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**INDIGENOUS SENTENCING COURTS AND PARTNER
VIOLENCE: PERSPECTIVES OF COURT PRACTITIONERS
AND ELDERS ON GENDER POWER IMBALANCES DURING
THE SENTENCING HEARING**

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Running head: Indigenous sentencing courts and partner violence

One of the most common forms of violence in Indigenous communities is violence between intimate partners. Indigenous sentencing courts and specialist family violence courts (as well as mainstream courts) are used in Australia to sentence Indigenous partner violence offenders. Currently there are over 50 Indigenous sentencing courts operating in all Australian states and territories, except Tasmania, which use Indigenous Elders to assist a judicial officer in sentencing an offender. Debates exist surrounding the issue of whether alternative justice forums are appropriate in cases involving domestic and family violence. Feminist advocates are concerned with the appearance of a 'too lenient' response to violent men and the danger of exposing a victim to further power imbalances during a hearing, whereas Indigenous advocates focus on the need for justice practices that are more culturally relevant, sensitive, and appropriate. This paper explores the extent to which gendered power imbalances are present in Australian Indigenous sentencing court hearings concerning intimate partner violence offending, and how, if at all, such power imbalances are managed by a process which aims to be more culturally appropriate.

Keywords: Indigenous sentencing courts, intimate partner violence, power imbalances

This research goes some way in mapping and assessing the processes of Indigenous sentencing courts and the role of the Elders, when dealing with family violence offences. In particular this research focuses on intimate partner violence (rather than other forms of family violence) since it is the most frequent form of family violence in Indigenous communities (Kelly, 2002; Mouzos, 1999). Rates of intimate partner violence and intimate homicide in Indigenous communities are widely documented as being much higher than that in non-Indigenous communities, despite the fact that measuring these rates is not straightforward (see Harry Blagg, 2008, p. 142; Mouzos & Makkai, 2004, p. 30; Memmott, Stacy, Chambers, & Keys, 2001). The use of Indigenous sentencing courts for sentencing family violence offenders has been supported and encouraged by many of the key players and Elders¹ involved with the courts. However, others, including key players and Elders

involved with the Koori Courts in Victoria, consider the dynamics surrounding the offence of family violence to be too complex for consideration by Elders who sit on the Indigenous sentencing courts (Harris, 2006, p. 122).

The presence of gendered power imbalances in a hearing concerning domestic and family violence is often identified as being a particularly problematic aspect of alternative justice processes (Daly & Stubbs, 2006, p. 17). Victims who are present at hearings held in alternative justice forums often lack proper support to counter the risks of further abuse and control continuing during such hearings. The main focus of this paper is exploring the extent to which gendered power imbalances are present in Australian Indigenous sentencing court hearings concerning intimate partner violence offending, and how, if at all, such power imbalances are addressed by the presence of Elders. Given the offender focus of the courts, this research attempts to determine what, if anything, can be said about their ability to address victim needs and victim safety. The research specifically focuses on the courts in New South Wales and Queensland and on the views of Magistrates, Elders, court workers and domestic violence support workers associated with those courts. Feminist and critical race/Indigenous theories that have explored the complexities involved in responding to family violence in Indigenous communities, are used as the theoretical framework from which to consider whether the processes of the Indigenous sentencing courts are suitable for dealing with offenders and victims of intimate partner violence. In particular, emphasis will be placed on studies that have focused on critiquing

the different types of court processes that are used for resolving matters involving family violence.

The paper firstly describes the different processes of the Indigenous sentencing courts in Queensland and New South Wales. Next, it outlines what feminist and critical race/Indigenous scholars have said about using alternative justice forums to deal with family violence offences and whether these forums are able to rectify any gendered power imbalances, which exist during the hearing itself. Finally, findings from an analysis of data collected from 39 interviews and eight observations of intimate partner violence sentencing hearings in the courts is presented to discuss whether the presence of Elders in Indigenous sentencing courts is able to provide a buffer for the victim against experiencing gendered harms during the hearing.

INDIGENOUS SENTENCING COURTS IN AUSTRALIA

Currently there are over 50 Indigenous sentencing courts operating in all Australian states and territories, except Tasmania. These courts were first established in urban centres in South Australia (the first was opened in Port Adelaide, a suburb of Adelaide, Australia on 1 June 1999) and today they operate under varied legislative frameworks and with differing eligibility criteria (Marchetti & Daly, 2004, 2007).

Indigenous sentencing courts arose first in Magistrates' or Local Courts, but are now part of the Youth (or Children's) Courts in some jurisdictions and the

District Court in Victoria. The courts have emerged mainly from the efforts of individual Magistrates and Indigenous community members, but they are now becoming formally recognised as a legitimate forum for sentencing Indigenous offenders, with the enactment of legislation to validate their operation. Despite their legitimisation, however, the number of offenders sentenced in these courts in most jurisdictions is still quite low as compared to the number of offenders processed via mainstream courts. Their purpose is often described as being: (1) to address the over-representation of Indigenous people in the criminal justice system; (2) to address recommendations by the Royal Commission into Aboriginal Deaths in Custody, in particular, those centring on reducing Indigenous incarceration and increasing the participation of Indigenous people in the justice system; and (3) to complement Justice Agreements that have been forged in Australian states and territories (Blagg, 2008; Briggs & Auty, 2003; Fingleton, 2007; Hennessy, 2006; Magistrates' Court of Victoria, 2003; Potas et al., 2003).

These courts are not practicing or adopting Indigenous customary laws. Rather, they are using Australian criminal laws and procedures when sentencing Indigenous people, but allowing Indigenous Elders to participate in the process. This is different from a court's recognition or application of Indigenous customary laws at sentencing, as for example, when Indigenous punishment practices such as spearing, shaming and banishment are taken into account.² Although the Indigenous sentencing courts may recognise the fact that certain cultural practices have been followed prior to the sentencing hearing, such as displaying respect for Elders, giving apologies according to

customary traditions or the imposition of banishment, generally the sentences imposed fall within the criminal sentencing law framework of the dominant Australian criminal justice system (Fingleton, 2007, p. 17; Harris, 2006, p. 15).

Practices amongst the courts vary, however, there are some common elements: (1) an offender must be Indigenous (or in some courts, Indigenous or South Sea Islander) and must have entered a guilty plea or was found guilty in a summary hearing;³ (2) the offender consents to having the matter heard in the Indigenous sentencing court; (3) the charge must be one that falls within the jurisdiction of the mainstream court of equivalent level; and (4) the Magistrate retains the ultimate power in sentencing the offender.

The courtroom setting is quite different to mainstream courts, with most jurisdictions having remodelled or built new courtrooms to house the Indigenous sentencing courts. There is more focus on dialogue, resulting in magistrates no longer sitting on an elevated bench, but rather sitting around a circle or an oval bar table with the offender, their support person (if one has attended), Elders, the prosecutor and defence lawyer. The involvement of the Elders vary between courts, but in all courts the Elders will speak frankly with the offender. All courts now employ Indigenous court workers (either within their own court administration or via the related department of justice) who organise Elders to appear at the hearings, liaise between the offender, prosecutor and victim (if they agree to participate), and sometimes monitor an offender's progress after the hearing.

The court practices are sometimes associated with restorative justice and therapeutic jurisprudence (see for example, Freiberg, 2005; King, 2003). However, although they share some similar qualities there are good reasons for maintaining that the Indigenous sentencing courts be viewed as being in a category of their own (Marchetti & Daly, 2007). The Indigenous sentencing courts are certainly more offender-centred than restorative justice practices, which tend to be more victim-centred (Holder, 2004, p. 20) and they are operating according to a transformative, culturally appropriate and politically charged participatory jurisprudence which goes beyond the principles found in restorative justice and therapeutic jurisprudence. How this type of jurisprudence should operate for intimate partner violence matters (where victims are particularly vulnerable to being subjected to further victimisation due to the presence of gendered power imbalances) is, however, something that needs to be considered.

Victoria currently excludes family violence offences and the Northern Territory directive suggests caution when dealing with such matters.⁴ However, there are no such restrictions or warnings in other states and territories. Indeed, many of the court workers and Elders who participated in this research believe that Indigenous sentencing courts are well suited to family violence cases, including intimate partner violence. It should be noted that none of the courts deal with sexual violence offences against children.

The five sites which form part of this research are Dubbo and Nowra in New South Wales, and Mt Isa, Rockhampton and Brisbane in Queensland. The

Dubbo and Nowra courts have been operating the longest in New South Wales and were selected for that reason, and the Mt Isa, Rockhampton and Brisbane Courts often deal with family violence matters (whether as a proportion of the total cases or in number).

The following table summarises the approximate percentage of family violence files which are heard in the courts, or family violence defendants who appear before the courts studied for this project.⁵ It is important to note that the estimates provided for Queensland are for numbers of files, and for New South Wales the estimates are for defendants. The number of files dealt with by a court will always be more than the number of defendants.

[Insert Table 1 here]

Although the Brisbane Murri Court has the lowest percentage of family violence files or defendants, it has the largest volume of cases out of the courts which were sampled and it therefore hears a large number of family violence matters.

With all of the courts (except for Dubbo which now hears less serious offences and focuses on offences that are 'offensive' to the Elders) (Interview with NI-CW-15, 2 April 2007),⁶ the focus is on offenders who are in danger of being sentenced to prison. The idea of having them appear in an Indigenous sentencing court is to see whether an alternative (that is, more appropriate) sentence to imprisonment should be imposed on the offender. Having said

that, the sentences imposed are by no means a 'soft option'. They are often 'onerous on the offender as they ... involve treatment and close supervision' (Fingleton, 2007, p. 18).

All of the courts operate differently. There is much more involvement during the actual hearing by the Elders in the Circle Court model (that is, in the Dubbo and Nowra Courts) than in the alternative Nunga Court model. The main interaction between the Elders and an offender in the Nunga Court model usually occurs at pre-hearing meetings rather than in the hearing itself, although the Elders will always speak to an offender during a hearing. With the Circle Court model there are up to four Elders who sit in the circle, whereas there are only one or two Elders who sit with the Magistrate in the Nunga Court model (which is the model used in Queensland). With both court models, there is an attempt to try and match the sex of the Elder with the sex of the offender and there is a preference for there to be an equal number of male and female Elders present, although the Elders who are available to sit in the courts are, at most sites, predominantly female.

The Elders who are selected to sit in the courts are respected representatives of the community and they have the approval of the Justice Group associated with the community in which the court is situated to sit with the Magistrate as representatives of the community. An Elder will not be selected to sit in a hearing if there are any conflicts of interest between the Elders and the offender or victim. This would include, for example, a situation where the offender does not recognise the Elder, as their Elder. The problem of

impartiality is one which is difficult to remove in many circumstances, since many of the courts are located in regional towns with relatively small and cohesive Indigenous communities. Indeed, the courts work best in communities which are united and in which the Elders take an interest in what is happening within their community. In some jurisdictions a code of conduct for the Elders has been introduced, which requires the Elders to avoid behaviour which may bring their reputation into disrepute (Harris, 2006, p. 45).

The victim will usually be present in a Circle Court hearing; this is not the case with the Nunga Court hearings. Circle court hearings 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 held in a mainstream courtroom which has, in most court sites, been remodelled so that all the participants sit around a bar table. In New South Wales the Circle Court is a closed court, which means that only the people participating in the court hearing can sit in the Circle and any observers need permission to attend. This assists with there being an increased level of frankness in the dialogue between the Elders and the offender:

[T]he elders ... [give] a glimpse of their personal life and that's why it'll never be recorded because if they knew it was going to be published, that it was going to be out there, then they wouldn't say it. They come along to Circle and they'll say it and they'll tell you about whether it be discrimination in one form or another or whether it will be sexual assault or whatever; things that they never tell other people. And a lot of the time it deflates the offender because, [the offender will think]

well, okay, maybe I'm not so hard done-by, maybe I'm not the victim
(Interview with NI-CW-9, 28 March 2007).

The Elders who sit in the Dubbo Court indicated that they would not hear 'serious' family violence matters. Assaults that resulted in injuries serious enough to require stitches would not be sentenced in the Circle Court. They thought that if they were to hear such matters it would give the impression that they were condoning domestic and family violence in the community. In contrast, in Nowra all family violence matters that come within the Magistrates' Court jurisdiction are considered eligible for the Circle Court.

In Nowra and Dubbo the sentence is ultimately 'officially' handed down in the regular Magistrates' Court a week or two after the Circle Court hearing. The imposition of the sentence in the regular court is done in an open court, which provides accountability to the public. It also gives the offender time to think about the penalty: 'I liken it to buying a used car - when you get talked into it and then you get home, you say, "damn, how the hell did I get here, I don't want that car". It's the same with Circle Court' (Interview with NI-CW-9, 28 March 2007).

The Mt Isa Court utilises bail in order to start the offender on a rehabilitation program. The offender gets put on bail for three to 12 months (usually about six months) in order to attend alcohol and drug rehabilitation programs and family violence residential programs. The offender will report back to the court via the Elders at 'mentions', which are held every month. This provides

a forum in which the Elders have the opportunity to influence the behaviour and attitude of the offender. Victims are encouraged to attend these meetings. Murri Women's and Murri Men's Support Groups have been established in Mt Isa to help change the behaviour and attitude of both victims and offenders. Elders attend both the Women's and Men's Groups. The Support Group meetings are fairly informal and simply allow participants to talk about their experiences. The women who attend the Women's Group usually talk while they are painting or cooking. It usually involves some sort of activity so that they are not sitting around and being 'forced' to speak. Both groups are well established and have strong community support.

The Elders in the Rockhampton Murri Court meet with an offender before the sentence hearing to discuss their behaviour and to determine whether the offender is committed to rehabilitation. Victims have not been encouraged to attend the Elder meetings nor the actual court hearing because, until recently, there have not been any victim support services available in Rockhampton, and the Magistrate and Court Liaison Officer are aware of the need to minimise any trauma to the victim. Recently a new victim support service has been established in Rockhampton. The service is not connected to the Murri Court per se, but it will assist victims of family violence with putting together a victim impact statement, with being connected to support services, and with being linked to appropriate Elders (for example, a female South Sea Islander victims would be linked with a female Elder from the South Sea Islander community). As part of the sentence in Rockhampton, offenders are required

to periodically report to the Elders at their community office, which is straight across the road from the court.

The Elders in Brisbane do not have as much contact with the offenders as the other courts. They used to meet with the offenders before the hearing but this no longer happens. They sometimes talk after the hearing but that only happens in an informal way not as a planned process. In Brisbane (and in other sites within Queensland), the offender elects to be sentenced in the Murri Court. This is different to the selection processes in New South Wales, which usually involves the Magistrate selecting appropriate matters for the Indigenous sentencing court. The hearing in Brisbane runs much more like a mainstream Magistrates' Court, however, it is held in a purpose-built courtroom and there is much more interaction between the offender and the Magistrate than in a regular Magistrates' Court hearing. The increased interaction allows the Magistrate to learn more about the background of the offender.

FEMINIST AND CRITICAL RACE/INDIGENOUS DEBATES SURROUNDING ALTERNATIVE AND SPECIALIST FAMILY VIOLENCE COURT PRACTICES

There has been a great deal of debate surrounding the appropriateness of using alternative justice practices such as restorative justice and Indigenous-controlled justice practices, for the resolution of partner, sexual and family violence offences (see for example, Coker, 2006; Cook, Daly, & Stubbs, 2006; Stubbs, 2007). Alternative justice practices such as mediation have been criticised by feminist scholars as 'defining battering (or other offences) as

“disputes”, for “pushing reconciliation”, “erasing victimisation” and “limiting [formal] justice options’ (Daly & Stubbs, 2006, p. 11). Although many practitioners align the two types of practices, restorative justice practices have been distinguished from mediation for a number of reasons, including the fact that the participants are recognised ‘as victim and offender rather than as disputants’, that it is important for victims to be heard and therefore recognised as important participants of the process, and that the expression of emotions is a valued part of the restorative justice process (Presser & Gaarder, 2000, p. 181). This distinction, in particular, recognises that restorative justice practices attempt to empower the victim rather than treat the victim and offender as two equal parties engaged in the resolution of a ‘conflict’.

Indeed, those that support the use of alternative justice processes such as restorative justice and Indigenous justice practices do so because they recognise victims are given the opportunity to participate in the process; they engage the community ‘to stop the violence and to repair the harms caused by it’ and to define social norms (Presser & Gaarder, 2000, p. 183); they emphasise healing by allowing the stories of the victims to emerge, often in the words of the victim (Hudson, 2003, p. 183); and they give offenders the opportunity to accept responsibility for their actions and to engage in intervention programs that are suited to their needs (Daly & Stubbs, 2006; Presser & Gaarder, 2000; Stubbs, 2007, p. 170). Ultimately, alternative informal decision-making processes try to alleviate the problems generated by the mainstream justice system which focuses on punitiveness and

stigmatization. Such problems stem from a process that discourages full and frank disclosure of all relevant factors and emotions, and which leaves the input of information and decision-making to only a select group of people (Bazemore & Hugley Earle, 2002, p. 161-162; Presser & Gaarder, 2000, p. 183).

Despite there being some support for alternative justice processes, some feminist scholars warn against the use of restorative justice practices for the resolution of domestic and family violence cases. Indeed, Julie Stubbs argues that some of the virtues of restorative justice disappear when such a process is used for domestic or family violence cases because such crimes involve more than one incident of conflict between two individuals that can be resolved by a meeting between the victim and the offender to restore the relationship. Instead, domestic violence

[i]nvolves the exercise of power and control, is commonly recurrent, may escalate over time, may affect a number of people beyond the primary target, including children, other family members and supporters of the victim and ... it contributes to the subordination of women. (Stubbs, 2004, p. 7)

The presence of gendered power imbalances is of particular concern when alternative justice processes are used to for dealing with offences involving domestic or family violence (Daly & Stubbs, 2006, p. 17). Such violence reflects 'ways of "doing power" in a relationship' (Coker, 2002, p. 141). Domestic and family violence victims, who attend hearings which are intended to be restorative and empowering, can often be subjected to further abuse and control. Power imbalances can continue due to the fact that alternative

justice processes ‘threaten to re-privatize domestic violence’ with families and community representatives, who may be present during such hearings, often being ‘unwilling or unable to oppose domestic violence’ (Coker, 2002, p. 129). For example, an evaluation of the Basingstoke Domestic Violence Family Group Conference Project (the Dove Project), found that a ‘few family members ... voiced concerns about the “overly hostile nature” of the family discussions’ and preferred the presence of an independent third party (Social Services and Research Information Unit, 2003, p. 40). Power imbalances, in practice, can occur in various forms during a justice process: it may be through the use of intimidating language or behaviour on the part of the offender (Daly & Stubbs, 2006, p. 17); through silencing the victim either because they are not given the opportunity to speak frankly or because their experiences are misrepresented by others (Bazemore & Hugley Earle, 2002, p. 166-169; Stubbs, 2007, p. 173-174); or through trivialising the harms experienced by the victim and their resulting needs (Coker, 1999, p. 15).

An analysis of whether Indigenous victims of intimate partner violence are protected from gendered power imbalances during a sentence hearing which occurs in an alternative justice forum cannot be conducted by only relying on feminist theories, even those that take a postmodern and non-essentialist perspective (Moreton-Robinson, 2000). Scholarship that evaluates how such processes treat racialised victims must be considered. Critical race scholarship is not entirely appropriate as a critical scholarship for Indigenous Australians. The discourse that has emerged in Australia has, instead, been

predominantly in the form of postcolonial and whiteness scholarship (Cunneen, 2001; Moreton-Robinson, 2000).

Distrust of established criminal justice practices stemming from a legacy of colonisation, has resulted in Indigenous community support of alternative justice practices for the resolution of family violence matters (Behrendt, 2003; Nancarrow, 2006; Robertson, 2000). Restorative justice practices have been recognised as not always 'support[ing] community healing and genuinely empower[ing] Indigenous women' (Blagg, 2002, p. 191), but there is support for an approach which seeks to find family healing rather than relying on the criminal justice system to solve the problem (Blagg, 2008, p. 141). Harry Blagg (2008, p. 141) emphasises that this does not mean that 'Aboriginal women do not hold offenders accountable or that the violence is culturally sanctioned'. Instead, a preference for alternative justice processes recognises the disadvantaged position of Indigenous men and the need for any intervention program for offenders (who, in matters concerning family violence in Indigenous communities, are predominantly male) to incorporate a method for healing the harms caused by colonisation. Whatever alternative justice practice model is adopted, however, it must be culturally relevant, sensitive and appropriate (Behrendt, 2002; Kelly, 2002). Loretta Kelly (2002, p. 212) suggests the following five criteria as essential for ensuring family violence justice practices are culturally appropriate: 'restorative values' need to reflect 'indigenous cultural values'; justice processes need to be culturally relevant; justice practices need to be culturally sensitive; justice programs

need to 'empower Indigenous communities'; and justice programs need to meet the desired outcomes of the community.

Referring to the work of Ruth Morris (1994), who espouses the need to acknowledge the link between an offender's subordination in society and his or her offending, Donna Coker (2002, p. 143) argues that in cases of family violence the justice process needs to be transformative in a gendered way rather than simply restorative. In order to achieve this Coker (2002, p. 144) suggests expanding Morris's concept of transformative justice by incorporating 'feminist/critical race feminist theory', which would address 'the manner in which subordinating experiences in the lives of batterers relate to their decisions to batter and the manner in which their battering subordinates women'. Coker refers to the use of traditional stories in Navajo peacemaking, support groups consisting of participants of the same sex and culture, and community reconciliation through acknowledgement of responsibility, as examples of more appropriate transformative processes. She argues (2002, p. 148) that a 'transformative justice process should include extensive fact-finding, planning, and enforcement', which involves the offender's and victim's family and supporters. Similarly, Larissa Behrendt (2002, p. 190) argues for processes that allow for 'Indigenous communities and families to develop and exercise control over their own decision-making and civil and criminal processes'.

Although Indigenous sentencing courts do not give Elders or community representatives complete control over the process and final sentence, 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. However, little is known about how such cultural participation affects an offender and whether such courts can address power imbalances, which may be present during a sentence hearing for an intimate partner violence offence. The findings presented below explore this issue from the perspectives of Elders, Magistrates, court workers, and domestic and family violence support workers.

METHOD

Although there has been quite a lot of debate surrounding the use of restorative justice and Indigenous-centred practices for family violence matters, there has been little research conducted in the area which utilises empirical evidence (Daly & Stubbs, 2006, p. 18). This study hopes to shed some light on the debates, particularly with regard to issues that relate to the presence of gendered power imbalances during the hearing, by utilising data collected from interviews and observations at five sites which use Indigenous sentencing courts in Australia to sentence family violence offenders. Data has been gathered to explain the *practices and role of the Elders*, focusing particularly on which elements facilitate 'better practice' and on whether power imbalances can be rectified by the presence and participation of Elders.

The field work for this study was undertaken in 2007. As well as observing numerous Indigenous sentencing court hearings over the past six years since starting my research in the area of Indigenous sentencing courts, two family

violence hearings were observed at each of the court sites in Brisbane, Rockhampton and Mt Isa, and one family violence hearing was observed in both Nowra and Dubbo. Although the total number of observations which pertain particularly to this study is quite low, the hearings lasted from between half an hour to two hours. At the Circle Court sites, there are only one to two hearings (of any type of matter) per court sitting, whereas in Rockhampton, Brisbane and Mt Isa, on average there may be between three to seven hearings per court sitting. The main reason for the low number of observations is that it is difficult to receive confirmation of when family violence hearings will be held and there are so few hearings in general held per annum, particularly at the regional court sites. Notes were taken from either the public gallery or outside the Circle about the set up of the room, the nature of the offences, the demeanour of the participants and the dialogue that transpired.

Thirty-nine semi-structured interviews were undertaken of people who, at the time of being interviewed, were involved with the operation of the courts in the five sites. Each interview took, on average, approximately 45 minutes to complete. The people who were interviewed belonged to the following groups:

- Sixteen were Elders (of whom six were male and 10 were female);
- Two worked with the local Community Justice Group (one of whom was male and the other female);

- Five were magistrates (one of whom was an Indigenous male, three of whom were non-Indigenous males and one who was a non-Indigenous female);
- One was the Local Court Registrar (who was female);
- Seven were Indigenous court workers (five of whom were females and two of whom were males);
- One was a non-Indigenous court liaison officer (who was female); and
- Seven were domestic and family violence support workers who were connected to the court through service programs (five of whom were Indigenous females; one of whom was an Indigenous male (who works with victims), and one of whom was a non-Indigenous female).

The number of interviewees from each court site is set out in Table 2.

[Insert Table 2 here]

Offenders and victims were not interviewed for this study since the research focused on mapping the processes of the court and the role of the Elders. I appreciate that interviewing only key court workers does not provide the entire picture of whether or not power imbalances within the hearings were able to be addressed. Victims and offenders would have their own views of such matters; however, interviews with such groups raise other methodological issues. Interviews with victims and offenders of intimate partner violence will occur for another research project which is currently underway, which will expand the current findings by providing alternative perspectives. Despite the

abovementioned limitations in relation to the data which has been collected, some significant and interesting findings have emerged.

A decolonising and critical race approach was adopted when conducting the interviews. Certain aspects of Linda Tuhiwai Smith's framework, such as having an awareness of the importance and uniqueness of Indigenous knowledge, the importance of providing feedback to participants, and the need to restructure hegemonic assumptions, values and concepts, were utilised for this research (Tuhiwai Smith, 1999). As a non-Indigenous researcher, it was particularly important to develop a rapport with, and gain the trust of Elders and Indigenous court workers who were interviewed, a process which is continuing and which has taken some years to establish. The participants were asked questions about: the process of the court in dealing with family violence matters; what the court and the Elders were able to achieve with the sentence hearing; what the presence of the Elders contributed to the process; how power imbalances were addressed during the hearing; and the role of community rehabilitation programs. The interview data was analysed according to themes which emerged from the interview questions and theoretical framework. As mentioned, this paper focuses on the responses, which related to the presence of gendered power imbalances during the hearing. The interview data was supplemented by the data collected from observations of the hearings, which focused on how the parties interacted, how questions from the Magistrate and Elders were answered, and to what extent the victim participated in the process.

It is important to note that the findings have been reported as an aggregate despite an awareness that different processes and views may be more suited or entrenched in a particular Indigenous community. The reason why the findings have been reported in this way is because it was necessary to protect the anonymity of the interviewees since there are such a small number from each court site. The findings were, in fact, similar across the court sites. If in the analysis, the interview data uncovered an anomaly in relation to a particular court site, this finding is highlighted as a general observation.

FINDINGS

Presence of Gendered Power Imbalances

This study confirmed that gendered power imbalances are often present and are not always addressed in an Indigenous sentencing court hearing. It was acknowledged by two Indigenous participants (one male and one female) that neither the Elders nor the Magistrate have had the necessary training needed to identify and deal with power imbalances and that there was also limited time in which to recognise and understand the dynamics of any power imbalance. Referring to a hearing where a victim was being intimidated by the offender, an Indigenous court worker noted that 'unless you were looking for it you wouldn't have seen it, but nothing was said then probably because there were a lot of other matters too that had to be dealt with' (Interview with I-CW-34, 10 May 2007).

The majority of interviewees who offered a view in relation to whether or not power imbalances were able to be addressed during a hearing (75% of 20 interviewees), thought that the presence of the Elders and giving the victim an opportunity to tell their story, allowed the imbalance of power to be equalised to some degree. A female Elder stated:

The Elders are [a form of] power balance. The Elders will always be for the women that come for domestic violence. The man knows that. The man can't say anything about it. So the Elder ... gives that power balance back to that woman. The women know it. (Interview with I-CR-36, 14 November 2007)

The shaming which occurs during a hearing and the 'dressing down' given by the Elders was thought to protect the victim. The offender is submitted to a candid discussion with the Elders, which is sometimes referred to as a 'shame job' (interview with I-CR-1, 10 May 2007). The role of the Elders in this process is therefore crucial. In some of the courts, the discussion will occur only in the presence of Elders who are of the same sex as the offender because it is believed that there is men's and women's business. Only when cultural practices are followed in this way, can the Elders then have a frank discussion with the offender:

There will be men's business where the men will talk of that man and they may talk harshly with that man or they may talk softly with that man or they may talk reason with that man, but the women don't get to see that because if the men address that man in front of a public gallery where you've got men and women that's like a shaming and

you're taking every dignity, every right away from that man and you are not helping him at all. He is only going to feel wilder towards his wife that he is there in court and that he had to be put through that process. So that's why they separate it and to me that's wisdom. (Interview with I-CW-34, 10 May 2007)

This quote illustrates the importance of ensuring that court processes reflect and value cultural and community specific practices.

Magistrates will also usually tell the offender that the behaviour they have been engaging in is not appropriate. Elders, particularly male Elders when it is a male offender, will emphasise the fact that violence was never part of the Indigenous culture and that men should honour their women. The offenders are challenged to make sure that they take responsibility and they are made to deal with their issues. Two male Indigenous community representatives, however, explained that they did not think that the Elders should engage in too much of a 'shame job' in court because it was 'shame enough' for the offender to be in court and facing the Elders (Interview with I-CR-1 and I-CR-32, 10 May 2007). They thought that the shame job should happen in the pre-sentence meeting before the hearing.

Allowing the victim to tell their story in a culturally appropriate environment was also thought to assist with equalising the power imbalance between a victim and an offender during the hearing. Two female Elders, two male Elders and a non-Indigenous female domestic and family violence support

worker identified giving the victim 'a voice' (Interview with I-CR-19, 4 April 2007) as one of the ways that power imbalances are managed during the hearings:

The power imbalance is broken down. It works both ways. It balances out in favour of the woman because when she tells her story, and he tells his story, it comes to a conclusion. The power an offender has in terms of using standover tactics don't work anymore. (Interview with I-CR-14, 29 March 2007)

Despite the fact that power imbalances between an offender and victim are not necessarily addressed in the hearing, there is emphasis on highlighting the harm done by the offender:

[T]he Elders speak into the life of that defendant and let them know that that behaviour is unacceptable, that that behaviour is not right and that the [Elder] is saying, that it's not right. Especially when you have an older man sitting across the table speaking to another young man saying that you shouldn't be hitting your woman or shouldn't be hitting your wife. That does carry a lot of power on the table in listening to an older person saying that to a younger person (Interview with I-CW-34, 10 May 2007)

Two non-Indigenous court workers and two domestic and family violence support workers compared the process of the Indigenous sentencing courts with the process of mainstream courts and noted that 'power imbalances don't get managed in normal court ... and the whole thing about the usual court

process is that there is nothing at the end of it' (Interview with NI-CW-24, 5 April 2007). At least with the Indigenous sentencing courts the process is 'not artificial'; instead having 'a family member saying those things, it's got to have an impact' (Interview with NI-CW-9, 28 March 2007).

The Role of the Victim

The discussion surrounding the presence of power imbalances in a hearing normally assumes that a victim is present during the hearing. With the Indigenous sentencing courts, victims in most cases, either do not appear at the hearings or do not participate in the discussion. More victims attended the Circle Court hearings rather than the hearings in the Queensland courts. Many victims do not attend court for fear of breaching a protection order that has been issued against them or for fear of causing their partner to breach an order. In some sites the victims will speak to Elders separately prior to a hearing. There is little support for victims if they do appear, which can make it difficult for them to voice their concerns.

It is important to note that the Indigenous sentencing courts do not operate according to a restorative justice framework. One of the main differences between restorative justice practices and Indigenous sentencing courts is the fact that Indigenous sentencing courts were not established to restore the relationship between a victim and offender but rather 'to change the relationship between "white (non-Indigenous) justice" and Indigenous people, including the offender' (Marchetti & Daly, 2007, p. 441). Therefore, although

the Indigenous courts may be criticised for not offering victims sufficient support during the hearings, it should be remembered that they were established as an offender-centred process rather than a victim-centred one and that the interests of victims were not expressly recognised as being of primary importance when establishing the courts, in all jurisdictions (Dawson & Holder, 2006, pp. 7–8). Despite this, consideration of the impact of the courts on victims of family violence who appear before the courts, is necessary, since the courts are being used to sentence such offences and since victims are sometimes present at the hearings.

Seven interviewees (five of whom were Indigenous males and two of whom were Indigenous females) commented that the violence needed to be treated as a relational rather than as an individualised issue. The interviewees emphasised the fact that both parties involved in the intimate partner relationship needed to consider their role in the relationship. This does not accord with traditional feminist domestic violence advocates and activists who identify domestic and family violence as a ‘gendered phenomenon’ and as being ‘about the exercise of power and control by one partner in a relationship ... over the other’ (Hunter, 2006, p. 740). This divergence in views is best explained by the importance of family unity within Indigenous cultures and by the recognition that both the Indigenous female and male have a ‘shared history of racial oppression’, which requires ‘helping [Indigenous] men to heal, and reviving and reuniting extended families and communities’ (Hunter, 2006, p. 749). Therefore, although only five interviewees (who apart from one, were all Indigenous) *expressly* stated that it was beneficial for the victim to be

present, there was an underlying message in many responses, which supported the notion that it was important for the victim to be present during hearings. It is important to emphasise, however, that if this is to occur the victim needs to be supported in ways that are culturally appropriate and offence-specific.

Recognition that the Offender is also a Victim of Colonisation

Four interviewees, all of whom were Indigenous females, drew attention to the fact that the offender was also a victim as a result of the history of colonisation. The interviewees pointed out that the Indigenous sentencing courts are able to acknowledge the intergenerational trauma experienced by Indigenous Australians and address the underlying causes of the offender's behaviour. Some noted that many of the offenders had been victims of sexual abuse as children and that this needed to be addressed just as much as the current charge. Having the history and circumstances of the offender come out into the open during sentencing is important for encouraging a community view that justice has been done (Blagg, 2008, p. 133).

The identification of the offender as a victim of the state accords with what many scholars have identified as Indigenous women 'stand[ing] alongside rather than in opposition to Indigenous men in the struggle for basic rights, including efforts to end family violence' (Hunter, 2006, p. 749)). It is an acknowledgement that Indigenous men have 'been stripped of their men's

business' and that this needs to be addressed in order for the family violence to end (Interview with I-CR-36, 14 November 2007).

One of the criticisms of using restorative justice processes for domestic violence cases is that often community participation cannot transcend certain societal biases and perceptions in order to appropriately deal with an offender's beliefs and controlling behaviour. Coker states that '[r]esearch with men who batter finds that friends and family often play important roles in supporting the batterer's view of himself as a victim rather than a victimizer' (Coker, 2002, p. 139). Due to the likelihood that an offender either isolates or socialises with men (and other community members) who overtly or covertly endorse the violence, the underlying causes of an offender's behaviour remain unaddressed during a restorative justice process where family and supporters (of both the offender and the victim) live in an environment where domestic violence, and all that surrounds such behaviour, remains unchecked (Coker, 2002, p. 140).

When it comes to Indigenous offenders, members of their community are all too often aware of how colonisation has affected the life of the offender on a day to day basis. This awareness can lead to excusing an offender's violent behaviour as being the result of more than 200 years of oppression and marginalisation. However, it was clear from the discussions I observed in the Indigenous sentencing court hearings, that although there was support for the view that the offender is a victim of the state, there was also a clear opposition towards using violence against their partners. Coker explains that Navajo

peacemaking uses traditional Navajo stories that embody gender-egalitarian themes to 'describe Navajo masculinity in ways that support gender-egalitarian relations' (Coker, 1999, p. 59). Indeed, Coker argues that (1999, p. 2)

Peacemaking avoids the "responsibility verses description dichotomy" of Anglo adjudication by creating a forum in which the oppressive systems that impact the life of the batterer, including systems of racism and colonization, are recognized without minimizing the harm done to the battered woman and without blaming her for the batterer's violence.

Although traditional stories analogous to the stories described by Coker used in Navajo Peacemaking, do not normally form part of the dialogue between the Elders and the offender during an Indigenous sentencing court hearing, Elders share their experiences and knowledge to impart similar messages, which are aimed at transforming the attitude of the offender. As an Indigenous female court worker pointed out, '[c]ulturally we are somewhat controlled by our own community and we could be easily ostracised by our own if we do something that meets with everyone's disapproval' (Interview with I-CW-12, 28 March 2007). Of course, the impact of the Elders' stories and dialogue is dependent on the cohesiveness and functionality of the community, and, in the case of the Indigenous sentencing courts and their use for intimate partner violence offending, it would require the participation of communities which disapprove of family violence. According to the people interviewed, this was the view held by the communities located at court sites included in this study.

CONCLUSION

Indigenous sentencing courts are not the same as restorative justice processes, but they are an alternative justice process that are being used to sentence intimate partner offenders. Critiques of alternative justice processes which focus on the position of victims are relevant when considering whether victims of intimate partner violence are subjected to further gendered power imbalances when present at Indigenous sentencing court hearings. This study has found that the 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 culturally appropriate ways. The presence of culturally appropriate authority figures and the focus on healing harms caused by colonisation subjects the offender to a forum that is more meaningful and therefore, more humbling than a mainstream court hearing. As a consequence, victims are given a greater chance of participating in a process that allows them to share their experiences. Indigenous sentencing courts, particularly the Circle Courts, give the victim the opportunity to 'openly talk about her issues, how she felt at the time, how it's affected her children and how she's had to deal with that' (Interview with NI-DFVSW-21, 5 April 2007).

Ultimately, the common view amongst interviewees was that at least the Indigenous sentencing courts gets 'everything out in the open' (Interview with I-CR-13, 29 March 2007). This includes harms done to the victim as well as

harms the offender may have experienced during childhood. Such disclosure and discussion allows the magistrate and Elders to tailor the penalties imposed according to the needs of the offender. Of course, the extent to which this is possible also depends on the availability of appropriate rehabilitation programs in each community.

More research is needed to determine what impact the courts have on offenders and victims of intimate partner violence. In particular, comparisons with other types of court processes, which are more offending-centred (rather than culturally-centred), are needed. Although such analyses were beyond the scope of this project, this study has found that the courts are supported for use in sentencing offenders of intimate partner violence, not only by non-Indigenous judicial officers, but also by respected members of the Indigenous communities within which the courts are located.

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ENDNOTES

¹ Elders or Respected Persons may be involved, but for simplicity, I use the term Elder.

² For a detailed discussion of the use of customary law and its place in the Australian legal system see (Australian Law Reform Commission, 1986; Finnane, 2001; Law Reform Commission of Western Australia, 2006; Northern Territory Law Reform Commission, 2003).

³ In the Northern Territory there is no such restriction that the offender be Indigenous. In Victoria, the Koori Court will also have jurisdiction to deal with an offence where the defendant 'intends to consent to the adjournment of the proceeding to enable him or her to participate in a diversion program': *Magistrates' Court Act 1989* (Vic), s 4F(c)(iii).

⁴ See *Magistrates' Court Act 1989* (Vic) s 4F(1)(b)(i) and (ii) and Northern Territory Department of Justice, *Community Court Darwin: Guidelines* (2005) <http://www.nt.gov.au/justice/ntmc/docs/community_court_guidelines_27.05.pdf> accessed 2 December 2008, clause 14.

⁵ The information in Table 1 is only an estimate since court sites have not necessarily kept accurate records of the types of matters heard in each court. The estimates were provided by Indigenous court workers and Magistrates during interviews. I have been informed that most, but not all, of the family violence matters involve intimate partners and that the offenders are both male and female (although they are more frequently male).

⁶ Throughout this paper a code is used for direct quotes to maintain the confidentiality and anonymity of each person who was interviewed. The code consists of two categories and a number:

- the first category indicates whether the person is Indigenous (I) or non-Indigenous (NI);
- the second category indicates their role - (CR - community representative (Elders and Community Justice Group workers); CW - court worker (magistrates, registrars, Indigenous court workers and non-Indigenous court liaison officers); DFVSW - domestic and family violence support workers; and
- the third category is a number which was randomly allocated to each person (1 to 39).

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TABLES

Table 1: Number of Family Violence (FV) Files or Defendants (Defs)

Court		When it started	Approx number (in general) per year	Approx FV as a % per year	Approx no. FV per year
Files	Defendants				
Brisbane Murri Court (Qld)		Aug 2002	260	10%	26
Rockhampton Murri Court (Qld)		June 2003	48	55%	26
Mt Isa Murri Court (Qld)		Dec 2005	60	90%	54
	Nowra Circle Court (NSW)	Feb 2002	7	50%	3.5
	Dubbo Circle Court (NSW)	Aug 2003	15	50%	7.5

Table 2: Number of Interviewees per Court Site

Court	Number of Interviewees
Brisbane Murri Court (Qld)	4
Rockhampton Murri Court (Qld)	7
Mt Isa Murri Court (Qld)	11
Nowra Circle Court (NSW)	6
Dubbo Circle Court (NSW)	11

