NEIGHBOURHOOD JUSTICE CENTRES AND INDIGENOUS EMPOWERMENT

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I INTRODUCTION

"They held a gun to our head in 1788, they have never removed it, and it's loaded."[1]

The ongoing impacts of colonisation have 'direct and immediate relevance to both criminal behaviour and to processes of criminalisation' of Indigenous people in Australia.[2] Decolonising, that is, addressing or reversing the impacts of colonisation, is necessary to improve the way in which the criminal justice system interacts with Indigenous people, and to reduce the shameful rates of Indigenous incarceration.[3] In this article, I suggest that Neighbourhood Justice Centres ('NJC'), a type of problem-solving court focussing on community engagement, may be part of the solution. I propose that they can operate as a decolonising agent by facilitating Indigenous empowerment and self-determination.

Indigenous people stress that, in order to address over-incarceration, crime and the 'scourge of grog and drugs', they must be empowered such that they can exercise self-determination.[4] Self-determination is Indigenous peoples' right 'to exercise autonomy in their own affairs and … make their own decisions'.[5] An NJC is a type of problem-solving court which explicitly aims to engage and empower

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1 Irene Watson, 'Indigenous Peoples' Law-Ways: Survival against the Colonial State' (1997) 8 *Australian Feminist Law Journal* 39, 58.

2 Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Federation Press, 2nd ed, 2016), 14.

3 The over-incarceration of Indigenous people has been described as a 'National shame': Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system* (2011) 36–37 [2.115]. For statistics as to Indigenous incarceration rates see Griffith University School of Criminology and Criminal Justice, Analysis of Australian Indigenous imprisonment and demographic information (2009).

4 Patrick Dodson, 'Whatever Happened to Reconciliation?' in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation* (Arena Press, 2007), 24. See also Harry Blagg, 'Colonial Critique and Critical Criminology: Issues in Aboriginal Law and Aboriginal Violence' in Thalia Anthony and Chris Cunneen (eds), *The Critical Criminology Companion* (Hawkins Press, 2008) 140, 134-135; Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report*, (1991) vol 1 [1.7].

5 Michael Dodson, *Aboriginal and Torres Strait Islander Social Justice Commissioner First Report* (AGPS, 1993), 41.

the local community, and increase community capacity to deal with crime.[6] This approach echoes the aspirations of Indigenous people in Australia. The second unique feature of NJCs is that they house services, such as drug and alcohol counselling, mental health support, and employment and housing support, to assist the court in its problem-solving role. Due to these two core features, I propose that NJCs can be a useful mechanism through which the criminal justice system can create space for Indigenous self-determination. Recognition of Aboriginal law and traditional punishment by our legal system are also important issues in this context, however, they are beyond the scope of this article.

Aboriginal Sentencing Courts ('ASC') currently operating in Australia have been broadly successful and well received by Indigenous communities, particularly in relation to their involvement of Elders in the sentencing process. However, they have also been criticised for failing to provide 'true self-determination' to Indigenous people.[7] While some ASCs engage with Indigenous-owned initiatives,[8] this has occurred on an 'ad-hoc' basis, dependent upon the initiative of the particular magistrate at the court. It is therefore vital to consider new ways of doing justice which respond to Indigenous aspirations. While ASCs and NJCs overlap to some extent in that they are informed by similar principles and include some similar features, I propose that a hybrid NJC-ASC model, incorporating the strengths of ASCs, may be better suited to responding to these aspirations for two reasons. Firstly, it would better enable decolonising outside of the courtroom by establishing community partnerships and transfer of power to the community as the focus of the court. Secondly, it would provide additional services thereby enabling the court to more effectively carry out its problem-solving role. This would also provide support to communities, increasing their capacity exercise their right to self-determination.

A further reason for investigating NJCs' capacity to enable Indigenous self-determination is that establishing an NJC in Western Australia is already being considered. Given that the majority of offenders attending a Western Australian NJC would likely be Indigenous, it is vital that any NJC established appropriately addresses the needs of Indigenous people.

In this article, I intend to adopt a postcolonial perspective. I note that it is not possible to reverse the effects of colonialism in their entirety. However, a compromise through a form of postcolonial hybridity may be possible.[9] Here,

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6 Cynthia Lee et al, *A Community Court Grows in Brooklyn: A Comprehensive Evaluation of the Red Hook Community Justice Center* (National Center for State Courts, 2013); David Karp and Todd Clear, 'Community Justice: A conceptual framework' (2000) 2 *Boundary Changes in Criminal Justice Organizations* 323, 324; Sarah Murray, 'Keeping it in the Neighbourhood? Neighbourhood Courts in the Australian Context' (2009) 35(1) *Monash University Law Review* 74.

7 Bridget McAsey, 'Critical Evaluation of the Koori Court Division of the Victorian Magistrates' Court' (2005) 10 *Deakin Law Review* 654, 669-670, 685.

8 See, eg, Kate Auty and Daniel Briggs, 'Koori Court Victoria: Magistrates Court (Koori Court) Act 2002' (2004) 8 *Law Text Culture* 7, 13-14.

9 Elena Marchetti, 'Delivering Justice in Indigenous Sentencing Courts: What This Means for Judicial Officers, Elders, Community Representatives, and Indigenous Court Workers' (2014) 36(4) *Law & Policy* 341, 346.

'hybridity' means the 'ambivalent in-between space' where colonisers and the colonised interact,[10] and potentially work side-by-side.

In Part III, I introduce the concept of an NJC, describing the varied ways in which NJCs engage communities. In Part IV, I justify the need for decolonisation in the criminal justice system. Based upon existing literature, I present four requirements underlying decolonisation:

- A recognition of the relevance of colonial history;
- A willingness to give Aboriginal law space to operate with 'jurisdictional autonomy', and to give Indigenous perspectives and knowledge central importance;
- A willingness to give Indigenous people control over matters affecting them; and
- Appropriate government support.

In Part V, I present my key findings obtained from interviews with members of the legal profession and judiciary. Key themes identified were support for alternative approaches to justice, barriers to understanding within the criminal justice process, consequences of formality of court processes and Indigenous disengagement, and need for cultural understanding.

In Part VI, I argue that NJCs can empower Indigenous communities outside of the court by addressing the requirements presented in Part IV. Specifically, NJCs can partner with Indigenous-controlled justice mechanisms. Further, I argue that the inner workings of an NJC would need to be modified so that Indigenous knowledge and perspectives have space to operate, the end result being a hybrid NJC-ASC court. Drawing upon my qualitative findings, and existing literature, I propose that this can be achieved by involving Elders in sentencing, employing Indigenous court workers, modifying the courtroom layout and conduct of proceedings, and facilitating these with cultural training.

II METHODOLOGY

A Approaches

I intend to apply a postcolonial perspective to the issue of using NJCs to assist Indigenous people. There is debate as to the scope and meaning of the term 'postcolonial'.[11] I will use it to reflect the recognition that colonialism's effects continue in the present day,[12] not to suggest that colonialism has concluded. Alpana Roy writes that applying a postcolonial approach 'essentially revisits the narrative of colonialism, but revisits it using a different lens'.[13] This 'different lens' is the perspective of the colonised group. As a white woman, my personal perspective is

10 Alpana Roy, 'Postcolonial Theory and Law: A Critical Introduction' (2008) 29 *Adelaide Law Review* 315, 326, 340.

11 Ibid 316-317. See also Robert Young, *Postcolonialism: An historical introduction* (Blackwell, 2001), 57.

12 See Gyan Prakash, 'Postcolonial Criticism and Indian Historiography' (1992) 31/32 *Social Text* 8, 8.

13 Roy, above n 10, 321.

not the perspective of the colonised group. As such, I aim to privilege the views of Indigenous people expressed in the literature. I do not attempt to explain the content of Aboriginal law, or to propose how Indigenous people should support their communities and engage with the justice system. Instead, I propose methods through which space can be created within the Anglo-Australian justice system for Indigenous people to use their knowledge, perspectives and law as they consider appropriate.

B Interviews

I also used a qualitative empirical method. Semi-structured interviews were conducted with seven members of the legal profession, all of whom had experience working with Indigenous people and exposure to problem-solving courts. Interview participants were:

- Two State Prosecutors with experience conducting matters in the Kimberly;
- One lawyer from Legal Aid WA's Perth office with experience appearing in the Barndimalgu Family Violence Court in Geraldton;
- One lawyer from Legal Aid WA's Kununurra office;
- One lawyer employed as a policy officer by the Aboriginal Legal Service (WA);
- One District Court Judge; and
- One senior member of the judiciary.

All participants were interviewed in person apart from the Legal Aid lawyer working in Kununurra who was interviewed over the telephone.

Human Research Ethics Approval was obtained from the University of Western Australia. Due to timing and resourcing constraints, it was not possible to interview Indigenous participants or community members. This is a limitation of this study.

III NEIGHBOURHOOD JUSTICE CENTRES

A A Type of Problem-solving Court

NJCs, also known as 'community courts' or 'community justice centres', are a type of problem-solving court.[14] A problem-solving court is a court which seeks to address the underlying causes of offending, for example through treatment and therapy, and provide tangible positive outcomes for victims and communities.[15]

14 Murray, above n 6, 75. There are a number of courts and programs in Australia called 'Community Courts' but which are not NJCs in the sense described in this article. Examples include the Kalgoorlie Community Court and Northern Territory Community Courts, which are ASCs, and the Community Justice Centre in New South Wales which is a mediation program.

15 Greg Berman and John Feinblatt, 'Problem-Solving Courts: A brief primer' (2001) 23 *Law and Policy* 125, 126, 130–131. See also Anne Freiberg, 'Problem-Oriented Courts: Innovative solutions to intractable problems?' (2001) 11 *Journal of Judicial Administration* 8, 9-11.

Their defining features include ongoing judicial monitoring of offenders, collaboration between judges, lawyers, professionals and external agencies, and a less adversarial approach.[16] NJCs extend the concept of problem-solving courts by addressing offender and victim needs holistically, and by focusing on community partnerships. Australia's first and only NJC was established in Melbourne in 2007.[17] While many NJCs focus on low-level crime,[18] some also deal with violent crime,[19] and some NJCs' jurisdiction is not restricted to criminal law.[20]

B Not just a Court

An NJC is more than just a court, and its role is not 'just about sentencing offenders' but rather to '[use] the court as part of the network of services in the community'.[21] NJCs house a multi-disciplinary team of professionals and services to assist the court in its problem-solving role. For example, the Melbourne NJC houses services specialising in mediation, legal advice, employment support, housing support, financial counselling, drug and alcohol counselling, victim support, youth support, mental health services and Indigenous support services.[22] NJCs also have partnerships with external groups such as 'social service agencies, community groups, schools, parent-teacher associations, churches, and other organizations' to which clients can be referred.[23] These links with community agencies increase the courts' flexibility, accountability and ability to respond to client and community needs.[24]

This holistic approach is a significant advantage of NJCs. While some problem-solving courts provide integrated services,[25] many are not able to address the multiplicity of offenders' problems.[26] This is a significant limitation, given that most people who experience problems such as drug addiction, mental illness, family violence or homelessness will experience these in combination.[27] Further, colocation of services facilitates information-sharing and collaboration between professionals and court staff.[28]

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16 Berman and Feinblatt, above n 15, 131-132.
17 Murray, above n 6, 76.
18 Lee et al, above n 6, 2, 4, 24; Michele Sviridoff et al, *Dispensing Justice Locally: The Implementation and Effects of the Midtown Community Court* (Center for Court Innovation, 2000), 14; Diana Karafin, *Community Courts Across the Globe: A Survey of Goals, Performance Measures and Operations* (Centre for Court Innovation, 2008), 6.
19 Karafin, above n 18, 7.
20 Murray, above n 6, 78.
21 Robert Wolf, 'Community Justice Around the Globe: An International Overview' (2006) 22 *Crime & Justice International* 4, 18, quoting Penny Armytage.
22 Caroline Ottinger, 'Hatching a new form of justice' (2012) 24(2) *LegalDate* 2, 2.
23 Jeffry Fagan and Victoria Malkin, 'Theorising community justice through community courts' (2002) 30(3) *Fordham Urban Law Journal* 897, 907.
24 Ibid 907.
25 Samantha Moore, *Two decades of specialised domestic violence courts* (Centre for Court Innovation, 2009), 2.
26 Michael King et al, *Non-adversarial Justice* (Federation Press, 2009), 146, 164.
27 Law Reform Commission of Western Australia, *Problem Oriented Courts and Judicial Case Management – Consultation Paper*, Project No 96 (2008), 96.
28 See Kelli Henry and Dana Kralstein, *Community Courts: The Research Literature* (Centre for Court Innovation, 2011), 14.

C Theoretical Basis

NJCs are based on a 'community justice' theoretical framework, which is an approach to crime which explicitly involves the community.[29] Its primary goal is to improve quality of life by making communities safer through enhancing the community's 'responsibility for social control'.[30] In doing so, community justice seeks to empower the community.[31] Community justice is based on three premises:

- The community is the ultimate consumer of criminal justice;
- Community justice is achieved through local partnerships; and
- A problem-solving approach should be implemented.[32]

A corollary of the idea that the community is the ultimate consumer of justice is that the community needs to retain confidence in the justice system and perceive it as legitimate.[33] Accordingly, NJCs also seek to improve procedural justice in court processes.[34]

Like other problem-solving courts, NJCs utilise therapeutic jurisprudence and, to a lesser extent, restorative justice.[35] NJCs apply therapeutic jurisprudence by addressing the underlying causes of offending in a similar way to drug courts and mental health courts. They apply restorative justice principles by imposing restorative sanctions.[36] As such, the sanction of choice in NJCs in the United States is often community service, for example cleaning litter or removing graffiti.[37] These sanctions are also intended to reduce crime according to the 'broken windows theory', which postulates that noticeable signs of low-level crime encourage serious offending.[38]

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29 Karp and Clear, above n 6, 324. See also, Todd Clear and David Karp, 'Toward the Ideal of Community Justice' (2000) 245 *National Institute of Justice Journal* 21.

30 Karp and Clear, above n 6, 324-325.

31 Fagan and Malkin, above n 23, 897-898, 949. See also, Henry and Kralstein, above n 28, 1.

32 Francis Pakes and Jane Winstone, 'Community Justice: The Smell of Fresh Bread' in Francis Pakes and Jane Winstone (Eds), *Community Justice: Issues for Probation and Criminal* (Willan Publishing, 2005) 1, 2.

33 Fagan and Malkin, above n 23, 898, 910, 928; Lee et al, above n 6, 7-9.

34 Fagan and Malkin, above n 23, 906-907; Murray, above n 6, 90.

35 For discussion of the concept of therapeutic jurisprudence see David Wexler, 'Therapeutic Jurisprudence: An Overview' in David Wexler (ed), *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (Carolina Academic Press, 2008) 3, 3-4; King et al, above n 26, 22. For a discussion of the concept of restorative justice see John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002), 11-12; Tony Marshall, 'The Evolution of Restorative Justice In Britain' (1996) 4(4) *European Journal on Criminal Policy and Research* 21, 37.

36 Fagan and Malkin, above n 23, 948. See also Eric Grommon, Natalie Hipple and Bradley Ray, 'An Outcome Evaluation of the Indianapolis Community Court' (2015) *Criminal Justice Policy Review* 1 <http://cjp.sagepub.com/content/early/2015/02/25/0887403415573774.full.pdf+html>, 11.

37 Pam Thompson and John Schutte, *Integrated Justice Services Project: Implementing Problem-Solving Justice* (2010), 19; Karafin, above n 18, 13-14; Lee et al, above n 6, 4-6, 42.

38 Lee et al, above n 6, 6. For a discussion of the broken windows theory see James Wilson and George Kelling, 'Broken Windows: The police and neighbourhood safety' (1982) 243 *Atlantic Monthly* 29; Brandon Welsh, Anthony Braga and Gerben Bruinsma, 'Reimagining Broken Windows: From Theory to Policy' (2015) 52(4) *Journal of Research in Crime and Delinquency* 447.

These restorative sanctions should be approached with caution as they could operate to stigmatise offenders. Further, the broken-windows theory has problematic applications to Indigenous people because it has become associated with 'zero-tolerance policing',[39] which is a punitive approach to public order offences focusing on increasing arrest rates.[40] The use of both restorative justice and zero-tolerance policing for Indigenous offenders has been criticised. Some restorative justice processes have been imposed on Indigenous people on the incorrect assumption that the process reflects Indigenous values and traditional justice practices,[41] and zero-tolerance policing stands in 'stark opposition' to Indigenous self-determination.[42]

D Community Engagement

1 Physical Placement

NJCs are physically placed within the community which they affect. For example, the Melbourne NJC's jurisdiction is dependent upon a connection between the municipal district and either the party or the subject matter of the proceedings.[43] Jeffry Fagan and Victoria Malkin argue that this is a fundamental aspect of NJCs because it facilitates community engagement by changing relationships between community members and the legal system.[44]

2 Community Partnerships

NJCs partner with services in the community to which clients can be referred. For example, the Melbourne NJC has links with housing and mental health service providers in the local area.[45] In New York, the Red Hook Community Justice Centre's partner organisations also attend the Centre to run programs.[46] At the Melbourne NJC, the opposite also occurs. Mediation staff from the NJC attend 'conflict hotspots' in the community to 'work with people and agencies to increase their problem-solving skills' to prevent crime by helping community members resolve disputes at an early stage.[47]

Sarah Murray argues that the integration of an NJC with services, as well as its positioning in the community, serves to provide useful community knowledge which assists the court in solving disputes, targeting local crime concerns and

39 Harry Blagg, 'Problem Oriented Courts' in Law Reform Commission of Western Australia, *Problem Oriented Courts and Judicial Case Management*, Project No 96 (2008), 18.

40 Chris Cunneen, 'Zero Tolerance Policing: How Will It Affect Indigenous Communities?' (1999) 4(19) *Indigenous Law Bulletin* 7, 7.

41 See, eg, Harry Blagg, 'A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia' (1997) 37(4) *British Journal of Criminology* 481; Chris Cunneen, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30(3) *Australian and New Zealand Journal of Criminology* 292, 300-303.

42 Cunneen, 'Zero Tolerance Policing', above n 40, 9.

43 *Magistrates' Court Act 1989* (Vic), s 4O(2); *Children and Young Persons Act 1989* (Vic), s 16G(3); *Children, Youth and Families Act 2005* (Vic), s 520C(3).

44 Fagan and Malkin, above n 23, 898.

45 Murray, above n 6, 77.

46 Fagan and Malkin, above n 23, 920-921.

47 Ibid; Ottinger, above n 22, 2.

delivering tailored community-based sentences.[48] It can also facilitate community engagement. The inclusion of non-treatment services, such as a child care centre, at the Philadelphia Community Court was particularly effective at improving community engagement.[49]

3 Informal Community Relationships

Due to community integration, judicial officers 'can come to know the community in a way not normally possible in traditional court settings' and are 'better able to liaise with stakeholders and engage with the public'.[50] For example, while presiding over the Liverpool Community Justice Centre, Judge Fletcher received valuable insight from talking with community members while taking a walk.[51] The Red Hook Community Justice Centre's Judge and staff attend local social events and recreational activities.[52]

4 Community Consultation

Some NJCs engage in a formal community consultation process. For example, the Red Hook Community Justice Centre has established 'Operation Toolkit' and the related Community Advisory Board to bring together community members, court staff, lawyers, police and social services staff to discuss court progress, community complaints, and ideas for community services and projects.[53]

5 Community Projects

NJCs are also involved in community projects generally considered beyond the role of the justice system. For example, the Red Hook Community Justice Centre has facilitated a park clean-up program, and runs a 'Youth Court' in order to engage young people with the justice system.[54] In response to tensions between business owners, police and Indigenous community members, the Melbourne NJC organises the Smith Street Dreaming, which is a community festival featuring Indigenous musicians and dance.[55] The Melbourne NJC has also facilitated a 'Justice Mural' project involving local youth, and organised the provision of payphones inside housing estates to improve safety.[56] It hosts events such as community barbeques,[57] and displays community artwork inside the building.[58]

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48 Murray, above n 6, 83. Indeed similar 'knowledge transfer' has occurred between health professionals and legal professionals in the drug court context: See Blagg, 'Problem Oriented Courts', above n 39, 16.

49 Fred Cheeseman et al, *Philadelphia Community Court Final Report* (National Centre for State Courts, 2010), 26-27.

50 Murray, above n 6, 86.

51 Wolf, above n 21, 11. Note, however, that the Liverpool Community Justice Centre is no longer operational.

52 Fagan and Malkin, above n 23, 924.

53 Ibid 922. See also Karafin, above n 18, 10.

54 Greg Berman and Aubrey Fox, 'Justice in Red Hook' (2005) 26 *Justice System Journal* 77, 82; Lee et al, above n 6, 30, 42. The Youth Court is presided over by young people from the area who resolve disputes involving other youths.

55 See Neighbourhood Justice Centre, *Smith Street Dreaming* (2015), 6-7, 15-17.

56 Murray, above n 6, 77-78.

57 Ottinger, above n 22, 2.

58 Murray, above n 6, 78.

IV THE NEED TO DECOLONISE CRIMINAL JUSTICE

A Aboriginal Law

Without a basic understanding of Aboriginal worldviews and Aboriginal law, one cannot fully appreciate the devastating effects of colonialism on Indigenous people, Indigenous peoples' calls for self-determination, or their unique ability to govern and support their communities. As a white woman, I cannot speak to the content of Aboriginal law, nor can I make generalisations about the laws of different and diverse Indigenous Nations. However, I can draw upon the writings of Indigenous scholars which outline what Aboriginal law means to their cultural group.

Public misconceptions of Aboriginal law are common.[59] As noted by Indigenous lawyer and academic, Irene Watson, 'laws relating to the obligation to care for country and family, ecological sustainability, and the ethics of sharing and caring and their deeper philosophy remain largely unknown to the public'.[60] When I speak of Aboriginal laws in this article, I am referring to a much broader set of cultural beliefs, authority systems, and sets of obligations than 'pay-back' systems of punishment.[61]

Aboriginal law 'is the ways of living in country that sustain country'.[62] For many Indigenous people in Western Australia, including Indigenous people living urban lifestyles, law is part of every aspect of life, and cannot be separated from culture and spirituality.[63] The all-encompassing nature of the law of the Tanganekald People is captured beautifully by Irene Watson:

> The law transcends all things, guiding us in the tradition of living a good life, that is, a life that is sustainable and one which enables our grand-children yet to be born to also experience a good life on earth. The law is who we are, we are also the law. We carry it in our lives. The law is everywhere, we breathe it, we eat it, we sing it, we live it. And it is, as explained by George Tinamin: *Ngangatja apu wiya*, *ngayuku tjamu*. This is not a rock, it is my grandfather. This is a place where the dreaming comes up, right up from inside the ground.[64]

Ambelin Kwaymullina and Blaze Kwaymullina, writing about the laws of the Palyuku People, discuss some of the following characteristics of their law:

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59 Public knowledge tends to be limited to 'repugnant' laws, such as traditional marriage and 'payback' punishment: See Irene Watson, 'Aboriginal Women's Laws and Lives: How Might We Keep Growing the Law' (2007) 26 *Australian Feminist Law Journal* 95, 100.

60 Ibid.

61 Recognition of 'pay-back' systems of punishment is a complex issue due to perceived inconsistencies between it and Anglo-Australian criminal law. It is not an issue which is explored in this article. For a discussion of this issue see Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Discussion Paper,* Project No 94 (2005).

62 Ambelin Kwaymullina, 'Country and Healing: An Indigenous Perspective on Therapeutic Jurisprudence' in Greg Reinhardt and Andrew Cannon (eds), *Transforming Legal Processes in Court and Beyond* (Australian Institute of Judicial Administration Incorporated, 2007) 1, 2.

63 Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Discussion Paper*, above n 61, 50.

64 Watson, 'Indigenous Peoples' Law-Ways', above n 1, 39.

- Law is given to all life by the Ancestors, is sourced from country and, as such, is location specific;[65]
- Its purpose is to 'sustain patterns of creation', and it defines relationships between people and all aspects of their environment;[66] and
- Individual members of communities, rather than institutions, are entrusted with sharing and enforcing the law.[67]

These characteristics show that Aboriginal law stands in stark opposition to Anglo-Australian law.

B Australia's Colonial History and its Effects Today

Colonialism 'reshapes, often violently, physical territories, social terrains as well as human identities'.[68] The colonial project in Australia expressly aimed to not only reshape Indigenous identity, but also eradicate it, first by attempting to eradicate Indigenous people and later by attempting to assimilate them such that they abandoned their Indigeneity and became 'civilised'.[69]

The law and law enforcement played a central role in the attempted eradication of Indigenous identity.[70] At a fundamental level, the existence of Aboriginal law was denied by an 'enlarged notion of *terra nullius*' which allowed English law to be brought onto the continent on the basis that Indigenous people were 'backwards' and that there was no 'local law in existence'.[71] This 'took away any right [of Indigenous people] to occupy their traditional land',[72] and left no space for the recognition of Aboriginal legal systems.

As noted above, the colonial process is not over. The current postcolonial state is an 'aftermath' of our colonial history.[73] There are two aspects to this aftermath:

- Negative effects on Indigenous people resulting from colonialism; and
- Neo-colonial controls over Indigenous people.

'Neo-colonialism' refers to the situation where a former colonial power continues to 'act in a colonialist manner' and exert influence on a former colony.[74] This term is commonly used to refer to economic influence or dependency.[75]

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65 Ambelin Kwaymullina and Blaze Kwaymullina, 'Learning to Read the Signs: Law in an Indigenous Reality' (2010) 34(2) *Journal of Australian Studies* 195, 202-202.
66 Ibid 196-198, 203-205.
67 Ibid 204.
68 Ania Loomba, *Colonialism/Postcolonialism* (Routledge, 2nd ed, 2005), 155.
69 See generally Heather McRae et al, *Indigenous Legal Issues* (Routledge, 4nd ed, 2009), 16-17.
70 Blagg, *Crime, Aboriginality and the Decolonisation of Justice*, above n 2, 76-79; Chris Cuneen, 'Colonial Processes, Indigenous Peoples, and Criminal Justice Systems' in Sandra M Bucerius and Michael Tonry (eds), *The Oxford Handbook of Ethnicity, Crime and Immigration* (Oxford University Press, 2014) 386, 398; Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2nd ed, 2014), 49; McRae et al, above n 69, 25 [1.290].
71 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 29-35, 37-38 per Brennan J (emphasis in original).
72 Ibid 29 per Brennan J.
73 Prakash, above n 12, 8.
74 Roy, above n 10, 335; Young, above n 11, 45.
75 Roy, above n 10, 335.

However, I will use it to refer to the use of law and law enforcement to control Indigenous people in a way that marginalises and oppresses them.

The impacts of colonialism have 'direct and immediate relevance to both criminal behaviour and to processes of criminalisation' of Indigenous people.[76] Colonial control resulted in Indigenous people experiencing disadvantage contributing to criminal behaviour. For example, economic disadvantage resulting from colonial control over wages and employment, and intergenerational trauma leading to alcohol abuse, violence, and mental illness.[77] Due to the integration between Aboriginal law, country, culture, and spirituality, actions of Australian governments preventing Indigenous people from practicing their culture (for example, laws banning languages and cultural practices) and from occupying their lands have fractured Indigenous Australians' identities and dispossessed them of their 'capacity to be self-determining peoples'.[78] Colonial oppression, together with marginalisation and frequency of involvement with the criminal justice system, has also contributed to a culture where crime can be a source of pride and a form of resistance against long-standing oppression.[79] Further, in light of our colonial history, it is not surprising that many Indigenous people see the criminal justice system as a source of oppression, not justice.[80]

Just as the law played a central role in colonialism, it plays a central role in neo-colonialism. It does so in two ways. Firstly, criminal law, particularly through policing for public order offences, is the primary means through which Indigenous people are controlled.[81] The justice system has 'evolved' to manage 'the Aboriginal problem' which is perceived to be a problem of public order.[82] Indigenous people are over-policed and incarcerated at incredible rates.[83] Some argue that missions and reserves were closed only to be replaced by an increased reliance on law enforcement and imprisonment to control Indigenous people.[84]

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76 Blagg, *Crime, Aboriginality and the Decolonisation of Justice*, above n 2, 14.

77 Chris Cunneen and Terry Libesman, 'Postcolonial Trauma: The Contemporary removal of Indigenous Children and Young People from their Families in Australia' (2000) 35(2) *Australian Journal of Social Issue*s 99, 103; Chris Cunneen, 'Reforming Juvenile Justice and Creating the Space for Indigenous Self-Determination' (1998) 21(1) *University of New South Wales Law Journal* 1, 242. See Chris Cunneen, 'Criminology, Criminal Justice and Indigenous People: A Dysfunctional Relationship?' (2009) 20(3) *Current Issues in Criminal Justice* 332, 329-330.

78 Michael Mansell, 'The political vulnerability of the unrepresented' in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit* (Arena Press, 2007) 73, 75; Irene Watson, 'Re-centring First Nations Knowledge and Places in a Terra Nullius Space' (2014) 10(5) *AlterNative* 508, 509.

79 Gillian Cowlishaw, 'Reproducing Criminality: How Cure Enhances Cause' in Kerry Carrington, Matthew Ball, Erin O'Brien and Juan Tauri (eds), *Crime, Justice and Social Democracy* (Palgrave MacMillan, 2013) 234, 235-238. See also Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2nd ed, 2014), 42-43.

80 See, eg, Chris Cunneen, 'Indigeneity, Sovereignty and the Law: Challenging the Processes of Criminalization' (2011) 110 *South Atlantic Quarterly* 309, 319.

81 Eileen Baldry and Chris Cunneen, 'Imprisoned Indigenous Women and the Shadow of Colonial Patriarchy' (2014) 47(2) *Australian & New Zealand Journal of Criminology* 276, 288.

82 Blagg, *Crime, Aboriginality and the Decolonisation of Justice*, above n 2, 2.

83 Cunneen, *Conflict, Politics and Crime*, above n 79, 85-86.

84 Baldry and Cunneen, above n 81, 291; National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, *Bringing them home* (1997) Part 6; Mick Dodson, 'Bully in

Secondly, the law imposes neo-colonial control through privileging the Anglo-Australian legal system and 'erasing' Indigenous law, knowledge and perspectives, by denying them space to operate.[85] Anglo-Australian law continues to be a foreign legal system imposed on Indigenous people, and continues to deny legitimacy to Aboriginal law. Aboriginal law is only validated when Anglo-Australian law chooses to 'recognise' it.[86] For recognition to occur, Aboriginal law must be considered consistent with Anglo-Australian law, reflecting the perceived dominance of Anglo-Australian law.[87] Further, 'recognition' often occurs through assimilation of Aboriginal law into our legal system. An example of this is native title law, which takes Indigenous land rights and law out of the control of its custodians and into the control of the Anglo-Australian legal system.[88] By denying equal legitimacy to Aboriginal law, knowledge and perspectives, Anglo-Australian law expects Indigenous people to assimilate into Western culture.

C What is Decolonisation and How is it Achieved?

1 What is Decolonisation?

As colonialism is directly related to Indigenous offending and over-incarceration, we cannot simply apply restorative justice, therapeutic jurisprudence or community justice as applied to non-Indigenous offenders. We must attempt to decolonise the justice system, that is, reverse the effects of colonisation.[89] It is not possible to reverse the effects of colonialism in their entirety. However, we can decolonise to some degree by addressing the continued neo-colonisation in the law and addressing underlying causes of offending with a recognition of the relevance of colonial history. This recognition is the starting point for decolonisation.[90]

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the Playground: A New Stolen Generation' in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stabilise, Normalise, Exit* (Arena Press, 2007) 85, 94.

85 Elena Marchetti and Janet Ransley, 'Applying the Critical Lens to Judicial Officers and Legal Practitioners Involved in Sentencing Indigenous Offenders: Will Anyone or Anything Do?' 37 *University of New South Wales Law Journal* 1, 23. Regarding the concept of 'erasure' see Deborah Bird Rose, 'Land rights and deep colonising: The erasure of women' (1996) 3(85) *Aboriginal Law Bulletin* 6, 6-7.

86 Chris Cunneen and Melanie Schwartz, 'Customary Law, Human Rights and International Law: Some Conceptual Issues' in Law Reform Commission of Western Australia, *Customary Laws Project: Background Papers*, Project No 94 (2006) 429, 432-433; Irene Watson, 'Indigenous Peoples' Law-Ways', above n 1, 58.

87 Cunneen and Schwartz, above n 86, 432-433.

88 See Naomi Fisher 'Out of Context: The Liberalisation and Appropriation of 'Customary' Law as Assimilatory Practice' (2008) 4(2) *Australian Critical Race and Whiteness Studies Association e-journal*, 3, 9-10; Irene Watson, 'Sovereign Spaces, Caring for Country, and the Homeless Position of Aboriginal Peoples' (2009) 108(1) *South Atlantic Quarterly* 27, 40-44.

89 Rose, above n 85, 6; Elena Marchetti, 'The Deep Colonizing Practices of the Australian Royal Commission into Aboriginal Deaths in Custody' (2006) 33(3) *Journal of Law and Society* 451, 461.

90 Sande Grande, 'Whitestream Feminism and the Colonialist Project: A Review of Contemporary Feminist Pedagogy and Praxis' (2003) 53(3) *Educational Theory* 329, 329.

2 Self-determination and Sovereignty

For any attempts at decolonisation to be achieved, Indigenous people must be empowered such that they can exercise self-determination.[91] Self-determination means the right of Indigenous people 'to exercise autonomy in their own affairs and … make their own decisions'.[92] The importance of self-determination has been noted by Law Reform and Royal Commission reports,[93] and is recognised by the United Nations as a fundamental right of Indigenous peoples.[94]

Since colonisation, Indigenous knowledge has been silenced, and the sovereignty of Aboriginal Nations and their laws displaced.[95] Irene Watson argues that *space* for Aboriginal law to operate with 'jurisdictional autonomy' is needed,[96] along with a 'shift' towards recognition of Aboriginal philosophy.[97] Indigenous law, philosophy and knowledge need to be 're-centred' and no longer left to operate on the margins. [98] However, Irene Watson considers Aboriginal sovereignty as the crucial factor, with land rights of central importance due to their relevance to the exercise of Aboriginal laws relating to caring for country.[99]

While Irene Watson sees Aboriginal sovereignty as 'thwarted by the federal government mantra of one nation one law',[100] Chris Cunneen argues that sovereignty can be 'conceptualised in terms of jurisdictional multiplicity and divisibility' and a decentralisation of state power.[101] Changes to the criminal justice system cannot address territorial sovereignty or give Indigenous people greater land rights. However, it may be possible, as will be discussed in Part VI, to bring Indigenous perspectives and knowledge to the centre and to create space for Aboriginal law and Anglo-Australian law to operate with 'jurisdictional

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91 See, eg, Baldry and Cunneen, above n 81, 289; Harry Blagg, 'Colonial Critique and Critical Criminology: Issues in Aboriginal Law and Aboriginal Violence' in Thalia Anthony and Chris Cunneen (eds), *The Critical Criminology Companion* (Hawkins Press, 2008) 140, 135; Cunneen, 'Community Conferencing', above n 41, 296, 300; Dodson, above n 4, 24; Loretta Kelly, 'Using Restorative Justice Principles to Address Family Violence in Aboriginal Communities' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 206, 212. See also Juan Tauri, 'Explaining Recent Innovations in New Zealand's Criminal Justice System: Empowering Maori or Biculturalising the State?' (1999) 32(2) *Australian & New Zealand Journal of Criminology* 153, 161, writing in the New Zealand context.

92 Dodson, above n 5, 41.

93 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, *Bringing them home* (1997); Commonwealth, above n 4 [1.7]; Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Discussion Paper*, above n 61, 421.

94 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007), art 3, art 4.

95 Watson, 'Aboriginal Women's Laws and Lives', above n 59, 99.

96 Ibid 105.

97 Watson, 'Re-Centring First Nations Knowledge and Places', above n 78, 517.

98 See ibid; Irene Watson, 'Aboriginal(ising) International Law and Other Centres of Power' (2011) 20(3) *Griffith Law Review* 619, 634, 636.

99 See Watson, 'Sovereign Spaces', above n 88.

100 Watson, 'Aboriginal Women's Laws and Lives', above n 59, 107.

101 Cunneen, 'Indigeneity, Sovereignty and the Law', above n 80, 317-319, 314-316, 323. While conducting consultations with Indigenous communities, the Law Reform Commission of Western Australia found that the Indigenous people consulted expressed 'a strong desire to cooperate, and work in partnership, with government' and not a desire to create a separate State or political system: See Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Discussion Paper*, above n 61, 421.

multiplicity' within the criminal justice system.[102] This would have a decolonising effect on criminal justice processes while leaving more work to be done in the broader legal and political system.

This challenges the dominant notion that the rule of law requires a single consistent legal system applicable to all.[103] However, recognising sovereignty as conceptualised by Chris Cunneen does not mean that Anglo-Australian law be inapplicable to Indigenous people, or that the Anglo-Australian legal system should enforce Aboriginal law. It means that the 'terms of engagement' between Indigenous and non-Indigenous people should be reframed, and those enforcing the criminal justice system should share 'administrative functions',[104] allowing Aboriginal law to operate. In practice, Cunneen suggests that this would operate as a system which offers a 'significant role for Indigenous people in justice decision-making at a community level and through the courts, as well as an emphasis on Indigenous modes of healing'.[105] Treating all individuals identically does not achieve substantive equality,[106] but rather ignores Indigenous peoples' particular position as victims of colonial processes, which is perhaps the 'most damaging' form of racial bias inflicted upon Indigenous Australians.[107]

3 Changing Power Imbalances

Imposed solutions cannot facilitate decolonisation as, at a fundamental level, decolonisation requires the changing of power imbalances between the former colony and the colonised.[108] While genuine consultation with Indigenous communities when planning initiatives is crucial,[109] consultation and participation do not constitute self-determination without Indigenous control over decision-making.[110] We must adopt a form of legal pluralism where Anglo-Australian law and Aboriginal law can operate side-by-side without Anglo-Australian law circumscribing Aboriginal law.[111] 'Minor tinkering' with the current system to make it 'culturally appropriate' is not enough.[112]

Indigenous people are capable of effective self-governance based on the authority of Aboriginal law. Indigenous communities have already established their own successful methods for dealing with alcohol, anti-social behaviour,

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102 Cunneen, 'Indigeneity, Sovereignty and the Law', above n 80, 323.
103 Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Final Report*, Project No 94 (2006), 8, 13-14.
104 Cunneen, 'Indigeneity, Sovereignty and the Law', above n 80, 315, citing Melissa Castan and David Yarrow, 'A Charter of (Some) Rights … for Some?' (2006) 31 *Alternative Law Journal* 132, 135; Steven Curry, *Indigenous Sovereignty and the Democratic Project* (Ashgate, 2004), 148-148.
105 Cunneen, 'Indigeneity, Sovereignty and the Law', above n 80, 323.
106 Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Final Report*, above n 103, 8.
107 Blagg, *Crime, Aboriginality and the Decolonisation of Justice*, above n 2, 9.
108 Cunneen, 'Community Conferencing', above n 41, 296; Marchetti and Ransley, above n 85, 25.
109 See, eg, Cunneen, and Libesman, above n 77, 107.
110 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, *Bringing them home* (1997), Chapter 15.
111 Cunneen and Libesman, above n 77, 110. See also Cunneen, 'Indigeneity, Sovereignty and the Law', above n 80, 317-319.
112 Tauri, above n 91, 162.

family violence, and reintegrating youth offenders, including self-policing initiatives and on-country programs.[113] Harry Blagg writes that these Indigenous-owned community justice mechanisms 'should constitute the bedrock for strategies intended to shift power to the Aboriginal domain'.[114]

4 Government Assistance

While government must necessarily relinquish control over Indigenous issues and law, partnership with government is necessary to facilitate Indigenous empowerment. Support from the government is necessary as most Indigenous communities lack an economic base.[115] As such, 'an established method' for the provision of assistance to Indigenous communities which maintains each community's independent status and does not create a 'welfare-dependent position' is needed.[116]

V MAIN QUALITATIVE FINDINGS

A Alternative Approaches to Justice

All interview participnts were of the view that approaches to crime should attempt to address the underlying issues causing criminal behaviour. While one prosecutor was sceptical of using problem-solving approaches for indictable offences, the other thought it would be very beneficial.[117] Participants identified a lack of services, including culturally appropriate services, as a pressing issue.[118] Most were of the view that greater collaboration with Indigenous communities and organisations was needed.[119] All participants supported the concept of an NJC, though one noted that issues of crime require structural changes beyond the criminal justice system, such as changes to welfare delivery in general.[120] One prosecutor considered that an informal mediation or conferencing process parallel to criminal proceedings should be implemented because many victims experience distress as a result of waiting months or years for the issue to be

113 Blagg, *Crime, Aboriginality and the Decolonisation of Justice*, above n 2, 59-61, 96-103; Harry Blagg, Tamara Tulich, and Zoe Bush, 'Diversionary pathways for Indigenous youth with FASD in WA' (2015) 40(4) *Alternative Law Journal* 257, 260.

114 Blagg, *Crime, Aboriginality and the Decolonisation of Justice*, above n 2, 167. See also Thalia Anthony, 'Is There Social Justice in Sentencing Indigenous Offenders?' (2012) 35(2) *University of New South Wales Law Journal* 563, 592.

115 Commonwealth, above n 4 [1.7.13].

116 Ibid [1.7.19].

117 Interview with State Prosecutor (Perth, 26 July 2016); Interview with State Prosecutor (Perth, 1 August 2016).

118 Interview with senior member of the judiciary (Perth, 1 August 2016); Interview with District Court Judge (Perth, 31 August 2016); Interview with Aboriginal Legal Service lawyer (Perth, 1 September 2016).

119 Interview with State Prosecutor (Perth, 1 August 2016)); Interview with Legal Aid WA lawyer, Kununurra (Telephone interview, 17 August 2016); Interview with State Prosecutor (Perth, 26 July 2016); Interview with senior member of the judiciary (Perth, 1 August 2016).

120 Interview with District Court Judge (Perth, 31 August 2016).

dealt with.[121] Such a program is beyond the scope of this article but could be implemented using an NJC given the flexibility of the model.

B Barriers to Understanding

Participants varied in whether they considered that the criminal justice system marginalises or disadvantages Indigenous people. Some considered Indigenous people to be already disadvantaged, with the criminal justice system failing to adequately accommodate this and cultural factors.[122] All participants identified barriers to understanding criminal justice processes, specifically cultural and language barriers, as a significant issue impacting on Indigenous participants in the system.

Cultural barriers can occur as the 'structure, process and penalties don't necessarily align with traditional Aboriginal justice processes', resulting in confusion due to conceptual differences.[123] Further, cultural protocols, such as silence, can be misconstrued by non-Indigenous participants.[124]

Language barriers can occur where the Indigenous person does not speak English as their first language. There is a significant absence of qualified interpreters for Indigenous languages.[125] Further, Indigenous people with basic English skills may be assumed to be fluent and special arrangements are not made for them.[126] Language barriers can also occur where English is the Indigenous person's first language. One prosecutor noted that 'some terminology is not appropriate' and the 'majority [of Indigenous defendants] don't have an appreciation or understanding of what's going on [in court]'.[127] One Legal Aid lawyer was of the view that even an English-speaking non-Indigenous person 'can easily go through the sentencing process and not understand' what occurred.[128]

Barriers to understanding impact on Indigenous people at all stages in the criminal justice system, from being interviewed by police to complying with court orders.[129] They can also affect rehabilitation given that rehabilitation is impeded if one cannot understand their counsellor or program provider.[130]

121 Interview with State Prosecutor (Perth, 26 July 2016).
122 Ibid; Interview with State Prosecutor (Perth, 1 August 2016).
122 Interview with senior member of the judiciary (Perth, 1 August 2016).
123 Interview with Legal Aid WA lawyer, Kununurra (Telephone interview, 17 August 2016).
124 Interview with District Court Judge (Perth, 31 August 2016).
125 Interview with Aboriginal Legal Service lawyer (Perth, 1 September 2016); Interview with State Prosecutor (Perth, 1 August 2016).
126 Interview with senior member of the judiciary (Perth, 1 August 2016).
127 Interview with State Prosecutor (Perth, 26 July 2016).
128 Interview with Legal Aid WA lawyer, Kununurra (Telephone interview, 17 August 2016).
129 Interview with Aboriginal Legal Service lawyer (Perth, 1 September 2016); Interview with Legal Aid WA lawyer (Perth, 20 July 2016).
130 Interview with Aboriginal Legal Service lawyer (Perth, 1 September 2016).

C Formality and Disengagement

A number of participants saw barriers to understanding as intertwined with the formality of court processes and disengagement from them.[131] Formalities impeding understanding and engagement include the artificiality of the process,[132] the use of video-link,[133] the role of the lawyer to speak for the defendant, the ceremonial nature of the process, and the placement of the defendant 'off to the side' of the room.[134] Use of plain English, and an oval seating arrangement could address these concerns.[135] All participants saw active engagement and monitoring from the judicial officer as a positive. Understanding and engagement were thought to be facilitated if the judge or magistrate had a conversation with the defendant rather than reciting their sentencing remarks *at* them.[136]

Further, colonial history is related to disengagement with court processes. The senior member of the judiciary noted that, in conventional courts, Indigenous people are 'not paying any attention' because it is 'white-fella business'. They feel that the process is 'irrelevant to them' and have a 'whatever happens, happens' attitude.[137] As such, involving Indigenous Elders in the process can have a significant positive impact on engagement.

D Cultural Understanding

Cultural understanding on the part of the court is also necessary. Most participants thought cultural information is valuable to a court when sentencing Indigenous offenders. Information as to Aboriginal law can help explain why an offence has occurred where there is an inconsistency between Aboriginal law and Anglo-Australian law.[138] It can provide information for how to practically deal with the issue before the court,[139] and what would be best for the defendant.[140] Information about kinship and avoidance relationships can be relevant to this, to what orders would be appropriate, and to court design.[141] As such, all participants supported Elder involvement in sentencing. Further, all were of the view that more cultural awareness training is required for non-Indigenous people working in the criminal justice system.

131 Interview with Legal Aid WA lawyer (Perth, 20 July 2016); Interview with senior member of the judiciary (Perth, 1 August 2016).
132 Interview with State Prosecutor (Perth, 1 August 2016).
133 Interview with senior member of the judiciary (Perth, 1 August 2016).
134 Interview with State Prosecutor (Perth, 26 July 2016).
135 Ibid; Interview with State Prosecutor (Perth, 1 August 2016); Interview with senior member of the judiciary (Perth, 1 August 2016).
136 Interview with Legal Aid WA lawyer (Perth, 20 July 2016); Interview with State Prosecutor (Perth, 26 July 2016).
137 Interview with senior member of the judiciary (Perth, 1 August 2016).
138 Interview with Legal Aid WA lawyer (Perth, 20 July 2016).
139 Interview with senior member of the judiciary (Perth, 1 August 2016).
140 Interview with Aboriginal Legal Service lawyer (Perth, 1 September 2016).
141 Ibid; Interview with senior member of the judiciary (Perth, 1 August 2016).

VI DECOLONISING THROUGH NEIGHBOURHOOD JUSTICE

In this Part, I propose that a hybrid NJC-ASC model can operate to promote decolonisation both inside and outside of the court. The NJC model presents two unique features – community justice as a focus, and provision of in-house, co-located services. These features of the NJC model make it particularly suited for decolonising outside of the court, and present this advantage when compared to ASCs. That is not to say that ASCs have not had a positive impact on Indigenous communities, nor that ASCs should be abandoned or aspects of ASCs should not be utilised as part of an NJC. The ASC model is well suited to decolonising inside the court. As such, I propose that a hybrid NJC-ASC model should be used, utilising the strengths of ASCs. This is discussed in Section B, below. This may address two limitations of ASCs currently used in Australia – shortcomings in granting Indigenous self-determination and a lack of services. Such a model could be incorporated into existing ASCs or new hybrid courts. Establishing new hybrid courts may be advantageous as 'starting from scratch' may provide more appropriate opportunities for engaging Indigenous communities at the planning stage, as discussed in Section A (3).

A Outside the Court

1 Partnering with and Supporting Indigenous Communities

NJCs could facilitate the creation of a hybrid space where Anglo-Australian and Aboriginal legal systems can work in partnership. As noted in Part III, community justice expressly seeks to build community capacity to deal with crime and empower local communities through partnerships. NJCs can give Aboriginal law space to operate with jurisdictional autonomy and give Indigenous people control over matters affecting them by:

- Encouraging and potentially funding Indigenous development of community-owned initiatives;[142]
- Referring Indigenous offenders and victims to Indigenous-controlled support groups, services, or on-country programs; and
- Working with Aboriginal community policing initiatives.

Previous attempts at Indigenous self-determination in Australia have focussed on the creation of Westernised Aboriginal institutions.[143] An NJC model would not attempt to transform Indigenous processes into Western conceptions of governance or co-opt them into the Anglo-Australian legal system, leaving control over Aboriginal law and initiatives in the hands of Indigenous people. It would also provide a means through which community-owned initiatives can be supported without control being exerted over them. Like existing NJCs, it can

142 See Blagg, *Crime, Aboriginality and the Decolonisation of Justice*, above n 2, 156-157 regarding the distinction between community-based and community-owned initiatives.

143 Megan Davis, 'Aboriginal women: The right to self-determination' (2012) 16(1) *Australian Indigenous Law Review* 78, 80-82, 84-85.

facilitate these partnerships through ongoing community consultation and social and community events.

Some ASCs engage with Indigenous-owned initiatives in a similar way. ASCs operate similarly to problem-solving courts but involve Aboriginal Elders or respected persons in the sentencing process.[144] They are also concerned with 'transforming racialised relationships and communities' and therefore have a political dimension.[145] Similarly to NJCs, they utilise a more informal setting.[146] The Shepparton Koori Court's 'open door policy' and physical presence in the community has facilitated discussions with Indigenous community members about law reform issues, community projects, and establishing community-owned initiatives such as a Koori night patrol, and court staff and police prosecutors have become socially engaged with the community.[147] In Mt Isa, Murri Women's and Men's support groups have been established for offenders and victims.[148] In the Northern Territory, community-owned Law and Justice Groups and Committees were formed by Indigenous communities to work with ASCs.[149]

However, such engagement has occurred on an 'ad-hoc' basis, dependent upon the initiative of the particular magistrate at the court.[150] Official aims of most ASCs do not include community ownership,[151] showing that creating community partnerships and working with community groups to address crime was not at the forefront of the minds of most policymakers establishing ASCs. Bridget McAsey argues that ASCs fail to provide 'true self-determination' primarily due to a failure to explicitly address power imbalances, self-determination, and 'devolution of power' to the Indigenous community.[152] Further, she points out that Elders were not formally engaged during the development of Victorian Koori Courts, including the Shepparton Koori Court, and the Koori community did not have the opportunity to independently develop a framework for the Courts.[153]

Because an NJC model is based on a community justice framework, it explicitly brings the goal of creating partnerships with community groups to the forefront. Working from this underlying principle would provide a clear mandate

144 Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29(3) *Sydney Law Review* 415, 443.

145 Ibid.

146 Kathleen Daly and Gitana Proietti-Scifoni, *Defendants in the Circle: Nowra Circle Court, the Presence and Impact of Elders and Re-Offending* (Griffith University, 2009), 5-6.

147 Auty and Briggs, above n 8, 13-14.

148 Elena Marchetti, 'Indigenous Sentencing Courts and Partner Violence: Perspectives of Court Practitioners and Elders on Gender Power Imbalances During the Sentencing Hearing' (2010) 43(2) *Australian & New Zealand Journal of Criminology* 263, 268.

149 Thalia Anthony and Will Crawford, 'Northern Territory Indigenous Community Sentencing Mechanisms: An Order for Substantive Equality' (2013) 17 *Australian Indigenous Law Review* 79, 81.

150 Interview with Legal Aid WA lawyer, Kununurra (Telephone interview, 17 August 2016); Interview with senior member of the judiciary (Perth, 1 August 2016).

151 With the exception of Victoria and South Australia, stated aims only include reducing recidivism, involving Indigenous people in the sentencing process, improving relations between Indigenous people and the legal system, and making the process more culturally appropriate: See Marchetti and Daly, above n 144, 422, 432-435.

152 McAsey, above n 7, 669-670, 685.

153 Ibid 670-671.

to work with Indigenous communities, and a clear theoretical basis for doing so, rather than leaving Indigenous engagement dependent upon the initiative of particular NJC staff members. To ensure that staff understand the significance of this, a hybrid NJC's aims should explicitly reference the need to enable self-determination and to share decision-making authority with Indigenous communities.

An NJC would also increase information-sharing. Participants identified a lack of information-sharing between courts and services, and between services.[154] Community-owned services are sometimes unknown to the court.[155] An NJC model would address this issue through colocation of services and community collaboration.

An NJC could also support Indigenous communities, and increase community capacity to develop programs, by providing services and organising community projects which assist the community. The potential benefits of using a hybrid NJC model to address the needs of Indigenous young offenders with Foetal Alcohol Spectrum Disorders have already been recognised.[156]

Participants saw the colocation of services as the one of greatest benefits of the NJC model.[157] Services addressing 'the issues that make your life easier' were considered highly important as reducing life stresses enables engagement with treatment or therapy.[158] As such, housing and employment were identified as fundamental issues which need to be addressed before a defendant can engage with treatment or counselling.[159] Participants thought Centrelink, licensing, and child support services at an NJC would also be highly beneficial.[160] The Aboriginal Legal Service lawyer interviewed also suggested that an NJC should organise 'positive fun' experiences as many Indigenous youths have not had the opportunity to engage in such activities with family or friends. Such experiences could include sport, camping or fishing trips, and cultural camps.[161]

NJCs should also be used to support offenders released from prison.[162] Partnering with Indigenous communities could enable utilisation of traditional authority structures to monitor offenders on bail and on parole, resulting in more

154 This issue was also identified in the evaluation of the Kalgoorlie Community Court: Heather Aquilina, Shelby Consulting, *Evaluation of the Aboriginal Sentencing Court of Kalgoorlie: Final Report* (2009), 69-70.

155 Interview with State Prosecutor (Perth, 26 July 2016).

156 Harry Blagg, Tamara Tulich and Zoe Bush, 'Placing Country at the Centre: Decolonising Justice for Indigenous Young People with Foetal Alcohol Spectrum Disorders (FASD)' (2015/2016) 19(2) *Australian Indigenous Law Review* 4.

157 Interview with Legal Aid WA Lawyer (Perth, 20 July 2016); Interview with State Prosecutor (Perth, 26 July 2016); Interview with senior member of the judiciary (Perth, 1 August 2016); Interview with Legal Aid WA lawyer, Kununurra (Telephone interview, 17 August 2016); Interview with Aboriginal Legal Service lawyer (Perth, 1 September 2016). The senior member of the judiciary also considered that interaction between the magistrate and the community as a key strength of the NJC model.

158 Interview with Legal Aid WA lawyer (Perth, 20 July 2016).

159 Ibid; Interview with Aboriginal Legal Service lawyer (Perth, 1 September 2016); Interview with State Prosecutor (Perth, 26 July 2016).

160 Interview with Aboriginal Legal Service lawyer (Perth, 1 September 2016); Interview with State Prosecutor (Perth, 1 August 2016).

161 Interview with Aboriginal Legal Service lawyer (Perth, 1 September 2016).

162 Interview with State Prosecutor (Perth, 26 July 2016).

culturally appropriate supervision and preventing Indigenous persons from being refused parole or bail due to unavailability of sufficient supervision.[163]

2 Services

A common limitation of ASCs is a lack of support services and post-hearing support programs,[164] including post-hearing cultural support to strengthen cultural ties.[165] Some blame this for the lack of observed reductions in recidivism.[166] Distance between the Koori Court and service providers has also limited the effectiveness of the Broadmeadows Koori Court.[167] Using an NJC model would solve this problem by not only providing offenders and victims with services over and above those available to mainstream courts, but also providing those services at a single location, thereby increasing accessibility, information-sharing and collaboration between service providers. As noted above, interview participants considered the *colocation* of services to be one of the NJC model's greatest strengths.

Community partnerships would also increase the level of available support and services by utilising services available in the community, including Indigenous-owned services. Partnerships with Indigenous community groups could provide an avenue through which cultural connections can be strengthened post-hearing.

3 Facilitating Engagement at the Planning Stage

For community partnerships to flourish, the community needs to be engaged in appropriate ways. Even in New York, where NJCs do not engage with Indigenous groups, there is a danger that the court will use the community as a 'symbolic partner'.[168] This danger is even more pronounced in a postcolonial context, and even good faith attempts at engagement can be compromised by cultural misunderstandings. A detailed discussion of culturally appropriate methods of engaging Indigenous communities is beyond the scope of this article. Policymakers should be aware of the following key points relevant to engagement:

- Local consultation prior to the establishment of an NJC is critical for the exercise of Indigenous self-determination, and necessary to ensure that 'solutions' are not imposed on Indigenous people. This requires addressing postcolonial power dynamics and 'adjustments in … non-Indigenous person[s'] perspectives'.[169]

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163 Interview with Legal Aid WA lawyer, Kununurra (Telephone interview, 17 August 2016).

164 See, eg, Aquilina, above n 154, 70; Daly and Proietti-Scifoni, above n 146; Jacqueline Fitzgerald, 'Does Circle Sentencing Reduce Aboriginal Offending?' (2008) 115 *NSW Bureau of Crime Statistics and Research Crime and Justice Bulletins* 1, 7.

165 Marchetti, 'Delivering Justice', above n 9, 360; Elena Marchetti and Riley Downie, 'Indigenous People and Sentencing Courts in Australia, New Zealand, and Canada' in Sandra Bucerius and Michael Tonry (eds), *The Oxford Handbook of Ethnicity, Crime, and Immigration* (Oxford University Press, 2014) 360, 362.

166 Aquilina, above n 154, 70; Fitzgerald, above n 164, 7.

167 McAsey, above n 7, 680.

168 Fagan and Malkin, above n 23, 950.

169 Marchetti and Ransley, above n 85, 25. See also Janet Hunt, Australian Institute of Health and Welfare, *Engaging with Indigenous Australia: Exploring the Conditions for Effective Relationships with*

- 'Free, prior and informed consent' should be obtained from Indigenous people before planning begins.[170] This requires a process of negotiation and deliberation, not merely consultation,[171] which treats Indigenous people as equal participants and utilises their knowledge and perspectives.[172] If respected persons or Elders are identified, it is important that they play an active role, for example by being a member of a working group, rather than only being consulted.[173]
- Indigenous people must be engaged in culturally appropriate ways, and this 'needs to be negotiated with people rather than assumed'.[174] Cultural protocols need to be respected and adhered to.[175] Care needs to be taken when using Indigenous knowledge.[176]
- The meaning of 'community' needs to be considered. A single locality may include Indigenous people from a number of cultural groups. It should not be assumed that these groups are culturally equivalent or have the same interests and needs.[177]

4 Facilitating Engagement after Establishment

(a) Indigenous Court Workers

Once an NJC is established, Indigenous court workers can help facilitate community engagement. The Melbourne NJC employs 'Koori Justice Workers' who assist Indigenous clients of the centre, and are involved in the broader Indigenous community by participating in community programs and events, and by interacting with community members and clients in the community.[178] This assists in building and maintaining relationships between the local Indigenous community and the NJC.[179] Indigenous court workers also play an important role in ASCs, which is discussed in Section B, below.

Aboriginal and Torres Strait Islander Communities (2013), 2; Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Australian Indigenous Studies* (2012), 4-8. These guidelines are focused on research affecting Indigenous people. However, they are equally applicable to consultations conducted for the purpose of establishing a justice project.

170 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007), art 18-19.

171 Hunt, above n 169, 2.

172 Australian Institute of Aboriginal and Torres Strait Islander Studies, above n 169, 9-14.

173 See Australian Institute of Aboriginal and Torres Strait Islander Studies, above n 169, 14; McAsey, above n 7, 669-670.

174 Barbara Miller, *A Community Development Approach to Crime Prevention in Aboriginal Aommunities* (Australian Institute of Criminology, 1992), 20. See also Larissa Behrendt, 'Eualeyai: The Blood that Runs Through my Veins' in Stephen Greymorning (ed), *A Will to Survive: Indigenous Essays on the Politics of Culture, Language, and Identity* (McGraw Hill, 2004) 32, 33 as cited in McAsey, above n 7, 669.

175 See Hunt, above n 169, 13, 32; David Martin, 'The Governance of Agreements Between Aboriginal People and Resource Developers: Principles for Sustainability' in Jon Altman and David Martin (eds), *Power, culture, economy: Indigenous Australians and mining* (ANE E Press, 2009) 99.

176 Australian Institute of Aboriginal and Torres Strait Islander Studies, above n 169, 6-8.

177 Hunt, above n 169, 9.

178 Ottinger, above n 22, 4.

179 Ibid.

(b) Active Participation

Active participation from community members and Elders should continue after establishment. Elders or respected persons could be recognised members of a committee, rather than having the status of a community member who can be approached if the NJC decides to do so in community consultations.

B Inside the Court

1 The need to include Indigenous Voices

Even if successful partnerships with Indigenous communities are established, an NJC would remain a Eurocentric forum. Unless Indigenous knowledge and perspectives are given space to operate within the internal processes of an NJC, the NJC will not be able to facilitate decolonisation because Indigenous voices would be silenced, and Indigenous perspectives and knowledge erased.[180]

Even if Indigenous people participate in a legal process, suppression of their voices can occur through 'reconfiguring what is heard and not heard', resulting from cultural clashes and Indigenous perspectives being misinterpreted or denied legitimacy by non-Indigenous participants.[181] This can occur if non-Indigenous participants hold 'cultural assumptions and stereotypes about what constitutes Indigenous culture'.[182] It will also be influenced by 'the meaning, weight and value placed on Indigenous knowledge' in a sentencing hearing.[183]

Silencing of Indigenous voices in the court would have the following practical consequences for the operation of an NJC:

- The magistrate would have insufficient knowledge of the types of Indigenous services, or sentencing dispositions, that would be appropriate for a particular offender, meaning that partnerships with Indigenous initiatives would not be adequately utilised;
- It may impact on the Indigenous community's perceived legitimacy of the NJC; and
- It will not address the confusion faced by Indigenous people involved in proceedings where Western and Indigenous conceptions of justice do not align with each other.

In applying therapeutic jurisprudence, Indigenous knowledge and perspectives relating to healing must not be treated as secondary to Western conceptions of treatment, which can be at odds with Indigenous perspectives.[184] Care must be taken to ensure that professionals devising treatment plans for clients of the NJC, and magistrates referring offenders to therapeutic services, respect and incorporate Indigenous perspectives, and collaborate with Indigenous people, rather than

180 Marchetti and Ransley, above n 85, 23, drawing on Roy, above n 10, 326.
181 See Marchetti, 'The Deep Colonizing Practices', above n 89, 461.
182 Marchetti and Ransley, above n 85, 23.
183 Marchetti and Ransley, above n 85, 23.
184 See generally Judy Atkinson, *Trauma Trails: Recreating Song Lines* (Spinifex Press, 2002), Chapters 4-5; Kwaymullina, above n 62.

controlling the process. This could be done by utilising Indigenous-controlled programs in addition to Western services.

It is also important that Eurocentric restorative justice processes are not imposed on Indigenous participants. While some Indigenous justice practices may appear similar to restorative justice, it cannot be assumed that they are equivalent or incorporate the same values.[185] Any mediation or family conferencing process must be developed by the Indigenous community and care needs to be taken to ensure that Indigenous knowledge and perspectives are afforded equal weight and value as Western perspectives at an NJC.

2 Bringing Indigenous Voices into the Courtroom

(a) Indigenous Court Workers

The Melbourne NJC's Koori Justice Workers provide an Indigenous voice in the courtroom by advising the Court regarding culturally specific programs and services.[186] This assists the Court in tailoring appropriate sentences for Indigenous defendants. Koori Justice Workers also support Indigenous clients of the NJC by:

- Creating treatment plans with clients to encourage them to take some ownership over their treatment plan;
- Providing Indigenous spiritual support;
- Referring clients to appropriate treatment and services at the NJC, and to external Aboriginal services; and
- Liaising with correctional services as a 'dual' case-manager.[187]

ASCs also employ Indigenous court workers.[188] Their role is to 'organise Elders to appear at the hearings, liaise between the offender, prosecutor and victim (if they agree to participate), and sometimes monitor an offender's progress after the hearing'.[189] Further, they may sit as a member of the court, 'advising the bench before, during and after court cases'.[190] At the Shepparton Koori Court, the Indigenous court worker also identifies local community services.[191] These Indigenous court workers play a 'pivotal role' in the ASC process.[192]

Indigenous court workers can play a valuable role not only in advising magistrates and supporting clients of an NJC, but also in ensuring that therapeutic jurisprudence does not silence Indigenous knowledge and perspectives. The involvement of Indigenous court workers in creating treatment plans can prevent

185 See, eg, Blagg, 'A Just Measure of Shame?', above n 41; Stephanie Vieille, 'Frenemies: Restorative Justice and Customary Mechanisms of Justice' (2013) 16(2) *Contemporary Justice Review* 174. See also Paora Moyle and Juan Marcellus Tauri, 'Māori, Family Group Conferencing and the Mystifications of Restorative Justice' (2016) 11(1) *Victims & Offenders* 87, 94-97, 101.

186 Ottinger, above n 22, 4.

187 Ibid.

188 Marchetti, 'Indigenous Sentencing Courts and Partner Violence', above n 148, 265.

189 Ibid 265.

190 Auty and Briggs, above n 8, 26.

191 Ibid.

192 Blagg, *Crime, Aboriginality and the Decolonisation of Justice*, above n 2, 113.

non-Indigenous professionals from unilaterally controlling the creation of these plans. The provision of spiritual support and referral to Aboriginal services further ensures that therapeutic jurisprudence is applied in a way which is relevant to Indigenous people and utilises their knowledge. Further, as noted in Part III, the inclusion of in-house service providers at an NJC facilitates knowledge-sharing and collaboration between these service providers. As such, the employment of Indigenous court workers at an NJC would facilitate knowledge-sharing and collaboration between Indigenous court workers and non-Indigenous professionals at the NJC, further giving space for Indigenous knowledge to be included in the operation of the NJC.[193]

(b) Elder Involvement

Elder involvement in the sentencing process is a prominent aspect of ASCs. Depending on the particular court and jurisdiction, between one to four Elders sit with the magistrate.[194] Their role ranges 'from briefly addressing the defendant during sentencing to … discussing a sentence and monitoring the defendant's progress afterwards'.[195] The placement of all participants, including the magistrate, at eye-level, facilitates respect for the Elders.[196]

Elder involvement brings an Indigenous voice and perspective into the sentencing process as it displays respect for, and acknowledgement of, the relevance of Indigenous culture and knowledge,[197] allows for the use of Indigenous knowledge in the sentencing process,[198] and facilitates a sense of ownership of the process.[199] It also makes the sentencing process a more positive and relevant (and thus deterring) experience for offenders, [200] and may strengthen Indigenous communities 'by re-establishing the authority of Elders'.[201] Even Bridget McAsey, who has criticised the Shepparton Koori Court for insufficiently facilitating Indigenous self-determination, has recognised these features of the Court as 'extremely positive'.[202] As such, involving Elders in an NJC may be a successful way of creating space for Indigenous voices to be heard in the court.

Arguably, all of these positive features are enhanced if the Elder's role extends to advising about appropriate sentences, rather than only admonishing the offender and providing the court with information as to their background. This is because

193 A similar arrangement has been utilised at the Shepparton Koori Court. See Auty and Briggs, above n 8, 26.

194 Ibid 24; Daly and Proietti-Scifoni, above n 146, 6-7.

195 Daly and Proietti-Scifoni, above n 146, 6-7; See also Marchetti and Daly, above n 144, 421; Marchetti and Downie, above n 165, 374.

196 McAsey, above n 7, 668, 676.

197 Anthony and Crawford, above n 149, 80.

198 Blagg, *Crime, Aboriginality and the Decolonisation of Justice*, above n 2, 113; Marchetti and Daly, above n 144, 422-423; Marchetti, 'Indigenous Sentencing Courts and Partner Violence', above n 148, 271.

199 Anthony and Crawford, above n 149, 80.

200 See, eg, Daly and Proietti-Scifoni, above n 146, 106; Elena Marchetti, 'An Australian Indigenous-Focussed Justice Response to Intimate Partner Violence: Offenders' Perceptions of the Sentencing Process' (2015) 55(1) *British Journal of Criminology* 86, 91, 100-101; Aquilina, above n 154, v; Blagg, *Crime, Aboriginality and the Decolonisation of Justice*, above n 2, 114.

201 Marchetti and Daly, above n 144, 422-423; Anthony and Crawford, above n 149, 89.

202 McAsey, above n 7, 678-679.

the Elder's role becomes more like that of a joint decision-maker and elevates the Elder to a position of 'status' similar to that of the magistrate, thus changing existing power dynamics between courts and Indigenous participants. One prosecutor interviewed thought that it is critical that the Elder be perceived as holding the status, or 'prestige', of a magistrate.[203] A Legal Aid lawyer interviewed expressed the view that the Barndimalgu Family Violence Court was more effective when the Elder advised the magistrate, rather than only speaking to the offender, and that the Elder's role should be advisory at a minimum.[204]

Some participants thought that the sentencing decision should be the result of consensus between the magistrate and the Elders.[205] Some literature also considers that the magistrate's retention of ultimate decision-making authority indicates that ASCs 'stop short' of addressing postcolonial power dynamics.[206] However, the Aboriginal Legal Service lawyer interviewed did not think that Elders should necessarily hold ultimate decision-making authority, but should instead provide cultural advice and advice about what is best for the defendant.[207] This was because Elders, like any community member, may not make sentencing decisions based on legal principle.[208] Requiring formal consensus between Elders and magistrates in determining sentences would certainly give more opportunity for Indigenous knowledge to be utilised, and would grant greater decision-making authority to the Elders. Discussion and collaboration could help prevent non-Indigenous magistrates from misinterpreting Elders' advice, and thus inadvertently silencing Elders' perspectives.

It may be more appropriate, at least in some cases, if collaboration is informal and Elders do not carry legal responsibility for making the ultimate decision. Collaboration and discussion between the Elder and magistrate would also create opportunities for Indigenous knowledge to be utilised though granting lesser decision-making authority to the Elder. In consultations leading to the establishment of the Shepparton Koori Court, Elders resisted taking on a greater decision-making role as doing so could expose them to 'pay-back' from community members for sentences imposed.[209] As such, whether and to what extent Elders should be involved in making the ultimate decision needs to be a matter considered in community consultations. Even if the Elder is not the ultimate decision-maker, their status may be appropriately elevated if the magistrate publicly acknowledges, and places value on, the Elder's views, for example by giving weight to the Elder's views and noting this in their reasons.[210]

Involving Elders in an NJC may be a successful way of creating space for Indigenous voices to be heard in the court. The resulting hybrid NJC-ASC would

203 Interview with State Prosecutor (Perth, 26 July 2016).
204 Interview with Legal Aid WA lawyer (Perth, 20 July 2016).
205 Interview with Legal Aid WA lawyer, Kununurra (Telephone interview, 17 August 2016); Interview with State Prosecutor (Perth, 26 July 2016).
206 Anthony, above n 114, 594; McAsey, above n 7, 671.
207 Interview with Aboriginal Legal Service lawyer (Perth, 1 September 2016).
208 Ibid.
209 Auty and Briggs, above n 8, 24.
210 Interview with Legal Aid WA lawyer (Perth, 20 July 2016).

operate as an NJC which involves Elders in sentencing in appropriate cases in the same way as an ASC.

(c) Courtroom Layout and Proceedings

Elena Marchetti and Janet Ransley write that 'courtroom insignia and layout play an important role in denoting the power of the judicial officer and hegemonic legal system'.[211] ASCs adopt a different courtroom layout and a less formal approach to mainstream courts. They are designed to be less intimidating – instead of an elevated judicial bench, all participants sit at the same level and without physical barriers,[212] hearings are less adversarial and more collaborative, and participants other than lawyers have an opportunity to speak.[213] There is no rising and bowing, and plain English is used.[214]

As discussed in Part V, participants identified barriers to understanding affecting Indigenous participants in mainstream courts which are compounded by court formalities. As such, NJCs should follow the example of ASCs as to courtroom layout and informality, prioritise the use of plain English, and make attempts to provide interpreters when required. Court staff must be aware that, though an Indigenous person may appear fluent in English in basic conversation, English may not be their first language. Involving Elders and Indigenous court workers may assist in this challenge, especially if they speak the local language.

There may be scope to include Indigenous practices and ceremonies, beyond a Welcome to Country, within court processes.[215] Rangatahi Courts in New Zealand/Aotearoa incorporate Maori law and culture to a greater extent than ASCs,[216] showing that it is possible to integrate Indigenous protocols into court processes to further create a hybrid forum and partnership between the two cultures.[217] However, all participants bar one were doubtful as to how this could be achieved in practice in Australian sentencing courts,[218] given that courts tend to be pressed for time. It was suggested that ceremonies could be instead incorporated in an opening day of an NJC, or to celebrate an offender's successful completion of a program.[219] One Legal Aid lawyer pointed out that there must be overwhelming community support for the incorporation of ceremonies and cultural

211 Marchetti and Ransley, above n 85, 29.
212 Anthony and Crawford, above n 149, 81; McAsey, above n 7, 659.
213 McAsey, above n 7, 660.
214 Auty and Briggs, above n 8, 28; McAsey, above n 7, 659; Anthony and Crawford, above n 149, 81.
215 ASCs currently include a Welcome to Country at the beginning of a hearing: Interview with Legal Aid WA lawyer (Perth, 20 July 2016).
216 See Ministry of Justice (NZ), *Evaluation of the Early Outcomes of Ngā Kooti Rangatahi* (2012); Judge Heemi Taumaunu, 'Rangatahi Courts of Aotearoa/New Zealand-An Update' (2014) 22 *New Zealand Law Society Continuing Legal Education Criminal Law Symposium*, 7; Valmaine Toki, 'Indigenous children and youth: The case of marae courts in Aotearoa/New Zealand' in W Littlechild and E Stamatopoulou (eds), *Indigenous Peoples' Access to Justice, Including Truth and Reconciliation Processes* (Columbia University, 2014) 243, 245-246.
217 There have been some Maori criticisms of Rangatahi Courts: Toki, above n 216; Matiu Dickson, 'The Rangatahi court' (2011) 19(2) *Waikato Law Review* 86.
218 Note that Rangatahi Courts do not conduct sentencing hearings but monitor young offenders: Ministry of Justice (NZ), above n 216.
219 Interview with Legal Aid WA lawyer (Perth, 20 July 2016).

protocols so that the ceremony is not co-opted in a tokenistic manner, or used in a way inconsistent with the purpose or nature of the ceremony or cultural protocol.[220] Further, care must be taken so that it does not appear that Indigenous culture is being associated with the 'negative brand' of the court.[221] As such, use of ceremonies and cultural practices is a topic requiring careful discussion with the local Indigenous community.

(d) Cultural Training

For an Indigenous-focussed NJC to be successful, non-Indigenous participants must be 'dedicated and open to transforming the process into one that honours the cultural norms and values of the community'.[222] While cultural training for non-Indigenous participants will not transform postcolonial power dynamics or change the NJC's status as a Eurocentric forum, it may be critical in facilitating the NJC's effective operation. Cultural training could be used to:

- Ensure that non-Indigenous participants understand the need to promote Indigenous self-determination, power-sharing, and the creation of space for Indigenous law, knowledge and perspectives to operate;
- Prevent non-Indigenous participants from relying upon stereotypes of what it means to be 'Aboriginal', and assumptions about Aboriginal culture such as the idea that 'traditional' communities are more 'authentically' Aboriginal;[223]
- Increase awareness of cultural differences between Indigenous and non-Indigenous people; and
- Improve relations between non-Indigenous stakeholders and the Indigenous community.

All participants believed that more cultural awareness training is required for judges, magistrates, lawyers, court staff and police. Participants identified the following shortcomings in the majority of cultural training programs currently available to members of the profession and the judiciary:

- Training is often a one-off, whereas ongoing training is required;[224]
- Most training is voluntary, and it is incumbent on the individual to obtain it;[225]

220 Interview with Legal Aid WA lawyer, Kununurra (Telephone interview, 17 August 2016).
221 For many Indigenous people, the court has negative connotations due to their experiences with the criminal justice system: Interview with Legal Aid WA lawyer, Kununurra (Telephone interview, 17 August 2016).
222 Marchetti and Ransley, above n 85, 31.
223 See Anthony, above n 114, 563.
224 Interview with Aboriginal Legal Service lawyer (Perth, 1 September 2016); Interview with State Prosecutor (Perth, 26 July 2016).
225 Interview with District Court Judge (Perth, 31 August 2016); Interview with State Prosecutor (Perth, 1 August 2016).

- Training often does not recognise the diversity of Indigenous people and of different Indigenous cultural groups;[226]
- Training often focusses on the urban experience, leaving practitioners working in regional and remote areas to learn anecdotally;[227] and
- Not all training is provided by Indigenous people.[228] Ideally, training should be provided by members of the local Indigenous community.[229]

An NJC is well placed to address these concerns. It could partner with Indigenous-controlled programs which can provide cultural training to NJC staff, and people working with the NJC, focussing on the local community and local issues. This would also ensure that Indigenous people remain in control of their knowledge and that a 'static museum-like approach to Indigenous knowledge' is not adopted.[230]

VII CONCLUSION

This article begun with a quote reflecting the sentiment that Indigenous culture continues to be supressed, erased, or even eradicated. In this article, I argued that the NJC model can be used to improve the way the criminal justice system interacts with Indigenous people by helping create a hybrid space where Indigenous and non-Indigenous laws and perspectives can operate side-by-side. Such a space can be created by decolonising through:

- A recognition of the relevance of colonial history;
- A willingness to give Aboriginal law space to operate with 'jurisdictional autonomy', and to give Indigenous perspectives and knowledge central importance;
- A willingness to give Indigenous people control over matters affecting them; and
- Appropriate government support.

The key to decolonisation may be supporting and partnering with Indigenous-owned community justice mechanisms. While this cannot grant Indigenous people territorial sovereignty or greater land rights, it would be a step forward in improving the operation of our criminal justice system.

The NJC model, being based on a community justice framework, is especially suited to empowering Indigenous communities outside of the court by partnering with Indigenous-controlled initiatives. This can be facilitated by decolonising

226 Interview with Legal Aid WA lawyer (Perth, 20 July 2016); Interview with Legal Aid WA lawyer, Kununurra (Telephone interview, 17 August 2016); Interview with State Prosecutor (Perth, 1 August 2016).

227 Interview with District Court Judge (Perth, 31 August 2016).

228 Interview with Legal Aid WA lawyer (Perth, 20 July 2016).

229 Ibid; Interview with Aboriginal Legal Service lawyer (Perth, 1 September 2016); Interview with Legal Aid WA lawyer, Kununurra (Telephone interview, 17 August 2016).

230 Watson, 'Re-Centring First Nations Knowledge and Places', above n 78, 511.

inside the court by involving Elders, employing Indigenous court workers, modifying the courtroom and procedures, and facilitating these with cultural training. The end result would be a hybrid NJC-ASC court.

While the model has potential, it necessarily carries with it limitations. It 'remains a court and is limited by the fact that it operates within a legal field'.[231] For example, mandatory sentencing in Western Australia poses a barrier to the effective administration of therapeutic jurisprudence by preventing the court from exercising its discretion as to the appropriate sentencing outcome. This 'legal field' is not Indigenous justice, but the Anglo-Australian legal system, thus placing limits on the extent to which the model can transfer power to the Indigenous domain. The model would operate within the broader framework of criminal procedure and policing which operate to criminalise Indigenous people.

The relationship between the NJC, the community and the police could also have an impact on the NJC's effectiveness. These relationships could depend on the jurisdiction and local policing policies, factors which a particular NJC could not control. As noted in Part III, in order for positive relationships to exist between an NJC and the Indigenous community, the NJC cannot facilitate zero-tolerance policing. Positive relationships with the police could be facilitated by including police representatives as one of the in-house service providers at the centre, establishing a special police division located in the community, establishing a working group such as that organised by the Melbourne NJC,[232] and engaging police at the planning stage to ensure that they are working towards the same goals as the NJC.

As the NJC model would operate within the Anglo-Australian framework, it carries with it the danger that it would simply be used to provide mainstream services to Indigenous people without engaging Indigenous-owned or culturally appropriate services. As such, policymakers need to keep firmly in mind the importance of Indigenous self-determination and the value of Indigenous-owned programs and justice initiatives. A related issue is the general lack of key services in areas where an NJC may be required – particularly if the model was adapted to a regional setting. As such, it may be appropriate to view any development of an NJC as part of a wider policy project involving provision of services and infrastructure. Perhaps development of an NJC could stimulate government funding for service provision, given that the model relies upon the concept of local service provision.

The NJC model was developed with the metropolitan setting in mind, and this article does not focus on the implications for development of an NJC in a regional or remote setting. It may be that it is most appropriate to implement the model in a metropolitan area or large town. However, if the model were to be implemented in remote and regional areas, a potential solution to the scarcity of services and

231 Fagan and Malkin, above n 23, 924.

232 The Melbourne NJC has worked towards improving relations between police and Indigenous community members through the Smith Street Working Group, which was partially motivated by concerns about heavy-handed policing in the local area. See generally Neighbourhood Justice Centre, above n 55.

infrastructure could be reliance on a mobile court model, such as that proposed by Blagg, Tulich and Bush.[233]

The issues relating to engagement noted in Part VI, particularly 'free, prior and informed consent', also need to be at the forefront of policymaking. Anything proposed in this article is ultimately contingent upon the Indigenous communities with whom policymakers collaborate. Indigenous communities may disagree with some of my proposals, or propose new ideas. If policymakers commit to empowering Indigenous people in the criminal justice system, and engage in genuine and appropriate consultation and collaboration, in time we may see decolonisation in the criminal justice system.

233 Blagg, Tulich and Bush, above n 156.