

Desistance and Indigenous Sentencing Courts

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Desistance and Indigenous Sentencing Courts
Kathleen Daly and Elena Marchetti^{1*}

Our paper presents the new desistance framework and its relationship to Indigenous sentencing courts and the people that come before them. We consider the implications for research and practice, and for recent developments in the Northern Territory.

BACKGROUND

We draw from research we have carried out, together and separately, for over 15 years. In the early 2000s, we began studying these courts. For Daly, it was in 2001 in South Australia; and for Marchetti, it was in 2004 in Queensland and New South Wales. Port Adelaide was the first place to hold an Indigenous sentencing court;² it was convened on 1 June 1999. Magistrate Chris Vass had been talking with Aboriginal people in the community for several years. He had in mind a new kind of court, in which

Aboriginal people could feel more comfortable, [a court] 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 without being overwhelmed by a large white presence. (Daly interview with Vass in 2001, reported in Daly, Hayes, and Marchetti, 2006: 452)

He got “huge support” for the idea from Aboriginal people. Furthermore, and importantly from a policy perspective, Vass said that the aim of the court was not “just about keeping people out of prison”, but

to have Aboriginal people trust the legal system, make them feel like they have a say, ... encourage them to be at court, encourage them to feel some ownership of the court process. That’s what it’s all about. It’s their court. (p. 452)

Looking back, the first Indigenous sentencing court was a model of creating a bottom-up justice practice.

Other courts soon emerged. By 2007, there were 28 adult and youth courts, not including those on circuit,³ in all Australian jurisdictions (except Tasmania) (Marchetti and Daly, 2007: Table 1, 417-18). Ten years later, the numbers have doubled. In March 2017, our survey of courts finds that 56 courts are operating, not including those on circuit.⁴ Today, Tasmania still does not have a court, the Northern Territory no longer has one, and Western

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² By Indigenous we refer to Aboriginal and Torres Strait Islander people. In Port Adelaide, Vass consulted with members of the Aboriginal community.

³ Of the 28 courts in 2007, 21 were adult and 7 were youth courts (youth courts 25% of the total).

⁴ Of the 56 courts in 2017, 41 were adult and 15 were youth courts (youth courts 27% of the total) (table on file with the authors).

Australian courts operate on an “as needs” basis without funding. Just one Australian jurisdiction (Victoria) enacted specific legislation when establishing the courts.

INDIGENOUS SENTENCING COURTS IN AUSTRALIA

In other publications, we detail the courts and how they relate to the broader landscape of Indigenous justice practices in Australian urban and remote areas (Marchetti and Daly, 2004; Daly, Hayes, and Marchetti, 2006; Marchetti and Daly, 2007). The common features are as follows:

- The offender must be Indigenous (or in some jurisdictions, Indigenous or South Sea Islander, although in the Northern Territory, there was no such restriction).
- The courts do not use customary (or traditional) law or forms of punishment, nor are they a type of Indigenous-controlled Community Court. They are a more informal sentencing process for those who have admitted (or pleaded guilty to) offending, with an emphasis on using plain English. The courts are normally located within the Magistrates’ Court (or Local Court) level, but some can operate at higher or Children’s/youth court levels.⁵
- A judicial officer sits at eye level with an offender, usually at a table where the defence lawyer and prosecutor also sit, rather than an elevated bench. One or more Indigenous Elders or Community Representatives are present, along with an offender’s supporters, and depending on the jurisdiction, the victim. The sentencing normally takes longer than in conventional courts, about one to two hours.
- The court’s physical set up and venue varies: most are located in a courthouse, but some are in community settings. The courts vary in the types of offences that can be considered,⁶ and they vary in the role and number of Indigenous Elders and Community Representatives.
- The courts are not a form of restorative justice or therapeutic jurisprudence, although they share elements in common such as an emphasis on aspects of procedural justice.

Elsewhere, we have compared similarities and differences in Indigenous sentencing courts and other Australian justice practices (restorative justice conferences and specialist or problem-oriented courts, the latter using terms from therapeutic jurisprudence) (Marchetti and Daly, 2007). We conclude that Indigenous sentencing courts are in a category of their own, and for two reasons. First, their legal and justice aspirations are to make court processes more culturally appropriate, to engender greater trust between Indigenous communities and court staff, and to foster a more open exchange of information in court. Second, their political aspirations are to transform relations between “white justice” and the Indigenous domain, to rebuild and empower Indigenous communities, and to change race relations. Neither

⁵ This can occur in South Australia, Victoria, New South Wales and Queensland, and has in the past also occurred in the ACT.

⁶ For example, some exclude sexual, partner, or family violence offences, or other offences (see Marchetti and Daly, 2007: 421-22; Marchetti, 2016: 73-74).

restorative justice conferences nor practices derived from therapeutic jurisprudence explicitly have these aspirations.⁷

Points of difference among the Australian courts are their names: Nunga Court (South Australia), Koori Court (Victoria), Murri Court (Queensland), and Circle or Youth Koori Court (New South Wales)—all of which have a place name in addition. The one court in the ACT is called the Galambany (formerly Ngambra) Circle Sentencing Court. When the courts were operating in the Northern Territory, they were called Community Courts; and in Western Australia, Aboriginal Sentencing Courts and the Barndimalgu Court (which was established specifically for domestic and family violence offending).

Different approaches are taken to remunerating Elders and Community Representatives. In all jurisdictions, transport and lunch (or morning tea) are provided. In New South Wales, there is no additional payment, but Queensland, South Australia, and Victoria pay sitting fees. Elders have made strong arguments, both for and against, sitting fees. Some believe they may be compromised by receiving a payment, whereas others see it as an appropriate acknowledgement of their time. In the Nowra Circle Court, the Elders were concerned that the payment might create “further factions with complaints of favouritism regarding Elder selection” (Daly and Proietti-Scifoni, 2009: 24). Some may elect to donate their payment to a community organisation.

Jurisdictional differences are evident in the volume of cases heard: some are high volume (such as the Port Adelaide Court in South Australia, where any eligible offender who wishes to be sentenced by the court can do so), and others are low volume (such as the Nowra Circle Court in New South Wales, which restricts cases to those in which incarceration is likely and offenders are thought to be ready for change). High- and low-volume jurisdictions reflect distinctive policy approaches to the courts: to hear as many cases as possible or to limit numbers based on a defendant’s risk of incarceration or readiness for change.⁸ Variation in case load volume and selection criteria are likely to affect research findings on re-offending.

Compared to practices in other countries, the courts are not a separate system of justice, like the Navajo Peacemaking Courts in the United States (Coker, 2006). They are also unlike the Canadian courts that use *Gladue* reports because they involve Elders or Community Representatives in the sentencing process (Marchetti and Anthony, 2016; see Anthony, Marchetti, Behrendt and Longman, 2017, on *Gladue* reports more generally).

⁷ Indigenous conferences and sentencing can be combined. In South Australia, Aboriginal Conferencing takes place before sentencing in the Port Lincoln Magistrates Court (Courts Administration Authority, South Australia, accessed 21 July 2017; see Marshall, 2008, for a review of the first year of the court’s operation).

⁸ Classifying jurisdictions by volume of cases can be difficult because most jurisdictions do not have data systems in place to describe case loads with accuracy, nor for that matter, to describe and compare re-offending patterns.

RESEARCH ON INDIGENOUS SENTENCING COURTS

Reviewed by Marchetti (2016), research shows that Australian Indigenous sentencing courts' community-building aims are being achieved: offenders view the courts as being fairer, the presence of Elders increases confidence and respect for the sentencing process and a sense of community empowerment, the courts strengthen the relationship between Indigenous communities and the criminal justice system, and the process is culturally sensitive, engendering more suitable sentencing options. In addition, there is evidence of improved court appearance rates and compliance with court orders. All these elements were what Vass and the Port Adelaide Aboriginal community had originally envisaged.

However, with increasing state capture of the idea, a dominant view has taken hold: we should expect Indigenous courts to reduce the over-representation of Indigenous people in custody. This is a desirable, but unrealistic: we do not expect to see significant change in incarceration rates in the short term, especially when the courts handle a relatively small number of Indigenous people.

Still the question remains: can the courts reduce re-offending to a greater degree than mainstream courts? Governments persist in asking this question; and unfortunately, it has become a dominant focus in evaluating the courts' merits, overlooking the courts' community- and trust-building aims and turn-up rates on the day.

Studies come to different conclusions on re-offending: it depends on how the research is carried out and how desisting from crime is conceptualised. To simplify: when researchers use quantitative methods and a binary understanding of re-offending (reoffended: yes or no), there are few or no differences in re-offending for those sentenced in Indigenous and mainstream courts. Although quantitative studies have a number of recognised problems, policy-makers rely on them in making funding decisions.⁹

By contrast, when we use qualitative methods (such as in-depth interviews with offenders and victims), ask participants about their experiences in the court and how the court affected them, and conceptualise re-offending differently, we come to a different conclusion. Rather than the yes/no binary—offended or did not offend—our research identifies a third group. Their efforts to desist from crime are “faltering, hesitant, and oscillating” (Bottoms et al., 2004: 383). We call this group the “partial desisters” and view them as being on a pathway to desistance.

⁹ As a result of a statistical study that found no differences in re-offending, the Queensland Murri Courts were de-funded in 2012; however, they were re-funded in 2016 with the election of a Labor Government. The Western Australian Kalgoorlie Community Court was de-funded in 2015, justified by a statistical analysis of re-offending data. The problem is not quantitative methods *per se*, but rather the assumptions and approaches researchers may take in using them in research on re-offending. See also Marchetti (2017) for a meta-review of Indigenous sentencing court evaluations and impact studies.

Our approach affirms perceptions of community people and others close to the courts, who believe that the court has been successful in reducing offending. What they have in mind are not only the desisters, but also the partial desisters.¹⁰

We have carried out two projects that apply concepts from the new desistance framework to Indigenous sentencing courts. The first was in 2008 for all non-partner violence cases handled during 2002 to 2005 in Nowra, NSW (Daly and Proietti-Scifoni, 2009, 2011). The second was from 2010 to 2014 of partner violence cases in two NSW sites (Nowra and Kempsey) and two in Queensland (Rockhampton and Mt Isa) (Marchetti and Daly, 2017).¹¹

Ours is the only Australian research that has used the new desistance framework to analyse Indigenous sentencing courts. And ours is one of two studies that have used this framework in analysing partner violence. Our findings will be presented shortly, but first we need to understand the new desistance framework.

NEW DESISTANCE FRAMEWORK

To begin, what is desistance? There is a straightforward answer: it is the ‘permanent cessation of offending behaviour’ (Graham and McNeill, 2018: 2).

Less straightforward is how best to measure or operationalise the definition. For example, are we measuring the cessation *of offending* or *of criminal justice contact*? What types of offending, and what types of criminal justice responses are relevant? Many approaches to measurement, including varied follow-up time periods, have been used.

The new desistance framework conceptualises and measures desistance differently compared to an older desistance framework (Table 1). Here are highlights.

- An older style desistance (or rehabilitation) framework asks ‘*what works?*’
The new desistance framework asks, *how does change work?*
- The former focuses on *offending* (identifying and correcting deficits).
The latter focuses on *strengths* (identifying behaviours that promote pro-social activities).
- The former is *event-driven*: it assumes that desistance is an event (yes or no) within a set time frame.
The latter is *process oriented*: it assumes that change is gradual and includes setbacks and relapses.

¹⁰ This is evident in a report by the Cultural and Indigenous Research Centre Australia (CIRCA) (2008: 49) on New South Wales Circle Sentencing; its “qualitative consultations among stakeholders” suggested that the court was having an impact on re-offending. By comparison, a statistical analysis by the New South Wales Bureau of Crime Statistics and Research (BOCSAR) (Fitzgerald, 2008) showed no differences in re-offending for those sentenced in Circle and conventional courts (see Daly and Proietti-Scifoni, 2009: 15-17).

¹¹ Other published research on the second study includes Marchetti (2010, 2014, 2015) and Marchetti and Ransley (2014).

- The former assumes intervention *programs are the major lever of change*. The latter assumes that *change occurs “before, behind, and beyond the intervention”* (McNeill, 2012: 13).
- The former is interested to *identify programs that “work”* (or not) to reduce re-offending. It does so using quantitative methods, analysing large datasets. The latter is interested to *understand individuals’ world views and day-to-day experiences*. It does so using qualitative methods and by analysing lived experiences.

Other differences can be noted, but these highlight how the two frameworks understand and measure desistance from crime differently.

 Table 1 about here

RESEARCH FINDINGS

Nowra non-partner violence (N=13 cases)

Thirteen cases is a small number, but Nowra is a low-volume jurisdiction. The total of 13 is all the non-partner violence cases handled by the court from 2002 to 2005.

In this study, a detailed analysis was carried out of the offenders’ criminal histories three years before and three years after the Circle. The result was that that five completely desisted (38.5%),¹² five partially desisted (38.5%), and three persisted in offending (23%). Although the partial desisters had re-offended, it was minor, occurred a long time after the Circle Court, or occurred right after, but with no subsequent offending (Daly and Proietti-Scifoni, 2009).¹³

If a binary analysis were used, it would have concluded that 62% offended post-Circle. Our analysis finds instead that 23% persisted in offending. We argue that the group of “partial desisters” must be considered when analysing re-offending. Furthermore, the Elders and court staff saw the partial desisters as success stories because they had taken steps toward change.

¹² Defined as no occasions of police contact for which at least one offence was proved.

¹³ The 128-page report provides an in-depth analysis of the biographies and criminal histories of thirteen offenders, along with transcripts of what was said during the Circle and interviews with nine of the 13 offenders. It provides a rich and comprehensive story of the Circle Court process and role of the Elders, offering far more than these percentages.

For most offenders, the Circle process was a deep, emotional, and spiritual experience because the Elders were there. The Elders knew them and could be tough on them, but they blended accountability with encouragement and support.¹⁴

New South Wales and Queensland partner violence (N=30 cases)

Partner violence research often uses quantitative methods and a binary approach to determine “what works” with respect to police, court, and program interventions.

At the same time, the new desistance framework has been limited to young men’s “high volume offending [in] burglary, drug sales, and low-level violence” (Maruna, 2010: 1).

Our study of *Indigenous* partner violence, using the new desistance framework, is unique. Although a study of British men was published by Walker, Bowen, Brown, and Sleath (2015), the men were predominantly ‘White British’.¹⁵ (We note, however, that the findings from their study and ours are similar in viewing desistance as a dynamic and complex process.)

The following summarises key findings from the New South Wales and Queensland courts.

- Almost all offenders had problems with alcohol or drugs and a history of previous criminal justice contact, and most had spent time in jail. Their profile was similar to those in the Nowra non-partner violence cases.
- Of the 30 cases (29 men, one woman), 12 were desisters (40%), 5 were partial desisters (17%), and 13 were persisters (43%). (The woman was a desister.)

Classification in the three groups was based on a number of variables, and evidence of criminal justice contact was just one. Others were how an offender related to the Elders and Community Representatives, whether they accepted responsibility for their actions toward a partner, whether they felt proud of how their lives had changed since the court hearing, and whether they had formed new or stronger social bonds with positive role models or family members. These items tap *how change works* (if change occurred) for offenders who participated in an Indigenous sentencing court.

- The sentencing courts helped to change the lives and identities of just more than half of the partner violence offenders (17 of 30, 57%). The process of change was not linear and immediate, but zigzag and lengthy.

¹⁴ Another finding from the Nowra study was that re-offending should not be used as a proxy for evaluating the merits of the court’s process. All the complete desisters who were interviewed had positive memories of the process, but two of the three persisters also had positive memories (Daly and Proietti-Scifoni, 2009: 106). Factors such as continued alcohol or drug use played a significant role in re-offending.

¹⁵ Walker et al. (2015) give no further breakdown than this. Years earlier, Dobash, Dobash, Cavanagh, and Lewis (2000) had anticipated elements of the new desistance framework for partner violence.

- For the full and partial desisters, violence toward partners would not have changed had they been sentenced in conventional courts.¹⁶ Except for two of the 30 offenders (both persisters), the court experience was positive and preferred over the mainstream court.
- Elders and Community Representatives can be a catalyst for pro-social identities, as long as an offender is ready for change. Not all were ready, as the persisters demonstrate. These men blamed others for their violence, including their partners, family members, and friends.
- Like other research, we find that targeted men's group activities can also be effective in changing attitudes and behaviour.
- For the partner violence cases, there was no decline in offending as people got older (what is termed the "age-crime relationship"): the average age for the desisters was 32; the partial desisters, 36; and persisters, 36. Likewise, for the British study of partner violence, desisters and persisters were similar in age.¹⁷
- By contrast, for the non-partner violence cases in Nowra, the age-crime relationship was evident: desisters were the oldest (average age 37), the partial desisters were 26, and the persisters, the youngest (21.5 years).

So, do partner violence cases differ from non-partner violence cases for age and desistance? The findings suggest they do, but the number of studies and sample sizes of the studies are too low to come to a firm conclusion or to explain why.¹⁸

IMPLICATIONS FOR RESEARCH AND PRACTICE

The new desistance framework better grasps the setbacks and obstacles that people face in their efforts to move from a criminal to a non-criminal life. The process of desistance takes time, and as Bottoms (2014: 264) says, it "does not appear by magic, [but] has to be worked for".

Research on partner violence needs to pay more attention to the social and legal processes that may encourage people on pathways to desistance. Such an approach requires an adequate time frame to observe change, an understanding of the life-worlds of offenders and victims, and methods that do not rely solely on binary understandings of re-offending.

¹⁶ All those in both groups said that that the court process provided information on how to change, what they needed to do to change, and how to access support. They said that none of this would have occurred in a mainstream court.

¹⁷ In the British study, the average age of desisters was 38; for persisters, 36 (Walker et al., 2015: 2732). Classification in the two groups was based on the men's self-reported violence in their lifetime and over the past year (p. 2731). If they used physical violence in their lifetime, but not in the past 12 months, they were classified as desisters (p. 2731). Of the 22 men, 13 (59%) were classified as desisters (p. 2732).

¹⁸ The non-partner violence analysis used official measures of offending (police and court contact). It may be possible that such measures show an age-crime relationship more so than other measures. Complicating the matter, we know that an offending profile can include both partner violence and other types of offences.

For practice, new desistance scholars have focused mainly on supervision practice (that is, the work of probation officers) in what is called “assisted desistance”. A key element of assisted desistance is that offenders are “confident that supervisors understand the social worlds they inhabit” (Bottoms, 2014: 269). Elders and Community Representatives are not probation officers, nor do they see themselves taking this role in Indigenous sentencing courts. But they do call upon “culture” to re-form offenders’ identities; they draw on knowledge of offenders’ relationships and encourage change by supporting them. All these activities align with the concept of assisted desistance.

A group that has been ignored in the desistance literature is lawyers representing defendants. They may be practicing assisted desistance without realising that there is a considerable body of theory and research to back up their efforts. The defence bar has much to gain by becoming familiar with the new desistance framework, and seeing its value in framing arguments in court and when communicating with clients. Indeed, all criminal justice practitioners have much to gain.

Those researching police, courts, and re-offending must become familiar with the new desistance framework. It challenges dominant ways of measuring re-offending and the success or not of criminal justice interventions. Quantitative researchers, in particular, need to contemplate methods of measuring the trajectories of partial desisters and of not viewing re-offending in simple binary terms. This will pose challenges because it requires assembling more sophisticated datasets with greater detail on the contexts, seriousness, timing, and persistence (or not) of offending over time.

IMPLICATIONS FOR THE NORTHERN TERRITORY

On 5 July 2017, the Northern Territory Government announced the establishment of an Aboriginal Justice Unit, whose members will consult with Aboriginal communities over the next 12 months to identify ways to reduce levels of Indigenous incarceration (among other aims) and to form an Aboriginal Justice Agreement.

Reducing incarceration rates requires two elements. First, policymakers and legislators must take a long-term and realistic view on outcomes. The socio-economic, political, historical, and legal conditions that have given rise to high incarceration rates in the Northern Territory cannot be quickly or easily “undone”.¹⁹ The new desistance framework suggests patience in addressing individual change, but in addition, this needs to be joined with large-scale societal change. Second, as suggested by Clear (2017), if policymakers and legislators are truly serious about reducing incarceration rates, their mandate is clear: they must change legislation to significantly reduce (1) the numbers admitted to prison and (2) the lengths of stay in prison, especially for violent offences. Indigenous sentencing courts (or other Indigenous-focused programs) can have important community- and trust-building roles, but they cannot by themselves have a significant impact on reducing incarceration rates, nor should their efficacy be measured against this criterion.

¹⁹ The overall incarceration rate is highest for the Northern Territory, but compared to other Australian jurisdictions, the Indigenous incarceration rate is highest for Western Australia, a pattern evident since 1988, when data collection began (Australian Prisons Project, 2013: 12, 14).

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Table 1. A comparison of the old and new desistance frameworks

Old desistance (rehabilitation) framework: 1980s and 1990s	New desistance framework: from 2000
Focus	
What works?	How does change work?
On offending: identifying, targeting, and correcting offender deficits	On strengths: identifying and encouraging behaviours that promote social bonds and pro-social activities
Distinguishing factors	
Event-driven: assumes that desistance is an event (yes/no) within a particular time frame.	Process-oriented: assumes that change toward pro-social behaviour is complex and gradual and includes setbacks, obstacles, and relapses.
Assumes that intervention programs are the key lever of change.	Assumes that the process of change occurs 'before, behind, and beyond the intervention' (McNeill, 2012: 13). Interventions may (or may not) encourage movement toward pro-social identities.
Primarily interested to identify programs that 'work' (or not) to reduce re-offending. More often uses quantitative methods of large samples, at times with random assignment of people to differing programs or interventions.	Primarily interested to understand individuals' world views and day-to-day experiences. Assume that individuals have ability and desire to change, although constrained by conditions and contexts. Uses qualitative methods to describe 'lived experiences'.
Desistance is 'an outcome that can be produced by applying well-engineered tools to unpromising raw materials' (Graham & O'Neill, 2018: 8).	Desistance is 'an organic process ... that can be carefully cultivated to enable flourishing, or [one that is] neglected and trampled' (Graham & O'Neill, 2018: 8).
Primarily interested in better methods of classifying, managing, and treating people. 'Medical model of expert-led change' (Graham & O'Neill, 2018: 10).	Primarily interested in understanding 'the lived experience of the struggle for desistance'. Those who offend can be a resource for their own change as well as change in penal policy (Graham & O'Neill, 2018: 10).