

Defendants in the Circle:

Nowra Circle Court, the Presence and Impact of Elders, and Re-Offending

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Abbreviations

ABC: Australian Broadcasting Corporation
 ACT: Australian Capital Territory
 AVO: Apprehended Violence Order
 BOCSAR: Bureau of Crime Statistics and Research
 CIRCA: Cultural and Indigenous Research Centre
 CSO: Community Service Order
 DOCS: Department of Community Services (NSW)
 GBB: Good Behaviour Bond
 N/A: Not Applicable
 NSW: New South Wales
 PCA: Prescribed Content of Alcohol
 ROD: Re-offending data (BOCSAR's datafile)
 TAFE: Technical and Further Education

Introduction

The first Indigenous sentencing court was established in 1999 in South Australia, and as of mid-year 2008, about 40 adult courts are operating around Australia. A growing literature has mapped jurisdictional variation, analysed the courts' processes and outcomes, and attempted to estimate differences in re-offending compared to conventional courts. This Report presents the first *qualitative* study of how Indigenous offenders view the court process and the role of Indigenous Elders, with reference to the Nowra Circle Court in New South Wales, established in 2002.

We draw from interviews and other case materials for all the Circle defendants who were sentenced for non-family violence offences from February 2002 to May 2005, a total of 13 people. The interviews were carried out in April 2008, which allowed for a minimum three-year window of time to analyse re-offending. The interviews explored three key areas: the defendants' reflections on their experiences in the Circle and on the involvement of the Elders, reasons for post-Circle offending (or not), and their perceptions of self-identity and change. In addition to the interviews, we drew on other materials that were made available to us: the dynamics of the Circle (from the Magistrate's detailed notes on each Circle), personal background and post-Circle progress of the defendants (from the Aboriginal Project Officer's notes), and criminal histories provided by the court.

Our empirical aims are to show how Indigenous people's entanglement with the criminal justice system is linked to adverse conditions growing up and into adulthood; to describe the Circle Sentencing process and its impact; and to contribute a specifically Indigenous element to the literature on people's pathways into and out of crime, with a focus on desistance theory and qualitative research.

Our analysis reveals three groups of Circle defendants: complete desisters (five), who had no offending three years after the Circle; partial desisters (five), who had some offending, but are on a pathway toward desistance; and the persisters (three), who have continued or escalated their offending. Our findings underscore the need for criminal justice professionals, policymakers, and researchers to take a more process-oriented and contextual approach to understanding and explaining desistance, an approach that is especially relevant for understanding Indigenous pathways into and out of crime. In taking this approach we view 'the progression from criminality to conformity (desistance) ... as faltering, hesitant and oscillating' (Bottoms et al. 2004: 383).

Although scholars have identified a range of mechanisms that aid a person's 'drift toward conformity' (Bottoms et al. 2004: 382), little is said about how a court process that is more informal, dialogic, and culturally relevant may encourage defendants to change. Our research gives insight into this

process by exploring how Indigenous defendants viewed the role and impact of the Elders, both during and after sentencing.

The results are presented in five chapters. Chapter 1 reviews the literature on Indigenous sentencing courts in Australia, and Chapter 2 describes the methods used in this study. The next two chapters present the empirical findings. Chapter 3 describes how we identified the three groups of defendants, and Chapter 4 provides an in-depth case study for each. We trace their experiences growing up, the Circle process itself, their views of the Circle and its impact, and the nature of their offending (if any) after the Circle. Chapter 5 discusses the findings and concludes the Report.

Chapter 1

Indigenous sentencing courts: background and research

Background

Indigenous sentencing courts first began in Australia in June 1999, when the Nunga Court was established in Port Adelaide, South Australia. Over the next several years, courts were established in all Australian states and territories, except Tasmania: NSW Circle Court (February 2002), Queensland Murri Court (August 2002), Victoria Koori Court (October 2002), ACT Ngambra Circle Court (May 2004), Darwin Community Court (April 2005), and Western Australia Sentencing Court (February 2006). As of mid-year 2008, there are about 40 courts in the adult jurisdiction, and additional courts in the youth jurisdiction (see Appendix I for a listing of the courts; see also Marchetti and Daly 2007, 2008, for the legislative or other directive governing the establishment and procedure of the courts).

Indigenous sentencing courts are one of two types of Indigenous justice practices in Australia. What Marchetti and Daly (2007) term 'sentencing courts' are the more formalised practices, typically but not always taking place in urban and country area towns, in which one to three days a month are set aside to sentence Indigenous offenders. The other type of Indigenous justice practice is less formalised, when judicial officers travel on circuit to regional and remote areas. It includes practices in Queensland, when Justice Groups provide oral or written submissions to magistrates and judges at sentencing in the circuits to Cape York, the Gulf, and elsewhere; and in circuits to remote parts of Western Australia. The distinctions between these two types are not sharp, however, because hybrid forms have emerged with the introduction of courts or circles when magistrates travel on circuit to regional and remote parts of NSW and South Australia.

The key elements associated with the courts are *to increase trust* between Indigenous people and white justice, *to strengthen and empower* Indigenous communities, and *to bend and change white law*. Collateral elements are *to increase the stature and respect of Indigenous people* working within the criminal justice system and *to develop more culturally appropriate and meaningful programs and services* for defendants and victims. In addition to these aims, all jurisdictions hope that the courts can play a role in reducing offending (see Marchetti and Daly 2007: 432-35).

In governmental promotional material and media stories, somewhat greater emphasis is given to criminal justice aims, as compared to community-building aims, in establishing Indigenous sentencing courts. Three major

reasons are often given for establishing these courts: (1) to reduce the over-representation of Indigenous people in custody; (2) to address key recommendations made by the Royal Commission into Aboriginal Deaths in Custody, specifically those centred on reducing Indigenous incarceration, increasing the participation of Indigenous people in the justice system as court staff or advisors, and identifying mechanisms for Indigenous people to deal with offenders in culturally appropriate ways; and (3) to complement Justice Agreements that have been forged in Australian states and territories.

In more political terms, these courts can be seen as a mechanism for working *within* a white legal system, with court staff and community people (both Indigenous and non-Indigenous) who are *working against* a white legal system, i.e., working to change it.

When the senior author and colleague Elena Marchetti have presented research on Indigenous sentencing courts to seminar and conference audiences, they find that those who offer critiques argue from both radical and liberal positions. Some say that the courts are not radical enough, that Indigenous people are being contained and colonised, yet again, by 'white justice'. Others believe that the courts are too radical, a form of 'apartheid justice', in which Indigenous people are being treated differently than non-Indigenous people. Despite these concerns (see, e.g., Tauri 1999 and Fisher 2008 from a radical perspective; Stenning and Roberts 2001 from a liberal perspective; see also Dickson-Gilmore and LaPrairie 2005 reviewing debate in Canada; and Blagg 2008, in Australia), there appears to be a broad acceptance of these courts in Australia. Marchetti and Daly (2004, 2007) find that the people who are involved, especially the Indigenous Elders and community groups, are positive about them and want to see them expand. As yet, there has been no negative politicisation of the courts in the media or by government. At the same time, it should be noted that the annual number of Indigenous offenders sentenced in these courts is relatively low.

Court processes and practices: common features

Although there is jurisdictional variation, the courts have several features in common concerning types of practices, eligibility, and the sentencing process.

Types of practices

The courts are not practicing or adopting Indigenous customary laws. Rather, they are using Australian criminal laws and procedures when sentencing Indigenous people.

Aboriginal and Torres Strait Islander laws are complex, dynamic, and encompass Land in its entirety (see, e.g., Kwaymullina 2005; Watson 1998). Their application to the Australian legal system was reviewed by the Australian Law Reform Commission (1986), and more recently by the

Northern Territory Law Reform Commission (2003) and the Western Australian Law Reform Commission (2006). Indigenous sentencing courts do not use traditional forms of punishment, but 'they do give due recognition and respect to cultural considerations' (Harris 2006: 15), and they engage and involve respected members of the community, typically Elders and Respected Persons,¹ in the sentencing process.

The courts are not Indigenous-controlled community courts, which exist in some jurisdictions; nor are they tribal courts or peacemaker courts.

Eligibility

In Australia, a defendant must be Indigenous (or in some cases, Indigenous or South Sea Islander, although this restriction does not exist in the Northern Territory). Because it is a sentencing court, not a court of adjudication, the defendant must have entered a guilty plea; in addition, s/he must have agreed to have the matter handled in the court. The offence must have occurred in the geographical area covered by the court, although this rule is relaxed from time to time. Depending on the jurisdiction, there are restrictions on offence eligibility, but the offence is one that is normally heard in a Magistrates' or Local Court.

Sentencing process

The Magistrate normally sits at eye-level with an offender, usually at a Bar table or in a circle rather than on an elevated bench. All courts involve Elders as participants, although their roles vary inside and outside the courtroom. The offender often has a support person, who is also invited to speak, and there is a significant degree of interaction among those present. The courtroom environment has Indigenous insignia and artwork. Other court staff (sheriff, court liaison officer, probation officer) may be Indigenous, and members of a Community Justice Group and Indigenous organisations may be present. Although Elders speak and play key roles, the final authority in determining the sentence rests with a judicial officer.

Court processes and practices: jurisdictional variation

Court practices vary across and within state or territory boundaries; specific protocols and practices have evolved and changed over time, reflecting local concerns and participants' experiences with the process.

Type of model used

There are broadly two types of models used: the Nunga Court model and the Circle Court model. Most Indigenous sentencing courts use the Nunga Court model (see Appendix I), but NSW and the ACT draw some elements from Canada's Circle Sentencing. The Nunga Court model typically uses a modified mainstream courtroom, whereas the Circle Court uses a culturally appropriate or significant location (e.g., a community centre or a

¹ Hereafter we refer to Elders and Respected Persons as Elders.

geographically meaningful place). Participants in a Circle Court sit in a circle rather than sitting at the Bar table or in regular courtroom seats. Victims have a somewhat greater degree of participation in Circle Courts, and the Elders in Circle Courts have a greater degree of participation and interaction with the defendant and in discussing penalty options.

High and low volume

Some jurisdictions handle a much higher volume of cases than others. This partly reflects the geographical area served by the court, but it also reflects the presence of certain criteria that may limit the number of cases. Some jurisdictions have assessment procedures to determine suitability and limit the number of cases, while others do not. Appendix II shows the estimated number of files or defendants that are annually disposed in these courts. They range from a low of less than ten defendants annually (Nowra Circle Court, NSW) to a high of over 130 defendants annually (Port Adelaide Nunga Court, South Australia). The figures in Appendix II were calculated in two ways: either by taking an average of all the files or defendants sentenced over a period of time, or by reporting data for one year from a jurisdiction. Obtaining accurate comparative information across jurisdictions is difficult because cases may be counted differently, depending on the jurisdiction. Note too that in Circle Court jurisdictions, a Circle may be convened more than once for a defendant.

Different names

As the courts emerged, they have taken different names. In South Australia, it is the Nunga Court; in Victoria, the Koori Court; in Queensland, the Murri Court. In NSW and the ACT, it is the Circle Court with a particular place or group name associated. In the Northern Territory, it is the Community Court; and in Western Australia, the Aboriginal Sentencing Court (see Appendix I).

Offence eligibility

As described in Marchetti and Daly (2007: 421-22), certain offences may not be eligible. In Victoria, ineligible offences are sexual and family violence; in Western Australia, sexual assault; in NSW, certain types of physical assaults, rape and sexual assault, offences involving a firearm, certain drug offences, or offences related to child prostitution or pornography; in the ACT, sexual offences or offenders with an addiction to illicit drugs (except cannabis); and in the Northern Territory, sexual offences and a cautious approach toward violent offences, domestic violence, and child victim offences. Two jurisdictions, Queensland and South Australia, have no specified excluded offences.

Elders and support for Elders

There is considerable variation in the number of Elders who may sit with the magistrate (ranging from one to four) and in their role in the sentencing process. This may range from briefly addressing the defendant during sentencing to a more involved role in discussing a sentence and monitoring the defendant's progress afterwards. It is recognised that the Elders need support in the form of information about sentencing alternatives and

debriefing after the sentencing process. Different approaches are taken to remunerate Elders. As documented in Marchetti and Daly (2008), in all jurisdictions, transport and lunch (or morning tea) are provided. In NSW, there is no additional payment, whereas other jurisdictions pay sitting fees. These range from a nominal \$36.50 per day (Queensland) to about \$325 per day (Victoria). In South Australia, it is \$100 per day, and \$50, a half day; and in the ACT, it is \$100, whether a full or a half day. Marchetti and Daly (2008) also find that there are strong arguments made by the Elders, both for and against, receiving sitting fees. Some believe they may be compromised by receiving payment, whereas others see it as an appropriate acknowledgement of their time. Some may elect not to keep the payment, but donate it to a community organisation.

How and why the courts emerged

Each jurisdiction has a particular story of how and why these courts came into being. The first Nunga Court emerged from a two-year consultation process between Magistrate Chris Vass and Indigenous groups in Port Adelaide (see Daly et al. 2006; Daly 2009a). Victoria is the only jurisdiction to have a legislated framework for the Koori Court, which emerged from a set of government, Indigenous community, and criminal justice agency commitments, which were part of the Victorian Aboriginal Justice Agreement in 2000 (Briggs and Auty 2004). In NSW, the Aboriginal Justice Advisory Committee proposed the idea of Circle Courts to government in a discussion paper (Potas et al. 2003). By contrast, in South Australia, Queensland, the Northern Territory, and Western Australia, although there was Indigenous community support, the courts initially emerged more from activist judicial officers or legal staff, albeit with some support from within government departments or advisory committees.

Although there is jurisdictional variation in how and why the courts emerged, the compelling concern across all jurisdictions is the very high rate of criminal justice capture of Indigenous people. In Australia today, Indigenous people are 2.5% of the population, but 24% of those imprisoned (both sentenced and awaiting trial). Using age-adjusted figures, Indigenous Australians are 13 times more likely to be imprisoned than non-Indigenous (Daly 2009b). Compared with Indigenous peoples in Canada, the United States, and New Zealand, Australian Indigenous people are worse off on nearly on socio-economic measures, including educational attainment, life expectancy, health, and employment (Kauffman 2003).

The reasons for the high imprisonment rates are broadly similar to those of other Indigenous peoples in colonised nations: a history of dispossession by white colonisers in the 18th and 19th centuries, which resulted in forced removal of people from their land and relocation to other areas, separation of kin and family groups, and loss of language and culture—all of which broke up effective informal and formal mechanisms of social control. Australian government policies of the 19th and 20th centuries created Indigenous people as societal 'outsiders' and facilitated economic, political, and social disadvantage. (Note that the history of colonisation, state and religious control, and state policies is varied across Australia; it was more

intense in some areas than others. This is partly reflected today in variable imprisonment rates and criminal justice capture across jurisdictions. Such geographical variation is also evident in Canada [see Dickson-Gilmore and LaPrairie (2005: 29-36); LaPrairie 1994 and 2002].) In Australia, redress and change has been slow. It was not until the passage of the *Racial Discrimination Act 1975* that all forms of legal discrimination in Commonwealth law were removed.² Despite this, scholars recognise that forms of neo-colonising practices continue to disadvantage Indigenous people in the criminal justice system (Blagg 2008; Cunneen 2001; Marchetti 2008).

It would be naive to suppose that Indigenous sentencing courts, or any other similar innovative justice practice, can alone produce significant reductions in re-offending or imprisonment. Other socio-economic policies are required in education, health, and economic development. However, conventional criminal justice practices can be improved by being less harmful and more socially re-integrative. Indigenous sentencing courts are one mechanism to increase trust between 'white justice' and the Indigenous domain and to develop more effective mechanisms of informal social control.

What kind of justice innovation is this?

One confusion that surrounds the research and policy field is what to call Indigenous sentencing courts. Are they a form of restorative justice or a type of therapeutic jurisprudence? Or, are they in a category of their own? Marchetti and Daly (2007) and Daly et al. (2006) review this question in considerable detail, which we summarise here.

At a general level, there are similarities among restorative justice, therapeutic jurisprudence and Indigenous sentencing courts. All emphasise *improved communication* between legal authorities, offenders, victims, and community members, using plain language and reducing some legal formalities. All emphasise *procedural justice*, that is, treating people with respect, listening to what people have to say, and being fair to everyone. All suggest the value of *using persuasion and support* to encourage offenders to be law-abiding, and all assume that *incarceration should be used as a penalty of last resort* (except some procedures in drug courts). However, the view taken in this Report, as developed in Daly et al. (2006) and Marchetti and Daly (2007), and shared by others who have conducted research in this area, is that Indigenous sentencing courts have a distinct basis, which cannot be simply derived from or subsumed by restorative justice or therapeutic jurisprudence.

² The Northern Territory Emergency Response legislation passed in federal parliament August 2007, ostensibly aimed at reducing Aboriginal child sexual abuse in certain areas in the Northern Territory, excluded the application of the *Racial Discrimination Act 1975* from its provisions. This and other avenues of appeal were limited to remove any obstacles to the federal government's speedy intervention (Wallis 2009: 63). Commentators such as the United Nations special rapporteur on Indigenous Affairs, James Anaya, have said that this is racially discriminatory.

Harris (2006: 134) draws analogies with American community courts and therapeutic jurisprudence, but concludes that Koori Courts are 'more than just an example of restorative justice or therapeutic jurisprudence'; they are in fact 'unique unto themselves'. A similar view was reached by the Western Australian Law Reform Commission (2005: 146) in its discussion paper on Aboriginal Customary Laws, where the point was made that Indigenous courts should not be viewed as problem-oriented or problem-solving courts because 'if there is a problem to be solved, it is the failure of the criminal justice system to accommodate the needs of Aboriginal people and to ensure that they are fairly treated within that system'.

In analysing Canadian Circle Sentencing, Green (1998) emphasises the role of Indigenous community engagement and participation in justice practices. Likewise, McNamara (2000: 61) says that Canadian Circle Courts represent a shift away from 'culturally inappropriate and unfair non-Aboriginal sentencing processes' towards processes that embrace a 'genuine respect for, and meaningful co-operation with, Aboriginal law and justice values and processes'. Rudin (2005: 99) argues that unless Indigenous people 'are given some options and opportunities to develop processes that respond to the needs of that community', such practices should not be termed Indigenous justice. This is a crucial point and a clear way to distinguish Indigenous justice practices, such as Indigenous sentencing courts, from restorative justice practices. The view taken in this Report, as elucidated in Marchetti and Daly (2007), is that restorative justice and therapeutic jurisprudence lack a political dimension that is more often present in Indigenous sentencing courts. Specifically, these courts have the potential to empower Indigenous communities, to bend and change 'white law' through Indigenous knowledge and modes of social control, and to come to terms with a colonial past. They are concerned not only with change in an individual's behaviour, but also group-based change in race relations.

What do we know about these courts?

There are both practical and lofty aspirations for Indigenous sentencing courts, but what is actually happening on the ground? There are several sources of information.

Information sources

First, there are conference papers and articles by judicial officers and staff associated with the courts in Australia. These give insight into court practices, provide examples of cases and outcomes, and discuss changes that have occurred in their jurisdictions. By jurisdiction, they include the ACT (Madden 2007); NSW (Dick 2004, 2006; Dick and Wallace 2007); Queensland (Hennessy 2006a, 2006b, 2008; Hennessy and Willie 2006a, 2006b); and Victoria (Auty 2006; Briggs and Auty 2004). (In September 2007 and August 2009, the Australasian Institute of Judicial Administration hosted a conference on Indigenous sentencing courts, and additional papers from that conference are at www.ajia.org.au.)

Second, there are academic and governmental department evaluations and reviews of the courts in Australia, including selected interview material. By jurisdiction, they include the ACT (Marchetti and Daly 2008); NSW (CIRCA 2008; Fitzgerald 2008; Potas et al. 2003); Queensland (Parker and Pathe 2006);³ South Australia (Tomaino 2004; selected interview material of Nunga Court magistrates in Daly et al. 2006); Victoria (Harris 2006); and across Australia (Daly 2009a; Marchetti and Daly 2004, 2007).

A third source are reviews of specialist courts that include a discussion of Indigenous sentencing courts (e.g., Freiberg 2001, 2005, 2007; Payne 2005); Newsletters (such as the *Murri Court news*, produced by the Queensland Department of Justice and Attorney-General, and the *AJAC Newsletter*, produced by the NSW Aboriginal Justice Advisory Council⁴); and government-produced videos and media-generated stories. This latter source is especially helpful in seeing court practices in action and what occurs in real cases (e.g., ABC television's 'Four-Corners' program on a Nowra Circle Court partner violence case, aired in October 2005).

Fourth is an international literature, inspired by feminist critical analyses of using Indigenous sentencing courts (or other similar practices that may be termed restorative justice) in cases of sexual and family violence (see, e.g., Daly and Stubbs 2006, reviewing a range of studies; the special issue of *Theoretical Criminology* 2006 [Vol. 10, No. 1] edited by Cook, Daly, and Stubbs; Marchetti's 2009 research on Australian Indigenous sentencing courts and partner violence cases; and Proietti-Scifoni 2008 on New Zealand opinion leaders).

Finally, there are other potential sources such as student papers and theses, and research by those in other disciplines, such as communication studies.

Provisional quality of information

When we consider that these courts began just a decade ago, there is considerable documentation about them. However, the quality of the research is provisional, preliminary, and impressionistic. Systematic research on court processes, practices, and outcomes over time has not yet been carried out in any jurisdiction to date. Even more rare are comparative analyses of Indigenous and conventional court processes over time.⁵ Such research requires a considerable expenditure of funds, researcher time, and the necessary jurisdictional infrastructure to carry out the project. To date, there is one quantitative study of re-offending:

³ An evaluation of a portion of Queensland's Murri Courts by the Australian Institute of Criminology is due to be released by the Department of Justice and Attorney-General some time in 2009.

⁴ AJAC ceased to function as of 30 June 2009. Many of its functions have been incorporated into wider Aboriginal programs run by the NSW Department of Justice and Attorney General's Crime Prevention Division and local Community Justice Groups.

⁵ A lack of systematic study is not confined to Indigenous sentencing courts. It holds generally for all kinds of specialist courts in Australia (see Payne 2005).

Fitzgerald's (2008) quantitative analysis of defendants sentenced in NSW Circle Courts and conventional courts.

General themes

Several general themes emerge from the available body of work. First, all the studies, reports, or commentary about Indigenous court practices in Australia are highly positive with respect to community-building aims. People say that the courts have increased communication, provided more culturally appropriate sentences, and empowered local Indigenous communities. Problems have been observed when defendants may not respect Indigenous Elders (e.g., CIRCA 2008; Potas et al. 2003), but the general message from the reviews or evaluations to date is the courts are a 'success' and participants are 'satisfied' with how they are working. Areas that have been noted for improvement are greater support for victims, better program options for both offenders and victims, and greater support for Aboriginal staff and Elders associated with the courts.

Second, it is recognised that data on criminal justice aims, such as turn-up rates on the day, defendants' completion of sentences, or subsequent re-offending, are lacking or not sufficiently accurate. There may be anecdotal evidence, particularly by judicial officers or other court staff, that turn-up rates have improved, but most jurisdictions lack the database infrastructure (specifically, linkages between police, court, and probation/corrections data; or methods of differentiating defendants who were sentenced conventionally or in an Indigenous sentencing court) to produce this information.

Documenting court processes and outcomes has long proved a difficult task for governments and researchers in Australia and other countries. The major reasons are two-fold. There are difficulties in *how to count* defendants, cases, and files, and the nature and severity of offence(s) accurately in light of the complexity of court adjudication, plea taking, and sentence dispositions. Added to this, if one wished to conduct analyses of re-offending, there is *a need to link* a court's sentencing decisions to other criminal justice databases maintained by the police and corrections (see also Payne's 2007 discussion of this problem). In general and with some exceptions (e.g., NSW), these links have not been made or have proven difficult to make. Until these problems are resolved in a jurisdiction, it will not be possible to provide accurate assessments of the impact of these courts with respect to criminal justice aims.

Even if the databases on individuals were available, there are two other problems. First, is sample selection bias. For example, we know that in NSW some cases are deemed eligible and suitable for Circle Courts, while others are not. That decision-making process likely creates a profile of Circle Court cases that differs from non-Circle Court cases. Unless cases are matched carefully or precise controls are used, it may be difficult to make sound comparisons.

Second, comparisons ideally should consider not only individuals, but the broader social and economic contexts in which police and courts are

embedded. There is well-known geographical variation in crime rates, which is linked to an area's socio-economic and demographic profile, and reflects economic conditions, social cohesion, and policing practices. There is also geographical variation in criminal justice programs and resources to assist in rehabilitating and re-integrating offenders. These varying geographical contexts of crime rates and criminal justice resources are not featured in individual-level studies of offending and re-offending. What would be optimal, then, is a long-term program of research that selects specific jurisdictions for comparison, with reference to official crime rates; police, court, and correctional practices; and criminal justice resources for rehabilitation and re-integration.

Specific themes: court processes

We highlight a set of interrelated themes about the court processes, which come from the literature and our interviews with judicial officers and staff.

Theme 1: trust, voice, and informality

When Magistrate Chris Vass talked with Port Adelaide Indigenous people during the latter part of the 1990s, he learned that they wanted to have a more informal court process, one

they could feel more comfortable with, that they could trust, [where] people could have an opportunity to speak and have their family members with them ... without being overwhelmed by a large white presence. (Daly interview, 2001)

The linked ideas of *trust*, *voice*, and *informality* are evident across the literature on these courts. For example, in writing about the Victorian Koori Court, Briggs and Auty (2004: 16) said:

What is impressive about the court ... is that many Aboriginal people have found their voice in it. ... We are listening to what we are told.

Two indications of informality are the *language used* and the ways in which the *room is arranged*. Both are indicative of changes in social relations and legal power.

Theme 2: plain English

As Vass said about the Nunga Court, 'you've got to rid yourself of legal language ... Try to keep the lawyer speak down to a minimum' (Daly interview 2001). Speaking in plain English, in ways that are comprehensible to the defendant and others in the room, is crucial in removing barriers and developing trust. This is also facilitated by minimising lawyers' time spent in speaking. Harris (2006: 46-50) noted a similar phenomenon in Victoria's Koori Court, where defendants were given more time to participate and speak, with correspondingly less time required by a defence lawyer.

Theme 3: the room and where people sit

When a magistrate comes down from the bench and either sits at the Bar table or in a circle, this changes the power relations in the courtroom or community venue.

Indigenous sentencing courts or circles are more difficult for magistrates because, as Chris Vass said, 'you've got to listen more ... It's much more emotional ... You have to agonise more ...' By comparison, the regular court is 'more comfortable' for a magistrate because 'you've got the machinery of the ordinary court to hide behind' (Daly interview 2001).

Magistrate Doug Dick (2004: 59) recalled his first Circle Court in Nowra, where he suggested that the tables be arranged in a circle. The response from an Aboriginal man in the group was 'Hey, Mr. Magistrate, you're not sending me back to school, I don't wanna sit behind no desk'. Reflecting on this exchange and its significance, Dick said:

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

Briggs and Auty (2004: 17) suggest that 'more than just the built environment ... is under scrutiny, and more than the shape of the bench is being changed'.

Theme 4: taking risks

For magistrates, a shift in power relations comes with taking risks in sentencing. As Magistrate Vass said, 'the other courts are easy, dead easy. This is not. This isn't easy because you've got to balance so many things. You're taking risks' (Daly interview 2001). Likewise, Briggs and Auty (2004: 17) report:

In embarking on this journey, we have started a debate about what it is we are doing ... We have started to talk about how the 'culture' of our [white] legal system and our courts needs to change ... We are talking about taking risks with our processes and making ourselves vulnerable to both rational criticism and intemperate harangue.

Theme 5: removing barriers

Indigenous sentencing courts or circles can remove barriers that both a magistrate and defendant hide behind. For a magistrate, s/he hides behind the trappings of western [white] law, while sitting on an elevated bench.⁶

⁶ It should be noted, however, that in some courts such as the Rockhampton Murri Court, Magistrate Annette Hennessy sits on an elevated bench with Elders; this is what the Elders and local community desired.

For the defendant, s/he hides behind legal barriers: the table and the 'solicitor's shield' (Dick 2004: 65). When these barriers are removed, more effective and honest communication can take place (Marchetti and Daly 2004).

The Elders' actions and words help to remove these barriers in several ways. First, they may cut through the 'solicitor's shield' by challenging the ways in which a defendant's solicitor may minimise or excuse criminal behaviour. Second, they may cut through the 'defendant's shield' by directly challenging a defendant's excuses for offending (see Dick 2004: 64).

Theme 6: Elders' authority and wisdom

The Elders' presence and participation in the sentencing process may be summed up with these words: *authority, knowledge* (personal knowledge about the offender and victim, wider understandings of the reasons for getting into trouble), and *caring and support*. The interview material in Chapter 4 will show how defendants view the role and impact of Elders in the Nowra Circle Court.

In the Rockhampton Murri Court, Magistrate Hennessy (2006a: 10) says while she can explain the sentencing procedure easily, 'the power of the Murri Court process on a spiritual or emotional level' is more difficult to describe. She continues:

The power of the natural authority and wisdom of the Elders is striking in the courtroom. There is a distinct feeling of condemnation of the offending, but support for the offender's potential, emanating from the Elders and the Community Justice Group members.

During a visit to Nowra in May 2005 by the senior author and colleague Elena Marchetti, a Nowra Elder said that the Circle was 'emotional and spiritual ... It's very much about culture and our people. It comes from the heart. It instils our values ... affirms wisdom, Aboriginality, and commonsense'. She said that 'when we talk to [the defendants], we never tell them they're no good. We want them to be somebody. ... We shame their actions, not themselves ...' (Daly field notes, May 2005).

Specific themes: reductions in re-offending

How, then, do these processes affect positive change in a defendant's attitudes or behaviour? This is a core question for research on Indigenous sentencing courts, but to date, it has only been addressed indirectly or for a small number of cases.

There are four sources of information on re-offending: one, for Victoria; and three, for NSW.

For Victoria, Harris (2006) evaluated two Koori Court locations: Shepparton and Broadmeadows, where 167 and 90 matters, respectively, were finalised over different periods of time. Most were driving-related or theft offences,

and most sentences were fines, community-based orders, or good behaviour bonds. Harris (2006: 8) concluded that the Koori Courts 'reduced levels of recidivism among Koori defendants'. Specifically, he reported that the Shepparton Koori Court recidivism rate was 12.5%, and in Broadmeadows, 15.5%, whereas the overall recidivism rate in Victoria was 29.4%. These figures have since been challenged by Marchetti and Daly (2007: fn. 5, p. 419) and Fitzgerald (2008).

Focusing on the numbers reported for Shepparton, Harris (2006: 85) reported that from 7 October 2002 to 7 October 2004, the court finalised 167 *matters*, and that during this time, there were approximately 21 *re-offenders*, or 21/167, for a 12.5% recidivism rate. Recidivism is defined as 'the conviction of the defendant for a subsequent offence from 7 October 2002 to 7 October 2004'. Several problems with these numbers are apparent. First, the number of *matters* is the number of files (or occasions) of offending, and these are often combined and disposed of in a sentencing hearing for a defendant. Data from South Australia suggests there are, on average, three matters per defendant sentenced in the Nunga Court. We can expect, therefore, that the number of matters will always be greater than the number of defendants. The selected numerator and denominator in the reported figures in the Harris (2006) report are thus counts of different things. Second, there is an insufficient window of time to observe re-offending. The time frame of court disposition (two years from 7 October 2002 and 7 October 2004) is the same as the window of time to observe re-offending. The analysis should have examined only those cases disposed of from October 2002 to, say, October 2003, which would have allowed a year⁷ to observe re-offending (and reconviction), if any. As it stands, the current analysis has underestimated rates of re-offending because there is little or no window of time to observe it, particularly when we consider that a conviction in a Magistrates' or Local Court takes three to six months from the time of an offence.

Fitzgerald (2008: 2) is critical of the reported comparison group figure of 29.4% in the Harris (2006) study. She argues that it 'was neither the recidivism rate for all Victorian defendants nor the recidivism rate for Indigenous offenders who did not attend a Koori Court'. Rather, it came from figures of people 'released from prison or placed under the supervision of Corrective Services', a group for whom we might expect higher than average rates of re-offending.

In NSW, Potas et al. (2003) report on eight cases of Nowra Circle Sentencing during 2002 and 2003. The study contains useful information on the dynamics of the Circle, but has insufficient data on re-offending.

Fitzgerald (2008) of the Bureau of Crime Statistics and Research (BOCSAR) produced the first quantitative study of re-offending, drawing from NSW

⁷ Even a year would have been a short window of time to observe in this court context. See Payne (2007) for discussion of varying findings from recidivism studies that arise from using differing time frames.

data. She examined three ways of assessing re-offending: a comparison of 68 Circle cases and 68 matched controls 15 months before and 15 months after sentence, a Cox regression analysis of the time to re-offend ('time to fail') for 153 Circle defendants and 21,324 control defendants, and a comparison of offence seriousness for those who did re-offend.

She found the following:

- In the 15 months after the Circle, defendants offended less frequently than in the 15 months before the Circle. However, the control group defendants also offended less frequently after being conventionally sentenced.
- There were no significant differences between the Circle defendants and the control group for the time to re-offend.
- There were no significant differences between the Circle defendants and the control group on the seriousness of subsequent re-offending.

Thus, the analysis finds no differences in Indigenous rates of re-offending, whether the person was sentenced in a Circle court or conventional court.

Fitzgerald suggests that these results should not be interpreted to mean that Circle Sentencing has no value. Among other reasons, reducing re-offending is just one aim. Further, the longer-term community-building aims of the process are not captured in individual-level quantitative analyses of re-offending. She proposes that in addition to the involvement of Elders in sentencing, there needs to be appropriate rehabilitative programs for defendants. This point has been made for some time by others (e.g., Briggs and Auty 2004; Harris 2006; Hennessy 2006a; Marchetti and Daly 2004, 2007).

In an evaluation of the NSW Circle Courts, the Cultural and Indigenous Research Centre Australia (CIRCA) (2008: 49) observed that their 'qualitative consultations among stakeholders was that Circle Sentencing is having an impact on re-offending, or that it is too early to tell'. The CIRCA Report draws attention to a conflict between Circle participants' perceptions that the Circle *has been highly successful* in reducing re-offending and the BOCSAR analysis that *shows no differences in re-offending* for defendants sentenced in Circle and conventional courts.

The CIRCA Report suggests several reasons for this conflict. One is that selected exemplars ('champions') whose lives had changed dramatically were remembered and cited as proof the positive effect of Circles. Second is that while some defendants may have re-offended, their lives had changed in significant ways, one magistrate saying: 'there have been standouts and failures, but less failures' (CIRCA 2008: 61). Third, it was recognised that the Elders and court officials may not know what happened to defendants after the Circle; and we would add, they may not know what happened to defendants sentenced in conventional courts. However, the Elders were more sure that only a small number of people had come back to the Circle.

The CIRCA Report has drawn attention to a key problem in understanding criminal justice interventions: local perceptions may differ from statistical analyses of re-offending. Why does this occur? One answer is the limits and problems in the ways in which quantitative studies of re-offending studies are conducted.

Re-thinking studies of re-offending

Fitzgerald (2008: 7) suggests that one reason for the finding of 'no differences' in offending is that the Circle Court process is principally focused on the role of Elders in sentencing, and is 'not designed' to address the characteristics associated with offending such as drug and alcohol abuse, which have been identified by the 'what works?' quantitative approach to assessing recidivism (MacKenzie 2002). Thus, she emphasises the need for more effective rehabilitative programs to work in tandem with the Circle process. This latter point is clearly important, and one we would endorse. However, there are other reasons for the finding of 'no difference' that she does not consider, which we consider next

Limits and critiques of quantitative analyses

Quantitative analyses fail to consider the growing qualitative literature on desistance. This literature challenges the assumptions and findings of quantitative analyses, and the 'what works' approach more generally (Farrall and Maruna 2004). Specifically, desistance scholars argue that just as the 'move to criminality or a criminal identity [is not] a sudden, dramatic thing', so too is the move toward desistance (Bottoms et al. 2004: 381). What this means is that we require a *process-oriented* understanding of desistance. Such a perspective sheds light on how people are able (or not able) to 'drift toward conformity' (p. 382), with the assumption that the 'progression is faltering, hesitant, and oscillating' (p. 383).

Quantitative studies can give us several pictures of re-offending: whether a person offended or not over a period of time, the length of time it took for a person to offend, and/or the number of times a person offended. Related techniques may examine different groups of people and time to offend, with control variables introduced in the analysis. These are standard approaches in the quantitative literature, and we are familiar with and have used them (e.g., Hayes and Daly 2003). However, we argue that they need to be joined with research that explores the contexts and conditions that can potentially produce change in people.⁸

McNeill (2003: 155-56), a desistance scholar, draws a distinction between offence-focused and desistance-focused program interventions this way:

⁸ It is important to underscore that studies of re-offending, whether qualitative (Bottoms et al. 2004) or quantitative (Payne 2007) are as much art as science. Both pose major conceptual and analytical challenges.

... Being offence-focused ... tend[s] to accentuate those aspects of an offender's history, behaviour and attitudes which intervention aims to diminish. It may also tend toward identifying the problem as one of individual 'malfunctioning'. Being desistance-focused ... implies a focus on the purpose and aspiration of the intervention rather than on the 'problem' that precipitates it. It tends toward recognising the broader social contexts and conditions required to support change.

His comparison is somewhat overdrawn, but it resonates with the aspirations of Indigenous sentencing courts, whose emphasis is desistance-focused: forward-looking with a recognition of social contexts and conditions.

What is desistance from crime?

Maruna (2006: 122) notes that the 'study of desistance has been riddled with definitional problems and confusions'. Indeed, two leading figures in the field, Laub and Sampson (2001: 8), say that 'a clear and precise definition of desistance cannot be developed from a clear and precise research question'.

In this Report, we chose Bottoms et al.'s (2004) definition because it is closer to the realities and contexts of Indigenous offending, with a desired 'drift toward conformity'. Desistance means the 'absence of criminal behaviour, ... [which] includes any significant lull or crime-free gap in the course of a criminal career' (p. 371). According to a process-oriented approach, desistance is 'accomplished', although constrained by structures and social contexts.

Levers of change: attachments, identities, hope, and supportive others

Researchers differ on what constitutes 'real desistance'. Is it a changed identity, a 'new me', as Maruna (2006: 123) suggests? Or is it stopping or slowing offending, with no necessary identity change, as Bottoms et al. (2004: 371) suggest? Two major sources of change are informal social controls via social attachments (e.g., stable employment, marriage)⁹ and cognitive transformations in how a person views him or herself. These may interact in complex ways. Specifically, meaningful social attachments may spur cognitive re-orientation; an external factor (i.e., a death of an important person, attending a rehabilitation program) may activate cognitive re-orientation and in turn lead to more meaningful social attachments; and a combination of these may occur and interact in a dynamic way.

With respect to an individual's desire to change, Bottoms et al. (2004: 376) make a relevant observation for mechanisms of change that may occur when Elders interact with defendants in Circle Sentencing. The authors suggest that a process of change would include 'greater self-responsibilisation', that is,

⁹ It should be noted that with some exceptions, this literature is predominantly about men's life histories (but see Bracken, Deane, and Morrisette 2009, who review studies on female offenders).

...allowing oneself *to stop and think* about what one is doing, particularly within a social context *where supportive others* are indicating that this is a desirable development. (emphasis added)

This activity of making defendants 'stop and think' in a context of 'supportive others' is precisely what Elders say they are attempting to do during the sentencing process.

One element that spurs cognitive re-orientation is 'hope'. Burnett and Maruna (2004: 395) draw from Stotland's (1969) idea of hope, which is defined as an 'individual's overall perception that personal goals can be achieved'. They found that an offender's success in desisting from crime was highly correlated with a positive answer to the question, 'Do you have the ability to go straight?' Halsey (2008) explored the post-release lives of young men who had been in and out of youth and adult detention. He found that they were sustained by a *sense of hope* that their futures could be bright, even if the realities may be different:

The sense of hope – whether connected to being reunited with a guardian, recovering from drug abuse, or earning a diploma at a technical college, or living in one's own house, or being able to start again in another town where no one knows who they are or what they have been through – these scenographies transcend the weight of all probable realities for these young men (p. 1214).

Other studies (Farrall 2002; Giordano, Cernovich, and Rudolf 2002) find that successful desisters have projected their thoughts forward, to a better life, rather than backward on their offending days. However, as Burnett and Maruna (2004: 395-96) suggest, such positive changes, including the ability to hope, calls for 'both the "will and the ways": the desire for a particular outcome, and also the particular ability and means of achieving the outcome'. Bottoms et al. (2004: 384) suggest that the 'content of those positive hopes' needs to be explored empirically.

Age-crime relationship

One quantitative association is strongly evident across nations and age cohorts: the age-crime relationship. As Maruna (2006: 121) says, 'the best known correlate of desistance ... is aging itself'. Estimates are that 'as high as 85% of young people involved in crime are likely to desist by the time they reach the age of 28', although it is not possible to calculate this percentage precisely. The age-crime relationship for Aboriginal offenders differs in that it does not drop off sharply in the mid- to late 20s age group as it does for non-Indigenous offenders; rather, it continues into the 30s before dropping off. This differential age-crime relationship is apparent from data presented in a NSW study of contact with the court system (Weatherburn et al. 2003: 4-5).

Individuals in structural context

Although empirical work has generally focused on an individual level, societal-level approaches, which consider the role of structure and social

context, have recently emerged (see Farrall 2009 for an overview). In a rare article that addresses this question for Indigenous offenders, Bracken et al. (2009) explore the relationship between individual 'agency' and structural constraints for Canadian Aboriginal male gang members, recently released from federal or provincial jails. Employment training and counselling are part of a program in which the men must 'cognitively and emotionally come to terms with their position as colonized people' (p. 69). The authors view desistance as a 'holistic process' that needs to address an individual's biography, gang affiliation, and 'mistrust of others based on experiences of racist stereotyping'. In addition, these individuals 'need to understand injustice structures ... and ... develop non-hostile responses to such injustice', heal from trauma and make cognitive sense of it, and 'build positive associations with their Aboriginal identities' (pp. 75-76). All of this suggests that a movement toward desistance is a process, which takes time and considerable strength of purpose, particularly for those who are highly socially marginalised.

Beyond dichotomised understandings of success and failure: pathways toward desistance

Affirming Bottoms et al. (2004: 383), we view the drift toward conformity (or desistance) not as a 'one-way progression'. Rather, it is a shifting and oscillating pathway: 'moving in a generally conformist direction, [but] oscillating on ... a continuum between criminality and conformity'. By including 'significant crime-free gaps' as part of the definition of desistance and by seeing desistance as a process, we can identify *pathways toward desistance*. An example will help. A person may have offended 60 days after a Circle, but then stayed out of trouble for the next three years. A standard quantitative approach would depict this case as a 'failure' (the person re-offended early), whereas a desistance approach would recognise a long crime-free gap following the offence. The point is that we need to consider other ways to study re-offending than dichotomous and absolutist views of 'success' as complete cessation from crime. Drawing from the young men in his study, Halsey (2008) finds that 'success' meant small steps forward such as

spending a few nights with a former or current girlfriend, managing to attend classes or obey curfews for a whole month rather than a few days, only smoking a little bit of weed or doing a small amount of heroin, sticking at a job for a month instead of two weeks, only assaulting someone at the third or fourth opportunity rather than the first ... (p. 1252).

For the men and women who come before Indigenous (or conventional) sentencing courts, success needs to be considered in the same way: as small steps forward.

Our review of the desistance literature sheds light on the 'conflict' that CIRCA identified between local perceptions and statistical analyses of re-offending. Elders and others recalled that some positive change occurred for some offenders, and in some cases, it was dramatic. 'Some positive change', 'small steps', and 'less failures' are likely to be recognised by Circle

Elders and court staff as ‘success’ or partial success stories, whereas they may be depicted as ‘failures’ in quantitative analyses because of the way in which offending is studied. The desistance paradigm better captures how Circle Elders and staff view pathways into and out of crime: as part of an oscillating process between conformity and criminality. By contrast, a quantitative analysis cannot easily grasp or depict this process since it views offending as a dichotomous (yes/no) event.

Studies of Indigenous offending can be significantly improved by taking a qualitatively-oriented desistance approach. Such an approach could compare Aboriginal offenders sentenced in conventional and Indigenous courts, and it may show different results or patterns than those revealed in quantitative studies. This is an empirical question, of course, and would need to be pursued. We do know that *how* a phenomenon is analysed—the methods used and assumptions made—has a bearing on what we find.

A related potential point of contention is what counts as ‘re-offending’. Some believe that if the re-offending offence differs in key behavioural ways from what led to the Circle offence, then it is not evidence of re-offending. Thus, for example, a defendant whose pattern of offending up to the Circle was related to drinking alcohol, but the re-offending offence was not, then this subsequent offence is not a meaningful instance of re-offending (see discussion of Chris on p. 67). A careful inspection of the type or pattern of offending pre- and post-Circle would require taking a qualitative approach to the available data.

A key omission in the desistance literature: intimate partner violence

Although Bottoms et al. (2004), Halsey (2008), and Maruna (2006), among others using a desistance paradigm, have demonstrated the limits of a dichotomous approach to analysing re-offending, there is a key omission in this body of work. How does the desistance paradigm relate to intimate partner violence? Do we think differently about offenders who ‘drift’ between conformity and criminality in assaulting current or former partners? We suspect so. The research literature on partner violence and re-offending is dominated by quantitative studies that use a dichotomous approach in determining ‘what works’ with respect to police, court, and program interventions (see e.g., *Criminology & Public Policy* 2008, Vol. 7[4], November). Furthermore, while the desistance literature gives attention to the positive impact of girlfriends and wives in men’s movements toward conformity, little is said about how a portion of such relationships may be violent.

The criminological literature tends to be bifurcated between research and policy on partner violence and on ‘general offending’, leading one to imagine that these are two distinct groups of offenders, when we know there is overlap. At the same time, the patterns and consequences of partner violence are distinctive in many respects from other types of criminal offending. This complexity raises questions for research on conventional and Indigenous sentencing courts, particularly in jurisdictions

like NSW that do include family and partner violence cases in Indigenous sentencing courts.

Adding another layer of complexity in statistical analyses of offending is the ability to determine if the initial court case is partner violence or not. On a quantitative statistical database, such cases may have a charge for 'property damage' or 'assault', but unless the database contains information on victim-offender relations (or additional information, such as a breach of an AVO), one cannot be sure if the offence is intimate partner violence.

The Research Site: Nowra Circle Court

The first Circle Court sentencing in NSW was held in Nowra on 5 February 2002. Circle Courts were subsequently established in eight other NSW jurisdictions (see listing in Appendix I). Circle Court sentencing was promoted by the Aboriginal Justice Advisory Council (AJAC) and supported by the NSW Attorney-General's Department. As noted in Potas et al (2003: 3-4) an early discussion paper by AJAC in 2000 outlined the benefits of introducing the Circle process to NSW.

Based on data compiled by CIRCA (2008: 31) for 2006-07, the population of Nowra was about 26,100, and about 7% Indigenous. Of offenders with a proven offence in the Nowra Local Court in 2006 (about 1,200), 25% (or about 300) were Indigenous. From 2002 when the first Circle was held to June 2007, a total of 48 Circles have been convened in Nowra. The number of Circles is not the same as the number of defendants because in some cases, two Circles are held for one defendant. However, these numbers show that the Circle process is a highly selective one.¹⁰

The legislation governing Circle Sentencing is Schedule 4 of the NSW *Criminal Procedure Regulation* (2005), which outlines eight objectives:

- to include members of Aboriginal communities in the sentencing process;
- to increase the confidence of Aboriginal communities in the sentencing process;
- to reduce barriers between Aboriginal communities and the courts;
- to provide more appropriate sentencing options for Aboriginal offenders;
- to provide effective support to victims of offences by Aboriginal offenders;
- to provide for the greater participation of Aboriginal offenders and their victims in the sentencing process;

¹⁰ CIRCA (2008: 32) estimates that across the nine jurisdictions in NSW that had Circle Sentencing in 2006, there were 2,270 Indigenous people with proven offences; 231 attended a Circle Sentencing, or about 10%.

- to increase the awareness of Aboriginal offenders of the consequences of their offences on their victims and the Aboriginal communities to which they belong; and
- to reduce recidivism in Aboriginal communities.

The list has considerably more community-building than criminal justice aims with its emphasis on including more people in the sentencing process, increasing confidence (trust), reducing barriers, supporting victims, and increasing the awareness of defendants about the impact of their offending. Just one aim, the eighth, relates to reducing re-offending.

Like all other Indigenous sentencing courts, offenders in Nowra must have pleaded guilty to an offence in the geographical area covered by the court. Compared to other jurisdictions, Nowra has a relatively smaller number of cases: on average, less than ten defendants are annually sentenced, although they may attend more than one Circle. The assessment for suitability is mainly concerned with identifying defendants who are likely to face a prison term and are thought to be ready to change.¹¹

From 2002 to the present, the Nowra Magistrate, Doug Dick, and the Aboriginal Project Officer, Gail Wallace, have worked to establish and develop the Circle Court. Wallace's knowledge and relationships with Aboriginal groups and Elders have been a significant contribution to the Circle process. The selection of the appropriate Elders who should be present in the Circle is a crucial task she carries out.

The Circles are held in seven communities that make up the Nowra Local Court area. Venues are community centres or places that 'value and embrace Aboriginal culture' (Dick and Wallace 2007: 6). (If the defendant is in custody, the hearing takes place in the courtroom.) In addition to the Magistrate and Aboriginal Project Officer, those present are the defendant, his/her supporter(s), the victim(s), his/her supporter(s), a police prosecutor, defence lawyer, and four Elders (typically two male and two female). Others may be permitted to attend or observe the Circle, although spectators are not allowed to participate.

Circles in Nowra normally run for one-and-one-half to two hours, but they can last as long as four hours. After discussing the offence, its contexts, and the offender's circumstances, the Circle participants then discuss and make recommendations for a sentence. If a sentence is settled,¹² the matter is adjourned for about two weeks to undertake any additional activities such as the preparation of a pre-sentence report or securing a recommended treatment placement. This adjournment is also a cooling off period for a defendant to consider the matters canvassed in the Circle and

¹¹ See detailed criteria under the *Criminal Procedure Amendment (Circle Sentencing Intervention Program) Regulation 2003*.

¹² If a sentence is not agreed to in Circle Court, the matter is returned to the Local Court and determined there.

to be given a final opportunity to accept or reject the Circle sentence.¹³ If, at this court hearing, the defendant accepts the sentence, it is finalised. A sentence can only be imposed if an offender accepts it (Dick and Wallace 2007: 14). From time to time, a Circle may be adjourned to a future date, two to four months later when a second Circle is convened, within which time the defendant may participate in a rehabilitation program.¹⁴

Unlike other Australian jurisdictions, Elders are not paid for their time in NSW. Dick and Wallace (2007: 8) say that 'it was the view of the Elders that payment had the very real potential of creating further factions with complaints of favouritism regarding Elder selection' and that the lack of payment may be 'seen as lending integrity to the process'.

A preliminary assessment of Nowra Circle Sentencing was produced by Potas et al. (2003). They praised the process and said that it was 'actively recognising traditional Aboriginal authority structures in the local area and engaging those structures in sanctioning offenders and in attempting to reduce future offending' (p. 51).

The CIRCA (2008) Report gathered information on all nine NSW jurisdictions, including Nowra. It concluded that confidence in the process was high, barriers between Aboriginal people and the courts were reduced to some degree, and sentences were perceived as more culturally appropriate. Of the eight objectives reviewed (see list above), just one was seemingly not achieved. As we have noted, Fitzgerald's BOCSAR (2008) Report showed no differences in rates of re-offending between Circle and other courts. However, CIRCA's (2008) consultations with Elders, court staff, and offenders reached a different conclusion: a perception that the courts had been effective in changing people to become more law-abiding. By taking a more qualitative and desistance-oriented approach in this Report, we will attempt to shed light on these conflicting findings.

¹³ If, at this hearing, the recommended sentence is rejected by the offender, the Local Court proceeds to hear and determine the matter in the usual way. However, the offender may seek to have the Circle Court magistrate disqualify him or herself because of the range of matters canvassed during the Circle process. Although this has not occurred in Nowra, it accords with an offender's legal rights at sentencing (Dick, personal communication by email 12 November 2009).

¹⁴ As discussed in CIRCA (2008: 29-30), there is variation among the nine Circle jurisdictions in NSW on how sentence is determined.

Chapter 2

Methodology

This chapter describes the study context, steps taken in the research process, the sample, data gathering, sources of data, and modes of analysis. We also consider the study's strengths and limits.

Context

This study is part of a broader program of research, which is investigating innovative justice responses to crime. Indigenous sentencing courts are one such innovation. Compared to other research to date, this study is the first to systematically conduct interviews with Circle Court defendants, using a qualitative, and decolonising and critical race methodology. By the latter we mean having an awareness of the importance and uniqueness of Indigenous knowledge, and the need to rethink hegemonic assumptions, values, and concepts (see, e.g., Tuhiwai-Smith 1999; see also Marchetti 2006).¹⁵

Steps taken in the research process

As initially conceptualised, the project was to study Circle Sentencing and re-offending for all the defendants appearing in the Nowra Circle Court from February 2002 through to May 2005 ($N=28$). The project received funding from a Griffith University Community Partnership grant awarded to K. Daly and E. Marchetti in 2006. As the project evolved, Daly and Marchetti decided to divide the responsibility for the Circles analysed. Daly took carriage of the non-family violence cases, and Marchetti, the family violence cases. In 2007, Marchetti sought and received separate funding to study partner violence cases in five sites (including Nowra) (Marchetti forthcoming, 2010), and a larger project comparing the handling of Indigenous sentencing courts and family violence courts (Marchetti, with Daly and Huggins ARC funded project, 2009-2013).

In the first phase of the study, an Aboriginal undergraduate student, Heather Cochrane, was employed to review the case files and assemble all the information on the 28 defendants who appeared before the Circle during this period. A central concern was the need to identify an Aboriginal person

¹⁵ We are aware of 'Indigenous methodology', which is defined as 'research by and for Indigenous peoples, using techniques and methods drawn from the traditions and knowledges of those peoples' (Evans et al. 2009); however, ours is better termed a critical analysis, with the research team comprising both Indigenous and non-Indigenous staff.

in Nowra to assist with the research. This took some time. In August 2007, Daly met with Nowra Magistrate Doug Dick and Aboriginal Project Officer Gail Wallace on how to progress the project. Daly had already established contact with Dick and Wallace, having visited Nowra and observed Circle Sentences in May 2005 with Marchetti. Magistrate Dick mentioned that Uncle Lou Davis (an Aboriginal Elder who had also been involved in a number of Circles) was interested in participating in the research. In February 2008, Daly formulated a plan, working with Wallace and Uncle Lou. It was agreed that Uncle Lou would assist in the project by seeking out those to be interviewed and working with Daly in conducting the interviews.

Drawing on the desistance literature (e.g., Bottoms et al. 2004; Halsey 2008; Maruna 2000), Daly designed the interview instrument. It focused on questions concerning the person's identity, self-concept, and change, with reference to their participation in the Circle. As shown in Appendix III, the interview has three parts:

- the person's experience in the Circle;
- if there was offending (or not) later, why or why not; and
- how they viewed themselves and their aspirations for the future.

Sample

Of the 28 defendants who experienced Circle Sentencing in Nowra in 2002-2005, there were 13 non-family violence cases. These included property, public order, driving-related, carry/use weapon, and violent (typically, assault) offences.

Daly travelled to Nowra on 12 April 2008 and was based there for ten days. During this time, she and Uncle Lou conducted nine interviews (see Table 1, p. 28). Of the four people not interviewed, two declined, one could not be located, and one had died. Obtaining nine of 12 interviews was an excellent response rate in light of the difficulties with hard-to-reach research populations. It would not have been possible without the efforts of Uncle Lou, who made initial introductions, explained the purpose of the interview, and put people at ease about participating. During the research period, Gail Wallace also played a key role in finding people and in helping to set up some interviews.¹⁶

Six of the nine people interviewed were men; and three, women. Their ages ranged from 20 to 45 years (average about 30 years). For the 13 defendants, the total elapsed time from the Circle to the end date of the court's criminal history record (mid March 2008) ranged from 3.4 to 6.1

¹⁶ Whereas Wallace and Magistrate Dick contributed time and expertise, Uncle Lou was a member of the research team and was paid accordingly.

years.¹⁷ However, six defendants were imprisoned during this time; and in Table 1, column 6, we show in parentheses the estimated time they were imprisoned. Of the nine defendants interviewed, the elapsed time between the Circle and the date of the interview ranged from 3.5 to 6.2 years (see Table 1, last column).

In our analysis of offending, and like Fitzgerald (2008), we used the actual date of the proved offence, and we only counted proved offences. However, unlike Fitzgerald, we also counted distinct occasions of offending as well as the number of offences, and we were able to establish a chronology of contact with the criminal justice system (or not) after the Circle. These points are developed further in Chapters 2 and 3.

In our study we report on five of Potas et al.'s (2003) eight cases. For readers who wish to compare our case analysis with Potas et al.'s (2003) case examples, Chris is example #1; Brian, example #2; Adrian, example #4; Harry, example #5; and Leena, example #7.

¹⁷ Four of the 13 participants had two Circles. Typically, a second Circle would be scheduled so that the defendant could complete certain undertakings before sentencing. In one of these four cases, however, the first Circle was adjourned because there was dissension among the participants over the offence circumstances and reasons for delay in police charging; a second Circle was scheduled with the hope that participants could address the matter. When calculating time frames (discussed more fully in Chapter 3), we used the first Circle date to calculate the defendant's age and the period of time before the Circle for all 13 defendants. For the nine cases with one Circle, we calculated all dates from the date of that Circle. For the four cases with more than one Circle, we used the second Circle date to calculate the window of time for re-offending, to count instances of re-offending (if any), and to calculate time from the Circle to the interview.

Table 1: Sample Features

Non-family violence Circle # and participant name	Gender	Drug and alcohol profile	Age at first Circle	Interviewed (Yes / No)	Window of time between Circle and end date of court's criminal history record (March 2008) (yrs) [minimum estimated <i>N</i> yrs incarcerated during this time]	Time between Circle and interview (yrs)
Circle 1, Chris ^a	Male	Alcohol	27.5	No (deceased)	5.1	N/A
Circle 2, Brian ^b	Male	Alcohol and marijuana	24	Yes	6.1 [0.75]	6.2
Circle 3, Adrian	Male	Alcohol and prescription drug abuse	28	No (declined)	5.9	N/A
Circle 4, John	Male	Alcohol and amphetamines	35	Yes	5.8	5.9
Circle 5, Harry ^c	Male	Alcohol and marijuana	23.5	Yes	5.7 [4.1]	5.8
Circle 6, Leena	Female	Heroin and alcohol	34	Yes	5.4	5.4
Circle 7, Gary	Male	Alcohol	34	No (declined)	5.2	N/A
Circle 8, Michael ^d	Male	Alcohol and marijuana	19.5	Yes	4.7 [2.15]	4.8
Circle 9, Jason ^e	Male	Alcohol	25	Yes	4.5 [2.5]	4.6
Circle 10, Bev	Female	Heroin, methadone, and alcohol	43	Yes	4.1	4.2
Circle 11, Hayley ^f	Female	Heroin, amphetamines, marijuana, and alcohol	22	No (could not be located)	3.7 [2.25]	N/A
Circle 12, Darrel ^g	Male	Alcohol, marijuana, and antidepressants	21	Yes	3.5 [0.75]	3.6
Circle 13, Jackie	Female	Heroin, methadone, amphetamines, heroin, marijuana, and anti-depressants	45	Yes	3.4	3.5

a. Chris died in a car accident in mid-March 2007. We could not identify the precise date, but have estimated it as 15 March. We used this as the end date in calculating the period of time post-Circle.

b. For a post-Circle offence, Brian was sentenced to serve a 12-month Periodic Detention Order (nine-month non-parole period). Estimated minimum time incarcerated = 0.75 years.

c. For offences that were dealt with by the Circle, Harry was sentenced to two-year Periodic Detention Order (18-month non-parole period). Estimated minimum time incarcerated = 1.5 years. For offences that occurred after the Circle, Harry was sentenced to serve five years (three-year non-parole period) in August 2005, just over three years after his Circle. He was still in prison during the fieldwork period. The estimated minimum prison time is a portion of the three-year (minimum) sentence up to mid March 2008 (2.6 years).

d. Michael received a 12-month Periodic Detention Order for the Circle offences. In the five months after the Circle, he re-offended twice. We believe that his Circle offences and two occasions of re-offending were sentenced concurrently to 12 months' imprisonment (nine-month non-parole). Michael also received two further imprisonment sentences: eight and nine months. Estimated total minimum time incarcerated = 2.15 years.

e. Jason received a 15-month Suspended Sentence by the Circle. He was then sentenced to four years (concurrent) imprisonment (2.5 years non-parole period) for three further occasions that breached the suspended sentence conditions. Estimated minimum time incarcerated = 2.5 years. Of the three years of Jason's post-Circle timeframe, he was imprisoned for 2.3 years (76%).

f. Hayley was sentenced to serve a term of imprisonment on five different occasions. We believe that sentence commencement dates were combined in some instances, and she went into prison twice during the time from the Circle to end date of the criminal history record. Estimated minimum time incarcerated = 2.25 years. She was imprisoned during the fieldwork period in April 2008.

g. For offences that were dealt with by the Circle, Darrel was sentenced to a 12-month Periodic Detention Order (nine-month non-parole period). Estimated minimum time incarcerated = 0.75 years.

Field work process

Ethics

During the time leading up to the field work, email and phone conversations took place between Daly, Wallace, and Uncle Lou regarding the carriage of the project, with attention given to outlining the steps from a research ethics point of view. It was decided that an informal approach would be taken to develop trust and set interviewees at ease. An information sheet was prepared to give to each person at the interview, but formal written consent was not sought. Wallace advised that 'forms requesting consent usually bring on hesitation and suspicion' (email, 23 February 2008). Uncle Lou (and at times Wallace) made initial contact with each defendant to let them know about the research and to seek their interest to participate. Oral consent to the interview was made on the interview day.

In presenting the defendants' interviews, we use pseudonyms for each person to protect their confidentiality and privacy. Although several Circle defendants in our research have publicly shared their experiences of the Circle (e.g., *Notebook Magazine*, July 2007), we elected to preserve anonymity. Likewise, when the defendants discuss the Elders by name, we use pseudonyms.

Interview process

Several days before the interviews began, Daly met with Uncle Lou and Wallace to discuss the interview questions and to finalise the interview process. We reviewed the list of defendants and devised a work plan of whom to contact first and how to best schedule the work. Working with an excel spreadsheet, we itemised those defendants Uncle Lou had already contacted and were ready to be interviewed, and others for whom we needed to gather further information on their whereabouts. The process moved quickly, as both Uncle Lou and Wallace contacted people to arrange times and places for the interviews.

All the interviews were carried out with the presence and assistance of Uncle Lou, and in one case, with Gail Wallace. Three interviews were conducted by phone, two at the courthouse, and four at the person's home. With one exception, all were tape recorded and later transcribed professionally. One interview, while conducted over the phone, could not be taped. Instead, a detailed field note was written up immediately after this conversation.

The fieldwork process was immensely rewarding. Working with Uncle Lou in finding people and conducting the interviews was a privilege and a lot of fun. Not only did he have great respect among those in the community, he was also a good researcher: he kept careful notes in his diary, was organised and resourceful, and had a warm and engaging interview style. Gail Wallace used her networks to identify where people were and was essential in finding several hard to reach people.

After conducting several interviews, we became aware that the items about 'identity', 'turning points', and 'future hopes', which had been drawn from the desistance literature, were difficult for people to answer. For example, the term 'turning point' was not familiar. An Aboriginal researcher, Naomi Fisher, who later reviewed and distilled the taped and transcribed interview material, shed light on this problem. She said that the concept of 'turning point' connotes a disavowal of what happened before, something not right and in need of 'correcting'. Further, in a reflective analytical note, she said that 'turning point' is more of an individualistic Western notion, rather than based in community:

Turning point is about 'the individual', *on their own*, experiencing an event as a catalyst to bring change. However, to the pragmatism of our Aboriginality and its Law, processes of grief and destruction need contextualising before they can be processed. And this is done in a group way, by the community, with the backing and assistance of Elders and meaningful relationships. (Fisher reflective note, December 2008).

In addition, we needed to rework the questions how about people saw their lives 'five to ten years later'. Rather than focus on a particular number of years, we simply referred to 'the future'.¹⁸ These questions were altered to conceptually remove the *quantity* or duration of time (see Crawford et al. 2000: 188).

Other sources of information

In addition to the interviews, we had additional sources of information: the Magistrate's summary of what occurred in the Circle (termed 'the transcript'); the Aboriginal Project Officer's notes on the personal background information about the defendant, the Circle, and follow-up report (Wallace notes); and the court's criminal histories, which were extracted on 14 March 2008.

During Daly's fieldwork and the research assistants' subsequent analyses of the material, reflective field notes were written. Above, we showed one field note by Naomi Fisher, and next, we discuss several others she wrote while listening to the tapes and reading the interview transcripts.

Analysis of materials

In analysing the interview materials, Fisher explicitly and self-consciously adopted an Aboriginal methodological approach to the research, one

¹⁸ The initial questions about identity were drawn from Maruna (2000), whose work was on United States offenders, not Aboriginal people from Australia. It became clear during the fieldwork that questions concerning 'identity' and 'the future' needed to be phrased differently for the group we were studying.

grounded in applying an Aboriginal ontology¹⁹ when analysing the interviews. In the following reflective notes, she attests to feeling emotionally connected to, yet drained by, the material:

These were people's lives and stories; and although it was my job to empathise and honour their narratives, I did not want them feeling someone was humbugging²⁰ them in their dreams or during the day.

I cried over her story, as I did for the others, sometimes in sadness, but also with admiration at their courage to tell their stories and to overcome all the stuff our people have to deal with.

Fisher's reflective notes show a strong sense of empathy with and a spiritual connection to the individuals being studied.

During the analysis, Fisher also found that the interview transcriptions were not fully accurate. They might summarise or 'smooth over' certain parts of the interview, or they may ignore or misunderstand the use of Aboriginal English words. (This problem partly lies with the instructions to the transcription company, but it may be a general problem in research of this sort unless researchers are clear on the type and detail of transcription they wish to have.) Fisher discovered this problem first when she read Darrel's interview. In a reflective note, she said:

Darrel's interview transcript prompted me to listen to the digital interview, and I'm so glad I did because I found that the transcription was flawed (and therefore potentially, so were the others), and there was a necessity to go into the Aboriginal English²¹ side of things. The listening/hearing enhanced my understanding, empathy, and therefore analysis of the interviews. Hearing a person's voice, their intonation and pitch, their silences and omissions, allowed me to 'feel' them as a person. You get to 'know' them, and you don't want to let them down. (Fisher reflective note, December 2008).

To increase the accuracy of the analysis, Fisher listened to all the interviews and amended the transcript, where necessary. When Aboriginal English terms were used by a participant, these are retained in reporting the interview material. The research team's experience with 'transcription' revealed that particular care and sensitivity were required in analysing what people said (see also Crawford et al. 2000).

¹⁹ We use this term to denote a distinctive Aboriginal way of looking at the world. However, a precise definition of Aboriginal ontology is difficult for two reasons. First, there are many groups in Australia who identify as Aboriginal (or as Indigenous, which encompasses Torres Strait Islanders), let alone cultures all over the world that identify as Aboriginal. Second, there are likely to be other 'personal biographies' (Denzin and Lincoln 2000: 18) that affect one's individual ontology.

²⁰ 'Humbugging' is a concept used by Aboriginal people to refer to being hassled or annoyed by someone. In this context, Fisher felt that her constant ruminations would direct an 'energetic disturbance' towards the participant.

²¹ For discussion of Aboriginal English, see Harkins (1994) and Eades (1996, 2003).

The analysis of the interview material was initially carried out by Fisher, who distilled the transcripts. Proietti-Scifoni then moved the analysis to the next phase: identifying emergent themes and joining the interview material with other sources of data, including the court's criminal histories, Magistrate Dick's Circle transcripts, and Aboriginal Project Officer Wallace's background notes.

The court's detailed criminal history records for the 13 Circle defendants were an invaluable source of data, and they augmented the post-Circle offending data we had obtained from BOCSAR. The BOCSAR re-offending data file (ROD) included all 28 defendants who experienced Circle Sentencing in Nowra from February 2002 to May 2005. These data gave some information on finalised and proved cases for any type of offending that occurred after the first Circle, including the principal offence type and the penalty imposed. BOCSAR's window for re-offending covered the period from the finalisation date of the first Circle to the extraction date (23 May 2006), thus ranging from just over one year to 4.3 years. Although the BOCSAR data were a useful start point, the court's more detailed criminal histories enabled us to examine pre-Circle offending (which the BOCSAR data we had initially sought did not) and post-Circle offending with more precision and a longer window of re-offending (a minimum of three years).

Proietti-Scifoni analysed the criminal histories to identify pre-Circle offending behaviour and post-Circle offending in more detail. For both pre- and post-Circle offending, we analysed the number of *occasions* of offending and the associated number and kinds of proved offences. If a Circle defendant had re-offended, we were specifically interested in determining whether they had been imprisoned after the Circle, and if so, the length of imprisonment and how many times this occurred. This was determined by re-constructing a timeline of occasions of offending (using the arrest date), associated convictions (using the court date), and date of imprisonment commencement. However, there were two major difficulties in making sense of the data. First, the detailed criminal histories do not provide information about whether sentences imposed were concurrent or consecutive. In depicting sentences, we decided to show the *minimum* length of time imprisoned.²² Secondly and relatedly, different occasions of offending were sometimes sentenced on the same court date. In these cases, we assumed that these the sentences were concurrent, and we show the minimum length of time imprisoned.

The principal aim of this study is to understand the effects of the Circle process on the 13 defendants and the broader community, and to explore the Circle defendants' views of the role of the Elders in the Circle, and their interactions with the Elders. Proietti-Scifoni, working with Daly, devised an analytical case approach, which sought to describe each individual case in some detail, and then locate it within the wider set of themes found for all the participants. A challenging task was to translate the meaning of

²² This same format is followed when presenting information about fine amounts.

'desistance', as we wished to use it in this Report, to the words and lives of the 13 defendants. Chapter 3 outlines how we did this.

Project strengths and limits

There are three strengths to this project. First, it is the first systematic qualitative study of Circle Court defendants, their experiences with the Circle, its perceived impact, and how Circle processes relate to desistance or persistence in offending. Second, we sought to link ideas in the desistance literature to this particular group of offenders. In particular, we were interested to say more than simply 'this person did (or did not) re-offend'. We expected to find a group of individuals who was in-between: they may have offended after the Circle, but they were on a pathway to desistance, as Bottoms et al. (2004) define it. Such an approach, we believe, offers a more accurate and respectful way to depict Indigenous pathways into and out of crime, as Bracken et al. (2009) suggest. Third, relative to other studies, we have a longer window of time to observe and ask people what occurred after the Circle. Although we are aware of recall and other problems arising with retrospective interviews (see e.g., Bottoms et al. 2004 on this point), a longer period of time offered defendants a way to reflect on questions of identity and change.

There is one clear limit to the study: we are presenting information on just 13 cases. However, these are *all* of the non-family violence cases that went before Circle Court in Nowra over approximately three and one-half years. Thus, while we can be confident of generalising to other Nowra Circle Court defendants, who have been convicted of non-family violence offences, we would require studies in other jurisdictions, both those with and without Indigenous sentencing courts, to determine the variable impact of court processes, both Indigenous and conventional, on Indigenous people.

Chapter 3

Desisters and persisters

Introduction

This chapter presents a distillation of the 13 defendants' pre- and post-Circle offending. It shows how we defined key concepts and three groups of defendants: the complete desisters, partial desisters, and persisters.

We identified these groups after comparing the frequency and nature of offending three years before the Circle and three years after it (see Table 2, p. 40). Like Table 1, Table 2 lists the Circles by the date when the Circle was held, from 2002 through 2005. If more than one Circle was held, both dates are shown. Column 2 shows the defendant's pseudonym and age at the time of the Circle.²³ (If there was more than one Circle, the age at the first Circle is shown.) Column 3 gives the year and the defendant's age at his or her very first contact with the police, which ultimately led to a proved offence.²⁴

For the three years preceding the Circle (or the first Circle if more than one was held), Column 4 shows the number of occasions of police contact; in parentheses is shown the actual number of offences charged because some occasions can have several charged offences. In Column 5 is listed the types of offences. (Note that the number reflects only those offences that were subsequently proved in court.)

Column 6, 'Nature of offending before the Circle', encapsulates the offending information from the previous two columns, with a focus on frequency: none, light (one or two occasions), moderate (three to six occasions), and heavy (seven or more occasions) in the three years before the Circle. The next three columns detail post-Circle offending: the number of days between the Circle (or the last Circle if more than one was convened for the offence) and first police contact that resulted in a proved offence, the number of occasions and offences, and the kinds of offences.

Column 10, 'Nature of offending after the Circle' encapsulates this detail, using the same criteria as Column 6. Column 11, the last, is an assessment

²³ To give an example, we used 25.5 yrs for those defendants whose age was 25.4 to 25.6 years. If they were 25.3 years, we rounded down to 25; and if they were 25.7 or more years, we rounded up to 26.

²⁴ In counting the number of proved offences, we did not count breaches, warrants, or contravening an AVO as offences because these are associated with police or court administrative decisions, not direct offending. However, we did count the offence(s) that may have led to breaches and contraventions, such as an assault or property damage offence.

of the change of the frequency of offending from Column 6 (pre-Circle) to Column 10 (post-Circle) for each defendant. There are five underlined cases, either as success or failure, and seven with question marks.

The underlined cases are straightforward. Circles 3, 4, 7, 10, and 11 are underlined as success because all had pre-Circle offending, but no post-Circle offending. Case 11 is underlined failure because the defendant (Hayley) moved from light to heavy offending pre- and post-Circle, and was imprisoned at the time of the fieldwork in April 2008.

The remaining seven cases required that we take a closer look. All had some post-Circle offending, but in some instances, it was for less serious offences or involved light to moderate offending:

- Three cases (Circles 1, 6, 8) appeared to be a 'partial success' because the nature of pre- and post-Circle offending reduced from heavy or moderate to light.
- In two cases (Circles 9 and 12), the character of offending was moderate in both the pre- and post-Circle period of time. Hence, there appeared to be 'no difference' in the two time periods.
- Two cases (Circles 2 and 5) appeared to be failures because the nature of pre- and post-Circle offending increased from light to moderate.

These seven cases are noted with question marks in Table 2 to signal the need for a closer inspection. They are listed in Table 3 (p. 41) with greater detail on the nature of post-Circle offending. We were interested to determine if each person's pattern of offending accorded with being on a 'pathway toward desistance' or not.

Several elements were considered in this determination: the *quality of the offending* post-Circle (that is, minor, somewhat serious, serious), the *frequency of offending* (number of distinct occasions of contact with the police), and the *time frame of offending*. For the latter, we examined the presence and quality of crime-free gaps over time. A fourth criterion was whether there was offending beyond the three years post Circle: we identified the last date of offending that resulted in a proved offence, up to the end date of the criminal history record (14 March 2008).

For the quality of offending, we recognise that inferring offence seriousness from offence categories can be hazardous. However, we used these criteria: minor (driving, public order, minor drug possession, and theft); somewhat serious (assault, carrying weapons, and damage property); and serious (aggravated break and enter, and sexual assault).

The judgments for the seven cases are necessarily subjective and qualitative, as we attempted to balance differing elements. Some

judgments were easier to make than others. We turn first to the easier ones.

Easier judgments

The pathway toward desistance was clearly evident for Chris (Circle 1), with just one occasion of offending, which occurred 16 months after the Circle. It was also evident for Leena (Circle 6). For Leena, there were three occasions of offending post-Circle: a property offence four months after the Circle; two driving offences, which occurred 16 months after the property offence; and an assault, which occurred nearly eight months after the property offence. Although her post-Circle offences are somewhat serious, there were significant crime-free gaps during the three-year period, and she has stayed out of trouble since March 2005.

The pathway was clearly not evident for Harry (Circle 5) and Michael (Circle 8). Although Harry appeared to be doing well two years post-Circle, with two long crime-free gaps, he committed several serious offences toward the end of the second year, and in 2005, he was imprisoned for a minimum of three years. Michael's offending was heavy before the Circle and moderate after, with a total of three occasions and 11 offences, largely driving-related, but also including an assault. In the period beyond the three years post-Circle, he has continued to offend: there were two occasions with four proved offences (one property and three violent) in this time, and a third occasion with one property and three driving-related offences, which was pending at the time of our interview in April 2008.

Difficult judgments

In three cases, the judgments were initially more difficult to make: Jason (Circle 9), Darrel (Circle 12), and Brian (Circle 2). For these cases, we determined that the men were on a pathway toward desistance, but our decisions require further justification.

For Jason, there were three occasions of offending during nine months after the Circle; two were minor (damage property and offensive behaviour), but the third was more serious (break and enter, with related drink driving offences). For these offences, including a breach of his Circle sentence, he began to serve two and one-half years in jail less than a year after his Circle. As best as we can determine, he was released from prison some time around November 2006. He has stayed out of trouble since then.

For Darrel, there were four occasions of offending before the Circle, and four occasions after the Circle. Although his history may initially appear to be serious, in reality, almost all the offending is minor public order offences, both before and after the Circle. There was a significant crime-free gap after the Circle, lasting over 16 months. The first occasion of post-Circle offending was 'using offensive language near a school', and the second, two

months later, was driving with a 'low range PCA'.²⁵ Nearly a year later, there was a third occasion where he was carrying a 'prohibited drug' and a knife in a public place; four months later, the fourth occasion was 'using offensive language near a school'. These offences, mainly public order, are not serious; indeed, the word 'crime' for using 'offensive language' seems inappropriate. Darrel's pattern of arrests may be better termed 'targeted criminalisation' by the police, rather than criminal offending because as Cunneen (2001: 97) suggests, 'they arise directly from situations initiated by the police'.

For Brian, there were four occasions of offending post-Circle: the first, third, and fourth occasions were for driving-related offences. The last recorded offence, for which he was convicted, occurred in January 2005. We note, however, that at the time of the interview in April 2008, Brian had a pending court case for breaking and entering a bottle shop, which occurred in 2007. While he had a significant crime-free gap of over 33 months (two years and nine months), his pending case suggests that he is on the borderline between being a partial desister and persister.

Comparison with Fitzgerald (2008)

In counting offending pre- and post-Circle, we used the same logic as Fitzgerald: counts were made only of offences that were proved, and the actual date an offence occurred post-Circle was used to determine 'time to fail'. However, our study followed the defendants for three years (and sometimes longer), not 15 months.

Another difference is that our study counted the number of distinct 'occasion(s) of police contact' before and after the Circle date, along with the number of offences associated, whereas Fitzgerald counted all offences and did not distinguish occasions. As can be seen in Table 2, it is useful to distinguish the *number of occasions* from the *number of offences* because, for example, a traffic offending 'occasion' produces more 'offences'. In counting the *number of proved offences*, we excluded breaches, warrants, and contraventions of AVOs because these are administrative offences, not actual direct crimes. However, in all cases, when these administrative offences were associated with a direct crime (or an instant offence, e.g. assault), we counted the assault (and related offences if any) as an occasion of offending, along with the relevant number of proved offences. It's unclear from Fitzgerald's (2008) study if administrative offences were included or excluded, but they appear also to have been excluded. Our study expressly excludes Circles that dealt with family and partner violence, but Fitzgerald includes these. A final difference is that Fitzgerald's counts of post-Circle offending started after the first Circle, if there were two or more Circles convened for an offence, whereas our start point began after the second or last Circle convened. All of these elements are relevant when we

²⁵ This means that he was tested for alcohol while driving, and the prescribed content of alcohol (PCA) reading was above the legal limit, but 'low level' in seriousness.

compare our findings with hers in Chapter 5. For now, we note that whereas she differentiates two groups, those who did or did not have a proved offence in the 15 months after the Circle, our desistance-oriented approach identifies three groups.

Summary

In the three years following the Circle, five defendants completely desisted from crime. Eight others did offend, but they were of two types: partial desisters, who were on a pathway toward desistance; and persisters, whose offending continued or escalated.

The complete desisters and persisters are easily recognised and classified: they stopped offending completely, or their offending intensified and escalated. The partial desisters are a new category: it was formed from our interpretation of desistance scholars' guidance to move away from dichotomised understandings of 'success' and 'failure' in assessing re-offending.

The partial desisters had one or more occasions of offending after the Circle, but in some cases, there was a reduction in the frequency of offending or the quality of the offending was minor. In some cases, 'offending' could be better described as overzealous policing. Significant crime-free gaps were evident, although with differing configurations, depending on the case. Our partial desisters would be classified 're-offenders' in a standard quantitative study, and two had relatively short periods of 'time to fail'. Our qualitative analysis of their files leads us to see them more as success stories because they are on pathway toward desistance.

A final point should be made about the Circle defendants' trajectories. The complete desisters were older at the time of the Circle (37 years), compared to the partial desisters (26.3) and persisters (21.7). This finding underscores the age-crime relationship, and it raises several questions. If Aboriginal people 'age out' of crime in their thirties, what does this suggest for procedures and practices in Indigenous sentencing court? What does it suggest for studies of re-offending?

In the next chapter, we shall gain further insight into the Circle defendants' lives, their Circle experiences, and post-Circle offending and desistance.

Table 2: Offending three years before and three years after the Circle, proved offences only

Non-family violence Circle # and date	Circle defendant name (age at Circle)	Occasion of first police contact (age)	N occasions of police contact (N offences) before the Circle	Kinds of offences (N offences) before the Circle	Nature of offending before the Circle ^a	Time between Circle and first police contact (days)	N occasions of police contact (N offences) after the Circle	Kinds of offences (N offences) after the Circle	Nature of offending after the Circle ^a	Effect of Circle on re-offending
Circle 1 Feb 02	Chris (27.5)	12 Jan 90 (15.5)	3 (4)	property (2), violence (2)	moderate	491	1 (1)	property (1)	light	partial success?
Circle 2 Feb 02	Brian (24)	4 Sep 93 (16)	2 (3)	driving (3)	light	31	4 (4)	driving (3), property (1)	moderate	failure?
Circle 3 May 02	Adrian (28)	23 Nov 89 (15.5)	1 (2)	driving (2)	light	N/A	0	N/A	none	<u>success</u>
Circle 4 Jun 02	John (35)	9 Jul 84 (17)	1 (5)	drug (1), property (4)	light	N/A	0	N/A	none	<u>success</u>
Circle 5 Jul 02	Harry ^b (23.5)	26 Aug 95 (16.5)	1 (1)	property (1)	light	290	4 (5)	drug (1), property (2), sexual violence (1), violence (1)	moderate	failure?
Circle 6 Nov 02	Leena (34)	25 Feb 94 (25)	9 (22)	driving (7), property (15)	heavy	125	3 (4)	driving (2), property (1), violent (1)	moderate	partial success?
Circle 7 Jun 02 & Dec 02	Gary (34)	17 Nov 82 (14.5)	0	0	none	N/A	0	N/A	none	<u>success</u>
Circle 8 Jul 03	Michael (19.5)	25 Dec 97 (14)	9 (18)	carry/use knife (1), driving (5), property (5), public order (4), violent (3)	heavy	53	3 (11)	driving (8), property (2), violent (1)	moderate	partial success?
Circle 9 Sep 03	Jason (25)	21 Oct 93 (15)	5 (11)	driving (9), property (1), public order (1)	moderate	68	4 (10)	driving (4), property (2), public order (4)	moderate	no difference?
Circle 10 Nov 03 & Feb 04	Bev (43)	23 May 77 (16.5)	1 (2)	property (2)	light	N/A	0	N/A	none	<u>success</u>
Circle 11 Jul 04	Hayley (22)	01 Dec 97 (15.5)	2 (4)	property (2), violent (2)	light	7	10 (16)	carry/use firearm (2), property (10), public order (3), violent (1)	heavy	<u>failure</u>
Circle 12 Jul 04 & Sept 04	Darrel (21)	10 Jun 97 (14)	4 (6)	public order (6)	moderate	509	4 (6)	carry/use knife (2), driving (1), drug (1), public order (2)	moderate	no difference?
Circle 13 May 04 & Oct 04	Jackie (45)	25 Oct 77 (18.5)	1 (3)	property (2), violent (1)	light	N/A	0	N/A	none	<u>success</u>

a. None = zero, light = one or two occasions; moderate = three to six occasions; heavy = seven or more occasions of police contact where at least one offence was proved.

b. After Harry's three-year window of time post-Circle, he was sentenced to imprisonment and was in jail during the fieldwork period in April 2008.

Table 3: Judging whether the pathway towards desistance is evident for seven Circle defendants

Non-family violence Circle #	Circle defendant name	Types of offences during the three years after the Circle (<i>N</i> offences)	Quality of re-offending (minor / somewhat serious / serious)	<i>N</i> days between the Circle and first occasion	<i>N</i> days between first and second occasion	<i>N</i> days between second and third occasion	<i>N</i> days between third and fourth occasion	Further proved and/or pending re-offending beyond three years post Circle? (yes/no)	Last proved offending date (age)	Pathway towards desistance is evident? ^a
Circle 1	Chris	destroy or damage property (1)	somewhat serious	491	N/A	N/A	N/A	no	Jun 2003 (29 yrs)	yes
Circle 2	Brian	driving while disqualified (3), goods suspected stolen in custody of other (1)	minor	31	195	667	168	yes (1 occasion, 1 offence – pending)	Jan 2005 (27 yrs)	yes
Circle 5	Harry	shoplifting (1), sexual intercourse without consent (1), aggravated break and enter (1), drug possession (1), assault with act of indecency (1)	serious	290	664	2	32	no	Mar 2005 (26 yrs)	no
Circle 6	Leena	destroy or damage property (1), drive while disqualified (1), dangerous driving (1), indecent assault (1)	somewhat serious	125	494	234	N/A	no	Mar 2005 (36 yrs)	yes
Circle 8	Michael	unlicensed for class (1), be carried in conveyance taken without consent of owner (2), drive while disqualified (1), use of unregistered vehicle (1), use of unserviceable/unsafe vehicle on road (1), use of uninsured vehicle (1), driver/rider state false name or address (1), negligent driving (1), drive vehicle recklessly (1), common assault (1)	minor and somewhat serious	53	87	662	N/A	yes (2 occasions, 4 offences – proved); yes (1 occasion, 4 offences – pending)	Aug 2007 (23.5 yrs)	no
Circle 9	Jason	destroy or damage property (1), behave in an offensive manner in/near public place/school (1), fail/refuse to comply with direction (1), intimidate police officer in execution of duty (1), aggravated break and enter (1), affray (1), drive with high range PCA (1), drive while disqualified (1), drive unregistered vehicle on road (1), drive uninsured vehicle (1)	somewhat serious	68	116	71	N/A	no	May 2004 (26 yrs)	yes
Circle 12	Darrel	use of offensive language in/near public place/school (2), drive with low range PCA (1), drug possession (1), custody of a knife in public place (1), possession/use of a prohibited weapon (1)	minor and somewhat serious	509	57	325	188	no	Sept 2007 (24 yrs)	yes

a. The pathway towards desistance was determined by examining the kinds of proved offences (minor, somewhat serious, or serious), the character of 'crime-free gaps' between the Circle and subsequent offending, and whether there was any offending in the time beyond the three-year post-Circle timeframe.

Chapter 4

Thirteen Circle defendants: backgrounds, experiences, and reflections

In this chapter, we sketch the defendant's circumstances before and after the Circle, and describe the Circle process and sentence (see Appendix IV for a summary of the defendants' Circle offences and finalised sentences). Attention is then drawn to how each defendant perceived the Circle Court process and its impact.

We turn first to the five complete desisters: Adrian, John, Gary, Bev, and Jackie. Completed interviews were carried out for three (John, Bev, and Jackie), and our case study provides more information from their perspectives. However, we include case studies for Adrian and Gary, including why they declined to participate in the research.

Next we analyse the five partial desisters: Chris, Leena, Darrel, Jason, and Brian, all of whom we interviewed except for Chris, who deceased. The chapter ends with the three persisters: Harry, Michael, and Hayley. We were able to interview Harry and Michael, but Hayley was incarcerated at the time of the fieldwork, and we could not locate her after she was released.

When describing the Circle dynamics, we draw from Magistrate Dick's detailed notes of what occurred and what people said at the Circle (the Circle 'transcript'). Also, in describing the personal background information about the Circle defendant, we drew from Aboriginal Project Officer Gail Wallace's notes. When attributing remarks made by the Elders or Respected Persons in the Circle, the Magistrate used the term 'Rep' to denote a community representative in the original transcript. We have changed this to Elder, and when citing the remark, we show the page number from the relevant transcript. When the defendants refer to the Elders by name, we have used pseudonyms.

To differentiate what the defendants said in our interviews from Magistrate Dick's or Aboriginal Project Officer Wallace's notes, all of the indented interview material is italicised. When drawing on the Magistrate's transcript of interactions, we use italics for the defendant when s/he is responding to the Elders.

The complete desisters (introduction)

The five complete desisters had no offending after the Circle. Three were male, and two, female. Their ages ranged from 28 to 45, with an average of 37 years. In the three years before the Circle, all had light or no criminal offending. However, all of them had first offended when they were in their teens (14.5 to 18.5 years of age). All have had problems with alcohol abuse or addictions to illegal drugs, or both. They have struggled to address these problems, and once they were successful, stopped getting into trouble. Of the five, we interviewed three, but two declined to participate. Among the significant themes emerging from the interviews are these. A defendant's resolve to change is essential for a constructive, meaningful interaction with the Elders. The Elders were highly effective in drawing on their personal knowledge of the defendants and in having genuine understanding of their circumstances. Their understanding and support for the defendant was joined with censuring their offending.

Before the Circle

- Adrian began offending when he was 15 years old.
- He suffers from schizophrenia and takes medication to reduce paranoia.
- He has alcohol and drug problems, and his offending typically occurs when he is drunk or high.
- He has sought counselling for mental health problems (schizophrenia).

At the time of the Circle

- Adrian had been living on his uncle's farm (a declared alcohol and drug free zone).
- He had stopped drinking for six months.
- He was caring for his 14-month old son with the help of his mother and step-father.
- He had a job starting three weeks after the Circle.
- He comes from a very supportive family.

Adrian's Circle

At age 28, Adrian attended a Circle to deal with several offences related to stealing and driving a motorbike while disqualified and intoxicated. The Circle began with an exploration of the offences. The victim, whose motorbike had been stolen, was present and was vocal about the emotional and financial effects of the offence on him and his family. The Elders recognised Adrian's relationship between offending and substance abuse. One said,

You have to make peace with yourself and give up the grog. Reoffending is very bad. You know I got one son who is a real dickhead, and you're the same. We aren't going to be soft on you today. We'll be harsh to straighten you out (Elder 4, p. 3).

The Elders were careful to show their disapproval of Adrian's offending and substance abuse behaviour, and at the same time were supportive. One said,

We'll help you, but you'll have to help yourself first (Elder 2, p. 4).

The Elders discussed the potential ramifications of Adrian's offence and how he could have killed someone. The Magistrate reinforced this by outlining the range of likely sentences he could impose for this kind of offending. Discussion ensued on the importance of accountability and what would be an appropriate penalty. The Circle decided that Adrian should have a 12-month Suspended Sentence with these conditions: 12 months good behaviour, to continue to actively participate in counselling for schizophrenia and substance abuse, submit to urinalysis tests, and two years' disqualification from driving. In addition, compensation (\$226) was awarded to the victim for repairs to the stolen motorbike.

Life after the Circle

When Uncle Lou first contacted Adrian, he agreed to be interviewed and a provisional date had been set. However, we then had trouble making contact with him. We visited Adrian's house to see if he was home, but he was away. We were then able to make contact with his mother and uncle by phone. During this conversation, Adrian's mother said that she felt her 'son's mind was not thinking straight'. His uncle then spoke of the difficulty that Adrian was having with the death of his cousin, Chris, another one of the Circle defendants. On the night in March 2007 when Chris was hit by a car and died, Adrian was with him. According to his uncle, Adrian was 'still trying to come to terms' with Chris's death. In the nearly six years since the Circle, Adrian has not re-offended.

Before the Circle

- John comes from a strong family, and his family relationships are important to him.
- He was close to his father and struggled with his death.
- He has had three relationships with women, with at least one child from each.
- He has had alcohol and gambling problems.
- He was addicted to amphetamines when he was younger.

After the Circle

- John has not officially re-offended since the Circle.
- He has a successful marriage, although his wife has been with him through difficult times.
- He and his wife recently adopted a baby from a relative.
- He remains in full-time employment (contract).
- He no longer uses amphetamines, but drinks occasionally after work.

John's Circle

John was charged with driving without a licence and under the influence of alcohol. As a result of these offences and outstanding fines related to other offences, John, at age 35, attended a Circle. The Magistrate's notes are brief, but they show that the Elders condemned John's drink driving, and noted the negative outcomes of the behaviour. One Elder said,

You got to look at the broader picture, you were a danger and could have taken a life (Elder 1, p. 2).

The Elders invoked the importance of John's family responsibilities when speaking to him. They were stern with him about the seriousness of drink driving, and when considering a sentence, they pushed John's resolve to change. The outcome was a 12-month Suspended Sentence, and disqualification from driving for two years.

John's Reflection

When asked to recall the experience, John cited the importance of the Circle's openness, a place where the offender's past and present can be explored, and the involvement of the Elders:

Mainly being able to sit down and actually talk to the judge or the magistrate and the Police Prosecutor and then having all the Elders there. Uncle Alf, he's pretty strict and it's good he's on it as well, because he doesn't put you down, he just makes you have a good look at yourself and what you're doing. More or less telling you to wake up to yourself and have a look at yourself and see what you're doing and what you've been doing ...

Talking to the Elders ... but mainly sitting down and letting the judge or magistrate know exactly what you were going through at that time ...

John remembered that he felt 'worried' at the prospect of entering the Circle, but mostly

because he was uncertain what the sentence would be:

I was more worried than anything because I didn't know what was going to happen because there was a lot of other stuff that was behind me at the time with [my illegal fishing offences],²⁶ and I had a pretty long list [of convictions] ... I think I had a warrant, and they didn't catch me for two years or something ... Yeah, I was on the run more or less ... If they had of caught me, I was going to jail apparently. That's how bad it was because it had lapsed over a certain time. ... From what I remember, they just went back to court, and I had to be fined. If they had of caught me any earlier, it was like 'take your toothbrush, see you later'.

The feeling of being afraid of what the sentence might be soon dissipated as he began talking with the Elders:

I didn't know what was going to happen ... Well, it started to be good in my mind because, as I said, I could actually talk, once the Elders spoke to me and I spoke to the Elders, and they more or less understood what was happening, then speak to the Magistrate and telling him what had gone on. And like my father had passed away, and after that I was sort of going backwards with things, with drugs and alcohol and all the rest of it.

John thought that being able to speak with the Elders, including the sentencing options, was the most positive part of the Circle:

The best thing is to sit and talk to everybody and for everyone to hear what you're going through. The other good thing too is, if you really want to pull your head in and have a go like I chose ... They asked me what I should have [as a sentence], all the Elders, I think they asked me. The Police Prosecutor didn't. I just said 'I think I'd like a two-year suspended sentence', and the solicitor looked at me and sort of went 'Are you sure you know what you're doing?' That was a chance to say 'Well, bugger it, if I knuckle down, this is a way to do it, and if I get caught within that two years, it's sort of like see you later, I'm going to jail'. Being able to sit down and mainly talk to the Elders, they talk to you. For sure they said, 'If you want to knuckle down, to be able to choose what direction you want or what sentencing you want, is a good thing as well'. I mean they've still got to approve it, so does the Magistrate as well. Just being able to sit down and speak and reveal everything was the best part about it, I think.

John also spoke of the 'encouragement' imparted by the Elders and the Magistrate during the process:

The Elders talking to you, more encouragement ... Like I said, they knew I was getting the mortgage, going through the mortgage thing, and they were just encouraging me with that as well. Even Judge Dick, at the end, he knew I had my own business sort of thing, I was working for myself. He pulled me up, and we had a talk on the way out, and he gave me the best of

²⁶ Later in the interview, John explained why he was fishing an excess of the limit of abalone: 'Selling them black-market ... Yeah it's good money ... I mean I was still working ... as a night-fill in one of the supermarkets, and I was just diving through the day ...'

luck as well. So it was everyone with their encouragement as well ... They could see I wanted to change.

When prompted to consider whether the Circle could improve, John spoke of offering more programs, particularly to younger offenders,²⁷ follow-ups, and ongoing support:

Maybe programs to get – especially to the young ones ‘cause the young ones, I don’t think, it’s just another court thing for them – maybe get them out, have programs afterwards for them or something, get them out in the bush and with the Elders, and camping ... Just to keep them on the good side of things because it’s a waste of time if they’re going to go there, and like I know a few of them ‘round here who have been to it [the Circle], and then they’ve re-offended again. I mean that seems like a waste of time, and a lot of other people would be thinking it too, so they really need to have something. Support group or something. They [the young ones] just come back to town, and they’re back up with their mates again, and they’re doing the same stuff ... That’s the difference, I’m getting older, I’m 41 now ... I go out in the bush, and you just sit there by the fire. ... They [the kids] definitely need a support group after [the Circle] just to take them up on the straight and narrow.

John compared the positive and meaningful interactions with the Elders in the Circle with what he had experienced in the conventional court:

It was really good [in the Circle], instead of going into court, sitting there for five minutes, your solicitor says a few things. He’s [the Magistrate] going through so much stuff in the day, he just goes bang, ‘see you later’ sort of thing. So it was good for him [the Magistrate in the Circle] to actually understand the whole background and how it all built up and what was happening and everything else.

He recounted how the Elders drew from their knowledge of him, specifically his difficulties with the death of his father, and how they struck a balance of support and censure in the Circle process:

My father had passed away, and after that I was sort of going backwards with things, with drugs and alcohol and all the rest of it ... It’s ten years this year [since my father passed away] ... But we [my father and I] we’re pretty close, I think that’s where [Uncle Alf] – he understood more because he’s known me since I was a kid and how close I was to my father and everything – he more or less saw the change in myself so that was pretty easy for us to get through [in the Circle] as well ... Even the other Elders, they knew me as well ... They know that you have mucked up, no one’s perfect, but they know that you’re still trying to do things right, and they know how you’re living and what you’re trying to strive for. They [the Elders] all went down hard on you, but they still know that you were trying to do or trying to get somewhere.

²⁷ As Circles evolved in Nowra, more programs have become available.

When asked to consider what changed in his life to stop offending, John spoke of several significant changes, including being fed up with his life of drug-taking:

Just probably enough of doing the stupid shit, just the shit I was doing at the time. It was just getting really out of hand. It wasn't affecting me work, but come to the weekend I was right out there doing some really stupid stuff. It didn't affect me relationship with ... [my wife], but it was just the stuff I was doing to myself, it was really dumb, especially all of the drug-taking. It was worse, I wasn't smoking dope or nothing, I was using amphetamines and stuff ... I got into a crowd that was taking that sort of drug. When you're on it, you're up all night ... But I still like a beer now ... It's all in your head, if you want to give up ... The worst thing I can't give up is cigarettes, that's the hardest one to get off ever. That's ridiculous ...

The fear of being imprisoned also kept him out of trouble. Added to that, providing for his family with regular employment and paying bills, kept him occupied:

Two years [of suspended sentence] if I got in trouble, it was see you later ... [and] knuckling down with work, that's more or less all I do now, go to work, come home, pay the bills, go to work, come home, pay the bills. I'm just in that cycle ... I'm only a subcontractor, I don't work on wages. Like if it rains tomorrow, I don't work ... I've always subcontracted as well. I was doing the same thing when I got caught drink driving, so nothing has changed [there], but it's just made me think now I've got a house and ... [my wife] had the kid, wake up to yourself and have a go ...

John now sees himself as a 'totally different person'. Recalling his time as a drug addict,²⁸ he now views that lifestyle as a waste of time:

Yeah, totally different person. Like I said, I still like a beer, and I've got a lot of friends in town, and I've still got a lot of friends who are on that drug [amphetamines], and I know a lot of people that are on it. I've been with them when they've been on it and asked me if I wanted some and stuff like that. I've gone 'No it doesn't interest me. Go and buy me a beer, that would be better!' ... I think back at those days when you're sitting up all night ... I think about times like that and I'm thinking 'How stupid was it?'

When considering his future, John first reflected on his past:

When I look back now, I think I should have at least been owning a house by now. [I was] living with the older girls' mother [an ex-partner] and probably set up a bit better than what I am now. Now I'm just really struggling. That and I think Dad passing away, just things not going the right way ... Things are still okay, but it's just a lot harder.

He then talked about wanting to pay off his mortgage and making a career shift:

²⁸ John described himself as a past 'addict' rather than a 'user', and thus we have used his words.

I want to try and pay the house off. But I want to try and get a different job, I've put in for an Aboriginal case worker for DOCS online ... I haven't heard nothing back but that's what I want. I want a career change. Like I've been a subby,²⁹ I'll have no super,³⁰ there's no such thing as saving money ... I just want something with a bit of security for the kids, maybe get a bigger house ... The kids are growing too much ... I really need a career change ... I think I could handle that stuff ... If you were a caseworker, I think you would be out in the field a bit, or even a ranger. Hopefully a ranger job might come up or something.

When asked at the end of interview if there was anything else he'd like to say, John reiterated that the Circle is only as effective as the defendant chooses it to be. He also spoke of the importance of respect, and how once having fronted the Circle and the Elders, it is important not to 'muck up' because the Elders trust that the Circle defendant will get their lives on track and not re-offend:

I think the Circle sentence is good, but it's only good if you want it to be, I think. That's the main part. And for it to work for everyone else who wants it to be beneficial for them, you've got to make it want to work because it's no good going in and saying 'All right, yeah, I've spoken to you guys, I'm off, see you later', then going out and doing something stupid again. You've got to want to do it for yourself and for the people [there], for the Elders you sat in front of, and the Police Prosecutor and the Magistrate. You're more or less going to make a fool out of the Elders and of yourself when you front back up to the Magistrate again because you've buggered up again ...

You've really got to want something and do it. It's just got to be in your head, as I say, mainly for the Elders, because it's shame on them again if you muck up again because they sat down and they were talking you up ... like 'I've known him since he was a kid, he was a good kid, played footy all his life'. This, that, and everything else.

John exemplifies the positive effects a Circle experience can have. However, he believed that to be effective, a person had to be ready and motivated to change. Moreover, he identified his increasing age (he was 35 at his Circle) as contributing to his readiness to accept responsibility, stop using drugs, and stay out of trouble. He looked forward to starting a new chapter in his life and sought more stable and secure employment for himself and his family.

²⁹ Shorthand expression for a sub-contractor

³⁰ Shorthand expression for superannuation

Before the Circle

- Gary was first arrested at age 14 for stealing.
- He continued offending as an adult, mostly related to driving.
- He had an alcohol problem and used marijuana.
- He attended a local rehabilitation centre for substance abuse (16 weeks).

At the time of the Circle

- Gary reduced his drinking to once or twice a week.
- His partner had restricted their relationship because of his alcohol problem.
- He had moved an hour's drive from Nowra to get away from friends who drank regularly.

Gary's Circle

When he was 34, Gary participated in two related Circles. The first was convened for two reasons. First, Gary was charged with four offences related to driving while disqualified and drink driving. Having failed to appear in Court, warrants were issued. Second, about a year later, he was charged with six similar offences. During the first Circle the Elders wanted to explore the circumstances surrounding Gary's offences and his pattern of offending and drinking. Gary acknowledged his drinking problem, and the Elders appeared to be sympathetically censuring his behaviour. As one Elder said:

If you know you have an alcohol problem, then you know grog is going to get you into trouble. Jail is no good. I've visited brothers in jail for over ten years and believe me, you don't want to go there. You don't want to be part of it. I know I'm harping on, but you have to say 'no'. Look at the stress you place on your father and your girl and your baby (Elder 3, p. 2).

The Elder's reprimand displays empathy when relating Gary's offending to his own experiences and by invoking family. These are positive and effective elements in the Circle. The Prosecutor also adopted this approach by saying:

You are not alone in committing this offence. You are not alone in going to rehab. I once investigated a crash involving a police car where the driver was over the limit. He went to jail because the people in the other car were seriously injured. It happens, and it must be stopped (p. 3).

There was considerable discussion about the need for an alcohol abuse program. The Circle agreed to place Gary on a Griffiths Remand (a deferred sentence), during which time he was to enter and to remain on the premises of a local residential rehabilitation centre.

Approximately six months after the first Circle, a second took place. After the Magistrate read

the transcript of the proceedings of the previous Circle, an Elder questioned Gary about the progress of his rehabilitation. Gary spoke of his time at the centre and how it had instigated a change of spirit. His return to Nowra was difficult because 'too many people ... are still using' (Circle transcript, p. 4); thus, he moved away from Nowra. After the Circle participants were satisfied that Gary was making a concerted effort with his alcohol problem (and during this time, he had not offended), discussion turned to an appropriate penalty. The Elders considered Gary's circumstances and progress:

I don't want to see fines imposed because of his wife's [health] problems. I think he's got to look after her, and fines are not the way to go. Some fines should be imposed, but he should also be put on a bond. I think the fines should total \$1,000 (Elder 3, p. 5).

I agree. Fines will only set him up to fail. He should make some arrangements for automatic deductions from his account to pay the fines so the money is gone before he can spend it (Elder 2, p. 5).

Such statements show a high level of care and concern that Gary succeed in staying out of trouble. The final sentence was a 12-month GBB and a two-year licence disqualification.

Life after the Circle

When Uncle Lou first contacted Gary in early April, he initially agreed to be interviewed. However, two weeks later, when Uncle Lou rang to organise a meeting time, Gary changed his mind. Uncle Lou paraphrased his reasons this way, 'Well, really, I don't think I want to ... I just want to get on with my life' (Daly field notes, April 2008). Gary has, in fact, got on with his life and stayed out of trouble. His criminal record shows no offending in the six years after the Circle.

Before the Circle

- Bev had a difficult upbringing. As a child, she was sexually abused by her step-father and neglected.
- She was exposed to prostitution and drug use at an early age by her step-father.
- She was involved in break and enter offences early on.
- Bev experienced homelessness as a teenager and went into a girl's home.
- She experienced violence from her son (physical and verbal).
- She was addicted to heroin for most of her life.
- At the time of the Circle, she was dealing with a methadone addiction and attending a program.

After the Circle

- Bev has not re-offended.
- She lives with her mother.
- She has been applying to get public housing for some time.
- She is still addicted to methadone, but is working towards being drug-free.

Bev's Circle

At 43, Bev participated in two Circles. The first dealt with the theft of small food items. During the early stages of this Circle, the Elders showed their disapproval of stealing, and reinforced that stealing is a crime, no matter what the theft is for. They addressed Bev's methadone and alcohol addictions by relating to their own experiences of alcohol addiction and ways to move beyond it. The Elders continually showed their support for Bev, for example:

You've got to trust in other people, but you can only trust other people after you trust yourself (Elder 3, p. 5).

You'll get support from us, I'll help if I can (Elder 1, p. 5).

It was agreed that the Circle should be adjourned for Bev to engage in drug and alcohol rehabilitation. She was also directed to attend a Women's Group and placed under Probation Supervision.

About three months later, a second Circle was convened. Bev had failed to attend drug and alcohol rehabilitation, and the Elders showed firm disapproval, which set the tone for the Circle. The dynamic became softer after Bev opened up and began to explain herself, and the Elders mixed support with censure:

There's no need to feel disgusted here. We're here to help. You're no good to anyone like you are. We're not trying to knock you down. We're trying to build you up (Elder 2, p. 9).

When discussing sentencing options, the Elders were annoyed that Bev had not undertaken the rehabilitation. Thus, it was resolved to finalise the Circle rather than adjourn again. The Elders remained firm throughout their interactions with, and sentencing considerations of, Bev. She received a 12-month Suspended Sentence with a number of conditions (see Appendix IV), including to attend Alcoholics Anonymous and Narcotics Anonymous meetings on a regular basis, and to attend a local, intensive

rehabilitation centre to address her methadone addiction.

Bev's Reflection

Bev recalled the Circles positively, as an environment with open communication, 'just them [the Elders] talking to me and that, like you know...' She said that the Circle was different from a conventional court because there was a familiarity and shared lived experience between herself and the Elders, which amounted to a genuine understanding:

It's done by people that know you. They know your past, they know what you're like, they know what you used to be, you know, what you used to do and that.

Bev contrasted the Circle environment with a conventional court, a place where defendants who use drugs are not understood and are only viewed as 'junkies':

They [court officials] just judge you in there ... [You're] just a junkie to them. Like, they say, once a junkie always a junkie which is not right, you know, not all of us are the same. There are so many young kids around at the moment that get into that speed and shit, you know, like they're going down like flies, it's disgusting.

When asked to reflect on whether the Circle was a 'soft option', Bev said she was happy with the sentencing outcome:

Well, I reckon I was lucky like getting a 12-month suspended sentence for [stealing] two packets of biscuits, like some people can get jail. Like I'm glad I didn't get jail, they'd probably think I was an idiot. I can't even remember how long it was the last time I was in there. I think it's six or seven years now.

Bev remembers that the Elders were supportive of her:

A lot of them [the Elders] knew me, like ... they knew what I used to do and that ... They [Elders] are really helpful. You know, they give you the benefit of the doubt and that, give you a chance.

Further, she recognised the power of the Elders' authority:

They [the Elders] weren't upset with me at all ... If they got upset with me in [the Circle] Court, I would have gone to jail.

Although the Elders were supportive, they also censured Bev. They wanted her to see the negative impact of her behaviours and to address her addictions. When asked about this, Bev said she felt 'All right because I knew them all'. At the same time, she remembered that the Elders were adamant that she attend counselling, an exercise she felt was futile:

Always wanting me to talk to someone or go to a counsellor or something like that, but I don't believe in that because they don't help you ... Like there's no use talking to a drug and alcohol counsellor who has never ever used a drug in their life. All they read is from a text book so they have no idea what the hell is going on. I haven't used for 13 years now, I might be on methadone, fine, but as for the heroin, no.

Bev perceived some of the drug and alcohol counsellors as hypocritical, and more generally, she couldn't relate to them:

I think I went to a meeting there. One meeting ... See I can't relate to them you know, like the counsellors and that ... There's people there [at the rehabilitation centre], that I've seen there, they are hypocrites. Like they sit there, and they have the hide to say to you, 'You shouldn't be doing this, you know, you shouldn't', and the arseholes are still drinking or still touching drugs themselves, and they are sitting down there telling me not to do it. Nah you're a ring-hole. Sorry ...

In the four years after the Circle, Bev has not re-offended. When asked why, she said simply:

I just got sick of going to jail. Like, you know, I feel like part of the furniture after a while. You get sick of it.

She had 'just had enough' of the revolving doors of prison and was ashamed that her mother had to keep visiting her in prison:

Well, when I was in jail, like mum used to have to come up and see me all the time, and it was so hard for her. Because I know that, you just get sick of it, like I said, you know? You go to jail, and there are arseholes that are out here still doing the same thing, and they're still out, and you're going in.

Several times during the interview, she spoke of her mother and her children as being the catalysts for getting her life back on track. When she spoke of her future, independent housing dominated her concerns. This, she felt, was important for her stability and well-being, and her ability to stop using methadone:

I sometimes feel bad, like not having my own place because that's all I've ever wanted, like my own home, you know, just so I can just look after myself and do what I want because I want to get off the methadone ... I can't do that while I'm living at home [with my mum]. I just want to get my own place ... It's too much of a hassle [at home] ... too much drama at home like ... trying to get off a methadone program at my mum's place, I'd end up killing myself.

She elaborated on the stressed environment of her mother's home:

She [my mother] just whinges a lot at me. Like I'm saying, you know, 'I'm 47 years old ... my God mum, leave me alone you know'. ... Like my eldest son ... he used to bash the shit out of me ... Yeah, sometimes [he still does] when he gets a bit grumpy at me, like you know, he'll call me a slut or a

fucking bitch or something like that, but I don't take any notice of him anymore.

Bev's vision for her future and what she would *like* to see not only included having her own place, but also giving back to her community by spending time with drug-affected youth or elderly people and possibly tracing her family history:

I'd love to have a job to go 'round to schools talking to kids. That's what I'd love to do. Doing that ... [and] I'd like to have my own place. Even get a job. But like just something to do with the elderly or even kids with their drug problems, there's not enough ... Apparently out there in the old people's homes, like a lot of them have no visitors and that you know, have nobody. A lot of them would be a lot stronger and live a lot better if they had visitors and someone to keep them happy, you know. Take them for a walk up the road ... My dad's parents, they came from Africa. They were born in Africa, my grandparents. I'd like to find out my family tree soon...

From Bev's perspective, the key barrier to her future wellbeing was a lack of independent housing. She was upset at being forgotten by the NSW Department of Housing, and she wondered if her previous criminal history, together with racism, were responsible for the department's not responding to her requests:

Well, I've had my name down on the list with Department of Housing, well they can't find their forms now. I've been on it for like years and years, and it's three times now that they've lost the forms. They were going 'I didn't put them in'. I bloody did put them in, and now, so I've got to go and start all over again now.

Uncle Lou: And you think that ... your record prevents you doing that sort of stuff?

Yeah, it could be, like you know, being an ex-junkie and like breaking in and stuff like that ... It just feels like, you know, they just don't want me to have a house. They say different strokes for different folks ... Like it pisses me off when they say 'oh you Koori people, you are all the same, you smash your houses up' and that. But we are not all the same, you know. Even with white people, they're not all the same, white people smash up houses and that too, you know? My goodness...

Bev was far more comfortable with the Circle rather than being in a conventional court, and she identified the key element as being the shared lived experiences between herself and the Elders. She had entered the Circle at 43, a factor that likely contributed to her acceptance of the Elders' words and her subsequent desistance from re-offending. Other elements that helped her to stay out of trouble were her commitments to family and being 'sick' of being in prison. Bev's hopes for the future included meaningful employment and independent housing. She viewed housing as imperative in her ability to overcome her methadone addiction.

Before the Circle

- Jackie was sexually abused as a child.
- She has experienced violence from her husband.
- When her mother died, Jackie began using, and became addicted to, marijuana and amphetamines.
- She later became addicted to heroin, then to methadone, and started using benzodiazepine (anti-depressants).
- She suffers memory loss and has suicidal tendencies.
- She was estranged from her family because of her drug use.

After the Circle

- Jackie has not officially re-offended.
- She has been reunited with her family.
- She has maintained a drug-free life.
- She wanted to leave Nowra because of widespread availability of drugs.
- She is hoping to secure public housing in Sydney.

Jackie's Circle

At age 45, Jackie attended the first of two Circles. The first dealt with her breaching a two-year GBB from an assault conviction. Jackie breached the bond by committing two further offences: six counts of cheque fraud ('obtain benefit by deception'), and shoplifting. For these offences, she was sentenced to 150 hours of community service. However, after an additional shoplifting offence, Jackie was deemed medically unfit to complete the community service hours, and a Circle was scheduled. During the first Circle, Jackie's life circumstances and her problems with drug addiction were discussed. The Elders concentrated on understanding why Jackie used drugs because this was the basis for her offending. On the one hand, they were caring, as evinced by this Elder's comments:

We'll give support, but her mind must be occupied to progress. I have faith in you ... If you have faith in you, you will do it (Elder 1, p. 6).

At the same time, the Elders reprimanded her. They agreed that her drug-taking and her mother's death should not be used as excuses for offending, and they focused on her inability to be a good role model for her children and grandchildren if she continued using drugs. They proposed that sentencing be adjourned so that she could enter into drug treatment. Jackie was to attend Narcotics Anonymous weekly and work on a voluntary basis for a rehabilitation centre.

Five months later, the Circle re-convened, and discussion focused on what had occurred in the intervening period. The Elders were pleased with Jackie's accomplishments: she had attended drug treatment, re-established contact with her formerly estranged daughter, and was looking healthy, despite having experienced a severe health problem. The Elders' words were encouraging and full of pride, as one Elder said:

Circle is a healing process. ... [The] hurt won't heal until it comes out in [the] Circle. Getting it out is a big step, I know it's hard to express yourself, but it's worthwhile. It's all about the healing. I'm really proud of you (Elder 5, p. 9).

Jackie's growth and change was acknowledged by all Circle participants, including the Prosecutor, and the proposed sentence took this into consideration. She was given an 18-month GBB, subject to Probation Supervision. It was also discussed that Jackie ought to maintain her attendance at counselling and rehabilitation services to keep her on a drug-free track.

Jackie's Reflection

When asked about the Circle, Jackie said she felt both ashamed and supported:

All I can remember feeling is guilt, embarrassed, happy ... glad that they [the Elders] wanted to help me ... I know I was pretty low [at the time of the Circle] ... I was ready to just do myself in, but then Auntie Annie and all them came to the rescue.

Jackie revealed that at the time, she was close to suicide, but the support she received from the Elders enabled her to see her situation differently. She recalled the Circle as a supportive environment:

Thinking I'm getting help because before that, I just didn't, I didn't know where to go, like I was in a little round room going nowhere. Embarrassed to go and see, to talk to anybody, especially the Elders, ooh yeah. Or just anyone, just keeping it all to yourself, and it doesn't work that way. It just doesn't work ... I wasn't in the right frame of mind. I can remember some things. I remember I didn't put my head up ... I had my head down, and I was ashamed because of what I'd done or what they'd [the Elders] think of me, and I just couldn't get any lower. But then, on the other hand, I was glad that I was there, and I was getting their help that I needed. Because before I just thought 'Oh no, no one can help me'. The only way I can help myself is put myself out of this world. That's how close I got.

About feeling supported in the second Circle, Jackie said:

It was just they [the Elders] were all proud of me. Then that made me feel really good because, like for the first time I thought, like with the Circle they don't sort of look down your nose at you, 'oh, you're a junkie. We don't want nothing to do with you'. It's not like that. See in courts, don't get me wrong, I love Judge Dick, he's a lovely man. He's helped me so much too ... He's good. Just to know that a Judge came up to me and shook my hand, and he said he's so proud of me. Just made me feel really ... Having that, and everybody in the Circle, they still say it to me, everybody.

When encouraged to say more about how the Circle process was different from the conventional court, Jackie reinforced the point that the Elders personally care for offenders:

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

In addition to emphasising that the Elders in Circle Court are there because they 'want to help you' whereas in the regular court, 'they've got to do that', Jackie reiterated the same point that another Circle defendant (John) made, 'you've got to want to be helped' and 'it's no good' otherwise.

Uncle Lou asked Jackie whether she thought the Circle was going to be an easy option, and in her response, she said that some defendants may go to a Circle, thinking that the Elders are going to be a 'pushover', but 'that is not what it's all about'. She continued:

They're [the Elders are] there to help you. They're there to give you advice, and that, and it's up to you whether to take it or not. Yeah, you're right, they [some offenders] do go there ... Somebody was telling me from the Circle that there's two young guys went there [for break and enters] ... They thought they were just going to go there and get a slap on the wrist ... [But they got] nine months each [imprisonment] ... Yeah, because that's the second time they were there [sentenced by a Circle], and they [the Elders] ... gave them advice like they did to me. You can do this, this, this, this. Well, I did all that, and then when I went back, that's why they were so proud of me. Ooh, even Judge Dick's proud of me!

Jackie acknowledged that for the Circle to be effective, a defendant needs to listen to and 'take' the Elders' advice fully, as she did. When asked to consider how the Circle process could be better, Jackie felt that nothing needed changing. However, she reiterated that a person must have the desire to change and 'want to be helped':

I don't see anything that needs to be changed. They're [the Elders are] doing great ... They're not pushovers either. So lots of people think they're a pushover, but they're not. You go there, you don't go there to try and con them into doing this, that, and the other. You're there for them to help you and the advice that they give you, they'll give you advice, you don't like to take it, well, that's up to you. ... But if you want to be helped by them, you'll listen and it's excellent.

Just before the first Circle, Jackie stopped using all types of drugs. The Circle transcript records her as saying, 'I'd stopped taking any sort of drugs, pills, everything. I detoxed'. At the second Circle, she had stopped taking methadone for 21 days. Jackie realised that her offending was directly related to her need for money to buy drugs, but she 'freaked out' when her 11-year old son was threatened by a drug dealer when coming home from school. She needed to find a way to pay back her 'drug debt', and quickly. She had 'nothing left to hock', and this led her to commit the cheque frauds:

When I was on the drugs and everything, I didn't care ... That fraud thing with the cheques, I didn't know that I was in a corner, and I didn't know what else to do ... I had nothing left to hock, I had nothing, and then they pulled him up [my son] and said that they were going to belt the crap out of him, and he was only, I think he was only about 11 ... He come home crying, and I freaked out, and I'm thinking I don't know what to do, I don't know what to do and then all of a sudden I just thought I've got to get stuff somewhere to sell it. So I went to the bank, got a cheque book, went to Harvey Norman bought all this stuff, sold it, paid my drug bill, and told the police. I didn't hide nothing. I didn't lie to them. I told them why I did it.

During her interview, Jackie spoke of the overwhelming availability of drugs in Nowra and the lack of police interest in curbing the problem. Uncle Lou also spoke of this problem, reinforcing what Jackie said. Despite this context, Jackie's strength and determination, with the support of her family, the Elders, and the community, resulted in her becoming drug-free. She said that her strength came from her immediate family members and 'knowing people were there that did care', and that she turned 'right around' when her son was threatened:

I think mainly things that changed me, that had a lot to do with my family. Really close, we're really close. Especially me ... dad and me kids, and me little brother. It was [also] just knowing people were there [from the Circle] that did care. They weren't bullshitting to me ... I sort of turned. I was thinking to myself there are people that do care so now it's up to you. They've done their part, you do your part. It's only really the Circle and what's happened with my son [when he was threatened] that turned me right around. That was like the slap in the face ... At the time I wasn't thinking. I didn't care if I got caught or anything. I just didn't care. I just didn't want nothing to happen to my son.

Although Jackie has not offended since April 2004, she acknowledged that she needs to steer clear of people she knew from her drug-using days:

Once they [people with whom drugs were the basis of a relationship] notice you're not into anything anymore, they sort of tend to not go near you, and that's what I like. If I see them in the street I just say 'hello' and just keep going ... I don't want to know. That's your life, this is mine.

When encouraged to talk about how she sees herself now, Jackie spoke of being overrun with guilt for being drug-using mother, and in hindsight

today, she cannot recognise herself as 'the drug addict person ... I can't even fathom her':

... Me son was three years old [when I started heroin] ... I just still now, I just feel guilt for what I've done to them ... to me kids. It still eats away at me ... Because he [my son] was around me all the time, see ... [but] he never did without. I never neglected him or anything, but just him seeing me, and he's seen me drop where the ambulance had to come, ... and that's really eaten away at me.

I will not walk back in that shop [where she passed the false cheques]. I've never been back in there since. I can't ... Guilt's still playing me. But I know that wasn't me [because of the drugs]. I don't know who that was. I didn't, I still don't. I can't even fathom her ... [Now] I get on good with everyone, and I feel better in myself that I'm not the person I was before, not the drug addict person. This is a new me ... Brand new.

Jackie's experience of desistance is how Maruna (2006) describes it: a change in identity, a 'new me'.

Toward the end of the interview, Jackie repeated that drugs made her feel 'worthless'. She wanted others to learn from her experience:

Just don't go near them [drugs]. If you don't know nothing about it, stay away from it ... It's just wrong. It doesn't make you big, it makes you small, and it makes you worthless. That's how I felt ...

In reflecting on her future, Jackie said she would like to take advantage of her ability to get along with people, by enrolling in a hospitality course:

I want to go and do a TAFE course – hospitality – because I get on good with everyone, I can talk to anyone, I can handle drunks. I know how to handle them without getting them upset and everything, so I reckon I'd do good service.

She would also like to live away from Nowra:

Getting out of this town ... I want out ... Too many drunks, too many drug addicts, too many junkies. They're everywhere, and I'm stuck right in the middle. I handled it. Three years I've been here, nearly four years, and I can still handle it. I can still say 'no'.

Uncle Lou reinforced Jackie's point about the widespread availability of drugs. During the interview, he said, '... this region here is absolutely rife with drugs ... Every level. Ice down'. It is in this context that Jackie spoke of her need for a different place to live:

That's what I said to the Housing Department: 'get me out of here please'. I even begged them for a two-bedroom unit. Just get me out because they [junkies] all come here. All hours of the night, I don't know, trying to break in. Kick me back door in when I wasn't home.

Jackie felt shame when facing the Elders in the Circle, but at the same time, she was grateful for their support at a time when she felt close to suicide. She believed that the Circle is effective because the Elders genuinely and personally care for the defendants. Like John, Jackie said that Circle defendants must be ready and willing to change their ways. In looking toward the future, Jackie desired meaningful employment and independent housing. She also believed that in leaving Nowra, she could escape a context of widespread access to drugs, which would better allow her to continue to be drug and crime free.

The partial desisters (introduction)

This group sits between the complete desisters and the persisters. From our analysis of their offending, each person is on a pathway toward desistance. The five partial desisters did re-offend, but the character of the offending was minor, it occurred a long time after the Circle, or it occurred soon after the Circle, but then stopped.

Of the five, four were male, one was female. Their ages ranged from 21 to 34. Of the five, four had problems with alcohol abuse, and one, an addiction to heroin.

We order the case presentations from those who clearly typify a partial desistance pathway (Chris and Leena), to those who may be viewed as borderline cases (Darrel, Jason, and Brian). Darrel's post-Circle offending showed a good deal of police targeting and criminalisation, and Brian's was largely related to driving offences. Jason was incarcerated for about 75% of the three-year window of time. For the three cases, we then examined the character of offending beyond the three-year window. Darrel has stayed out of trouble since September 2007, and Jason had not offended since his release from prison, about a 15-month period of time. Neither has any pending court cases. Brian had a significant crime-free gap of about 22 months, but was again arrested for driving offences, the last one early in 2005. Although he had no proved offending since then, he had a pending court case for an arrest late in November 2007. For these three cases, the oscillation between conformity and criminality is tied to the men's abilities to drink responsibly and not drive a car.

Before the Circle

- Chris had an extensive criminal history (over 50 convictions), along with terms of imprisonment.
- He had an alcohol problem.
- He was unemployed and under the influence of alcohol for most of his offending.
- Family was very important to him.
- At the time of the offences that were dealt with through the Circle, he said he was profoundly affected by relatives' deaths.
- His wife had recently left him with their three children.

After the Circle

- Chris stayed out of trouble for 16 months after the Circle and was deemed a success story by Nowra locals and the media.
- Chris died in March 2007 in a car accident.

Chris's Circle

At 27.5 years old, Chris participated in one of the earliest sittings of the Nowra Circle Court. He had an extensive criminal history, having first offended at age 16, although during the three years before the Circle, his offending was less heavy. The Circle was convened to address an assault and damage property offence. Right after the assault, Chris reported it to the police. At the time, he was serving a Periodic Detention sentence.³¹

The Circle began with an exploration of the offence. Chris was described as having a 'cavalier and haughty demeanour' (Circle transcript, p. 3). Supporters for the offender and victim were vocal during the early stages of the Circle. The Elders censured Chris's offending behaviour, one saying:

You wouldn't hit a Koori³² who was 52, because at that age he'd be an Elder. So don't hit any other Elders, black or white (Elder 3, p. 3).

The Elders then shifted the focus to consider sentencing. They spoke about the potential for Chris to receive a prison sentence and the effect of this on him and his family:

Do you want your little fellas [children] coming to jail to visit you, is that what you want, you want them to follow your footsteps, you want them to come to the jail? (Elder 4, p. 4)

No.

Then get some self-respect (Elder 4, p. 4).

The final sentence was an eight-month Home Detention Order (six months non-parole), a nine-month GBB, completing an anger management course, and accepting the supervision of an Elder. In the final stage of the Circle, Chris apologised to the victim and

³¹ This means he was serving time on the weekends.

³² Koori generally refers to Aboriginal peoples living in South-eastern Australia.

admitted he needed help:

I need help [with alcohol problems and violence], I blame myself. I'm doing weekends [Periodic Detention], but that still gives me five days to get on the grog, I need to get off the grog (Circle transcript, p. 5).

Chris's apologies to the victim were received as genuine, and at the end of the Circle, they shook hands.

Life after the Circle

Chris had no offending for 16 months after the Circle. He was viewed as a clear success story in the local area, and there were many media reports during this time about his experience with the Circle and how it affected him.

In a television program on Circle Sentencing, Chris said that before the Circle:

I was just on a downward spiral, out of control, didn't care no more (7.30 Report, ABC television, 1 September 2003).

In a newspaper article about the Circle, he was quoted as saying:

My crime to me was a pub fight, but for the victim it was terrifying, and I felt remorse for what I had done (Jopson, 15 March 2003: 1).

In another newspaper article, Chris attested to the difficulty of the Circle process:

I think I got punished twice, by being in the Circle in the first place and then getting the sentence itself (Harris, 2 July 2003: 1).

In a third newspaper story, Chris spoke about a misplaced perception that the Elders treat Circle defendants leniently:

You think they [the Aboriginal Elders] are going to be on your side because it's black versus white. It was a bit of a shock. I thought if they are saying I am doing wrong, I must be doing wrong (Pelly, 29 October 2003: 1).

In ABC's 7.30 Report (1 September 2003), when Chris was asked why the Circle worked for him, he said:

For me, it's just being honest with meself, being honest. I couldn't con me aunties and uncles because they knew who I was, you know what I mean? They [the Elders] knew if I was talking crap, or what not, you know what I mean? So I couldn't con them. And I really got pushed into a corner where I had to be honest with meself and with the people that were in the Circle.

Several sources quoted Chris saying that as a result of the Circle, he had undergone significant change:

Now I make my own decisions, I make my own choices and enjoy life ... I've made amends with people I've hurt in the past, I have got my relationship back on track, and my kids love and respect me (Harris, 21 May 2003: 22).

I've changed my attitude. More love inside me now than anything else, not the hatred. So, out of the Circle, I got me own respect back, I got financially right, cleaned up all me debts, got me kids' respect back, I'm able to do things with me children. If I didn't go to Circle, I'd probably be in jail writing letters to me kids, you know what I mean, instead of being with them full time. (7.30 Report, ABC television, 1 Sept 2003)

Chris's mother was quoted as having thanked the Magistrate and others connected to Circle Sentencing:

Without you, my boy would have ended up in jail ... The Elders in this community gave him the chance (Jopson, 15 March 2003: 2).

All the available public records attest to Chris's crime-free life during the 16 months after his Circle. However, at about 16 months, Chris committed a property offence. Upon conviction, he was fined \$450. Magistrate Doug Dick shed further light on the circumstances surrounding this property offence. He noted the following:

Chris forcefully pushed open a glass door of a hotel after being told to leave. He hadn't been drinking. The direction to leave had an element of unfairness about it. The glass in the door shattered. His plea was accepted on the basis of recklessness. He was clearly distressed at returning to court and through his solicitor, apologised for his recklessness. He wanted me, the prosecutor, and the Elders to know that he felt he had let us down (Dick personal communication, email 28 October 2009).

Unfortunately and sadly for his family and the Nowra community, Chris died almost three and one half years later in a car accident in March 2007. He was in his early 30s.

Before the Circle

- Leena brought up her three children on her own.
- Since the death of her mother, Leena has had poor relations with her family and had little support from them.
- She has struggled with a heroin addiction since 1994.
- She was imprisoned for two months, which made her feel ashamed and affected her self-perception as a good mother.

After the Circle

- Leena says she is drug-free.
- She has reconciled with her family.
- She re-offended after the Circle, but at the time of the interview, three years had passed since any official re-offending had been recorded.
- She feels she has grown since the Circle.
- She attributes staying out of trouble to her desire to better herself as a person and mother.

Leena's Circle

At the age of 34, Leena attended Circle Sentencing for a driving while disqualified offence and two theft offences (one was for small food items, the other for clothing and food items valued at \$98). These offences, which occurred on separate occasions, were initially brought before the Court. However, when Leena did not attend Court, a warrant was issued for her arrest.

The Circle began with an exploration of the offences and Leena's personal circumstances. Finances, lack of family and community organisational support, her relationship with her children, and her past and current substance abuse were discussed. The Elders continually showed their support. For example:

Well, I'm always just a phone call away (Elder 4, p. 3).

We are already here, and we will always be here for you (Elder 3, p.3).

The Elders reinforced that the difficulties Leena faced with her teenage daughter were a result of her offending. Although the Elders were supportive of Leena's circumstances and difficulties, they were quick to remind her that the Circle was her final chance. As one Elder said:

With Circle Sentencing, you only get one chance. If you fail, the Magistrate will deal with you (Elder 3, p.5).

In exploring sentencing options, the Elders conferred with the solicitor and the Magistrate. After much discussion, the official sentencing outcomes of the Circle included a nine-month Suspended Sentence, Probation Supervision (nine months), counselling (anger management, family support, and financial management), drug and alcohol treatment, and a licence disqualification for two years. In addition, Leena's Habitual Offender Declaration was quashed, and she was to accept the guidance of Elders while serving the sentence.

Leena's Reflection

Recalling the Circle, Leena focused on the shaming aspect of the process:

I didn't know what to expect [of the Circle]. As I said to Aunty Annie, it was horrible. It was like being scolded again as a child, and it does really work in that sense.

She was frightened at the prospect of going to the Circle:

[At the time] I still had ... [my youngest child] who was very sick, the little one. I had her [gave birth to her prematurely] at 22 weeks pregnant, so at that time I didn't want to go to jail. I was very frightened. ... I didn't know what to expect.

She was aware that the Magistrate and an Elder she knew well were going to be there, and this made her a bit apprehensive:

No. I didn't want to front that [Magistrate] again. I knew Uncle Alf was going to be there. I knew if I had to go back to court, I knew I was facing a sentence, definitely.

At the start of her Circle, she was asked by an Elder if she thought the process was going to be 'easy' because she was Aboriginal and facing Elders. She recalled saying to the Elder,

I said 'No, Uncle Alf, I'd rather face the Magistrate Doug Dick than front you'...

Once in the Circle, she learned that it allowed the space to discuss her behaviour and problems:

They [the Elders] actually talk to you about why you committed the crime, why you did what you did, and where your head was at. That's not the way that you normally would think. They [the Elders] actually got to the stem of the problem, and I realised that I know what it is, it's the guilt of mum and not having said sorry [before she died], I had to go back and face a few demons.

She relayed that she had had a 'massive blue' with her mother, and she didn't have a chance to apologise to her before she died.

Compared to the conventional court, in the Circle, 'there was nothing to hide':

It's totally different [from court] ... It's more, we say 'shame job'. Everybody knew all the gory details. There was nothing to hide. I had to sit there right in the middle, and I had to look at everyone. If I dared put my head down, they would say, 'Look at me when we're speaking to you, Leena'. They really made me front it all. As I said to Uncle Alf, 'I am at fault Uncle Alf, and I should be punished'...

Her comment reinforces the themes noted in Chapter 1 about the Circle process: a defendant cannot 'hide', but must 'front it all'. That happens in a context in which the defendant feels a strong sense of respect for the Elders:

The ones [the Elders] that I've fronted up to, they're all a wakeup so you can't take them for fools.

When Uncle Lou asked Leena about 'the shame factor' in the Circle, particularly 'if her mum and dad were alive now, how would they feel about what you're doing?', Leena replied:

When they [the Elders] talk to you about fronting the people you stole the money from, like the people that own the bank books, as I said to Uncle Alf, 'I don't want to do that' ... He said, 'You think they've got hundreds of thousands of dollars in that account. Well, they've just taken out a double mortgage. ... It wasn't savings, Leena, it was loans'.

The Circle was 'real spiritual' to her, as if her mother was there:

It was like my mum was there too. It was real spiritual. And it is. I haven't felt like that since I was a little kid and my grandmother was still alive. Instantly the guilt and all that was lifted ... Uncle Alf said to me, 'Your mum would have been so proud of you' ...

Leena was vocal that the Elders must be the *right* Elders. She recalled a conversation with a family member about problems that can arise in a Circle when the Elders may not be appropriate:

Yeah, he was more or less pointing out to me about South Nowra's got their little mob ... And as I said to him, that's something we've all got to come to terms with. ... As long as people know the defendant, and they do class the Elders as Aunties and Uncles, it will work ...

She believed there needed to be greater awareness about the process:

People need to know more about Circle Court because even in the local area a lot of the kids don't know, they have no idea about it.

Further, she noted there were misperceptions about the Elders being paid:

They're [the Elders are] not getting paid for it. That's another thing. A lot of people think they're getting money. It's got nothing to do with bloody money. These people are there because they care.

Several weeks after the Circle Court meeting, and like other Circle defendants, Leena's sentence was reviewed and finalised in the Nowra courtroom. Leena recalled the experience fondly because the Magistrate was someone she had grown to trust and could talk with:

... when [the Circle sentence was finalised], [Magistrate] Doug Dick was in the room that day. Now me and Doug, I can actually go to him and speak

to him. I have a totally different wavelength with Doug now. That's something I never thought in my entire life would happen, I'd actually become a personal friend of Doug Dick's!

Although the Circle was a positive experience for her, she continued to use heroin, and as a result, got into trouble again. She spoke of the support she received from the Circle as a catalyst that prompted her to stop using drugs, although it took some time:

No [I wasn't completely clean at the Circle]. It wasn't until I actually got on a program, and I wouldn't have done that if I didn't have the support of the Circle Court. I probably would have ended up in a bigger mess, but I had to beat that [heroin] habit first ... I've been clean for five and a half years now.

Leena re-offended a number of times after the Circle, but the offences were mainly driving related. When asked if the heroin was partly responsible for further offending, Leena disagreed:

With the driving [offence] with ... [my youngest daughter's father] I ended up in a terrible mess there. I shouldn't have had anything to do with the man. He actually gained access through the courts ... Otherwise she [my youngest daughter] wouldn't even know him. I ended up indulging in alcohol again. It was more the grog that led me back [to offending].

Leena has stayed out of trouble since March 2005. When encouraged to consider what happened to help her stay out of trouble, Leena said that the key factor was a desire to be there for her children:

Starting to stand on my own two feet. I got away from the two fathers [of my children] and stayed clear of them and realised that if anything is going to happen, my kids need me.

She also had a health scare, which made her realise that she needed to look after herself so she could care for her children:

Then I had a turn, I had a 16-centimetre clot go through my heart a few years ago, and I realised, shit if anything happens to me, there's ten years between ... [my youngest and the middle daughters], five years between ... [my middle and oldest daughters]. She [my oldest] said 'Mum I'm big enough to look after myself and bubby'. She's my little gift from God.

Before the Circle, Leena was apprehensive that she might receive a prison term. She had been imprisoned once before, in 2000, and the experience made her realise it was 'more punishment for my kids than for me':

Jail, it was a big wakeup. That was more punishment for my kids than for me. That was a big eye opener seeing all them young girls coming and going. In two months, seven girls had gone back through the system. One of them said, 'We just went out and re-offended because we don't have to worry about electricity bills'. I thought then and there, the poor kids, they've just got no idea. There's more to life than going to jail and wanting to go back. Going out and re-offending instantly ... they didn't have homes

... When I went to jail, my oldest daughter got into the opening ceremony of the Olympic Games. She danced in the Koori dancing so she made me very proud. But I wasn't there to support her. All the training that she did, she started all that on her own.

Leena recounts her time in prison as a 'holiday' for her, but difficult for her children:

Like I said to them [the Elders in the Circle], jail was like a little holiday for me. I didn't have to cook or clean after my kids, but that was the biggest and the worst part of it ... [My oldest daughter] is 21 now, and she still plays the guilt trip on me: 'You went to jail when I was a kid'...

Leena frequently spoke of the importance of family. She cited the death of her mother as a major blow (she died more than a decade ago), but more recently, her family is back 'together again':

It was horrible [when mum died]. Mum was our rock. She was a big stitch to the woven blanket. When mum left, we all fell apart as a family. But we're all slowly getting better. Just to see dad and all of us together again. It's amazing.

When asked about her self-identity and how she sees herself, Leena said:

You can only change the future, not the past ... It's no good dwelling on the past. I know I've changed for a better person. My dad actually brags about me, something that he hasn't done in many years. He used to avoid me like the plague.

For her future, Leena sees her three daughters' schooling as important:

I'm praying that ... [my middle daughter] will stay at school. We got her back to year 10. She's got two jobs ... on the weekend. ... [My youngest] will be still at primary school so I hope all is going well at school for the kids. I'm getting more involved with [my youngest daughter] at school, something that used to eat me because I didn't do a lot for ... [my other daughters] when they both went to school.

In sum, Leena described facing the Elders as a 'shame job', but she was grateful for the Circle's open communication and believed it was a powerful and spiritual process. She reinforced the view that it was important to have the *right* Elders involved for the Circle dynamics to work well. Leena believed that the support she received from the Elders helped her to break her drug addiction. Although she did offend after the Circle, it was relatively minor, and she had significant crime-free gaps in the three-year window of time and has stayed out of trouble since. Like others, Leena's reflection on her future was founded on her relationships with and the wellbeing of her children and family.

A postscript: As this Report was going to press, we were saddened to learn that Leena had passed away from a health-related illness in September 2009. She was just 40 years old.

Before the Circle

- Darrel began drinking at age 14, and later in his teens began smoking marijuana.
- He has been convicted of many public order and property offences.
- Darrel felt harassed and 'picked on' by the Nowra police and said that one officer 'bashed' him.
- He was suffering from depression and taking anti-depressants.

After the Circle

- Darrel has a girlfriend and son, and they live with his mother.
- He has been disqualified from driving because of an inability to pay fines for varied offences.
- Darrel's debt from accumulated fines is scheduled to continue to 2016 or 2017.
- He has completed several educational courses, and intends to pursue further education.
- At the time of the interview, Darrel was unemployed, but has been actively seeking employment.

Darrel's Circle

At age 21, Darrel attended two Circles. The first dealt with wounding a licenced nightclub security guard with a broken glass bottle, an offence he committed while he was on a GBB. The Magistrate adjourned the Circle because questions were raised about the circumstances surrounding Darrel's arrest, and Darrel and his supporters appeared to be uncooperative with the Circle process. In the first Circle, the Elders disapproved of police procedures because it took the police three months to lay charges against Darrel. The Police Prosecutor, and to a lesser extent the Magistrate, defended these police procedures, a point that led to much discussion. As one Elder said:

Why did it take three months to charge him? It seems to me blackfellas never get a fair go (Elder 1, p. 4).

The Magistrate sought to focus the Circle on Darrel's offence. However, when exploring the offence circumstances, there was much debate between the victim (the security guard), his supporter, and Darrel's supporter (his mother) about the conditions under which Darrel's offending occurred. The Elders attempted to re-focus the Circle participants, and they sought to engage Darrel. This failed mainly because Darrel's mother remained in staunch defence of her son, having the same defiance as Darrel. Three Elders suggested it was futile for Darrel to be in the Circle if he was going to be uncooperative; one said:

If you don't want to tell us, how can we help you? (Elder 2, p. 8).

The Magistrate then adjourned the Circle to discuss with the participants what should be done next. They remained divided, as they were during the Circle. The Magistrate described the inappropriateness and self-defeating nature of dissension among the participants. In summing up the first Circle, he said:

They [the Elders] feel an adjournment of a few weeks is appropriate so as to allow Darrel an opportunity to consider his position (Circle Transcript, p. 8).

A second Circle was convened about six weeks later. During this time, Darrel had re-offended and was charged with (and sentenced for) four offences related to driving an unregistered car.³³ In the early stages of this second Circle, the same dissension that was evident in the first Circle, again arose.³⁴ However, the Elders instigated an abrupt shift to explore Darrel's offending and alcohol use:

If alcohol is changing the way you behave, you've got an alcohol problem (Elder 2, p. 11).

You can be charged with having a deadly weapon [referring to the broken glass bottle]. See what the old firewater does to you (Elder 1, p. 11).

Darrel resisted these ideas about alcohol use. The problem, in his view, was that the police single him out. The dynamic of the Circle, and especially the Prosecutor's attitude, appeared to be hostile towards Darrel. Added to this, Darrel's 'failure' in staying out of trouble was compared to his older brother, Kyle, who had been to a Circle and was deemed a 'success' story.

The Elders reprimanded Darrel for having an attitude problem, with one Elder comparing Darrel to a 'billy goat', who 'butts back'. During these interactions, Darrel was defensive. He maintained he did not have an attitude problem; rather, he said, 'if they [the police] give me shit, I'll give them shit back' (p. 13). The Circle participants began to discuss sentencing options. The final sentence for the violent offence was 12 months' Periodic Detention and Parole Supervision. For the GBB that was breached, Darrel received an additional 12-month GBB, as well as Probation Service supervision and a recommendation that he attend anger management and drug and alcohol rehabilitation.

Darrel's Reflection

During the interview, Darrel had difficulty distinguishing the first and second Circles. However, when reflecting on what happened, he referred mainly to the second Circle, and what he remembered was largely negative. When asked what he did remember, Darrel noted the people who were there:

³³ These offences were sentenced through the court (before the second Circle), and he received fines.

³⁴ There was dispute over why the security staff did not escort Darrel completely out of the premises when he was asked to leave. Later, back on the premises, Darrel broke a bottle and threw it in the direction of one of the security staff, which injured his face.

I don't remember that much. Just a little bit. I remember sitting around and all that ... Doug [the Magistrate]... was there, mum and a couple of cops – the gungies³⁵ – and that. ... Prosecutor was there.

When probed about what bothered him, he said that it wasn't the general Circle process that made him angry, but rather how the Prosecutor acted and spoke in the Circle. This and the other excerpts from Darrel's interview are liberally peppered with the word 'like', language we preserve.

[I was] not really [angry] with what was going on. But like just that Prosecutor man. He was like he was still in the courthouse.

In Darrel's view, the Prosecutor seemed to be taking over the Circle; consequently, his experience was little different than being in a conventional courthouse:

I reckon it wasn't that good because it was just, like, we had Uncle Alf and that there. It was, like, giving his opinion. Then you had the little Prosecutor thing there. Then, like, he thought, like, he was still in the courthouse or something ... Like, there were cops around ... I remember him [the Prosecutor] from when I was in courthouses before. Like, he was just the same like he was in the courthouse.

When asked if he was bothered by Uncle Alf 'giving his opinion' in the Circle, Darrel indicated that the Elder was standing up for him. Further, he noted that the Circle would have been better if the Prosecutor wasn't there or had taken a different attitude toward him:

The Prosecutor was, like, giving it a bit, so he [Uncle Alf] had to, like, give it a bit back. ... If the Prosecutor wasn't there, it would have been all good. Or, like if he would have talked in a different, like, attitude.

In his view, there was an imbalance in the Circle. Rather than an equal sharing of discussion time, it felt more like an '80-20 job' to him, with white officials taking up too much airtime:

Well, it should be like 50-50 [white officials/Elders] ... instead of like an 80-20 job [white officials/Elders].

Darrel seemed to be disappointed with the limited role and participation of the Elders in the Circle. Although he remembered that they were 'backing me up' and 'helping' him, they didn't 'sit down and talk ... normal':

[It was] just like a courthouse. Yeah. But it was just in a different spot. I just had my Elders, like a couple of Elders and that. They were just like backing me up ... just like helping. ... [But] they didn't, like, take, like, a different approach to it ... They didn't sit down and talk like normal.

³⁵ Gungies is an Aboriginal term for police officers.

He said that it would have been better if the Elders had had more involvement. He 'respect[s] them way more' because

... they've got a different approach ... So I just, like see, like, they're not having a go at me all the time, sort of thing. They're like my Elders and that. So I just respect them way more.

When Uncle Lou asked Darrel if he thought the Circle would be easier than going to the regular court, he said, 'Well, yeah, a bit'. However, because of the dynamics of this Circle, he didn't see it as being that different from a regular courtroom.

He said that his serving the periodic detention sentence may have had a greater influence on changing his behaviour than the Circle process:

It did [change me] in a way ... After I'd done all them weekends and that, like I snapped out of it a little bit ... But, like, I was just, like, sort of like, in the wrong place at the wrong time for, like, a couple of other ones [offences] ... in the last couple of years ... I was probably just, like, sick of it.

Between his first and second Circle, Darrel was arrested for offences related to driving an unregistered car.³⁶ However, he was not charged with another offence for over 16 months after the second Circle, when he was arrested for offensive language. About two months later, he was arrested for driving under the influence of alcohol. About ten months later, he was arrested for possession of an illegal drug and a knife; and on a fourth occasion, about six months later, he was arrested for offensive language, yet again! All together, Darrel had five convictions for using offensive language on his record.

He told us that he had lodged a complaint with the Ombudsman's office for being 'bashed' by the police, and that this was under review during the time of the second Circle. Ultimately, though, 'nothing got done about it'. The nature of Darrel's post-Circle offending is largely overzealous policing or in Darrel's terms, police harassment in that 'they just try to get me for anything':

Before, like, the cops bashed me. And, like, nothing got done about it. Like, the coppers harass me. Like, I was in a bit of shit and that now so I reckon they just try to get me for anything ... Like, every time I go out [the policeman who bashed me follows me], like, it always happens. So I don't really go out these days. I just sit at home. So fucking sit with the little lad and that, my little boy.

Darrel's experiences with the police were brought up in the second Circle, when he said, 'the police are always picking on me'. The Prosecutor reacted this way:

³⁶ This offence, for which he was fined, is not listed in Table 2 because it occurred after the first Circle and before the second Circle.

I'll tell you why, my friend, police get paid to watch. When you are out with your girlfriend, police do not expect trouble, but when you're with your mates, your past tells us to expect the worst. Things happen that tell police to watch because the past tells us something is likely to happen, and when you are with your mates, it usually does (Circle transcript, p. 11).

This Prosecutor confirms that the police are selectively 'watching' some people more than others because they think that 'something is likely to happen'. Although we do not know the specific circumstances surrounding Darrel's arrests, most of them were public order offences initiated by the police, who seem to be following and 'watching' (or harassing) him.

During the second Circle, Darrel was subject to additional criticism when he was compared to his brother, Kyle, who was present in the Circle as one of his supporters. Kyle had also been Circle defendant (but for a family violence matter), and he had stayed out of trouble. According to the Prosecutor, Kyle was 'no longer a person of interest ... no longer a target':

If you can demonstrate change, you'll find the attitude of police changes in tune ... Look at your brother, there is one hundred and fifty cops in the station who know he has changed ... You see ... Kyle is no longer a person of interest, he is no longer a target (Circle transcript, p. 11).

Darrel's contact with the criminal justice system initially began with drinking alcohol, 'partying', and 'rock[ing] up to the school socials ... drunk'. At 14 years, he and some friends came to a school social drunk and were 'locked up'. Some time later, they were expelled from school. He recalled what happened:

I was, like, partying and that back then too ... I used to rock up to the school socials and that drunk. That's how come we were kicked out of school ... I was blind, eh. ... We got locked up that night ... Went back to the school there the next day or something, got kicked out.

However, now that he is older, Darrel sees himself differently:

I'm heaps different now ... I want to see a future for myself. Because, like, back in the day when I was a teen and that, I used to just break into stuff ... I was just, like, a bored young little blackfella. Just nothing to do. So just hung around [with] the boys and drunk ...

In addition to his experience in periodic detention, he said he 'snapped out' of offending when he and his girlfriend had a son:

I snapped out of it [offending] because probably the little lad [my son]... So that's why I probably snapped out of it ... because back in the day, there used to be parties and that. I used to sit around and drink with the boys and that. Then stay in the parties after football ... because we're playing on Saturdays and that. Go to parties on Saturday nights ... [But], like, I was just sick of feeling like shit, hey, all the time.

Darrel says that having a son has helped him to stay out of trouble:

Feels like I have to provide for him [my son], and that, and do the fuckin' right thing. I want to give him motorbikes and shit, because I like motor-riding.

Looking to his future, Darrel spoke of the importance of providing for his family by getting a job:

I might be getting, like, a job soon. Like training out in National Parks and that ... It's, like, Certificate III in Horticulture ... I hope I'm out here, doing that National Parks and that. I just love being out in the bush and that.

He also wanted to establish his own home with his girlfriend and son. When asked to reflect on the steps he needed to take, he discussed a set of interrelated hurdles. He had to get his driving licence back, which required a letter from the state about his schedule of paying back his fines, before he could drive to training sessions:³⁷

I'm just, I'm waiting for my licence. Like, because I'm getting a letter back from state debt and that. ... And then I can start that [training], like two days a week ... I have to start doing the two days ... out there. But I have to get my licence, and that, before I start doing days out there ... [I got disqualified] because I couldn't pay my fines, and that, ... I'm already paying like, \$25 a fortnight off them ... Probably, like, 2016, 17 or something [before I] pay them all off ... So when I do that, it'll be all good.

When Uncle Lou asked if his criminal record made it difficult to get a job, Darrel agreed that it did, but he also spoke of racism:

Sometimes I think they're fuckin' racist, that's how come ...

In sum, Darrel's Circle experiences were generally negative. He thought that criminal justice officials, particularly the Prosecutor, had too much 'airtime', compared to the Elders. He said he was 'heaps different now' than when he was a teenager, although his record suggests he is still being 'watched' by the police. He tries to stay out of trouble by staying home and not going out.

³⁷ We estimate that at a minimum, Darrel had \$3,600 in fines for offences committed since 1998. However, in his interview, he estimated that he will be paying \$25 a fortnight for 8 years, for a total of over \$5,000.

Before the Circle

- Jason experienced a difficult upbringing: he didn't know his father, and his mother was an alcoholic.
- From the age of ten, he cared for himself and his younger brother.
- He has problems trusting people and expressing himself.
- He has had alcohol and gambling problems.

After the Circle

- In the four and one-half years since the Circle, Jason had been imprisoned for at least two and one-half years, or 55% of the time.
- In the year and several months since release from prison, he has not re-offended.
- Jason says he no longer has gambling and alcohol problems, and he feels his alcohol rehabilitation is progressing well.
- He is no longer with his girlfriend (and mother of his three children), but he takes care of the children every other weekend.
- At the time of the interview, Jason said he was living in an independent and stable arrangement.

Jason's Circle

At age 25, Jason attended a Circle to deal with three offences related to driving while disqualified. Initially, the Elders were concerned with the offences, the potential imprisonment that could result, and the effect of such imprisonment on Jason's children. The Elders were firm, and to some degree, harsh with him. For example, three Elders said:

What gets me is your bloody stupidity
(Elder 1, p. 5).

You're not just a danger to yourself, you're a danger to others (Elder 2, p.5).

I can't fathom it, why not speak to someone about your problems? The last one [offence], there was no reason to drive; you just decided to go for a drive (Elder 4, p. 5).

The Circle transcript suggests that there was minimal interaction between the Elders and Jason, and it appears that he may have been ashamed. Although the Elders continued to reprimand Jason and consider severe penalties, they were also concerned that he receive appropriate and meaningful counselling. Toward the end of the Circle, the Elders softened and showed their encouragement and faith in Jason:

You are brave to come here today and face us, you have shown yourself you can do that, so keep it up (Elder 3, p. 9).

How are you feeling now? (Elder 1, p. 9)

It will make a difference, I now want to get out there and stop offending.

I have a feeling you'll come good (Elder 1, p. 9).

The sentencing outcomes of the Circle included a 15-month Suspended Sentence, Probation Supervision, counselling and rehabilitation programs, and two years' disqualification from driving. Further, his Habitual Offender Declaration was quashed.

Jason's Reflection

When asked to recall his experiences of the Circle, Jason said:

I was happy with the Circle Sentencing ... There was only one thing that upset me. The rest of it was pretty good.

During the interview, Jason explained that Uncle Alf said something that 'upset' him. He recalled the Elder saying

... that I had demons in me ... It hurt me. Especially in front of everyone, like, you know, it just made me feel that small, and he kept going on about it. 'You've got demons young man. You've got to get rid of them demons', you know. After that, I just felt like crying, hey. [It] just sort of put me down ...

However, the Circle transcript shows that the first mention of 'demons' was made in an introductory statement by Jason's solicitor. It is mentioned once, and much later in the Circle, by an Elder:

I don't know for the love of God why you do this. You got demons inside, and you have to get them out (Elder 1, p. 6).

Jason's recollection shows that the solicitor's mention of 'demons' meant little to him, but when an Elder brought it up, this struck an emotional chord. This illustrates the power of an Elder's words: he or she can engender certain feelings in a Circle participant, both positive and negative. Although the Circle occurred over four and one-half years ago, Jason's recollection of what Uncle Alf said was still at the fore of his mind:

It [the Circle] was going good until that was said, and after that I just sort of quietened up and just sat there sort of thing. Just 'yes' and 'no' and didn't talk again sort of thing ... Yeah, well, it did make me angry.

Apart from this negative memory, Jason recalled feeling comfortable with the Circle:

I didn't feel scared or anything going in there. Not like going to a normal court where I am nervous and that before I come in, stuff like that.

He continued to speak of the Circle in positive terms and spoke of being able to express himself:

Yeah, no, it was good because I got to talk with the Elders and that too. Yeah, ways of keeping out of trouble ... It was better than a normal court anyway, plus it saved me from going back to jail.

Jason spoke about how he felt different going to the Circle as opposed to court:

It was different than the normal court, like, I felt a lot ... I didn't feel as nervous and that, like, down there, with sitting around, with all the Elders

and stuff like that. The Judge seemed to be a lot nicer towards me too with the Elders and that around.

He continued to compare the Circle and court environments:

Well, the atmosphere was totally different than walking into a normal court room. So I knew there was the Elders, and that, were going to be there, plus the Judge ... Plus even [Magistrate] Dougie Dick shook me hand after I finished. I didn't expect that. Like he walked up and shook me hand and told me he wished me well, keep out of trouble ... instead of getting angry looks off him all the time in a normal court room [laughs]. He seemed a bit nicer anyway.

When Uncle Lou asked Jason whether he thought the Circle was going to be lenient, he responded:

Well, I did. To be honest, I did, yeah ... No, they [the Elders] still got into me [laughs]. Yeah, the Elders still had their say and told me I was a bad boy, and I got to snap out of it. It wasn't all nice, sort of thing.

Jason relayed that the Circle was a more intimate process, in which the Elders knew and discussed his past:

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

Although he was unprepared for and 'didn't want to remember' what the Elders said about his past, he recognised that he was supported in the Circle. His Uncle affirmed the difficulties that Jason had growing up, and he remains to be an important source of support to Jason:

Well, he has been [supportive] since I've been out of jail. Yeah, he stuck by me all the time. He's always been a support person for me.

Throughout the interview, Jason repeated his discomfort with the Elder who had discussed 'demons'. Upon reflection, he thought this might be related to the fact that he didn't 'get on with' with one of the Elder's family members:

I don't really get on with one of [the Elder's] sons, see. I don't know whether that had anything to do with it.

This is a significant point. Personalised relationships in the Circle are typically a positive force for offenders. However, there may be times when past or current relationships between defendants and Elders (or their family members) create problems in communication and trust.

When asked to consider the impact of the Circle, Jason said that it helped him stay out of trouble, at least for a while, until he was victimised:

Well, it [the Circle] did affect me. It made me stay out of trouble until what had happened in me house, like, because I was thinking ... I didn't want to go to jail ... So I was keeping out of trouble, doing what I was told to do ... Going counselling and stuff like that, yeah.

Our records show that Jason hadn't remembered two offences, although both were relatively minor. About two months after the Circle, the record shows a damage property offence; and about four months after that, three public order offences (offensive behaviour and not complying with the police).

What Jason did recall was a third offence he committed about nine months after the Circle: 'what had happened in me house'. When asked what happened, he explained it this way:

That was [an] aggravated break and enter ... I was down visiting the kids one weekend, and I come back, and me house was broken into ... Everything was stolen out of it, everything, and I just sort of got back on me feet from when ... [my girlfriend] left with the kids. And two weeks later I found out [who it was that broke into my house]. I was at the pub, I was pissed, and I found out who it was. Yeah, I ended up going round to their house and yeah, playing up ... I just found it out at the wrong time because if I was sober, I would have approached it a totally different way. But because I was pretty drunk that night, yeah, I went around there and did the wrong thing, yeah.

It is understandable that Jason was angry after his house was broken into and 'everything was stolen'. When he learned who did it, coupled with the fact that he was 'pretty drunk', he sought revenge. He acknowledged that he 'did the wrong thing' and that had he not been drunk, he would have behaved differently. He recognised that his offending was alcohol-related, and during the Circle, he was reproached by the Elders for this:

Like all my charges have been alcohol-related. I've never had a charge where I've been straight. It's all been alcohol-related, yep ... Oh yeah, they [the Elders] were onto me about me drinking.

Consolidating the sentences received for all three occasions of offending, Jason was sentenced to serve a minimum of two and one-half years in prison. He was released some time in November 2006, as best we can estimate, and was on parole at the time of the interview. He said he was 'a different person now' and doesn't 'drink much':

Yeah, well I've changed now. I'm a different person now. I don't drink much anymore. I have a few beers every now and then. Get a slap on the pokies. Before that, it was nearly every day ... Well, I'm going good now. I've still got parole on me head so ... 'til November so I've been doing everything I've got to do for them [parole supervisor].

When prompted to consider his future, Jason talked about 'taking each day as it comes'. Somewhat ironically, he noted that there may be a 'bit of work' with building a new jail in the area:

I don't really like planning too far ahead sort of thing. I've just been taking each day as it comes lately ... Since I've been back down here, I've been avoiding a few people. So I don't want to get back around into me old scene what I was in before ... I was going to see about the new jail that's getting built up here because apparently there's a bit of work, two years' work out there.

Looking to the future, although Jason hoped to get a job, '... I wouldn't mind bricklaying, I've done a bit of that', he also spoke of seeing more of his children:

I look forward to having me kids. Yeah, I look forward to having the kids because the relationship, our relationship before I went to jail was pretty good, and when I got out, it wasn't the same. Like, I didn't see them for two and a half years, so when I got out, it wasn't the same. But yeah, getting that relationship back and building a bigger and stronger one now since I've been out with 'em.

Since coming out of prison, Jason has not re-offended. The jail experience '... stopped [me] and made me think', and since then, he has been 'keeping out of trouble':

I've just been taking it easy, keeping out of trouble. ... So far, I've been out of trouble. So I'm going pretty good at the moment.

... I haven't worked since I've been out. So I haven't really worried about work to tell you the truth ... I just finally got a house down here in Nowra...

On balance and with the exception of an Elder's comment, which angered him, Jason's reflections on the Circle process were positive. For him, the Circle was more friendly and open than the regular court, and as a result, he felt less nervous. Although he was challenged when the Elders probed him about his experiences growing up, this enabled him to reflect on his own family and family relationships. During the Circle, Jason was reprimanded for his alcohol use and its negative impact on his behaviour, and he knew he had to change his drinking patterns. He said he is drinking more responsibly now and spending more time with his children, and he hoped to secure work.

Before the Circle

- Information on Brian is limited, and we know less about him compared to other Circle defendants.
- He is not originally from Nowra; as a result, there were no existing relationships in the Circle.
- The Elders were unable to draw from knowledge of Brian's family and background.
- Brian told the Circle that he and his wife had recently moved to Nowra.

After the Circle

- He offended four times after the Circle and served time on the weekends on a Periodic Detention order.
- At the time of the fieldwork, Brian was employed and living with his wife. He also had a pending property offence.

Brian's Circle

At age 24, Brian came before the Circle for two driving-related offences: driving with a cancelled licence and doing burnouts. He had been previously convicted of similar offences, for which he had received a Community Service Order (CSO).

Brian's Circle differed from all the others in two key respects. First, there was a lack of an existing relationship between him and the Elders. This compromised the Circle's potency, and according to the Aboriginal Project Officer in Nowra, 'this factor could explain the offender's failure to appreciate and embrace the full benefits of Circle Sentencing' (Wallace notes). Second, the Elders appeared to be harsher and less supportive toward Brian, compared to other defendants:

How do you know a little kid is not going to come out of a house in front of your car?
How do you know? (Elder 4, p. 2)

You're going to ruin your life and probably someone else's (Elder 3, p. 2)

How sorry are you? (Elder 1, p. 2)
[no answer]

Although the Magistrate's transcripts typically show that the Elders censured defendants, the dynamic in Brian's Circle did not shift to include supportive and encouraging words.

The final sentence included a two-year GBB, a 300-hour CSO, disqualification from driving for three years, and attend the Traffic Offenders Program. During the Circle itself, a number of other orders were recommended and agreed to, including that Brian directly experience the effects of dangerous driving by undertaking his community service hours at the Ambulance Service, and that he speak to young people in schools about his driving offences and encounters with the criminal justice system. (These latter outcomes were subsequently changed as noted in the next section.)

Brian's Circle did not go well. The Elders felt that the support they extended to Brian during the Circle was not accepted. They also felt that his manner was largely disrespectful, not only toward them, but also toward himself and his wife. The Magistrate's transcript indicates that Brian said to an Elder, 'I don't want you people talking down to me' (Circle transcript, p. 3). The Elders believed that Brian left the Circle with a 'thorn in his foot' (Circle transcript, p. 3).

Two related aspects of this Circle may explain why it did not go well. First, although the Magistrate's transcript is brief, it suggests that the Elders were very reprimanding of Brian. Second, he was not a member of the local Aboriginal community, and the Elders did not have personal knowledge of him or his family.

Life after the Circle

Because of potential liability problems, Brian was not permitted to fulfil his community service hours at the Ambulance Service, nor was he able to complete the task of talking to high school students. In lieu of the Ambulance Service, he began completing his community service hours for a local Aboriginal Centre. A progress report from the Aboriginal Project Officer suggests that Brian's performance at the Centre was pleasing to his supervisor, and Brian was regarded as an 'enthusiastic worker and exceptionally good at catering' (Wallace notes). However, Brian completed about one-third of his community service hours, and he did not attend the Traffic Offenders Program as directed.

A month after the Circle, he was arrested for driving while disqualified. For this offence, he was sentenced to a 12-month Periodic Detention Order, with a minimum length of time to serve of nine months. About six months after this offence, he was arrested for a stolen property offence, which was eventually proved and for which he was fined. However, there is a significant crime-free gap of 22 months from the second to the third offence, when he was arrested for driving while disqualified; and five months later, he was again arrested for a driving while disqualified offence. The last proved offence occurred early in 2005. However, at the time of the interview in 2008, Brian had a pending court case for breaking and entering a building, which was alleged to have occurred late the previous year. It is likely that he has a continuing problem with alcohol because among his bail conditions is 'not to be intoxicated in a public place'.

With the exception of the proved and pending property offences, all of Brian's offending is related to driving a car when he was disqualified from holding a licence. We suspect, but cannot be entirely sure, that all of his offending is alcohol-related.

Three times during the fieldwork period, Brian agreed to a face-to-face interview, but then he did not show up. Finally, Daly was able to speak with him by phone, and elicit some information about his experiences with the

Circle. (The conversation was written up in the form of field notes.) Not surprisingly, the phone interview revealed that Brian's memory of his Circle experience was negative. He believed he had been treated too harshly and was not supported by the Elders. He characterised the Circle as a 'waste of time', especially since he had spent some time in jail on a Periodic Detention Order (Daly field notes, April 2008). He felt he had already talked enough to people about his Circle, and he didn't want to discuss it anymore. He wanted to put the Circle experience, together with his post-Circle offending, behind him and move on with his life.

In Potas et al. (2003), the authors' interpretation of Brian's Circle is that he was broadly at fault and his behaviour was unacceptable. However, from Brian's perspective and the Magistrate's transcript, our interpretation is that the Elders seemed to be particularly harsh and censoring. Brian felt that the Elders were 'ganging up on him', and he didn't understand why they were being so tough on him in light of his offences (Daly field notes, April 2008). Potas et al. (2003: 14) also recognised that Circle members 'seemed to be antagonistic' and the process 'lacked the suggestion of spiritual help or guidance' that was evident in other Circles. Despite the Circle's apparent failure in terms of processes, and despite Brian seeing himself as having failed, at least in the short term because he was sentenced to periodic detention, we have taken a longer view. With the exception of a pending court case, he has stayed out of trouble for over three years.

The persisters (introduction)

Three Circle participants were classified persisters. Two offended shortly after the Circle, and over the past five years, they continued to offend; two were in prison at the time of the fieldwork. Two were male, one was female; their ages ranged from 19.5 to 23.5 (average of 21.5 years). Of the three, all had alcohol problems, two used marijuana, and one used multiple illegal drugs.

For two of the three (Harry and Michael), their experiences in the Circle were positive: they had a high regard for the process and how the Elders were trying to help. The third (Hayley), we were unable to interview, but the transcript suggests that she resisted the Elders' suggestions and likely would have found the process unsatisfactory.

Before the Circle

- Harry comes from a well-respected Aboriginal family in Nowra.
- He used drugs to counter emotional problems.
- He attended drug counselling at a local centre.
- He admitted that most of his offending was related to financing his drug use.
- Harry was drug-free for five months prior to the Circle.

After the Circle

- Harry offended about ten months after the Circle.
- Nearly three years after the Circle he committed a serious offence, for which he was imprisoned.
- In the nearly six years since the Circle, Harry was imprisoned twice, spending four years in prison.
- He was in prison at the time of the interview, but maintains a relationship with a new girlfriend, whom he hopes to be engaged with, soon after his release.

Harry's Circle

At age 23.5, Harry attended a Circle to deal with a set of offences committed on three occasions. They included breaking and entering, stealing two vehicles, damaging a vehicle, dangerous driving, stealing electronic goods, providing misleading information, and stealing goods from a dwelling. Initially, the Circle focused on the Elders' exploration of the circumstances surrounding one of the offences, dangerous driving. There was considerable input from one of the two victims, the business owner from whom Harry had stolen the motor vehicles.³⁸ Harry had also stolen goods from an electronics shop. The Elders told Harry that his actions had caused the victims and community much harm. One Elder said:

You've destroyed your own community, you've hurt local people and local business (Elder 3, p. 6).

There was a great deal of discussion between Harry and the Elders about potential penalties. Harry thought he should 'probably get locked up', but the Elders were quick to point out that 'jail's no place to be' (Elder 3, p. 7). The Elders spoke of drug and alcohol rehabilitation and Harry's attempts to attend a local rehabilitation centre. They reprimanded Harry for using his drug and alcohol problems as an excuse for offending:

One thing that bugs me is you blame drugs and alcohol. That's a stupid excuse. That excuse gives me the shits (Elder 2, p. 7).

The Magistrate outlined the sentencing considerations, and then the Circle participants deliberated. Before the Circle, both victims wanted to see Harry 'locked up', but in learning more about Harry, they both changed their views:

³⁸ The circumstances were that Harry and an accomplice broke into a business display area, stole two vehicles and went joy-riding in them.

You can turn your life around, you can do anything in this country, all you got to do is try. I did want to see you locked up, but I see you have a wife and child. It's up to you to turn your life around. I'd like to see rehabilitation as well (Victim 1, p. 8).

Prior to today and the Circle Court, I wanted to see him locked up for a very long time, but now there appears to be some hope (Victim 2, p. 8).

Harry volunteered to work for one of the business owners, but the victim did not accept this. The final sentence imposed was two years' Periodic Detention, supervision by the Aboriginal Medical Service and a caseworker from a local rehabilitation centre, and pay compensation in the amount of \$4,200 to the two victims.³⁹

Harry's Reflection

Harry spoke positively of the Circle experience and remembered feeling ashamed that he had to face his Elders. He recalled arriving at the venue and being informally told what to expect from the Circle:

Well, I remember going there on the day; I was with my girl and my son. We rocked up ... We were sitting around there for ... Judge Dick to arrive, and there was a couple of the community Elders ... [and] my mother, my son and girlfriend at the time. We sort of sat around out the front and had a bit of a chat, had a cuppa, and they sort of told me what sort of, what was looking to happen on the day and that.

Harry remembered feeling 'nervous' about the Circle, and when he had to face up to the Elders, he felt he had 'disrespected the community' and the Elders:

I can remember I was pretty nervous because I was sitting up against like with the Judge, the victims of my crime ... the owners of the shops ... I was actually going up to face these Elders, you know, rather than the Judge and that. I felt like I sort of disrespected the community and the Elders in a way ... 'Cause having to face up to them ... I felt a bit disrespectful and down.

Later in the interview, he reinforced his feelings:

I just feel I let everyone down, all my family and especially my young fella [my son] and girl.

Initially, Harry thought the Circle might be easier than attending court; however, he later felt that the Circle was challenging:

In a way I thought it might have been a bit easier being there in front of the community and the Elders, but I don't think that was the case at all ...

³⁹ We understand that Harry did not pay compensation. The order was sent to the State Debt Recovery Office for enforcement, but we do not know what happened.

Harry spoke about his interaction with the Elders and how they censured his behaviour. He said that the Elders 'put things in blunt terms', which 'hit home' and 'really made me think':

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

For Harry, the Elders 'really opened [his] eyes', and it was 'really good':

For them to tell me what they thought, and they was sort of coming down on me a bit like a parent would, it really opened my eyes to be sitting there in front of the Elders and have them having their input and saying what they thought. I think that was really good.

Compared to the conventional court, Harry thought that the Circle was much less formal and intimidating:

I'd have to say being able to sit down in an environment where you feel comfortable with being Koori, and you're sitting around with Koori Elders, and the Koori community, and that, that's a bit less maybe [intimidating]. ... Some Koori people, they get a bit nervous going into a white organisation ... It just felt comfortable for us to sit there in front of Koori Elders ...

When asked about his participation in the Circle and conventional court, Harry said that he felt more alienated and less able to comfortably express his views in a regular court:

We don't get to voice our opinion much, we've got the judge, and that, talking for us, and maybe our solicitor talking for us, and they don't give us that opportunity actually to get up and say something.

Throughout the interview, Harry was positive about his Circle experience, and he recommended that further work be done to retain and improve the Circle process:

All I can say with the research that you're doing, I hope you can really come up with some good solutions to keep it going, the more you put into it, the more everyone is going to benefit from it, the whole community, the broader community, the Aboriginal people, maybe for the court systems as well.

However, he suggested that offenders needed ongoing follow-up support:

One thing that I did think would be better for that Circle Sentencing is maybe just a follow-up once or twice, say a couple of months after the Circle Sentencing, maybe some follow-up counselling just to see how they're [offenders are] going ... A support program or something maybe. ... If there was someone allocated for that certain job, you know, phone them up and say this and that, 'how are you going? ... how have you been coping with

everything, with your result what you got from the court?' Just pretty much follow-up up stuff like that.

Harry said that he felt supported by having his mother and father at the Circle, and he suggested that offenders should have people they respect at the Circle:

Maybe a couple more family members [as support], maybe one or two, someone that they really respect, someone that is a real role model to him. I think say nan, pop, mother, or father. Obviously, my mother and father was there, and I had other family members there at the time, they was very well supportive. Even other sort[s] of mentor[s] or role model people in communities ...

Although Harry spoke of the Circle in a positive light, he thought the Circle process was better for those who were a bit older, who would be better able to appreciate the depth of the process. In his early to mid 20s, he still had a 'young mind':

When I faced up to that Circle Sentencing, I admit I was only young then, and I'm 29 now, and I'm different to what I was then. That's what I was saying to Unc [Uncle Lou] there before, that I wish I was a bit older when I did face the Circle Sentencing because I still had a young mind, and I was out and wanted to party and do things. It wasn't the time for me then.

After the Circle, Harry recalled that initially he had stayed out of trouble:

After that [the Circle] I was crime free, I didn't do no crime after that, I did ... the two years' weekend [periodic detention], and I was 18 months clean after the rehab and all that. It was a pretty good result.

Our records show that about ten months after the Circle, while he was on periodic detention, Harry was arrested for shoplifting, for which he was subsequently convicted.

A more serious offence occurred about 22 months after the shoplift, when he was arrested for a sexual assault and break and enter. He was arrested for other less serious offences on two occasions over the next month (drug possession and indecent assault). He began to serve a five year (three-year non-parole) term of imprisonment for these offences in August 2005, about three years after his Circle.

When asked what things needed to be in place for him not to re-offend, he spoke of the need for volunteer and paid work that was meaningful:

Things in place to do with community, family, sport ... Work obviously, work is a big thing too, there are always other little things where you can go, non-profit organisation things, and you don't have to be working or something 'to do' things. You can go and put something in place in an Aboriginal community, where they can work on sports, recreation, arts, crafts. There's a big area of things, where family and friends can get out and work and do

things to occupy their time, where they can learn these skills, learn sorta all these living skills.

In contrast to Harry's view of himself as having a 'young mind' at the first Circle, he now sees himself as more responsible. He says that music has contributed to his sense of wellbeing:

Music is a big thing. I've been learning guitar and singing, I love to sing. Music's really good. Since I've been up here [at the Correctional Centre], I've recorded 14 songs, four CD's. None of my own work, and that, but I'm working on that.

Looking to the future, Harry plans to get engaged to his girlfriend, once he is released:

My girl lives out in [area near Nowra] so I'll be going down there, and we're getting engaged and everything when I come home.

His aspirations for the future are based around music:

I'm planning on studying music when I go home ... [mainly country and western] ... and I also want to study all areas of music as well, not just the country, reggae, maybe hip hop, R and B, soul, blues ... I would like to go onto the electric stuff and that, bass [guitar] maybe.

In sum, the Circle process was positive for Harry: it was a more comfortable place to talk, and it felt less alienating. At the same time, he said that the process made him feel ashamed for disrespecting his community and the Elders. He thought the Circle process could be improved by having more follow-up and support by the Elders. Looking back, he thought he may have been too immature to appreciate the full impact of what was going on. As he put it, 'it wasn't the time for me then', when he was in his early 20s. Now, in his late 20s and in prison, he has a different outlook and has set a positive direction for change by plans to get married and study music, when he is released.

Although Harry's Circle experience was positive, his post-Circle offending was moderate in frequency and became more serious in time. One inference, then, is a need to de-couple an evaluation of the Circle process from the impact of a Circle on re-offending. In Harry's case, he recognised the benefits of the process, but 'it wasn't the time' for him to change.

Before the Circle

- Michael's parents separated when he was a child, and he and his siblings lived with his mother.
- He has lost contact with his father, and he blames his lack of a good family life on his father.
- For a short period, he lived with his grandparents, until they died. This was the only real home Michael had.
- His parents' separation and the deaths of his grandparents affected him greatly.
- Although he completed an alcohol rehabilitation program, he still has problems with drinking.

After the Circle

- Michael had three instances of re-offending in the three years post-Circle.
- In the five years since the Circle, he has been in prison nearly half of the time.
- At the time of the interview, he was out on bail, living at his mother-in-law's house, and seeking employment.
- He is in a long-term relationship and has two children.

Michael's Circle

At 19.5 years, Michael attended a Circle for several offences: failing to comply with a CSO, and further driving-related offences.⁴⁰ The Circle began by an exploration of the offences. The Elders were stern in underscoring the seriousness of his offending, one saying:

The trouble with these young blokes is they think they are ten-foot tall, especially when they are drunk. You didn't worry about the public; you could have killed someone and yourself. Just driving drunk, that's ridiculous. How would you like to pay \$20,000 for four funerals? (Elder 1, p. 6).

The Elders and Michael recognised that he had a problem with alcohol, and the Elders thought he should receive further rehabilitation. A discussion of potential penalties ensued, and the Elders were adamant that Michael receive a lengthy licence disqualification. One Elder pointed to the significance of imposing a severe sentence:

It [seven years' disqualification] shouldn't be lessened, he needs to mature ... We're not going to be soft. If we are, word will get out 'Let's go to Circle'. If we are going to help our community, then we are going to be tough. Our community needs us, and we have a reputation to uphold (Elder 3, p. 8).

This Elder's words suggest a concern not only for individual deterrence, but also general deterrence in sentencing. The latter is expressed, however, by a specific Aboriginal cultural morality.

During the Circle, there was little interaction between the Elders and Michael, yet it appears the dynamic of the Circle softened once the Elders saw that Michael understood that his behaviour was wrong and that he was receptive to seeking further treatment for his alcohol problem.

⁴⁰ These involved taking and driving of a vehicle while under the influence of alcohol and with a cancelled licence.

His final sentence was 12 months' Periodic Detention, and three years' disqualification from driving. The Magistrate recommended that Michael attend more counselling, spend more time at the local rehabilitation centre for alcohol abuse, and Michael agreed to three more months. He also agreed to attend a halfway house until he was rehabilitated, and to attend a Sober Driver's program. In addition, Michael received a five-year Habitual Offender Declaration.

Michael's Reflection

When asked to recall his experiences of the Circle, Michael spoke positively and emphasised the role of the Elders. Although he remembered 'feeling a bit nervous', he also said that he 'wasn't that worried because it was the Elders giving me a sentence and not the white man'. He saw the Elders as having knowledge and understanding of his experiences as an Aboriginal youth, and more generally, the social climate Aboriginal people face on a daily basis:

The Elders know what us young lads have been through and all that, and all the grog that we had to grow up around, and violence and stuff, and the white man don't know that. They haven't seen it or nothing, and the Elders have.

Whereas the Elders have seen the social contexts of violence and grog, 'the white man don't know that', and this is one way the Circle process is different from a conventional court. Michael felt privileged that the Elders were willing to give him another chance:

They was trying to give me another fair go, and not just throwing away the key and putting me in jail ... Because they'd known what all us young blokes have been through.

Although Michael was positive toward the Circle process, he would like to see the Elders have greater decision-making power than they currently have:

It's just the white man thing, you know? ... Don't get me wrong, I'm not racist or nothing, but you know what I mean? It should be the Elders doing the stuff ... Well, I reckon you've got to go to the towns where they really need them. Like Bathurst is a good place because there are a lot of Elders over there and a lot of Kooris getting into trouble.

When asked by Uncle Lou if he thought Circle Sentencing was an 'easy ride', he responded:

No, not really because when I went in there, I was nervous. I was thinking 'Oh, it should go all right because it's the Elders doing the damage and not the Judge', and I thought whatever outcome, whatever they say, I'm going to do it because I grew up listening to Elders and that, and not being stubborn or ... anything like that. At the end of the day, if you go back up

against them or anything, then they are not going to go easy on you that time or anything.

Although he was nervous at the prospect of facing his Elders, Michael also saw the Circle as a fairer hearing, where he could voice his experiences:

You can have your own say and that. Some Judges just don't listen to you. They just hit the hammer, and then that's it.

He recognised that although one could 'speak' in the courtroom, it was different in the Circle because you can 'speak from yourself, from your heart':

Oh, you can do that in court too, but it just doesn't seem right speaking out, speaking out properly in your own words. But around Elders and that, you can speak out and speak from yourself, from your heart, and that, and let them know what's going on, and they can sit down and listen ... The Judge in his eyes doesn't care.

In the conventional court room, Michael recounted being alienated, frightened, and intimidated. The Circle was 'more better', in part because it was not in a courthouse, but rather 'out and free', and in part, because the Elders were there:

I don't know, you're just more nervous and scared [in a regular courtroom]. You don't know what's going to happen to you if you get locked up ... Just going in the courthouse scares you. Even if you've got maybe 50 percent [chance] of getting out, but still I find it [the Circle] more better because sometimes you're not actually in a courthouse, you know? You're out and free, and you're just sitting there, listening to the Elders telling you what's wrong and what's right and what they're going to give you.

When we interviewed him, Michael was just 24 years old. Since his late teens, he had been imprisoned three times and served a minimum of 26 months of prison sentences. He said that jail did nothing to deter or rehabilitate him; instead, it added more negative experiences to his life. Prison, he said, 'straightens your head out, but in a way, you can come out a bit more violent'.

Drawing from his Circle experiences and a program he had seen on television (the ABC 'Four Corners' Program on Circle Sentencing, October 2005), Michael thought that it was a valuable process, one that should be extended:

I reckon there'd be a lot more improvement with the system if it was their own people sitting on it and giving them the stuff they need instead of throwing them in jail. There'd be a better outcome...

As valuable as the process was to him, it didn't change his pattern of offending. Less than two months after the Circle he was involved in a motor vehicle theft; and less than three months later, he was involved in the same offence, along with seven charges related to driving recklessly and

without a licence. He was imprisoned, we estimate, for a minimum of nine months, beginning some time in November 2003. The third occasion of post-Circle offending, an assault, occurred after his release from prison, less than two years after the Circle.

Over the next two years, Michael continued to offend: he was convicted of four offences that took place on two separate occasions (one property and three violent offences), and he served a minimum of a further eight months in prison. At the time of the interview in April, he was awaiting a court date for another occasion of offending, which involved three driving-related offences and one property offence. Altogether, over the nearly five-year period between the Circle and the interview, Michael has served over two years in prison.

Michael's self-confessed problems with alcohol—together with his parents' inability to care for him and his grandparents' death—are the key reasons he gives for getting in trouble. When asked what would need to happen for him to stay out of trouble, he said that alcohol was his main problem. He also said he had always lacked things to keep him busy, although this was recently changing:

I just bought a motorbike for myself, and I do a bit of cleaning and go for a little dirt ride, and it keeps your mind off the piss and that.

In considering his current and future circumstances, Michael spoke of several positive things in his life that helped him be, and feel, a better person. He focused on his children (a son and a daughter) and being responsible for his family:

It's my kids because I never had a father growing up. I don't want my kids to grow up the way I did. I want to be there for them and, you know? Just be ... their father and not be a alcoholic drunk, who sits around the street or in a pub drinking all the time.

During the Circle, the Elders said they understood Michael's problems growing up in a disruptive family environment, without a father and with a mother, who 'preferred boyfriends over her own children' (Circle transcript, p. 5). In light of this history, Michael wants to be good father, both for himself and his children. In addition, Michael spoke of the need to get a job and independent housing, and 'fix [his pending] court case up':

Well, I want to get a job for starters. I'm still waiting for the network that I've signed up for to ring me so I can go and get my construction card so I can work on construction ... [Also] try and get a house and hopefully fix this court case up, and my kids can come and see me, or they can live with me, or yeah, whatever they choose, when they're old enough.

In sum, Michael spoke about the Circle in positive terms. The Elders had knowledge of and understood the effects of his family upbringing and environment, and speaking in the Circle was more open, flowing, and 'from

your heart'. These qualities were often lacking in a conventional courtroom, from his experience.

Michael wants to be a good father and have stable employment, but he is up against several barriers: his continued problems with alcohol, a pending court case, and a substantial criminal history that will likely limit his job prospects. Despite this, at the time of the interview, Michael was optimistic that he could change his circumstances for the better.

Before the Circle

- Hayley grew up on an Aboriginal mission.
- At 15 years old, she moved to Nowra and became rebellious and was unhappy.
- She began drinking, smoking marijuana, using heroin and amphetamines at 15.
- When Hayley began using drugs, she started offending.
- Before the Circle, she had 35 convictions and had been imprisoned.

After the Circle

- Seven days after the Circle, Hayley re-offended.
- In the nearly four years after the Circle, she was imprisoned twice, spending about 60% of post-Circle time in prison.
- At the time of the fieldwork, Hayley was imprisoned.

Hayley's Circle

At age 22, when Hayley was initially assessed for suitability for Circle Sentencing, the Elders felt she should receive drug treatment and rehabilitation before her involvement in a Circle. Thus, the Circle took place nearly five months after she was charged.

The Circle participants were interested to know what had occurred during this time. Hayley said that she had detoxed in hospital, but had continued taking drugs. She had received some counselling and was given an opportunity to attend an intensive drug rehabilitation program. However, she did not attend her appointments and was withdrawn. At the time of the Circle, she said had not been using heroin for about two weeks.

The Circle was convened to address five separate occasions of offending, committed on different days, over about four months. They included property and public order offences, breaches of an AVO, and common assault.⁴¹ During the initial stages of the Circle, Hayley's drug and alcohol use and offending behaviours were explored. She read from a written statement to inform the Circle of her difficult upbringing and how she had turned to, and became addicted to, drugs. On the mission, she said, 'drugs, alcohol, and violence was an everyday thing'⁴² (Circle Transcript, p. 6). She also spoke of alcohol abuse and smoking marijuana: 'I started to drink and get into yandy.'⁴³ I was just losing interest in my life ... I was introduced to heroin and speed at the age of 15' (Circle Transcript, p. 6). Hayley admitted that her multiple drug use turned to addiction, and that she used heroin to deal with her depression and painful memories of life on the mission. She has tried to stop using drugs on her own, but has not been successful.

⁴¹ The offences included stealing alcohol (value \$32), theft of a blanket (value \$89), carrying a knife, damage to property, and an assault.

⁴² The mission location she is referring to is some distance north of Nowra, about an hours' drive up the NSW coast.

⁴³ Yandy is an Aboriginal term for marijuana.

At the time of the Circle, Hayley was unemployed, but she wanted to get her life on track and study art. After Hayley read her statement, one Elder tried to be supportive and said:

If you want to do art, you know a bus runs from East Nowra to TAFE. Why don't you get on a bus and do art (Elder 4, p. 6).

However, when the Elders returned to discussing how Hayley needed to address her multiple drug addictions, she became defensive, saying she didn't want to seek help, as the following exchange shows:

You still need help, you should go back into the crisis centre (Elder 1, p. 6).

No.

But you have a problem with drugs and alcohol. Alcohol is a problem if it makes you behave in a way you normally wouldn't (Elder 1, p. 6).

You need some help (Elder 3, p. 6).

I'm doing it myself.

Later in the Circle, the Elders again returned to discussing Hayley's drug addictions. They persisted in saying that she needed professional assistance, but again, Hayley remained staunchly opposed. It appears that she then became frustrated and irritated that the Elders were unrelentingly focusing on her drug abuse and that she was unable to sway their decision-making, as this exchange reveals:

Can't I have a suspended sentence?

No, that's for us to decide (Rep, 4, p.9)

Can I have home detention instead of rehab?

No, because at home you don't get the right support (Elder 2, p. 9).

You need counselling ... (Elder 1, p. 9).

I don't want to go, if I go there everyday, I wake up, they tell me what to do, I can't even go for a walk.

Hayley continued trying to influence the Elders' decision-making, albeit unsuccessfully. From the transcript, it appears that she was growing increasingly concerned with what the Circle outcome would be: 'I thought the Circle would help me and get me out of jail'. In response, the Elders patiently explained the goals behind Circle Sentencing. One Elder said:

No, we are here to help, but that's not all. We come here and spend our time in Circle to help our people, but we are also here for punishment. We have to be strong when we impose punishment. We don't like knives [the

weapon Hayley was convicted of possessing]. You can get into trouble with a knife (Elder 4, p. 10).

Hayley began to vocalise her irritation, saying:

It pisses me off that you won't let me do it on my own ... I'm trying to tell you I can do it on my own; I don't need help. You are all doubting me ...

The Circle shifted to discuss ways to include drug rehabilitation in Hayley's sentence, but she did not want this. Hayley again voiced her annoyance that the Elders did not trust her to embark on her own drug rehabilitation, but the Elders steadfastly maintained that the Circle was about penalties and potentially also healing. Because Hayley's attitude remained the same, the Circle dynamic did not shift to a dynamic of support and closure. The transcript finished with one Elder saying:

This is a real Court, we can tell you what to do. You have a very bad attitude problem. We pass a sentence, and it's up to you whether to accept it or not (Rep 3, p. 12).

The Circle was adjourned for Hayley's Solicitor to arrange for her to attend a four-week intensive drug rehab residential program, and for Hayley to reconsider her position. The Circle agreed that sentencing would be addressed after the four-week program.

The Circle transcript shows that Hayley was not ready to address her drug use and addiction. She wanted to stop using drugs on her own, but the Elders knew she required professional intervention. She did not attend the intensive treatment program, and a week after the Circle she was arrested for two weapons offences (possessing and firing a firearm) and a property offence. She was sentenced to a two-year term of imprisonment (15 months' non-parole) for the three offences and the five Circle offences.

Once released from prison some time in late October 2004, she offended about two weeks later. The criminal history record shows nine subsequent occasions of offending, involving mainly property offences, but also public order and one violent offence. On two separate occasions she was sentenced to imprisonment, serving a total of two years and three months. She remained imprisoned at the time of the interview in April 2008, and we were unable to locate her after she was released.

Chapter 5

Summary and discussion

The thirteen case studies give us insight into Circle defendants' lives, the Circle process, and what occurred after the Circle. We summarise the findings in these areas: before the Circle (defendants' backgrounds growing up, substance abuse, and offending patterns); Circle dynamics (drawing from the transcripts); in the Circle (drawing from the interviews); and after the Circle (offending desistance or persistence, identity, and future). We relate the findings to the literature on Indigenous sentencing courts and desistance.

Before the Circle

There were many commonalities in the Circle defendants' backgrounds, including difficult upbringings, early introductions into crime, alcohol and drug abuse problems, and the importance they placed on family. For one Circle defendant interviewed, Brian, we have less information on his background compared to the others.⁴⁴

Of the nine defendants interviewed, six spoke of having had difficult and traumatic upbringings as children. The problems they faced revolved around fractured families, parental alcoholism and violence, parental inability to care for them, sexual abuse victimisation, and homelessness. As adolescents or adults, all nine had begun to abuse alcohol, use illegal drugs, or both.

Of the 13 defendants, all but one (Leena) committed their first offence leading to conviction as a teen. Except for Leena, who was 25, the age range for the others was 14 to 18.5 years. Darrel and Hayley said that their offending began as a result of using drugs, alcohol, or both, when they were 14 and 15 years old. Bev said her stepfather introduced her to heroin and prostitution when she was in her teens. Alcohol abuse or drug addiction was a significant problem for all 13 Circle defendants.

From the interviews and transcripts, six defendants explicitly spoke of using heroin and/or amphetamines to deal with emotional problems in their lives. For John, Jackie, and Leena, this was directly related to the death of a parent, while Bev's use of drugs stemmed from being introduced to prostitution and being homeless in her teens. Harry and Hayley's use of drugs occurred from adolescence onwards, and both said they used drugs to

⁴⁴ However, piecing together bits of evidence from the file, it is likely he had a problem with alcohol abuse, and our summary reflects this.

deal with their emotional problems. All four women had heroin addictions, whereas the men's substance abuse was more likely associated with alcohol. Of the nine defendants interviewed, all acknowledged that their offending was linked to alcohol abuse or drug addictions. Of this group, only four (Bev, Jackie, Harry, and Michael) spoke of having attended some kind of formal rehabilitation before going to the Circle.⁴⁵

Two other points about offending patterns deserve mention. Darrel conceded he had a problem with alcohol, but added to this, his relations with the Nowra police were poor: he was watched by them, arrested on trivial street offences (such as using offensive language), and felt harassed and picked upon by them. This approach to policing in Aboriginal communities, where individuals are selectively targeted with street offence arrests is well-known (Cunneen 2001). Brian had a pattern of arrests for disqualified driving, which led to a sentence of periodic detention and community service orders. A NSW Aboriginal Justice Advisory Committee Report (2003: 1) points out that 'driving offences [are] the third highest offence category for convictions of Aboriginal people after assault and disorderly conduct', and driving while disqualified is particularly associated with sentences to prison (p. 8). Targeted interventions, designed to reduce driving offences have been proposed, and we understand, are underway (Indigenous Justice Clearinghouse 2009).

Circle dynamics

Although each Circle has specific dynamics, in general, each began with an exploration of the offence(s) and the defendant's circumstances. The Elders reinforced the seriousness of the offending; and in six Circles, they spoke of specific ramifications of the offence for offenders themselves, victims, and the community as a whole. The Elders often spoke of the potential sentences, such as imprisonment, that might arise, and the implications of this for defendants' family members. Although the importance of family was a central concern in the interactions between Elders and defendants, this was particularly evident in five cases. To John, the Elders said he should be mindful of his family responsibilities; to Gary, they noted the stress his offending was placing on his family; to Chris and Jason, they noted the impact of a potential prison sentence on their families; and to Jackie, they asked what kind of role model she would be for her grandchildren if she continued to use drugs.

Substance abuse problems and their link to offending were discussed and disapproved of by the Elders, despite their understanding of the circumstances that may have led to drug use. Thus, as in the case of Jackie, although the Elders expressed concern with her drug use and the death of her mother, they were quick to remind her that this was not an

⁴⁵ Of the four defendants who were not interviewed, the Aboriginal Project Officer's notes show that before the Circle, Adrian and Gary (both complete desisters) had attended rehabilitation for drug and/or alcohol abuse.

excuse for offending, and they then focused attention on Jackie's need for rehabilitation. When a second Circle was scheduled so that a defendant could undertake drug or alcohol rehabilitation (in Gary's, Bev's, and Jackie's cases), the Elders sought to determine if the defendant attended the program or residential treatment. When, as in the case of Bev, a defendant did not attend, the Elders were disapproving.

The Elders took a balanced approach: they reprimanded the offending, but at the same time, supported the defendant and expressed faith in his or her ability to move forward. An exception to this pattern was their interaction with Brian. He was not a member of the Aboriginal community in Nowra; as a result, existing relationships were lacking, and the Elders were unable to draw from an understanding of his background. Their approach in Brian's Circle was relatively more reprimanding, without the nurturing and support that was evident in other Circles.

In discussions concerning sentence outcomes, the Elders' approach encompassed rehabilitative and punishment goals, and where relevant, compensation. Only one defendant, Hayley, was clearly opposed to the Elders' views. Hayley sought to sway the Elders' decision-making by saying she could stop using drugs by herself, but the Elders believed she had an 'attitude problem'.

In the Circle

For the nine defendants interviewed, we review how they felt when entering the Circle, their positive and negative views and perceived role of the Elders, whether they viewed the Circle as lenient, their views on the Circles compared to conventional court, and other observations.

Entering the Circle

Of the nine, most spoke specifically about their feelings when entering the Circle. Some said they were worried, frightened, or nervous, and others said they were 'comfortable' or relaxed. Jackie said she felt ashamed at facing her Elders and kept her head lowered, Leena remembered feeling frightened and ashamed, and Harry felt nervous at the idea of facing his Elders and victims. Michael remembered feeling nervous and 'comfortable', his comfort stemming from knowing that the Elders would be there, not just white criminal justice officials. Jason recalled that he was less scared and more relaxed going to the Circle than when he went to a conventional court.

Positive and negative views

Seven of the nine defendants were positive about the Circle process (all but Brian and Darrel), and seven of the nine came away with a positive judgement of the Elders (all but Brian and Jason, who was bothered by what an Elder said).

Two recurring positive elements were mentioned. One is open and honest communication, specifically, being able to speak safely about the offence

and its contexts, and to express oneself freely. This permitted an exploration of reasons underlying the offending and a self-examination by the defendant of what was required to change. It also permitted the victims present to hear more about the circumstances surrounding the offending. The second is the Elders' presence, knowledge, and their approach in the Circle. The Elders drew from shared lived experiences, and they supported and encouraged defendants toward a path of change.

For the three with generally negative views, Brian felt badly treated and not supported by the Elders; and although Jason was broadly positive about the Circle process, he recalled feeling hurt by one Elder. Darrel was critical of the Prosecutor's 'taking over' of the process, and he felt it was little different from a regular courtroom.

Three offered suggestions for improving the Circle process. John and Harry noted the need for follow-up and support after the Circle, and Leena thought there needed to be greater awareness about Circles in the Aboriginal community.

Perceived leniency

Seven gave views on the perceived leniency of the Circle process, or as Uncle Lou asked them, whether they saw it as an 'easy ride'. Three thought the Circle was going to be, or had the potential of being, lenient; whereas four believed otherwise. However, most felt that the reality of what occurred in the Circle was far from lenient. For instance, Jason thought the Circle was going to be lenient, but upon reflection, he said, 'it wasn't all that easy'. Another defendant, Darrel, saw the Circle as similar to a conventional court, and he said it was neither more lenient nor more harsh.

Circle and conventional court

With the exception of Darrel, who saw few differences between the Circle and conventional court, and Brian, who wasn't asked the question, all the defendants discussed differences between the Circle and a conventional court. They re-affirmed the positive elements noted above and in the research literature reviewed in Chapter 1: less formality and an ability to speak freely, more time to explore their specific circumstances, and the presence and participation of the Elders. Their comments show that a greater degree of procedural justice exists in the Circle court: there is more time to speak and be listened to, and respect is shown. Jason said that 'the judge seemed to be a lot nicer towards me too while the Elders were around'. Michael felt the Circle was a fairer hearing than court, one where he could voice his experiences. John noted that the time restrictions in court mean that an offender's background and reasons for offending could not be explored. Bev believed that the conventional court de-personalised drug-using offenders, viewing them only as 'junkies', not as people.

Other observations

There were other observations made about the Circle, which are relevant to understanding its strengths and limits to functioning well. First, a defendant needs to be ready to change. John and Jackie said that a person

must be wholly present and *want* to change and be helped. Likewise, Harry recognised that he was too 'young in the mind' to benefit from the Circle. Second, Circle dynamics can be derailed when questions are raised about the circumstances surrounding an offence and a defendant's culpability. This occurred in Darrel's two Circles. Added to this, Darrel's negative experiences with the Nowra police were reinforced in the Circle, when, in Darrel's view, the Prosecutor was acting too heavy-handedly. Finally, all but one Circle defendant (Brian) recognised and respected the power of their Elders. For Leena, the fact that the Elders volunteered their time meant that they genuinely cared for offenders and their community. She also noted that the Circle must include the *right* Elders. Aboriginal Project Officer Gail Wallace recognises this too as an essential ingredient, but in one Circle, Brian's, the match with the Elders was not successful.

After the Circle

Desistance or persistence

We draw attention to several points about Circle processes, a defendant's substance abuse (see Table 1, p. 28) and readiness to change, and offending desistance or persistence.

All 13 defendants had problems with alcohol abuse, illegal or prescription drug abuse, or both; and these were precipitating triggers to their offending. The ability to stop using illegal or prescription drugs or to drink more responsibly was a key element for the five who were able to completely desist from offending (Adrian, John, Gary, Bev, and Jackie); and it was evident for two of the partial desisters (Chris and Leena). For the three other partial desisters, there was oscillation between periods of responsible drinking (in public places) and driving, and not doing so. The three persisters were unable to cease or reduce their drug or alcohol use.

There is a clear age relationship in the ability to completely desist from drug or alcohol use, and by implication, crime. At the time of the Circle, the complete desisters were, on average, the oldest (37 years), the partial desisters were 26 years, and the persisters, 21.5 years. Complete desisters John and Bev explicitly discussed their age as a factor. John wanted to put his drug-taking lifestyle behind him, while Bev said she was 'sick of going to jail'.

In addition to age and drug or alcohol abuse, family responsibilities can also play a role. Several defendants said that maintaining and improving family relationships was important to their complete or partial desistance. Bev said that relationships with her mother and children were catalysts in deciding to change her life. Several partial desisters (Leena, Darrel, and Jason) also spoke of curtailing their offending because they wanted to be better parents.

There is some relationship between having a positive Circle experience and desistance, but it is not fully consistent. Of the five complete desisters, all

seemed to have a positive experience. However, of the three persisters, two (Michael and Harry) also had positive memories of what occurred. Of the partial desisters, two were generally negative (Brian and Darrel), one was a qualified positive (Jason, who was troubled by one Elder), and one was definitely positive (Leena). *Thus, re-offending, however measured, should not be used as a proxy for evaluating the Circle process.* Other factors in a defendant's life, in particular alcohol and/or drug abuse, are more significant, as two persisters told us (Michael and Harry).

Identity and the future

Of the nine defendants interviewed, seven spoke of how they viewed themselves today. In different ways, all said they had become a 'better' or 'different' person than the one who was in the Circle. This held not only for the desisters, but also the persisters, who felt they had matured. A very strong sense of a 'new me' was evident for John and Jackie.

Looking to their future, the following elements were uppermost in their minds: establishing, maintaining, and strengthening family relationships, with particular concern for the care and support of children; having independent and stable housing; and having a secure job and meaningful work, which for some, included a desire to return to school.

For family, John wanted to better support his family financially, Leena wanted to become more involved and supportive of her daughters, Michael and Jason wanted to spend more time with their children, and Harry said that getting married was important to his future. For housing, Bev and Jackie had been waiting for some time for public housing; and Darrel, Jason, and Michael said that having independent living arrangements was important. For jobs and education, Jackie was interested to enrol in a hospitality program, Harry planned to study music when he was released from prison, John was seeking a career shift to a more stable government job, Bev wanted work in a way that 'gave back to the community' by helping drug-using youth or the elderly, and Darrel and Michael were seeking employment. Some recognised, however, that access to housing or jobs was hindered by their criminal history.

How do our findings relate to the literature?

In relating our findings to the literature, we focus on the character of the Circle process, Circle processes and desistance, and ways of studying 're-offending'.

Character of the Circle process

Reinforcing previous research (e.g. Harris 2006; Marchetti and Daly 2004, 2007), we find that from the perspective of defendants, Circles have many positive qualities: open participation, greater informality, more information-sharing, a greater degree of procedural justice, a welcome change in white-Indigenous power relations with the role and presence of Elders, a censuring process that is meaningful and constructive, support and

encouragement by the Elders to change offending behaviours, and sentencing outcomes that are rehabilitative or that balance punishment and rehabilitation.

Like CIRCA (2008), we find that the defendants view the Circle as preferable to conventional courts, but unlike CIRCA, we did not find that it was viewed as a more lenient option. CIRCA also suggests that Circle sentences are more 'culturally appropriate'. We did not explore this question explicitly, although most defendants reflected positively on the ways in which the Elders drew from shared lived experiences and had personal knowledge of the defendants' backgrounds.

Generally, and in line with all the extant writing by academics, researchers, and court staff (e.g., CIRCA 2008; Daly 2009a; Dick and Wallace 2007; Harris 2006; Hennessy 2006a, 2006b; Potas et al. 2003), the most important element in Indigenous sentencing courts is the presence and role of the Elders. For most defendants in Nowra, the Circle was a deep, emotional, and spiritual experience because the Elders were there. The Elders knew them and could be tough on them, but they blended accountability with encouragement and support.

Not all Circles go well. Of the 13 Circles in this study, two defendants did not want to listen to the Elders or follow their advice, and in a third, one Elder's comment troubled a defendant. In a fourth, the defendant viewed the Prosecutor as overbearing. The dynamics in this latter Circle (Darrel's) show that when a defendant feels aggrieved about the circumstances leading to an arrest or the police response to an offence, the Circle can be derailed.

Circle processes and desistance from crime

Recall that the legislation governing Circle Sentencing has eight objectives, just one of which is to reduce recidivism in Aboriginal communities. The seven others concern inclusiveness in sentencing, confidence in the courts, reducing barriers between Aboriginal people and the courts, better sentencing options, greater participation, increased awareness of the impact of offending, and support to victims. Like CIRCA (2008), our study finds that these seven objectives are being met in the Nowra Circle Court.

An important finding from our study is that from the perspective of defendants, Circle processes may be highly positive, but there are other things in their lives that lead to re-offending. A positive Circle experience may be associated with complete desistance, partial desistance, or persistence in offending after the Circle.

The Circle processes and outcomes that are likely to help defendants desist from crime are sentences that include effective alcohol and drug rehabilitation programs, alongside Elder-defendant interactions that provoke and encourage a defendant to change. However, not all Circle defendants were ready to change. For example, Michael said he was 'too young in the mind', Hayley challenged the Elders' advice on drug rehabilitation, Darrel

maintained an antagonistic relationship with the police, and Brian thought the Elders were too harsh. 'Readiness to change' is associated with a defendant's increasing age and strong desire to fulfil conventional adult roles of caring for children and supporting families.

Our findings reinforce the views of Bottoms et al. (2004: 376) that the process of change includes 'greater self-responsibilisation'. As we had anticipated, several defendants said that the Elders' words made them 'stop and think'.⁴⁶ Like Halsey (2008: 1214), all the defendants we interviewed had a 'sense of hope' that their future could improve; even those with lengthy criminal histories or in jail were optimistic that they could make a better life.

Our findings also confirm the age-crime relationship: the complete desisters were older, they were 'sick' of prison, wanted to stop using illegal drugs, and to drink alcohol more responsibly. The partial desisters, although on a desistance pathway, have struggled to maintain a 'drift toward conformity' (Bottoms et al. 2004: 383). The persisters, the youngest of the three groups, continued or escalated their offending or were in prison.

Ways of studying re-offending

Quantitative studies of re-offending have important political caché. They have become a key measure for policymakers and governments to decide that a particular policy or practice 'works' or not. The one quantitative study to date finds 'no differences' in re-offending for Circle and conventional court defendants in NSW (Fitzgerald 2008). By comparison, CIRCA's (2008) research in the same year and jurisdiction, came to a different conclusion: a perception by those associated with Circles that they were highly effective in reducing re-offending.

CIRCA (2008) suggests that perhaps those interviewed recalled one or two 'success stories' in judging the effectiveness of Circles. This seems likely. An additional element is how 'success' itself is understood. Following the lead of the desistance-oriented scholars, who take a qualitative approach (e.g., Bottoms et al. 2004; Farrall and Maruna 2004; Halsey 2008; McNeill 2003), we identified a group we call partial desisters. Its members oscillated between offending and significant crime-free periods of time, and their offence histories post-Circle suggested they were on a pathway toward desistance. We suspect that the CIRCA interviewees may have had both the complete and partial desisters in mind.

Fitzgerald (2008) analysed re-offending 15 months before and after the Circle, whereas our study had a longer window of time: 36 months before and after. She found that in the 15 months post-Circle, 40% had re-offended (Fitzgerald 2008: 6). Applying her criteria to our sample, six of 13

⁴⁶ Several also said that spending time incarcerated, whether for straight incarceration sentences or periodic detention, also stopped and made them think.

defendants (or 46%) re-offended in the 15 months post-Circle. However, of the six who re-offended, three were partial desisters (Leena, Jason, and Brian), and three were persisters (Harry, Michael, and Hayley).

Qualitative analyses, like ours, permit an examination of chronologies and pathways to desistance or persistence. In taking this approach, we assume that it may take some time for people to change; and if too short a time frame is used, a pathway toward desistance cannot be identified. This was the case for Leena, who although she offended four months after the Circle, had two significant crime-free gaps and has since stayed out of trouble. Likewise for Jason, although he was incarcerated for most of his three-year window of time, he has not offended in over a year since his release.

Quantitative analyses that model 'time to fail' (i.e., time to first proved offence) focus on the length of time after a legal intervention in which a person may offend. This gives us some useful information, but it does not provide a longer, more holistic view of a person's offending and desistance pathway.

Another quantitative approach to understanding offending is to examine the number of proved offences before and after a legal intervention. Fitzgerald (2008: 4) utilised this approach in comparing the average number of offences for Circle and conventionally sentenced defendants 15 months before and 15 months after sentence. If we apply this approach to our group of 13 defendants (using a 36-month lens), the average (mean) before is 6.2 offences, and after, 4.4 offences. These averages may well be similar to conventionally sentenced defendants, as Fitzgerald (2008) finds, but our study cannot make this comparison. What we can say, based on a careful inspection of 13 cases, is that *the averages do not give a useful picture of offending and desistance*. Better to use the approach we adopted, which has two steps: first, to examine shifts (if any) in none, light, moderate, and heavy offending before and after the Circle; and second, to then examine a smaller number of cases in greater depth to determine the nature of offending over time.

We understand the difficulties in conducting solid studies of offending, using quantitative approaches, but one lesson we draw is the value of using a mixed methods design. In light of the small number of matched cases in the BOCSAR sample ($n=68$), Fitzgerald (2008) would have been on a better track by comparing these Circle and conventional court cases in greater depth. These could have been examined with reference to offending trajectories and types of offences subject to police targeting (e.g., driving and public order). Such an approach would shed insight not only on comparing Circle and conventional court outcomes, but also provide a better understanding of Aboriginal pathways into and out of crime, more generally.

Two final points bear mention. First, taking a dichotomous or 'time-to-fail' approach to research re-offending can mislead policymakers and politicians into thinking that a 'quick fix' to crime cessation can be found with the introduction of new justice interventions. No such quick fix exists.

Offending and desistance are learned processes and behaviours, and in this group of Circle defendants, all the offending was related to alcohol problems and/or addictions to illegal drugs. Changing learned behaviour takes courage, persistence, and resources. As Burnett and Maruna (2004: 395-96) say, such change calls for 'both the "will and the ways"', that is, a desire to change, coupled with the 'ability and means' to do so.

Second, except for NSW, all Australian jurisdictions lack the database infrastructure to conduct individual analyses of re-offending for those Indigenous defendants sentenced in Indigenous sentencing courts or conventionally. We have proposed a better way to assess offending, which assumes that crime and criminal justice processes are context-dependent. Taking such an approach requires a long-term program of research that compares several *specific areas* in a state or region with respect to crime rates; criminal justice resources; and police, court, and correctional practices. It assumes that crime rates, policing practices and court decisions, and rehabilitation options and supports are embedded within specific social, economic, and political contexts (see McCausland and Vivian 2009 comparing two towns in country NSW). By taking this view, we may also learn whether a goal of 'strengthening Indigenous communities' can be realised with Indigenous court practices.

In conclusion, our study is the first to provide in-depth interviews of defendants' experiences and views of the Circle process. We sought to contribute to the literature on people's pathways into and out of crime, with references to theories of, and qualitative research on, desistance. Our study is limited by its small sample size of just 13 cases, but these were all the non-family violence cases sentenced in Nowra, NSW during 2002 to mid-2005.

We found that positive Circle experiences were associated with all forms of desistance and also with persistent offending. Many other facets of a defendants' circumstances and their will to change explain desistance from offending. We argue for a more holistic and nuanced approach to analysing offending, one which does not conceptualise it solely in dichotomous terms. After the Circle, some Nowra defendants were complete desisters, and some, persisters. We identified an important third group who were neither complete desisters nor persisters. Rather, their desistance suggests positive movement between conformity and criminality.

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Legislation

- Criminal Law Sentencing Act* 1988 – 2007 (NSW).
- Criminal Procedure Amendment (Circle Sentencing Intervention Program) Regulation* 2003 (NSW).
- Criminal Procedure Regulation* 2005 (NSW), Schedule 4.
- Racial Discrimination Act 1975 (Cth).

Appendix I

Adult courts in seven Australian jurisdictions

This Table is adapted from Marchetti and Daly (2008) and is current as of June 2008.

Jurisdiction and model used	Court and establishment date
Australian Capital Territory – Circle Court model	Ngambra Circle Sentencing Court – May 2004
New South Wales – Circle Court model	Nowra Circle Court – Feb 2002 Dubbo Circle Court – Aug 2003 Brewarrina Circle Court (on circuit) – Feb 2005 Bourke Circle Court – Mar 2006 Kempsey Circle Court – Apr 2006 Armidale Circle Court – Apr 2006 Lismore Circle Court – Mar 2006 Mt Druitt Circle Court – Nov 2006 Walgett Circle Court (on circuit) – June 2006
Northern Territory	Darwin Community Court (also used in Nhulunbuy, Nguiu on the Tiwi Islands, and Yuendumu when the magistrate is on circuit) – Apr 2005
Queensland – Nunga Court model	Brisbane Murri Court – Aug 2002 Rockhampton Murri Court (Aboriginal people, Torres Strait Islanders and South Sea Islanders) – Jun 2003 Mt Isa Murri Court – restarted Dec 2005 Townsville Murri Court – Mar 2006 Cherbourg Murri Court – Nov 2006 Ipswich Murri Court – Feb 2007 Coen Murri Court – Mar 2007 Cleveland Murri Court – May 2007 Caloundra Murri Court – June 2007 Cairns Murri Court – Jan 2008 Caboolture Murri Court – May 2008 St George Murri Court – June 2008
South Australia – Nunga Court model	Port Adelaide Nunga Court – Jun 1999 Murray Bridge Nunga Court (on circuit) – Jan 2001 Port Augusta Special Aboriginal Court – Jul 2001 Ceduna Aboriginal Court (on circuit) – Jul 2003 (although currently on hold) Adelaide (Aboriginal Sentencing) District Court, s.9C of <i>Criminal Law Sentencing Act</i> 1988 – 2007 (general sentencing application) Berri Nunga Court – proposed to start July/August 2008
Victoria – Nunga Court model	Shepparton Koori Court – Oct 2002 Broadmeadows Koori Court – April 2003 Warrnambool Koori Court (on circuit including Hamilton and Portland) – Jan 2004 Mildura Koori Court – July 2005 Moe/Latrobe Valley Koori Court – May 2006 Bairnsdale Koori Court – March 2007 Swan Hill Koori Court – July 2008 Latrobe Valley County Court – due to be launched in Nov 2008
Western Australia	Norseman Aboriginal Sentencing Court – Feb 2006 Kalgoorlie Aboriginal Sentencing Court – Nov 2006

Note: Courts in Queensland, Victoria, and South Australia also have a children's or youth court sitting.

Appendix II

Number of files or defendants per year

The approximate number of files or defendants dealt with by each *adult court* for each year for courts in selected jurisdictions is shown below. Note that the estimates for the ACT and NSW are for numbers of defendants, and for the other jurisdictions (Queensland and Victoria), they are the number of files. The number of defendants will always be less than the number of files. For example, based on data for fiscal year 2005-06 from three jurisdictions in South Australia (see below), there are, on average, 3.3 files (or matters) per defendant.* Further, when the Circle Court model is used, there may be more than one Circle convened for each defendant.

Approximate number of files or defendants, selected jurisdictions

Court	Approximate number of files or defendants per year
Australian Capital Territory – Ngambra Circle Sentencing Court	10 defendants
New South Wales – Nowra Circle Court	8 defendants
New South Wales – Dubbo Circle Court	15 defendants
Queensland – Brisbane Murri Court	260 files
Queensland – Rockhampton Murri Court	48 files
Queensland – Mt Isa Murri Court	60 files
South Australia – Murray Bridge Nunga Court	72 files (24 defendants, 160 charges) *
South Australia – Port Adelaide Nunga Court	414 files (134 defendants, 1492 charges) *
South Australia – Port Augusta Nunga Court	73 files (25 defendants, 181 charges) *
Victoria – Shepparton Koori Court	172 files
Victoria – Broadmeadows Koori Court	184 files
Victoria – Warrnambool Koori Court	32 files
Victoria – Mildura Koori Court	117 files
Victoria – Moe/Latrobe Valley Koori Court	101 files
Victoria – Bairnsdale Koori Court	72 files

* The 2005-06 data from South Australia show a total of 1833 charges for 559 matters for 183 defendants, or 10 charges per defendant, and 3.3 files per defendant (data supplied by Stephen Brady, Courts Administration Authority [CAA], South Australia, 9 March 2007). CAA officials have told us that previous published data on the number of annual cases, which was given in Tomaino (2004) and the CAA's Annual Reports for 2003-04 and earlier years are incorrect. Indigenous cases are typically more complex, with more files to consider at sentencing, compared to non-Indigenous cases.

Appendix III

Consent package and interview

The following is the text of the information sheet, which was prepared on Griffith University letterhead and handed to each person interviewed. Verbal, not written, consent was secured for each interview. Uncle Lou Davis and Project Director Daly conducted the interviews.

Information sheet for Circle defendants

An independent, university-based research project is watching Indigenous sentencing courts and talking to people about the courts in South Australia, Queensland, NSW, and Victoria. The project is studying the Nunga Court (South Australia), the Murri and Indigenous Courts (Queensland), Justice Group activities and relationships to judicial officers (Queensland), the Koori Court (Victoria), and Circle Courts (NSW). The researchers are talking to everyone involved in the courts: magistrates and judges, prosecutors and defence attorneys, Elders and Aboriginal project officers, and defendants.

The interview with Circle Court defendants asks how the Circle process affected you then and today. We would like to know what you think about Circle—what's good about them and what can be improved—and how the Circle process has helped you stay out of trouble.

Anything you tell us is treated in confidence. Your privacy and anonymity is ensured. What you tell us will only be seen by the project's researchers, not by anyone else. Each interview will go for about an hour. We would like to tape record the interview and are seeking your permission to do that.

Your participation is voluntary; you don't have to answer a question if you don't want to, or you can end the interview if you want. If you want me to turn off the tape recorder, I'll of course do that.

The conduct of ethical research in Australia requires that if any participant has a complaint about the manner in which a research study is conducted, the complaint is made to the Project Director (Professor Kathleen Daly, School of Criminology and Criminal Justice, Griffith University, 07/3735-5625, or k.daly@griffith.edu.au); or if an independent person is preferred, to Griffith University's Manager, Research Ethics, Office for Research, Bray Centre, Nathan Campus, Griffith University, 07/3735-5585, or research-ethics@griffith.edu.au.

Visit the Project Director's website (www.gu.edu.au/school/ccj/kdaly) for further information and to obtain a copy of 'Indigenous sentencing courts in Australia' (2004).

Under Queensland law, we are required to include the following text in the information sheet.

The conduct of this research involves the collection, access and/or use of your identified personal information. The information collected is confidential and will not be disclosed to third parties without your consent, except to meet government, legal or other regulatory authority requirements. A de-identified copy of this data may be used for other research purposes. However, your anonymity will at all times be safeguarded. For further information, consult Griffith University's Privacy Plan at www.griffith.edu.au/ua/aa/vc/pp or telephone 07/3735-5585.

Interviewee consent form

I consent to participate in the Indigenous Sentencing Courts Project, as described on the information sheet. I understand that my participation is voluntary, that I can end the interview at any time, and that the Project Director will protect the confidentiality and privacy of any information I give.

Note: In the course of the interviews, consent was obtained verbally. A written signature was not sought.

Signature:

Name (print):

Date:

Interview: Content areas and questions

The following shows the general content areas and prompts that were used as a guide in the interview process.

A. Experience of the Circle process, how it affected the person, what was good about it, what could be made better, how different from regular court?

1. Circle on _____ for _____.

- (a) What do you remember from it?
- (b) How did you feel when you were in the circle? (feel good, feel bad?)
- (c) What did you like about the Circle, what was good about it?

What about the Elders in the circle?

- (d) What didn't you like? How could it be better?
- (e) You've been to court ... How is the circle different from court?
- (f) Uncle Lou's question on perception of the Circle Court (lenient, soft touch?)

B. Post circle offending (or not), to tailor questions based what happened,

e.g.,

- (i) pre-circle offending, but none (or little) afterwards (desistence)
- (ii) pre-circle offending, but some afterwards (mid-way)
- (iii) pre-circle offending, but deeper end (persistence)

For (i),

So no police or court contact after the circle. What changed for you? What's helped you to stay out of trouble?

For (ii)

Some police/court contact after the circle. Things going good for a while and then you get into a bit of trouble, but not a lot of trouble. Can you tell me about that?

For (iii)

You've had a lot of police/court contact after the circle. Can you tell me about that ... Why do you think you get into trouble? What would need to happen for you to stay out of trouble?

C. General questions about self-identity (from the literature, to gain a narrative understanding)

1. What are some important turning points in your life?
2. What do you see in your life, say 5 to 10 years down the road?
3. What would you like to be doing, say 5 to 10 years down the road?

Appendix IV

Circle offences and sentences

The Table below shows each defendant's Circle offences and finalised sentence. We have assembled this material based on what was reported and agreed in the Circle transcripts, together with elements from the court's detailed criminal history, where relevant.

We call attention to the fact that data sources are inconsistent in describing Circle offences and outcomes. In particular, the BOCSAR datafile (the ROD, for re-offending data) does not show all the offences subject to disposition. Both it and the court's criminal history record for each defendant do not show all the elements in the finalised sentence. These Circle cases are quite complex, both with respect to the offences discussed and the sentences imposed, and administrative data (such as BOCSAR's datafile or the court's criminal history record) are unable to capture all of this complexity. We draw attention to several areas in which the Circle transcript, BOCSAR's datafile, and the court's criminal history record are inconsistent, and how we resolved the problem.

First, based on the Circle transcript, we find that it may address a larger number of offences than the immediate Circle offence itself. For example, a warrant issued for, or a breach of, a previous sentence may also be considered in the Circle, and at times are the basis for, or are included in, the recommended sentence. The BOCSAR datafile for each Circle shows the most serious offence sentenced,⁴⁷ and thus, it shows fewer offences than were actually sentenced in the Circle. (For instance, in Jason's case, the ROD shows one 'driving while licence cancelled or suspended offence', while we show all three driving-related offences.) The Table shows all offences, including breaches and warrants, that were dealt with in the Circle.

Second, there can be discrepancies in the sentence recommended in the Circle and the sentence finalised several weeks to a month later by the court, as shown in the court's criminal history record. (For example, in Chris's case, the Circle agreed on a three-month Home Detention Order, while the court's criminal history shows an *eight*-month Home Detention Order.) The Table shows the finalised court sentence.

Third, as we might expect, administrative data do not show all the elements of a sentence. Circle sentences contained many rehabilitative elements that were not shown in the BOCSAR datafile or the court's criminal history record. The Table shows all the elements in the finalised sentence. As the reader will see, some sentences are complex and have many elements and conditions.

⁴⁷ The ROD shows the most serious offence for *each occasion of offending*, i.e., if a Circle defendant offended on two *different* occasions (as in Darrel's case), the most serious offence is shown for each.

Non-family violence Circle # and participant name	Previous warrant or a breach of a sentence that was considered in the Circle	Circle offences	Finalised Circle sentence
Circle 1, Chris		property (1), violent (1)	Eight-month Home Detention Order (six months non-parole), nine-month GBB with supervision (subject to attend anger management and accept supervision of an Elder).
Circle 2, Brian		driving-related (2)	Two-year GBB (subject to supervision by NSW Probation Service), 300 hours of CSO, three years' disqualification from driving, and attendance in the Traffic Offenders Program.
Circle 3, Adrian		driving-related (4), property (1)	12-month Suspended Sentence (subject to a 12-month GBB, counselling for schizophrenia and for drug and alcohol abuse, and Aboriginal Medical Service to conduct urine test), two years' disqualification from driving, and compensation \$226.
Circle 4, John		driving-related (2)	12-month Suspended Sentence (subject to a 12-month GBB) and two years' disqualification from driving.
Circle 5, Harry		false statement (1), property (5)	Two-year Periodic Detention Order (18 months non-parole, subject to supervision by the Aboriginal Medical Service and a caseworker from a local drug and alcohol rehabilitation centre, and participation in counselling and rehabilitation programs), and compensation \$4,200.
Circle 6, Leena ^a	Failed to appear in court and a warrant was issued	driving-related (1), property (2)	Nine-month Suspended Sentence (subject to supervision by NSW Probation Service, attend anger management, finance counselling as arranged by Probation and Parole, attend drug and alcohol treatment as required by Probation and Parole, submit to random urinalysis), two years' disqualification from driving, two-year Habitual Offender Declaration quashed, and accept the guidance of Aboriginal Elders.
Circle 7, Gary ^b	Failed to appear in court for four driving-related offences and a warrant was issued	driving-related (6)	12-month GBB and two years' disqualification from driving.
Circle 8, Michael ^c	Failed to undertake a previous CSO (150 hrs) for one violent and two public order offences	driving-related (4), false statement (1), property (2), public order (2), violent (1)	12-month Periodic Detention Order (subject to supervision by NSW Probation Service, obey all reasonable directions for counselling, educational development or drug and alcohol rehabilitation, report to Nowra Probation Office within 24 hours, attend Sober Driver's Program, attend drug and alcohol rehabilitation at a local centre and reside in halfway house accommodation, three years' disqualification from driving, and a five-year Habitual Offender Declaration.
Circle 9, Jason		driving-related (3)	15-month Suspended Sentence (subject to supervision by NSW Probation Service, obey all reasonable directions for counselling, educational development, drug and alcohol rehabilitation, psychological counselling, anger management, attend Sober Driver's Program as directed by Probation and Parole service), two years' disqualification from driving, and Habitual Offender Declaration quashed.
Circle 10, Bev		property (1)	12-month Suspended Sentence (subject to a 12-month GBB, accept supervision from a local drug and alcohol rehabilitation centre for as long as considered necessary, obey all reasonable directions for counselling, educational development or drug and alcohol rehabilitation, including attending AA and NA meetings three times a week [Monday, Wednesday, and Friday] as directed by the coordinator of a local drug and alcohol rehabilitation centre, and report to the coordinator of a local drug and alcohol rehabilitation centre within 24hrs).
Circle 11, Hayley ^d		carry/use knife (1), property (3), violence (1)	Two-year Imprisonment (15 months non-parole).
Circle 12, Darrel ^e	Serving a 12-month GBB for two public order offences	public order (2), violent (1)	12-month Periodic Detention Order (nine months non-parole subject to supervision by Probation and Parole), 12-month GBB (subject to supervision by NSW Probation Service), anger management, and drug and alcohol rehabilitation.
Circle 13, Jackie ^f	Serving two-year GBB for one violent offence, CSO (150 hrs) for six counts of fraud and one property offence. Considered medically unfit for CSO (150 hours).	fraud (6), property (2), violent (1)	18-month GBB (subject to supervision by NSW Probation Service).

a. Leena attended the Circle for the three offences that she had not attended court for.

b. Although Gary had failed to appear in court for four driving-related offences, these were heard and sentenced *ex parte*. He then attended the Circle for an additional six similar offences.

c. Michael's Circle re-sentenced those offences for which he had failed to undertake a CSO and a further six offences, totalling ten offences.

d. Hayley's sentencing was adjourned until after defendant spent some time in a crisis centre. However, seven days after the Circle, Hayley re-offended. She was then sentenced for her Circle offences and these subsequent offences at the same time in the conventional court.

e. Darrel's Circle re-sentenced the two public-order offences for which he had originally received a GBB, as well as one further violent offence.

f. Jackie was re-sentenced for her previous offending (one property, one violent, and six deception offences), as well as the additional property offence.