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INDIGENOUS YOUNG PEOPLE AND THE NSW CHILDREN'S COURT: MAGISTRATES' PERCEPTIONS OF THE COURT'S CRIMINAL JURISDICTION

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I Introduction

This article presents the findings of a component of the National Assessment of Australia's Children's Courts (the 'national study').[1] Specifically, this article focuses on the perceptions of magistrates in the New South Wales (NSW) Children's Court ('NSWCC' or the 'Court') in relation to the issues facing Indigenous young people in the Court's criminal jurisdiction generally, and the potential of Indigenous youth courts more specifically. Part II outlines the method for the national study from which this article stems, as well as the method for the NSW component of the study. Part III provides an analysis of NSWCC magistrates' perceptions of challenges and reforms in the Court's criminal jurisdiction as they relate to Indigenous young people specifically, and discusses our analysis in light of findings from the national study from other states and territories. Finally, Part IV briefly considers the key findings of our analysis in light of the current Koori Youth Court pilot.

A Overview of the NSWCC

The NSWCC is a separate Local Court that deals with children's criminal and care and protection matters.[2] The NSWCC sits in three designated courthouses located in Parramatta, Glebe (also known as Bidura Children's Court), and Broadmeadow.[3] The Court also sits at non-specialist courts in Campbelltown, Port Kembla, Sutherland, Nowra, Woy Woy and Wyong.[4] In non-metropolitan areas outside of these locations, Court hearings are conducted by non-specialist local court magistrates.[5]

The age of criminal responsibility in NSW (as in all Australian jurisdictions) is 10 years.[6] Like most other Australian jurisdictions, the NSWCC hears criminal matters in relation to children aged between 10 and 17 inclusive at the time of the alleged offence. The Court deals with the vast majority of offences alleged to have been committed by young people that have not been resolved under the *Young Offenders Act 1997* (NSW) (see below), but does not have jurisdiction over serious indictable offences (ie, homicide and offences punishable by 25 years' or life imprisonment).

The principal legislation governing the Court's criminal jurisdiction is the *Children (Criminal Proceedings) Act 1987* (NSW). Under s 6 of that Act, the following principles apply in respect of young people dealt with by the Court:

> (a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,
> (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
> (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,
> (d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,
> (e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,
> (f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,
> (g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,

(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

Another significant piece of legislation is the *Young Offenders Act 1997* (NSW), which provides a framework for dealing with young people in contact with the youth justice system and emphasises the principle of diversion. Placing a child before the Court should be the option of last resort, and the *Young Offenders Act* seeks to ensure that, where possible, a system of warnings, cautions and youth justice conferences precede court appearances.

II The National Study: Overview and Method

The national study from which this article stems was unique in gathering comparative data on all states and territories and focusing on the views of the judicial officers as well as other relevant stakeholders, which no prior study had done.[7] The national study aimed to address three main research questions:

- what are the contemporary status of and current challenges faced by Australia's Children's Courts, in relation to both their child welfare and criminal jurisdictions, from the perspective of judicial officers and other key stakeholders?
- what issues and challenges do judicial officers and other key stakeholders believe the Children's Court will face over the next decade?
- what are the judicial officers' and other key stakeholders' assessments of, and degree of support for, child welfare and youth justice jurisdiction reforms that have recently been canvassed in Australia and overseas?

A mixed method research design was developed by the Victorian research team,[8] with semi-structured interviews and focus groups being used to gather data from relevant stakeholders as determined by each state or territory. In NSW, all practising Children's Court magistrates were approached to be interviewed (n=12).[9] To capture the views of court workers, semi-structured interviews (n=38) and focus groups (n=8) were undertaken with a purposive sample of affiliated workers from: the NSW Attorney General's Department; Juvenile Justice; Department of Community Services, Justice Health; the NSW Police; the Children's Legal Service; Legal Aid; the Aboriginal Legal Service; private solicitors; case workers; those with a direct role in the Court such as Court Registrars and Guardians *ad Litem*; representatives of affiliated court practices (Children's Court Clinic, Care Circles, Youth Drug and Alcohol Court); relevant non-government organisations; and academics. Five of the participants were Indigenous. The present article focuses on the findings from the interviews with NSWCC magistrates.

Interviews lasted approximately an hour and covered approximately 17 questions relating to the purpose of the court, personnel, structure, cases and 'clients', and directions for reform. Magistrates were specifically asked to comment on the ways that court processes could be improved for Indigenous young people and families across both care and crime matters. Participants were also asked for their views on the Nowra Care Circle Pilot, an alternative court process for Aboriginal families that seeks to provide a culturally appropriate means to determine Aboriginal child protection care matters.[10] While the current article focuses on the criminal jurisdiction of the Children's Court, participants commenting on the Nowra pilot program frequently spoke in more general terms about Indigenous courts when responding to this question, and the responses on this issue have therefore been included in our analysis.

III Findings: NSWCC Magistrates' Perceptions of the Issues Facing Indigenous Young People

This section provides an overview and discussion of NSWCC magistrates' views of the challenges facing Indigenous young people at court, the ways in which court processes can be improved for Indigenous young people generally, and on the use of Indigenous youth courts specifically. While magistrates consistently understood their role as making judicial determinations with a mind to the specialised rules and procedures available to young people, some magistrates reflected on a tension in their role around law and welfare. As one respondent put it: 'there's probably a divide between some magistrates as to how much we should be welfare oriented and how much we are just appliers of the law'.[11] This tension is reflected throughout the magistrates' comments in the following subsections.

A Indigenous Over-Representation and the Court's Capacity to Address this Issue

(i) Background

The over-representation of Indigenous young people in Australian youth justice systems has been well-

documented.[12] Indigenous young people come into contact with police, courts and detention at rates far greater than their non-Indigenous counterparts.[13] Indigenous over-representation in the criminal justice system has been described by the then Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, as 'one of the most urgent human rights issues facing Australia',[14] and as 'a catastrophe in anyone's language'.[15] Recent video footage of the brutalising treatment of children in youth detention in the Northern Territory, where Indigenous youth make up 97 per cent of the inmate population,[16] has prompted a Royal Commission into the mistreatment of children in detention in the Northern Territory, with Mick Gooda appointed as one of commissioners by the Federal Government.[17] Partly as a way to address this over-representation, and in response to the recommendations of the 1991 Royal Commission into Aboriginal Deaths in Custody ('RCIADIC'), Indigenous courts (including Indigenous youth courts) have been introduced in a number of jurisdictions during the last decade.

In 2014, the NSWCC finalised matters in relation to 2,781 Indigenous young people.[18] Although they comprise only five per cent of young people in NSW, [19] they accounted for 41 per cent of defendants finalised by the Court.[20] Indigenous young people were no more likely than young people overall to be found guilty of one or more charges (both 93 per cent), but were more likely to receive a control order (ie, a sentence of detention) (13 per cent vs 10 per cent).[21] Previous research has shown that Indigenous young people are less likely to receive a caution or youth justice conference than their non-Indigenous counterparts.[22] However, more recent research suggests that the *Young Offenders Act* has been effective in reducing the risk of custody for both Indigenous and non-Indigenous young people in NSW.[23]

Data from the Australian Institute of Health and Welfare ('AIHW'),[24] indicate that, in 2013-14, just under half (48 per cent) of all young people in detention in NSW on an average day were Indigenous, compared with a national rate of 58 per cent. Indigenous young people in NSW were also overrepresented in detention at a lower rate than nationally (17 versus 24 times). Indigenous young people accounted for 41 per cent of offenders under community-based supervision in NSW, compared with 45 per cent nationally; here, the rate of over-representation was the same as the national rate (both 15 times as likely).

Indigenous young offenders are also more likely to have complex needs and to be more entrenched within the justice system. For example, the NSW Young People in Custody Health Survey indicated that they were more likely than non-Indigenous young people to have been in out of home care, come from a non-metropolitan area, currently have a parent in prison, have a range of medical issues, be a parent, use drugs, and have mental health problems.[25] Using data from the NSW Bureau of Crime Statistics and Research ('BOCSAR'), Weatherburn, McGrath and Bartels found that 84.3 per cent of Indigenous young people who had their first contact with the criminal justice system were reconvicted within 10 years, compared with 55.7 per cent of non-Indigenous young people.[26] On average, they also had more court appearances (6.02 versus 3.27) and were much more likely to have received a custodial penalty (32.6 per cent versus 7.2 per cent) than non-Indigenous young people.

(ii) Findings

A key finding of our research is that NSWCC magistrates view the court system as having a limited capacity to address the over-representation of Indigenous young people. For example, magistrates commented that:

> [In relation to] Indigenous over-representation, I really still am at the belief that there is only so much the criminal justice system can do.[27]

> [I]f there are more [Indigenous] kids in juvenile custody … then that's not as a result of the court system. … Whoever is there on the day, that's not the court system's problem or fault….the court really hasn't got a lot more it can do.[28]

A number of interrelated reasons for this view of the Court's limited capacity to affect change were put forward by the magistrates interviewed for this study. For some, a court appearance simply occurs too late in young offenders' criminal trajectories to have any real influence in stemming offending behaviour:

> [W]e've got to stop them getting there in the first place, rather than having them there and saying 'what can we do?'.[29]

> [I]t is complex, it is inter-generational, it goes back right to the earliest days of young people's lives. …[30]

> [T]he idea is to chip away at the cyclical thing that happens. Mum and Dad do it, the kids do it, their kids do it, it stays within the cycle. Break that, do whatever you can to break that, then you start, even if it is a little bit at a time, keeping kids out of the system. …[31]

For many, addressing the underlying causes of offending by working with Indigenous communities to develop primary crime prevention measures and universal service provision was seen as a more effective way of addressing over-representation than court:

> I think it happens prior to them coming to court really, with the support services.[32]

> I would say, more education into the Indigenous communities through family Elders. Get people out to impress upon these people, the effect that alcohol abuse and domestic violence and drug abuse has on the young members of their community. Parenting skills, family skills. Living within the community skills.[33]

> [T]hings like the Tribal Warriors program for Aboriginals,[34] those sorts of things are essential because the kids just don't get them from anywhere else. …[35]

For some magistrates, over-representation reflects the limited resourcing targeting need:

> [Y]ou can't say, 'you need a job, go out and get one', but there's no … and I know that there are organisations out there that specifically address, their role is to find employment for juveniles, but I again think that probably the resources are really limited.[36]

> [O]bviously the big problem in the country is lack of resources … and it goes without saying the high rate which affects Aboriginal kids—it's so much higher in the country.[37]

Importantly, socioeconomic disadvantage was not only seen as increasing young people's risk of offending, and their risk of coming into contact with the Court, but also limiting the ability of criminal justice responses to address this offending. For example, one magistrate commented that:

> [B]ecause Indigenous families are more disadvantaged, you're going to get kids who don't have accommodation to go to so they stay in custody because they're granted bail but there's nowhere for them to go. They don't have supervision, so they keep on committing offences, and ultimately the public interest has got to be taken into account and they've got to be refused bail. There are a lot of Indigenous kids that are locked up, but the thing is it's not because you want to lock Indigenous kids up, because a lot of them come out in crime because a lot of them don't have parents because of the Stolen Generation stuff.[38]

Finally, magistrates' comments suggest a tension between their mandate to deal with all young people before the court in an equal manner irrespective of their Indigenous status, and the need for individualised, creative and culturally sensitive responses to Indigenous young people's offending:

> I like to think that the system tries to be sensitive to their issues, but at the end of the day you're going to court and you've got to think that people are treated equally. … So what are you supposed to do? Let them off because they're Indigenous? Well you can't do that, you can't change the rules.[39]

> I think for Indigenous people, their needs for programs should be tailored to involve their community. … [There are] totally different issues with Anglo-Saxon families and how their programs need to be tailored. So I again, don't think you can say 'a juvenile, one size fits all'.[40]

> [T]he problem aspects that need to be addressed are just really the ability to deal a bit more creatively with each person that comes before the court. … [The Tribal Warriors program] is Indigenous focused, and not me, a very Anglo-Saxon person, telling them what to do.[41]

The theme of what the Court can (or rather, cannot) do about Aboriginal over-representation in Children's Courts echoed the findings of the national study in other states and territories. In Queensland, according to Tilbury and Mazerolle,[42] there was a suggested need for more intervention programs designed and run by Indigenous community groups, as well as services for Indigenous families and a more therapeutic approach overall. The *Just Reinvest* project recently launched in Bourke is one example of such an approach. The project, based on a justice reinvestment philosophy, seeks to improve outcomes across a range of domains for young people and families in the community by empowering the local Aboriginal community.[43] While data for the current study were

collected prior to the introduction of this project, it may address some of the concerns raised by magistrates.

B Limited Access to Specialist Resources

Another key finding of our analysis was that the NSWCC magistrates perceived there to be limited access to specialist resources for responding to offending by Indigenous young people. While several judicial officers confirmed that Indigenous young people generally have access to an Aboriginal Legal Service ('ALS') lawyer, a number believed ALS to be under-resourced, and noted problems associated with this. For example, one commented that:

> ALS would not be there every day of the week, so if a kid gets arrested and refused bail, then the Children's Legal Service … is going to represent them, not ALS. And again that's just a practical thing, you can't have a whole bunch of ALS lawyers hanging around wondering whether a kid will get refused bail.[44]

In this context, the findings of Fernandez et al should be noted. It appears that although the magistrates felt Indigenous young people did have access to ALS representation, this was not shared by all of the study participants, with one academic commenting that:

> [L]egal representation is an issue and it's one that's particularly problematic for Aboriginal kids in remote areas or rural areas. … [T]he Aboriginal legal services really don't have the resources to be able to represent … Indigenous young people to the extent that they should be represented.[45]

Magistrates were pessimistic about the likelihood of the ALS getting more funding (meaning that access to specialist legal advice will remain inconsistent), and unsure how to better address the disparity in access to services that young people living in rural and remote areas of NSW face. There has since been something of a reprieve in this context, with the Federal Government 'back[ing] down on its planned cuts to community and Indigenous legal centres'.[46] However, this decision simply reinstated $25.5 million to the sector, rather than extending funding in this area. In the 2016 budget, the Federal Government announced that Aboriginal legal services would be cut by $6 million, a decision the Aboriginal and Torres Strait Islander Legal Services deputy chair, Cheryl Axleby, described as 'totally unbelievable'.[47] At the state level, NSW Legal Aid has committed to a *Reconciliation Action Plan 2013-2015* designed specifically to improve legal services to Aboriginal communities, including in regional and remote areas.[48] However, our research points to the perceived need for adequate resourcing to address the overrepresentation of Indigenous young people before the Children's Court in NSW.

A related finding was that the Court's practitioners perceived young people in regional and remote parts of NSW to have consistently less access to the specialty features of the Children's Courts available in metropolitan Sydney. While specialist magistrates do go on 'rural circuit' around NSW, in many instances, matters are heard by non-specialist Local Court magistrates (see discussion above). Other magistrates noted that, from their perspective, young people in rural and regional areas have less access to related services such as psychological reports. This in turn means that the Court has less information to work with in making decisions. The disparity in services between metropolitan and non-metropolitan areas in NSW is a particular issue when understanding the experiences of Indigenous young people, given the number living in regional and remote areas. This issue was also reported in other jurisdictions, including by participants in South Australia, who commented on the lack of services and resources in remote areas such as the Anangu Pitjantjatjara Yankunytjatjara Lands, where a high proportion of residents are Indigenous.[49]

For one respondent, the lack of resources manifested itself in concerns about the amount of time that magistrates and lawyers then need to spend with each young person:

> If we were able to take more time, I think it could improve, but I don't think that that's isolated to Indigenous families. So more time so there was greater opportunity to understand, [a] greater opportunity to process what was going on. Even [a] greater opportunity to develop a greater sense of trust with their lawyer. … I think there are issues there and the greater availability of our resources, it's just awful that Indigenous juveniles are in custody at a much higher rate than other juveniles.[50]

C Breaking Down Cultural Barriers in the Courtroom

A further key theme that emerged was the need to improve trust between the Court and Indigenous communities, although it was conceded that this was not easy. For example,

Magistrate 4 noted: 'I think Indigenous people have some basis for being fearful of court process because there is a history of them not being well treated by the justice system. So how do you build up that trust, I'm really not sure, apart from just doing it really well'.[51] Magistrate 2 likewise acknowledged that 'an Indigenous child or family would still have a real sense that what's being dispensed, if not white middle class justice, it's definitely being dispensed by white middle class people'.[52]

Part of the solution, according to this magistrate, 'would be having more Indigenous juvenile justice officers, police officers, magistrates, and others working in a whole lot of other welfare and service industries. There aren't, and that requires a commitment from people in the wider community, not just the judicial system'.[53] Magistrate 7 also observed that 'it's a shame there aren't any [Children's] Aboriginal magistrates'.[54]

One way of breaking down these barriers is through judicial education. The Judicial Commission of NSW *Equality before the Law Bench Book* contains information on a range of cultural issues, [55] albeit not with a focus on young people. In particular, the bench book provides extensive information on appropriate terminology and communication styles, as well as consideration of bail and pre-sentencing issues that may go some way to addressing the cultural barriers identified by magistrates in this study.

Indigenous issues also form the basis of various judicial conferences and education events.[56] These are currently offered on a voluntary basis, but Magistrate 2 suggested that they be made compulsory:

> The Judicial Commission does a lot of seminars, but again they're in your own time. It would be better if they were on working days and that you were required to go. I think you really need to. It doesn't matter how enlightened or informed you might think you are, you don't know about issues you should know about until people inform you. So that's why you should go to a lot of seminars that are organised by the Judicial Commission. I think it's unfortunate that they're voluntary and that they're in your own time. I think that they should be non-voluntary and … all magistrates are required to go.[57]

In this vein, a NSW judge recently called for compulsory components on Indigenous issues as part of both orientation information (as already occurs in South Australia) and annual conferences, and suggested that all judicial officers dealing with Aboriginal people 'should have access to a checklist of issues particular to the jurisdiction that permit consideration of the context in which the individual offender comes before the court'.[58]

D Indigenous Sentencing Courts

(i) Background

Indigenous youth courts emerged in various locations around Australia to address the over-representation of Indigenous people in the criminal justice system, to complement Aboriginal Justice Agreements that have been developed in some jurisdictions, and to address the recommendations of the RCIADIC.[59] The latter focused on reducing the incarceration of Indigenous people, supporting the increased participation of Indigenous people in the criminal justice system in a professional capacity (eg, as court staff or advisors), and developing culturally-appropriate practices for responding to offending by Indigenous people.[60]

Evaluations of Indigenous youth courts have found that although they have not resulted in significant reductions in reoffending, they have met some of the other aims of Indigenous courts, in particular those aligned with procedural justice. For example, Borowski's evaluation of Victoria's Children's Koori Court ('CKC') found that although the recidivism rate of 60 per cent was high, the CKC remains 'an important vehicle for satisfying the demands by Indigenous people for a more effective legal system … [and] a significant means for empowering and strengthening Indigenous communities and transforming their relationships with "White" society'.[61] Borowski later noted that '[a] feature of virtually all [CKC] hearings was their highly supportive and caring nature. The magistrates went to considerable effort to affirm or validate the defendants—to identify and underscore their strengths'.[62] They also 'directed the hearings with a gentle and dignified hand and less formal manner than proceedings in the mainstream Children's Court'.[63] Overall, Borowski found that the CKC had realised its procedural justice objectives of contributing to building a culturally responsive youth justice system for Koori young people and fostering positive participation by Koori young people and their families and communities in the court process.

Morgan and Louis's evaluation of the Queensland Youth Murri Court ('YMC') similarly found that while there was little impact on reoffending rates, the process was successful in increasing the Indigenous community's participation in the court process, improving perceptions of fairness and cultural appropriateness, and increasing stakeholders' collaboration.[64]

In November 2014, it was announced that NSW would introduce its first Youth Koori Court, with a 12-month trial commencing in early 2015,[65] and it was still operational as at August 2016. The purposes of this newly established process for dealing with criminal charges against Indigenous young people are to:

(a) increase the Aboriginal and Torres Strait Islander (ATSI) community, including ATSI young people's, confidence in the criminal justice system;
(b) reduce the risk factors related to the reoffending of ATSI young people;
(c) reduce the rate of non-appearances by young ATSI offenders in the court process;
(d) reduce the rate of breaches of bail by ATSI young people; and
(e) increase compliance with court orders by ATSI young people.[66]

The Youth Koori Court is available to Indigenous young people who have been found guilty or indicated that they will plead guilty to one or more charges heard in the Children's Court jurisdiction.[67] Importantly, in order to be referred to the Youth Koori Court, it must be likely that the young person will face an order of juvenile justice supervision (in the community or in detention).[68] Before being sentenced by a magistrate or judge, a Children's Registrar facilitates a Youth Koori Court Conference, with input from the young person, their family, Elders and staff from government and non-government agencies. At this meeting, an Action and Support Plan is developed for the young person to focus on over three-to-six months before sentence.[69] The plan is designed to help reduce the young person's likelihood of reoffending, including strategies to improve cultural connections, encourage the young person to stay at school or secure employment, secure stable accommodation, and address any health, drug or alcohol issues.[70] After the Plan is approved by the Koori Youth Court, sentencing of the young person is deferred to enable them to complete it. At the end of the designated period, the Court will determine the sentence, after considering the young person's compliance with the Plan.[71] The Government has indicated that the program 'could be introduced in other locations if [it] is successful',[72] with more recent reports suggesting expansion to Bidura and Campbelltown.[73]

(ii) Findings

The interviews with NSWCC magistrates revealed that there was some support for the introduction of Indigenous sentencing courts. Magistrate 6, who was based in a regional area, admitted 'I haven't read a lot about them', but then added:

> If they're proving successful in those other states, then there would [be] no reason why they wouldn't be successful here. If they have the result of keeping kids out of court and preventing them reoffending, then I think you'd have to regard it as a positive development. But I can't comment from any specific knowledge about the courts and the effectiveness. But the idea is obviously a good one.[74]

Magistrate 1 was the strongest advocate, stating:

> We don't have that in the Children's Court and that's something that I think we obviously should look at; in Victoria they have a Children's Koori Court and that's having great success. And I can't see a reason why we shouldn't.[75]

Magistrate 3 saw advantages in terms of improving engagement with the Indigenous community, but favoured a more therapeutic jurisprudential approach overall:

> They do have it in Victoria, the Koori Courts, and the statistics are reasonably small, it hasn't been around for that long, but it's shown very similar things to NSW. It's breaking down barriers, making the justice system more accessible to Aboriginal people, etc, but it's not being seen to affect recidivism rates. … I prefer myself to see more specialist type courts like the Youth Drug Court. I actually think it's a better model than Circle Sentencing because you look at the adult drug court, [they] are really making some [in]roads in terms of recidivism. … I'd rather go down that way than Circle Sentencing because I think one of the really, really fantastic parts about Drug Courts that works is the consistent involvement of someone in authority who actually cares about your progress and we're talking like 6-12 months involvement and the kind of relationships that build up.[76]

The views of participants in the national study in relation to Indigenous courts were similarly mixed. While many acknowledged that evaluations had shown that circle sentencing does not reduce recidivism (see above discussion), participants in the ACT reported increasing use of the Ngambra Circle Sentencing Court (as it was then known), and in Victoria and Queensland were 'generally positive about the value of Indigenous Children's Courts'.[77]

In Victoria, Borowski and Sheehan found that the CKC was perceived as an effective response to Indigenous young people's offending, because the Elders provided an opportunity for better engagement with young people and their families, and it was seen as a culturally appropriate way of dealing with Indigenous young offenders and strengthening their cultural identity. [78] Regional magistrates in particular supported the expansion of the CKC. Another issue that was identified, however, was the need for appropriate and accessible support services post-court, with one magistrate suggesting that the CKC process is otherwise 'a complete waste of time'.[79]

In Queensland, the YMC was abolished in 2012, but reinstated in 2016. Interviewees were reported to be 'generally positive' about the YMC, especially in relation to the involvement of Indigenous Elders and the pre-sentence programs available in some locations.[80] However, there was concern about the lack of continuity with Indigenous representation and variations in practice in different locations. Similarly, in the ACT, [81] the expansion of the Circle Sentencing Court was seen as a way of responding to the community needs of Indigenous young people.

In the Northern Territory, by contrast, judicial officers were cautious about introducing similar sentencing practices.[82] However, community courts (which were similar to Indigenous sentencing courts, but not restricted to Indigenous offenders) 'were identified by participants as a potentially effective method of working with young offenders'.[83] Nonetheless, these were subsequently abolished in 2012.[84] In Western Australia, judicial officers were also cautious about the utility of Indigenous sentencing courts, due to perceptions of diversity and conflict within Indigenous communities and the lack of suitable Elders and culturally appropriate services run by Indigenous people.[85] These findings highlight some of the complexities involved in developing and delivering an alternative court model that seeks to be responsive to the needs of Indigenous young people.

IV Conclusion

This article presented the findings of a component of a major study of Children's Courts across Australia. The national study identified a number of issues that need to be addressed in order to improve justice outcomes for Indigenous young people, including consistent access to specialist legal representation, due acknowledgement of language and communication difficulties, improved cultural awareness of professional staff, and consistent resourcing.[86] As our findings reveal, NSWCC magistrates raised similar concerns. Specifically, they noted the limited capacity of the Court to address the over-representation of Indigenous young people, and a lack of resources for specialist services (including community-based crime prevention programs, as well as innovative and culturally-relevant sentencing options), particularly in non-metropolitan areas of the state. Magistrates interviewed for the NSW component of the study also identified a need to address cultural barriers in the courtroom as an important step in better responding to Indigenous young people appearing before the Court. Furthermore, in NSW, there was consensus among Children's Court magistrates interviewed that the Indigenous young people and families coming before them consistently displayed a range of characteristics that reflected the long-standing disadvantage that Indigenous Australians have experienced since colonisation. The effects of colonisation on Aboriginal peoples has meant that those coming before the courts are the product of intersecting disadvantages including poverty, lack of access to housing, reduced employment and education opportunities, and family and parenting disruption (including the impact of generations of stolen children).

Our findings indicate that opinions on specialist Indigenous sentencing courts were mixed among NSW magistrates. As discussed in this article, NSW currently has a Koori Youth Court, adopting a hybrid approach that brings together the principles of circle sentencing with a therapeutic jurisprudence approach involving the development and ongoing support for and monitoring of Action and Support plans. Up to 24 young people were expected to participate in the pilot,[87] which is currently being independently evaluated by researchers at Western Sydney University. While there was not universal support for such an initiative among the magistrates in our study, there was widespread consensus that more needs to be done to address the over-representation of Indigenous young people. In this context, the pilot

shows some promise as, in contrast with some of the other Indigenous courts, it seeks to address underlying risk factors relating to employment, housing, health and substance abuse issues. The evaluation of this pilot will be of great interest to all those concerned by the over-representation of Indigenous young people in the Australian criminal justice system.

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1 See Allan Borowski, 'A Portrait of Australia's Children's Courts: Findings of a National Assessment' in Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts Today and Tomorrow* (Springer, 2013) 165; Allan Borowski, 'Whither Australia's Children's Courts? Findings of the National Assessment of Australia's Children's Courts (2013) 46 *Australian and New Zealand Journal of Criminology* 268; Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts Today and Tomorrow* (Springer, 2013).

2 See Elizabeth Fernandez et al, *A Study of the Children's Court of New South Wales: Part of a National Assessment of Australia's Children's Courts* (University of New South Wales, 2014) 10.

3 Children's Court of New South Wales, *Court Structure* (25 May 2015) Children's Court Home <http://www.childrenscourt.justice.nsw.gov.au/Pages/childrenscourt_aboutus/structure.aspx>.

4 Ibid.

5 Ibid.

6 *Children (Criminal Proceedings) Act 1987* (NSW) s 5. For discussion, see Sheehan and Borowski, above n 1.

7 Borowski, 'A Portrait of Australia's Children's Courts', above n 1.

8 Ibid; Sheehan and Borowski, above n 1.

9 The second author conducted a number of interviews in the criminal jurisdiction component of the study.

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11 Magistrate 2.

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