This final chapter brings together the ideas and findings presented in the previous chapters to consider how current and future justice responses can be tailored to best serve the needs of victims and offenders of Indigenous partner violence and of Indigenous offenders, in general. First, it is important to consider how the research findings in this book are similar or different to other evaluations and impact studies of Indigenous sentencing courts, and how they relate to feminist debates concerning the use of informal or innovative justice practices when sentencing partner violence offenders. Part of this analysis, concerns the role of domestic and family violence victims in such processes, which has not been fully explored in other evaluations and impact studies of Indigenous sentencing courts. The findings in this book, however, offer more than an assessment of how sentencing courts can better address Indigenous partner violence offending. In recent times, there has been a greater emphasis on ensuring criminal justice programs are culturally appropriate and inclusive of Indigenous epistemologies, axiologies and ontologies when they are specifically targeting Indigenous offenders or victims of crime. However, when it comes to evaluating the Indigenous-focused programs it appears that little thought is given to how the
measures and methods reflect Indigenous-centric values and knowledges. Research or evaluations of even the most thoughtful Indigenous-focused criminal justice programs continue to find that such programs have little or no impact on offending outcomes such as recidivism rates (Beranger et al. 2010), but we need to ask whether such findings are an accurate reflection of program ineffectiveness or the consequence of how the research was carried out. This chapter considers this question with reference to Indigenous-focused sentencing court practices for those who abuse their partners. The ideas presented have significant implications for future evaluations and impact studies of Indigenous-focused criminal justice programs. This chapter ends by exploring the extent to which Indigenous community involvement transforms a sentencing hearing into something which might be described as a legal hybridity of Indigenous knowledges and values and Anglo-centric criminal laws and processes. Non-Indigenous legal players, particularly judicial officers presiding over Indigenous sentencing courts, have an important role to play in allowing Indigenous cultural norms to imbue the sentencing hearing. Recognising this and acknowledging that it requires a particular form of judging and prosecuting to achieve cultural parity in the sentencing space, raises a range of questions and challenges about who should be selected to work in this space.

How the Findings Relate to Previous Evaluations of Australian Indigenous Sentencing Courts

Evaluating Indigenous-Centric Criminal Justice Processes

As mentioned in Chapter 4 there have been a number of evaluations and impact studies conducted of the effect Indigenous sentencing courts are having on various outcomes, particularly on reoffending, penalties imposed and strengthening Indigenous communities over the past 10 years. The studies are mostly jurisdiction specific and they use different methods to evaluate outcomes, making them difficult to compare.
They all identify limitations in the manner in which the data were either collected or analysed. Recently, Weatherburn, the Director of the New South Wales Bureau of Crime Statistics and Research (BOCSAR), which was the agency that conducted the quantitative component of the 2008 evaluation of the New South Wales Circle Courts, admitted that that evaluation ‘would have profited from having a closer working relationship with the people who were actually involved in circle sentencing’ to better understand how the process could best operate (Jambor 2018). There were only 68 participants included in the 2008 study, who were compared to a control group of Indigenous offenders who had been through the mainstream sentencing process in New South Wales. Weatherburn notes that a new evaluation of the Circle Courts, that is currently underway and which will be completed early 2019, will have access to a larger sample group and will be able to incorporate changes to circle sentencing that try and address the causes of offending.

Both the community-building and offender/offending-centred aims require comparative benchmarks in order to assess whether the Indigenous sentencing courts are improving the experiences and outcomes of Indigenous people when appearing before a sentencing court. However, when it comes to the community-building aims little thought is given to the use of control or comparative groups (to measure equivalent indices in mainstream courts), and interviews are generally used to collect data. In contrast, the offender/offending-centred aims tend to be tested using statistical quantitative analyses and comparing findings with those generated using comparison groups sentenced via the mainstream court system (as noted in the abovementioned newspaper article about the previous and current evaluations of the New South Wales Circle Courts). There are problems with using comparison groups from the conventional court system. For example, The BOCSAR study of the New South Wales Circle Courts contained explanations of the various factors that limited further or varied analyses or sample selection in the footnotes of the report (Fitzgerald 2008). It also acknowledged that the study only addresses one of the aims of the Circle Courts and that there is nothing in the analysis ‘to suggest that circle sentencing is not meeting the other objectives’ (Fitzgerald 2008: 7). Similarly, the Victorian
Sentencing Advisory Council’s ‘statistical profile of accused persons appearing before the Koori Court, the offences heard and sentencing outcomes’ acknowledged that ‘the relatively low number of Koori Court cases, compared to Magistrates’ Court cases, limits the inferences that may be drawn as to the differences in sentencing outcomes between the Koori Court and the Magistrates’ Court, and the factors underlying those outcomes’ (Byles and Karp 2010: 2). It is encouraging to read in the newspaper article reporting the news of a new evaluation of the New South Wales Circle Court that more resources, consultations and closer working relationships with stakeholders such as Elders, will be integrated into the approach used to assess recidivism, since evaluations of Indigenous-focused criminal justice programs need to adopt more nuanced and theoretically sound methodologies in assessing the outcomes of the programs. An approach that might be more suited in assessing recidivism for programs such as Indigenous sentencing courts is one that utilises a desistance framework. Desistance studies focus on understanding the process by which people change from engaging in anti-social or criminal behaviour to social, non-offending behaviour (Bottoms 2014).

Assessing How Indigenous Sentencing Courts Affect Partner Violence Offenders

None of the evaluations or impact studies of Indigenous sentencing courts have specifically assessed the effect on partner violence offending. This study is the first to do that, and although it does not use quantitative statistical analyses of court and police data, it uses in-depth interviews and a pathways to desistance analysis to assess how culture and the criminal justice system can latch or ‘hook’ onto an offender's internal sense of who they are to encourage Indigenous partner violence offenders to change. This choice of method was considered appropriate because it is able to accommodate the many complex and contributing factors that affect a person’s partner violence offending trajectory. Like other First Nations people around the world, Australian Indigenous people are more likely to experience higher unemployment, chronic health conditions, and violent
victimization, and to have fewer years of formal education. Changing offending behaviour in such circumstances, particularly in regional or remote towns, where access to jobs and services is more limited and where systemic and institutional racism can be more pronounced, is not easy. However, as this research shows, it is not impossible. With the help of Elders and Community Representatives, who act as cultural authority figures in court, Indigenous perpetrators of partner violence, with a readiness to change, can find the support and motivation to either desist from further offending or reduce the severity of their abuse in towns that have Indigenous sentencing courts. The cultural influence of an Indigenous court contrasts to the impersonal and efficiency-driven nature of mainstream courts. Having said that, the incorporation of a cultural element in sentencing Indigenous partner violence offenders, depends entirely on the willingness of Elders and Community Representatives to engage with that type of offending behaviour. In Queensland, some Murri Courts do not deal with matters of domestic and family violence (despite not being prevented by law from doing so) because the Elders refuse to engage with offenders charged with this type of offence. When the Koori Courts were first established in Victoria, the Elders took a similar stance and legislation reflected that at the time, although the exclusion of domestic and family violence offending has been relaxed in that jurisdiction. The Elders and Community Representatives need to be prepared to manage familial and clan group conflicts, and attempts by an offender to justify their actions by blaming their abused partner.

The cultural ‘hook for change’, when present, comes not only from Elders and Community Representatives, but also from reconnecting with one’s cultural heritage and identity and by being reminded that Indigenous cultural respect includes respect and consideration for family, kin, partners and children. Often a community members’s reference to how an offender’s behaviour affected their children, was the impetus for the perpetrator to reflect on the violence he was inflicting on his partner. Focusing on how a ‘perpetrator’s behaviours and choices impact child and family functioning’ is a recognised intervention model that has been used globally to help child welfare professionals become domestic-violence informed (Mandel and Rankin 2018: 4). The Safe & Together Model, trains social workers and service providers working in
the area of domestic and family violence how to encourage male perpe-
trators to become ‘father-inclusive’ (Fletcher 2009). A father-inclusive
approach in the domestic and family violence intervention space focuses
on not just protecting and supporting victims, but also approaching
‘men with high expectations of their abilities to parent, and a definition
of being a good father that explicitly includes respectful treatment of
the other parent’ (Mandel and Rankin 2018: 1). The ways in which the
Elders and Community Representatives spoke to the Indigenous male
perpetrators appearing before an Indigenous sentencing court, are akin
to these sentiments.

Indigenous sentencing courts have only been operating for a short
period of time in Australia’s settler-colonial history and most of the
courts are not adequately funded if it is acknowledged that to be prop-
erly resourced, the courts require culturally appropriate post-sentence
support programs to be established. Nevertheless, the Australian
Indigenous sentencing courts appear to effect change, even if it is not
linear and immediate, as Dave, who was mentioned at the beginning of
Chapter 6 said:

I didn't walk out of [the Indigenous court hearing] … a changed per-
son. But having that imprinted in me head you know, every time a pos-
ible offense came up that I was going to commit, thinking about the
[Indigenous court hearing] …, it just pulls you straight back. This just
yanks you back, it does … Like there was people I could have punched
in the face, and the only thing that’s stopping me was the thought of [the
Indigenous court] … in me head.

An important finding of this study, is the pronounced effect the pres-
ence of Elders and Community Representatives had on the consump-
tion of alcohol and drugs for some of the offenders. As other scholars
have pointed out, alcohol in particular, plays a major role in perpetuat-
ing the cycle of domestic and family violence in Aboriginal and Torres
Strait Islander communities. Blagg et al. found that the Aboriginal
female participants in their study thought that alcohol consumption
contributes to family violence because it is normalised as a social activity
to the point of addiction, when getting together with family and friends
and it is used ‘as self-medication as a response to trauma, boredom, and lack of meaningful activities’ (2018: 35). This is indeed, consistent with the findings in this study, with victims who were interviewed noting that the consumption of alcohol and/or drugs exacerbated the incidence and degree of violence. Re-establishing a respect for Elders and other community leaders through their participation in the Indigenous sentencing court process, assisted in re-establishing connections to culture and the influence Elders had on younger generations. This was usually associated with the notion of cultural ‘shaming’, which mainstream courts have been incapable of replicating. Discussions held in men’s and women’s groups that were closely connected with the Indigenous sentencing court process and which included the attendance of respected community members, also brought about changes in the way and in the amount alcohol and drugs were consumed.

The Role of Victims

Domestic and family violence victim participation in an Indigenous sentencing court process has not been the focus of such courts. Instead, the courts take an offender-centred approach by increasing communication and understanding between Indigenous and non-Indigenous key players in order to impose sentences that are more suited to the offender’s situation. They have not taken a primarily restorative justice approach, which focuses on repairing harms done to the victim. As mentioned in Chapter 7, the New South Wales Circle Courts encourage victims to attend, whereas the Murri Courts in Queensland tend to leave victims out of the process. But as this research has found, victim participation can empower victims by allowing them to have their say in a safe environment and by increasing feelings of support. It can also provide the court with a better understanding of what has transpired.

Even the only Indigenous-focused specialist family violence court in Australia (at the time this research was conducted), the Barndimalgu Court in Geraldton, Western Australia, struggled with the question of whether victims should be encouraged to attend the hearing or not. The evaluation of the court in 2013 concluded that the provision of victim
services for safe and appropriate participation in the court process was ‘a relatively new aspect of the Barndimalgu Court and as such … [had] been inconsistent over time with varying levels of success’ (Research and Analysis Branch Department of the Attorney General Western Australia 2014: 8). Three victims were interviewed for the evaluation and a further 10 victims completed a victim feedback survey. The findings from this data was that the ‘vast majority’ of comments regarding their experience of the services was positive, although it seems that most of the victims who were interviewed indicated that they were relieved they did not have to attend court. This contrasts with what a former magistrate of the court noted in a discussion during a site visit, which was that he was often stopped by victims in the street asking him if they could participate in the process. The reasons given in the evaluation for why Aboriginal victims were reluctant to participate in the Barndimalgu court process was that they felt ashamed, they were unfamiliar with the service, they did not have the resources to attend or sufficient self-esteem, they felt that they were being ‘punished’ if they were required to attend and the venue at the courthouse was inappropriate, ‘particularly for children, or victims separated from the offenders’ (Research and Analysis Branch Department of the Attorney General Western Australia 2014: 15).

As mentioned in Chapter 5 of this book, 94 per cent of the victims who had participated in an Indigenous sentencing court process, who were mainly from New South Wales, found the Indigenous sentencing court process less threatening than a mainstream sentencing hearing. The overwhelming consensus was that the presence of the Elders and Community Representatives, helped the victims to feel comfortable with the process and ensured the environment was culturally safe in the sense that they felt supported and able to speak their truth. Kelly suggests the following five criteria as essential for ensuring family violence just 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 (2002: 212). Although Indigenous sentencing courts do not allow Indigenous communities to exert Indigenous sovereignty in the sense that they do
not transfer the control over decision-making to Elders or Community Representatives, as recommended by Behrendt (2002), they offer victims of partner violence an opportunity to be present for the sentencing of their abusive partner in a way that is not replicated in a mainstream sentencing hearing. More consideration needs to be given to how this can benefit the victim, offender and other family members in communities where partners are likely to continue to be in contact, whether they are separated or not, and where partner violence impacts on other kin and family relationships.

The Transformative Power of Indigenous Sentencing Courts

The Role of Judicial Officers and Prosecutors

The power of the Elders and Community Representatives to culturally shame partner violence offenders is one of the most important aspects of Indigenous sentencing courts attempting to address domestic and family violence in Indigenous communities. Potas et al. state in their report that:

[f]undamentally the strongest aspect of the circle sentencing process, as clearly enunciated by the offenders themselves, is the involvement of the Aboriginal community in the sentencing process. Facing one’s own community – respected people who have known the offender his or her entire life – is the most powerful aspect of this process’. (2003: 52)

This view is shared by other evaluations. In particular, the role of Elders or Community Representatives generates accountability between offenders, victims and the wider community (Cultural & Indigenous Research Centre 2008; Harris 2006; Parker and Pathé 2006; Potas et al. 2003). One defendant, cited in Harris said ‘[i]t means a whole lot more to be given directions about your future life path from a person who is an Elder of your community and has a better understanding of the shoes us blackfellas walk in’ (2006: 91).
However, the roles of magistrates, judges (in jurisdictions where Indigenous sentencing courts operate in the higher courts) and prosecutors also play an integral part in ensuring that the process supports the cultural authority of Elders and Community Representatives to be present, a factor which is not often the focus of an evaluation or research study of Indigenous sentencing courts. Like mainstream courts, the sentence is handed down by the judicial officer, but this does not preclude Elders or Community Representatives from having input into the framing of the sentence. This occurs during the hearing in New South Wales and in much great depth than in Queensland, where the Elders are more likely to limit their conversations with the offender to be about their behaviour and the impact that it has had on their family and community, rather than on what the sentence will be. Ultimately, the extent to which Elders and Community Representatives are able to assert their cultural authority largely depends on how the judicial officer chooses to run the court. Bennett, a South Australian magistrate notes in his book on Indigenous sentencing courts that ‘the magistrate who does least will often do best’ in an Indigenous sentencing court process, ‘allowing others to give their views’ (2016: 48). There has been little analysis of how different magisterial or judicial styles affect the operation of an Indigenous sentencing court process. The only evaluation that dedicated a separate section to court personnel, including magistrates, was the 2006 Koori Court evaluation completed by Harris (2006). Harris notes that ‘[t]here is widespread recognition within the legal community and the Koori community of the fact that the choice of an appropriate Magistrate to sit upon the Koori Court can be crucial to its success’ (2006: 34). Feedback from community members for Harris’ study, was that organisations such as the Regional Aboriginal Justice Advisory Committee (RAJAC) should be involved in the selection of Koori Court magistrates, not to undermine the independence of the judiciary, but rather to ensure that the community has input into the establishment and operation of an Indigenous sentencing court. Such an approach would undoubtedly raise concerns about the independence and neutrality of judicial appointments, however, as Rottman notes ‘[s]pecialized forums like drug or domestic violence courts require
a different kind of special qualities, specifically of a judicial tempera-
tment in interacting directly with litigants and an openness to insights
from fields like mental health’ (2000: 25). Legal training does not nec-
essarily prepare judicial officers for this type of judging, since the study
of law and legal systems is primarily focused on rational and analytical
thinking rather than interpersonal and empathetic skills.

The introduction of innovative justice practices for sentencing
Indigenous offenders is a consequence of both the evolution of justice
practices that have appeared in jurisdictions around the globe to address
the inadequacies of the conventional court system and a response to the
over-representation of Indigenous people in custody. As mentioned in
Chapter 3 of this book, Indigenous-focused sentencing practices can
exhibit elements of both restorative justice and therapeutic jurispru-
dence, in that they have a strong focus on assisting Indigenous offenders
to reconnect with their community (whether it be Elders, Community
Representatives or victims) and obtain the help necessary to abstain
from criminogenic behaviour. But they also transform the racialised and
cultural elements of a sentencing court and for this reason, Indigenous
sentencing courts go beyond the aims of problem-solving or prob-
lem-oriented courts that rely on restorative justice and therapeutic
jurisprudence principles. The transformative nature of Indigenous sen-
tencing courts results in empowering Indigenous communities through
Elders and Community Representatives who sit on the courts, making
it even more important for judicial officers presiding over the courts to
be accepted and supported by Indigenous community members. An
evaluation that considered the relationship between community accept-
ance and support of the magistrate, and acceptance and support of an
Indigenous sentencing court process, was the qualitative evaluation con-
ducted by the Cultural & Indigenous Research Centre in 2008 of the
New South Wales Circle Courts. It found that:

[acceptance of Circle Sentencing appeared to be greater in locations
where the Magistrate had strong links to the community and had been
very active in promoting Circle Sentencing to both the non-Aboriginal
and Aboriginal communities. (Cultural & Indigenous Research Centre
Australia 2008: 68)
Some Indigenous sentencing courts, particularly those located in central Australia or in remote regions of a state, operate when a magistrate travels on circuit, making it unlikely that the magistrate can form any meaningful links with the community. Additionally, the Cultural & Indigenous Research Centre report mentioned that decisions relating to which offences are eligible to be sentenced in an Indigenous sentencing court, should be made in consultation with respected members of the community. In one Circle Court, a decision had been made by the magistrate that traffic offences should not be heard, creating a perception that the court had more power than the community. Ensuring that the Indigenous community within which the Indigenous sentencing court is situated, supports the inclusion of domestic and family violence offences is particularly important, since such offences can and do create divisions amongst clan groups. This can have a flow-on effect in a sentencing process where Elders or Community Representatives are present, making it difficult to select appropriate community members or making it challenging for offenders and victims to feel comfortable in opening up if perceptions of bias arise.

Reflecting a recognition that the Anglo-centric Australian legal system continues to advance colonial power despite its rejection of the concept of terra nullius, judicial officers who have described their involvement in Indigenous sentencing courts recognise the need for ‘power sharing’ between legal personnel and Indigenous community members:

If the community does not have confidence that the power-sharing arrangements will be honoured, the prospects for the successful implementation of Circle Court are likely to be diminished. I cannot over emphasise the importance of the magistrate, prosecutor and solicitor allowing this to happen. (Dick 2004: 61)

Dick advocates that the same principles apply to the involvement of solicitors and prosecutors, who also need to genuinely attempt to power-share with Indigenous participants. He argues that there is ‘no place for a prosecutor who is all passion but devoid of perspective and capacity to apply cultural sensitivity’ (Dick 2004: 61–62). This contradicts what is usually learned by legal practitioners engaging in the hegemonic Anglo-centric
sentencing process. In effect, prosecutors and solicitors should have ‘lit-
tle to say’ during a New South Wales Circle Court process (Dick and
Wallace 2007: 10) and during a South Australian Aboriginal Sentencing
Conference, a defence lawyer should allow the offender to ‘speak for him
or herself and the lawyer’s role will be as an observer and to give advice
as required’ (Cannon 2007: 6). These ideas are applicable to Indigenous
sentencing courts in other states and territories, since they support the
need for cultural transformation when sentencing Indigenous offenders.
As a former South Australian Chief Magistrate once noted, however, ‘not
all of … [his] magisterial colleagues would be able, or even willing’ to
run courts in the way that is required for Indigenous sentencing courts to
operate effectively (Moss 2000: 67).

De-colonising the Sentencing Process

A final question that should be considered in assessing Indigenous-
centric legal processes is whether such a process, embodying
Anglo-centric norms and values and which exists in a postcolonial envi-
ronment, can ever be culturally appropriate, relevant and sensitive? The
answer to this may depend on how well such a process can ‘de-colonise’
and thereby transform the historically negative race relations, which still
exist between law enforcers and Indigenous communities (Rose 1996).
Without acknowledging the continued existence of the dominant
colonial enterprise, changes to laws and legal practices will do nothing
more than create a legal discourse that converses with itself to explain
and manage the needs and wants of the colonised ‘Other’ (Roy 2008).
For example, as Davis notes, despite the High Court’s recognition of
native title in Mabo v Queensland [No 2] [1992] 175 CLR 1 (Mabo v
Queensland), it did not “recognise” Indigenous law, beyond the rec-
ognition that it exists. It merely construct[ed] a new fiction – “native
title” – within the framework of Western law’ (Davies 2002: 275). In
this sense, postcolonialism in law and legal practice exists as primarily
privileging the colonial Eurocentric legal system.2

Adapting a sentencing process so that it becomes more culturally appro-
priate and sensitive involves more than a rudimentary change in processes
and procedures; it requires changes in postcolonial power dynamics that
might exist between Indigenous and non-Indigenous actors, and adjustments in a non-Indigenous person’s perspectives. Although admitting that defining cultural appropriateness is no easy task, Kelly and Barac (in a submission to the New South Wales Department of Attorney-General and Justice on youth justice conferencing) list the following elements as important when working with Indigenous juveniles:

- The agency or program must work directly with local Indigenous communities;
- The preferred model for culturally appropriate service delivery is that the agency works in a direct and equal partnership with local Indigenous communities;
- Elders and/or respected community members must have a central place in [the] practice;
- Non-Indigenous personnel must engage in an ongoing capacity with the local Aboriginal community. For example: attending cultural events, being a part of NAIDOC celebrations, involvement in sorry business such as National Sorry Day and local events, as well as (but not limited to) Invasion Day/Survival Day events;
- If non-Indigenous practitioners are involved, they must have in-depth knowledge of the local Aboriginal community’s culture, protocols and customs (including customary law). For example, they must have cultural knowledge as to who are the acknowledged local elders (the practitioner must be able to discern between self-appointed Aboriginal elders and acknowledged Aboriginal elders who are ‘widely respected for their fairness, reasonableness, honesty and wisdom’);³
- If a practitioner’s work covers the geographic area of different Indigenous language groups, then there must be ongoing consultation with elders of those local communities to ensure that the current protocols are being adopted for different language groups; and
- Needless to say, the practitioner must not make assumptions about how particular Indigenous juveniles, their family or even their elders, practice their culture. In an urban Aboriginal community the cultural protocols may not appear ‘Indigenous enough’ if the practitioner already has stereotypes about Aboriginality and cultural manifestations. (Kelly and Barac 2011: 17–18)
In an earlier publication which considers the use of restorative justice in addressing family violence in Indigenous communities, Kelly also notes that in order to be culturally appropriate, justice programs need to ‘respect and enhance’ Indigenous peoples’ right to self-determination and ‘meet the desired outcomes of the community’ (Kelly 2002: 212). Kelly (2002) concludes that the New South Wales youth justice conferencing program operating at the time her aforementioned chapter was published was culturally inappropriate because the restorative justice practices, as opposed to values, failed to enhance self-determination for the communities involved in the program. Tauri, a Maori academic, goes further when discussing the bicultural criminal justice programs that have been established in New Zealand and Canada. He believes that ‘[m]erely tinkering with the existing criminal justice system’ by recruiting First Nations people in criminal justice roles without relinquishing control of the application of innovative processes will never address the cultural divide and disadvantage that is evident and ever present in the justice system (1999: 162).

A number of past evaluations have found that Indigenous sentencing courts promote shared justice, reconciliation and empowerment for Indigenous communities (Cultural & Indigenous Research Centre 2008: 40; Harris 2006: 94; Parker and Pathé 2006: 23; Potas et al. 2003: iv, 51). For example, the involvement of the broader Indigenous community in the sentencing process has been identified as promoting a sense of pride amongst Indigenous participants and a sense of ownership in the criminal justice process. The Cultural & Indigenous Research Centre evaluation concluded that the courts encouraged a ‘two-way education’ process between court workers and communities that promoted cross-cultural understanding and learning (2008: 40), as did the Magistrates interviewed in the Harris study (2006: 94). Similarly, Potas et al. found that Circle Courts build on individual and community empowerment, and that the process was effective in reducing barriers between courts and Indigenous communities (2003: 48). Community participation was perceived as critical in bridging the gap between Indigenous communities and ‘white law’ (Parker and Pathé 2006: 23; Potas et al. 2003: 51). It could be argued, therefore, that Indigenous sentencing courts provide an
opportunity for a legal ‘hybridity’ whereby the hegemonic system can be redefined and reinvented to accommodate Indigenous knowledges and values and vice versa.4

Despite the possibility that Indigenous sentencing courts may transform the sentencing process into a forum that can better support Indigenous community empowerment and notions of shared justice, much of this can be lost if an Indigenous sentencing court outcome is appealed. On appeal, no Elders or Community Representatives are present to assist the appellate court in deciding what to make of the Indigenous sentencing court process. It may even be that appellate court judges have never personally observed an Indigenous sentencing court process, relying instead on descriptions of the process contained in submissions or other documentation that describes how such a court operates (Marchetti 2011). Victoria seems to offer the most examples of how appellate courts can reinterpret or negate the shared justice approach of the original Koori Court jurisdiction, which can damage the confidence of the Indigenous community in cases involving domestic and family violence. One such case is that of Steelie Morgan, a 24 year old Indigenous man (whose father is of South Sea Islander descent and mother of Yorta Yorta descent), who had pleaded guilty to committing 12 offences that related to violence against his then 15 year old girlfriend. In the County Koori Court5 sentencing hearing, Lawson J went to great lengths to discuss the impact of the crimes on the victim and although she accepted that Morgan’s early plea of guilty, his personal circumstances and difficult family upbringing and his genuine remorse and dedication to turning his life around were grounds for mitigation, the judge sentenced Morgan to a total effective imprisonment term of three years and six months with a non-parole period of 18 months. The Elders who had participated in the sentencing hearing had endorsed the judge’s view, with one male Elder noting that Morgan had ‘scarred the victim mentally’, scars that would remain with the victim for the rest of her life, and that it was not ‘acceptable for a man to act in that way towards a woman’ (The Queen v Morgan [2009] VCC (The Queen v Morgan [2009]): 9–10). Morgan appealed his sentence on the grounds that it was manifestly excessive. In considering the appeal, the Victorian Supreme Court of Appeal, comprising two male justices, Maxwell P and
Buchanan JA, accepted the concession of the Crown that ‘the sentence imposed could be viewed as falling outside the sentencing range applicable to this case’ (*R v Morgan* [2010] 24 VR 230 (*R v Morgan* [2010]): 233). After briefly describing the sentencing procedure of the County Koori Court, the Supreme Court of Appeal concluded that it was ‘more burdensome than appearing at a traditional plea hearing, particularly in circumstances like the present where Mr Morgan had sought reconciliation with his indigenous heritage’, and that ‘Her Honour was in error in holding that Morgan’s participation in the sentencing conversation could not be treated as a mitigating factor’ (*R v Morgan* [2010]: 238). This decision was controversial, not least amongst Indigenous and non-Indigenous domestic and family violence scholars and advocates, because it suggested that Koori Courts could be used by offenders to get a reduction in their sentence. What was missed by these critiques is that it was not the Koori Court nor the Elders who ultimately decided that participation in a ‘sentencing conversation’ could mitigate the sentence, but a court of a higher standing which did not have the benefit of community input and participation. Interestingly, in another appeal from the County Koori Court in 2018, the Victorian Supreme Court of Appeal dismissed the appeal despite the appellant arguing that his sentence in the Koori Court had been manifestly excessive because of his young age (24 at the time of his sentence, which consequently was the same age as Morgan when he committed his offences), his tragic personal history, his Aboriginality, his remorse evidenced by his early guilty plea and his genuine participation in the Koori Court process (*Honeysett v The Queen* [2018] VSCA 214 (*Honeysett v The Queen*)). Honeysett had committed armed robbery of a liquor store and theft of a motor vehicle and had an offence history involving violence, although not domestic and family violence. The appellate court acknowledged the appellant’s participation in a ‘sentencing conversation’, but distinguished Morgan’s appeal because Morgan had only appeared in a Koori Court once and had shown that he was committed to his rehabilitation. Honeysett had instead, been through the Koori Court process twice and had ‘failed to live up to his statements in the 2013 sentencing conversation’ (*Honeysett v The Queen*: 21). The appellant had argued in his submissions that the Koori Court judge should have sought the views
of the Elders about his participation in the sentencing conversation in order to come to a determination about what weight should be given to that participation when determining sentence. The Court of Appeal, however, decided that ‘the weight given is ultimately a matter for the judge based on the information before the Court and his or her observations during the sentencing conversation’ (Honeysett v The Queen: 18–19). One wonders, however, how a court of appeal can decide an appeal from an Indigenous sentencing court, without having observed or discussed what happened in the original Indigenous sentencing court hearing and any progress made by the appellant, with the Elders and Community Representatives who had been present and who may have possibly monitored the offender’s rehabilitation? Further thought should be given to this question if Indigenous sentencing courts are thought to ensure greater participation of the Indigenous community in the sentencing process and to transform Indigenous-white power relations in a sentencing hearing.

Notes

1. Wilson describes these terms as encompassing a person’s thoughts or knowledge (epistemology), a person’s ethics or values (axiology) and a person’s belief system or way of being (ontology). He makes the point that Indigenous research ‘needs to reflect Indigenous contexts and world views’ (Wilson 2001: 176), meaning Indigenous epistemologies, axiologies, ontologies, and methodologies. He considers the research methodology to be about ‘how you are going to use your ways of thinking (your epistemology) to gain more knowledge about your reality’ (2001: 175). Using all four aspects creates research that ‘comes from an Indigenous paradigm rather than an Indigenous perspective’ (2001: 176).
2. This line of reasoning resembles Said’s (1978) construction of imperialism.
3. The quote is contained in the cited text and taken from (Kelly 2002: 220–221).
4. This type of transformation or understanding of Indigenous-focused sentencing courts and programs draws upon Bhabha’s (1994) work.
5. The County Koori Court is a mid-tier court that sentences indictable offences committed by Indigenous offenders, in Victoria.
References


