



# Racializing Restorative Justice: Lessons from Indigenous Justice Practices

Professor Kathleen Daly

School of Criminology and Criminal Justice  
Griffith University

[k.daly@griffith.edu.au](mailto:k.daly@griffith.edu.au)

2<sup>nd</sup> National Conference on Restorative Justice  
San Antonio, Texas  
13-15 May 2009

# Australia: large and diverse





# Aims of talk

- Describe how and why the courts emerged and what is occurring today
- Show how the courts are distinctive from other innovative justice practices
- Reflect on how we may “racialize restorative justice” more deeply



# Elements of the courts

## ➤ Key elements

- Increase trust between Indigenous people and white justice
- Strengthen and empower Indigenous communities
- Bend and change white law

## ➤ Collateral elements

- Increase stature and respect of Indigenous people in the criminal justice system
- Develop more culturally appropriate and meaningful programs and services



# Reactions to the idea

- Academic and legal critiques from both sides
  - Courts are not radical enough
  - Courts are too radical
  
- Acceptance of the idea
  - Broad acceptance of courts in Australia
  - Indigenous Elders and community groups like them and want to see them expand
  - No negative politicisation by media or politicians



# What these courts are and are not

- Courts located in urban or regional areas
- Hearings are a court, a regular part of the court's schedule
- Courts not practicing or adopting Indigenous customary laws
- Elders and Respected persons play important roles, but final decision rests with the judicial officer
- Courts are not Indigenous-controlled community courts, peacemaker courts, or tribal courts



# Positioning myself

- Conducting research on restorative justice for over 15 years, and Indigenous justice practices for about 10 years
- Critics of restorative justice think I am an advocate. Advocates think I am a critic. Both are right.
- The argument
  - Disagree with others who put varied innovative justice practices under one umbrella
  - Distinctive practices are taking place



# The Australian context

- Australian Indigenous people are 2.5% of the population, but 24% of those imprisoned
- Indigenous people are 13 times more likely to be imprisoned than non-Indigenous
- Socio-economic measures and Indigenous people: Australian Indigenous people worse off compared to those in Canada, the United States, and New Zealand



# Why high imprisonment?

- History of dispossession of Indigenous people by white colonizers in 18<sup>th</sup> and 19<sup>th</sup> centuries
- Forced removal from the land, separation of kin and family groups, loss of language and culture: all broke up informal and formal mechanisms of social control
- State policies of protection-segregation and assimilation in 20<sup>th</sup> century created Indigenous people as societal “outsiders”
- Change slow: *Racial Discrimination Act 1975* removed all explicit *legal* discrimination; official federal apology to the “stolen generations” and their families, February 2008



# Emergence of Indigenous sentencing courts

- June 1999, first session of the Nunga Court
- Magistrate Chris Vass, Port Adelaide, South Australia
- Travelled for many years on circuit to remote Aboriginal areas; wanted to bring more informality to urban courts



# Themes from Chris Vass, Nunga Court

(interviews, K. Daly 2001)

## ***“The huge mistrust.”***

... I talked to more and more Aboriginal groups ... I sat on committees and I raised the topic. I didn't talk about it to the Chief Magistrate, ... the department, the attorney's office, or any government agency. ... I thought that once I do that, they'll form a committee, and nothing would happen. ... And I visited prisoners. It was a matter of talking with people, listening to them. And what was confirmed ... was the huge mistrust.

## ***“To have a court ... they could trust [and be given] an opportunity to speak.”***

My idea [was] to have a court that Aboriginal people could feel more comfortable with, that they could trust, where there was less formality, a court that would give people an opportunity to speak and have their family members with them, where they would feel comfortable without being overwhelmed by a large white presence. ... I got huge support for that idea.

## ***“I thought it would be good if I got off the bench and came down at eye level [with] an Aboriginal person sitting next to me.”***

... I thought it would be good if I got off the bench and came down at eye level. ... If I had an Aboriginal person sitting next to me as an advisor on cultural things, to set me straight.... The court would be less formal. The accused person would be able to sit at the bar table alongside their legal representative, and a companion, a mother or a father, or a sister, or uncle, or aunty or a friend. Family members and friends or community members could come in and be part of the court process. That is what they said they were looking for.

# Chris Vass, cont'd

***“If you have a different environment, it puts people in the right frame of mind.”***

You've got to start with the room. ... You have to sit opposite each other ... a circular table so that everybody feels that they've got an equal part to play. If you have a different environment, it puts people in the right frame of mind from the start. It makes them feel that they're part of what's happening, that they have an equal say, and they're being listened to, which is pretty important for everybody, not just Aboriginal people.

***“Keep the lawyer speak down to the minimum.”***

You've got to try to think a little bit laterally. You've got to try and rid yourself of legal jargon. That's the first thing: you've got to rid yourself of complicated language ... Try to keep the lawyer speak down to a minimum. The lawyers ... [have encouraged] ... the defendants to talk, and the aunties and the uncles ... It's better to listen to them because they're closer to the issues. They know what's going on.

# Chris Vass, cont'd

***"They'd say, 'We can trust it.'"***

***"There's a lot of faith there, and it's very tiring." "It's hard work."***

The feedback I got from people ... [was] they thought it was pretty good. They'd say, *The thing we like most about it is that we can trust it.* That's a bit overwhelming. There's a lot of faith there, and it's very tiring. There's a lot of effort in running a court. It's very draining. The other courts are easy, dead easy. This is not. This isn't easy because you've got to balance so many things. You're taking risks,

It's hard work. At the end of the day, if I did a long Nunga Court down at Port Adelaide I was quite exhausted, mentally and physically. You've got to listen to a lot more. You're closer to the action, it's much more emotional, you really feel that there's a greater obligation on you to do right. ...

Being down there amongst them [rather than on the bench], ... you hear people and it makes you think hard about what you should be doing. In a sense, you have to agonise a little bit more. That can be stressful, having to make the decision and knowing you've got to do it quickly and hoping that it's right. ... You have an enormous obligation, and that makes it hard because you think you might let them down.

The ordinary court is more comfortable because you've been doing it for years and you've got the machinery of the ordinary court to hide behind.



# Vass's early vision

- Redress the “huge mistrust” fostered by a history of racism and colonialism
- Have a more comfortable environment for defendants to speak and be supported
- Culturally-aware and tuned-in magistrate
- Plain English



# Expansion of Indigenous sentencing courts

- Over 30 courts in all the states and territories, except Tasmania
- Mainly in adult jurisdiction, but some in youth jurisdiction
- Practices vary from place to place



# Eligibility and sentencing process

## ➤ Eligibility

- Defendant Indigenous, entered guilty plea, agree to the court, offence in geographical area, and magistrates' court offence seriousness

## ➤ Sentencing process

- Magistrate normally sits at eye-level, not elevated bench
- Elders or Respected Persons participate, but roles vary
- Offender has a support person(s), who is invited to speak
- Significant interaction, but judicial officer makes final decision
- Indigenous insignia and artwork
- Other court staff (sheriff, court liaison officer, probation) are Indigenous
- Others there: community justice group members, Indigenous service organizations



# Jurisdictional variation

- **Type of model used**
  - Nunga Court and Circle Court
- **High and low volume**
  - Some places have a higher volume of cases than others
  - Some limit cases; others do not
- **Different names**
  - Nunga Court (South Australia)
  - Koori Court (Victoria)
  - Murri Court (Queensland)
  - Circle Court (New South Wales and the ACT)
  - Community Court (Northern Territory)
- **How and why the courts emerged**
  - Each jurisdiction has a particular story
  - Victoria alone has a legislated framework; the rest use extant sentencing provisions
  - Different mix of involvement by government and activist magistrates; all had significant participation by Indigenous people



Brisbane Murri Court with  
Magistrate and Elders (Aug  
2005)

Opening day of  
Rockhampton Murri Court  
(June 2003)



# Rockhampton Murri Court Symbols



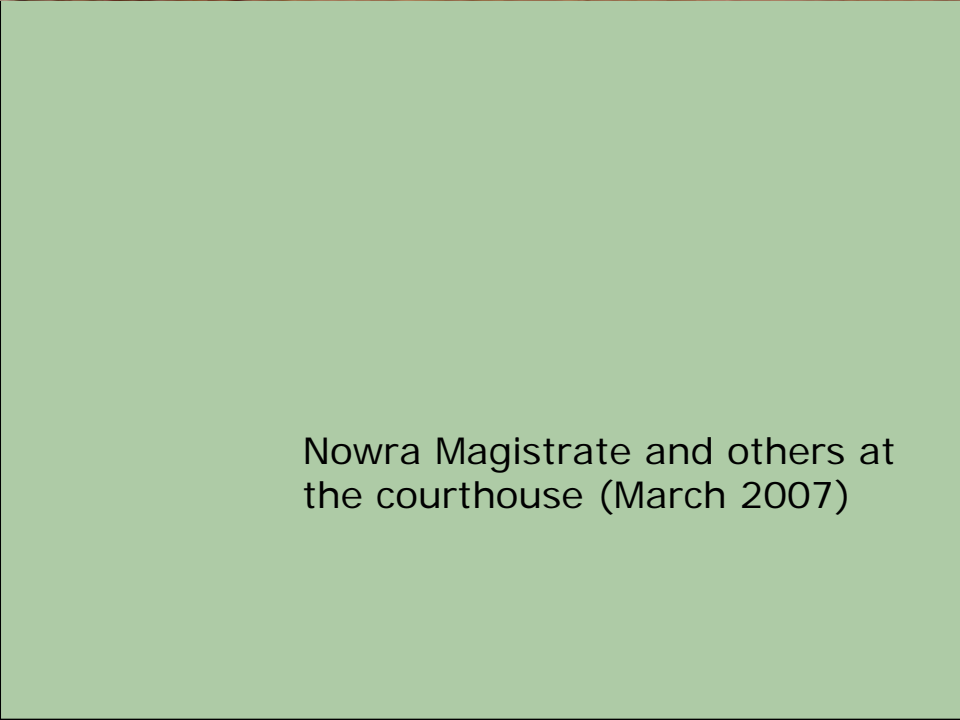
Painting *Yoombudda gNujeena*  
("Listen, I have something to tell you")

Message stick and conch shell





Nowra Courthouse (May 2005)



Nowra Magistrate and others at the courthouse (March 2007)





After a Nowra Circle Court (Jerringa Community Health Centre, May 2005) with Respected Person Doug Longbottom

Uncle Lou Davis working on research, Nowra Courthouse (April 2008)





Before the start of a Dubbo  
Circle Court (Chinchilla Gardens,  
Nov 2004)



# Themes from Daniel Briggs and Kate Auty, Koori Court

(Briggs and Auty 2003)

***“We are listening to what we are told.”***

What is impressive about the court ... is that many Aboriginal people have found their voice in it. We wait and take time, we invite rather than compel engagement, we back-track and re-enter dialogue from other places. We are listening to what we are told. We listen to aunties and uncles, to mothers of young babies, and to young men who have committed a criminal offence but who defer and show respect to their elders. (p. 16)

***“Commitment from agencies, service providers, and members of the community.”***

Equally important ... is the commitment from community agencies, service providers, and other members of the local community to attend Koori Court. Their attendance enhances the Koori Court’s ability to put together meaningful sentencing options and strengthens the Koori Court’s status, credibility and relevance in the community. (p. 16)

***“More than just the built environment is under scrutiny. More than the shape of the bench is being changed.”***

In embarking on this journey we have started a debate about what it is we are doing ... We have started to talk about how the “culture” of our [white] legal system and our courts needs to change to more comprehensively serve a group in the community ... This discussion is still inchoate in that it takes time for us to understand that we are talking about our “culture.” We are talking about taking risks with our processes and making ourselves vulnerable to both rational criticism and intemperate harangue. More than just the built environment ... is under scrutiny, and more than the shape of the bench is being changed. (p. 17)



# Desks and furniture as metaphors for power

- All about change in social relations and legal power
- Vass: not being able to “hide behind the machinery of the ordinary court”
- Briggs and Auty: more than changing the “shape of the bench”



# Themes from Doug Dick and Gail Wallace, Nowra Circle Court

(Dick 2004)

## ***“I don’t wanna sit behind no desk.”***

At our first Circle Court I ignorantly ... suggested that we arrange tables in a Circle. ... Having already abandoned my suit coat and tie, it was another gesture at informality. An Aboriginal man in the group said, “Hey Mr. Magistrate, you’re not sending me back to school, I don’t wanna sit behind no desk.” The order for the desks was cancelled; a Circle of people formed and the first Circle Court was underway. (p. 59)

[This] symbolizes for many what ... Aboriginal people feel about the trappings and formalities of western institutions and in particular the legal system. The system is entrenched with proprieties, rules, and regulations that have always signified for Aboriginal people, their powerlessness and the power of white men over them. “*I don’t wanna sit behind no desk*” was a crucial objection. The removal of the desks was the removal of the overwhelming power of the western legal system. Without a desk, a barrier, the proceedings would appear fairer, more equitable and less formal. (p. 59)

## ***“The Circle, in removing the table, literally turns the tables.”***

The Circle, in removing the table, literally turns the tables and allows not just for a sentence to be considered and passed, but in this process also demands that the offender be responsible for his or her actions. (p. 61)



# Themes, cont'd

- Removing barriers to “hiding” by magistrate and defendant
  - For magistrate, hiding behind elevated bench and trappings of legal power
  - For defendant, hiding behind “solicitor’s shield”
- Creates more effective and honest communication
- Elders’ actions and words help remove the barriers

# Elders' actions and words in the Nowra Circle Court

## ➤ Piercing the solicitor's shield

- Challenge the solicitor about the defendant ("We've known him since he was born")

## ➤ Piercing the defendant's shield

- Challenge excuses, but support defendant



# Piercing the solicitor's shield

(Dick 2004)

**Nowra Elder says:** *"We've known him since he was born."*

**Solicitor** *It is important for the Circle to know that my client suffers from depression, alcohol, and substance abuse. He had an exposed upbringing in a domestic violence family with a father dependent upon alcohol.*

**Elder 3** *We know about his childhood. We've known him his since he was born.*

The prosecutor outlines the defendant's criminal history and points out that the majority of entries are alcohol-related.

**Solicitor** *But he had also run out of medication.*

**Elder 4** *The system didn't let you down, you let yourself down. If you are running low on medication, you do something about it, 3 weeks before. (p. 65)*



# Piercing the defendant's shield

***Nowra Magistrate describes an Elder's response to "an offender ... hiding behind past injustices."***

... [The Elder] had participated in Circle Court with vigour and enthusiasm. One passage that I often quote was directed to an offender who was ... feeling sorry for himself and was hiding behind what he considered past injustices. She drew reference to the offender's own children and linked them to his offending. His outward demeanour visibly changed. He was humbled as her words sunk in. She said,

*My parents didn't teach me how to live. They lived and I watched.  
Your children are doing the same.*

(Dick 2004, p. 64)

***Nowra Elder: "It comes from the heart ... We shame their actions, not themselves."***

*It's very much about culture and about our people. It comes from the heart. It instils our values. Affirms wisdom, Aboriginality, and commonsense.*

In reflecting on what the Elders try to communicate to offenders, she says,

*When we talk to [the offenders], we never tell them they're no good. We want them to be somebody. We use the language, use the words. [reference is to using Aboriginal language].*

*We shame their actions, not themselves. We say to them: "If they don't pull up their socks and do something, who's going to do the Circle [when we go]?"*

(K. Daly, field notes May 2005)



# Two-way learning

- Court brings down barriers between
  - Indigenous people and criminal justice system
  - Indigenous and non-Indigenous people

## ***Nowra Aboriginal Project Officer: "Two-way learning."***

At first, the Elders were not sure they wanted to be part of it. In time this changed, and now *they are more trusting of the process. They are more aware of the seriousness of the offence*, Gail says. One side of the two-way learning is the Elders and Respected Persons knowing more about what an offender has done, more about the seriousness of their acts, and the logic behind "white justice" sentencing. *They never knew what the offenders had done when they were sent off. They now know why, in most instances, Aboriginal offenders are sent to goal.*

Gail says that the Circle process *brings down barriers between the criminal justice system and Indigenous people*, but it *took a long time to develop the trust. ... It was a major job to bring them together* [the Elders and the court system].

The other side of two-way learning is how the magistrate and criminal justice staff change. Among the things that occur, the magistrate, prosecutor, and defence do less talking. They listen more, and they work with the ideas coming from the Elders in the Circle. Gail reports that now *there is respect by the community for Doug* [the magistrate], *and Doug for the community* although *both of them were hard to bring around.*



# Defendants in the Circle

(K. Daly, interviews April 2008)

***John: "He makes you have a good look at yourself."***

... Having all the Elders there. ... Uncle Alf, he's pretty strict. And it's good he's on it because he doesn't put you down. He just makes you have a good look at yourself and what you're doing. More or less telling you to wake up to yourself and have a look at yourself and see what you're doing and what you've been doing.

***Jackie: "With the Circle ... you know they [the Elders] care. They want to help, they want to see their culture do better ... "***

With the Circle it's different because you know they [the Elders] care, and you know that they're to help you. In other courts I went, ... they just [claps her hands] go away, but with Circle they really care. They want to help, they want to see their culture do better for themselves, not just get a slap on the wrist and say "you pay this fine and go and do it again" because that's what I did. ... Look, I reckon it's good. Well, it helped me, and I know it helped a couple of others. If you want to be helped ... You've got to want to be helped. ... It's no good going to the Circle if, no. But without them, I'd be dead now. That's a fact.

# Defendants in the Circle, cont'd

***Jason: “[The Elders talked] about me kids you know, start thinking about me kids and staying out of trouble and stuff like that. That made me stop and think ...”***

There was a couple of things brought up about when I was a kid ... because me mum was alcoholic, see. So yeah, a couple of things were brought up, .... and I didn't really want to remember them ... but it was brought up ... But [the Elders talked] about me kids you, know, start thinking about me kids and staying out of trouble, and stuff like that. That made me stop and think...

***Rueben: “I remember sitting there ... I was trying to fight back the tears ... it just really hit home.”***

They [the Elders ] were just very straight out and upfront ... They talked about the family, about my young kid at the time. They said, “how would you like it if this was your house, your family, your car, your shop?” They put things very blunt and it really made me think. I remember sitting there, and ... they said something about family, ... I got really emotional, and I was trying to fight back the tears ... It just really hit home, you know? ... It really made me think...



# Themes from Annette Hennessy, Rockhampton Murri Court

(Hennessy 2006)

***“The power of the natural authority and wisdom of the Elders is striking.”***

.. After consideration of all the material presented ..., the sentencing decision is taken by the magistrate alone. This is made quite clear to the offender and his family ... to protect the Elders from any potential backlash.

What cannot easily be explained is the power of the Murri Court process on a spiritual or emotional level. The power of the natural authority and wisdom of the Elders is striking in the courtroom. There is a distinct feeling of condemnation of the offending, but support for the offender's potential, emanating from the Elders and the Community Justice Group members. (p. 10)

***“Communication ... flows in all directions, and everyone takes a part.”***

Communication is a theme and integral component of the ethos of the Murri Court. Communication is improved, more detailed, flows in all directions, and everyone takes a part. No one person or group has all of the wisdom or knowledge, and each depends on the other for a just outcome. (pp. 12-13)



# Annette Hennessy, cont'd

## ➤ Other benefits

- Encourage development and better coordination of services and programs for defendants
- Change relationships within the courthouse (two-way learning again!)

### ***“Significant building of relationships.”***

There has been a significant building of relationships between workers in the criminal justice system and the members of the Indigenous community throughout the process, and the Elders and members of Community Justice Groups are accepted as an important part of the local justice system. (p. 14)



# Restorative justice, therapeutic jurisprudence, or something else?

- We see some aspects of restorative justice and therapeutic jurisprudence
- Key areas of difference
  - Changing relationships between “white justice” and the Indigenous domain
  - Building greater authority in Indigenous communities
  - Using that authority, inside and outside a court process, as effective social control
  - Aiming to redress centuries of racial oppression and distrust



# Lessons learned

## 1. Tension between two aims

- *Criminal justice aims*: increase “turn up” rates on the day, complete sentences, and reduce re-offending
- *Community-building aims*: increase trust in CJS, increase the stature and respect of Indigenous people working in the system, strengthen and empower Indigenous communities

## 2. Misplaced belief that reductions in re-offending can come from CJS practices alone

- Criminal justice policies can be improved by being less harmful and more re-integrative
- Other socio-economic policies are required



# Lessons learned, cont'd

## 3. Do the courts work? Answering the question requires

- Research infrastructure to depict conventional and innovative justice practices and outcomes
- An understanding that what we would like to know is complex, not simple

*Is there greater trust by Indigenous people towards these courts?*

*Is the legal process more relevant and meaningful to offenders and victims?*

*Do offenders have a greater commitment to becoming more law-abiding?*

*Do the courts strengthen Indigenous communities?*



# Lessons learned, cont'd

4. Courts are vulnerable with a lack of research evidence, including that on gaps between aspirations and actual practices

- Victim participation is low, but this is changing
- Quantitative study of re-offending finds no differences compared to conventional courts (Fitzgerald 2008 in New South Wales)

5. No single approach for an effective Indigenous sentencing court

- The more that practices are driven from the Indigenous domain, the better.
- The more that practices feature in all phases of the criminal process, not just sentencing, the better

# Workshop

- To see a video on how the Murri Court operates in Queensland
- After listening to this paper and what people are saying, can you see:
  - Ways to apply these ideas to other racial-ethnic minority group and “white justice” contexts?
  - Ways to more deeply racialize restorative justice?