: six males and three females, 20 to 45 years old.⁹ They described their experiences in the Circle, gave their views towards the Elders, reasons for post-Circle offending (or not), and hopes for the future. In this article, we draw from the interviews, Wallace's notes on each participant, and the Magistrate's summary of the Circle. Using the court's criminal histories, we assembled a chronology of pre- and post-Circle offending.¹⁰ Post-Circle, five participants did not get into trouble again (*complete desisters*). Five did re-offend, but it was minor or the offending happened a long time or soon after the Circle, and then stopped (*partial desisters*).¹¹ Three continued offending (*persisters*).

BEFORE, DURING AND AFTER THE CIRCLE

BEFORE THE CIRCLE

Traumatic upbringings, including fractured families, parental alcoholism and violence, parental inability to provide care, sexual victimisation, and homelessness were common. All but one participant had been convicted in their teens; alcohol abuse or drug addiction was a significant problem for all thirteen. Of the nine interviewed, all acknowledged that their offending was linked to substance abuse. For example, Darrel¹² said:

I was, like, partying and that back then too ... I used to rock up to the school socials and that drunk. ... We got locked up that night ... Went back to the school the next day or something got kicked out.

Six used heroin or amphetamines to deal with emotional problems. For John, Jackie, and Leena, their drug use was directly related to the death of a parent. John said, 'my father had passed away, and after that I was sort of going backwards with things, with drugs and alcohol and all the rest of it'. Hayley began using heroin when she was 15 years old to deal with depression and painful memories of her life as a child. All the women had been addicted to heroin, but the men more often abused alcohol. Although Darrel admitted he had an alcohol problem, he was also targeted by the police with multiple arrests for trivial street offences: '...the coppers harass me. Like, I was in a bit of shit and that ... so I reckon they just try to get me for anything'.¹³

CIRCLE DYNAMICS

Each Circle begins with a discussion of the offence and the person's circumstances.¹⁴ The Elders emphasise the negative impact of the offence on the offender, victim, and community; and they highlight the importance of family. To John, the Elders said he should be mindful of his family responsibilities. To Gary, an Elder said: 'I know I'm harping on, but you have to say 'no' [to the alcohol]. Look at the stress you place on your father and your girl and your baby'. In Chris' and Jason's Circle, the Elders considered the effect of a prison sentence on children, as this exchange shows:

Elder: Do you want your little fellas [children] coming to jail to visit you, is that what you want? You want them to follow your footsteps; you want them to come to the jail?

Chris: No.

Elder: Then get some self-respect.

To Jackie, the Elders asked what kind of role model she would be for her grandchildren if she continued to use drugs. Although they understood why Jackie began to use drugs, they disapproved of it:

Elder: All this started after your Mum died, didn't it?

Jackie: Yes.

Elder: You shouldn't be using that as an excuse.

Jackie: I know.

The Elders took a balanced approach: they scolded the offending, but supported the Circle participant. An Elder said to Adrian:

You have to make peace with yourself and give up the grog. Reoffending is very bad. You know I got one son who is a real dickhead, and you're the same. We aren't going to be soft on you today. We'll be harsh to straighten you out.

A bit later, another Elder said to Adrian, 'we'll help you, but you'll have to help yourself first'.

IN THE CIRCLE

'When I went in there, I was nervous'

Before the Circle, Michael remembered feeling both nervous and comfortable, his comfort stemming from knowing that the Elders would be there:

When I went in there, I was nervous. I was thinking 'Oh, it should go all right because it's the Elders doing the damage and not the Judge', and I thought whatever outcome, whatever they say, I'm going to do it because I grew up listening to Elders and that, and not being stubborn.

Others said they felt ashamed to face the Elders and were frightened or nervous. Jackie said, 'I remember ... I had

my head down, and I was ashamed because of what I had done, or what they'd [the Elders] think of me'. Harry felt 'nervous' at the prospect of facing his Elders and felt bad because he had 'sort of disrespected the community and the Elders'. On the other hand, Jason was more relaxed going to the Circle than going to court, saying 'I didn't feel scared or anything going in there. It's not like going to a normal court where I am nervous and that before I come in'.

Positive Views

Most were positive about the Circle process (all but Brian and Darrel), and most came away with a positive judgement of the Elders (all but Brian and Jason, who was bothered by what he recalled an Elder saying). The positives most often mentioned were open communication and the Elders.

(a) *'The best thing is to sit and talk to everybody'*

Many spoke affirmatively about the open and honest communication. Leena noted, 'they [the Elders] actually talk to you about why you committed the crime, why you did what you did, and where your head was at'. John said, 'the best thing is to sit and talk to everybody and for everyone to hear what you're going through'. This openness made it possible for the Circle participants to explore the reasons for their offending and to reflect on what they needed to do to change.

(b) *'They know what all us young blokes have been through'*

The Circle participants spoke positively of the Elders' presence, knowledge, and their approach in the Circle. Bev said:

It's done by people that know you [the Elders]. They know your past, they know what you're like, they know what you used to be, you know, what you used to do and that. ... They [court officials] just judge you in there.

Michael felt he was given a second chance because the Elders knew him: 'they was trying to give me another fair go, and not just throwing away the key and putting me in jail ... because they know what all us young blokes have been through'. The Elders drew from shared experiences, and they supported and encouraged the participants toward a path of change.

Negative Views

There were some negative views. Brian felt he had been treated harshly and that the Elders were 'ganging up' on him; he described the Circle as a 'waste of time'. Jason was positive about the Circle process, but remembered feeling hurt when an Elder said 'I don't know for the love of God why you do this. You got demons inside, and you have

to get them out'. Darrel disliked the prosecutor's 'taking over' the process, likening it to a regular courtroom: 'If the prosecutor wasn't there, it would have been all good. Or, like if he would have talked in a different, like, attitude'. Others suggested ways to improve the Circle process. Harry and John wanted better post-Circle follow-up and support, and Leena said there needed to be greater awareness about Circles in the Aboriginal community.

Circle as an 'easy ride'

Seven gave views on the perceived leniency of the Circle process when Uncle Lou asked them if it was an 'easy ride'. Four thought it was not going to be a soft option. For example, Jackie said that the Elders are 'not pushovers ... lots of people think they're a pushover, but they're not ... they're there to help you'. Three thought the Circle was going to be, or had the potential of being, lenient. However, most felt that what occurred in the Circle was far from easy. Chris said:

You think they [the Elders] are going to be on your side because it's black versus white. It was a bit of a shock. I thought if they are saying I am doing wrong, I must be doing wrong.¹⁵

Jason thought the Circle was going to be lenient, but on reflection said 'it wasn't all that easy'.

You can speak ... from your heart'

The participants identified elements in the Circle that show a greater degree of procedural justice (being listened to with respect and having a say) compared to what happens in a regular court. For example, Michael said:

It just doesn't seem right speaking out [in court], speaking out properly in your own words. But around Elders and that, you can speak out and speak from yourself, from your heart, and that, and let them know what's going on, and they can sit down and listen.

John noted that time restrictions in the regular court hindered an exploration of a person's background and reasons for offending. In the Circle, 'it was good for him [the Magistrate] to actually understand the whole background and how it all built up and what was happening and everything else'.

'Circle is only good if you want it to be'

Several noted that a person has to be ready to change and to be helped. John said:

Circle sentence is good, but it's only good if you want it to be ... It's no good going in and saying 'All right, yeah, I've spoken to you guys, I'm off, see you later', then going out and doing something stupid again. You've got to want to do it for yourself and for ... the Elders.

Harry was in his early 20s when he attended a Circle. He believed he was too 'young in the mind' to benefit from the Circle, adding that it 'wasn't the time for me then'.

'[The Elders] are there because they care'

All Circle participants (except one, Brian, who was not from the area) respected the power of their Elders. Leena spoke about the Elders volunteering their time: 'It's got nothing to do with bloody money. These people are there because they care'. She emphasised that the Circle must include the *right* Elders: 'As long as people know the defendant, and they do class the Elders as Aunties and Uncles, it will work'. Project Officer Wallace knows this very well when she contacts people for each Circle, but in Brian's case, the match with the Elders was not successful.

AFTER THE CIRCLE

We consider five factors related to re-offending and desistance: substance abuse, age, family relations, a changed identity, and hope for the future.

All the participants had had problems with alcohol abuse, illegal or prescription drug abuse, or both, which were related to offending. The ability to stop using was important for the five who did not re-offend at all (complete desisters); and it was evident for two partial desisters (Chris and Leena). For the other partial desisters, there were periods of responsible drinking and driving, and not then doing so. The three persisters were unable to stop or reduce their substance use.

Age is related to drug use and desistance from crime. At the time of the Circle, desisters were, on average, the oldest (37 years) compared to the partial desisters (26 years) and persisters (21.5 years). Desisters John and Bev explicitly discussed their age as a factor. John wanted to put his drug-taking lifestyle behind him, and Bev said she 'just got sick of going to jail. Like, you know, I feel like part of the furniture after a while'.

Maintaining and improving family relationships was important to complete or partial desistance. Bev said that relationships with her mother and children helped to change her life. Similarly, Jackie said: 'things that changed me ... had a lot to do with my family ... we're really close'. Partial desisters Darrel, Leena, and Jason spoke of trying to stay out of trouble because they wanted to be better parents. For example, Darrell said: 'I snapped out of it [offending] probably because [of] the little lad [my son]'.

In different ways, all Circle participants said they had become a better, different, or more mature person than

the one in the Circle. A strong sense of a 'new me' was evident for desisters Jackie and John.¹⁶ Both spoke of their previous drug-using history. For example, Jackie felt guilty for being a drug-using mother, but now, she cannot recognise herself as 'the drug addict person ... I can't even fathom her'.

Looking to the future, the Circle participants wanted to establish, maintain, or strengthen family relationships; to have independent and stable housing and a secure job, and for some, a desire to return to school. All had a 'sense of hope'¹⁷ that their future could improve, although some expressed worries about getting good housing or a job in light of their criminal history.

DISCUSSION

This article sketched the Nowra Circle Court from the perspective of offenders. Their experiences are positive: compared to regular courts, there is greater informality, more open information sharing, welcome change in white-Indigenous power relations, a meaningful and constructive censuring process, and sentencing outcomes that balance punishment and rehabilitation. For most, the Circle was a deep, emotional, and spiritual experience mainly because the Elders were there. The Elders knew them and could be tough on them, but they were also encouraging and supportive. Like the Cultural and Indigenous Research Centre ('CIRCA'), our study finds that the process-oriented objectives of the Circle Sentencing legislation¹⁸ are being met in the Nowra Circle Court.

We explored the relationship of Circle Court experiences to re-offending. Almost all Circle participants—including the persisters—had highly positive views about the Circle and the Elders. Thus, if there was re-offending, it was related to life circumstances, not Circle experiences. Our analysis of criminal histories over a long period of time reveals a key finding: there is a third group of offenders, the partial desisters. Their post-Circle offending was minor, it occurred a long time after the Circle, or it occurred soon after the Circle, but then stopped. This group enjoyed long periods of time that were arrest-free. Thus, they should be viewed as 'success stories', not as 'recidivists'.

The third group of partial desisters challenges the findings from conventional quantitative analyses of re-offending, which use dichotomous measures (re-offended, yes or no) or time to first offence. Awareness of this group may also reconcile the literature on the impact of Circles for reducing re-offending.¹⁹ We suspect that CIRCA study participants had both the complete and partial desisters

in mind when evaluating the Circle's ability to reduce re-offending.²⁰

There is an age-based pattern to desistance and readiness to change. The complete desisters were older, said they were 'sick' of prison, wanted to stop using illegal drugs, and to drink alcohol more responsibly. The partial desisters, although on a desistance pathway, struggled to maintain a 'drift toward conformity'.²¹ The persisters, the youngest group, continued offending or were in prison at the time of the research. Although re-offending studies typically rely on quantitative methods alone, we urge greater use of qualitative methods. These offer greater depth and a more accurate understanding of the complex patterns of pathways into and out of crime.

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- 1 For the full study, see Kathleen Daly and Gitana Proietti-Scifoni, *Defendants in the Circle: Nowra Circle Court, the Presence and Impact of Elders, and Re-Offending* (2009) Brisbane: Griffith University.
- 2 Elena Marchetti, 'Indigenous Sentencing Courts', Brief 5 (2009) Indigenous Justice Clearinghouse <<http://indigenousjustice.gov.au/briefs/brief005.pdf>>.
- 3 For a comprehensive overview, see Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review* 415.
- 4 See, eg, *ibid*, 430-438.
- 5 Jacqueline Fitzgerald, 'Does Circle Sentencing Reduce Aboriginal Offending?' (2008) 115 *Crime and Justice Bulletin*.
- 6 Cultural and Indigenous Research Centre (CIRCA), *Evaluation of Circle Sentencing Program – Report* (2008).
- 7 See, eg, Tony Bottoms, Joanna Shapland, Andrew Costello, Deborah Holmes, and Grant Muir, 'Desistance and Social Marginalization: The Case of Aboriginal Offenders' (2004) 13 *Theoretical Criminology* 61; Stephen Farrall and Shadd Maruna, 'Desistance-Focused Criminal Justice Policy Research: Introduction to a Special Issue on Desistance From Crime and Public Policy' (2004) 43 *Howard Journal of Criminal Justice* 358; Mark Halsey, 'Assembling Recidivism: The Promise and Contingencies of Post-Release Life' (2008) 97 *Journal of Criminal Law and Criminology* 1207.
- 8 Some of these cases are also considered in Ivan Potas, Jane Smart, Georgia Brignell, Brendan Thomas and Rowena Lawrie, *Circle Sentencing in NSW: A Review and Evaluation* (2003). In this paper, we do not review this research; please refer to Daly and Proietti-Scifoni, above n 1.

- 9 Two declined the interview, one could not be located, and one had died.
- 10 Daly and Proietti-Scifoni above n 1, 25-32, 35-39.
- 11 This category emerged from our understanding of the desistance literature; see above n 7.
- 12 Pseudonyms are used.
- 13 This approach to policing in Aboriginal communities, where individuals are selectively targeted for street offences is well known. See, eg, Chris Cunneen, *Conflict, Politics and Crime* (2001).
- 14 See Gail Wallace, 'Nowra Circle Sentencing: Seven Years Down the Track' (2010) 7 *Indigenous Law Bulletin* 13.
- 15 This comes from Michael Pelly, 'The Circle of Shame Gives Lives a Turn for the Better', *Sydney Morning Herald* (29 October 2003), 1.
- 16 Shadd Maruna, 'Desistance from Crime' in Eugene McLaughlin and John Muncie (eds), *the Sage Dictionary of Criminology* (2nd ed, 2006), 122.
- 17 Halsey, above n 7, 1214.
- 18 CIRCA, above n 6; NSW *Criminal Procedure Regulation* (2005) sch 4.
- 19 Fitzgerald, above n 5; CIRCA, above n 6.
- 20 CIRCA, above n 6.
- 21 Bottoms et al., above n 7, 383.

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