Giving Victims of Intimate Partner Violence Offences a Voice in Indigenous Sentencing Courts

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I INTRODUCTION

For approximately 15 years, Indigenous sentencing courts[1] have been providing an avenue for Indigenous offenders, communities, and in some cases, victims, to have a greater voice in the sentencing process. Elders or Community Representatives work together with a judicial officer in understanding an offender's behaviour, and in determining what penalty should be imposed to not only punish the offender but to assist in their rehabilitation.[2] In most jurisdictions, breaches of family and domestic violence orders can be referred for sentencing in an Indigenous sentencing court.[3] Feminist scholars have argued that the presence of gendered power imbalances in hearings concerning family and domestic violence make alternative justice processes, that are often less formal than a conventional justice process, unsuitable for victim participation.[4] Despite these views, research has found that Indigenous sentencing courts, while not well-equipped to eradicate the presence of power imbalances between an offender and victim, do attempt to address imbalances of power through 'shaming' the offender in cultural-

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1. The term 'Indigenous sentencing courts' is commonly used to collectively refer to courts that include the participation of Elders and Community Representatives in the sentencing court process. It is used to refer to courts that utilise a more culturally appropriate sentencing process for both Aboriginal and Torres Strait Islander (and in Queensland, Pacific Islander) offenders. To maintain consistency in terminology, this article uses the term 'Indigenous' when referring to the Aboriginal and Torres Strait Islander communities and people who are involved with the courts.
2. Elena Marchetti, 'Delivering Justice in Indigenous Sentencing Courts: What This Means for Judicial Officers, Elders, Community Representatives, and Indigenous Court Workers' (2014) 36 *Law & Policy* 341.
3. As will be explained, Victoria and Western Australia exclude breaches of protection orders from being heard in their Indigenous sentencing courts. In Victoria, the Statewide Working Group that initially established the Koori Courts believed the complexity of such matters and the likelihood that they would not be able to be resolved in a collaborative manner, warranted such measures: Mark Harris, *'A Sentencing Conversation': Evaluation of the Koori Courts Pilot Program: October 2002–October 2004* (Department of Justice, 2006) 122.
4. Julie Stubbs, 'Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice' (2007) 7 *Criminology & Criminal Justice* 169.

ly appropriate ways and by creating a forum that is more meaningful to an offender than a mainstream sentencing process.[5] Using data collected from interviews with victims of intimate partner violence offences, this article traces the extent to which victims of family and domestic violence participate in Indigenous sentencing courts in different jurisdictions. It explores what benefits, if any, victims experience from having the opportunity to have a say in sentencing processes that allow Indigenous cultural knowledge and values to be present.

II JURISDICTIONAL DIFFERENCES

Over the past 15 years, Indigenous sentencing courts have been established in all states and territories around Australia (aside from Tasmania) to try and address the mistrust Indigenous Australians have of the mainstream criminal justice system and as an attempt to lessen the incongruity of the court system.[6] Some courts have come and gone, and some lost funding and began operating under a different name, but then reappeared as a result of changes in government.[7]

Although the Indigenous sentencing courts operate within the mainstream criminal court system, with the involvement of Elders and Community Representatives they aim to make the court process more meaningful for Indigenous offenders, hoping to invoke change in an

5. Elena Marchetti, 'Indigenous Sentencing Courts and Partner Violence: Perspectives of Court Practitioners and Elders on Gender Power Imbalances During the Sentencing Hearing' (2010) 43 *Australian and New Zealand Journal of Criminology* 263.
6. Elena Marchetti and Kathleen Daly, 'Indigenous Courts and Justice Practices in Australia' [2004] (277) *Trends & Issues in Crime and Criminal Justice* 1.
7. In relation to Queensland's Murri Courts, see Tony Moore, 'Diversionary Courts Fall Victim to Funding Cuts', *Brisbane Times* (online), 13 September 2012 <http://www.brisbanetimes.com.au/queensland/diversionary-courts-fall-victim-to-funding-cuts-20120912-25sj5.html>. In relation to the Murri Court reopening, see Queensland Government, 'Murri Court Opens in Rockhampton' (Media Statement, 13 April 2016) <http://statements.qld.gov.au/Statement/2016/4/13/murri-court-opens-in-rockhampton>. In relation to the Western Australia Kalgoorlie Community Court suspension in 2015, see Amanda Banks, 'Aboriginal Court Gets the Chop', *The West Australian* (online), 14 August 2015 <https://au.news.yahoo.com/thewest/wa/a/29258150/kalgoorlie-aboriginal-court-gets-the-chop/>. In relation to the Northern Territory Community Courts suspension in 2011, see Thalia Anthony, 'Two Laws: Indigenous Justice Mechanisms in Context' (2015) 18(1) *Journal of Australian Indigenous Issues* 99, 110.

offender's attitude and behaviour.[8] They have both community building and offending-centred aims, some of which, such as reducing the over-representation of Indigenous people in custody, are quite ambitious and unlikely to be achieved in the short term.[9] They mainly operate at a Magistrates' or Local Court level but they have also been operating at a County (District) Court level (in Victoria) and in Children's Courts. In addition, all levels of South Australian criminal courts can now convene an Aboriginal sentencing conference prior to sentencing (according to section 9C of the *Criminal Law (Sentencing) Act 1988* (SA)). In Port Lincoln, an Aboriginal conference can be convened out of court without the presence of a Magistrate, with the conference report being used in the sentencing hearing that follows.[10]

Victoria, New South Wales, Western Australia and the two territories (including the Northern Territory while its Community Courts were in operation) limit the types of offences that can be heard in their Indigenous sentencing courts, although there is no explanation for these limits in the legislation or procedural guidelines. Of particular relevance to this article is that a breach of a family violence intervention order or an offence arising from the same conduct is excluded in the adult jurisdiction of the Koori Court in Victoria, but not in the Children's Koori Court Division, which 'has the jurisdiction to hear and summarily determine all offences other than murder, attempted murder, manslaughter, culpable driving causing death and arson causing death'.[11] The Western Australian Community Courts also exclude family violence, although '[s]ome family violence cases related to feuding have been heard in the court'.[12] When they were operating, the Northern Territory Community Court guidelines recommended the exercise of caution when dealing with cases involving violence, domestic violence or where the victim was

8. Marchetti, 'Delivering Justice in Indigenous Sentencing Courts', above n 2.
9. Cultural and Indigenous Research Centre Australia, 'Evaluation of Indigenous Justice Programs – Project A: Aboriginal and Torres Strait Islander Sentencing Courts and Conferences' (Final Report, Attorney-General's Department (Cth), January 2013).
10. Courts Administration Authority of South Australia, *Aboriginal Programs* (2012) <http://www.courts.sa.gov.au/Community/Pages/Aboriginal-Programs.aspx#sentencing>.
11. Allan Borowski, 'Indigenous Participation in Sentencing Young Offenders: Findings from an Evaluation of the Children's Koori Court of Victoria' (2010) 43 *Australian and New Zealand Journal of Criminology* 465, 469. See also *Children, Youth and Families Act 2005* (Vic) ss 516, 519.
12. Heather Aquilina et al, 'Evaluation of the Aboriginal Sentencing Court of Kalgoorlie' (Final Report, Shelby Consulting, 16 October 2009) 21.

a child.[13] Sexual offences are excluded in Victoria,[14] Western Australia,[15] New South Wales,[16] and the two territories.[17] Certain drug offences, violent offences, stalking, offences involving the use of a firearm, and offences relating to child prostitution or pornography are also excluded in New South Wales.[18]

III PARTICIPATION OF VICTIMS OF DOMESTIC AND FAMILY VIOLENCE IN SENTENCING

In conventional Magistrates' or Local Court sentencing hearings, victims of domestic or family violence are generally not encouraged to provide a victim impact statement, leaving them voiceless during the sentencing process. Other problems with the conventional court system are that courts may or may not provide appropriate separate waiting facilities, there may be unnecessary delays in processing orders due to the need to accommodate more than one jurisdiction to deal with all matters relating to domestic and family violence, and there may be conflicts between orders generated from different court jurisdictions.[19] Specialist domestic and family violence courts have been introduced to address many of the problems victims of family and domestic violence face when navigating the conventional court system. However, the use of other innovative justice processes, such as restorative justice processes, have been criticised for not being able to adequately respond to victim safety and to the manipulation of the process by the offender.[20] The presence of gendered power imbalances is of particular concern in matters involving domes-

13. Community Court Darwin, *Community Court Darwin: Guidelines*, 27 May 2005 <http://www.nt.gov.au/justice/ntmc/docs/community_court_guidelines_27.05.pdf>.
14. *Magistrates' Court Act 1989* (Vic) s 4F(1)(b)(i).
15. Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29 *Sydney Law Review* 415, 421 n 19.
16. *Criminal Procedure Act 1986* (NSW) s 348(2)(b).
17. Magistrates Court of the Australian Capital Territory, Galambany Court, *Practice Direction No 1 of 2012*, August 2012, cl 12(iii) <http://cdn.justice.act.gov.au/resources/uploads/Magistrates/Practice_Direction_1_of_2012_Galambany_Court.pdf>; Community Court Darwin, *Community Court Darwin: Guidelines*, 27 May 2005, cl 14.
18. *Criminal Procedure Act 1986* (NSW) s 348(2).
19. Annette Hennessy, 'Specialist Domestic and Family Violence Courts: The Rockhampton Experiment' (Paper presented at the Ministerial Forum, Gold Coast, 16 June 2008).
20. Kathleen Daly and Julie Stubbs, 'Feminist Engagement with Restorative Justice' (2006) 10 *Theoretical Criminology* 9, 17.

tic or family violence,[21] since such violence reflects '"way[s] of 'doing power'" in a relationship'.[22] Power imbalances, in practice, can occur in various forms during a justice process such as through the use of intimidating language or behaviour on the part of the offender,[23] silencing the victim either because they are not given the opportunity to speak frankly or because their experiences are misrepresented by others,[24] or trivialising the harms experienced by the victim and their resulting needs.[25]

Proponents of the use of innovative justice processes such as restorative justice and Indigenous justice practices argue that victims are more likely to be given the opportunity to participate in the process; the community is engaged 'to stop the violence and to repair the harms caused by it'[26] and to define social norms; healing is emphasised by allowing the stories of the victims to emerge, often in the words of the victim;[27] and offenders are given the opportunity to accept responsibility for their actions and to engage in intervention programs that are suited to their needs.[28] Ultimately, non-conventional decision-making processes try to alleviate the problems generated by the participants' emotions and the mainstream justice system (which discourages full and frank disclosure of all relevant facts), and which leaves the input of information and decision-making to only a select group of people.[29]

21. Ibid.
22. Donna Coker, 'Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 128, 141.
23. Daly and Stubbs, above n 20.
24. Gordon Bazemore and Twila Hugley Earle, 'Balance in the Response to Family Violence: Challenging Restorative Principles' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 153, 166–9; Stubbs, above n 4, 173–4.
25. Donna Coker, 'Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking' (1999) 47 *University of California Los Angeles Law Review* 1, 15.
26. Lois Presser and Emily Gaarder, 'Can Restorative Justice Reduce Battering? Some Preliminary Considerations' (2000) 27 *Social Justice* 175, 183.
27. Barbara Hudson, 'Victims and Offenders' in Andrew von Hirsch et al (eds), *Restorative Justice & Criminal Justice: Competing or Reconcilable Paradigms?* (Hart Publishing, 2003) 177, 183.
28. Daly and Stubbs, above n 20, 19; Presser and Gaarder, above n 26, 186; Stubbs, above n 4, 170.
29. Bazemore and Hugley Earle, above n 24, 161–2; Presser and Gaarder, above n 26.

IV VICTIM VOICES IN INDIGENOUS SENTENCING COURTS

Distrust of established criminal justice practices stemming from a legacy of colonisation has resulted in Indigenous community support of innovative justice practices for the resolution of family violence matters.[30] Indigenous sentencing courts do not give Elders or Community Representatives complete control over the process and final sentence, but they do allow for the incorporation of Indigenous knowledge in the sentencing process and in this way, transform the sentence hearing into one that reflects Indigenous community values. Victims are more likely to be present in a Circle Court hearing, which is the model used in New South Wales. This is not the case with Indigenous sentencing courts that use a Nunga Court model, which is the model used in Queensland, Victoria and South Australia. Circle Court hearings are usually a few hours long and are often held in a venue that is culturally significant to the local Indigenous community instead of a mainstream court. The Nunga Court hearings are shorter and held in a mainstream court room which has, in most court sites, been remodelled so that all the participants sit around a bar table.

The following findings come from interviews with 29 victims of intimate partner violence whose partners had been through an Indigenous sentencing court process in either Queensland or New South Wales. The interviews were conducted over a three-year period (from May 2010 to July 2013) and on average took approximately 20 minutes each. The interviews were conducted in the presence of an Elder or Aboriginal court worker, a requirement of the Human Research Ethics Committee. Twenty-five of the interview participants were Indigenous and four were non-Indigenous. All 10 of the victims whose partners had been through a Circle Court hearing had attended the process compared to only 7 (out of 19) of those whose partners had been through a Queensland Murri Court process. The remaining 12 victims did not attend a Murri Court process. The reasons why so few victims in Queensland had participated in the Murri Court sentence hearing included that they did not want to attend due to the fact that they thought the offending behaviour was something

30. See, eg, Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003); Heather Nancarrow, 'In Search of Justice for Domestic and Family Violence: Indigenous and Non-Indigenous Australian Women's Perspectives' (2006) 10 *Theoretical Criminology* 87; Boni Robertson, 'Aboriginal and Torres Strait Islander Women's Task Force on Violence' (Report, Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, 2000).

their partner needed to address, not them; nobody had advised them that they could attend; or they had separated from their partner and did not want to see them. One victim thought she would be breaching the protection order if she attended.

Of the 17 victims who attended the Indigenous sentencing court process in which their perpetrator was being sentenced, only one thought that the mainstream sentencing court process was less threatening than the Indigenous sentencing court process, confirming findings from other studies that have highlighted the unsupportive nature of legal processes.[31] The victim who preferred the mainstream system was Indigenous and had participated in a New South Wales Circle Court process for the sentencing of her partner. She preferred the mainstream process because she felt more anonymous and less observed. The 16 victims who preferred the Indigenous sentencing court process to the mainstream process did so mainly because they felt that everyone, including the offender, was able to have a say. The presence of the Elders and the fact that the victim was able to explain how the violence had impacted on them made the perpetrator accountable.[32] One of the victims described her experience in Circle Court as follows:

> I wasn't the least bit feeling humiliated or anything at Circle. I felt quite – like I had some power. I actually had some power. I had some backup around me. It wasn't me sitting there at the police station trying to remember every little word and they're saying, what happened next … what happened next. It was just – you had so much power, yeah, and back up.[33]

Instead of victims' stories not being heard or being 'heard, filtered, and interpreted through non-feminist social and legal narratives',[34] the vast majority of the victims who attended an Indigenous sentencing court hearing found it did allow their stories to emerge, resulting in a more positive justice experience.

31. Rosemary Hunter, *Domestic Violence Law Reform and Women's Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (Cambria Press, 2008).

32. This was also found in an earlier study of Indigenous sentencing courts which examined offender perceptions of justice: Elena Marchetti, 'An Australian Indigenous-Focussed Justice Response to Intimate Partner Violence: Offenders' Perceptions of the Sentencing Process' (2015) 55 *British Journal of Criminology* 86.

33. Interview with Victim 2 (Nowra, 17 May 2010).

34. Hunter, above n 31, 264.

V CONCLUSION

Traditionally, victims (of any crime) have little or no voice when it comes to sentencing an offender, particularly in lower courts. The victims who were interviewed for this study described how in the mainstream court process, they would be left to wait in an adjacent room with other victims of family and domestic violence if they attended court on the day their perpetrator was sentenced, often without being asked to speak to the judicial officer about their experiences or needs. Having the opportunity to tell the Circle or Murri Court how they felt about the offending behaviour and having the support of the Elders was a positive experience for all but one of the victims who attended an Indigenous sentencing court process. This study confirms that more consideration needs to be given to how victims of domestic and family violence can be empowered throughout the criminal justice process, and that we need to rethink the manner in which we allow victims to participate in a sentencing process. This is particularly pertinent for cases involving Indigenous offenders where Elders, who are respected by all those present at the hearing, can assist in ensuring a victim feels safe when addressing the court.