

## ***Sentencing Aboriginal Offenders: The Future of Indigenous Justice Models***

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At the end of the 20th century, Australia's first Aboriginal court was established to sentence indigenous offenders. Over the last 6 years, a number of different courts, in most of our States and Territories, have become operational. While their style and set up differs to accommodate the interests of the local community, the broader aims are the same - to create a distinct culturally appropriate tribunal in which to sentence indigenous offenders, that will increase the involvement of the offender and the local community in the decision making process. The primary purpose of this paper is to explore two existing indigenous justice models - Aboriginal Courts and circle sentencing courts - and to suggest ways in which they may be expanded in the future, both geographically and in scope.

Every incentive exists to encourage Australian Governments to support alternative court models for indigenous offenders. It is a bleak indictment of the Australian criminal justice system that in 2005, 14 years after the Royal Commission reported into the deaths of Aboriginal and Torres Strait Islanders in custody, indigenous Australians are still massively over-represented in our prison population. Despite the fact that indigenous adults represent less than 2% of the total population of Australia, approximately 21% of the prison population are indigenous<sup>1</sup>. The figures are even more disturbing for juveniles - 47% of the total number of persons detained in a juvenile detention centre are indigenous<sup>2</sup>. Following European settlement in 1788, law enforcement and judicial officers were instrumental in imposing a discriminatory system of punishment and regulation<sup>3</sup>. Recent riots between police and the members of the Aboriginal community<sup>4</sup> in different locations around Australia are ample evidence that serious tensions remain. They should encourage decision makers to

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<sup>1</sup> These statistics are the most current in Australia and relate to a survey conducted in 2003 by the Australian Institute of Criminology. In 2003 Indigenous prisoners comprised 21% of the total prisoner population, an increase from 14% of the population in 1992. See "Facts and Figures 2004", Canberra: Australian Institute of Criminology, 2005; ISSN 1832-228X; ISBN 0 642 53869 7.

<sup>2</sup> *Ibid.*

<sup>3</sup> Much has been written by Australian scholars on the use of law to subjugate and oppress indigenous communities. See further, for example, C Cunneen and T Libesman (1995), *Indigenous people and the Law in Australia*, Butterworths, Sydney; B Attwood (2003), *Rights for Aborigines*, Allen & Unwin, Sydney and Human Rights and Equal Opportunities Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, (1996) Sydney.

<sup>4</sup> For example, recent riots between police and the Aboriginal community of Redfern in February 2004 following the death of Thomas Hickey that month, and riots in January 2005, in protest at the death of Cameron Mulrunji in November 2004 on Palm Island.

support alternative court structures that will foster respect for the legal system and may ultimately reduce criminal behaviour.

### **Terminology**

In an effort to explain the impetus for and aims of the models for sentencing of indigenous offenders, some commentators have classified them as a form of therapeutic or restorative justice, or even as one of a number of “problem solving courts” that have emerged in recent years. While it does no harm to recognise some of the similarities involved in recent innovations, the indigenous court structures defy classification into existing models and must be recognised as having a unique place in the Australia criminal justice system. This paper adopts the suggestion put forward by Professor Daly, that we recognise a separate classification for models of “indigenous justice”<sup>5</sup>. Like restorative justice, indigenous justice practices aim to recognise the harm to the victim and the broader community that is caused by the commission of crime. Furthermore, there is a move away from the theme of retribution and an emphasis on the relationship between a number of individuals affected by the crime - victim, members of family, offender, and the broader community. Indigenous justice models, however, are focused much more on the actual offender than other forms of restorative justice. Although the victim is a welcome and respected participant, the success of the process is not contingent on whether the victim is satisfied with the outcome.

It is even more parlous to place indigenous models of justice under the umbrella of “problem-solving” or therapeutic justice. In detailing recent “innovations”, Frieberg includes the indigenous models as one example of a significant number of problem solving or problem-oriented courts<sup>6</sup>. His other examples are the drug courts, a form of therapeutic justice based on US models and introduced in Australia in the late 1990s, specialist domestic violence courts and the South Australian diversion court dealing with mentally ill offenders. Yet aboriginality is not a ‘problem’ in need of an innovative solution. It should not to be focused on and dealt with as such. To Berman and Feinblatt, a problem solving court is one which seeks “to use the authority of the courts to address the underlying problems of individual litigants, the structural problems of the justice system, and the social problems of communities”<sup>7</sup>. When that definition is adopted one can see why indigenous courts are placed under this banner. Care must be taken, however, in embracing the label of problem solving courts, so that indigenous offenders themselves are not labelled “problematic”.

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<sup>5</sup> Professor Kathleen Daly is critical of the description of Aboriginal Courts and circle sentencing as a form of restorative justice. In a recent paper, she refers to three distinct categories - therapeutic justice, restorative justice and indigenous justice. See K Daly, “Seeking Justice in the 21<sup>st</sup> Century: The Contested Politics of Race and Gender”, *Professorial Lecture*, 21 April 2005, Griffith University.

<sup>6</sup> Later in his paper Frieberg acknowledges that indigenous courts are not problem-solving courts in the strict sense, but rather can be conceived of as specialist courts “with some problem-solving and therapeutic overtones”. See A Frieberg, “Innovations in the Court System”, Paper presented at Crime in Australia: international connections, Melbourne, 29-30 November 2004.

<sup>7</sup> G Berman and J Feinblatt, “Problem-Solving Courts: A Brief Primer”, (2001) 23 Law and Policy 125, as cited in A Frieberg, above.

Although it is useful to refer to terms like “indigenous justice practices” or “indigenous sentencing models” to classify modern Aboriginal courts and circle sentencing, it must be recognised that for as long as indigenous peoples have inhabited Australia there has existed a body of customary laws to govern distinct communities. While in urban areas, few if any of the traditional laws are relevant, in many more remote communities customary law is regularly practised. This remains the case despite the decision of the High Court in *Walker v New South Wales* that Australian criminal law can not accommodate an alternative body of law operating alongside it<sup>8</sup>. Further discussion of the nature of Aboriginal customary law and the virtues of continued recognition is beyond the scope of this paper and there exists a significant body of literature in the area<sup>9</sup>. It should be recognised that the modern sentencing practices discussed here do not seek to accommodate traditional customary law. Yet they do to some extent incorporate aspects of traditional sentencing by drawing on the experience of respected Elders, shaming participants and involving the community in supervising those who transgress acceptable rules of behaviour.

### **The spread of indigenous sentencing courts**

In 5 of the 6 States in Australia, and in the Northern Territory, some form of indigenous courts or circles have been introduced over the last 6 years. Table 1 lists the number and location of indigenous sentencing courts that have been established in Australia to date.

### **Objectives**

An overview of the existing literature on indigenous courts and circle sentencing reveals that all models share the following broad objectives.

- To increase the rate of attendance of indigenous offenders at court.
- To reduce the number of court orders that are breached by indigenous offenders.

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<sup>8</sup> *Walker v New South Wales* (1994) 69 ALJR 111 at 111. In that case it was urged by the Plaintiff that the 1992 decision of *Mabo v Queensland (No 2)* (1992) 175 CLR 1, providing for recognition that native title law existed to govern land rights in Australia prior to European settlement, meant that the Courts should recognise a pre-existing body of law to govern criminal activity, that could only be extinguished if legislation specifically provided that it should be. In rejecting the argument, Mason J, stated as follows: “*In Mabo (No 2), the Court held that there was no inconsistency between native title being held by people of Aboriginal descent and the underlying radical title being vested in the Crown. There is no analogy with the criminal law. English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it.*”

<sup>9</sup> See G Zdenkowski, “Customary Punishment and Pragmatism: Some Unresolved Dilemmas” (1994), 3(68) *Aboriginal Law Bulletin*, 26-27; Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC, 31 (1986), Vol 1; New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, (2000) Report No 96. There are also numerous cases where customary law has been accommodated. See, for example, *Wilson Jagamara Walker*, Supreme Court of the Northern Territory, Unreported, 10 February 1994, per Martin CJ; *Rogers v Murray* (1989) 44 A Crim R 301; *Juli* (1990) 50 A Crim R 31 and, more recently, the controversial decision of *Hales v Jamilmira* [2003] NTCA 9.

- To increase awareness amongst the indigenous community about type and levels of offending.
- To explore all sentencing options, with imprisonment as a last resort.
- To involve victims and the community in the sentencing process.
- To use the courts as a gateway for offenders to gain treatment for identified problems linked to offending.
- To provide a more culturally appropriate setting than is available in mainstream courts.
- To increase the confidence of Aboriginal communities in the sentencing process.

And more ambitiously:

- To redress the massive overrepresentation of indigenous offenders in the prison population.
- To reduce the number of Aboriginal and Torres Strait Islander deaths in Custody.
- To decrease the rate of recidivism amongst indigenous offenders.

### **The Nunga Court**

The first Aboriginal Court was opened in the South Australian town of Port Adelaide in 1999. The initiative for the Court came from Magistrate Chris Vass who worked with local Aboriginal community groups and other interested parties including Aboriginal legal aid (Aboriginal Legal Rights Movement), police prosecutors and Government agencies<sup>10</sup>. Those who participated in the discussions articulated concerns that had long been obvious - that Aboriginal people feel a deep mistrust of the justice system, including the courts, feel alienated by formal practices and consider most proceedings to be culturally inappropriate. Some individuals articulated a concern that participants often fail to understand the proceedings and are silenced by the European adversarial system, where lawyers attempt to express things on their behalf.

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<sup>10</sup> J Tomaino, "Aboriginal (Nunga) Courts, *Information Bulletin*, No 39, 2005, Government of South Australia, Office of Crime Statistics and Research. The history of the court tells an important story of how valuable individual members of the judiciary can be in introducing reforms. At the time he advocated for the Nunga Court, Chris Vass was a member of the Judicial Aboriginal Cultural Awareness Program and the Regional Manager of the Port Adelaide Magistrates Court and its circuits, including the Anunga Pitjantjatjara Lands.

In response, a sentencing court specifically for Aboriginal offenders was established. The Nunga Court, as it is termed by the local Aboriginal community<sup>11</sup>, convenes once a fortnight to sentence adult Aboriginal offenders in the Port Adelaide Magistrates Court, and sits monthly in courts at Murray Bridge and Port Augusta. To be eligible, offenders must have pleaded guilty and must be located roughly in geographical areas serviced by the courts.

One of the most basic but fundamental characteristics of the Nunga court is the informal set up of the sentencing venue. First, all parties, including the Magistrate are seated at the same level. The significance of an informal arrangement for the Court was well expressed by Magistrate Vass, who explained it as follows:

*“You gain respect from what you do rather than where you sit or how many wigs and gowns you wear ... The first thing I did was get off the bench ... They weren't too keen on a white guy sitting up on a throne like a king, so I sat down on the other side of the bench where the court reporter generally sits, virtually at eye level... And I wanted to get rid of the standing ... What I wanted to introduce was the ability for the accused to be able to speak ... I also wanted to include groups that could include alternatives to imprisonment, provide sentencing options ... People from government and non-government programs are able to sit in the court and speak and say, ‘Well, this is what I can do for this person’”<sup>12</sup>.*

As outlined above, other trappings of a traditional court, including wigs and robes, are removed in order to make the process less culturally distant.

The most significant feature of the Nunga court is the central role played by the local indigenous community. Firstly, an Aboriginal Elder or Respected Person is seated beside the magistrate to advise the court on issues relevant to the particular community. Second, relatives of the offender and other members of the local Aboriginal community are invited to attend. Given the importance of kinship and extended familial relationships in indigenous culture<sup>13</sup>, the aim is for the offender to make promises in front of people they respect, many of whom will be in a position to offer assistance. Third, Aboriginal Justice Officers are employed by the Court to assist the magistrate with administration and to answer the queries of participants. Again, the aim is to establish an environment that is less culturally alienating and provides a contrast to the traditional setting where courts staffed by non-indigenous Australians deliver justice to Aboriginal offenders who feel disconnected from the surroundings.

A significant body of information is put before the Court by different organisations in the local community. Reports are prepared detailing the participant's individual needs and identifying any issues that put them at risk of re-offending. Both government and

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<sup>11</sup> There are numerous indigenous communities throughout Australia with distinct names and a traditional dialect. While traditional communities do not fit neatly into State and territory boundaries, it is generally accepted that in South Australia, indigenous Australians are referred to as “Nungas”, in Queensland as “Murri” and in New South Wales as “Koori”.

<sup>12</sup> J Tomaino, “Aboriginal (Nunga) Courts, *Information Bulletin*, No 39, 2005, Government of South Australia, Office of Crime Statistics and Research.

<sup>13</sup> *Ibid.*

non-government agencies can attend sentencing and often provide the Court with information on the type of support available and the willingness of the offender to access what has been offered. In this way, the judicial officer is given a deeper understanding of both the individual before them, and issues in the broader Aboriginal community that might impact on offending. They are also made aware of what support is available to assist with rehabilitation of the offender.

It is anticipated that as a result of the flow of information between participants, a level of understanding and respect will develop between judicial officers and the local community. Clearly this depends largely on the personalities involved and care must be taken to choose judicial officers who are committed to the Nunga court scheme.

### **Evaluation of the Nunga Court**

An early evaluation of the South Australian Nunga Courts is extremely positive. It seems clear that in the first few years of the Court's operations the aim of improving Aboriginal attendance rates was achieved<sup>14</sup>. It is probable that this resulted in a reduction in the number of arrest warrants issued and the number of indigenous participants that would have been held in custody as a result. There is a need for ongoing, and more thorough evaluation to take place to determine whether the project continues to meet the communities needs, and whether some of the more ambitious objectives can realistically be achieved.

### **Circle Sentencing**

A very different model, with corresponding objectives, is the circle sentencing court. The modern concept of circle sentencing was developed in Canada and first trialed in 1992 in the Yukon Territory of the north west<sup>15</sup>. The practice has since been adapted to suit the needs of a number of Aboriginal communities throughout Canada, particularly in the Yukon and in the province of Saskatchewan. In February 2002, in the small New South Wales town of Nowra, the first Australian circle sentencing court convened.

In contrast to the Nunga Court model described above, the circle sentencing court does not sit in the local Magistrates' court, but in a location that is more culturally suited to the offender and the indigenous community participating in the process. A significant number of people sit within the circle - four community Elders, the magistrate, the offender, a support person for the offender, the victim, a support person for the victim, the Aboriginal Project Officer<sup>16</sup>, defence lawyer and prosecutor<sup>17</sup>.

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<sup>14</sup> *Ibid.*

<sup>15</sup> As was the case in South Australia, circle sentencing was introduced at the urging of a particular justice (Judge Barry Stuart of the Yukon Territorial Court), in co-operation with various local communities (in Canada, a number of the First Nation Communities in the Yukon Territory). See L McNamara, "Indigenous Community Participation in the Sentencing of Criminal Offenders: Circle Sentencing", *Indigenous Law Bulletin*, 2000, 29.

<sup>16</sup> The Aboriginal Project Officer is employed by the Aboriginal Justice Advisory Committee to manage the local proceedings. They play a crucial role in assisting the magistrate and the Aboriginal Community Justice Group (a body of respected indigenous people established to

In ordinary local court proceedings, a fact sheet and criminal history would be presented to the magistrate, the defence lawyer would submit (usually briefly) on the objective seriousness of the offence and the offender's subjectives, and the magistrate would proceed to sentence. The process operating in the circle court is in stark contrast. First, a document is prepared by the magistrate which outlines the offence and any relevant information about the offender's background. Following this, every member of the circle has the opportunity to comment on the offence itself, what they know of the offender, and what issues in the community may be relevant to the offending behaviour. Both the offender and victim are actively involved in the process. The offender has the opportunity to explain their wrongdoing, and to apologise to the victim for the harm caused. Other community members are invited to express their feelings to the offender and to provide the magistrate with any information they feel is relevant.

At the end of this process, the circle members decide on a sentencing plan which is appropriate for the particular offence and the individual perpetrator. Members of the indigenous community may offer to assist the offender to attend particular programs (e.g. drugs and alcohol, anger management, cultural awareness), or to offer other forms of encouragement. Several months later, the circle reconvenes to assess the offender's progress and their commitment to the sentencing plan.

Not all indigenous offenders are eligible to be sentenced by the circle. As outlined below, offenders charged with strictly indictable offences, sex offences, and certain indictable drug offences, must remain to be dealt with by the regular court process, and would in any event, usually appear for sentence at the District Court. On the other hand, first time offenders and those charged with minor matters are not likely to be chosen for the circle<sup>18</sup>. The aim is to target recidivist offenders who are likely to receive a custodial sentence. This is in recognition that regular local courts and the usual condign punishments have had little impact, and an alternative model of sentencing may prove more meaningful. When the offender first appears before the Court, the magistrate undertakes an initial review to determine suitability. Those candidates then appear before the Aboriginal Community Justice Group (made up of respected community members) which makes the ultimate decision about whether the offender is suitable.

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oversee the process) to establish and manage the process. Responsibilities include establishing the Aboriginal Community Justice Group and contacting them about offenders, contacting the victim and offender and informing them about the process, contacting interested community members and attending to follow up requested during the circle sentencing process. See I Potas et al, *Circle Sentencing in New South Wales; A review and evaluation*, Judicial Commission of New South Wales and Aboriginal Justice Advisory Council (2003).

<sup>17</sup> E Marchetti and K Daly, "Indigenous Courts and Justice Practices in Australia", *Trends and Issues in Criminal Justice*, AIC, No 277, May 2004, p 3.

<sup>18</sup> *Ibid.* For a further discussion of the eligibility criteria used to determine participants, see I Potas et al, *Circle Sentencing in New South Wales; A review and evaluation*, Judicial Commission of New South Wales and Aboriginal Justice Advisory Council (2003) at p 6.

## **Comparing the Nunga Court and circle sentencing process**

While the objectives of the two models are the same, there are significant differences between the Nunga Court and a sentencing circle that must be considered before a model is chosen to suit a particular community. One obvious difference is that the South Australian Nunga courts are set up to deal with a much greater number of offenders. While the Nowra circle court usually considers only one offender at each session, and convenes on a fortnightly basis, the Port Adelaide Nunga Court sits two to three times per month and may sentence between eight and 12 people per day. In South Australia, a greater number will be eligible to be dealt with by the indigenous court, since there are no limits on the type of offences that can be dealt with, and no eligibility test that focuses on recidivists at risk of incarceration. Practices must be different in the Nunga Court system in order to accommodate the higher number of participants. In contrast to the circle sentencing model, there are no discussions prior to the court date on an appropriate sentencing plan, and no written reports are necessarily prepared.

Other differences are obvious in the lay out and operation of the courts. While the sentencing circles are closed courts (permission from both the magistrate and the elders is required before observers can view the sentencing process by sitting outside the circle<sup>19</sup>), Nunga courts are open to the public. Sentencing circles are convened in places other than a court room, while Nunga courts operate as an indigenous court within a regular court house. Certainly there is less formality in the Nunga court than in a regular court room. There are more indigenous staff and importantly, offenders and the magistrates sit at eye level. In a Nunga court, however, persons relevant to the sentencing process sit across tables rather than in a circle. Thus, it is the circle sentencing model that moves the furthest away from traditional court room practice.

## **Evaluation of the Nowra sentencing circle**

A thorough and formal evaluation of the Nowra sentencing circle conducted during the first 12 months of operation was extremely positive and provided significant support for an expansion of the scheme. The New South Wales Judicial Commission assessed 13 matters that had been dealt with by the sentencing circle between 5 February 2002 and 4 March 2003<sup>20</sup>. Eight of the offenders pleaded guilty to driving offences (driving under the influence), 7 of the offenders to violent offences (including resist arrest, assault police and common assault), and 4 to property offences (including break, enter and steal and malicious damage). Offender, victims, the magistrate, lawyers and indigenous participants were all interviewed about their experiences and follow up was undertaken to assess rates of re-offending.

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<sup>19</sup> E Marchetti and K Daly, "Indigenous Courts and Justice Practices in Australia", *Trends and Issues in Criminal Justice*, AIC, No 277, May 2004, p 3.

<sup>20</sup> I Potas et al, *Circle Sentencing in New South Wales; A review and evaluation*, Judicial Commission of New South Wales and Aboriginal Justice Advisory Council (2003). Each of these cases is assessed in considerable detail in this published monograph. Offenders, victims and circle participants were interviewed and their attitudes to the process are recorded.

The evaluation suggests that even at this early stage, it is possible to conclude that the more modest objectives of the indigenous sentencing process have been met. The key findings were that:

- Generally, offenders considered that they were given more respect and treated more fairly by the sentencing circle.
- The majority of victims also felt that they were heard throughout the sentence were respected and supported.
- Community members reported feeling a strong sense of empowerment throughout the process and considered the sentencing circle a means by which the community could be strengthened.
- With the exception of one participant, the participants did not re-offend during the 12 months of the evaluation. Given that all had a criminal history, and some of them had repeatedly offended in recent years, this is a remarkable outcome.

Interestingly, the one offender who was dissatisfied with the circle sentencing process, and thought he would have been better off in a regular court setting, did not belong to the local Aboriginal community of Nowra. The offender considered that the indigenous participants did not show him respect and at one point he asked an Aboriginal elder to “stop talking down to him”<sup>21</sup>. The participant committed further offences after the sentencing process and it is clear that none of the sentencing objectives were achieved. This story provides a useful note of caution for future circles. Offenders are less likely to have respect for Aboriginal Elders and community members that they do not know and trust, but equally, the Elders and community members are likely to be less willing to invest in someone they have no particular knowledge of. Thus, there may be little point in referring an Aboriginal offender to a circle court where they have no connection to the local community.

In 2004, circle sentencing courts began operation in the New South Wales towns of Dubbo, Walgett and Brewarrina. Each of these is a rural area with a significant indigenous population, and a history of conflict between police and the local Aboriginal community. The NSW Government plans to further expand circle sentencing to the towns of Bourke, Lismore and Armidale, and into Western Sydney<sup>22</sup>. It will be imperative that evaluations are carried out on each of these circle courts to ensure that the needs of these very diverse communities are being met.

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<sup>21</sup> I Potas et al, *Circle Sentencing in New South Wales; A review and evaluation*, Judicial Commission of New South Wales and Aboriginal Justice Advisory Council (2003).

<sup>22</sup> “Partners in Crime Prevention”, *Newsletter of the Crime Prevention Division of the NSW Attorney Generals*, April/May 2005.

### Limits on offences that can be dealt

In the States of South Australia and Queensland, no limits are placed on the type of offences that can be dealt with. In New South Wales, however, a sentencing circle can not accept an offender charged with strictly indictable offences, sex offences, and certain indictable drug offences. Similarly, Victorian Koori Courts cannot impose sentences where sexual or family violence is involved<sup>23</sup>. There are obvious reasons for limiting the use of indigenous justice models where there is a risk that the victims of serious crime will be further victimised and subjected to undue pressure. This is even more pertinent where family violence is involved<sup>24</sup>. It may be, however, that the community would be well served by ensuring that the perpetrator's of violent crime face a tribunal that includes respected elders and members of their Aboriginal community. Further evaluation of individual models is required to determine the dangers involved in expanding the jurisdiction of the courts, and the interests of each community would have to be canvassed before an expanded jurisdiction be contemplated.

### Future of indigenous justice

Given the positive early evaluations of Australian indigenous courts and circle sentencing, there is every reason for our State and Federal Governments, and the broader community, to support the expansion of relevant models throughout the country. Thirteen years after circle sentencing was first introduced in Canada, it was described by the Chief Justice of the Saskatchewan Court of Appeal as "*part of the fabric of our system of criminal justice and ... a recognised and accepted procedure*"<sup>25</sup>. It is to be hoped that by 2010, the Australian judiciary will describe indigenous models of justice as an important part of the fabric of our criminal justice. More importantly, it is hoped that the indigenous communities they serve will regard them as a means by which participants and their local communities can achieve just sentencing results.

Since 1999, a number of Aboriginal courts and circle sentencing models have been introduced to cater for indigenous communities that are quite distinct, both socially and culturally. In urban, rural and remote communities, courts and circles appear to have been adapted to accommodate the needs of the local Aboriginal population. It should never be forgotten that the success of any model of indigenous justice is dependent upon the indigenous community being willing and able to participate in the initial sentencing process **and** to commit to the follow up supervision and support of participants. To this end, Governments must adequately invest in funding for ongoing training, resourcing and evaluation of the local projects, and, critically, that

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<sup>23</sup> See E Marchetti and K Daly, "Indigenous Courts and Justice Practices in Australia", Trends and Issues in Crime and Criminal Justice, No 277, May 2004, AIC.

<sup>24</sup> A significant number of academics have written of the dangers of restorative justice models that involve the victim confronting the perpetrator of a violent crime. See, for example, D Schmid, "Restorative Justice: A New Paradigm For Criminal Justice Policy", *Victoria University of Wellington Law Review*, 2003, No 4.

<sup>25</sup> Chief Justice Bayda in *R v Morin* (1995) 4 CNLR 37 at 86, 69, cited in L McNamara, "Indigenous Community Participation in the Sentencing of Criminal Offenders: Circle Sentencing", *Indigenous Law Bulletin*, 2000, 29.

commitment must not hinge upon the political whim of the party in power, and must not be modified in the light of the bureaucratic efficiency drives that have disabled many worthwhile community projects.

For many of those interested in improving access to justice for indigenous Australians, Aboriginal courts and circle sentencing should be one stage in a broader movement towards greater self determination. Magistrate Chris Vass, who was so crucial in establishing the South Australian Nunga Courts, has joined those who voice their concern that the indigenous justice models trialed to date are still presided over by a white decision maker. In his words:

*“The first thing that has to happen is you’ve got to get rid of me. You’ve got to get rid of whitefella judges and magistrates; you don’t really want them in this system”<sup>26</sup>.*

Given the lack of indigenous Australians currently in judicial positions in New South<sup>27</sup>, Governments would have to work extremely hard to embrace the challenge of appointing an independent indigenous judiciary to preside over indigenous sentence proceedings.

The Royal Commission, reporting in 1991, wrote in strong terms that reform of the legal system required non-indigenous decision makers to relinquish some of the decision making power to indigenous communities.

*“But running through all the proposals for the elimination of these disadvantages is the proposition that Aboriginal people have for two hundred years been dominated by an extraordinary degree by the non-Aboriginal society and that the disadvantage is the product of that domination. The thrust of this report is that the elimination of disadvantage requires an end of the domination and an empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands”.*

Surely one of the most valuable aspects of the indigenous justice models outlined here is the empowerment of the local community in the decision making process. At this stage it is difficult to imagine that our politicians would ever countenance a full transfer of sentencing powers to indigenous leaders presiding over circle sentencing and Aboriginal courts. It will probably always be the case that an appeal from their sentencing decision will be heard by a white judicial officer higher up the *stare decisis* ladder. Nevertheless, indigenous sentencing models have been embraced by the local Aboriginal communities they serve. They represent a determined effort by a number of highly motivated agitators to move towards a sentencing process that offers real justice for indigenous offenders.

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<sup>26</sup> C Vass, (2002) speech delivered at the Indigenous Governance Conference, Reconciliation Australia Organisation, Session 7, 4 April, cited in J Tomaino, above, p 11.

<sup>27</sup> At present, the only indigenous member of the New South Wales judiciary is Magistrate Pat O’Shane. Earlier this year, many members of the indigenous and non-indigenous communities mourned the passing of District Court Judge Bob Bellea, the only Aboriginal person ever to have been appointed to the District court bench in New South Wales.

**Table 1: Indigenous courts and circle sentencing in Australia**

Jurisdiction	Locality	Name of Court	Type of court	Date Established
New South Wales	Nowra	Circle Court	Circle sentencing courts	Feb 2002
	Dubbo	Circle Court		August 2003
	Walgett	Circle Court		May 2005
	Brewarrina	Circle Court		May 2005
Queensland	Brisbane	Murri Court	Aboriginal Courts	August 2002
	Rock-hampton	Murri Court		June 2003
South Australia	Port Adelaide	Nunga Court	Aboriginal Courts	June 1999
	Murray Bridge	Nunga Court		Jan 2001
	Port Augusta	Special Aboriginal Court		July 2001
	Port Augusta	Youth Aboriginal Court		May 2003
	Ceduna	Aboriginal Court		July 2003
Victoria	Shepparton	Koori Court	Aboriginal courts	May 2003
	Broad-meadows	Koori Court		June 2004
Western Australia	Wiluna	Nunga Court	Aboriginal courts	May 2003
	Geraldton	Geraldton Alternative Sentencing Regime		
	Yandeyarra	Yandeyarra Court		
Northern Territory	Darwin	The Community Court	Circle sentencing	May 2005

## **Table 2 - Features of the South Australian Nunga Court**

- ◆ All parties, including the Magistrate are seated at the same level, and seated close to each other so as to break down traditional barriers to communication.
- ◆ The magistrate sits with at least one respected member of the local Aboriginal community who can provide advice on a number of relevant issues.
- ◆ The courts are largely offender focused, and much time is spent discussing the particular of offender and plans to improve their future.
- ◆ Relatives of the offender and the members of the broader indigenous community are invited to attend to hear the undertakings made by a participant.
- ◆ A number of reports are gathered to assist the magistrate in formulating a sentence plan. These may include reports on the way the offender has behaved on bail, available resources and the individual participant's response to help offered to them to date.
- ◆ A number of government and non-government agencies may attend to advise on what assistance is available to the offender after sentence.
- ◆ Magistrates are trained to respond in a culturally appropriate way and aim to develop a positive relationship with the indigenous people assisting the court.
- ◆ Courts are open to the public, as with regular Magistrates Court

**Table 2 - Features of the Nowra Circle Sentencing Court**

❖ Sits in location culturally suited to participants, not in Magistrate's Court.
❖ Participants sit in a circle, rather than across tables.
❖ Four community elders sit within circle to advise Magistrate and communicate with offender.
❖ Victim, and victim's support person, are invited to attend and participate.
❖ Aboriginal Project officer appointed to assist with administration of circles and facilitating sentencing on the day.
❖ Document prepared by Magistrate outlining offence and relevant subjectives of the offender.
❖ Sentencing plan is developed and circle reconvenes several months later to check progress of offender.
❖ Courts are closed to the public. Special permission needed to sit outside circle to observe.

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